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DANIEL HOLLAND v. STATE OF NEBRASKA.

FILED DECEMBER 9, 1916. No. 19697.

1. **Information:** VERIFICATION: OBJECTIONS. "It is too late to object to the verification of an information after the accused has been arraigned, and pleaded not guilty, unless such plea has been withdrawn." *Johnson v. State*, 53 Neb. 103.

2. ———: ———. Section 5599, Rev. St. 1913, authorizes a county attorney to appoint deputies to assist him in the discharge of his duties, and a deputy so appointed and qualified may sign a criminal information.

3. ———: ———: PRESUMPTIONS. When the right of a person to sign an information as deputy county attorney is questioned for the first time after arraignment and plea, and while a plea of not guilty is still pending, his appointment, qualification and right to sign, in the absence of a showing to the contrary, will be presumed.

ERROR to the district court for Furnas county: ERNEST B. PERRY, JUDGE. *Affirmed.*

John Stevens, for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe, contra.*

MORRISSEY, C. J.

This is an error proceeding from the district court for Furnas county. The information contained two counts, one charging an assault with intent to inflict great bodily injury, and another charging an assault with intent to kill. From a verdict finding defendant guilty of assault and battery, he prosecutes error.

First, defendant complains that the information differs from the complaint filed before the magistrate at the time of the arrest. As to this it is sufficient to say that the transcript brought to this court contains a copy of the complaint filed before the county judge. It also shows the subsequent filing of what is termed an "amended complaint,"

but it nowhere shows that there was ever a preliminary hearing held on either complaint. From the argument we are left to infer that there was a preliminary hearing, but the record is silent on the subject.

After a copy of the information was served on defendant, he filed a motion to quash the information, "for the reason that the same charges a different and more serious offense than was charged in the complaint on which this defendant was arrested." This motion was overruled. Defendant was then arraigned, and entered a plea of not guilty, and by arrangement with the county attorney the trial was continued over the term and defendant admitted to bail. At a subsequent term a jury was impaneled and a witness for the state called and sworn. Without withdrawing his plea of not guilty, the defendant then objected to the introduction of any testimony, and moved the court to enter a discharge: First, because "no information has ever been filed against the defendant herein by the proper prosecuting officer, and no indictment found by a grand jury;" second, that the duly elected, qualified and acting county attorney had not filed and verified the information, and that the information was null and void for that reason. The information is signed "B. F. Butler, County Attorney, by E. J. Lambe, Deputy." The verification and jurat are as follows:

"I, B. F. Butler, do solemnly swear that I am county attorney in and for said county and that allegations and charges in the foregoing information are true as I verily believe. B. F. Butler, by E. J. Lambe.

"Subscribed in my presence and sworn to before me, by the said B. F. Butler, this 8th day of March, 1915. C. A. Modlin, Clerk of the District Court."

These objections were not made before the defendant had entered his plea, nor did he ask leave to withdraw his plea to the information. In *Johnson v. State,* 53 Neb. 103, it is held: "It is too late to object to the verification of an information after the accused has been arraigned, and pleaded not guilty, unless such plea has been withdrawn."

It is not material whether the information differs from the complaint filed before the examining magistrate, for the reason that no plea in abatement was filed. If defendant was not given a preliminary hearing on the charges contained in the information, he waived his right thereto when, without filing a plea in abatement, he entered a plea to the information.

It is urged that the information is absolutely void, because not signed by the county attorney in person, and we are cited to *Cubbison v. Beemer*, 81 Neb. 824, which follows an earlier case, holding that an information filed out of the term time is void. Section 5599, Rev. St. 1913, authorizes the county attorney to appoint deputies who may assist him in the discharge of his duties. There is nothing in this record to show that Lambe was appointed such deputy, but when his right to sign the information is questioned for the first time after arraignment and plea, and while a plea of not guilty is still pending, his appointment, qualification and right to act in the absence of a showing to the contrary, will be presumed.

The judgment of the district court is

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

EDWARD A. WUNDER, ADMINISTRATOR, APPELLEE, v. GEORGE F. CRANE ET AL., EXECUTORS, APPELLANTS.

FILED DECEMBER 9, 1916. No. 18955.

1. **Executors and Administrators:** TRUST FUNDS: JURISDICTION. The district court has jurisdiction over executors and others holding a fiduciary relation, and may compel the proper application of trust funds committed to their care.

2. ———: ACCOUNTING. Accounting made by the trial court reviewed, found to be sustained by the evidence, and is adopted by this court as a proper finding of the amount due.

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

F. L. Rain and *Heasty & Barnes,* for appellants.

John C. Hartigan and *Edward A. Wunder, contra.*

BARNES, J.

This was an action in the district court for Jefferson county by the administrator of the estate of Jeannette Van Orsdol against George F. Crane, sole surviving executor of the estate of W. S. Van Orsdol, deceased, and George F. Crane and George A. Vinton, executors of the estate of Cora Van Orsdol, deceased, to recover three-eighths of the estate of W. S. Van Orsdol. The cause was tried to the court without a jury, and the result of the trial was a judgment for plaintiff and against defendants for the sum of $4,877.72. The defendants have appealed.

The record shows that on October 31, 1906, W. S. Van Orsdol, a resident of Jefferson county, made a will by which he bequeathed to his daughter Minnie $3,000, and devised the remainder of his estate to his wife, Cora Van Orsdol. After his will was made, a daughter was born to him, who was named Jeannette, and who was about 17 months old at the time of his death. No provision was made for the daughter Jeannette by will or otherwise. After Van Orsdol's death, his will was probated by the county court of Jefferson county and his estate was distributed by the order of that court. Minnie was paid the $3,000, bequeathed to her by the will, and the remainder of the estate was turned over to George F. Crane and deceased's wife, Cora, who were the persons named as executors of the will, and was converted to their use. At the time of Van Orsdol's death, his estate consisted of his share as a partner of the firm of Van Orsdol & Crane, and a note for $3,050, bearing interest at 5 per cent., signed by his partner, Crane. On March 30, 1910, the executors were discharged by the order of the probate court, and on April 18, 1910, the mother of Jeannette died. George F. Crane and George

A. Vinton were appointed and qualified as executors of the widow's estate. On August 4, 1913, Edward A. Wunder was appointed and qualified as administrator of the estate of Jeannette, who had died a short time before that date.

It is conceded on all sides that Jeannette's estate was entitled to three-eighths of the estate of her deceased father, but appellants contend that the district court had no jurisdiction in this action against defendants to recover her share of the estate as a trust fund which had been converted under the proceedings above set forth. In *Blake v. Chambers,* 4 Neb. 90, it was held that the district court had jurisdiction over executors and others holding a fiduciary relation, and might compel a proper application of trust funds committed to their care. The same rule was announced in *McGlave v. Fitzgerald,* 67 Neb. 417, *Adams v. Dennis,* 76 Neb. 682, *Coleman v. McGrew,* 71 Neb. 801, and *Prusa v. Everett,* 78 Neb. 250. We therefore hold that the district court had jurisdiction, and appellants' contention on this point cannot be sustained.

It is appellants' second contention that the amount found due plaintiff was excessive, and the evidence was insufficient to sustain the finding and judgment of the trial court. On the other hand, the appellee contends that the recovery was insufficient, and he claims a larger amount. That court made an accounting, which we find in the record, and, after a careful examination of it, we conclude that said accounting was fairly made, and the evidence is sufficient to sustain the judgment.

The judgment of the district court is therefore

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

MORRIS L. STERNBERGER, APPELLEE, v. SANITARY DISTRICT, APPELLANT.

FILED DECEMBER 9, 1916. No. 19087.

1. **Eminent Domain:** CONDEMNATION PROCEEDINGS: PARTIES. The trial in a condemnation proceeding may be had in the name of the person as plaintiff who owned the land condemned at the time the proceedings were commenced. In such case the court should order the payment of the judgment to the party entitled to the damages.
2. ———: EXCESSIVE DAMAGES: REMITTITUR. Evidence examined, and found that the verdict was excessive, and the judgment thereon should be reversed in event the plaintiff fails to file a remittitur.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed on condition.*

C. J. Campbell and *H. R. Ankeny*, for appellant.

Morning & Ledwith, contra.

BARNES, J.

This cause was tried in the district court for Lancaster county on an appeal from a judgment of the county court confirming an appraiser's award in a condemnation proceeding.

It appears that Sanitary District No. 1, of Lancaster county, made an application to the county court of that county to condemn a right of way for the construction of a ditch to straighten that part of the channel of Salt creek across the corner of the northeast quarter of section 7, township 10, range 7, in said county. Such proceedings were had that the appraisers found the damages to the land in question amounted to the sum of $500. Judgment was rendered on the award, and the sanitary district appealed to the district court. On a trial in that court the jury returned a verdict against the district and for the plaintif for the sum of $1,585.15. A motion for a new trial was overruled, judgment was returned on the verdict for that sum, and the sanitary district has appealed to this court.

Appellant's first contention is that the appellee was not the real party in interest. It appears without dispute that at the time the condemnation proceedings were commenced one Morris L. Sternberger was the owner of the quarter section of land described in the application; but, before the award was made and judgment was entered in the county court, Sternberger sold the quarter section, together with other adjoining lands, which comprised 310 acres, to P. J. Turner and A. O. Corbin. Turner and Corbin divided the entire tract so that Corbin became the owner of the quarter section across which the ditch was constructed, and by agreement was entitled to damages awarded. It also appears from the evidence that neither Sternberger nor Turner had any interest in the award. Therefore Corbin might have been substituted as plaintff in place of Sternberger, and the proceedings might have been conducted in his name; but that fact is not decisive of the question here, for it was not error to continue the trial in Sternberger's name for the benefit of the person entitled to the damages.

It is appellant's second contention that the verdict of the jury was excessive and is not sustained by the evidence. The record discloses that the cause was tried on the theory that the whole tract of 310 acres was damaged by the construction of the ditch. The witnesses for the plaintiff all testified that the whole 310 acres of land was worth $125 an acre before the ditch was constructed, and that after the construction it was worth only $118 an acre, thus fixing the damages at $2,170. This testimony, as a whole, was entitled to little consideration. The record shows that the plaintiff's witnesses gave their evidence with such perfect agreement that it should be carefully scrutinized by the court, and was not entitled to adoption as the true measure of damages. The record also shows that only 80 acres of the tract of land described in the application was damaged by the construction of the ditch, and it may be fairly said from the testimony that not more than 40 acres of it were damaged by such construction. The record shows that the ditch was about

1,200 feet long and there were only 3.3 acres of land taken for its construction. It cut off about 23 acres from the main body of the farm, and the land cut off is accessible by a public road located on two sides. There is considerable competent evidence in the record tending to show that the land through which the ditch was constructed was low and wet, and some of it was covered with trees and brush; that there were several lakes and ponds situated thereon which had no outlet, and the construction of the ditch afforded drainage for such ponds. There is also some evidence in the record tending to show that the construction of the ditch was a benefit to the tract of land across which it was constructed. We therefore conclude that the verdict was excessive and is not sustained by competent evidence. The evidence fails to sustain damages in excess of the amount found by the appraisers.

Errors are assigned for the giving of instructions: First, that the court erred in not limiting the damages to the 80 acres across which the ditch was dug; and, second, that the court erred in not instructing the jury on the law relating to general and special benefits. An instruction should have been given restricting the damages to the land described in the application, and the jury should also have been instructed as to the law relating to benefits. A jury of laymen should not be expected to make correct findings on those questions without proper instructions. We therefore conclude that the judgment complained of should be reversed, and this will be done unless the plaintiff shall, within 30 days, remit all of said judgment except $500 and interest on the same from the date of the award in the county court. It is further ordered that the sanitary district shall pay all the costs in the district court, and recover costs in this court.

JUDGMENT ACCORDINGLY.

SEDGWICK, J. I think the damages are excessive and there should be a remittitur, but the amount of the remittitur should be definitely ascertained and determined.

JACOB SHAPIRO, ADMINISTRATOR, APPELLANT, v. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 9, 1916. No. 19122.

1. **Appeal:** CONFLICTING EVIDENCE. Where the evidence is conflicting, a verdict will not be set aside by a reviewing court unless it is manifestly wrong.

2. **Trial:** HARMLESS ERROR: INSTRUCTIONS. Ordinarily it is not reversible error to copy the pleadings in an instruction, if by other instructions the issues as to the particular acts of negligence relied upon are properly and concisely stated and submitted to the jury.

3. **Street Railways:** INJURY TO PEDESTRIAN: LIABILITY. Where a motorman in charge of a street car operated by electricity is suddenly confronted by an emergency which requires him to stop his car or lower the fender, if, in such emergency, his best judgment prompts him to stop the car, instead of attempting to lower the fender, and he uses suitable and the best approved means which are at his command for that purpose, neither he nor his employer are guilty of negligence, as a matter of law.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

John L. Webster and *William R. King, contra.*

BARNES, J.

This action was brought by Jacob Shapiro, as administrator of the estate of his deceased minor son, Leon Shapiro, against the Omaha & Council Bluffs Street Railway Company for negligently causing the death of decedent, who was killed when attempting to cross the defendant's tracks in front of a moving car.

The allegations of negligence set forth in plaintiff's petition were, in substance, as follows: The death of Leon Shapiro was caused by the negligence and failure of the motorman in charge of defendant's street car to stop his

car before it reached the decedent, and, when said car struck the deceased, he was thrown on the fender of the car, and the motorman negligently and carelessly failed to stop the car while he was on said fender; that the motorman in charge of the car negligently and carelessly failed to stop his car after the child rolled off in front of the fender and before he was run over and killed; and that the motorman negligently failed to lower the fender and prevent the accident.

Defendant's answer admitted that the deceased, Leon Shapiro, attempted to cross one of defendant's street car tracks south of Paul street, and on Twentieth street, in the city of Omaha. He was passing in front of a car going north on the east track of said defendant's street railway, and, with reference to his doing so, defendant alleged that deceased's attempt to cross the track in front of said car was so sudden and quick that the motorman in charge of said car was unable, although he exercised the utmost diligence in that behalf, to stop the car before said Leon Shapiro stepped in front of the same. Defendant further answering plaintiff's petition, and especially with reference to the third paragraph thereof, admitted that, when said Leon Shapiro started to run across said tracks, the car was running at a moderate rate of speed, about eight or ten miles an hour, the said speed being not only moderate, but, as defendant alleged, the usual rate of speed said car was run at or near said place. Defendant expressly denied all allegations and statements contained in the petition, and further denied the statement in paragraph 3 except as above admitted to be true. Plaintiff's reply was a general denial of the allegations of the answer.

On the issues thus presented, the case was tried to a jury in the district court for Douglas county. Defendant had the verdict and judgment, and the plaintiff has appealed.

Appellant's first contention is that the evidence was not sufficient to support the verdict. The record discloses that on the 22d day of August, 1912, plaintiff's decedent, a boy about three years of age, was run over and killed by one of

defendant's street cars which was being operated on north Twentieth street. The accident occurred between Nicholas and Paul streets, at a point where defendant's track was nearly level. The car which ran over the boy was a northbound car running at about eight or ten miles an hour. The testimony shows that, about 3 or 4 o'clock in the afternoon of the day of the accident, the decedent, with several other children, was playing on the street along the east curb of Twentieth street, and, when the approaching car was at considerable distance away, all the children, except the boy Leon, ran across the street from the east to the west curb; that Leon remained on the east side of the street somewhere between the curb and the street car tracks; that, as the car approached him, and when it was about a length and a half away from him, he suddenly started to cross the tracks and ran in front of the car, with the result that he was knocked down, run over, and killed. So far there was no conflict in the evidence. There is not much conflict in the testimony as to the point where the child started to cross the street, but the evidence is somewhat conflicting as to the distance the car ran after the child started to cross the track and the place where it was stopped. There was also some conflict in the evidence as to whether the motorman was negligent in failing to stop his car. This was not a direct conflict, for the motorman testified that, as soon as he saw the child was going to cross the track, he sounded the gong and made every possible effort to stop the car as quickly as possible. His evidence was corroborated by the testimony of others who saw the accident, and by a disinterested eyewitness, who testified that when the boy ran in front of the car it was within three feet of him, and was further corroborated by the testimony of experts in the management of street cars. One of plaintiff's witnesses who saw the accident testified that the stop made was as good as could have been made considering the speed at which the car was running. There was no direct evidence to the contrary, but certain witnesses for the plaintiff gave their opinion as to the distance in which a car could be stopped under the cir-

cumstances existing at the time of the accident. As we view the record, the evidence quite conclusively establishes the fact that the car, which was a short one operated by hand brakes, was stopped within from 15 to 25 feet after it struck the child. Appellant strenuously contends that the child was struck and fell upon the fender of the car, and it was claimed that the motorman was negligent in failing to lower the fender. On this point there was a direct conflict in the evidence. The preponderance seems to favor the defendant's contention that the child did not fall upon the fender, but was knocked down by the fender and immediately rolled under it. The motorman testified that he did not have time to drop the fender because he was exercising all his energy and making every effort he could to stop the car. With this conflict in the evidence, it cannot be said that it does not sustain the verdict.

Appellant's next assignment of error which requires consideration is that the trial court erred by copying the pleadings in his instructions. We have often had occasion to condemn this practice; but, in reading the instructions in the instant case, it appears that the court by instructions numbered 5 and 6 correctly and concisely submitted to the jury the particular allegations of negligence of which the plaintiff complained. In view of this fact, the judgment should not be reversed. Other instructions are assigned as error, but, without making particular reference to them, we are satisfied that the case was fairly tried and correctly submitted to the jury.

Finally, it is contended that, by failing to lower the fender of the car, the motorman was guilty of such negligence as entitles the plaintiff, as a matter of law, to a judgment. Where the motorman in operating a street car moved by electricity is confronted with a sudden emergency which requires him to attempt to stop his car or lower the fender, if in such emergency he exercises reasonable care and adopts well known and approved methods of stopping his car, instead of dropping the fender, he cannot be said to be guilty of negligence, as a matter of law, and this rule

should be applied where the evidence tends to show that he had insufficient time to lower the fender, and that, if it had been lowered, the injury could not have been prevented.

The evidence sustains the verdict, and the judgment of the district court is

AFFIRMED.

GEORGE T. STEPHENSON, APPELLANT, v. GERMANIA FIRE INSURANCE COMPANY, APPELLEE.

FILED DECEMBER 9, 1916. No. 18704.

1. **Insurance:** POLICY: NATURE OF CONTRACT. An insurance policy is a contract between the insurer and the insured, and neither party can make a new contract for the other without his knowledge or consent.

2. ———: ———: ASSIGNMENT. The owner of a policy of insurance, who has parted with the title to the premises, cannot assign the policy, after a fire, and without the knowledge and consent of the insurance company which issued the policy, so as to make it liable to a third person for the loss.

3. ———: ———: STATUTORY PROVISIONS. The provisions of section 3187, Rev. St. 1913, do not apply to a case where the insurance company has never entered into contractual relations with the person claiming under the policy.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

E. N. Kauffman, for appellant.

J. L. Caldwell, contra.

LETTON, J.

Action to recover upon a fire insurance policy. A general demurrer to the answer was overruled. Plaintiff elected to stand on his demurrer, and judgment of dismissal was rendered. Plaintiff appeals.

The petition alleged, in substance, that the insured property was owned by one W. M. Rice; that about the 1st of August, 1913, the plaintiff commenced negotiations by mail with Rice who lived in Pueblo, Colorado, to purchase the property, and soon thereafter completed a contract of purchase. As a part of the consideration, Rice agreed to assign and deliver to him the policy of insurance. The deed and policy were sent to a bank at Wymore for delivery to plaintiff, but Rice failed to assign it in writing. Before the plaintiff could procure a written assignment, on the 31st day of August, a fire occurred which almost wholly destroyed the building. After the fire, Rice sent the plaintiff an assignment in writing. It is also alleged that the property was damaged more than the indemnity provided for, and that no additional hazard was caused by the transfer of the property.

The defendant's answer, in addition to certain admissions and denials, pleads (1) a provision of the policy that, if a change took place in the title or interest of the assured in the property, the policy should be void, and the fact that the title to the property had passed from Rice before the fire; (2) a provision of the policy that it should be void if assigned without the written consent of the insurance company indorsed thereon, and the fact that the attempted assignment was made after the fire and without its consent; (3) that it never entered into a contract with the plaintiff or knew he claimed any interest in the property until after the fire; (4) that he is not the owner of the policy and the defendant company has never recognized him as such.

The general demurrer searched the record. The pleadings disclose that, after the title had passed from Rice and after a fire had practically destroyed the insured property, he undertook to assign the policy to plaintiff without defendant's consent or approval. At this time defendant knew nothing about the change of title and had not consented to enter into an insurance contract with the plaintiff. By the terms of the policy the change of ownership avoided the contract. This is a reasonable provision for

the protection of the insurer. An insurance company has the right to determine with whom it shall contract, and while in the great majority of instances its consent to an assignment may be, as plaintiff insists, merely a matter of course, it is so because of the fact that there is ordinarily no moral hazard, and therefore it is willing to enter into a contract. Instances do occur occasionally when insurance companies decline to enter into insurance contracts with individuals. This is their right and privilege, and it is not unreasonable that they reserve to themselves by their policy the right to determine with whom they will contract.

Plaintiff virtually concedes that this is the law, but insists that by the enactment of the new insurance code the law has been changed so as to allow the recovery. He relies upon the following language in section 3187, Rev. St. 1913: "The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." At the time the contract was entered into with Rice no such provision was in the statutes; but, even if such a provision were in force, how can it apply to the facts pleaded? It is the entire absence of a contract relation between the plaintiff and defendant that is relied on as a defense. Plaintiff never owned a policy issued by the defendant, and hence the defendant is not an insurer of his property, and never has been. *Farmers Mutual Ins. Co. v. Home Fire Ins. Co.*, 54 Neb. 740.

The petition shows that the policy would expire in about nineteen days after the fire. The plaintiff, who, it was said at the argument, is a man experienced as an insurance agent, accepted the title to the property when the policy which accompanied the deed expressly stated the necessity of the consent of the insurer to an assignment in writing in order to transfer the insurance. He could have declined to take title until the insurance was transferred, or he could

have taken out new insurance, since the policy had such a short time to run; but, instead of following the safe course, he took the risk of a fire occurring in the interval of time it would take to again communicate with Rice. There is no privity between him and the defendant, and they have never had any contractual relations.

Moreover, a contract requires the meeting of minds. In *New England Loan & Trust Co. v. Kenneally,* 38 Neb. 895, it is said: "The general rule of law is, that a policy of fire insurance is a personal contract with the party insured and does not run with the land or pass to the purchasers by a sale of the premises or property insured, and any assignment of the policy *must be with the knowledge and consent of the insurer. Ayres v. Hartford Fire Ins. Co.,* 17 Ia. 183, and cases cited; *Simeral v. Dubuque Mutual Fire Ins. Co.,* 18 Ia. 319; *Ætna Fire Ins. Co. v. Tyler,* 30 Am. Dec. (N. Y.) 90; May, Insurance, sec. 6." Each party has the right to determine for himself whether he will do business with the other. In the case of an attempted assignment of a policy of insurance, there is no new contract until the insurer knowingly accepts the assignee in the place of the former as the person with whom it insured. The insurance company would have the same right to insist that an assignee of the policy, without his consent to and acceptance of the assignment, would become liable for any unpaid premiums, as an assignee, without the insurer's knowledge or consent, has to insist upon payment of a loss.

There was no forfeiture as defendant insists. Rice had the right to surrender his policy at any time, receiving back the unearned premium at the customary short rates. When he parted with the title, he had no insurable interest left, and there was nothing to forfeit.

Plaintiff contends that there is a saving clause in the new statute which in some way aids his contention. This clause, however, merely provides: "All actions and proceedings which may be pending in any court under existing laws which this act in any way supersedes or repeals shall proceed without being in any manner affected by the passage

of this act." Rev. St. 1913, sec. 3321. This action was not pending when the insurance code took effect, and the saving clause has no application.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

SEDGWICK, J., dissenting.

The insured agreed to convey this property to the plaintiff and assign the insurance policy. He afterwards executed the deed, but there was some delay in assigning the policy, and before a formal assignment had been made the building burned. The policy provided that it should be void "if any change took place in the title, possession or interest of the assured, * * * unless otherwise provided by agreement indorsed thereon." There was a blank form on the policy for assignment and consent of the company, but the insurance company had not executed it. The question is whether the policy was void under this condition. It clearly did not avoid the policy under the present statute: "The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." Rev. St. 1913, sec. 3187. The majority hold that this section does not apply, because this policy was issued before this statute was enacted. That may be doubtful, but it does not seem to be material, because we had decided the same thing long before this policy was issued. "A contract of insurance, where the insurer has received and retains the consideration, is to be sustained, if possible and should not be defeated upon any ground which does not materially increase the risk." *Billings v. German Ins. Co.*, 34 Neb. 502. For the same principle the following cases are cited in the brief: *Phœnix Ins. Co. v. Barnd*, 16 Neb. 89; *State Ins. Co. v. Schreck*, 27 Neb. 527; *Farmers & Merchants Ins. Co. v. Newman*, 58 Neb. 504;

Hanover Fire Ins. Co. v. Gustin, 40 Neb. 828. "It should not be defeated upon any ground which does not materially increase the risk." This conveyance did not materially increase the risk, since the residence was occupied by a tenant a long time before the conveyance was made, and the same tenant continued to occupy after the conveyance was made and until the house burned. There was no change in the occupancy and no possible increase in the risk. We are not alone in this holding. "Under a provision in a fire insurance policy that it shall be void if the risk is increased in any manner, or if the property is sold or any change is made in the title, or if the property is incumbered or used for other purposes without consent, a change of title, incumbrance or use will not render the policy void unless it increases the risk or decreases the security." *Russell v. Cedar Rapids Ins. Co.* (78 Ia. 216) 4 L. R. A. 538, and note. This seems to be the general rule without a statute.

The majority opinion says: "Moreover, a contract requires the meeting of minds." If this statement has any force in this case, it must mean that one party to a contract cannot assign his interest therein so as to give his assignee any interest in the contract without the consent of the other party. This is announcing a great change in the law of contracts, and, if adhered to, will disorganize business as at present carried on. If I contract to convey my house and lot to A, and he assigns that contract to B, I cannot refuse to recognize the right of B to a conveyance. The contract becomes one between myself and B, whether I do or do not consent. In the case at bar, Rice could sell his property to Stephenson, including his interest in the insurance, and the contract of sale included the transfer of the insurance policy. As there was to be no change of occupancy of the property, or any other possible increase of hazard, the parties were justified in assuming that the company would consent to the assignment of the policy. The purchaser could not be compelled to take the property under their contract unless an assignment of the policy could be made. There was no attempt on the part of the company to show any reason for

objecting to a transfer of the policy or that consent would have been refused, except as a pretext for avoiding payment of a meritorious claim. The contract of insurance contemplates that the interest of the insured is assignable, and the company's consent is formal, unless some reason, contemplated by the contract exists for refusal.

The general rule that a sale and transfer of the property without the due assignment of the policy will avoid the policy does not apply in this case.

JOSEPH H. DAVISON, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

STEVEN E. DEXTER, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

RAY H. MCCORMICK, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 9, 1916. NOS. 18946, 18947, 18948.

1. **Statutes:** VALIDITY: FORMER ADJUDICATION. A statute may be upheld as against an attack made by one party claiming it to be invalid upon one ground, and still it may be declared unconstitutional in a later attack by another litigant for reasons not called to the attention of the court, or not shown to exist, in the first case.

2. ———: ———: TRANSPORTATION OF LIVE STOCK. A statute or order regulating the rate of speed of the carriage of live stock is a proper exercise of the police power of the state, but such a statute or order must be reasonable, and practical in its operation, and it must not impose an undue burden upon the carrier, nor take away any of its constitutional rights.

3. ———: ———: ———. Where the undisputed evidence shows that for the greater portion of the year defendant, which operates a single-track railroad in Nebraska and other states, with several branch lines in this state, cannot comply with the speed law (Rev. St. 1913, secs. 6018, 6019) as to west-bound shipments of live stock

without sending out special trains on branch lines to transport from one to four or five cars, and at a cost of double the rates allowed to be charged, and it is further shown that on account of the ordinary incidents and vicissitudes of operation of a long single-track railroad, such as making up and inspection of trains at division points, waiting to meet mail, passenger and other trains, waiting for stock from branch lines, and those delays occurring by reason of storms, washouts, wrecks and other unforeseen and unavoidable casualties, it is often impracticable to come within the statutory limit with east-bound traffic, and the statute permits of no defense by reason of any of such conditions, such a statute is an unreasonable exercise of the police power of the state and violates the constitutional rights of the defendant.

APPEALS from the district court for Brown, Holt and Dawes counties: ROBERT R. DICKSON and WILLIAM H. WESTOVER, JUDGES. *Reversed.*

A. A. McLaughlin, Wymer Dressler and *Lyle Hubbard,* for appellant.

A. W. Scattergood, M. F. Harrington, Hugh J. Boyle, W. K. Hodgkin and *Earl McDowell, contra.*

LETTON, J.

These actions are brought to recover liquidated damages from a common carrier for failure to comply with the terms of the "speed law." Rev. St. 1913, secs. 6018, 6019. In the *Davison* case, which is to recover for delay in shipment of stock east-bound from Ainsworth to South Omaha, a jury was waived, the cause tried to the court, findings made, and a judgment rendered for the plaintiff for $935. The shipment in the *McCormick* case was of one car of cattle west-bound from South Omaha to Andrews, a distance of 469 miles. A verdict of $170 was directed. In the *Dexter* case delay was complained of in transporting three cars of cattle west-bound from south Omaha to O'Neill. A verdict was directed for $545. Defendant appeals in each case. The three causes were submitted together in this court and are illustrative of different conditions.

The petition in the *Davison* case contains 15 separate causes of action which are substantially alike. In sub-

stance, the first cause of action alleged is that on the 9th day of January, 1912, plaintiff delivered to defendant for shipment from Ainsworth to South Omaha a car-load of hogs; that the defendant unlawfully and negligently used 24 hours in transporting the hogs to South Omaha, when no more than 15 hours should have been taken, and thereby it became indebted to plaintiff at the rate of $10 an hour for 9 hours. The remaining causes of action cover like shipments upon different dates.

The answer alleges that the shipments were forwarded with due and proper dispatch. It also pleads that each shipment was necessarily delayed for the purpose of taking coal and water for the locomotive, for meeting west-bound trains, and permitting passenger trains going in the same direction to pass, for setting out and picking up empty cars and dead freight for stations through which the trains passed, for the purpose of inspecting, making up and rearranging trains at division and junction points, and for other purposes necessarily incident to the operation of trains; that a portion of the delay was occasioned by hot boxes and by extremely cold weather and storms, and that all were necessary in the operation of its railroad and for the service of the communities dependent upon it for railroad transportation.

It is further pleaded that defendant's road is a single-track railroad, part of a system extending into and through eight other states; that it was engaged in transporting both interstate and intrastate traffic from Ainsworth to South Omaha, carrying United States mail and passenger trains in both directions, and carrying live stock as interstate commerce from points in South Dakota and Wyoming to South Omaha and Sioux City and Chicago; that it is and was impossible to so operate its railroad as to move the stock shipments at the statutory speed without unreasonable interference and delay to west-bound interstate commerce and United States mail, and without giving preference to intrastate shipments of live stock east-bound; that the live stock offered in this state for trans-

portation to South Omaha is insufficient in quantity to enable it to run special trains therefor without great loss; that shipments of live stock from South Omaha to points on the various branches of defendant's lines in the state of Nebraska average less than five car-loads a day, and on many days no car-loads are offered for shipment; that the greater portion of the year only one or two car-loads are offered in any one day for such shipments, except during the months of September, October and November, when there is a general movement of stock cattle from South Omaha to the feeding yards along the line; that, after a train with such car-loads of live stock reaches Fremont, it is often necessary to divide it and send part of the live stock in small shipments over its branches; and that, in order to comply with the statutes, it will be necessary to run high-speed special trains to move small quantities of live stock, and thus give such trains a preference over freight from other states, thus interfering with interstate commerce. It is also alleged that numerous cities, towns and villages through which the train passes have enacted speed ordinances limiting the speed of trains, with which it is compelled to comply, and that, in order to comply with the statute, it will be required to move trains between stations at a dangerous rate of speed; that to transport live stock at the rate of speed required will involve an expense greatly in excess of the rate defendant is permitted to charge, and in excess of the amount the shipper can afford to pay and that the traffic will bear; that the enforcement of the statute would deprive it of its property without due process of law, and without just compensation, and would deny to defendant the equal protection of the laws, in violation of the Fourteenth amendment to the Constitution of the United States, and of the Constitution of the state of Nebraska. The reply was practically a general denial.

The findings of the court in the *Davison* case, on the first cause of action, summarized are: That the time necessarily consumed in setting out, loading and picking up

live stock was 15 minutes; in waiting for and meeting trains carrying United States mails, 1 hour and 36 minutes; in waiting for and meeting trains carrying interstate commerce 43 minutes; in taking coal and water, 1 hour and 59 minutes; in inspecting trains at division points for defects in safety appliances, 1 hour; in breaking up trains at division points, making up trains to go forward afterward, and waiting for stock from branch lines and from trains following, 40 minutes. The court refused to deduct any of the time of these delays, and found there was due on the first cause of action, at the statutory rate, $60 with 7 per cent. interest to date. Equally detailed findings were made for each of the other causes of action. The court further found that defendant's railroad in the state of Nebraska is, and was at the time complained of, a single-track railroad; that defendant is engaged in both interstate and intrastate commerce; that its system of railroads extends to and through the states of Illinois, Wisconsin, Michigan, Minnesota, Iowa, North Dakota, South Dakota, Nebraska and Wyoming; that the defendant now operates a sufficient number of west-bound trains on its railroad, including its main line and its branches in the state of Nebraska, and at a sufficient rate of speed, to adequately serve all communities on its said lines in Nebraska in the transporting of all kinds of inanimate freight; that, in order to transport live stock in a westerly direction from South Omaha to stations on the defendant's main line and branches in the state of Nebraska at the average rate of speed required by sections 6018, 6019, Rev. St. 1913, special trains must be operated, in addition to trains required for transporting other kinds of freight in each instance when live stock is tendered for transportation; that, except during a small portion of the year, the defendant could transport all live stock offered to it for transportation from South Omaha to stations on its line, in its trains regularly operated for the transporting of inanimate freight, if permitted to transport live stock at the rate of speed at which such regular trains can be operated; that de-

fendant is offered about 1,600 or 1,700 car-loads of live stock yearly at South Omaha for transportation to the various stations on its lines in Nebraska, and except during the months of August, September and October, when feeders are being moved from South Omaha to the feeding yards on defendant's lines, it rarely happens that more than three or four cars are offered to it for transportation on any one day; that South Omaha is the principal market for live stock shipped from stations on defendant's line of railroad in the state of Nebraska, and that substantially all the live stock offered to defendant for transportation in the state of Nebraska is destined either to South Omaha, or same is shipped from South Omaha to stations along defendant's line; that, in cases where more than one car of live stock is offered for transportation from South Omaha over defendant's line of railroad, the destination of such live stock may be such as to require a special train for each car-load before same reaches destination on account of destination of the various cars being on the various branch lines of defendant operated in the state of Nebraska. The court found that, in order to comply with the statute, special trains for live stock will be required to be operated at times in excess of those otherwise required, without decreasing the number of trains necessary for transporting other kinds of freight, including freight moving as interstate commerce.

The court refused to make the following findings requested by defendant: That a compliance with the speed statute would require the abandonment of safety precautions in the operation of its trains, and would tend to promote unsafe methods of operation, danger to the general public, and the violation of the speed ordinances, and would cause loss and damage to freight, passengers and employees; that the time necessarily consumed in waiting for and meeting passenger trains carrying United States mail, in meeting trains carrying interstate commerce, in taking coal and water, in inspecting trains at division points for defects in safety appliances, and in

breaking up trains, and making them up, and in waiting for stock from branch lines or in a train following at such points should be excluded; that the cost of transporting live stock in compliance with the statute would be grossly in excess of the revenue derived therefrom under present tariffs, and in excess of the amount that shippers can afford to pay, and that its collection of a compensatory rate would destroy traffic in live stock to and from South Omaha; and that the statute is unconstitutional as an unreasonable exercise of the police power, or for any other reason.

The affirmative findings of fact made by the trial court are supported by the evidence, and their correctness is not disputed by either party. The train sheets covering the cars of stock offered for shipment and actually shipped westward from South Omaha during the year 1910 are in evidence in the *Davison* case, and from these, together with the testimony of the train dispatcher, it is shown that 1,616 cars were shipped west, mostly to Nebraska points; that there were four days in January when only one car of live stock was offered for shipment west, two days when two cars were offered, two days when three, two days when four, two days when five, two days when seven, one day when eight, and one day when nine cars were shipped, being 63 cars in January. In February there was an average of a little over two cars a day for 15 days; in March about five cars a day for 23 days were offered. In September, October, November, and December the number of shipments was largely increased; but, even then, on only 9 days in the year did the number of cars offered exceed 20. Even where the number of cars was sufficient to make up a complete train, in most instances it could only run a short distance before being broken up, and the cars distributed to the Lincoln branch, the Superior branch, Hastings branch, Albion branch, or other branch lines. In the *Dexter* case it is shown that, in 1913, 1,591 cars of stock were shipped westward to Nebraska points and that for the years 1911 and 1912 the

traffic was about the same. For about eight or nine months of the year cars of stock which are offered for shipment at South Omaha to points in Nebraska are so inconsiderable in number that they cannot be moved within the time limited, except in special trains and at an excessive expense. Such cars on branch lines are placed in regular local freight trains which run according to a time table, and are scheduled so as to allow time for the delivery of local freight and merchandise at each station. This of itself makes the time consumed exceed the statutory limit.

It is also established that on account of unforeseen accidents and delays that sometimes happen to the train in which stock is shipped or to other trains which it is scheduled to meet, by reason of unavoidable delays incident to the business, such as wrecks, washouts, storms, cold weather, hot boxes, and the like, it is often impossible to move shipments of live stock east-bound within the limit. The time consumed on a single-track railroad in waiting at stations in order to meet mail and other trains, in taking coal and water, and time consumed at division and junction points, in inspection for defects in car appliances, and in breaking up the train and incorporating other cars brought from branch lines, are necessarily incident to the operation of the railroad. A number of these elements increases the delay with an increase in traffic on the road. It is also evident that, as the distance to South Omaha becomes less, the difficulties in transportation become greater on account of the congestion of traffic brought to the main line from branches. The testimony of the general superintendents in Nebraska of the defendant, and of the Chicago, Burlington & Quincy Railroad Company, and Union Pacific Railroad Company, and others concerned with the operation of trains, is substantially to the effect that, while it would be possible to comply with the statute, in many instances special trains would be required for a few cars, undue preference would require to be given to such traffic over other trains, the expense of operation would be so greatly increased that, in

order to cover the cost, tariff rates would require to be made double what they now are, and the rates be made prohibitive, and other trains and interstate business would be interfered with and delayed.

Defendant insists that if time necessarily occupied in taking coal and water, in taking side tracks to allow meeting and passing trains, in delays at division stations for inspection and rearranging cars, and those caused by severe storms, washouts, excessive cold weather, unforeseen and unavoidable accidents, and the like, could be added to the exceptions in the statute, its terms might be complied with. It insists that the time consumed in such necessary operations must of reason be exempted from the provisions of the statute—citing *United States v. Kirby*, 7 Wall. (U. S.) 482, which is to the effect that, although a statute providing a penalty for interference with the transmission of mails did not contain an exception, yet an officer might lawfully arrest a mail carrier upon a warrant charging him with the crime of murder, even though it operated to cause delay. Other cases are cited in this contention which are mentioned in the opinion in *Cram v. Chicago, B. & Q. R. Co.*, 84 Neb. 607, a case involving the validity of the same statute. The trouble is that to write so many exceptions into the statute would be judicial legislation. We held in the *Cram* case that the common-law exemption of common carriers from liability for loss occasioned by the act of God or the public enemy may be presumed to have been in the legislative mind, and therefore the court may properly allow them to be made, though not expressed in the text; but this is as far as we find warrant to go.

Plaintiff insists that the constitutionality of the law was fully considered and definitely upheld in the *Cram* case, and that the question cannot be relitigated. But the main question in this case was not then presented or in issue. But little testimony was offered, and no concrete facts were presented to demonstrate that a speed of 14 or 18 miles an hour was unreasonable or impracticable. That

case was determined, as to the practicability of operation of trains within the prescribed limit, on an *a priori* basis. In the opinion it is said: "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 maintained or offered to maintain a legitimate defense, the courts have determined that the statute denies the carrier that right."

We are now presented with concrete cases in which defense was attempted by showing that a large portion of the time occupied by delay in transit was absolutely necessary in the proper and lawful operation of the railroad. The district court, however, determined that the statute denied the carrier the right to make such defense, or rather refused to hold that the statute permitted such a defense to be made, and, hence, a new question is presented here not determined in the former case. A statute may be upheld as against an attack made by one party claiming it to be invalid upon one ground, and still it may be declared unconstitutional in a later attack by another litigant for reasons not called to the attention of the court, or not shown to exist, on the first attack. The facts here in evidence were not adduced in the *Cram* case. It may be that on account of the difference in the character and equipment of the two railroads, the weight of metal in the rails, or amount of ballast on the track, the nature of the localities through which their lines run, the different facilities for operation, etc., such a defense could not have been made by the defendant in that case. At all events no such showing was made. There was evidence in the *Cram* case showing, as a general proposition, that in the management of traffic the defendant was compelled to side track trains containing live stock and wait for passing trains; but there was no specific evidence applying to the particular shipments in controversy, nor as to other matters for which it is now asserted deductions of time should be allowed, nor as to the

need of special trains if the statute was to be complied with. The questions at issue here were not presented, and it was held that it was unnecessary to consider whether facts not in evidence might constitute a defense.

A difficult question in the case is whether, if the defendant complies with the statute strictly, incurring very large expense for special trains, and making the cost of intrastate transportation of live stock westward, if carried on at the present rates, unremunerative, a sufficient remedy is furnished by the fact that it may apply to the state railway commission for an increase of rates, or whether it is the duty of the court, considering the impracticability of operation of such trains in many cases, the lack of qualification or excuses in the statute for unavoidable delays, and the additional expense which the operation of such trains at the statutory rate of speed must entail, to declare that such a statute is an unreasonable exercise of the police power, and therefore void. The extra expense of carrying on the west-bound traffic within the time limit is not necessarily the determining factor.

The case does not involve a consideration of the whole scheme of rates for the carrying of freight, but merely whether an order by the legislature to perform certain acts within a limited time is valid, and the question whether the operations of the railroad as a whole may be carried on profitably is not an issue in the case.

"The distinction between an order relating to such a subject and an order fixing rates coming within either of the hypotheses which we have stated is apparent. This is so because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, under the doctrine of *Smyth v. Ames*, 169 U. S. 526." *Atlantic C. L. R. Co. v. North Carolina C. C.*, 206 U. S. 1, 26. But the

fact that the performance of such duty is unremunerative is a weighty and important factor for consideration in passing upon the reasonableness of the provision. *Missouri P. R. Co. v. Kansas,* 216 U. S. 262. The real question is whether, considering all the facts in evidence as to the impracticability of complying with the statute in many instances in east-bound shipments, and for the greater portion of the year in west-bound shipments, the necessity of preventing discrimination against interstate traffic by reason of giving precedence to trains carrying live stock for intrastate delivery, and of compliance with the federal safety appliance act, the requirements of the law are reasonable, or whether they constitute an unreasonable exercise of the police power and interfere with the constitutional rights of the defendant. If the legislators could have known or foreseen the necessary delays and the innumerable contingencies that may occur in the operation of trains as shown by evidence in these cases, they, we feel certain, would have allowed further latitude to the carriers. The legislature knew of the existence of the evil, and that stock shippers were often vexed by delays whereby they suffered damage, and properly sought to provide a remedy. There is no doubt that a statute or order regulating the rate of speed of the carriage of live stock is a proper exercise of the police power of the state, whether provided for by the legislature or by an order or regulation of the state railway commission, but such a statute or order must be reasonable and practical in its operation, and it must not impose an undue burden upon the carrier, nor take away any of its constitutional rights. In North Dakota a statute similar to this was declared unconstitutional before experience as to its operation had been had. *Downey v. Northern P. R. Co.,* 19 N. Dak. 621, 26 L. R. A. n. s. 1017.

The state of Kansas has a speed statute (Laws 1907, ch. 276) which fixes 15 miles an hour as the rate of speed, "unless prevented by unavoidable cause," and it allows the recovery of all damages to the shipper, with a reasonable

attorney's fee. This law seems to be reasonable in its terms, and apparently has been complied with, since no opinions have been reported touching its validity.

The question whether statutes which attempt an unreasonable exercise of the police power may be valid has been directly passed upon by the United States supreme court. Though that court concedes the validity of laws designed to secure the safety and comfort of passengers, or employees, or persons crossing the railroad tracks, it has been repeatedly held that a statute making an unreasonable exercise of the police power of the state, which interferes with interstate commerce, or which has the effect to deprive the carrier of its property without due compensation, or to deny it the equal protection of the laws, is invalid. A discussion of how far the right of regulation may go, with a consideration and citation of prior cases on the subject, may be found in the opinion of Mr. Justice Brown in *Cleveland, C., C. & St. L. R. Co. v. Illinois,* 177 U. S. 514, wherein a requirement that express trains intended only for through passengers should stop at every county seat, when accommodations were provided by local trains, was held to be unreasonable and invalid. *Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin,* 237 U. S. 220.

A Texas statute (2 Sayles Tex. Civ. St., art. 4502) provided that, when the shipper made application in writing to a railroad company to supply a number of cars for the shipment of freight, on the failure of the company to supply such cars within six days from the receipt of the application, it should forfeit to the party applying $25 a car for each car they failed to furnish, and be liable for all damages the applicant might sustain, with a countervailing penalty for failure on the part of the shipper to take the cars when furnished. The only exemption provided was that the act "shall not apply in case of strikes or other public calamity." In the opinion in *Houston & T. C. R. Co. v. Mayes,* 201 U. S. 321, the court said, by Mr. Justice Brown: "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of

both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state and amounts to a burden upon interstate commerce. It makes no exception in cases of sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather."

"Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the state and may have been intended merely to secure promptness on the part of the railroad companies, in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional and accidental violations of its provisions, when no damage could actually have resulted to the shippers."

"While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfil all its legal requirements cannot provide for, and against which the statute in question makes no allowance.

"Although it may be admitted that the statute is not far from the line of proper police regulation, we think that suf-

ficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

It is clearly shown that, unless further exceptions and exemptions are interpolated in the law, the operation of trains at the speed required by the statute would in many cases be impracticable, would operate to interfere with the operation of trains carrying mail, interstate commerce, and with the transportation of other freight. It is also in evidence that an enormous increase in the rates charged by defendant would be necessary in order to so adjust the whole transportation facilities of the railroad as to provide for accelerated service, in many instances requiring special trains consisting often of from one to a few cars of live stock. These are burdens which interfere with the business of tranportation and violate defendant's constitutional rights.

It is argued that, since this court has held that a statute is valid making a railroad company insurer of the safety of passengers, regardless of whether it was at fault for an accident which caused an injury, it must hold that this statute is also proper legislation. The law as a matter of public policy exerts exceeding care to conserve human life and personal safety. Such an object is not to be compared to the mere monetary loss which may occur by reason of delay in the carriage of live stock. Public safety is of supreme importance, and stringent measures, used to exert pressure upon carriers of passengers so that nothing less than the greatest care and diligence will be used by them in such carriage, are entirely justifiable. The statute under consideration is an exercise of police power, and it must be reasonable in order to be valid. The legislature has not the power to interfere in an arbitrary manner with the conduct of a business or occupation by a police regulation, unless the regulation bears some definite and reasonable relation to the public welfare, and to enforce it does not infringe upon constitutional rights. Each person is guar-

anteed the liberty to carry on his lawful business or occupation unhampered, except by regulations necessary for the public welfare, having just relation to the object sought, and not unreasonably oppressive.

Plaintiffs argue that the best answer to the contention that the railroad companies cannot comply with the law is the fact that the evidence shows that they are complying with it. Where this evidence is to be found in the record has not been pointed out, and we have not found it. Plaintiffs say that the court can take notice of the fact that few cases have been brought here on appeal. On the other hand, defendant says that a large number of claims are outstanding awaiting a decision upon these appeals. These statements are alike based on facts not in the record. The contention of plaintiffs is that, "so long as the aggregate business of transporting this class of property is adequate and profitable, the company cannot complain, and no claim or color of claim can be made, upon the evidence, that the Northwestern railroad company is not making money in the transportation of live stock in Nebraska," and much is said in the briefs with regard to the profits that defendant is making, the dividends it is paying, and the amount of money it is investing. There is no evidence of this kind in the record, and, if the facts are as stated, they are not so public and notorious that the court can take judicial notice of them. Under the undisputed evidence, we conclude that the statute cannot be enforced without unduly interfering with the constitutional rights of this defendant. It is possible that with other railroads, better built and equipped, whose lines run through a richer territory, with fewer converging branch lines, or with heavier rails or double tracks, the difficulties shown here do not exist, and the act might be enforceable, but we cannot draw a line and say the act is enforceable as applied to one railroad and invalid as to another, or as to shipments in one direction and not to shipments in the other direction. The object and purpose of the law is within the proper police powers of the state. The legislature is about to meet, and it is to be presumed

that, with the knowledge gained by experience of the practical operation of the statute, that body may amend it by allowing further and proper exemptions, permit other defenses to be made, or in such other manner that it may not be vulnerable to attack. The several judgments of the district court are reversed, and the causes are remanded.

REVERSED.

BLACK BROTHERS, APPELLANTS, v. LOGAN COUNTY, APPELLEE.

FILED DECEMBER 9, 1916. No. 19081.

Taxation: RECOVERY OF PAYMENT. Taxes paid cannot be recovered back on the ground that the property of the tax-debtor had been twice assessed, where the tax receipt neither shows payment under protest nor any ground of protest. Rev. St. 1913, sec. 6491.

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

Thomas F. Hamer and *Frank O. Divisek,* for appellants.

W. E. Hill and *B. F. Johnson, contra.*

ROSE, J.

This is a proceeding to recover from Logan county $163.19 paid by plaintiffs as taxes on personal property alleged to have been legally assessed in Thomas county, where the valid taxes are said to have been paid. The tax receipt issued by the treasurer of Logan county, considered as part of plaintiffs' claim, did not show payment under protest or any ground of protest. The trial court sustained a demurrer to the petition. Plaintiffs refused to plead further, and from a judgment of dismissal they have appealed.

Was the demurrer properly sustained? Referring to the right of a tax-debtor to pay taxes under protest, the revenue law provides:

"If such person claim a tax, or any part thereof, to be invalid for the reason that the property upon which it was levied was not liable to taxation, or that the property has been twice assessed in the same year and taxes paid thereon, he may pay such taxes under protest to the county treasurer, or other proper authority, and it shall be the duty of the treasurer, or other proper authority receiving such tax, to give a receipt therefor stating thereon that they were paid under protest, and the grounds of such protest, whether or not taxable or twice assessed, and taxes paid thereon." Rev. St. 1913, sec. 6491.

The tax receipt is a part of the tax-debtor's claim for taxes paid under protest, and is made so by a statute declaring:

"Within thirty days after paying such taxes the person paying them shall file a statement in writing, duly verified, with the county board, setting forth the amount of tax paid under protest, the grounds of such protest, and shall attach thereto the receipt taken for said taxes." Rev. St. 1913, sec. 6491.

Plaintiffs contend that these provisions are merely directory, and that the treasurer's failure to comply with them does not affect the remedy of the taxpayer. This construction would in a measure defeat the purpose of the lawmakers. Taxes essential to county government are generally collected in small amounts from many tax-debtors. The collection of revenue involves many transactions which are not committed to the memory of county officers or taxpayers. Prompt payment is an essential feature of the revenue system. In absence of statute, taxes voluntarily paid cannot be recovered back. The statute creates a remedy, but requires prompt payment under protest, leaving for future determination questions relating to invalidity of taxes. The legislature intended to make the receipt for taxes paid under protest evidence of the protest and of the

grounds thereof. This is a method of pointing out the items of taxes assailed as invalid, and of giving timely notice to public officers to prepare for a defense, if any. The duty of a treasurer to note on the tax receipt a payment made under protest and the grounds thereof is a reasonable one and he cannot successfully resist a proper demand for its performance. To require a taxpayer to see that the steps essential to his statutory right to recover back illegal taxes paid are taken is not exacting too much. The statute thus construed is a protection to the taxpayer as well as to the public. In this view of the revenue law, the demurrer was properly sustained.

AFFIRMED.

HAMER, J., not sitting.

WILLIAM A. COLE, RECEIVER, APPELLEE, v. ORVAL C. MYERS ET AL., APPELLEES; NATIONAL FIDELITY & CASUALTY COMPANY, APPELLANT.

FILED DECEMBER 9, 1916. No. 19668.

Subrogation: SURETIES. Where a bank fails while having on deposit county funds illegally deposited in excess of the amount for which the bank had given a depository bond pursuant to the depository law of Nebraska, and the surety thereon pays the county the full amount of its liability and the treasurer's surety pays the overdeposit, the sureties may share ratably the dividends declared by the bank's receiver upon the county's claim for the entire deposit. Rev. St. 1913, sec. 6662.

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

Nye F. Morehouse, for appellant.

Montgomery, Hall & Young, Bernard McNeny and *Stubbs & Stubbs, contra.*

ROSE, J.

This is a suit in the nature of a bill of interpleader. The First National Bank of Superior failed when Nuckolls county was an unpaid depositor therein to the extent of $13,189.61, including an overdeposit of $3,189.61 made by the county treasurer in violation of statute. Rev. St. 1913, sec. 6662. For the protection of county funds deposited in the bank the American Surety Company had become liable on the bank's depository bond in the penal sum of $10,000. The National Fidelity & Casualty Company was surety on the county treasurer's official bond. After the bank failed the county treasurer filed with the receiver a claim for $13,189.61. The American Surety Company promptly paid the county the amount of its liability as surety ($10,000) and to that extent procured an assignment of the deposit. Later the Fidelity & Casualty Company paid the county the remainder of the deposit ($3,189.61), took an assignment of it, and also obtained a formal assignment of the claim for $13,189.61, which the county treasurer had filed with the receiver. The receiver afterward paid the National Fidelity & Casualty Company a dividend of $1,979.37, being 15 per cent. of the county's entire deposit of $13,189.61. The sureties are rival claimants to dividends. The purpose of the suit, which was brought by the receiver, is to determine the respective rights of the sureties. As defendants they are joined with Orval C. Myers, county treasurer. The trial court held that the American Surety Company, the surety on the bank's depository bond, is entitled to share the dividend with the National Fidelity & Casualty Company, the surety on the treasurer's bond, in the proportion that $10,000 bears to $3,189.61. Judgment was accordingly rendered in favor of the American Surety Company against the National Fidelity & Casualty Company for $1,664.50, being 15 per cent. of $10,000, with interest. The latter has appealed.

The sureties are not contesting the validity or priority of separate claims against the insolvent bank, but are assert-

ing hostile claims to dividends on a single uncontested claim for an unpaid deposit of $13,189.61.

The treasurer's surety calls attention to the liability of the bank's surety for the bank's obligation to safely keep the deposits of county funds, to pay "each and every part thereof, upon the written demand of the county treasurer," and to "save and keep the people of Nuckolls county, and the county treasurer harmless and indemnified." In this connection the treasurer's surety argues that, having paid the debt of $3,189.61 owing by the treasurer and the bank to the county, it is by subrogation entitled to all of the rights and remedies of both; that the county and the treasurer, after receiving $10,000 from the bank's surety, are entitled to dividends on $13,189.61, until the overdeposit of $3,189.61 is fully paid; that the effect of allowing the bank's surety to draw dividends before the overdeposit is paid from the assets of the bank is to reduce the penalty in the depository bond below $10,000, thus injuring the county and the treasurer; that the bank's surety is not entitled to the benefits of subrogation until the bank's debt is paid in full. On the other hand, the bank's surety insists that, when it discharged its full liability by paying $10,000, which would have been the maximum amount of its principal's indebtedness to the county, except for the illegal overdeposit made by the treasurer, it was, to the extent of $10,000, subrogated to all of the rights of the county. The question thus presented is not free from difficulty. The courts have not agreed on the solution. There is reason on both sides of the controversy. The doctrine invoked by the treasurer's surety has been stated as follows:

"As a surety is not entitled to subrogation until the debt is paid in full, a surety on a bond to secure a city in the deposit of moneys in an insolvent banking institution is not entitled to subrogation, though he has paid the bond, where the bank was still largely indebted to the city, and the total amount of dividends, together with the amount of the bond, would not discharge the obligation; for in such case, if the surety were *pro rata* subrogated to the

city's right to receive dividends, the city would be injured." *Knaffl v. Knoxville Banking & Trust Co.,* 133 Tenn. 655. *Board of Health v. Teutonia Bank & Trust Co.,* 137 La. 422; *Buffalo German Ins. Co. v. Title Guaranty & Trust Co.,* 99 N. Y. Supp. 883; *Commissioner of Banking v. Chelsea Savings Bank,* 161 Mich. 691.

There is a recognized exception to the general rule, however, where the surety discharges his full liability to the creditor by paying the entire debt protected by his suretyship, though the principal still owes the creditor an additional sum. The doctrine on which the exception is based seems to have been first announced in *Ex parte Rushforth,* 10 Ves., Jr. (Eng.) 409. In a later English case the principle was restated in the following form:

"When a surety is only surety for a part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged." *Gray v. Seckham,* L. R. 7 Ch. (Eng.) 680.

A review of the English cases shows that the doctrine on which the distinction is based is firmly established. *Ellis v. Emmanuel,* 1 Exch. Div. (Eng.) 157. While the leading case has been criticised in *Knaffl v. Knoxville Banking & Trust Co.,* 133 Tenn. 655, as announcing a doctrine at variance with the rules of equity governing subrogation, the exception, in the opinion of another American court, rests on a logical basis. *Buffalo German Ins. Co. v. Title Guaranty & Trust Co.,* 99 N. Y. Supp. 883.

In the present case, what is the contract of suretyship into which the bank's surety entered? The depository bond for $10,000 was executed under a statute providing:

"For the security of the funds so deposited under the provisions of this article the county treasurer shall require all such depositories to give bonds for the safe-keeping and payment of such deposits and accretions thereof, which bond shall run to the people of the county and be approved by the county board, and conditioned that such depository shall, at the end of each and every month, render

to the treasurer and county board a statement in duplicate, showing the several daily balances and the amounts of moneys of the county held by it during the month, and the amount of the accretion thereof, and how credited. * * * The treasurer shall not have on deposit in any bank at any time more than the maximum amount of the bond given by said bank in cases where the bank gives a guaranty bond." Rev. St. 1913, sec. 6662.

The statute is by construction a part of the depository bond. *Blaco v. State,* 58 Neb. 557. In entering into the contract of suretyship, the surety had a right to assume that the treasurer would comply with the statute and limit his deposit to $10,000. The bond was given to protect legal deposits of county funds to the contractual and statutory maximum of $10,000, and not as security for an illegal deposit in excess of that sum. Both the surety's liability and the debt protected by the suretyship are limited to $10,000. In paying the amount of the bond, the bank's surety not only discharged its legal liability, but also discharged the entire debt to secure which the bond was given. The terms of the contract of suretyship, when considered with the statute and with the public duties of the treasurer, will admit of no other construction.

After the bank's surety paid the county the bank's debt in the sum of $10,000, it became a creditor of the bank to that extent, and the county, by reason of the treasurer's illegal overdeposit, remained a creditor in the sum of $3,189.61. The trial court held that the two creditors described should share ratably in the dividends declared by the bank's receiver. The ruling is challenged as erroneous, for the reasons that the treasurer, when the bank failed, became personally liable to the county for the amount of the unpaid overdeposit; that the bank's surety agreed to indemnify him; that the surety on the treasurer's bond paid the county the remainder of the bank's debt for which the treasurer was liable, amounting to $3,189.61, and was thus subrogated to the treasurer's rights; that consequently the bank's surety will not be entitled to participate in

dividends until the bank's debt for which the treasurer is liable has been paid from the assets of the insolvent bank.

The position is untenable. The treasurer's surety cannot trace through subrogation to the treasurer a right to dividends superior to that of the bank's surety. The treasurer's compliance with the statute would have prevented the bank from incurring an indebtedness to the county in excess of $10,000. In that event the debt of the bank would have been paid in full. By making an overdeposit contrary to the letter of the law, the treasurer incurred a personal liability to the county which otherwise would have had no existence. Neither the treasurer nor his surety will be permitted to make use of this wrongful act to establish a right to dividends superior to that of the bank's surety.

Under the conditions outlined, the further point that the treasurer's surety, by asserting rights of the county, can prevent the bank's surety from sharing ratably in the dividends does not seem to be well taken. The reason for the rule that a surety is not entitled to subrogation until the debt of the principal has been paid in full does not apply to the facts in the present case. The bank's surety paid the entire debt for which the depository bond was given as security. If injury to the county would result from permitting the bank's surety to share the dividend, the county's loss would not grow out of the debt secured by the depository bond. Such loss, if any, would be traceable to the illegal conduct of the treasurer in making deposits in excess of the penalty named in the depository bond. For this wrongful act on the part of the treasurer, neither the bank's surety nor the county is in anywise responsible. If the treasurer had complied with the law, the principal's debt would be paid in full and the right of the bank's surety to subrogation would be unassailable. In that event the ultimate loss of the bank's surety would be less than the maximum amount for which the depository bond was given. To deny or postpone subrogation because the treasurer, for whose wrongful act the bank's surety was not responsible,

made overdeposits in violation of law would extend the liability of the bank's surety beyond that created by the contract of suretyship. In respect to the dividends, therefore, the bank's surety and the treasurer's surety are asserting claims of equal rank. This conclusion results in the affirmance of the judgment of the district court.

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

JOHN A. BENTLEY, APPELLEE, v. GEORGE W. SPACE, APPELLANT.

FILED DECEMBER 9, 1916. No. 18942.

Specific Performance: MISLEADING STATEMENTS. A court of equity may refuse to decree specific performance of a contract for the sale of land at the instance of the vendor, where he has misled the vendee as to the quantity to be conveyed, even though he acted innocently in so doing.

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

C. Petrus Peterson, R. W. Devoe and *J. M. Swenson*, for appellant.

W. P. Miles and *J. L. McIntosh, contra.*

FAWCETT, J.

From a decree of the district court for Cheyenne county, awarding plaintiff a decree for the specific performance of a contract for the sale of land in that county, defendant appeals.

The written agreement entered into between the parties, dated October 23, 1913, recited the sale by plaintiff to defendant of the north half of section 7, township 15, range 48, west of the sixth P. M., in Cheyenne county, "containing 320 acres, more or less, according to the government survey thereof." The consideration expressed in the agreement was $7,360, payable $500 cash, $3,860 on or before March 1, 1914, remainder of $3,000 on or before five years, with interest at 6 per cent. per annum, to be secured by first mortgage on the land. The $500 was paid by defendant at the time of the execution of the agreement. When March 1, 1914, arrived, it was learned that the tract of land did not contain 320 acres, but was 24.2 acres short. Upon learning this fact, defendant refused to take the land, and this suit was instituted. The petition is in the usual form. The answer alleged that defendant purchased the land on the representation of plaintiff that it contained 320 acres; that he would not have purchased it, nor have entered into the contract, if he had known that it contained a less number of acres than 320; and by cross-petition defendant asked for a return of the $500 which he had paid, together with interest from the date of payment. The answer further alleged that plaintiff represented to him that the tract of land contained 320 acres, for which he agreed to pay $23 an acre; and that the consideration of $7,360 was ascertained by multiplying 320 (acres) by 23 (dollars an acre). In his answer to the cross-petition of defendant, plaintiff denied that he made any representations to defendant as to the acreage; and alleged that at the time he made the sale he was not aware that the half section involved was short; that the land was sold by him to defendant as a half section of 320 acres, more or less; that the tract was sold for the specific sum of $7,360; and set out other matters which need not be considered. The reply to this answer was a general denial.

The evidence shows without dispute that the gross sum of the consideration was ascertained in the manner alleged by defendant. Defendant testified in his own behalf that

on the day plaintiff showed him the land in controversy he first showed him two or more other tracts, one of which tracts contained 160 acres; that he told plaintiff "it wasn't enough, and he said he thought he could get me the 80 adjoining it, and I told him I didn't want less than 320 acres, because I had two sons and I wanted to give them a farm of 160 acres each;" that plaintiff then said he had 320 acres northeast of town, which he would sell at $23 an acre. He further testified that prior to reaching the land in controversy plaintiff stated to him "that there were 320 acres in it." Plaintiff took the stand on rebuttal, but made no attempt to deny this testimony given by defendant. It stands, therefore, established without dispute that plaintiff knew defendant was seeking to purchase a tract of land containing 320 acres, for the purpose of giving two sons a farm of 160 acres, each. It is conceded by the parties that neither of them knew at the time the agreement was entered into that they were dealing with a short half-section of land. The trial court found "that the consideration agreed upon, for said sale, was $23 an acre," and that both parties supposed that the tract contained approximately 320 acres, when in fact it contained only 295.8 acres. On these findings the court adjudged that defendant was not entitled to avoid the contract, but must take and pay for the 295.8 acres at the agreed price of $23 an acre; that after deducting the price of the 24.2 acres, at $23 an acre, defendant should specifically perform the contract for the reduced gross consideration within 60 days from the date of the decree, and refused defendant relief under his cross-petition.

We think the district court erred. The evidence of defendant shows that he would not have entered into the contract had he known that the tract contained only 295.8 acres. While it may be conceded that a court of equity will compel specific performance of a contract which the parties intended to make, but which, through their mutual mistake, is not the one actually made, it will not compel performance of a contract materially dif-

ferent from the one which they both intended to make. That would be to make a new contract for the parties, and one which one of them at least never intended to make. In other words, a court of equity will not grant its affirmative remedy to compel the defendant to perform a contract which he did not intend to make, or which he would not have entered into had its true effect been understood; nor will specific performance of a contract for the sale of land be decreed at the instance of the vendor, where he has misled the vendee as to the quantity to be conveyed, even though he acted innocently in so doing. Pomeroy, Specific Performance of Contracts (2d ed.) sec. 250; 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 860; 2 Story, Equity Jurisprudence (13th ed.) secs. 769, 770.

In 2 Warvelle, Vendors (2d ed.) sec. 749, it is held: "It is beyond dispute that a purchaser is entitled to all that he bargains for, and is under no obligation to accept a part or to accept compensation or abatement, hence, if he contracts for the purchase of land of defined area or specified quantity, he is under no obligation to complete the contract if the vendor is unable to convey all that the agreement calls for."

In *Allen v. Kirk,* 219 Pa. St. 574, it is said: "It is ungracious to ask that the appellees be compelled to take that which, under a further unchallenged finding of the court, they would not have agreed to take if they had known its real dimensions. * * * The learned judge below cited authorities to support his correct conclusion that the bill ought to be dismissed, but he needed none. The equities were all with the appellees. The appellant, who sought relief, came into court with none. He had innocently and unintentionally, as found by the court, misled the parties with whom he contracted, but out of their mistake, so induced, no contract arose which equity would enforce."

In 2 Warvelle, Vendors (2d ed.) sec. 749, it is said: "If the vendor cannot make out a title as to part of the subject-matter, or in case of a deficiency in the quantity of the

land, equity will not compel the vendee to perform the contract even in part."

In *Flynn v. Finch,* 137 Ia. 378, it is held: "Deceit in representing the area of land need not be shown to justify denial of specific performance of a contract to convey; innocent misrepresentation to a substantial extent, which induced the making of the contract, is sufficient to defeat such relief at the suit of the party making the representations. Evidence held to show misrepresentation."

In *Gurley v. Hiteshue,* 5 Gill (Md.) 217, it is said: "A court of equity, professing as it does to lend its aid exclusively to cases in which a claim can be conscientiously enforced, will never coerce the specific performance of a contract for a party who has not acted fairly, openly and without suppression of any important fact, or the expression of any falsehood. Whether with a fraudulent design or innocently, yet if a false impression has been conveyed and made the basis of the contract, this extraordinary jurisdiction of the court will not be exercised by coercing a specific performance."

Our own cases are in harmony with these authorities. *Stanton v. Driffkorn,* 83 Neb. 36, and other Nebraska cases therein cited.

While authorities may be found which seem to point the other way, we think the authorities cited clearly state the correct rule applicable to the facts in the case we are now considering. Defendant thought he was purchasing 320 acres of land. He was warranted in thinking so because the plaintiff stated that it contained that number of acres. He agreed to pay $23 an acre for that number of acres, and signed an agreement for the gross consideration, ascertained by multiplying the number of acres which the tract was represented to contain by the price per acre agreed upon. Upon learning that the tract contained many acres short of the number represented, he declined to proceed with the contract. He was justified in so doing, and, having paid $500 upon the contract in reliance upon the represen-

tations so made, he is entitled to have that money repaid to him.

It is claimed by plaintiff that after the parties had ascertained that the land was short they had a conversation in relation thereto, in which he first offered to allow defendant a credit of $200 if he would proceed with the contract, and then offered to throw off half of the acreage that was short, at the rate of $23 an acre; that in a subsequent conversation he told defendant that he would throw off the entire shortage in acreage. He did not testify that defendant accepted this offer. The fact that defendant did not at that time consent to take the land if the price of the 24.2 acres were deducted and the failure of the plaintiff to testify that he did so agree are shown by plaintiff's allegations in his answer to defendant's cross-petition, in which he alleges that the first time he became aware that defendant was dissatisfied with the deal was about March 4 or 5, when defendant told him that he did not know the land was short in acreage; that "plaintiff told defendant that he was selling the land to him, just as he bought it himself, and that he did not know the half-section was short, and said to defendant that under the conditions he was willing to make a reduction in the consideration for said land equal to one-half the short acreage, but that he thought the defendant ought also to stand for one-half the shortage, and that the defendant then told plaintiff that he would see him again with reference to it, and the defendant did come around to see the plaintiff about the shortage of acreage, and the plaintiff then said to the defendant that he would be willing to throw off an amount of the consideration for the purchase of said tract equal to the amount of said short acreage multiplied by the price per acre of said land, just the same as though there were 320 full acres in it, which would be about $560, and that the defendant then said he would be around again, and that plaintiff thought there would be no other complaint, and that the deal would be finished according to contract." It appears, therefore,

from plaintiff's own allegations that when he wired to his vendor for a deed he did so without any agreement on the part of defendant to accept it, and that he sent his wire indulging in the mere "thought there would be no other complaint, and that the deal would be finished according to contract."

We are unable to discover any theory upon which plaintiff should be permitted to recover. The judgment of the district court is reversed and the cause remanded, with directions to dismiss plaintiff's suit for want of equity, and to enter judgment in favor of defendant upon his cross-petition, as prayed therein.

REVERSED.

MORRISSEY, C. J., and SEDGWICK and HAMER, JJ., dissent.

HENRY N. WIESE ET AL., APPELLANTS, v. CITY OF SOUTH OMAHA ET AL., APPELLEES.

FILED DECEMBER 9, 1916. No. 18964.

1. **Municipal Corporations:** STREET IMPROVEMENTS: VOID ASSESSMENT: RE-ASSESSMENT. Where a statute provides that, if an assessment for a local improvement shall be declared void on the ground that the proceedings of the city council were "defective, irregular or void, including among other things the want of jurisdiction," the city council may make a new assessment upon lands benefited by the improvement, except where the first assessment was made "for an unauthorized purpose," or there was "an entire and complete want of authority in the council to proceed in the premises." And such new assessment may be made where the first assessment has been adjudged void by the courts on the ground that the ordinance creating the improvement district failed to properly define the limits of the district. Rev. St. 1913, sec. 4748.
2. ——: ——: ——: STATUTORY PROVISIONS: CONSTITUTIONALITY. The provisions of the South Omaha charter in 1905 did not authorize the city council to assess lands benefited by a local improvement in excess of the benefits, and was not unconstitutional as taking property without due process of law. Comp. St. 1905, ch. 13, art. II, sec. 128, subds. IV, XVIII.
3. **Statutes:** REPEAL AND RE-ENACTMENT. "It is a settled rule of construction in this state that a simultaneous repeal and re-enactment of a statute or section thereof, in terms or in substance, is a mere

affirmance of the original and not a repeal thereof in the strict or constitutional sense of the word." *Stenberg v. State*, 50 Neb. 127.

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

A. H. Murdock and *Arthur C. Pancoast,* for appellants.

John A. Rine, W. C. Lambert and *Murphy & Winters, contra.*

FAWCETT, J.

This is an action by plaintiffs to enjoin the collection of and to cancel special assessments levied against their property in South Omaha for the grading of a portion of K street. From a judgment dismissing the action, plaintiffs have appealed.

Proceedings were instituted in 1905 for the grading of a portion of K street and assessments were levied against property benefited. In an action by the present plaintiffs and others, the assessment was declared void on the ground that the city council was without jurisdiction to make the assessment since the ordinance creating the improvement district failed to properly define the limits of the district. *Wiese v. City of South Omaha,* 85 Neb. 844. Thereafter the city council passed an ordinance for the creation of an improvement district in which the grading had been done, and another ordinance for the assessment of benefits. The assessment was made under authority of the following statutory provision: "Whenever an assessment for any of the improvements provided for herein or for any local improvement which has been heretofore made, or which hereafter may be made, is void or has been, or may be, declared void, or its enforcement under the laws of this state or the charters of cities of this class is not possible or is refused, or for any other cause the same is void or may be declared void by any court, either directly or by virtue of any decision of such court, the mayor and council of such city shall, by ordinance, order and make a new assessment or re-assessment upon the lots, blocks, land and parcels of lands which have been or will be benefited by such local

improvements, it being the true intent and meaning of this chapter to make the cost and expense of all local improvements payable by the real estate benefited to the extent of the improvements by the same, either by reason of the first assessment or re-assessment therefor, and notwithstanding the proceedings of the mayor and council, or of any of the officers of the city, may be found to be defective, irregular or void, including among other things the want of jurisdiction, and the city council or such officer to proceed in the premises, as well as other defects, except where such assssments may be made for an unauthorized purpose, or there is an entire and complete want of authority in the council to proceed in the premises." Rev. St. 1913, sec. 4748.

Plaintiffs contend that the section quoted does not authorize a re-assessment under the circumstances of this case. Does the statute authorize a re-assessment where the original assessment has been declared void on the ground that the ordinance creating the improvement district failed to properly define the limits thereof? It is the contention of plaintiffs that in such a case there is an "entire and complete want of authority in the city council to proceed in the premises," and for that reason a re-assessment was not authorized. In the former opinion it was held that failure of the ordinance to properly define the limits of the district rendered the assessment void for want of jurisdiction. In one sense, want of jurisdiction is "want of authority in the city council to proceed in the premises." The statute, however, provides that re-assessments may be made though the proceedings may be found to be void for "the want of jurisdiction." Without attempting a definition, it may be said that the city council did not proceed with "entire and complete want of authority" merely because the ordinance creating the improvement district did not properly define the limits thereof. The proceedings of the city council were based upon a petition filed with the city clerk which was signed by owners representing a majority of the taxable feet front upon the street to be

improved. The city council did not proceed with "entire and complete want of authority" within the meaning of that term as used in the section quoted.

Is the re-assessment statute unconstitutional as contended by plaintiffs? The power of the legislature to authorize a re-assessment, in case the first assessment has been declared invalid for failure to comply with provisions which the legislature might in the first instance have dispensed with, is generally upheld. *Spencer v. Merchant,* 125 U. S. 345; *City of Seattle v. Kelleher,* 195 U. S. 351; *Lombard v. West Chicago Park Commissioners,* 181 U. S. 33; *West Chicago Park Commissioners v. Farber,* 171 Ill. 146; *Mayor & City Council of Baltimore v. Ulman,* 79 Md. 469; *Warren v. Street Commissioners,* 187 Mass. 290; *State v. District Court of Blue Earth County,* 102 Minn. 482; *Jones v. Town of Tonawanda,* 158 N. Y. 438; *Frederick v. City of Seattle,* 13 Wash. 428; *Sanderson v. Herman,* 108 Wis. 662; *Schintgen v. City of La Crosse,* 117 Wis. 158. The first assessment was declared void for failure of the ordinance creating the improvement district to properly define its limits. The legislature might have authorized the city council on its own initiative to improve the street and, after the improvement had been completed, to create an improvement district and provide for the assessment of the property benefited, if notice thereof and opportunity were given to property owners to be heard upon the assessment. *Londoner v. City and County of Denver,* 210 U. S. 373; *Hoopes v. City of Omaha,* 99 Neb. 460. The legislature has provided that by a re-assessment the failure of the city council to comply with dispensable requirements may be corrected. Property owners who have been benefited by an improvement and who have been given an opportunity to be heard upon the assessment of the benefits are not deprived of any constitutional rights by a re-assessment. Plaintiffs contend, however, that the judgment of this court declaring the first assessment void cannot be overruled or annulled by a re-assessment, and cite *McManus v. Hornaday,* 124 Ia. 267. The case may

be distinguished. The first action in Iowa was brought upon a tax certificate issued by the city to the plaintiff. In that suit the court held that the tax certificate was void and uncollectible. Subsequently, the legislature passed an act legalizing the action of the city in making the improvement. A second action was brought "by the same plaintiff against the same defendant upon the same certificate, and for a recovery of the same tax." *McManus v. Hornaday,* 124 Ia. 267, 273. The second suit does not appear to have been based on a new certificate issued after a re-assessment had been made. If this had been done a recovery would have been sustained. *Tuttle v. Polk & Hubbell,* 84 Ia. 12.

It is also contended that the statute under which the improvement was ordered is unconstitutional. Comp. St. 1905, ch. 13, art. II, sec. 128, subds. III, IV. The argument is that the statute provided that the entire cost of the improvement should be assessed against property owners within the district though in excess of the benefits derived from such improvement. *Schneider v. Plum,* 86 Neb. 129; *Cain v. City of Omaha,* 42 Neb. 120. A fair reading of the statute does not sustain this contention. The statute provided that special taxes to cover the cost of the improvement should be assessed on all lots "to the extent of the special benefit to such lots." Comp. St. 1905, ch. 13, art. II, sec. 128, subd. XVIII. Subdivision XXVII declared it to be "the true intent and meaning of this act to make the cost and expense of all local improvements payable by the real estate benefited to the extent of the improvements by the same."

It is further contended that the act of 1905, under which the improvements were made, was repealed in 1907, and that there was no saving clause. The answer to this is: The act of 1907 was, in substance and substantially, in terms a re-enactment of the act of 1905, and hence was not a repeal in the strict or constitutional sense of the word. *Stenberg v. State,* 50 Neb. 127.

AFFIRMED.

ROSE, J., not sitting.

PEARL R. BRADY, APPELLANT, v. STATE INSURANCE COMPANY, APPELLEE.

FILED DECEMBER 9, 1916. No. 19014.

1. **Election of Remedies.** One who has voluntarily chosen an appropriate legal remedy and obtained full satisfaction therefor, with knowledge of the facts and of his rights, will not ordinarily be allowed to afterwards resort to an inconsistent remedy involving a contradiction of the grounds upon which he before proceeded.

2. **Insurance:** DESTRUCTION OF PROPERTY: ELECTION OF REMEDIES. Where the owner of a building obtains separate policies of insurance thereon, one covering loss or damage by fire or lightning, and the other by wind or tornado, and the building is wholly destroyed, partly by fire and partly by tornado, the amount written in one policy cannot be recovered under the provisions of the valued policy law on the ground that the building was wholly destroyed by the elements therein insured against, when it appears that the assured has demanded and obtained payment of the full sum written in the other policy upon the claim that such building was wholly destroyed by the elements therein insured against. Such claims being clearly antagonistic to each other, the election to pursue the remedy under one will be held to be a bar to the other.

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

I. J. Dunn and *T. E. Brady,* for appellant.

Stout, Rose & Wells, contra.

FAWCETT, J.

On the evening of Easter Sunday, March 23, 1913, plaintiff's dwelling-house was completely destroyed, partly by the terrible tornado which swept through the city of Omaha about 6 o'clock that evening, and partly by fire. On February 14, preceding the fire, plaintiff obtained from defendant a policy of insurance in the sum of $2,000, insuring her building against loss or damage by fire or lightning. At the same time, and as a part of the same transaction, but for a separate agreed consideration, defendant also

issued to plaintiff a separate policy for the same amount, viz., $2,000, covering the same property against loss by tornado. Two days after the destruction of the building plaintiff executed and delivered to defendant sworn proofs of loss under the tornado policy, in which proofs she stated: "The total insurance on said property, or any part thereof, at the time of the tornado, including the above mentioned policy, was two thousand dollars, and no more." She also stated in the affidavit that the "sound value" of the building was $3,500; that the "total loss" thereof was $3,500; that the "total insurance" on the building was $2,000; that the "amount named in this policy" was $2,000; and that she "claimed under this policy" $2,000. Two days later, on March 27, the defendant paid the amount thus claimed in full. On the 8th day of November following she instituted the present action, to recover the amount stated in the fire insurance policy, above referred to. At the conclusion of the trial the district court directed a verdict for defendant. Plaintiff appeals.

The errors assigned are: that the court should not have directed a verdict for defendant; that the verdict is contrary to law, and not sustained by the evidence, but is contrary thereto. The petition is in the usual form. The answer denies generally all allegations of the petition, except as to the corporate capacity of defendant and the issuance of the policy sued upon, and pleads, specifically: (1) That by the terms of the policy it was provided that, "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease;" that the building was blown down and destroyed by tornado, so that it fell, not as the result of any fire or lightning, but solely as the result of wind and tornado; that there was no loss or damage to the building by fire or lightning prior to the time it fell as a result of the tornado; that the liability of the defendant, under the terms of the policy, immediately ceased the moment the building fell as the result of the tornado; and (2) that, concurrently with the execution of the fire

policy, and for a like term and amount, and upon the same property, defendant issued to plaintiff a tornado policy; that on March 23 the house was totally destroyed by wind and tornado. The answer also sets out the presentation of sworn proofs of loss under the tornado policy and settlement as above set forth, and alleges that by reason of the premises plaintiff is "barred and estopped from claiming that the said dwelling-house was not totally destroyed by tornado and wind, and from claiming that the same was destroyed or damaged by fire or lightning."

Plaintiff testified that on the evening in question she was on the back porch of the house, and saw the tornado approaching at a distance of about a block, and then observed flames, from 4 to 6 or 7 inches long, in a number of places along the roof of the porch, where the electric wires were fastened; that the tornado struck the house (which must have been practically immediately), moving it bodily about 10 or 12 feet north and a little to the west, where it stood partly on the foundation and partly off the foundation, leaning a little because of the slope of the ground; that, when the storm had passed, the house was standing apparently in good shape, except as described, and except the front porch, which was somewhat dilapidated, and possibly some windows broken; that the fire had increased in the meantime, and could be seen at the back of the house by looking through the front windows; that the house continued to burn with more or less force, depending upon how hard it rained; that, when she left there at the end of that time, the house was still standing, but burning generally all over; that, when she next saw the place, the following day, the house had been entirely burned and nothing but ashes and noncombustible portions of the house and furniture remained on the former site of the house.

Richard Brady (plaintiff's son) testified that, as soon as he reached the cellar, the house moved from over them and the south and west foundation walls of cement fell in on top of them; that, as soon as the storm passed, he climbed out from under the debris and out of the cellar;

that the house had been moved about 10 or 12 feet north and a little to the west; that it tilted a little on the foundation because of the slope of the ground; that the roof was still on the house and the house intact, except the front porch, which was somewhat damaged; that he did not go into the house, but could see things inside, which appeared to be all right; that the house was on fire generally; that when he left the house it was still blazing, most of it standing, except the back wall; that the next morning nothing was left but ashes and pieces of iron and portions of some bedsteads.

R. H. Randall (plaintiff's father) testified that he was a carpenter and contractor; that he built the house for plaintiff four years before the tornado, and described the character of the house. He testified that it would cost from $3,000 to $3,600 to construct one like it; that after the tornado had passed all of the north side of the west gable of the house was burning rapidly and flames were coming out of the roof in several places; that the house seemed to be in good condition, the roof and sides all there, but the roof of the porch seemed to be gone, and the house was tilted some because of the slope of the ground; that the sides of the house were all right, except leaning over; that it continued to burn until past midnight, when it was all burned up.

This is substantially all of the evidence that was given as to the condition of the house immediately before and immediately after it was struck by the tornado. Taking this testimony as true, it clearly establishes that but little damage was done to the house by the tornado, and that its total destruction was due to fire. In the light of this testimony, if there had been no fire the loss which defendant would have been compelled to pay, by reason of the tornado, would have been a nominal amount as compared with the amount of the insurance. Under this testimony, the defendant would not have been liable under the valued policy law for the destruction of the building, as it had not, by reason of anything which had been done by the tornado,

lost its distinctive character as a dwelling-house. It was still resting partly upon the foundation, and it would not have been a difficult or expensive matter to have replaced it squarely upon the foundation and repaired the slight damage shown. It is hard to understand why plaintiff would sign proofs of loss for a total loss by the tornado, even though those proofs may have been prepared by a representative of the defendant, unless she fully understood that the limit of defendant's liability under both policies was the sum of $2,000. That being true, then it mattered not to her, nor to the defendant, whether the sum of the insurance was paid to her under the one policy or the other, and this brings us to the controlling question in the case.

Under the valued policy law of this state, when insurance is written to insure real property against loss by fire, tornado, or lightning, and the property shall be wholly destroyed without criminal fault on the part of the insured, "the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages." Rev. St. 1913, sec. 3210. What was the amount of insurance written by the defendant under its two policies issued February 14? Was it $2,000 under each policy, making an aggregate of $4,000 under both, or did the amount stated in one policy constitute the value of the property to be insured, as contemplated by the contracting parties? and was the tornado policy merely an incident to and a part of the fire policy, so that $2,000 in all was the sum upon which the minds of the parties met as the sum which should constitute plaintiff's indemnity in case of her loss of the building by any of the contingencies insured against? We think it is a matter of common knowledge, not only among insurers, but with the insuring public, that insurance for a certain sum against loss or damage by fire or lightning, and for the same sum for loss or damage by tornado, is understood and intended to mean that the insurance by the second policy is not for a sum in

addition to the first, but is the assumption by the insurer of risk from elements not covered by the first policy. When a fire policy is taken on a building, it is not unusual for the insurer to grant additional protection against loss or damage by tornadoes by what is called a "rider" attached to the fire policy, in which the insurer, for a certain additional amount of premium, assumes the risk for damage by tornado; the amount of this additional premium being based upon the extent to which the insured desires the insurer to assume this additional risk. In such a case, it surely would not be claimed that under the valued policy law the insurer could be held liable for both amounts; this, for the reason that the assured can only recover under the provisions of the valued policy law when his building is "wholly destroyed," and, as it could not be wholly destroyed by fire and also wholly destroyed by tornado, there would be no theory upon which the assured could recover under both. The case is entirely different from where two or more insurance companies, each with the consent of the others, write a specific amount of insurance upon a building covering the same liability. In such a case we concede that this court, following other courts, has held: "Where several concurrent policies of insurance upon real property have been written with the consent of the respective companies, and the property insured is wholly destroyed by fire, each company is liable for the full amount of its policy." *Home Fire Ins. Co. v. Weed*, 55 Neb. 146, 151.

That those cases apply only where the several companies assume the same character of risk is made plain by a simple illustration. Suppose two different companies had insured plaintiff's building, company No. 1 against fire or lightning for $2,000, and company No. 2 against tornado for $2,000. Is there any possible theory upon which plaintiff could have recovered from both of those companies under the valued policy act? Clearly she could not. Why? Because the building could not have been "wholly destroyed" by the fire and "wholly destroyed" by the tornado. If one of these elements wholly de-

stroyed the building, the other element certainly could not have wholly destroyed it. In such a case, the burden would have been upon plaintiff to show which of the elements wholly destroyed her property. If she proved that it was wholly destroyed by fire, company No. 1 would have to pay the loss, and company No. 2 would have no liability. If the evidence showed that it was wholly destroyed by the tornado, the situation of the companies would be exactly reversed. We are unable to see any difference between a case where two such policies were written by two different companies, and where they were both written by one. The testimony in the case before us shows, as above stated, that the building was not much damaged by the tornado; yet plaintiff recovered the full sum of $2,000 under the tornado policy on the theory that the building had been wholly destroyed by the tornado. In doing so, she collected a sum largely in excess of what she now says was her actual tornado loss. Under her present testimony, she collected from defendant money which she was bound to know she was not entitled to receive. She should not be permitted to make a false claim and collect it, and then assert the reverse of that claim at a later day, and, when her right to do so is challenged, invoke the strong arm of the law to enable her to enforce it. By asserting a total loss by tornado and collecting the full amount of the policy on the strength of her assertion, she has barred the door of inquiry as to the actual damage by tornado against the defendant. That defendant never intended to assume more than $2,000 liability on her building under both policies is too plain to require discussion, and that she so understood it is equally clear. Defendant knew that it was liable for the amount it had assumed, and it was justified in paying it under either policy upon demand; but there is no reasonable theory upon which it should be required to pay the full amount under each. This would be to make a new contract for the parties and compel defendant to respond in double the amount that either party contemplated

when the contract was entered into. If plaintiff's house was on fire when the tornado struck it, either from a stroke of lightning or from defective wiring, and the fire continued to burn, notwithstanding the shock from the tornado, until it consumed the building, it is possible that plaintiff would have been entitled to recover for a total loss under her fire policy, in which case it would have been error to refuse to submit the question to the jury. If such a case had been presented, then the clause in defendant's policy, which provides that, "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease," would have been a proper issue to be also submitted to the jury. But that is not the case we have before us. In the case under consideration, plaintiff is relying upon the valued policy law. She relied upon the statute in collecting the full amount of the tornado policy. She now relies upon the same statute to collect the full amount of the fire policy. As we have already shown, she did not have a single remedy under both policies. Conceding that she had a remedy under either, she would be required to make her election. She made this election promptly, two days after the fire, by asserting her remedy under the tornado policy.

As held in *Dyckman v. Sevatson,* 39 Minn. 132: "One who has voluntarily chosen and carried into effect an appropriate legal remedy, with knowledge of the facts and of his rights, will not, in general, be allowed to afterwards resort to an inconsistent remedy, involving a contradiction of the grounds upon which he before proceeded."

In *Turner v. Grimes,* 75 Neb. 412, 416, after quoting from the opinion in the Minnesota case, we added: "To sustain the present action requires a negation of the facts set forth in the petition in the first action, and having assumed a certain position in this litigation, and having vexed the defendant with a lawsuit based thereupon, he cannot now be permitted to change his position and

harass the defendant with another action based upon another and totally different theory."

The language there used by Mr. Commissioner (now Judge) Letton exactly fits the case at bar. To sustain the present action requires a negation of the facts set forth in plaintiff's proof of loss under her tornado policy, and, having assumed the position then that defendant was liable for the full amount of her insurance under the tornado policy and obtained the same from defendant upon that claim, she cannot now be permitted to change her position and harass the defendant with an action based upon another and totally different theory, viz., that her house suffered little damage from the tornado, but was wholly destroyed by the fire.

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

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

J. RICHARDS, APPELLANT, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 9, 1916. No. 19080.

Assignment of Wages: VALIDITY. A power of attorney granting authority to assign wages, made previous to the existence of a contract of employment, is ineffectual to authorize such an assignment in the future and after a contract of employment has been entered into by the maker.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

J. E. von Dorn, for appellant.

W. D. McHugh, W. H. Herdman, E. P. Holmes and *Guy C. Chambers, contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Douglas county to recover $75 claimed to be due by reason of an assignment of the wages of one Lawrence B. Savage. From a judgment in favor of the defendant, plaintiff appeals.

There is no issue of fact involved. In May, 1912, Savage, who was not then in the service of defendant company, executed to one Morgan a power of attorney, in and by which he empowered him, at any time thereafter when Savage should be indebted to plaintiff, to execute and deliver to plaintiff an assignment of any wages, commissions or other moneys due or to become due him from any person, firm or corporation, within one year from the date of the instrument. Savage did not enter the service of the defendant company until August 3, 1912, and his services with the company terminated on September 5, 1912. On August 27, 1912, Morgan, as attorney in fact for Savage, executed an assignment to plaintiff for all sums of money then due or to become due to Savage from the defendant company not to exceed $81, and on the next day counsel for plaintiff served notice of such assignment on defendant. Defendant refused to pay, and this action was instituted. The answer of defendant shows that during the term of Savage's service he earned $62.98 in August and $14.70 for the five days in September, but alleges that the pretended assignment was null and void, for the reason that it was executed by an attorney in fact under a pretended power of attorney executed long prior to the time when Savage entered the employ of defendant. This presents the question of law involved. The district court very correctly held the assignment void, and entered judgment for defendant.

The rule is correctly stated in *Richards v. Inter Ocean Newspaper Co.*, 181 Ill. App. 515, as follows: "(1) A power of attorney to make an assignment of wages given by an employee, to plaintiff, cannot authorize plaintiff to make an assignment which will be valid against defendant a subsequent employer with whom the employee

had no contract at the time the power of attorney was executed. (2) An assignment of wages to be earned in the future from employers with whom the assignor has no contract of employment at the time of making the assignment is invalid." The same rule is announced in *Ogle Co-Operative House Furnishing Co. v. Shauman,* 188 Ill. App. 4, and in *Blakeslee v. Make-Man Tablet Co.,* 175 Ill. App. 515. Any other rule would be contrary to the clear weight of authority and against public policy.

AFFIRMED.

HAMER, J., not sitting.

HERBERT J. UNDERWOOD, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.*

FILED DECEMBER 9, 1916. No. 18949.

1. Costs: STATUTORY PROVISION. Section 8168, Rev. St. 1913, provides that, when an action is begun in the district court which should have been tried before a justice of the peace, the plaintiff cannot recover the costs of the trial in district court.

2. ———: TAXATION. It is the duty of the court in which the action is tried to determine whether the action is of such a nature that it was properly brought in that court, and if the judgment in that court is of such a nature as to justify a recovery of costs by plaintiff, and costs are so adjudged, this court will not retax such costs upon appeal, although a remittitur is required reducing the judgment to an amount within the jurisdiction of a justice of the peace.

3. ———: COSTS ON APPEAL. The costs in this court upon appeal are the same whether the action was begun in justice court or in district court, and the taxation of costs of this court are not governed by that statute.

4. ———: ———. Upon appeal to this court, if the appellant recovers a better judgment than the one appealed from, he is entitled to costs of this court, unless the court for special reasons otherwise orders.

*See opinion, *ante, p.* 275.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. Motion to tax costs. *Sustained in part, and overruled in part.*

A. A. McLaughlin, Wymer Dressler and *Lyle Hubbard,* for appellant.

Sutton, McKenzie, Cox & Harris, contra.

SEDGWICK, J.

The plaintiff began this action in the district court for Douglas county and there recovered a judgment for $374.36. Upon appeal to this court the plaintiff was required to enter a remittitur in the sum of $194.93, which was accordingly done, thereby reducing the amount of the plaintiff's recovery to $179.43, and interest from the date of the judgment, June 9, 1914, to September 21, 1916, at 7 per cent., amounting to $208.25 in all.

The defendant has filed a motion in this case to tax the costs of the district court and the costs of this court against the plaintiff under section 8168, Rev. St. 1913. That section provides as follows: "If it shall appear that a justice of the peace has jurisdiction of an action and the same has been brought in any other court, the plaintiff shall not recover costs." The costs of commencing and the trial of an action in the district court are necessarily much larger than the costs of the same action in justice court, and the plaintiff who commences an action in the district court that might, and therefore ought to, be brought in justice court incurs a larger amount of costs than the proper prosecution of such an action would require. The purpose of this statute is to prevent the incurring of the unnecessary costs of the trial in the district court when the action might, and ought to, be prosecuted before a justice of the peace. Construing this statute according to its purpose and spirit, if the plaintiff causes the unnecessary additional expense of a trial in the district court when it might have been tried in the justice

court, he cannot recover the costs of that trial from the defendant.

When the recovery in the district court is beyond the jurisdiction of a justice of the peace, the plaintiff recovers his costs. The district court determines the question of costs in such case, and, if that court determines it correctly upon the record as it is before that court, this court upon appeal cannot say that the court erred in so doing.

The defendant construes the statute as though it read: "If, upon appeal, it shall finally appear or be determined that a justice of the peace has jurisdiction, and the plaintiff has recovered his costs in the trial court, the appellate court shall retax such costs against the plaintiff." It would seem more probable that the legislature intended that, if it appears upon the trial that a justice of the peace has jurisdiction, the plaintiff shall not upon that trial recover costs. The omission of the word "finally," which appears in the statutes of some states before the word "recover," is suggestive.

In an action to recover damages for negligence, the amount of the recovery is often so uncertain that to enforce the rule insisted upon by defendant would prevent a fair trial of the case. The injured party who recovers a judgment could not present and try the amount of his claim for damages without incurring the risk of being compelled to pay the costs of the trial of an issue that could not be satisfactorily tried in a court of inferior jurisdiction. It would seem that the statute is for the court in which the action is tried, and the determination by that court that the action is of such a nature as justifies bringing it in that court will enable the plaintiff to recover his costs of that trial. Moreover, if we should give this statute the literal and technical construction that the defendant contends for, it would appear that by the final order of this court the plaintiff recovers from the defendant a sum of money beyond the jurisdiction of the justice of the peace. The costs in this court are the same whether the action was begun in justice or district

court. Therefore the taxation of costs in this court should not be controlled by this statute.

As the defendant recovered in this court a more favorable judgment than the judgment of the district court, and there was no finding by this court that the costs ought to be taxed against the defendant, we think that the defendant's motion to tax the costs of this court against plaintiff should be, and it is, therefore, sustained. The motion to tax the costs of the district court against the plaintiff is overruled.

JUDGMENT ACCORDINGLY.

WILLIS I. HOOPES, ADMINISTRATOR, APPELLEE, v. JOHN D. CREIGHTON, APPELLANT.

FILED DECEMBER 9, 1916. No. 18737.

1. **Negligence:** ACTIONS: VIOLATION OF STATUTE. The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. *Omaha Street R. Co. v. Duvall*, 40 Neb. 29.

2. **Innkeepers:** DUTIES TO GUESTS: FIRE ESCAPES. A hotel owner may not omit to do the things that are reasonably necessary for the safety and protection of the guests of the house, and if he disregards the provisions of the law concerning the establishment of fire-escapes upon the building, and such other devices as the law provides for, he will be held liable for the damages sustained because of the death of any guest which may be brought about by his negligence.

3. **Negligence:** ACTIONS: VIOLATION OF STATUTE. The fact that the statute or ordinance in question does not in terms impose a civil liability for its violation does not affect such evidence of its violation as may go to show negligence.

4. **Innkeepers:** ACTION FOR NEGLIGENCE: TRIAL: INSTRUCTIONS. A requested instruction of the defendant, to the effect that the plaintiff's decedent assumed the risk of injury because he knew the dangerous condition of the building as regards injury by fire, was properly refused.

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

Mahoney & Kennedy and *Yale C. Holland,* for appellant.

Brown, Baxter & Van Dusen and *Gurley & Fitch, contra.*

HAMER, J.

Appeal from the judgment of the district court for Douglas county. Willis I. Hoopes, as administrator of the estate of Renfree H. Rickard, brought an action against John D. Creighton to recover damages because of the alleged negligence of said Creighton in maintaining a hotel in the city of Omaha, known as the "Dewey Hotel," and in which he failed to furnish fire-escapes for the said building as prescribed by the statute of the state of Nebraska. The plaintiff recovered a judgment for the sum of $6,000.

The plaintiff alleged that Renfree H. Rickard died at Omaha, Nebraska, February 28, 1913, leaving as his next of kin his widow, Clara Rickard, and his father, Peter H. Rickard; that John D. Creighton was the owner of the Dewey Hotel, the same being used by and held out to the public as a hotel and public lodging place; that said building was maintained without having one or more fireproof stairways; that the defendant negligently failed to provide any fire-escapes to which convenient access could be had from the interior of said building on the second floor, and with only one insufficient fire-escape stairway and platform on the north side, and one standpipe and ladder on the east side, neither of which was of convenient access from the interior of the building; that the way of egress to such fire-escapes was at all times obstructed by solid doors of wood with locks and bolts attached thereto, and maintained between the only fire-escapes on the second floor; that the defendant failed to equip any outside rooms with automatic fire-escapes or device so as to

offer the means of escape to the occupants who might be unable to reach such defective fire-escapes as were maintained; that the defendant, shortly before the fire, was notified by the deputy labor commissioner to provide fire protection and to remedy the said defects as required by law; that on February 28, 1913, said Rickard, as a guest of the said hotel, was assigned to room No. 34, an outside room that was not equipped with a fire-escape ladder or other device for the safety of the guests, and that said Rickard did not know the condition of the premises and the lack of proper fire-escapes; that shortly after said Rickard retired a fire broke out in the said hotel, and solely by reason of the failure of defendant to provide fire-escapes said Rickard lost his life; that said Rickard at the time of his death was a strong, well-educated man, 37 years old, operating as a brand inspector and a trainer and trader of horses at the South Omaha stock-yards, earning more than $5,000 a year, and contributing large sums of money to his father, as well as supporting his home for his wife and himself.

The defendant admitted that he was the owner of the said Dewey Hotel building, and denied the other averments of plaintiff's petition. He alleged that whatever injuries plaintiff's decedent had received were occasioned solely through the failure and negligence of said defendant, who was familiar with the conditions and surroundings of said hotel building and assumed whatever risk there was; that the premises were purchased by the defendant February 6, 1907, subject to a lease made to one Charles E. Wilkins, and were then and at all times subsequent thereto equipped with fire-escapes adequate and sufficient in number and design, and with a free and unobstructed access thereto from all parts of said building, and that said fire-escapes and the means of access thereto were then, and at all times subsequent, maintained as required by law; that the lessee had complete possession of the premises at the time of the fire, and that the defendant had no control over the said building and took no part

in its use and management. The reply was a general denial.

The evidence sustains the allegations of the petition and supports the verdict. It was in testimony by the night clerk, Nold, that on the night of the fire the door leading to the fire-escape on the second floor opened into a guest room, No. 30. This is also shown by the plan of the second story contained in the record. The fire-escape at the north end of the building, such as it was, could be reached from room No. 40 through the window furthest west. Room No. 40 was a guest room and had a door leading into it from a corridor which extended the length of the building. A person could go from this corridor through and into this guest room and then through a window to the fire-escape at the northeast corner of the building. This fire-escape would permit him to reach a ladder, which, when unhooked from the wall where it usually hung, extended a short distance below the floor of the second story. It was not unhooked the night of the fire, and the occupants of room No. 40, Clara Newman and Iona Jennings, went down the fireman's ladder. The photograph of the north end of the building shows that this fire-escape could be reached from the second window from Thirteenth street and "from the ledge along the front of the building under the window." The "ledge" or "cornice" referred to on the north end of the structure was practically on a level with the second floor. The north fire-escape went clear up onto the roof. Access to the north fire-escape could be had from the second story by going through the window at the north end of the corridor and then crawling along on the "cornice" or "ledge" toward the northeast corner of the building until it was reached. Of course, an athlete might have walked along on this ledge. No one seems to have escaped from the second story by means of these fire-escapes. There was a ladder on the east side which did not extend very far toward the ground. It could be reached from the second floor through room No. 30.

Nold testified that every room on the second floor was provided with a lock and key, and that each guest assigned to a room on that floor was provided with a key. The testimony of Nold is corroborated by the testimony of Garrett F. Vliet, who was also one of the clerks of the hotel. Vliet testified that room No. 34 was occupied by Rickard, the decedent, and the woman whom he registered as his wife. He also testified that rooms numbered 20, 28 and 32 of the second floor were not occupied that night, and that No. 30 was occupied by a Charles Cummings. His testimony corroborated that of Nold concerning the fact that Iona Jennings and Clara Newman occupied room No. 40. He testified that Rickard was under the influence of liquor when he and the woman came in; that it was about 3 o'clock in the morning when they came; that the woman appeared to be intoxicated; that Rickard was able to walk, and that he did not stagger noticeably; that the witness assigned him to room No. 34, the fourth room from the north on the east side of the hallway, on the second floor; that this was the last time the witness saw him alive; that none of the outside rooms was equipped with an automatic fire-escape; that after calling the fire department the witness called Mrs. Wilkins and her sister; that the witness met Mr. Nold before he got out of the building, and that Nold had apparently been crawling; that the witness met him about one-third of the way up from the vestibule to the office.

The defendant, John D. Creighton, testified that at the time he bought the building the fire-escapes were there which we have described; that the fire-escape on the north end was a regular iron fire-escape, the steps being of cast iron and 5 inches wide and 27 or 28 inches long; that when he put in a new front he was given permission to come out with the "cornice" or "ledge;" that this "ledge" was 26 inches wide by 44 feet long, and was at the level of the second floor; that it was made of wood and covered with tin; that it ran clear across the width of the hotel; he also described the fire-escape at room No. 40 on the north

end of the building and also the ladder fire-escape on the east side at room No. 30. The testimony concerning the fire-escapes, such as they were, is corroborated by the testimony of other witnesses. Alexander Beck testified that the platform on the second floor, being the one at room No. 40, could be reached by going out through the hall window and walking along the "ledge."

C. S. Ely testified that the door from room 34, the one occupied by Rickard, opened into the corridor, and that there was a chance to go through the window at the north end of the corridor onto this "ledge," or that one could go south along the corridor and then go down the winding stairway which led from the office to the entrance on Thirteenth street, or that one could come out of the room No. 34 into the corridor, and then go south to room No. 30, and then go, if possible, down the ladder fire-escape which might be reached from that room.

Baker Cole testified that he was a city fireman at the time of the Dewey Hotel fire; that his company, Hook & Ladder No. 1, was one of the first on the ground; that the company got there about 4:48 a. m.; that the witness was acquainted with Rickard; that the witness went into the Thirteenth street entrance; that the building was very smoky at that time; that Rickard was the first man that the witness got hold of, and that he dragged him out and called for help; that he was then alive; that he was inside the door when the witness found him, but "plumb" down the stairway; that it was absolutely dark in there in the entrance-way when the witness found Rickard; that the witness and others took Rickard to a restaurant.

Martin Dinenn testified that the first alarm came at 4:44 a. m.; that the second alarm came at 4:47, and the third alarm at 4:52; that this last alarm was turned in immediately after the second explosion; that the witness got there about 4:51 and was on the ground floor when the second explosion occurred; that he saw a ladder going up to the second floor, and that he went up on that ladder

and into a bedroom, and then out into the hall; that about that time the explosion came and he got out as fast as he could; that after the witness was dragged out from upstairs he met some firemen on the sidewalk, and they said somebody was inside the entrance; that the witness went into the doorway of the entrance and found the Lee woman on the floor; that she was then alive, and the witness called for help, and they pulled her out and took her to a restaurant. The woman described by the witness was the woman who occupied room 34 with Rickard. Both appear to have died.

F. E. Hodges, called as a witness for the defendant, testified that he was night manager of the Calumet restaurant; that he waited on Rickard the night of the fire between 2 and 3 o'clock in the morning; that he had a woman with him; that he staggered; that the woman was probably intoxicated, but that Rickard was well able to handle himself, although he staggered some both going out and coming in.

No fire-escape constructed for the second floor was made in compliance with the statute. No fire-escape was built on a level with the floor of the second story "and of sufficient length to permit access to the same from not less than two windows," nor were they "so constructed as to be of convenient access from the interior of the building," nor were they "commodious in size and form and of sufficient strength to be safe for the purpose of ascent and descent," all as provided by the statute, nor did any outside room of said hotel contain an automatic fire-escape or other proper and sufficient device to escape from a fire. The provision of the statute (Laws 1911, ch. 56, sec. 1) "that in every hotel, boarding, lodging, tenement, or apartment house, there shall also be provided one automatic metallic fire-escape, or other proper device, in every outside room of such hotel, boarding, lodging, tenement or apartment house, each automatic metallic fire-escape or device to be attached to the inside of said rooms so as to afford an effective means of escape to all occupants who,

for any reason, are unable to reach or use the said fire-proof stairways, chutes, or toboggans," was entirely disregarded. The law also provides: "The way of egress to such fire-escapes shall, at all times, be kept free and clear of all obstructions of any and every nature." Laws 1911, ch. 64, sec. 14.

The appellant complains that the court erred in giving instruction No. 3 to the jury. That instruction simply states the law as it is contained in the Laws of 1911 above cited. If the law is wrong and without foundation, then the instruction is wrong. The first part of the instruction provides for the building of fire-proof stairways, chutes or toboggans, and steel platforms and automatic metallic fire-escapes. The second provision, to the effect that "the way of egress to such fire-escapes shall, at all times, be kept free and clear of all obstructions of any and every nature," is contained in the section last above referred to. The law is contained in two provisions of the statute. After a careful examination of appellant's brief, we are unable to discover anything wrong with the third instruction given by the court upon its own motion. We do not copy it for the reason that it is itself a copy of the law.

The Reagan act seems to be a complete law touching the matters within it. It contemplates protection against fire. It is made to apply to hotels, boarding houses, store houses, tenement houses, and every building used in whole or in part as a public building, or used as an office or store building or schoolhouse or theatre or public hall or place of assemblage. We see no constitutional inhibition against the passage of the act. There is a provision looking to the inspection of any building in the state where it is claimed that the provisions of the act are violated. The inspection is to be by the commissioner of labor, the deputy commissioner of labor, or such other person as may be appointed by the deputy commissioner of labor. There is also a provision touching the payment of compensation for services. The act winds up by certain provisions with respect to the punishment of those who violate it, and it

is made the duty of the county attorney to prosecute the persons who violate the law before any court of competent jurisdiction. The act was no doubt intended to provide whatever might be necessary. The act introduced by Mr. Bulla looks to the creation of a hotel commission, and then there are certain regulations concerning the lighting and plumbing and water closets, and then the pillow slips and sheets and bedding and the wash room and towels, and in section 14 there is the provision that within six months after the passage of the act every hotel in the state more than two stories high shall be equipped with an iron fire-escape on the outside of the building. These provisions, which may not be more specifically set forth because of unduly extending this opinion, are in no way in conflict with the Reagan act. It seems to look toward the enforcement of the provisions contained in the Reagan act, together with certain additional duties that are imposed upon the hotel-keeper. In the Reagan act the provisions are intended to apply to a large class of buildings, not hotels alone, but seven or eight other different classes of buildings. It is said that the Reagan act is void for the reason that it undertook to prescribe fire-escapes for hotels. We are unable to see any good reason why the Reagan act is void. Many authorities are cited, but they do not seem to contain the reason contended for.

In *Board of Education v. Moses*, 51 Neb. 288, which is cited by counsel for appellant, it was held: "An act of the legislature which is clearly amendatory of an existing statute is unconstitutional when such amendatory act in no way mentions or describes that of which it is amendatory." The purpose of the act was to make the public high schools of the state open to attendance of any person of school age residing outside the district, being a resident of the state, and whose education cannot profitably be carried further in the public school of the district of his residence. It was held that the fundamental law of the state required all

the parts of an amended law to be incorporated into the act, and the old law so amended to be repealed. We are unable to see any similarity between the case cited and the instant case.

In the case of *State v. Majors,* 85 Neb. 375, it was held that an amendment by implication repealed section 22, subd. XIII, ch. 79, Comp. St. 1907, and that it did not contain the section as amended, or purport to repeal the same. This would be a very different case from the one under consideration. Here is a complete act, if we understand it aright, and it stands on its own legs without being an attachment to anything.

In *Minier v. Burt County,* 95 Neb. 473, it was said in the syllabus: "An act of the legislature, which is complete in itself, does not violate section 11, art. III, of the Constitution, which provides: 'No law shall be amended unless the new act contained the section or sections so amended and the section or sections so amended shall be repealed.'" In that case, however, it was held that the amendment did not contain the section or sections amended, nor repeal them.

In *Stewart v. Barton,* 91 Neb. 96, it is said in paragraph 2 of the syllabus: "Where an act is passed as original and independent legislation and is complete in itself so far as applies to the subject-matter properly embraced within its title, the constitutional provision respecting the manner of amendment and repeal of former statutes has no application.". That was a case where the legislature provided for the construction and equipment of a laboratory on the campus of the medical college of the university of Nebraska at Omaha under the supervision of the board of regents. Laws 1911, ch. 205. There was an effort to defeat the act. It is said in the body of the opinion: "We think it cannot with reason be contended that the legislature has not the authority to enlarge by a separate and subsequent act the powers and duties of any officer of its own creation, nor that it cannot widen or relax by later enactments any building limitations it may have estab-

lished. The provisions of the general act limiting the powers of the regents with regard to the erection of other university buildings was not interfered with by the new act, but it conferred additional powers and prescribed a different location for another building; while, in some sense, supplemental to the former act, it leaves its general provisions untouched and therefore is not amendatory in the proper sense. * * * Where an act is complete within itself, it may be valid even though in conflict with a prior law not referred to in the later act"—citing *State v. Cornell,* 50 Neb. 526; *Affholder v. State,* 51 Neb. 91; *Zimmerman v. Trude,* 80 Neb. 503; *Allan v. Kennard,* 81 Neb. 289; *State v. Ure,* 91 Neb. 31.

The second reason given why there should be a reversal of the judgment is that the Reagan act is not germane to the chapter and section which it purports to amend and repeal. The section referred to provides with respect to the commissioner or his deputy that either shall have a right to enter any factory or workshop in which labor is employed for the purpose of gathering facts and statistics, or examining the means of escape from fire, and the provisions for the health and safety of operatives. As we have said before, this Reagan act is not intended as an attachment to any other provision; it purports to be, and is, of and in itself, a complete act. We have examined some of the cases cited in support of the contention made. Among others is *Armstrong v. Mayer,* 60 Neb. 423. In that case this court held that the supreme court had jurisdiction to review by proceeding in error a judgment rendered by the district court without jurisdiction of the subject-matter. We are unable to see the force of counsel's contention.

In *Strahl v. Miller,* 97 Neb. 820, this court said, in an action for damages against a hotel keeper: "This (provision of the law of 1883) is sufficient to attach a civil liability to the innkeeper for negligence in not properly safeguarding his guest."

In *Rose v. King,* 49 Ohio St. 213, the court said: "Such liability followed as a consequence of the terms of the original act in which the language above quoted does not appear, but which enjoined the duty, and resulted from the principle, which we supposed to be of universal application, that where a statute imposes a duty but gives no penalty to the party aggrieved by its nonperformance, that party is entitled on common law principles, to maintain an action for his damages." In support of the position stated, the Ohio court quotes from Wharton, Law of Negligence, sec. 443, and many other authorities.

In *Yall v. Snow,* 201 Mo. 511, there was an action for damages for neglect of the owner to provide fire-escapes in accordance with the statute. The court held that there was a right of action for death of the guest in the hotel building not equipped with fire-escapes in accordance with the statute. In this case the defense was that the building then used for a hotel, was not constructed for a hotel, and therefore that the owner was relieved from the duty of placing fire-escapes on the building. It was held that the defense could not be maintained, and that it was the duty of the owner, if he leased the building for hotel purposes, to put the fire-escapes on.

The third proposition contended for by the appellant is that the judgment should be reversed because of the misconduct of counsel. We may say that there are a good many cases on this subject, and several of them are cited. As we look at the matter, much of the trial consisted of a battle of words. Upon the part of the plaintiff it was contended that the Dewey Hotel was kept in order that the defendant might make money out of prostitutes who used the hotel for the accommodation of themselves and their male companions. On the other hand, it was contended by counsel for the defendant that the decedent himself was living with a prostitute, and therefore that the case was not a proper one in which to give the plaintiff damages. We think that it was about an even case of mud throwing, probably found by both parties to be necessary

because of the exigencies under consideration. We do not indorse this manner of trying the case, and it is certainly open to censure; but, where both parties use the same sort of weapons, we do not feel like setting the judgment aside. Each appears to have shown unusual skill in this line of argument; but, after all, as one of the counsel expressed it in the brief, it is a case of the pot calling the kettle black. The affidavit of defendant's counsel touching the misconduct of plaintiff's counsel was made on memory, and there was no stenographic report of what was said. This makes an uncertain element in the case. In the *City of Lexington v. Kreitz*, 73 Neb. 770, it was held that there was no probability that the language used by plaintiff's counsel in any manner influenced the verdict. In this case the decedent was shown to be a man of large earning capacity. He was a brand inspector for the state of Montana and received a regular salary of $1,800 a year. He was also a horse trainer and trader on the South Omaha market. He left a widow and a father surviving him. The judgment was only for $6,000. The remarks of Mr. Woodrough do not seem to have done the defendant an injustice, so far as the verdict and judgment are concerned. The jury could not have been carried away by passion or prejudice.

The building was not equipped with fire-escapes as required by the statute. The evidence clearly shows that this neglect was the proximate cause of Rickard's death, and the defendant is liable in damages. There was no access from either of the hall windows of the second floor to any fire-escape. There was a door to be broken through in order to reach the window and fire-escape in room No. 34. They were shut in. Apparently they had opened the door into the hall and struggled to go to the bottom of the entrance on Thirteenth street. On their way there they were overcome by smoke, and gas, and heat, and they died because of it. Four persons besides Rickard lost their lives in this fire. The evidence shows that the owner of the building had been notified, and he must have been

aware of the fact. He took the risk by neglecting to equip the second story as the law provides.

The requested instruction of the defendant, to the effect that Rickard assumed the risk because he knew the dangerous condition of the building, was properly refused. Rickard did not assume the risk because he stopped at the hotel. We are cited to *Armaindo v. Ferguson,* 55 N. Y. Supp. 769, where it is said: "By staying at a hotel for six months, paying weekly rent, without objecting to a failure to provide the room with a rope or other appliance for escaping in case of fire, a guest waives the provisions of section 40, ch. 376, Laws 1896 (Domestic Commerce Law), requiring the hotel-keepers to provide each lodging room with a rope or other appliance sufficient to enable the guest to escape in case of fire." In that case there were, it is said, fire-escapes, "and the platform to one of them was directly under one of the windows opening out of the plaintiff's room." The plaintiff seems to have kept her window nailed down to prevent unbidden persons from entering her room. She could have opened the window and could have gone down the fire-escape. The man who occupied the room with her escaped from the burning building by means of this fire-escape. The woman failed to use it, through fear or confusion, and jumped to the ground. As there was ample means of escape the proprietor of the building was not held liable.

We are also cited to *Huda v. American Glucose Co.,* 154 N. Y. 474. In that case there were fire-escapes constructed on the outside of the building. There was a provision in the law that the fire-escapes should have landings "embracing at least two windows at each story and connecting with the interior by easily accessible and unobstructed openings." The building was a factory. The court tells in the opinion that, to conduct the business of the factory, the manufacture of glucose, it is necessary to keep the windows nailed close and to maintain an even temperature. The windows were screwed down. The court seems to have taken the view that as the windows

were slight they could have been easily broken, and that when the fire broke out it was the duty of the employees, if they wished to save themselves, to smash the windows and get out on the fire-escapes.

In *Willy v. Mulledy,* 78 N. Y. 310, the court said: "It was the intention of the statute that they (the tenants) should have two means of escape in case of fire, one by the scuttle (through the roof), and another by the fire-escape. It was the duty of the defendant to provide a ladder, and then to use reasonable care to keep it there in readiness for use." The court held that it was the duty of the proprietor to keep a ladder so that the tenants might reach the scuttle, and that it was his duty to build and maintain a fire-escape. He was held liable for the death of the plaintiff's wife and child.

In *Cittadino v. Schackter,* 83 N. J. Law, 593, the plaintiff, a widow, was tenant of the top floor of an apartment house for more than a year at the time of its partial destruction by fire. She endeavored to escape and was injured. It was held: "Even though the plaintiff had discovered that the landlord failed to perform his statutory duty, she might reasonably assume that he would perform that duty at any time and not continue to disregard the law."

Aldermen cannot dispense with a requirement for fire-escapes on a factory building. *Maiorca v. Myers,* 115 N. Y. Supp. 923. Such fire-escapes as may be deemed necessary by the fire inspector shall be provided on the outside of every factory three or more stories high. *Arnold v. National Starch Co.,* 194 N. Y. 42.

In *McLaughlin v. Armfield,* 58 Hun (N. Y.) 376, the court had before it for construction section 16, tit. 14, ch. 583 of the Laws of New York, 1888, which directed that certain buildings "shall be provided with such fire-escapes and doors as shall be directed and approved by the commissioner." Held: "The duty rests upon the owner to bring the subject before the commissioner and obtain his direction in the premises; and, where an accident

occurs because of the absence of such fire-escapes from the building, the owner cannot avoid responsibility by alleging that the statute does not declare absolutely that fire-escapes shall be erected by the owner."

When the legislature of Nebrska passed the acts referred to concerning fire-escapes, it was apparently determined that they should be put upon the kind of buildings named, and with a view of saving human life. There appear to be three expressions of the legislature touching the same subject-matter, the preservation of life by the use of fire-escapes. So far as the same can be done, the legislature of Nebraska has declared its wishes in the matter. The courts are not called upon to disregard the expressions of the legislature, when they have been frequently repeated, and all the time along the same line.

The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., and SEDGWICK, J., dissent.

HENRY M. THORNTON, APPELLANT, v. VERNON KINGREY ET AL., APPELLEES.

FILED DECEMBER 9, 1916. No. 18914.

1. Waters: MUNICIPAL CORPORATIONS: IRRIGATION LATERALS IN STREETS. A village having for years maintained a lateral ditch for irrigation purposes through one of its streets, a landowner who had irrigated his land through this ditch for a long time and based the irrigation system of his land on the fact that the water was received from such lateral cannot be deprived of his right by the village in the regulation of its streets, unless it furnish him another lateral through which he may obtain water from the same source.
2. ———: ———: ———. A village may in the exercise of its police powers require one entitled to the use of water for irrigation purposes to take the same through another lateral if it provide a suitable connection therewith without expense to the water user.

APPEAL from the district court for Scotts Bluff county: RALPH W. HOBART, JUDGE. *Judgment modified.*

Wright & Mothersead, for appellant.

Morrow & Morrow, contra.

HAMER, J.

Appeal from the judgment of the district court for Scotts Bluff county. There is not much, if any, dispute about the facts. The Gering irrigation district is the owner of a canal by means of which it supplies water to the lands within the said district. The canal which it owns runs west of the village of Gering. The plaintiff and appellant, Henry M. Thornton, owns a tract of land in the eastern part of the village of Gering, and his land is also embraced in the Gering irrigation district, of which it is a part. This land has for several years past been used solely for agricultural purposes. About ten years before the commencement of the action in this case the plaintiff and other landowners in the Gering irrigation district constructed an open ditch from the main canal of the irrigation district directly through O street to the tracts of land which were severally owned by them. The open ditch or lateral enters O street at its west end, and continues along said street to the eastern terminus thereof at a distance of about 16 feet from the curb line of the street. The ditch was constructed apparently without authority from the village, except as might be implied because no objection was made to the construction of the same. It might further be said that the village authorities undertook to supervise the distribution of water from this lateral, which was part of the distributing system of the Gering irrigation district. No one not an owner of land in the district had any right to use of the water conducted through said ditch, and no one had any right to the use of said ditch, except an owner of land in the said district. It is not claimed that the inhabitants of the village of Gering had any right to use said lateral except those entitled to water from the canal. It is claimed that the ditch was a private enterprise conducted only for the benefit of those entitled to water from the irrigation dis-

trict, nor is it claimed that the lateral was in any manner connected with the municipal affairs of the village.

Before the commencement of this suit the village board caused the plaintiff to be notified that he must cease to draw water through said lateral for the irrigation of his land, but that he had permission to draw water through another lateral passing through a different street. Upon receiving this notice the plaintiff at once commenced this action to restrain the village board and its employees from preventing him from conducting water through said lateral in O street, alleging that it was the only lateral through which he could obtain water for the irrigation of his land. The court found that the land might be irrigated by means of another lateral, through which the plaintiff was to be permitted to conduct water upon constructing a small section thereof so as to connect said ditch with his land. There was a finding that the board of trustees of the village could not as a matter of law grant permission for the construction of said lateral, and the injunction prayed for was denied.

There is a contention by the appellees that the lateral in question did not become a part of the water-works of said village, and that the village was under no obligation to furnish water through said lateral to the plaintiff, or to permit the plaintiff to use it. Also that said lateral was constructed and maintained without any authority, and that it therefore constituted a nuisance which the village might abate at any time. Also that the power to abate said lateral carried with it the power to limit its use, and that the village board might, therefore, prevent the plaintiff, and as many others as they saw fit, from using said lateral. Also if said lateral was not a nuisance, and might be maintained as long as the village did not object, yet the power vested in the village board to regulate the use of the streets carried with it the power to require the removal of said lateral at any time, or to limit its use, as the board might deem advisable.

It is contended by appellant that the lateral was really a part of the water-works of the village; that said lateral is for the purpose of carrying water from the canal of the Gering irrigation district to the lands of the plaintiff and others. It is not admitted to be proved that said lateral was ever used for municipal purposes. It is claimed that its use was strictly limited to the carrying of water for those who were entitled to receive the same from the canal of the Gering irrigation district, and not for any other purpose. It is claimed that this was not a business which the municipality had any right or authority to conduct.

It is contended that under the provisions of section 5119, Rev. St. 1913, the village had authority to conduct water in open ditches for the use of the inhabitants. If that proposition should be conceded, the question is raised whether it would aid the appellant in this case. It is contended by the appellees that, if the village had authority to conduct water through open ditches to its inhabitants for irrigation or domestic purposes, it could hardly be contended that it had authority to distribute water for the irrigation district. It is contended that only a very small part of the inhabitants of the village were entitled to water from said irrigation district. It was therefore contended that the distribution of water to those who might be entitled to the same from said district was not an affair of the village of Gering, and could not be.

The land platted is known as "Thornton's first addition to the village of Gering." The rest of the land is farmed, and most of the platted portions are also farmed. The whole of this land is in the village of Gering and within the Gering irrigation district. These lands receive water from the main canal of the district. It is about 1½ miles west of the lands of the plaintiff. A part of the platted portion of the village of Gering lies between the plaintiff's land and the canal. It is claimed that this town lateral runs in an easterly direction from the main canal of the Gering irrigation district until it strikes the platted por-

tion of the village of Gering on the west. It is claimed that this lateral is the only ditch ever used for the irrigation of plaintiff's land; that it was built by the village and by different landowners, and that since it was built it has been maintained and operated by the village. It is said that a man or a boy, referred to in the evidence as "a water monkey," has been employed by the village to attend to the distribution of water from this lateral to the various tracts of land watered therefrom, including the lands of the plaintiff; that the plaintiff has been acquainted with these lands since long before they were irrigated, and since some time in 1902; that he was not, however, the owner of the lands until 1907, at which time the lands had been irrigated from this lateral for the period of five years; that the land continued to be irrigated from this lateral until 1913, when the village board ordered the "water monkey" to refuse to permit plaintiff to draw water therefrom, and directed him to take water from another lateral. Now, it seems to be agreed that this other lateral was not built to the lands of the plaintiff, and that to reach the lands of the plaintiff would require the plaintiff, to build some 700 feet of lateral down the streets and alleys of the village. The present action was commenced in September, 1913. All other landowners, except the plaintiff and the owners of lots in Thornton's first addition, were, and are, permitted to continue the use of the lateral as before.

The plaintiff's petition alleges the ownership of the land, and the manner in which it has been watered; that the defendants Kingrey, Southwell, Birchell, Rubottom and Hayes are the members of the village board of Gering, and that the defendant Barkdoll is employed by such board to superintend the distribution of water from the town lateral, and, acting under the instructions of the other defendants, who refused to permit the plaintiff to draw water therefrom, although the Gering irrigation district turned the water into the lateral for the irrigation of this land. The plaintiff also alleged that all the other landowners

were permitted to draw and use water from said lateral. The plaintiff prayed for an injunction to enjoin the defendants from interfering with the water turned into the lateral for the use of the plaintiff.

In the answer of the defendants it is admitted that the plaintiff owns the lands; that the lands will not grow crops without irrigation; that the lands are within the Gering irrigation district; that the defendants Kingrey, Southwell, Birchell, Rubottom and Hayes are the members of the village board, and that as such members they have assumed control over the said lateral so far as it is in the streets of the village of Gering; that the defendant Barkdoll is employed by the village board to look after the canal and to control the diversion of water therefrom to the several pieces of land situated in the village, and that the village board has instructed the said defendant Barkdoll not to permit plaintiff to receive water therefrom. And defendants further say that when water sufficient to irrigate the plaintiff's lands and the other lands in the village irrigated from said canal was carried through the lateral it flooded the streets of the village of Gering; that the defendants notified plaintiff that he must draw the water through certain other laterals constructed in the streets, and which are equally feasible; also that no permission was ever given the plaintiff to conduct water through the lateral, and that the village had no authority to give such permission.

The plaintiff in his reply alleged that the lateral was built with the knowledge and consent of the village, and since the building of the same it had been maintained by the village and taxes levied to maintain it, and that all of plaintiff's land is within such village, and that the taxes for the purpose of maintaining the lateral have been levied against said land and collected. It is further alleged that the lateral is of sufficient size to irrigate plaintiff's land and the lands of other persons who use the same. Affirmative defenses in the answer are denied.

In the bill of exceptions, there is a stipulation admitting the facts set forth in the statement made, and there is a plat showing the course of the lateral. It is further admitted that the village employed the defendant Barkdoll to take charge of the lateral and superintend the delivery of water, paying him for his services from the village treasury. Also it is stipulated that the plaintiff had demanded water from the Gering irrigation district for his lands, and that the village turned such water into the laterals in question. It is further stipulated that during the season of 1913 the plaintiff was not permitted to use water from the town lateral, and that, in order to use water from the lateral designated by the village board, it would be necessary for the plaintiff to construct the said 700 feet of lateral above mentioned, and which the village did not offer to build, but which they intended the plaintiff should build for himself.

The testimony of the witness Neeley shows that the lateral, if properly handled, has a sufficient carrying capacity to water the lands irrigated therefrom. The witness Gardner testified to a place in the lateral where its carrying capacity is limited, but that it will still carry enough to irrigate 420 acres of land. On cross-examination his evidence perhaps shows that there is sufficient capacity to supply water to everybody.

In its decree the court found the ownership of the land as alleged; the necessity or irrigation; the manner in which it had been irrigated before the time set forth in plaintiff's petition; that the village board had assumed to exercise control over the lateral, and had employed the defendant Barkdoll to divide the water among the various tracts of land. The court also found that the employment of Barkdoll was *ultra vires,* and that as a matter of law the board of trustees could not grant permission for the construction of a lateral in the streets; that prior to the commencement of this suit the plaintiff was notified that he must cease conducting water from the town lateral, and that he must draw water through another and different

lateral, and permission was given plaintiff to construct the unconstructed portion of said lateral to his land. The court also found that the village board wrongfully applied the funds of the village to the repair of said lateral; that said lateral was purely for private purposes for the irrigation of lots and lands lying within the corporate limits of the village; and that it was beyond the powers of the board to appropriate money for such purpose.

The court thereupon dismissed plaintiff's petition and found for the defendants. It is from this decree that the plaintiff appeals.

The plaintiff alleges the following errors of law: (1) The court erred in not holding that the village, by assuming control of the lateral in question, made it a part of its water-works; (2) the court erred in not holding that the plaintiff had acquired an easement by acquiescence to convey water through the lateral in question; (3) the court erred in holding that the village could discriminate against the plaintiff and refuse him the right to draw water through the lateral, and at the same time permit all others to use the lateral; (4) the court erred in refusing plaintiff the injunction as prayed and in dismissing plaintiff's action.

It is contended by the appellant: 1. That, the village having assumed control of the lateral in question, it thereby became a part of the water-works of the village. Rev. St. 1913, sec. 5119; 3 Kinney, Irrigation and Water Rights (2d. ed.) sec. 1448. The village having assumed control of the lateral it was its duty to furnish water to the plaintiff. 40 Cyc. 791.

2. The village, having acquiesced in the building of the lateral and affirmatively approved of the maintenance thereof, and having permitted plaintiff to acquire his land depending on this lateral for irrigation thereof, is estopped to deny his right to use it. *Omaha & C. B. Street R. Co. v. City of Omaha,* 90 Neb. 6; *Gregsten v. City of Chicago,* 145 Ill. 451, 36 Am. St. Rep. 496.

3. The village is not attempting to destroy the lateral, nor abate it as a nuisance, and it is not in fact a nuisance. *City of Denver v. Mullen,* 7 Colo. 345; *City of Fresno v. Fresno Canal & Irrigation Co.,* 98 Cal. 179.

4. The village could not wrongly discriminate, and permit all others to use the lateral, and refuse the plaintiff the same right. *Pickrell v. Carlisle,* 135 Ky. 126, 24 L. R. A. n. s. 193.

The evidence shows that after the lateral was constructed the village assumed control thereof, and employed a man to maintain the lateral and to supervise the distribution of the water therefrom. It is the contention of the appellant that this lateral was a part of the water-works of the village. Section 5119, Rev. St. 1913, empowers villages "to establish, alter and change the channel of water-courses, and to wall them and to cover them over; to establish, make and regulate wells, cisterns, windmills, aqueducts and reservoirs of water, and to provide for filling the same."

The lateral in question has been taken over by the village, which assumes the control and management thereof. While this may be new in Nebraska, in the western states, where irrigation is more universal, similar conditions have arisen, and the courts of those states have passed on such questions. The result of such consideration is, we think, fairly summarized by Mr. Kinney in 3 Irrigation and Water Rights (2d ed.) sec. 1448, as follows: "And it is further held that where ditches and canals run through a city and the water is used therefrom by the inhabitants for irrigation, although both the water rights and the ditches and canals may be owned by others, the municipality has the power to assume the control and management of the ditches and canals and the method of distribution of the water within the city limits. And having once acquired the right to control and to regulate the distribution of the waters, and such authority having been given to be exercised for the benefit of the people, this

duty becomes obligatory upon the municipality. And where a city with the consent of the original appropriators took control of such waters and distributed them to the inhabitants of the city, the right to exercise such control vested in the city, and it was therefore held that it was not only the right of the city, but also its duty, to employ such remedies as the law or rules of equity authorized to defend and maintain such right to control the use of such waters by the people." This would seem to give the city the right to control the property although it belongs to others. See *City of Springville v. Fullmer*, 7 Utah, 450.

"Where the water rights and the ditches and canals used in connection therewith and running within the limits of a municipality are owned by parties other than by the city or town itself, the question has often arisen as to the power of the municipality to pass ordinances regulating and controlling such rights and ditches and canals tending to restrict the original rights and privileges of the owners. A large, open irrigation canal running through the heart of a city may be dangerous at times to the life and property of the inhabitants. Oftentimes children, and sometimes older persons, fall in and are drowned. Their waters sometimes overflow or seep through their banks and the neighboring property is flooded and injured; or, again, the waters become stagnant with the accumulation of rubbish and breed disease. It is therefore necessary that there should be some control over such ditches and canals passing within the limits of municipalities so as to prevent, as far as possible, the interference with the rights and property of the municipality itself, and the danger to the lives, health, and property of its inhabitants. This regulation and control may come from two sources: First, direct statutory enactment under the police power of the state; and, second, by the way of municipal ordinances under the powers granted by the Constitution and statutes of the state. By direct statutory enactment

the legislature may require the owners of such ditches and canals operating within municipal limits to do certain things and perform certain duties for the protection of the public." 3 Kinney, Irrigation and Water Rights (2d ed.) sec. 1448. In the note to said section we find the following: "So, a statute which required the owners of such canals operating within the limits of municipal corporations to construct certain devices, such as lattice work and slats at the head of flumes to prevent persons and animals from being drawn through the flumes, was held to be valid as a proper exercise of the police power of the state; and, further, that the failure to perform such statutory duty specifically imposed was negligence *per se*, and, in the absence of contributory negligence, a recovery may be had for an injury thereby occasioned"—citing *Platte & Denver Canal & Milling Co. v. Dowell*, 17 Colo. 376.

In *Mugler v. Kansas*, 123 U. S. 623, 661, it is said: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

This doctrine, applicable to a legislative act, is by *Platte & Denver Canal & Milling Co. v. Lee*, 2 Colo. App. 184, held applicable to an ordinance seeking the punishment of those persons who had acquired certain rights touching the construction of ditches, and refused to be bound by an ordinance curtailing the enjoyment of the same.

An injunction will lie restraining a city from interfering with the use of ditch property which has not been lawfully ascertained and declared to be a nuisance. *City of Denver v. Mullen,* 7 Colo. 345.

The right of a municipality to the exclusive control and regulation of water within its limits, to which others have a paramount right and ownership, prior to the incorporation of the municipality, is based upon the acquiescence of such owners. *Fisher v. Bountiful City,* 21 Utah, 29.

In *Levy v. Salt Lake City,* 5 Utah, 302, the city did not build the ditch, which received water from a creek and carried it to several lot owners for purposes of irrigation. The ditch was built by private landowners for their benefit, but it ran through block 59 of Salt Lake City. The city assumed control of this water, and turned it onto the premises of a lot owner to such an extent that it overflowed the land and ran into a cellar, where it injured personal property which was stored there. In an action by the owner of the property against the city it was held to be liable for the damages sustained, although the rights of the original builders of the ditch and users of the water were recognized and protected. The city was held liable for its mismanagement of its water system, of which the ditch was treated as a part. This is not unlike the instant case so far as the protection of the rights of the ditch builder is concerned. While the water comes from a private source and runs into a ditch constructed by private parties, it is yet subject to the control of the village, provided that the water users should not be deprived of the use of the water. The plaintiff is therefore entitled to a remedy which gives him the water which is turned out to him from the canal of the irrigation district.

In the brief of appellees we are cited to that part of section 5132, Rev. St. 1913, which reads: "To open, widen or otherwise improve or vacate any street, avenue, alley or lane within the limits of the city or village."

We are next cited to so much of section 5141, Rev. St. 1913, as provides that the "board of trustees shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons within the city or village, and shall cause the same to be kept open and in repair, and free from nuisances."

To do what appellees suggest in their brief—fill up the ditch and remove the obstruction—would be an interference with the plaintiff's use of his property, the water that comes to him out of the canal of the irrigation district, and which he should be permitted to use unless the destruction of its use becomes necessary in the interest of the public welfare. Besides, it does not appear that the village board of the village of Gering desires to destroy the ditch, or that there has been any attempt by the board to pass a resolution of that kind. There is only an attack on the plaintiff's use of the water. Water for irrigation is very much a necessity in the neighborhood of Gering and in many thousands of square miles all about Gering. The people there are used to ditches, and uncovered water running in them is so common that it does no violence to the feelings of any resident. An irrigated field with its very necessary ditch becomes a thing of beauty which delights the eye and cheers the spirit.

Where an irrigation and land company succeeded its predecessors in interest and acquired an easement and right of way for the construction of certain ditches to carry water for irrigation purposes, and the ditches were constructed and were used to carry the water according to the plan under which they were made, it was beyond the power of the city to destroy the property rights of the company, although it might destroy the ditches and compel the company to change the plan of its conduit from an open ditch to a pipe-line; but there could be no destruction of the easement or right of way acquired by the company. *City of Nampa v. Nampa & Meridian Irrigation District,* 19 Idaho, 779. In the syllabus in this case it is said: "A grant to a canal company of a

right of way or easement for its ditches in the streets of a city is subject to the right of the city to thereafter regulate the manner of the exercise of such easement, or to change the grade of the streets in such a way as to require a corresponding change in the conduit for the delivery of water; and in exercising its right to grade its streets, the city may, if it becomes necessary so to do, remove such ditches and require the reconstruction of the company's system by a pipe-line beneath the surface." In the same case it is said, in substance, that lot owners in a city who have become entitled to the use of water from an irrigation system cannot be compelled to pay for the company's system, nor can they be denied water for the reason that its delivery has been made more expensive.

The plaintiff in this case is entitled to the use of the water which he gets from the canal because it is given to him by the irrigation district. The lateral which furnishes water to plaintiff runs through the main street of Gering, and its grade is so steep that in times past the water eroded the side of the ditch and made it ten feet wide in places. To remedy this the town board put in eight or nine drops from four to five feet high so as to lessen the force of the water and prevent the cutting of the banks. It was finally determined by the authorities that if no more water than necessary to irrigate the platted portion of the town site was carried through the ditch the street could be preserved, but if it was attempted to carry water enough to water the farm lands below, in addition to the water for the inhabitants of the village, the ditch would overflow, injuring the streets, and would seep into the cellars and foundations of the business buildings. For these reasons, the council passed the ordinance complained of, providing that no water for land should be carried through this lateral, but that the same might be carried in a lateral near-by. The village has the right to regulate the use of its streets. It seems that the plaintiff, relying upon the fact that

the village had permitted him to obtain water from the main ditch by means of the lateral in question, expended money and labor upon his place in order to receive the water at the point where it was delivered to his land. The evidence shows that to take the water to his land from the other lateral will require the construction of about 700 feet of new lateral. It would be inequitable to permit the village to deprive the plaintiff of the use of the water from this lateral unless provision is made to supply the water to him by other means.

The judgment of the district court is modified so as to require the village, before ceasing to supply the plaintiff with water through the lateral in dispute, to take such steps as may be necessary so that plaintiff may be able to receive upon his land as much water through another lateral as he formerly obtained from the lateral in dispute, and without additional expense for construction of the same.

JUDGMENT MODIFIED.

WILLIAM WUNRATH, APPELLEE, v. PEOPLES FURNITURE & CARPET COMPANY, APPELLANT.

FILED DECEMBER 19, 1916. No. 19667.

1. **Master and Servant:** INJURY TO SERVANT: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* sufficient to support the verdict of the jury.

2. ———: ———: INSTRUCTIONS. The instructions set out in the opinion, when construed together, *held* free from error.

3. **Trial:** INSTRUCTION TO DISREGARD EVIDENCE. A trial court is not warranted in giving an instruction to a jury that, if they believe any witness has intentionally sworn falsely to any material matter in the case, they are at liberty to disregard the entire testimony of such witness, unless the evidence tends to show that a witness was wilfully guilty of false swearing on a matter material to the issues.

APPEAL from the district court for Douglas county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Mahoney & Kennedy and *Nolan & Woodland,* for appellant.

Brome & Brome and *A. H. Burnett, contra.*

MORRISSEY, C. J.

Defendant appeals from a judgment entered in the district court for Douglas county awarding plaintiff $8,500 damages for injuries sustained while in defendant's employ. Defendant first contends that the verdict is contrary to the evidence. Defendant was engaged in the furniture business, occupying an entire building. This building was equipped with an elevator running from the basement to the top of the building. The main sales-room was located on the ground floor. The sales-room occupied the entire ground floor, except that at one end there was a balcony, and in the northwest corner a partition inclosing the elevator shaft, together with a corridor leading past the shaft to a toilet room. The corridor was about five feet in width, and it was entered from the main room by a door which was the full width of the corridor. When this door was opened it swung into the corridor. The elevator is located opposite the entrance, so that one entering the corridor from the main floor would stand immediately in front of the elevator door, or the elevator shaft, if the door was open. The door of the elevator shaft was the full width of the corridor and reached from the floor to the ceiling. This was a double door with hinges attached on one side of the opening, and also hinges in the middle so that one half of the door might be opened while the other half remained closed.

Plaintiff visited this building for the first time May 24, 1910, and made an arrangement with the assistant manager to take employment as a porter or janitor. The assistant manager gave him a set of written instruc-

tions, and also told him that his brooms, brushes and implements with which he would be required to work were kept in the toilet room mentioned, and went with plaintiff through this corridor into the toilet room and showed him where they were to be found. Plaintiff reported for duty the next morning when the store opened. In obedience to the instructions he received the day before, he started for this toilet room, intending to leave his dinner pail and to secure a broom with which to begin work. He passed through the door leading into the corridor, which he says was closed, and immediately fell into the elevator shaft, a distance of 12 or 15 feet, receiving injuries to his head, shoulder, back and knee.

It is alleged that, when plaintiff opened the door leading from the main store into the corridor, the corridor was unlighted; that the door opening from the corridor into the elevator shaft was open, and the opening to the elevator shaft unguarded; that plaintiff did not know there was a door leading from the corridor into the elevator shaft, and, because the corridor was unlighted, plaintiff was unable to discover the danger, and that the injuries received were due to the failure on the part of defendant to advise him of the location of the elevator shaft, and in leaving the door thereto open and unguarded.

Defendant denies each of these charges of negligence, and insists that plaintiff has not only failed to prove these allegations by a preponderance of the evidence, but that they are disproved by a preponderance. There are, however, certain undisputed facts which may be considered in connection with the disputed testimony. It is admitted that Wunrath applied to defendant the day before the accident and secured employment; that its assistant manager told him that the brooms and brushes were to be kept in this toilet room at the end of the corridor; that on the morning of the accident plaintiff arrived at the store for the purpose of going to work, and that he went into this corridor for the pur-

pose of leaving his hat, coat and dinner bucket and procuring his brushes according to the instructions given by the assistant manager the day before; that, upon his failure to return, the assistant manager went to look for him and found him, together with his hat, coat and dinner bucket, lying at the bottom of the elevator shaft. He was then unconscious and remained in that condition for several hours.

Wunrath testified that he stepped through the door leading into the corridor, turned around to close the door behind him, and was immediately precipitated to the bottom of the elevator shaft. He does not say that the door to the elevator shaft was open; but, if it were closed, he could not have fallen into the elevator shaft without first opening the door. He testified that the hall was unlighted. Defendant has offered testimony going to show that the door to the elevator shaft was equipped with coil springs which automatically closed the door and kept it closed, except when it was held open. The assistant manager testified that, when he went in search of plaintiff, he found the door closed. There is also testimony of other employees that the door was equipped with springs which automatically closed it. The door extended from the floor to the ceiling, and the knob by which it was manipulated in opening and closing was fastened to the door six feet or more above the floor. If the door was closed when plaintiff stepped into the corridor, before he could fall down the shaft he would have to reach up, grip this knob, open the door, and then step into the shaft. There is no reason why he should have done this, and it does not stand to reason that he would do so. On the other hand, if the hall was unlighted and the door open, his story is entirely probable. The plaintiff and the assistant manager both testified that he was shown into the toilet room the day before, so he knew its location. When he stepped into the corridor, there can be no question but that he intended to deposit his dinner bucket and his coat and hat in the toilet room,

but he never reached that room. These articles were found with him at the bottom of the shaft. The night watchman testified that the elevator doors were closed when he visited the toilet room sometime during the night. However, there was nothing to expressly direct his attention to that fact. There is more or less discrepancy in the testimony of witnesses of the defendant as to the construction of the door and the springs by which they were supposed to be closed.

A witness named Smith, who was in the employ of defendant at the time the accident occurred, testified that half of the door could be opened and placed in such a way that it might remain open. H. B. Wunrath, a son of plaintiff, visited the store soon after the accident, with Dr. Whinnery, and gave the following testimony: "Q. What I want to know is, would the east half of the door stay open if it was pulled open? A. Yes, sir; it was open when he stood there. Q. And stood there? A. Yes, sir. Q. Without anybody holding it? A. Yes, sir." The evidence of Dr. Whinnery was that he, in company with young Wunrath, inspected the doors soon after the accident; that he opened one-half of the door, and that it remained open, and he explained his recollection: "Q. Did you have the whole door open, or did it stay open on its own volition? A. No, sir; it stayed itself. How I remember that I opened the door so well was, I commenced to feel for the knob. That place was not well lighted, and I commenced to feel for the knob. And he said 'higher,' and I went up and finally got the knob. Q. How high up was the knob? A. Quite a way to reach. The door could open perfectly easy, and I stood there and tipped that door open. There wasn't anybody guarding the door. Q. Nobody held the door open? A. No, sir." Dr. Whinnery subsequently visited the store with another son of the plaintiff. He testified that on this occasion the assistant manager opened the door, and that the door stood open without being held or fastened in any way. On the whole, the testimony supporting plaintiff's theory

that the door was open seems sufficient to warrant the trial court in submitting that question to the jury, and is sufficient to support the jury's finding thereon.

Defendant also complains of the instructions given by the court, and points out that in stating the issues, in instruction No. 1, the court told the jury: "Plaintiff charges defendant with negligence in three particulars: First, that defendant failed to inform him of the existence of said elevator shaft; second, failed to cause said corridor to be lighted; and, third, that defendant negligently caused and permitted said elevator door to be left open and the shaft unguarded."

Instruction No. 2 is as follows: "The burden of proof in this case is upon the plaintiff to establish by a preponderance of the evidence: First, that the defendant was guilty of negligence in one or more of the particulars charged in the petition; second, that plaintiff's injuries, if any, were the direct result of negligence of the defendant charged and proved; and third, the character and extent of his injuries, and the amount of his damages, if any, resulting therefrom. If all of the above matters are so established to the satisfaction of the jury, then your verdict should be for the plaintiff, unless you find, from a preponderance of the evidence, that the plaintiff was guilty of negligence contributing to cause his injuries. The burden is also upon the plaintiff to establish, by a preponderance of the evidence, that the elevator door in question was open at the time plaintiff entered the corridor."

Defendant criticizes this instruction, insisting that it told the jury that, if any one of the acts of negligence designated in instruction No. 1 were found to exist, they might return a verdict for plaintiff. This instruction must be construed in connection with the other instructions given, and if, when they are all taken together, the jury is fairly instructed the instructions will be upheld.

Instruction No. 4 told the jury: "If you find from a preponderance of the evidence that, at the time plaintiff entered the corridor in question, the door leading into the elevator shaft was open and unguarded, and that defendant had not used proper care to prevent such condition, and that plaintiff did not know that said door was open, and did not, in the exercise of ordinary care, discover that fact in time to avoid the accident, then your verdict should be for the plaintiff. On the other hand, if you find from the evidence that, at the time plaintiff entered the corridor, the door leading into the elevator shaft was closed, or, if you find that said door was open, and you further find, from a preponderance of the evidence, that the plaintiff, in the exercise of ordinary care, should have discovered that fact in time to have avoided his injuries, then your verdict should be for the defendant; or, if you find from the evidence that the plaintiff himself opened the door leading into the elevator shaft, your verdict should be for the defendant."

The second paragraph of the third instruction, which reads: "If you find, from a preponderance of the evidence, that leaving the door into the elevator shaft open and unguarded rendered passage through such corridor by a person using ordinary care unsafe, then it was the duty of the defendant to exercise ordinary care to keep such door shut, and a failure to do so would be negligence"—is criticized because, it is said, this paragraph assumes that the door to the elevator shaft was open, and takes from the jury this important question of fact. If this paragraph of the instruction could be segregated from the other instructions, it might be given the interpretation which defendant would have us give it. But instruction No. 4 expressly told the jury that, if they found from the evidence that the elevator shaft was closed when plaintiff entered the corridor, or that he opened the door himself, the verdict should be for defendant. The criticism directed against instruction No. 5 is along the same line.

Instructions are to be construed together, and when these paragraphs are read in connection with the other paragraphs, it is clear that every disputed question of fact was properly submitted to the jury.

The next assignment deals with the court's refusal to instruct the jury that, if they believed any witness had intentionally sworn falsely to any material matter in the case, they would be justified in disregarding the entire testimony of such witness. The general rule is that the trial court is not warranted in giving such an instruction, unless the evidence tends to show that a witness was wilfully guilty of false swearing on a matter material to the issues. It therefore devolved upon the trial court to determine whether, under the facts and circumstances, there was evidence tending to show that any witness whose evidence was submitted to the jury did wilfully swear falsely. In determining this question, it was the duty of the court to bear in mind that wilfully false swearing is not lightly to be imputed to a witness. Discrepancies, conflicts and contradictions in evidence are more often honest mistakes due to faulty observation, imperfect recollection, or varying impressions which the facts may have made on the mind. Before a court is warranted in giving this instruction it must find something in the appearance, demeanor or manner of a witness while testifying, or such conflict and contradiction between him and the other witnesses in the case, or such an inherent incredibility in the story told, as would reasonably tend to show that he wilfully swore falsely. We find nothing in this record which would warrant us in saying the court was guilty of an abuse of discretion in denying this instruction.

Misconduct of the jury is also alleged, and we find a showing and counter showing in the bill of exceptions. There appears to have been an acrimonious debate between two of the jurors, but after this debate had subsided the jury deliberated for several hours before they reached a verdict, and finally came into court the fol-

lowing morning, and this juror, who now seeks to impeach the verdict, together with his fellow jurors, returned the verdict into court in the usual way. There is no misconduct shown which would warrant us in disturbing the verdict.

This leads us to the consideration of the sole remaining question: Is the verdict excessive? At the time the accident occurred, plaintiff was 56 years of age, with a life expectancy of more than 16 years. He was earning $12 a week, without any prospect of promotion or increase of income. It is claimed in his behalf that the injuries received have totally incapacitated him for labor, and that he has undergone great pain. The case has twice been tried. The first jury returned a verdict for $8,100, and the second a verdict for $13,500, on which the trial court ordered a remittitur of $5,000, which was entered, although appellee now asks us to disregard the remittitur and enter a judgment for the original amount of the verdict under the provisions of chapter 247, Laws 1915. Defendant denies that plaintiff is wholly incapacitated for labor. It appears that in September, 1913, three years after the accident, he undertook to do janitor work in an apartment house. He lived with his family in this building from September until March. Plaintiff and members of his family testify that he was unable to do the work alone, but that his sons, daughter and wife assisted him and really did the greater part of the work; while defendant offers the testimony of the proprietor of the building and another witness, who visited the building from time to time, who say they saw the defendant shoveling coal and doing other work of like character. With the exception of this short period, he had done nothing during the five years intervening between the date of the injury and the date of the trial. Defendant might have availed itself of its right to have him submit to a medical examination (*State v. Troup,* 98 Neb. 333), but did not see fit to do so. Plaintiff was before the jury and the trial judge, and they were better able to

judge of his physical condition than we may do from the printed record. We may assume that he is permanently and totally disabled. He has also endured great pain and suffering. For this it is hard to fix a proper amount of recovery. In view of the two verdicts returned, and the order made by the trial judge, we are not prepared to say that the recovery is excessive. On the other hand, we must refuse to entertain appellee's request to enter a judgment for the original amount of the verdict, and the judgment will be affirmed for the amount fixed by the trial court.

AFFIRMED.

ROSE, J., not sitting.

WILLIAM H. NUTTER, APPELLEE, v. STANDARD LAND COMPANY ET AL., APPELLANTS.

FILED DECEMBER 19, 1916. No. 19063.

Appeal: REMITTITUR. Where, in a case appealed to this court, the record clearly shows that the judgment is excessive in a certain amount, a remittitur will be ordered, and if the remittitur is not filed the judgment will be reversed.

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

Fred A. Nye, John A. Miller and *Strode & Beghtol,* for appellants.

W. L. Hand and *N. P. McDonald, contra.*

BARNES, J.

This was an action to recover damages which plaintiff alleged he had sustained by reason of deceit and fraud practiced upon him by the defendants the Standard Land Company and Samuel C. Hawthorne, in exchange of plaintiff's land situated in Buffalo county, Nebraska,

for certain land of the Standard Land Company situated in Hidalgo county, in the state of Texas. A trial in the district court for Buffalo county resulted in a verdict in favor of plaintiff for $16,806.79. Defendants' separate motions for new trial were overruled. Judgment was rendered on the verdict, and both defendants have appealed.

The record contains a copy of plaintiff's petition, in which it is alleged, in substance, that defendants, the Standard Land Company and Samuel C. Hawthorne, in order to induce the plaintiff to make the contract for the exchange of the real estate described therein, represented to plaintiff that a part of the land which he took in exchange contained 210 acres of what is called the lower lift land, situated near the Rio Grande river in Hidalgo county, and described as certain lots in block 14, all good, tillable and irrigable land, and having no resaca or lake thereon; that it was worth $150 an acre, and was not subject to overflow; that plaintiff relied on defendants' representations and believed the same, and had no opportunity to ascertain the facts in relation to the amount of land in the tract above mentioned; that a resaca was situated thereon, and that he had no means of knowing the value and quality thereof; that defendants' representations and statements were false and untrue in this, that in fact and in truth there was situated thereon a resaca which covered about 60 acres; that the land was subject to overflow, which rendered it valueless; that the remainder of the tract was in truth and in fact not worth over $25 an acre; and that the tract of land contained only 201.72 acres, instead of 210.72 acres as represented. Plaintiff prayed for a judgment for $26,565 and costs.

The defendants filed separate demurrers to the petition, which were overruled, and the defendants each excepted. They then filed separate answers. Hawthorne, by his answer, denied that he was either an officer or stockholder of the Standard Land Company when the trade was consummated, and alleged that he made no repre-

sentations whatever to the plaintiff; that he received no benefits out of the exchange of plaintiff's land for that of the Standard Land Company, and denied each and every allegation contained in plaintiff's petition. He prayed for a dismissal of the action.

The defendant Standard Land Company, by its answer, alleged that it is not now, and never has been, a resident or citizen of the county of Buffalo, in the state of Nebraska; that it did not at any time enter into any of the dealings or transactions with Samuel C. Hawthorne or Ralph R. Langley, as its president, as alleged in plaintiff's petition; that it had not at any time incurred a joint liability with its codefendants Samuel C. Hawthorne and Ralph R. Langley in any of the matters set up in plaintiff's petition; that no summons or process of any nature had been served upon the defendant Standard Land Company in Buffalo county, Nebraska, and that it had never voluntarily appeared in said action; that plaintiff wrongfully and collusively joined this defendant with its codefendants Samuel C. Hawthorne and Ralph R. Langley, for the purpose of forcing this defendant to defend said action in a county other than that of its residence; that, by reason of the matters and facts above stated, the court has no jurisdiction over the Standard Land Company in this action. For further answer to the petition, the defendant Standard Land Company alleged that its codefendants Samuel C. Hawthorne was not at any of the times complained of in plaintiff's petition an agent of this answering defendant, nor its representative in any matter, nor was said Samuel C. Hawthorne connected in any way with this answering defendant; that this answering defendant had no part in any transactions by Samuel C. Hawthorne with the plaintiff; and for further answer to the petition the defendant denied each and every allegation therein, and concluded its answer with a prayer that it go hence without day and recover its costs.

Separate motions were filed before the commencement of the trial requiring the plaintiff to elect whether he would try the case for false representations concerning the land which he had purchased, or whether he would rely for his case upon the allegations that he was shown other land than that which he actually received and contracted for, or whether he would prosecute this action for failure to obtain title to the land actually bought. The court overruled the motions, and defendants excepted.

The case coming on for trial, each of the defendants objected to the introduction of any evidence for the reason that the petition failed to state facts sufficient to constitute a cause of action, which objections were overruled. The defendants separately excepted to each of the instructions given and refused by the trial court.

Among other things, appellants contend that the evidence is insufficient to support the judgment, and that the verdict was excessive. These assignments of error will be first considered.

The testimony of plaintiff as found in the record is, in substance, as follows: He was a farmer 55 years of age, and prior to entering into the contract with the Standard Land Company was the owner of 480 acres of land near Gibbon, in Buffalo county, Nebraska, and 800 acres situated on an island in the Platte river in that county; his lands were heavily incumbered, and in April, 1911, Mr. Butcher, agent for the Standard Land Company, induced him to make a trip to the lower Rio Grande valley in Texas. They met defendant Hawthorne at Lincoln, and went with an excursion party of the Standard Land Company. On arriving in Texas, they met Mr. Langley, the president of the company. They remained in Texas, in and near San Juan, for about two days. He was taken around the country in an automobile. He entered into a contract with the company to purchase about 80 acres of land. He made another trip to San Juan, Texas, in the fall of 1911, and stayed there for six weeks, at that time putting up cane for the

defendant company. When he was in Texas on his first trip, he went over the lower lift with an excursion party. The lower lift is about a mile south of San Juan. When he was down there in the fall of 1911, he became acquainted with the country all around San Juan. He returned in December, and saw Mr. Hawthorne about the 10th of that month. They talked about Texas lands. The next time he saw Mr. Hawthorne was in Omaha on May 20, 1912, at the Standard Land Company's office. Plaintiff said: "I told him, * * * I wanted to either call this deal off or go through with it." Hawthorne told plaintiff that he had sold off part of the Texas land which was in his contract; that they could make up the difference by including land on the lower lift. Plaintiff said he told Hawthorne that he either wanted to call the deal off or go through with it; that Hawthorne told him that he thought he had sold off part of the land that was in his contract, but that they could make up the difference by including land on the lower lift, which was priced at $150 an acre; he said this land did not need fertilizing, that it would raise anything the upper lift would; he said the land did not generally overflow, but that it had overflowed 17 and 30 years ago; that he intended to take a piece of this land, as it was the very best. Plaintiff said Mrs. Nutter was with them; that he relied on Hawthorne's statements and believed everything he said up to that time; that Hawthorne went out; that Langley called them into his room, and that he told Langley that he was there to close the deal or call it off. Langley stated, in substance, the same as Hawthorne had told him. Langley told him there were 210.72 acres they could substitute on the lower lift, and that it never overflowed; that he relied on Langley's statements and entered into the contract; that after they signed the contract which was read to him they went out to dinner, and he did not see Hawthorne again that day. Nutter further testified that they wanted him to sign the vendor's lien notes, but he would not sign them until he had

seen the land; that they were afterwards sent down to Texas for his signature and he signed them; that he got his deed for the upper lift lands, but never got a deed for the land on the lower lift. Langley said that Mr. Kean would show him the lower lift land. Nutter testified further that they all went down to Texas on the following 4th of June; that they saw Mr. Kean there; that they had an automobile and went out to look at the land. Mrs. Nutter went along. They went across the basin and it was dry. Kean showed him the northwest corner of the land. Nutter testified that he got out several times and looked the tract over; that he had no information as to the corners, except what Kean and Langley had told him. They stayed down there until August, when they returned to Nebraska. They went back to Texas in October, when they decided to go down and see the land on the lower lift again, which they did. They found water there. Hawthorne and Langley were there then, and Hawthorne took off his shoes and waded across the water, which covered some 20 or 30 rods in width. They went down later, on Thanksgiving day, and the water was then about 10 or 12 rods wide. He testified that his land near Gibbon was priced in the exchange at $125 an acre, and his land on the island was put in at $50, making a total valuation of $55,656.

The contract made May 20, 1912, was introduced in evidence, and provided, in substance, as follows: The Standard Land Company had sold to the plaintiff 445.61 acres of land in Hidalgo county, Texas; the payment for said land and the price named in the contract was $150 an acre, the amount being $66,841.50. Plaintiff agreed to convey by warranty deed to Dan W. Gaines his lands in Buffalo county, 320 acres of it at the price of $41,200; 800 acres, known as the Island farm, was taken at $32,000. It was agreed that the land company should allow plaintiff the sum of $3,200, being a loss sustained on the former sale of real estate. The land

company was to have $2,335, making a total of $74,065. It was agreed that the lands deeded by the plaintiff and his wife to Gaines were subject to liens or incumbrances to the amount of $22,000 and no more. The Standard Land Company agreed to pay plaintiff the sum of $5,000 with which to pay off certain indebtedness on his home in Gibbon, Nebraska, with the further sum of $5,000, as plaintiff desired, for the improvement of the lands purchased by him in Hidalgo county, Texas. The remainder of the consideration due the land company was $24,776.50, and was to be evidenced by the first vendor's lien notes on the Texas lands described in the contract. The notes were to be executed at the time of the delivery of the deed, and were to run in installments of one, two and three years from March 1, 1912, with interest at 6 per cent. per annum, payable annually. It was further agreed that, in event the liens against the land so deeded by plaintiff and wife to Dan W. Gaines should exceed the sum of $22,000, then, in that event, the excess above such amount should be added to the vendor's lien notes. Deeds were to be executed to Dan W. Gaines to be left in escrow with the Standard Land Company and to be delivered when abstract of title was brought down to date. The purchase and sale was to be in full settlement of all prior contracts executed between the parties respecting the purchase and sale of Texas lands and the land of plaintiff, and, in event the incumbrances of the property of the plaintiff should be less than the $22,000, then the difference should be deducted from the vendor's lien notes to be secured on the Texas land. Plaintiff, continuing his testimony, stated, in substance, that he was curious to know how the water got on the land in Texas, whether by reason of rains or from overflow from the river; that there was about four or five inches of rain in that county the last of June, 1912, and he could not tell how the water got on the land. The record shows that Nutter did not pay the first of the vendor's lien notes when it became due, and Langley

demanded payment and tendered a deed to Nutter for the lower lift lands.

On cross-examination plaintiff testified that he made his first trip to Texas on April 8, 1911; that he found the corn down there was just earing out and of good quality. Pictures were taken, which are attached to the record. He went to Texas the second time in July of the same year with his brother-in-law; they stayed two or three days. When he came home he got ready to go down there and put up cane for the defendant company. He made another trip in the fall of 1911 to put up cane for the company. His three boys went with him. The cane was located north of San Juan and was growing on land somewhat like the land he had purchased. The cane was of good quality. There is a picture in the record taken of the cane field where they were cutting. He stayed six weeks, and got acquainted with the people down there at that time. While down there on that trip, he had occasion to go south of San Juan about a half mile to cut a piece of cane. He came back and executed a memorandum contract on December 21, 1911. The contract was satisfactory to him then, and carried out his wishes the way it looked to him. He made another trip in March, 1912, to Texas, at the request of Mr. Langley. They showed him some pieces of alfalfa north of San Juan, some west of San Juan and south of McAllen. They were pretty fair. The purpose of the trip was to see whether alfalfa would grow. He was satisfied with it at that time. He went down again on June 4 of the same year. He made up his mind to make the contract before he went to Omaha. He concluded to go through with it or call the deal off. The last trip was made to Texas in March, before he bought the land. He went down there on June 10 to look at the land. He had not signed the vendor's lien notes then. He had been around there four or five times before this trip, and had been at liberty to go and come as he pleased. He knew what resacas were before May 20. He knew

what the first and second lift land was. He had more talk with Langley than with any one else. He asked Langley the day the contract was made whether the land was in or near lake Sardines. He wanted to look at it. He was not satisfied with what they told him and wanted to see it before he consummated the deal. The land that Mr. Kean showed him was all right. He did not know then that it overflowed. Mr. Butcher first interested him in Texas land. He read the government reports about soil and conditions down there before he went down and before he made the final contract. He left Texas and came back to Nebraska about December 18, 1912. He came back because his wife did not like the country. He would have stayed there and run his chances with the rest. He liked it when he first went down there and thought it a great country. His wife is the one who caused him to go down there. He saw water on the land several times during the summer. There was no water on the land when he went there with Mr. Kean on June 10. On June 22 he saw water there. There was a big rain after he got there, between June 10 and June 22. Mr. Kean pointed out the northwest corner as they came out of the basin. The resaca was on the north side. It appears from the testimony that a resaca, as described by a witness, is a depression like a ravine through which the water ran in times of rain. Mrs. Nutter, in a measure, corroborated the testimony of her husband. Nutter said he wanted to trade his Nebraska lands for the Texas lands. He thought he liked the country. He made one trip before April, 1912, and another again in June, 1912. He stayed in Texas from that time until August, and then returned to Nebraska and stayed until October 15, then started back to Texas and lived on the farm until December 18. He signed up the vendor's lien notes in July.

Mr. Frank, a witness for the plaintiff, testified that he was able to cross the resaca in March, 1914. There was no water there at that time. The resaca appears to

be a drainage course. He did not consider it productive. The resaca was only waste land. He had heard it said that the first lift was the most productive land in the valley for sugar cane. The land is level and in its wild state is covered with brush. This kind of growth is found on both the first and second bottom. It can be cleared readily. The soil is a dark sandy loam about 20 feet deep.

One Lucas testified as a witness for plaintiff that he was down in San Juan in 1912. He had been down "road 1" many times. There were two low places. There was water in both of them. They had a heavy six-inch rain down there in June, 1912. The resaca was dry the first time he went down there.

The plaintiff was recalled, and testified that he did not know at the present time what the market value of the land was on May 20, 1912; that he did not know what the actual value of the land was at that time. This is the substance of the plaintiff's testimony.

Witness Frank testified, in substance, that the depth of the soil on the second lift is 20 feet. He owns land there which he purchased in 1912, and raised corn, alfalfa and vegetables of the first class. The corn was raised on the edge of the first lift, and, in the opinion of the witness, would yield 80 bushels an acre, although he had heard it said it would go 100 bushels to the acre. The quality of the crop raised is of the best. Last year he raised 600 bushels of Bermuda onions on two acres. The water is good for domestic purposes. The country seems to be perfectly healthy. On cross-examination he testified that one field west of Parker raised 40 tons of cane an acre last year, which sold for $3.25 a ton. A man can raise 300 hampers of lettuce on an acre, and the market price for vegetables is good; the highest was $35 a ton for cabbage last winter, and the lowest $10 a ton.

Ralph R. Langley testified that he was the president of the Standard Land Company in 1912 and since that date; that Mr. Hawthorne had no interest in the com-

pany after he sold out, except that he agreed to go down on the next excursion. He bought his interest for himself and Mr. Gaines. He first met Mr. Nutter at San Juan in 1911. Mr. Nutter wanted to buy a good piece of land, but did not have the money. He wanted to sell some of his land in Nebraska, and would use the proceeds to buy Texas land. Witness wrote a contract with Nutter whereby the company had the privilege of selling 800 acres of his land. Witness knew nothing about the land. In event the company sold the land, he was to use the proceeds to buy Texas land. Nutter wanted to put in all of his lands in Nebraska and go down to Texas. Witness found that Nutter had listed the Nebraska lands at such high prices that they could not be sold. Nutter represented that the incumbrances were much smaller than they were; represented them as being only about half what they proved to be. They were past due, or about due. They found it would be necessary to pay about $40,000 in order to save the equity in Nutter's land, all of which was contrary to Mr. Nutter's representations. Nutter went to Texas in 1912 to put up sorghum for the company. He came to the office one day and said he wanted to rearrange his deal so he could have land on the first lift, for the reason that he thought it would grow better alfalfa than the second lift. He went down to Texas on that excursion and looked at 160 acres of alfalfa on the first bottom south of Mission. Langley stated that he did not encourage Nutter to buy any land; in fact, he tried to discourage him. He further stated that Nutter came to the office on May 20 and wanted to consummate his transaction right then, so he got Mr. Gaines to figure out some way that they could possibly make the deal. Langley made arrangements with Mr. Dan Gaines to put up the money that was necessary to pay Nutter's incumbrances and personal debts. Mr. Nutter desired to have first bottom land. Langley showed him a blue print which shows the contour and elevation

of the first bottom land, the only land he could sell him, which was 201.72 acres. Nutter said he would see it, and they entered into a contract with him. At that time it was impossible to determine the exact amount of his indebtedness, and hence the amount of his vendor's lien notes could not be determined. Nutter went to Texas, and Mr. Gaines paid his indebtedness, which was more than was expected. They found out the amount his notes would be, and sent them down to him to sign, and in the meantime he had examined the land which he had purchased. When the contract was made, Langley told him that he would execute his deed and retain it until he paid his first notes. There was an error in the amount of the land. It was called 210.72 acres, when in fact it was only 201.72 acres. When March 1, 1913, came, he did not pay his note. Langley paid all the incumbrances against his land, and tendered his deed to him and demanded payment for the note. Nutter put in a crop in a very poor manner and did not take care of it. They gave him $5,000, as required by the contract. He spent only a small portion of it on the land. In fact, he was paid more than that amount. They have always been willing and ready to deliver the deed to him, and had it ready to deliver and tendered it to him. Langley never made any representations whatever as to the character or quality or value of the land. Mr. Nutter had seen the valley before that time. The company had to raise more than $27,000 to pay the incumbrance on a portion of his land, and about $13,000 on another tract, and an additional incumbrance of $5,000 on 800 acres of it. Mr. Hawthorne had nothing whatever to do with making the contract. Mr. Nutter said that he wanted to divide his land, half of it on the second bottom and half of it on the first bottom. He was familiar with the first bottom and the second bottom land, and knew the difference. He said he considered the first better than the second bottom land. Langley made no representations to him about it. Parts of the

first bottom land will overflow at times. Langley only knew of its overflowing one time before Mr. Nutter made this contract, and had told him about it before. Langley attempted not to take his land because he did not want that "white elephant in Nebraska" on his hands. It was incumbered for more than its normal value, and the incumbrances were past due and subject to foreclosure. It took a large amount of money to pay them, and they did not have it. The fair market price of Texas land was from $150 to $165 an acre. They could sell it very easily, and did sell all of the adjoining lands, at these prices, and later on it sold for more money. They sold 10,000 acres in that vicinity at those prices during 1911, 1912, and 1913, not an acre for less than $150, and later on as high as $250 and $300 an acre. This included first bottom lands. Defendant Hawthorne did not sign the contract.

Eugene R. Kean testified for defendants that he resided in Edinburg, Texas; was manager of the Valley Reservoir & Canal Company; that he had worked for the Standard Land Company from May, 1911, to July, 1913, as local manager at San Juan, Texas; was acquainted with Mr. Nutter; had known him practically all his life. He had some business relations with him in Texas for the Standard Land Company, and made a contract with him to put up sorghum cane. Kean, at Nutter's request, took him in the summer of 1912 to look at lots 8, 9, 10, 12 and 13, in block 14, south of San Juan. He did not show him lots in block 15. He went with Mr. Nutter and wife to show them the lands they said they bought from the Standard Land Company; went to the northwest corner of lot 10, block 14. After leaving the northwest corner of the lot, they drove east on the north side of lot 10, where there was a road. The resaca runs along the south side of the road. He took them down to the edge of the resaca, approximately 1,000 feet. He knew nothing about the contract between Nutter and the company. The division of lots 10 and

11 is a little to the south of the center of the resaca. The northwest corner of lot 10 is covered with water a portion of the time. It had water on it at the time he showed it to the Nutters. He pointed out the resaca as a part of their land.

H. P. Griffin, a civil engineer, testified for the defendants that he was familiar with the resaca and the vicinity of San Juan; that the lands along the resaca were usually the best drained lands; that the first lift lands in the resaca were good agricultural lands, and would raise corn, cotton, cane, alfalfa, frijoles, onions, cabbage, potatoes, lettuce and beans; that the yield of sugar cane was from 40 to 60 tons an acre.

There was much testimony of other witnesses, but none of it relates materially to the questions involved in this suit.

The evidence shows conclusively that the plaintiff was indebted in a large amount, which was secured by liens upon the lands in Nebraska. Foreclosures were about to be commenced against him. He was very anxious to exchange his equities for the land in Texas. He had made several trips to that country; had worked there for the defendant company near the land in question in harvesting its cane, and had a general knowledge of the country. He deferred the execution of his vendor's lien notes until he made further examination of the land to be conveyed to him. Finally, after such examination as satisfied him, he executed the notes. It therefore may be said to be somewhat doubtful if the evidence is sufficient to authorize a recovery. However, the jury determined that question in his favor, and on this appeal, if their verdict could in other respects be sustained, would be conclusive on that point. It seems clear from the evidence that the verdict was excessive. The amount of land covered by the resaca was about 35 acres, and the remainder of it was substantially as represented. Allowing plaintiff $150 an acre for the 35 acres of waste land and $1,350 for the 9 acres of shortage, he would

not, at most, be entitled to recover more than $6,600. Therefore the verdict for $18,806.79 cannot be sustained. This obviates the necessity of passing on the other questions presented by the record.

On the question of the market value of the Texas land, it may be said that the contract was for an exchange of lands, in which each party fixed a trading value on his land, and they should be bound thereby. The evidence clearly shows that the defendant company tendered plaintiff a deed for 201.72 acres of the land in question, and is ready to convey it to him.

We therefore hold that, unless the plaintiff files a remittitur of all the judgment except $6,600 within 30 days, the cause will be reversed and a new trial awarded; but, if such remittitur is filed, a judgment for the above amount, with interest thereon from the date when it was rendered in the district court, will be affirmed.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., concurs in the conclusion.

FAWCETT, J. The evidence does not sustain a recovery. The judgment should be reversed and the action dismissed.

RUSSELL S. POWELL, APPELLANT, v. TRENMORE CONE, APPELLEE.

FILED DECEMBER 19, 1916. No. 18475.

1. **Landlord and Tenant:** LEASE: CONSTRUCTION: RENEWAL. A five-year lease giving lessee an option to renew it for a "like term or terms of years," and providing that such option shall be exercised within five years from date, entitles lessee to one renewal.
2. ———: ———: ———. Though a contract granting the right to remove sand and gravel from leased premises uses the term "lease and demise" in the granting clause, subsequent provisions may show that it was a lease for that purpose only.

APPEAL from the district court for Merrick county: CONRAD HOLLENBECK, JUDGE. *Reversed, with directions.*

Elmer E. Ross and *Martin & Bockes,* for appellant.

Burkett, Wilson & Brown, F. A. Bald and *Albert & Wagner, contra.*

ROSE, J.

In a petition in equity plaintiff prays for the reformation of a written instrument, for its cancelation when reformed, and for an accounting by defendant. Under the contract in controversy defendant acquired from plaintiff the right to remove sand from a 40-acre tract of land in an abandoned bed of the Platte river near Central City for the compensation of 25 cents a car-load. Defendant by pleading and proof resisted reformation. The trial court declined to reform the written instrument and dismissed the suit. Plaintiff has appealed.

The writing signed by the parties is in part as follows:

"This lease entered into this twenty-fourth day of February, 1911, between R. S. Powell, party of the first part, and T. Cone, party of the second part, is as follows: Witnesseth, for and in consideration of one dollar paid to party of the first part by the party of the second part and in consideration of the covenants hereinafter set forth by the party of the second part, or assigns, the party of the first part does by these presents lease and demise to the party of the second part the following tract of land situated in Merrick county, Nebraska, containing 40 acres, more or less, lying immediately north of the present north bank of the Platte river and immediately east of the present right of way of the Chicago, Burlington & Quincy Railroad, where said railroad crosses the Platte river, and being a plat of land that was a part of the old river bed of the Platte river, to have and to hold the same to the said party of the second part, without any liability or obligation on the part of R. S.

Powell or assigns of making any improvements of any kind thereon for the benefit of the party of the second part upon or about said premises, for the term of five years from this date, to February 24, 1916: Provided that R. S. Powell reserves the right to stock the waters thereon with fish, to use and improve said premises as a pleasure resort, either private or public, and to pasture the same, so long as such occupancy by R. S. Powell shall not interfere unreasonably with the occupancy of said premises by the party of the second part in handling sand and gravel thereon and the removal of them therefrom.

"It is further agreed between the parties hereto that the party of the second part shall have the right to construct railroad tracks, and erect such derricks and buildings upon these premises as may be necessary in handling sand, gravel, etc., and to removal therefrom, and party of the second part shall have the right to remove such improvements during the life of, or at the expiration of, this lease.

"It is further agreed that the party of the first part gives to the party of the second part the option to renew this lease under like conditions for a like term or terms of years, but the party of the second part shall exercise such option within five years from date hereof.

"The party of the second part, in consideration of leasing the premises as herein set forth, covenants and agrees with the party of the first part to pay to the party of the first part, or assigns, the sum of twenty-five (25) cents per car-load for each and every car-load of material taken from said premises during the life of this lease or the renewal thereof."

One provision which plaintiff seeks to reform is as follows:

"It is further agreed that the party of the first part gives to the party of the second part the option to renew this lease under like conditions for a like term or terms

of years, but the party of the second part shall exercise such option within five years from date hereof."

Plaintiff's contention seems to be that the term of defendant, under the agreement in fact made, was the definite period of five years, with the privilege of extending it five years more, "if entirely satisfactory to both parties." According to the undisputed evidence, a renewal option was discussed before the instrument was executed. The quantity of sand on the premises owned by plaintiff and the magnitude of the enterprise contemplated by defendant made the privilege of renewal an important factor. Plaintiff admitted on the witness-stand that defendant in his negotiations had mentioned the subject of renewals. The option, in the form appearing in the written instrument, was read to plaintiff before his signature was attached. On the question of fraud or mistake the proof does not warrant a reformation authorizing plaintiff, if dissatisfied, to oust defendant after an occupancy of five years. The parties made provision for a renewal option "under like conditions for a like term or terms of years." The privilege of renewal for the definite period of a "like term" of five years is not defeated by the indefinite phrase "or terms of years." The entire grant for a "like term or terms" is qualified by the clause, "but the party of the second part shall exercise such option within five years from the date hereof." Taken as a whole, therefore, the agreement for a renewal grants one option only, to be exercised within five years from the date of the contract. This construction requires the parties to respect the right of renewal for the five-year term specifically described, but does not sanction indefinite renewals without limit. *Winslow v. Baltimore & O. R. Co.*, 188 U. S. 646; *Tischner v. Rutledge,* 35 Wash. 285; *Drake v. Board of Education,* 208 Mo. 540; *King v. Wilson,* 98 Va. 259; *Syms v. Mayor,* 105 N. Y. 153.

The ice on the ponds created by the excavations made in removing sand is also the subject of controversy,

both parties claiming it. In this respect defendant seems to be in the wrong. The contract does not specifically mention ice, and nothing is said about compensating plaintiff for it. While the words "lease and demise" are used in the granting part of the contract in connection with the 40-acre tract of land described, the grant itself is limited by provisos, reservations and other provisions indicating that the parties meant to execute a lease for the removal of sand and gravel and for the occupancy and use necessary for that purpose. Plaintiff reserved the right to stock the waters with fish and to use and improve the premises for a pleasure resort. These reservations, in connection with the instrument as a whole, include control of both water and ice for those purposes. Defendant drew the instrument and protected himself from the reservations mentioned by forbidding unreasonable interference with his right to handle and transport sand and gravel, but inserted nothing in regard to ice. The conclusion is that he is not entitled to it. The preponderance of the oral evidence is in harmony with this interpretation of the contract.

Defendant constructed on the premises and operated a plant for the manufacture of cement products, and this enterprise is also a subject of controversy. For reasons already suggested, the use of plaintiff's land for such a purpose is not authorized by the lease. Defendant did not obtain oral permission to operate a manufacturing plant, and the evidence will not justify a finding that plaintiff's right to enjoin him from doing so is defeated by estoppel. On this issue, however, plaintiff did not prove substantial damages and is entitled to nominal damages only. On the issue as to waste in defendant's use of the premises for the purpose of removing sand and gravel, plaintiff, under the evidence, is not entitled to any relief.

The judgment is therefore reversed and the cause is remanded to the district court, with instructions to enter a decree conforming to the views herein expressed.

REVERSED.

KALMAN KAPLAN, APPELLEE v. CITY OF OMAHA, APPELLANT.

FILED DECEMBER 19, 1916. No. 19763.

1. **Appeal:** FINAL ORDER. In an action to recover damages for personal injuries, the overruling of a motion by defendant to bring in as an additional defendant another wrongdoer, alleged to be liable to the former as an indemnitor, is not a final order in the sense that it is appealable. Rev. St. 1913, sec. 8176.

2. **Trial:** NEW PARTIES. The statute providing that, "when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in," applies to cases where "there are persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined." Rev. St. 1913, sec. 7604.

3. **Action for Tort:** NEW PARTIES. In an action to recover damages for personal injuries, a wrongdoer who may be liable to defendant as an indemnitor need not be made an additional defendant under the statute providing that, "when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in." Rev. St. 1913, sec. 7604.

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

John A. Rine, for appellant.

Smyth & Schall, E. P. Smith, J. E. Von Dorn and *Sutton, McKenzie, Cox & Harris, contra.*

ROSE, J.

This is a motion by plaintiff to dismiss an appeal by defendant from an order overruling the latter's motion to bring in additional parties defendant.

Plaintiff commenced the action against the city of Omaha to recover damages for personal injuries caused by a failure to properly fill and guard an excavation for a sewer. Instead of answering, the city filed a motion to bring in its contractor and his surety as additional parties defendant, on the ground that the contractor had

agreed to indemnify the city against such a claim. The contractor resisted the motion and it was sustained, but later the order was vacated and the motion overruled. Defendant has appealed.

Is the order appealable? The statute provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment is a 'final order' which may be vacated, modified or reversed, as provided in this chapter and chapter 19." Rev. St. 1913, sec. 8176.

Is the order overruling the motion to bring in additional parties defendant an order which "in effect determines the action and prevents a judgment?" Ordinarily such a ruling does not determine the action and prevent a judgment, and therefore is not appealable. *Smith v. Scott,* 93 Wis. 453; 3 C. J. p. 477. A judgment determining the liability of the city to plaintiff may be rendered in this action, unless the contractor is an indispensable party thereto. Unless the controversy between the city and its contractor must first be determined, the order from which the appeal is taken does not in effect terminate the action and prevent a judgment either for or against the city. The city contends that it was the imperative duty of the trial court to make an order bringing in the contractor and his surety as additional defendants under the following statutory provision:

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in." Rev. St. 1913, sec. 7604.

This section is practically a copy of a provision of the New York Code and has been construed by the courts of that state. It is declaratory of a well-established equity rule. The words, "when a determination of the contro-

versy cannot be had without the presence of other parties," apply to cases where "there are persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined." *M'Mahon v. Allen,* 12 How. Pr. (N. Y) 39; *Chapman v. Forbes,* 123 N. Y. 532; *Bauer v. Dewey,* 166 N. Y. 402; *Merchants Trust Co. v. Bentel,* 10 Cal. App. 75; *Kresge v. Maryland Casualty Co.,* 154 Wis. 627.

The present action is brought to recover damages for a tort. If the negligence of the contractor in performing the work was the cause of the injury, both the city and the contractor are liable; but such a liability is both joint and several. While plaintiff might have sued the city and the contractor in the same action, it was not necessary for him to do so. He may not be concerned in the question of the city's right to indemnity from the contractor. *City of Peoria v. Simpson,* 110 Ill. 294. That question may be settled after the action by plaintiff is determined. His right to a judgment against the city does not depend upon a determination of the contractor's liability as an indemnitor. He should be allowed to proceed against the city without the presence of other parties, since he has elected to do so.

Defendant relies upon *Phœnix Mutual Life Ins. Co. v. City of Lincoln,* 87 Neb. 626. In that case there was a stipulation as to the amount of damages sustained by plaintiff, and the action was treated by the reviewing court as a friendly suit to determine who should pay them after hearing all parties interested. It should be considered in that light. No change in the rules of law governing actions against wrongdoers was intended.

The order from which defendant attempted to appeal was not appealable. The appeal is therefore

DISMISSED.

IDA MULVANEY BOSLER, APPELLEE, v. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED DECEMBER 19, 1916. No. 18662.

1. **Insurance:** FORFEITURE: VIOLATIONS OF LAWS. A provision in a certificate of membership in a fraternal beneficiary society that, if the death of a member holding such certificate shall occur in consequence of any violation or attempted violation of the laws of any state or territory or of the United States, "then the certificate shall be null and void and of no effect," is a reasonable and lawful provision.

2. ———: ———: ———. And where the holder of such a certificate, while he is in the act of committing a violent and unprovoked assault upon another, is shot and killed by the person whom he is assaulting under the conditions described in the opinion, no recovery can be had by his beneficiary upon such certificate.

3. **Evidence:** WITNESSES: INTEREST. And, in such a case, the fact that the slayer is the only eyewitness of the killing, and is the only witness who testifies to the facts leading up to the act, will not permit the jury to disregard his evidence on the ground of personal interest, when his testimony is corroborated by another disinterested, credible witness, and by facts and circumstances established at the trial.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

T. S. Allen and *Truman Plantz,* for appellant.

J. A. Brown, contra.

FAWCETT, J.

Defendant is a fraternal beneficiary society, and Lawrence Mulvaney, deceased husband of plaintiff, was at the time of his death a member in good standing. On December 6, 1908, while engaged in a controversy with one James Finley, Mulvaney was shot and instantly killed by Finley. Plaintiff, as the beneficiary named in the certificate of membership of her husband, recovered judgment in the district court for Lancaster county for the full amount thereof. Defendant appeals.

The defense interposed by the defendant society is based upon the following clause in the certificate of membership: "If the member holding this certificate shall be expelled from this society, * * * or if his death shall occur in consequence of a duel, or of any violation or attempted violation of the laws of any state or territory or of the United States, * * * then this certificate shall be null and void and of no effect, and all moneys which have been paid and all rights and benefits which may have accrued on account of this certificate shall be absolutely forfeited and this certificate become null and void." It is alleged that the death of Mulvaney occurred in consequence of a violation by him of the laws of the state of Wyoming, in that on December 6, 1908, in Natrona county, Wyoming, Mulvaney committed an assault upon Finley, and Finley, while defending himself from this assault, shot and killed Mulvaney; that the assault was in violation of the laws of the state of Wyoming. Section 4957, Rev. St. 1899, then in force, provides: "Whoever, having the present ability to do so, unlawfully attempts to commit a violent injury on the person of another, is guilty of an assault and shall be fined in any sum not exceeding fifty dollars."

The evidence shows that Mulvaney was engaged in the sheep business in Wyoming, and was grazing his sheep near the North Platte river. Finley was employed by one Josendal, a sheep raiser, to move his herder's camp from place to place and to provide provisions for the herder. In the performance of his duty, he moved Josendal's camp so as to locate it near what was called the Bryan homestead, which was also located on the Platte river, and which Josendal had leased. Finley proceeded north from Alcova for a certain distance, then turned off the main road up a draw, in which it appears Mulvaney's camp was located, and about noon pitched his camp about two miles from the river, and about a mile beyond Mulvaney's camp. His outfit consisted of a sheep wagon, a supply wagon, four draft horses and a

saddle horse. The sheep wagon was so constructed that the bed of the wagon projected over the wheels, so as to make it about six feet wide. It was covered with a canvass top, and had a window at the rear and a door in front. The door was about two feet wide and a little to the left of the center of the front. Near the front of the room thus created, and to the right as one entered, there was a stove, upon which the occupant cooked his meals. A bed was located across the rear of the room. In addition to the bed and stove, the wagon contained a few cooking utensils and provisions. The only eyewitness to the killing was Finley. He was called as a witness for defendant, and testified substantially as follows: On the day in question he pitched his camp about a mile from Mulvaney's camp. About half an hour after locating his camp, he saw Mulvaney, with whom he was well acquainted, approaching on horseback. At that time he (Finley) was in his camp wagon. He had started a fire in the stove in his wagon to melt ice and to prepare lunch for himself. When Mulvaney rode up, he saluted Finley, "How are you, Jim?" and Finley answered, "How are you, Mulvaney?" Mulvaney rode up close to the end of the tongue of the wagon in which Finley was standing, got off his horse, and then said to Finley: "Don't you think you are coming in pretty close?" The following questions and answers in Finley's examination explain what occurred: "Q. What did you say? A. I said, 'No; Josendal has a right to water at the Bryan homestead, and I could not very well get to water there, and if I set further down I was crowding you and Ed. Royce, and be in between you, and I thought if I got down here I would be out of the way.' He said, 'I am taking all I am going to do off from this outfit,' and said, 'I am going to give you the worst beating I have given anybody.' Q. What did he do? A. He took off his coat and gloves, and threw them on the ground. Q. What did he say? A. And started for the wagon. I said, 'I can't fight you, and I don't want any trouble, and I

want you to go off and let me alone.' Q. How near did he come? A. Got up on the doubletrees; they are fastened on the wagon in front. Q. What did you say? A. I pulled my gun and I said. 'Mulvaney, don't come in here or I will shoot, sure.' Q. Did you point the gun at him? A. Yes, sir. Q. What did he do then? A. He hesitated on the doubletrees a second or so, and then started into the wagon, kind of crouching down. Q. What did you do? A. I pulled the trigger. Q. How did he appear when he was coming into the wagon? A. Well, he appeared pretty mad. Q. And were you afraid of him? A. Yes, sir. Q. Why were you afraid of him? A. Well, I am not a fighting man, and I never had a fight in my life, and I knew he was able to handle me any way he wanted to. Q. And from his appearance and conduct, you knew he was mad? A. Yes, sir. Q. And did you think he intended to do you bodily harm? A. Yes, sir. Q. You did? A. Most assuredly, he intended to. * * * Q. You had known Mulvaney for some time? A. Yes, sir; two or three years. Q. Had you ever lived with him in a sheep wagon? A. Yes, sir. Q. You may state whether or not he knew your physical condition? A. Yes, sir; he must have known it. We slept together and he could see the truss. Q. After you fired the shot, what then happened to Mulvaney as you saw? A. He still kept coming. Q. Did he fall? A. He started to fall. Q. In the wagon? A. Yes, sir. Q. What did you do? A. I brushed by him, and got on my horse. Q. Then what did you do? A. I went as hard as I could to Alcova." On reaching Alcova he reported what had occurred, and requested one or two parties and also a physician to go out to the camp and ascertain the condition of Mulvaney, stating to them that he thought he had killed him. He then surrendered himself to the deputy sheriff, and told him the same story.

If this testimony of Finley is to be believed, the defense of the society was fully established. Is there anything in the record that would justify the jury in

disbelieving it? Within a day or two after the occurrence, a coroner's jury was called. The jury visited the scene of the tragedy, took the testimony of Finley and other witnesses, and held Finley blameless. It has been said in discussion that the fact that Finley was held blameles by the coroner's jury does not free him from prosecution for the killing of Mulvaney, but that he may yet be prosecuted for that act, and that he has, therefore, a great motive for fastening upon Mulvaney the blame for his own death. While it may be seriously doubted that a jury in a civil action has the right to absolutely discredit the uncontradicted testimony of a competent witness, even if it has no corroboration, we need not decide that point, for the reason that, if that were to be conceded, it would not justify the rejection of Finley's testimony in this case. His testimony is strongly corroborated by conceded facts and circumstances, and by the testimony of the witness Holden Peterson. Mr. Peterson testified that both Finley and Mulvaney were friends of his; that he remembered the time when Mulvaney was killed; that in the afternoon of the day he was killed Mulvaney came to his blacksmith shop to get something that witness had been fixing for him; that he was on horseback; that "he seemed very much excited and angry, and when I asked him about a certain sheep wagon which was in the road, and asked if it did not belong to Finley, who was working for Josendal, he said it did, and that Finley was——." He testified to the vilest kind of a name imaginable that Mulvaney applied to Finley, and, continuing, said: "And that if he saw him today he would tell him so. He was always a quick acting and moving man, and jumped on his horse and rode off in a hurry. I thought he was very angry from the way he acted. He was at my place not more than an hour before the time he was shot by Finley, according to what I learned at the inquest of the time of the shooting."

Here is positive proof as to Mulvaney's feeling toward the man whom he assaulted an hour later. What about the circumstances corroborating Finley's testimony? Finley was in his own camp. Mulvaney, whose camp was a mile at least away, appeared upon the scene. After the salutations, "How are you, Jim?" and "How are you, Mulvaney?" he alighted from his horse and opened the affray with the question above quoted, "Don't you think you are coming in pretty close?" and made the threat that he was going to give Finley the worst beating he had ever given anybody. Why did Mulvaney go from his own camp to Finley's? The reason for his going is shown in the testimony given by Mr. Peterson, who said he was "very much excited and angry." Although the land on which Mulvaney was camped was government land, he resented any imagined encroachment upon his domain by other sheep men, and decided he would put an end to it by giving Finley a beating that would cause him to move on. In addition to the fact that he is shown to have been in an angry mood, and that he had gone from his camp to the camp of Finley, we have the corroborating testimony of witnesses, to whom Finley reported the shooting, and who immediately went to the scene of the tragedy, that they found Mulvaney lying with his face down, just inside the door of Finley's wagon. This corroborates the testimony of Finley that at the time he pulled the trigger he (Finley) was at the rear end of the room, close to his bed, and that Mulvaney had entered, or was in the act of actually entering, the room, when he fired. His testimony is that he was just inside of the door of the wagon, and Mulvaney was up to the doubletrees when he first warned him "to go off and let me alone;" that, when he fired and Mulvaney fell inside of the wagon, he had to brush past him as he rushed out. It is apparent, therefore, that Finley had retreated until, figuratively speaking, his "back was against the wall." Finley's wagon was at the time his dwelling. It was his castle. He had a right to stand his ground in that castle

and defend it from all assailants, even to the extent of taking his assailant's life. But, it is said in argument, Mulvaney was not armed himself; that he undoubtedly intended to commit an assault upon Finley (he was already committing an assault, and intended to commit a severe battery) without use of weapons of any kind, and he could not apprehend that a deadly weapon would be used against him by Finley, and had no reason to believe that his death might result from his encounter with Finley. We are unable to understand how Mulvaney could not apprehend that a deadly weapon would be used against him by Finley, when Finley was standing with a gun leveled at him, telling him that, if he attempted to enter the wagon, he would shoot. Nor are we able to understand how it can be said that Mulvaney had no reason to believe that his death might result from his encounter with Finley. If he did not believe that Finley would shoot, why did he crouch down and make a rush? The argument is unsound. To hold in line with the contention above outlined would be to declare the rule in this state to be that, when a man is standing inside the threshold of his own house, and a rival in business appears upon the scene, tells him he is going to give him a severe beating, starts up the front steps for the purpose of carrying his threat into execution, the occupant of such home may not defend it, or himself, with a gun if necessary, but must engage in a personal physical encounter with his assailant in his own home. We are unwilling to establish such a rule. In *Hoover v. De Klotz*, 89 Neb. 146, 148, we held: "This court is not committed to the doctrine that a person unlawfully assaulted must fly to the wall before he may lawfully strike a blow in self-defense, but, on the contrary, we have said as a general proposition that a person unlawfully assaulted may stand his ground and repel force by the exercise of such force as to him reasonably seems necessary to protect his person or property from injury."

In addition to what has been said upon the merits of the case, there is prejudicial error in the instructions given by the court. The question for the jury to determine was: Did Mulvaney's death occur in consequence of his violation or attempted violation of the laws of the state. Prize-fighting is now a violation of the law in nearly every state in the Union. Surely, no one will claim that the holder of a certificate in defendant society could engage in a prize-fight, meet his death while so engaged, and the society be held liable because his opponent struck him a needless blow which killed him. The society in such a case would be released from liability for the member's death, by reason of his violation of the laws of the state, and not by reason of anything his antagonist may have done.

By instruction No. 8 the jury were instructed: "If a person shoots another who assaults him through mere cowardice, or under circumstances which the jury find from the evidence are not sufficient to induce a reasonable and well-grounded apprehension in the mind of an ordinarily courageous person of danger to life or great bodily harm, the law will not justify the shooting on the ground of self-defense, and in this case, if you find that under this rule Finley was not justified in shooting Mulvaney, then your verdict should be for the plaintiff."

By No. 9 the jury were instructed: "That before a person can justify the taking of the life of a human being on the ground of self-defense, he must, when attacked, employ all reasonable means within his power, consistent with his own safety, to avoid the danger and avert the necessity of killing. And if in this case the jury find from the evidence that Finley might reasonably have repelled the alleged assault of Mulvaney with his hands or feet or other weapon within his reach, less deadly than the revolver, then the shooting of Mulvaney was not justifiable as a matter of self-defense."

No. 10 reads: "Gentlemen of the jury, the court instructs you that the alleged assault by the deceased would call for a repulsion of it on the part of Finley by just such force as was necessary to overcome it, and more than that would be unlawful. And if the jury find from the evidence that the alleged assault by Mulvaney was in fact repelled by more force on the part of Finley than was actually necessary, then the killing of Mulvaney by Finley would not be justifiable, and the plaintiff would be entitled to recover the full amount of the benefit certificate."

That the defense pleaded by defendant, under the terms of its benefit certificate, is a valid defense, and that under the evidence it should have been sustained, is fully shown in *Travelers Ins. Co. v. Seaver,* 19 Wall. (U. S.) 531; *Murray v. New York Life Ins. Co.,* 96 N. Y. 614; *Bloom v. Franklin Life Ins. Co.,* 97 Ind. 478; *Gresham v. Equitable Accident Ins. Co.,* 87 Ga. 497; *Davis v. Modern Woodmen of America,* 98 Mo. App. 713; and by the numerous authorities cited in those cases.

The court also committed prejudicial error in not giving instructions 9 and 10, requested by defendant. They correctly state the law as shown by the cases above cited, and are in harmony with the evidence adduced at the trial. A case very much in point is *Woodmen of the World v. Hipp,* 147 S. W. (Tex. Civ. App.) 316.

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

REVERSED.

ROSE, J., dissents.

IN RE ESTATE OF SARAH A. GETCHELL.

FRANK G. CARRIER, APPELLEE, v. MELVIN GETCHELL, APPELLANT.

FILED DECEMBER 19, 1916. No. 18960.

1. **Domicile.** Where the owner of a home in one county sells the same, with the intention of removing to another county, reserving the right to store his furniture in one room of such house until he can arrange for such removal, and shortly thereafter goes to another county, rents a house there for the purpose of removing thereto and making it his home, immediate possession of one room in such house to be given him, and possession of the entire house to be given about six weeks later, and subsequently completes such transaction, at the time appointed, by removing his household effects from his former home to the new one, such final act of removal will relate back to the time he rented the house in the second county, and his residence and that of his wife in such second county will date from the time when he rented such house for the purpose and with the intention of removing thereto and making that his family home.

2. **Executors and Administrators:** ADMINISTRATION: JURISDICTION. And, in such a case, where the wife dies before such final act of removal takes place, and it clearly appears that the delay of a few weeks in removing from the old home to the new was not occasioned by any doubt as to the ultimate removal to the new home, but was caused solely by the illness and death of the wife, and the husband, shortly after his removal to the new home, in good faith applies for and obtains letters of administration on the estate of his deceased wife in the county court of the county to which he has removed, and such estate is in due form fully administered in such court, such administration will be sustained.

APPEAL from the district court for Cuming county: GUY T. GRAVES, JUDGE. *Reversed and dismissed.*

J. F. Boyd, for appellant.

A. M. Emley, contra.

FAWCETT, J.

Plaintiff filed in the county court of Cuming county a petition for letters of administration on the estate of

Sarah A. Getchell, deceased. Defendant, the surviving husband of decedent, resisted the application on the ground that her estate had already been fully administered in Antelope county. His objections were overruled, and an appeal was taken to the district court, where he was again unsuccessful.

The only question involved in the case is: Was Mrs. Getchell, at the time of her death, a resident of Antelope or Cuming county? The evidence is undisputed. It shows that some time in 1906 the defendant and his wife removed from Neligh, in Antelope county, to Wisner, in Cuming county, where a home was purchased, in which they resided until about January 4, 1910, at which time they sold the property and gave possession of the same to the purchaser, except as to one room in which they stored their furniture, under an arrangement that they might keep it there until they decided upon a new location. They then went to reside, temporarily, with a daughter in Wisner. Some time during the same month defendant went to Neligh, in Antelope county, and while there rented a house for the purpose of removing to that city. At the time he rented the house it was occupied by another tenant whose tenancy would not expire until March 1. He made arrangements with this tenant for immediate possession of one room, in which to store the furniture which he then had stored in his old home in Wisner, until he should receive possession of the entire house on the date named. While defendant was at Neligh, or immediately upon his return to Wisner, Mrs. Getchell was taken ill, and on February 14 she died. On March 1 defendant obtained possession of the house in Neligh, which he had rented in January, and moved his furniture from Wisner thereto. In April he applied to the county court of Antelope county for letters of administration on his wife's estate. His petition was granted, and by subsequent proceedings, the regularity of all of which is not disputed, the estate was fully settled and the administrator discharged.

We think the evidence shows that when defendant sold his home in Wisner he did so for the purpose and with the intention of removing from Cuming county, and that when he rented the house in Neligh it was with the intention of making that his home. In accordance with that intention he arranged for the immediate possession of one of the rooms, and for possession of the entire house on March 1. He subsequently carried that intention into effect by moving into the house he had rented in Neligh, at the appointed time. He thereby changed his residence from Wisner, in Cuming county, to Neligh, in Antelope county. The final act of removing his furniture from Cuming to Antelope county was simply one of the parts of a single transaction. It completed the intended removal, and related back to the time when he rented the home in Neligh, with the intention of removing thereto. That in making this arrangement for the transfer of his residence he was acting for himself and the decedent is clear. That he acted in good faith in administering the estate in Antelope county is also clear. In the light of these facts, the county court of Antelope county was the proper court in which to administer the estate of his deceased wife. The fact that, on account of her illness, he did not immediately remove the furniture from the room in which it was stored in Cuming county to the room in his new home which he had rented in Antelope county is immaterial, as it clearly appears from the evidence that this delay was not occasioned by any doubt as to the ultimate removal to Neligh, but was caused solely by his wife's illness.

The judgment of the district court is reversed and the petition for letters of administration in Cuming county dismissed.

REVERSED AND DISMISSED.

LETTON and ROSE, JJ., not sitting.

SEDGWICK, J., concurring.

Some weeks before the death of his wife, Melvin Getchell sold the house where they were living in Cuming county, and himself and wife gave possession thereof to the purchaser, reserving one room in which they stored their furniture. He then went to Neligh, in Antelope county, and rented a house of which he could not get complete possession for a few weeks, but took possession of a room therein. While these negotiations were pending, and on the 14th day of February, Mrs. Getchell died in Cuming county. A few days later Mr. Getchell removed his furniture to the house he had rented in Neligh and continued to reside in that county. These circumstances, as appears from the opinion and the dissenting opinion, presented a nice question of law as to at what point of time Mr. Getchell changed his residence from Cuming county to Antelope county. He might well have been in doubt as to which was the proper county in which to settle the estate of Mrs. Getchell. He concluded that he should apply for settlement of the estate in Antelope county where he was living. All parties interested might well have taken notice that this would probably be his conclusion. No objection was made, and the estate was duly settled by the court of that county. Four years later application was made by a son of Mrs. Getchell to the court of Cuming county to settle Mrs. Getchell's estate, ignoring the proceedings in Antelope county. Over the objections of Mr. Getchell, that court proceeded with the matter, and, upon appeal to the district court of that county, the action of the probate court was sustained.

Of course, the jurisdiction of the probate court of Antelope county depended upon the legal residence of Mrs. Getchell being in that county, and that depended upon the question of fact as to whether Mr. Getchell had changed his legal residence before the death of Mrs. Getchell. This question was necessarily submitted to the county court of Antelope county, and that court found the fact to be that Mr. Getchell had changed his residence to that county before Mrs. Getchell's death.

The son might anticipate that some action would be taken to settle the estate within four years after Mrs. Getchell's decease. The facts determining jurisdiction must have been litigated in that proceeding. After allowing the expense of the first proceeding to be incurred, and waiting for four years, the son should not now, in this collateral way, be allowed to retry the facts upon which jurisdiction depends. I concur in reversing the judgment of the district court.

MORRISSEY, C. J., dissenting.

Melvin Getchell and his wife had been residents of Cuming county for a number of years. February 14, 1910, Mrs. Getchell died in that county. Getchell, the husband, claims that in January preceding the death of his wife he went to the city of Neligh, in Antelope county, and leased a house which was then occupied by another family. He says he was unable to secure possession at once, but that an arrangement was made whereby he might ship his furniture and store it in a couple of rooms in this house, but he admits that the furniture was not shipped, and that he did nothing further than this toward establishing a residence in Antelope county until after the death of his wife. At the time of her death the furniture was still in Cuming county. Getchell took out letters of administration in Antelope county, alleging that his wife died a citizen of that county. Later, one of her heirs applied for letters in Cuming county. These letters were granted over Getchell's objections, and he took an appeal to the district court. His objections were overruled, and he brings the case here.

The majority opinion reverses the judgment of the district court, and, in effect, holds that, although Mrs. Getchell had done nothing during her lifetime to transfer her residence from Cuming county to Antelope county, the mere intention on the part of the husband to change the family residence is sufficient to change the residence of the wife. Under such a holding a married woman may

never know the place of her domicile. Being unable to know what her husband has in mind, she will be unable to say that he has not formed the intention to remove the family to some distant place. It seems to me that the judgment of the district court is clearly right. This woman had no residence in Antelope county, could not have been found there, was not there, died before her husband went there to live, and the judgment of the district court ought to be affirmed.

HOWARD WISEMAN, APPELLEE, v. CARTER WHITE LEAD COMPANY, APPELLANT.

FILED DECEMBER 19, 1916. No. 19039.

1. **Master and Servant:** DANGEROUS EMPLOYMENT: DUTY OF MASTER. Where a master employs a servant to work in a room in which the air is impregnated with poisonous dust and fumes, which, when inhaled, are liable to result in permanent or serious impairment of health, it is the duty of the master to fully caution the servant as to such danger and advise him as to the serious consequences that may result therefrom; and this duty is not fully performed by merely furnishing the servant an appliance to be worn over the mouth and nose for the purpose of preventing or minimizing such danger, without instruction as to the danger of failure to constantly wear the same. Nor will the master be excused from the performance of such duty by the fact that the servant may have some degree of knowledge of the dangerous character of the employment, but does not understand or fully appreciate its nature or extent, or the serious consequences liable to result therefrom.
2. **Evidence** referred to in the opinion examined, and *held* sufficient to sustain the verdict.
3. **Instructions** referred to in the opinion examined, and *held* free from error.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Montgomery, Hall & Young, for appellant.

Gurley & Fitch, contra.

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, in an action for personal injuries, defendant appeals.

The petition alleges that plaintiff commenced work as a laborer in defendant's plant at East Omaha, June 24, 1913; that, in the process of manufacturing white lead, poisonous dust permeates the air, making work dangerous for those working therein, but plaintiff was not aware of such danger, and was not informed thereof by defendant; that plaintiff was poisoned by the lead fumes, and contracted plumbism, which caused him to become permanently sick, and to suffer pains incapacitating him for work, all to his damage in the sum of $10,000. The answer denies all allegations in the petition, and alleges that, if plaintiff suffered injuries from his work, the same were caused by his failure to exercise ordinary care for his own safety, his failure to properly wear and use the appliances furnished by defendant to prevent the inhalation of poisonous dust and fumes, and in failing to observe the instructions and rules of the defendant for the safeguarding of his health, and that his injuries, if any, are and were owing to his own carelessness and negligence; that plaintiff was informed of all dangers and risks of the work, and that these were obvious and known to him; that he therefore assumed all risk while engaged in the work; that the appliances furnished him were those in general use in lead factories, and were fit and proper to conserve his health if he had exercised due care for his own safety. The reply was a general denial. The jury returned a verdict in favor of plaintiff for $2,500, upon which judgment was entered.

The errors assigned are: (1) That the court erred in refusing at the close of the evidence to direct a verdict for the defendant, as such evidence shows that plaintiff assumed all risk of injury from lead poisoning while working in defendant's factory; (2) that the court

erred in giving instruction No. 4; and (3) that the court erred in its assumption in instruction No. 2 that there was any evidence whatever "that the defendant had knowledge or notice that the plaintiff was inexperienced in such work and did not know and appreciate the dangers thereof, if such dangers existed."

1. The evidence shows that plaintiff had formerly worked on a farm. On leaving the farm he obtained employment in the city of Omaha as a teamster. Later he obtained employment with the defendant. His first work was unloading coal for the company in the company yards. He then worked at handling pig lead bars, and a few days later was set to work in the blow room of the factory, firing a kettle where lead was boiled and blown. In this room the air was at all times more or less poisoned with lead fumes and dust. As to his employment in the blow room, he testified, substantially, that one of the men employed in that room quit work, and that in a conversation with the foreman who hired him "he asked me if I could handle that upstairs. I told him I didn't know; I never tried it; knew nothing of it. He says, 'You go up there in the morning. Go up this evening and put in the shingle so the night man' would build me a fire for the next day." He says he went up and put in the shingle as directed, and the next morning went to work in the blow room. When asked to describe the apparatus with which he worked, he answered: "A. Well, it is a kettle. The lead comes up on the carrier and is dumped into the kettle, and we have got to keep it so hot—the difference in the lead; some you will keep 700 degrees, and as high as 900, 950. You have a thermometer to go by. * * * Q. Describe the apparatus you call kettle a little more fully. A. Well, it is a large kettle. I don't know just what size it is. It stands up on a—well, kind of a foundation, and there is a nozzle in it goes into the tank, when the lead is hot it goes out that. You have a plug. You plug that up when you stop,

and when you pull the plug it goes out in there. It is blowed with 100 pounds by something. It is blowed into the tank, and you have three steps, a stairway of three steps you get up on to skim the dross off the kettle. You have got to keep the dross skimmed from the kettle." He testified that the kettle stands "better than waist high when you are on the floor by it there." He further testified that, before going to work in the blow room, he did not know anything about the disease called "plumbism" or lead poisoning, and that no one at the plant said anything to him, before he went at that work, about such a disease; that no one said anything to him about any danger connected with the work or contracting the poison. This testimony is controverted by the testimony of the foreman. The evidence further shows that the men engaged in that work were furnished with respirators, or "muzzles" as some of the witnesses called them. This appliance was worn over the mouth as a protection, defendant insists, against the inhalation of lead dust. Plaintiff testified that he knew it was dusty and dirty in the blow room, but did not think there was any danger from breathing the lead dust. There is some evidence that on two or three occasions he was seen without the respirator on, and was warned to put it on. His testimony is that he wore it at all times except when he went to a window for fresh air. These were all questions for the jury. Without recounting the testimony further, we cannot say that the trial court erred in holding it sufficient to warrant the jury in finding that plaintiff was set to work in the blow room under these dangerous conditions without sufficient warning or instruction from the defendant as to the latent danger incident to his employment, viz., the danger of lead dust or fumes causing the very serious disease which he subsequently contracted.

2. The complaint of instruction No. 4, covered by the second assignment, is that there was no evidence

that defendant knew plaintiff to be inexperienced in such work, and that it was error to give an instruction which implies that there is evidence from which the jury may find a fact of which there is no evidence before them. We think the evidence which we have outlined under the first assignment, as to what plaintiff said to the foreman when he was told to commence work in the blow room, is a sufficient answer to this complaint of instruction No. 4. In the light of that testimony, we do not think it can be held that "there was no evidence that defendant knew plaintiff to be inexperienced in such work."

3. The complaint under the third assignment is that the court erred in its assumption in instruction No. 2 that there was any evidence "that the defendant had knowledge or notice that the plaintiff was inexperienced in such work and did not know and appreciate the dangers thereof, if such dangers existed." Regardless of whether or not this would constitute a defense, it involves the consideration of conflicting evidence, which we feel constrained to hold is disposed of by the finding of the jury. It must be conceded that plaintiff knew that the conditions existing in the blow room were unusual. The fact that the men were wearing respirators, and that he also wore one, was sufficient to advise him of that fact, but, if his testimony is to be believed, he did not thereby know or realize that the inhalation of the lead fumes or dust would render him liable to contract the serious disease with which he was subsequently afflicted, and which the evidence shows he was liable to contract if he did not make a proper use of the appliances furnished. Under the authorities cited by appellee, plaintiff was not required to show entire ignorance of the danger to which he was exposed. He was entitled to a verdict and judgment if he satisfied the jury that he had some degree of knowledge of the dangerous character of the employment, but did not understand or appreciate its full nature or

extent. As said by the supreme court of California, in *Pigeon v. Fuller,* 156 Cal. 691: "He may, for example, have observed that the melted pig lead gave off fumes, and that dust arose from the white lead in the process of manufacture, and that this involved the possibility of some degree of discomfort or injury, without realizing or understanding that the very serious disorders from which he claims to be suffering were a probable consequence. In the face of appellant's contention, strongly urged even on appeal, that there is no danger in the employment in question, it can hardly be claimed that the plaintiff must, as matter of law, be held to have known that the inhalation of the fumes and dust had a tendency to produce lead poisoning, with its accompaniment of loss of teeth, paralysis and derangement of the digestive organs. This is not a fact of universal knowledge, nor was it necessarily apparent to one employed, even for a long time, in defendant's works. The risks assumed by a servant are only the ordinary risks of the employment. He does not assume the risk of hidden dangers which are, to the knowledge of the master, not apparent to him. (Citing cases.) There was ample evidence to warrant a finding that plaintiff, by reason of his prior experience, knew that some risk attached to work in a white-lead factory, but that, until he was suddenly stricken down, he had no conception of the real character or extent of the danger which he incurred." This discussion by the California court so aptly fits the case under consideration here that we deem further discussion unnecessary.

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

AFFIRMED.

MARTHA VAN DORN, APPELLEE, v. WILLARD KIMBALL, APPELLANT.

FILED DECEMBER 19, 1916. No. 18837.

1. **False Imprisonment:** BELIEF IN GUILT: QUESTION FOR JURY. In an action for false imprisonment, if it appears that the defendant was instrumental in causing the arrest of the plaintiff upon a charge of felony, and that the plaintiff was not in fact guilty of the offense charged, it becomes an important question to be submitted to the jury, if the evidence is conflicting, whether the defendant had sufficient reason to believe and did believe that the plaintiff was guilty.

2. ———: RESPONSIBILITY FOR ARREST: QUESTION FOR JURY. In such case, if the officer who made the arrest in the presence of the defendant made a personal investigation of the fact as to plaintiff's guilt, and then communicated with his superiors before making the arrest, and the evidence is conflicting as to whether the arrest was made wholly upon the officer's responsibility or was caused by the defendant, it is proper to submit that question to the jury with proper instructions.

3. ———: DAMAGES: QUESTION FOR JURY. In such case, the question of the effect of such arrest upon the health or bodily condition of the person arrested is for the jury upon conflicting evidence, and their finding will not be disturbed upon appeal, except so far as the damages allowed, or some part thereof, are clearly unsupported by the evidence.

4. ———: ———: EVIDENCE: HYPOTHETICAL QUESTIONS. The fact that the arrest *might* cause the injury to plaintiff's health complained of is not conclusive that it did so; but it is important to know whether the arrest and the mental strain and worry caused thereby could under ordinary circumstances occasion the troubles which the plaintiff afterwards suffered, if there was other competent evidence tending to prove that, as a matter of fact, the physical troubles of the plaintiff were caused by the arrest and its accompanying circumstances. The use of the word "might" in a hypothetical question to a medical expert is not to be approved; but it would not of itself be considered so prejudicial as to require a reversal.

5. **Trial:** REFUSAL OF INSTRUCTION. The judgment of the trial court will not be reversed because of refusing a requested instruction which assumes the existence of a material fact upon which the evidence is conflicting.

6. ———: INSTRUCTIONS: NECESSITY OF REQUEST. Nor because it appers that a more detailed instruction might have been given upon the question of the responsibility of the defendant for some of the matters complained of, when no further instruction was requested by the defendant which would have been suitable under the circumstances.

7. **Instructions** complained of are found not to be so inconsistent as to require a reversal.

8. **Evidence:** HYPOTHETICAL QUESTIONS. If the evidence is conflicting as to a material matter, the hypothetical question asked the expert witness is not objectional because it recites such matter as a basis for his opinion. It is for the jury to determine whether such an hypothesis is warranted by the evidence.

9. **Trial:** DAMAGES: PREJUDICE. The fact that the jury errs in its judgment of the amount of plaintiff's damages is not such conclusive evidence of prejudice as to admit of no other conclusion.

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

Burkett, Wilson & Brown and *Ralph P. Wilson,* for appellant.

Claude S. Wilson and *Homer L. Kyle, contra.*

SEDGWICK, J.

The defendant complained to the police officers that this plaintiff had in her possession some property in which the defendant was interested, and a policeman was sent with the defendant to search for the property. They went to the house where the plaintiff was living, and there found some property that did not belong to the plaintiff and in which the defendant was interested, and the police officer required the plaintiff to accompany him to the station, which she did, and remained there for some time, and was allowed to go upon her promise to return the next morning. She returned the next morning, and after some examination was allowed to go home, with the statement by the officer that she need not return until she was called for. She began this action in the district court for Lancaster

county against the defendant to recover damages for an alleged false arrest. On the trial the jury found a verdict in her favor for $10,000 damages. The trial court required her to remit one-half thereof, which she did, and judgment was entered in her favor for $5,000, from which the defendant has appealed.

The plaintiff was conducting a rooming house, called in the record the "Q street house," and was or had been interested in another rooming house called the "R street house," which was under the direct management of a Miss Shockey. In this house the bed linen and some of the furniture and other articles were the property of Miss Shockey and were also leased by the defendant. Miss Shockey informed the defendant that some of her property in the R street house, consisting mostly of bed furnishings, had disappeared, and that she believed the plaintiff had taken them and had them in her Q street house where she lived. Upon this information, and perhaps other facts within his knowledge, the defendant complained to the police officers. The officers testified that the defendant suggested that the plaintiff should be arrested, and that they informed the defendant that they would not arrest the plaintiff upon the information given them by the defendant without a complaint and warrant. The officers suggested that they would send a policeman with the defendant and, unless the plaintiff objected to their searching her house, they might make such search for the missing articles. Thereupon the next day a policeman, Mr. Sides, was sent to the defendant's place of business, and he and defendant, taking with them Miss Shockey to identify the articles if found, went to the plaintiff's residence, and, she making no objection, they made a search of the house and found a considerable quantity of bed linen and other articles which they identified, and were conceded by the plaintiff, to be the property of Miss Shockey, in which the defendant was interested. The value of these articles so identified is variously estimated by

the defendant's witnesses at from $50 to $100. According to the plaintiff's evidence, the value is very much less. The plaintiff, through some contract between herself and the defendant, was or had been interested in the management of the R street rooming house, and the employees of the laundry where the washing for these two rooming houses was done testified that they supposed that the furnishings for both houses belonged to the plaintiff, and that it was immaterial to which house they were returned, and that articles were frequently received by them from one of the houses and returned to the other house. The plaintiff testified that she did not have the immediate care of the rooms and bedding in her house, that she had a housekeeper and help to attend to these matters, and that she was not aware that the articles had been so exchanged; and the evidence shows that at least some of the articles of the plaintiff, that were taken from the house that she occupied, were found immediately after she was arrested in the R street house where Miss Shockey resided.

The evidence wholly fails to prove that the plaintiff had committed any crime requiring her arrest and punishment. In this condition of the evidence, some of the important questions for the jury were whether the defendant, when he complained to the police officers, had sufficient reason to believe and did believe that the property belonging to Miss Shockey, in which he was interested, had been purposely taken by the plaintiff into her possession with the intention to feloniously convert it to the plaintiff's own use, and whether, acting upon that belief, he went to the plaintiff's residence with the police officer for the purpose of ascertaining the facts.

The defendant first appealed to the chief of police and requested that the plaintiff be arrested for the offense which he appears to have stated that she had committed. The police officer refused to arrest the plaintiff without a complaint and warrant, and the de-

fendant declined to make a complaint. Afterwards the chief of police decided to send an officer with the defendant to make investigations, and the officer, with the help of the defendant and Miss Shockey, made investigation, and thereupon the police officer called up the police headquarters by telephone, and after this conversation over the telephone the officer announced that the plaintiff would be arrested. One of the important questions of the case was whether the officer determined upon this arrest from what he had himself observed and instructions from headquarters independently of any wrongful act on the part of the defendant, or whether the arrest was brought about by the unjustified statements of the defendant. The evidence is not conclusive upon this point, but is of such a nature as to require it to be submitted to the jury.

There is some language in the petition that might lead one to think that the plaintiff was seeking to recover for slander for false statements made in regard to her character, but that question was entirely eliminated by the court. The case was submitted to the jury entirely upon the theory that the action was for unlawful arrest and imprisonment, and the jury by instruction were not allowed to consider any damages except those resulting directly from the arrest and imprisonment.

The defendant insists that the court erred in allowing answers to a hypothetical question. Dr. Walker had testified to the physical condition of the plaintiff, showing that the plaintiff had suffered considerably physically, and was then asked this question: "Assuming that prior to June 12 of that same year, five days prior to your examination of her, Mrs. Van Dorn was a strong, well woman, and assuming between the 12th day of June of that year and the 17th day, when you examined her, that she had undergone a severe mental strain by being arrested and confined in the police station of the city, state whether or not, under those conditions of mental worry

and strain, that *might* be the controlling feature of this trouble?" The defendant objected to this question principally on the ground that it was too indefinite; that it recites that the plaintiff "suffered a severe mental strain." The question was amended on the suggestion of the court by adding, "That she was confined in the police station, although not placed in a cell and not taken in the patrol wagon, but by an officer accompanying her through the streets of the city of Lincoln," and "I will also add, no handcuffs being placed on the prisoner, nor her body not touched except by the officer who assisted her at times when she appeared weak and needing his assistance," and "now, assuming this state of facts, what in your opinion, or what would you say in your opinion whether that might be the controlling features that caused the condition in which you found her on the 17th day of June, 1912?" The objection to the question was overruled, and the witness answered, "Well, it might."

The principal objection to this question discussed in the brief is that it required the witness to answer whether the arrest complained of might have caused the physical condition which the witness saw. Of course, the fact that the arrest *might* have caused that condition would not be at all conclusive. The question for the jury is whether it in fact did cause it; but it is important to know whether the arrest and the mental strain and worry caused thereby could under ordinary circumstances occasion the troubles which the plaintiff afterwards suffered, if there was other competent evidence tending to prove that as a matter of fact the physical troubles of the plaintiff were caused by the arrest and its accompanying circumstances. The form of the question in this respect is not to be approved, but it would not ordinarily of itself be considered necessarily so prejudicial as to require a reversal.

The defendant assumes that the only evidence in the record tending to show that the plaintiff's condition

as found by the physician was the result of the arrest was this evidence of Dr. Walker's that such arrest might have caused the condition. Of course, as already observed, such evidence of itself would not be sufficient; but it appears from the evidence of the police officer and others there, without contradiction, that, when the officer first informed the plaintiff that she would have to go to the police station, the plaintiff fainted and fell to the floor and remained unconscious for several minutes. The evidence also shows that before the arrest the plaintiff uniformly enjoyed good health, and that from the time of the arrest for several weeks she was in the condition described by the physician. While the evidence is not conclusive that this condition of the plaintiff was caused by the arrest, it was sufficient to require that question to be submitted to the jury.

The defendant complains of various instructions given by the court, and also of the refusal to give instructions requested by the defendant. The court instructed the jury: "If you should find from the evidence and under these instructions that the defendant did cause the arrest of the plaintiff, he would be liable for only such damages as resulted directly from such arrest, and would not be liable for damages that were not the usual or ordinary result of such an arrest, nor for such damages as could not have been anticipated by the defendant." There was some evidence tending to show that the plaintiff, after she was arrested, stated that she would have to change her clothes before she went with the officer, and that she was not allowed to go into another room to change her clothes, but was compelled to do so in the presence of the officer and others. This evidence was contradicted by several witnesses. The defendant insists that he was not present when this took place and had nothing whatever to do with that transaction, and that the court did not fully present this question to the jury in the instruction above quoted, and that the court erred in refusing to give the instruction upon that

point requested by the defendant, which was as follows: "You are instructed that, even though you should find from the evidence that the defendant requested the officers to arrest the plaintiff, this would not make the defendant liable for any acts done or indignities offered the plaintiff by the policeman after the arrest took place; there being no evidence that he either directed, requested, or ratified such alleged indignities." The requested instruction would tell the jury that there was "no evidence that he either directed, requested, or ratified such alleged indignities." The great preponderance of the evidence is that the defendant was not present when the plaintiff changed her clothing, and that he was not in any way connected with that transaction, and, if that was the only indignity offered to the plaintiff, the instruction requested by the defendant would no doubt have been given. There is, however, evidence of other indignities offered the plaintiff, and this evidence is strongly supported by the testimony of the police officer. The defendant accused the plaintiff of stealing, not only the articles for which they were searching, but other articles, such as a basket and bedstead, and enforced his charges with violent gestures toward the plaintiff. It would not have been proper for the court to have told the jury, under the evidence in this case, that the defendant did not direct, request, or ratify any indignities offered to the plaintiff. The court told the jury that the defendant "would be liable for only such damages as resulted directly from such arrest, and would not be liable for damages that were not the usual or ordinary result of such an arrest." The case is a difficult one and pre-eminently in its facts is a case for the consideration of the jury.

A large volume of evidence was taken, and many questions of law and practice were raised and determined by the court. The instructions were comprehensive, were clear and apparently fair, and in the main disposed of the many legal questions in the case in a

satisfactory manner. Perhaps a more detailed instruction might have been given upon the question of the responsibility of the defendant for some of the matters complained of, but no further instruction was requested by the defendant which would have been suitable under the circumstances.

The defendant complains that two of the instructions given by the court were inconsistent. In one of these instructions the court said: "When a person in good faith, acting as a reasonable and cautious man under the circumstances, upon information which he has received, believes that property of his own or of another in which he is interested has been stolen, he has a right to inform the police of the fact, and of his belief so formed, and, if in doing so he acts without any malice or sinister motives, he is not responsible for any arrest which may follow made by the police authorities acting upon their own volition, although based in whole or in part upon the information that he may have given such police authorities." It is conceded that this is a proper instruction, but the court also told the jury: "If the plaintiff was innocent of the theft charged against her, she should not have been arrested and detained, as shown by the evidence." This last instruction might have been made more explicit, but we cannot see that it is inconsistent with the other instructions. It will not be denied that, as an abstract proposition, an innocent person should not be arrested, and that statement is not inconsistent with the statement that, although the plaintiff was improperly arrested, the defendant would not be liable for such an arrest under the conditions recited in the former instruction.

The defendant also complains that, in submitting to the jury as to whether the defendant had a reasonable or probable cause to believe that a crime had been committed, the court refused proper instructions tendered by the defendant. It is insisted that, as probable cause is a question of law and fact, the court should have

fully told the jury specifically what facts would constitute probable cause, and the failure to do so, and at the same time refusing instructions requested by the defendant, was prejudicial error. In this connection it is complained that the hypothetical question asked the physician assumed that the plaintiff had undergone a severe mental strain, and the defendant insists that that fact nowhere appears in the record. We cannot agree with the defendant upon that point. If the jury found that the plaintiff, when she was informed of her arrest, fainted and fell to the floor, that fact and others appearing in the record might have justified the jury in deciding that the plaintiff had undergone severe mental strain. The plaintiff objected to riding in the patrol wagon and was not compelled to do so. She walked with the police officer three or four blocks to the police station, and was not confined in a cell, but remained in a waiting room. She was allowed to go home, and was required to return to the police station the next day, which she did, and after an hour or two was allowed to go until called for. It is said in the brief: "Such an experience might, in some persons, cause a great mental strain; in others, it certainly would have no such effect, and the court cannot assume, without any evidence whatever, that the plaintiff belongs to one class or to the other." Of course, it is not a trifling matter to arrest a woman of good character upon a charge of grand larceny and restrain her for hours where criminals congregate. From the evidence above quoted the jury might find that it quite seriously affected the plaintiff.

It is insisted that the fact that the jury upon this evidence returned a verdict for $10,000 damages is of itself enough to show that the jury generally was ruled by passion and prejudice. The trial court found that the damages were exaggerated by the jury and required the plaintiff to remit one-half of the verdict, and this, it is said, shows that the trial court considered

that the jury acted from prejudice. The task of estimating damages in such a case is a difficult one. There is no exact rule by which damages can be computed. Different minds might come to different conclusions. The theory of the law is that ordinarily a jury is more competent than the court to estimate such damages. When it is clear that the damages allowed by the jury cannot be supported by the evidence, the court will require a remittitur. The fact that a juror errs in his judgment is not such conclusive evidence of prejudice as to admit of no other conclusion.

The brief is a thorough discussion of the case and suggests some other minor points of objection to the judgment, but we think they are not of such a nature as to require an extensive discussion, in view of the unusual length of this opinion. Some of the questions presented are not free from difficulty; but, on the whole, we cannot say that there is any such prejudicial error in this record as to require a reversal, except in the amount of the verdict.

The principal allegations of indignities and ill treatment which the defendant caused the plaintiff to suffer are not supported by the evidence. The jury must have been misled in considering these allegations which led to a verdict for a larger amount than the evidence will warrant. The evidence will not justify a verdict for more than $3,000.

The judgment of the district court is therefore reversed, unless the plaintiff enter a remittitur for $2,000 from the judgment. If such remittitur is entered within 30 days, the judgment will be

AFFIRMED.

WILLIAM E. WALLACE, APPELLANT, V. A. W. COX ET AL., APPELLEES.

FILED DECEMBER 19, 1916. No. 18944.

1. **Replevin:** JUDGMENT. Section 7833, Rev. St. 1913, provides that, when the finding is for the defendant in an action of replevin, the judgment shall be "for a return of the property or the value thereof in case a return cannot be had." The "value thereof" is instead of a return of the property when a return cannot be had, and should be the equivalent of the property itself as it was at the time of the trial.
2. ———: **Appeal:** BOND: DAMAGES. If, upon appeal to this court, such judgment is affirmed, and the property is returned to the defendant pursuant to such judgment, in an action upon the appeal bond the plaintiff cannot recover damages occurring prior to the original judgment.

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

L. H. Blackledge, for appellant.

Bernard McNeny, contra.

SEDGWICK, J.

This action is upon a replevin bond. It was once before in this court, and in the first opinion the judgment of the district court was affirmed. 92 Neb. 354. Afterwards, upon rehearing, it was reversed and the cause remanded. 94 Neb. 194. There has since been a trial in the district court and the case is again appealed.

In this last trial the court instructed the jury to find for the plaintiff the amount that the jury in the first trial found as damages, together with the costs of the first trial, and then instructed the jury that the only question for them to determine was whether the property in question was damaged after the trial in the original replevin suit, and the amount of such damage. The plaintiff asked the court to instruct the jury that they should find all damages which "occurred while the property was in the possession of the Clark Imple-

ment Company or its agents from the time it was taken in the replevin suit * * * to the time of the offered return" of the property. The court in several different instructions made it plain to the jury that they should not allow any damages to the property in this suit upon the bond, which damages occurred before the trial of the replevin suit. This was upon the theory that the defendants in replevin must upon the trial recover any damages that have occurred to the property up to that time, and this is the principal, if not the only substantial, question that is presented in this record. The statute provides that, when the finding is for the defendant, the judgment shall be "for a return of the property or the value thereof in case a return cannot be had." Rev. St. 1913, sec. 7833. The "value thereof" is instead of a return of the property when a return cannot be had, and should be the equivalent of the property itself as it was at the time of the trial, that is, should be its value at the time of the trial, and, if it has been decreased in value by the action of the plaintiff in replevying it, such loss of value would be damages which should be included in the judgment in favor of the defendant in replevin. The New York court has so decided under a similar statute; that is, the New York court construes the statute to mean that the value thereof which is to be recovered in case the property cannot be returned is the value at the time the property should be returned, that is, at the time the judgment is entered. The contention of the plaintiff in this case now is that he ought to be allowed to prove that as a matter of fact the jury did not take into consideration any damages to the property in their verdict in the original replevin suit.

The trial court on this last trial has followed the decision of this court upon the former appeal, and the judgment is therefore

AFFIRMED.

LETTON, J., dissents.

HAMER, J., dissenting.

I am unable to agree with the majority opinion. William F. Wallace, the defendant in the replevin suit and the plaintiff in this case, testified that there was taken from him a threshing machine. It was a 10-horse Russell engine, separator, blower, feeder, driving belt, water tank—a threshing machine outfit. It was returned to his shed, and he testified that he refused to receive it; also that the property was in bad condition; that the cylinder was pitted where it had been run without oil and burned; that the driving wheels were broken; that the canopy top was torn; that the cylinder guides were all cut; that the axle on the water tank was broken; that the grain pan was warped, and where there was a strip of tin to separate the grain it had come loose, and nails had been driven in the separator along the side; that the driving belt was worn out and the other belts were badly worn; that the engine was not getting enough oil; that the man who was running it said that he tried to pump oil into it, but the cylinders were so worn that it would not take any effect; that they started about 9 or 10 o'clock in the morning to go 2¾ miles, and it took until after 2 o'clock in the afternoon to go that distance; that it took a big tank of water and eight tanks besides to run the machine to town; that the property was not worth over $700; also that he offered to prove that he had had no access to the machine and engine, and that there was no opportunity to examine it from the time it was taken from him until it was offered back; that he did not know its actual condition till that time; that he offered to prove by a witness on the stand that the difference in the value of the outfit in controversy in the replevin suit from the time it was taken from him until it was offered back to him was $1,200; that between the time when it was taken from him under the replevin proceedings and the time when it was offered back it was kept in the possession of the Clark Implement Company

and its agent, Eli H. Cox, and away from him, and without his having any access or means of access to it, or any knowledge or means of knowledge of its condition, and that the actual condition at the time it was tendered back was not known to him, and that the condition at the time of the trial of the replevin suit could not be ascertained by him; that the said Clark Implement Company and its agent, Cox, concealed the fact of the damage and injuries from him, so that he did not know the same. This is the third time this case has been before this court.

The action is one brought upon a replevin bond by the successful defendant in a replevin suit. The machine, when returned, was in so badly a damaged condition as to give the defendant in the case the option of rejecting it and suing for its value on the bond. Upon the trial of the replevin suit the jury found that the defendant (plaintiff herein) was the owner and entitled to the possession of the property, and that, at the time the property was taken under the writ, its value was $2,000, and that defendant had sustained damages by the wrongful taking and using of said property in the sum of $404.50, and costs $121.60. Upon the trial of the action on the replevin bond, there was a verdict and judgment for the plaintiff in that case for $2,686.33. The judgment was first affirmed (92 Neb. 354) upon condition that plaintiff remit from the judgment the sum of $404.-50. The badly damaged condition of the property controlled the views of the majority. It was said: "Our statute does not provide that the property shall be returned in the same condition as when taken, as in some states, but the holding is practically uniform that such a statute is not necessary, as we have in effect held. Some of the authorities containing these views we here cite, but without quoting from any." The citations are: "*Eickhoff v. Eikenbary,* 52 Neb. 332; *Berry v. Hoeffner,* 56 Me. 170; *Parker v. Simonds,* 8 Met. (Mass.) 205; *Capital Lumbering Co. v. Learned,* 36 Or. 544; *Childs*

v. Wilkinson, 15 Tex. Civ. App. 687; *Fair v. Citizens State Bank,* 69 Kan. 353; *Douglass v. Douglass,* 21 Wall. (U. S.) 98; *Pittsburgh Nat. Bank of Commerce v. Hall,* 107 Pa. St. 583; 34 Cyc. 1551, 1552; Cobbey, Replevin (2d ed.) sec. 1182; Wells, Replevin (2d ed.) sec. 422; Shinn, Replevin, sec. 679"—which we have examined.

It was then said that the judgment of the district court would be reversed and the cause remanded, unless the plaintiff within 60 days from the rendition of the order remitted from the judgment $404.50 as of the date of the judgment: "If such remittitur is filed, the judgment of the district court for the sum of $2,121.60, with interest at 7 per cent. on $2,000 from the 19th day of July, 1909, will be affirmed, but at the costs of the appellee."

Judge Sedgwick dissented from the above opinion, and he claimed in his dissent that the plaintiff was not justified in refusing to accept the property when it was returned. He claimed that the petition and the evidence failed to make a case for the plaintiff, because they did not allege or prove that there was any other or different damage than that which the jury allowed in their verdict. He stated that no reason was given for refusing a return of the property: "The evidence and the rulings of the trial court show plainly that the court tried the case upon the incorrect theory that this plaintiff would be justified in refusing to receive a return of the property if he could show that the property was not in the same condition when it was returned as it was when it was replevied, without regard to the fact that he had been allowed $404.50 because of the change in the condition of the property." Judge Sedgwick's contention was: "If the property replevied is delivered to the plaintiff and the plaintiff has damaged the property in any way while so in his possession, there seems to be no doubt that the defendant may upon the trial of the replevin action recover such damages." Judge Sedgwick's view is clearly apparent

when he says: "If he (plaintiff) fails to return the property at once, and retains it, and the property is damaged in his possession while he retains it after the judgment in replevin, a different question is presented, which is not involved in this case." He was then of the opinion that the judgment of the district court should be reversed. The majority opinion affirmed it.

The case was heard on rehearing before this court, and Judge Rose delivered the majority opinion. 94 Neb. 194. It was said in the third paragraph of the syllabus: "Deterioration in the value of replevied property, while it is unlawfully detained, does not alone justify the owner in refusing to accept it, when returned in due time pursuant to a judgment in replevin, damages to the property after the rendition of such a judgment being recoverable in an action on the replevin bond."

If I understand this aright, it is contended that because the property may be returned it must be received. The condition apparently is that in any event the property must be received, and then if it is not in the same condition that it was when taken there must be another law suit, and this last case must be brought upon the replevin bond. In this case the property in controversy was the threshing machine and a traction engine. In the first opinion Judge Reese calls attention to the damaged condition of the machine. It will be readily understood that an old, worn-out threshing machine would be of very little, if any, value, and a badly damaged traction engine would only be junk. The contention apparently is that the strict letter of the statute must be followed, and that, in any event, when the machine is returned, however badly injured it may be, the party from whom it was taken is bound to accept it. That does not seem to me to be good law or good business.

While the judgment of the district court was affirmed in the opinion delivered by Judge Reese, and it seems to have been held in that case that the damaged condition

of the threshing machine and engine was a good reason why they should not be received when tendered by the plaintiff in that case to the defendant therein, yet by the time the same case was reached on rehearing it was held, Judge Rose delivering the opinion, that the damaged condition of the threshing machine and engine furnished no sort of good reason for not receiving them, and that the defendant in that case was bound to receive the same old threshing machine and engine when tendered, no difference how much they had been injured since they were taken away from the defendant, and regardless of the circumstances under which they might have been kept out of sight of the defendant, and regardless of the circumstances surrounding the transaction and the trial, and without reference to the defendant knowing their condition, and that the statute contemplated nothing else except that the battered old threshing machine, though only fit for kindling wood, and the burned-out old engine, though only fit for the junk heap as old iron, must be received when offered to the defendant, and at any loss to him. In other words, this theory permits the plaintiff to take away from the defendant his property, to keep and use it up to the end of a long lawsuit, and then, when the plaintiff has lost the case, he may return the property which he has taken away and injured and rendered worthless, and he then is bound to receive it, whether or no, and is without remedy, except by bringing another lawsuit on the replevin bond, which may be attended by all the uncertainties and loss of time and money incident to any other lawsuit.

Section 7833, Rev. St. 1913, refers to sections 7831 and 7832, and says that the judgment in replevin "shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property and costs of suit." Of course, where the property is very much deteriorated in condition, or

shrunken in value, this section, if it is to be strictly construed, cannot give relief. It should be considered in conjunction with the two sections to which it refers. In section 7831 it is provided that, if the property has been delivered to the plaintiff and judgment be rendered against him on demurrer, or if he otherwise fail to prosecute his action, the court on the application of the defendant shall impanel a jury "to inquire into the right of property and right of possession of the defendant to the property taken. If the jury shall be satisfied that said property was the property of the defendant at the commencement of the action, or if they shall find that the defendant was entitled to the possession only of the same at such time, then, and in either case, they shall assess such damages for the defendant as are right and proper; for which, with costs of suit, the court shall render judgment for the defendant."

Section 7832 provides: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant."

It will be noticed that each judgment referred to in the sections quoted is a judgment in a replevin suit. Neither of these sections seems to have the replevin bond in mind; yet the law provides for the replevin bond, and these sections are not complete, unless the provision of the Code with reference to the replevin bond is also to be kept in mind. Section 7827, relating to the bond, provides that the sheriff or other officer shall not deliver to the plaintiff the property taken until there has been executed by one or more sureties of the plaintiff

a written undertaking to the defendant in at least *double the value* of the property taken, "to the effect that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him, and return the property to the defendant, in case judgment for a return of such property is rendered against him." Neither of the sections referred to specifically provides what shall be done in case the property is so damaged when it is returned that it is of little or no value. If a strict interpretation of these sections is to be given, then the defendant, although entitled to the property, is without remedy. In other words, if these sections quoted contain the sum of human knowledge on the subject, the injured defendant is utterly without prospect of relief. This can never have been intended, and no doubt the purpose of the section relating to the replevin bond is that damages may be recovered against the plaintiff in a proper case in which he has injured the defendant.

In *Eickhoff v. Eikenbary*, 52 Neb. 332, it was stated in paragraph 3 of the syllabus: "A plaintiff in replevin against whom judgment has been rendered, must, in order to satisfy the judgment for a return of the property, return or offer to return the identical property replevied and not other property of like kind and value." In *Reavis v. Horner*, 11 Neb. 479, it was held that a party might return a portion of the property, where its value had been separately ascertained, and tender the value of the remaining property. It is said in the body of the opinion in *Eickhoff v. Eikenbary, supra:* "There can be no doubt that in order to satisfy a judgment for the return of property the identical property must be tendered, *in substantially the condition in which it was received.*" In that case the property in controversy was lumber. After the property was replevied, the plaintiff went on with his business and proceeded to get other lumber. When he got beaten, it was decided that any sort of lumber would not do.

It must be the same old lumber and in the same condition that it was when it was taken.

In *Berry v. Hoeffner,* 56 Me. 170, it was held, as stated in the second paragraph of the syllabus: "If goods have been damaged since they were replevied, and while in the possession of the plaintiff in replevin, their mere restoration in a damaged condition will not be a compliance with the bond which requires them to be restored in like good order and condition as when taken."

In Massachusetts, by the statute of 1789 (Laws 1789, ch. 26, sec. 4), the proviso of the writ was: "And also to return and restore the same goods and chattels, in like good order and condition as when taken, in case such shall be the final judgment." Afterwards the statute was amended, and as amended the language was, "to return the said property, in case such shall be the final judgment" (Rev. St. 1836, ch. 113, sec. 19); but no mention was made that the goods and chattels were to be restored in like order and condition. In *Parker v. Simonds,* 8 Met. (Mass.) 205, 210, it was contended that because of this change the plaintiff in replevin was not bound to restore the goods replevied in the same condition as when taken. The court held otherwise.

To hold that in every case the damages found by a jury embrace all damages which defendant may be entitled to will often result in injustice. To illustrate: Certain staple articles having a well-known market value are replevied. They pass from the possession of the defendant to that of the plaintiff, and while in plaintiff's possession are so far removed from the defendant that he has no knowledge of their condition, presumably the plaintiff may be exercising proper care to preserve them. Upon trial of the case, however, it is shown that the articles were the property of the defendant and properly in his possession. Therefore a verdict must be returned in his favor. Suppose

the market value of the articles has depreciated. Defendant knows this fact, and offers proof of it in evidence. He is entitled to the verdict for damages, which shall include the depreciated value. He gets this. Plaintiff then returns the property. It had a value when taken from defendant of $10,000, so found by the jury. The same articles, because of the depreciation in the market value, are, though in good condition, worth at the time of the trial but $7,500. Suppose ordinary wear and tear incident to plaintiff's use is $500. The jury makes the loss good by finding defendant's damage to be $3,000. However, because of plaintiff's neglect or failure to properly care for the articles returned, they have suffered a loss in value and are worth but $5,000. Defendant in the replevin suit must accept the goods worth $5,000. 94 Neb. 194. He has judgment for $3,000 and the loss of $2,000 in place of what the plaintiff wrongfully took from him worth $10,000. If defendant must suffer this, then here is a wrong without a remedy. Defendant is deprived of $2,000 through a fiction that he has recovered all damages in the replevin suit. Such a theory is a fiction in any case where the defendant has no knowledge that the goods had been injured by more than the ordinary wear and tear. That is this case.

In the case of *Washington Ice Co. v. Webster,* 125 U. S. 426, which was a suit on a replevin bond, Mr. Justice Blatchford used this language: "The principal argument on the part of the defendants in the present suit is that in the statute of Maine (Rev. St. 1857, 1871, ch. 96, sec. 11), which provides that, in a replevin suit, 'if it appears that the defendant is entitled to a return of the goods, he shall have judgment and a writ of return accordingly, with damages for the taking and costs,' the words 'damages for the taking' mean all damages resulting from the taking and detention of the goods; that, if the defendant in replevin recovers judgment for a return of the goods replevied, he may, at his elec-

tion, have the damages which he has sustained by reason of the taking and detention of them, to the time of such judgment, assessed in the replevin suit, or he may recover those damages in a suit on the bond, but cannot have both." Judge Blatchford then said that the contention was "that, as the plaintiff in this suit failed to have such damages assessed in the replevin suit, he cannot recover them in the present suit. This point seems to us, at best, to be altogether technical, and not to be founded on any sound principle." If I understand this, Justice Blatchford condemned the principle for which the majority opinion contends. I think the law is, and ought to be, that, if the facts are known to the plaintiff which relate to the alleged damages, the extraordinary damages must be considered at the time of the trial of the replevin case, and, if such damages are allowed, they should be put into the verdict; but, if there are damages to the property in controversy which occur after the trial, then such damages form a sufficient basis for an action on the replevin bond. The damages awarded in the replevin action should be conclusive of all damages sustained prior to the trial of the replevin suit, unless there has been some sort of concealment or other sufficient cause that has prevented their discovery by the plaintiff. The principle of allowing litigants to get done at some time is recognized in *Reams v. Sinclair,* 97 Neb. 542, wherein, notwithstanding the prior judgment in the ejectment case by reason of plaintiff's failure to show a legal title, he was permitted in the second suit to establish and quiet his title based upon the same defective instrument which had resulted in his defeat in the former action.

In *Ewald v. Boyd,* 24 S. Dak. 16, the horse in controversy died. The judgment was rendered July 10, 1907. On July 13, 1907, the defendant wrote to the plaintiffs, requesting them to come and get the horse. This request reached the plaintiffs on July 29, 1907.

One of the plaintiffs went to the defendant's premises, and was told that the horse died about a week before out in the slough in the pasture. The plaintiff was not shown the body of the horse, but he was shown a mound where it was claimed the horse was buried. It was the contention of the defendant that, inasmuch as he had offered to deliver the horse after judgment and before plaintiffs came after it, and the horse had died through no fault of his, it worked a satisfaction of that part of the judgment awarding the plaintiff possession of the horse or its value. The court said: "After the judgment was entered, the defendant retained possession of this horse at his own peril. If he desired to protect himself against the alternative judgment for value of the horse, he was bound to return the horse to plaintiffs. Plaintiffs, if they saw fit, could allow their judgment to stand without issue of execution, desiring that a time would come when defendant would be unable to turn over the horse, and they then be able to collect the alternative judgment which might be more than the horse was worth."

In *Hinkson v. Morrison,* 47 Ia. 167, there was an action brought on defendant's redelivery bond, and defendant attempted to plead as a partial defense the death of one horse. The court said: "We think the defendant's bond cannot be discharged *pro tanto* by showing the mere fact that one of the horses died. By the verdict his detention of the horse was found to be wrongful. His undertaking is absolute to return the property in as good condition as it was when the action was commenced. His obligation is entirely different from that of a bailee rightfully in possession."

In *Lillie v. McMillan,* 52 Ia. 463, the plaintiff took possession of property pending the suit. The jury found for the defendant. One horse and one cow had died. The defendant elected to take the money judgment, and the court held that this was his right, not merely for the property that had died, but for all of it.

In *Capital Lumbering Co. v. Learned,* 36 Or. 544, it was held, as stated in the second paragraph of the syllabus: "Where, in replevin, plaintiff takes possession of the property, and judgment is rendered for its return, and it is of such a character that it can be moved, plaintiff must seek defendant and there tender it to him in the same condition as when received, to avoid liability on his bond."

In *Vallancy v. Hunt,* 26 N. Dak. 611, it was held, as stated in the syllabus: "A party who desires to avoid the penalties of a redelivery bond in replevin must show a delivery or offer of delivery of the property within a reasonable time, in substantially as good condition as when taken, and without material depreciation in value."

In *Moran v. Plankington,* 64 Mo. 337, it was held that the judgment in the first action is only a bar to the second action as far as the plaintiff knew, or ought to have known, of the facts in time to have included the omitted articles in such first action.

In *Schrandt v. Young,* 62 Neb. 254, it is said in the syllabus: "The rule announced in *Romberg v. Hughes,* 18 Neb. 579, that damages for detention may only be had where there is a return of the property, should be restricted to damages for deterioration or depreciation after the taking." In the body of the opinion it was said: "If the property is injured or deteriorates in value after it is taken, a return does not make the defendant whole, because he does not get it in the condition in which it was, and, in order to be fully restored to his former position he ought to have the difference in value as damages. This is universally recognized, and such deterioration is considered a proper element of damage." Commissioner Pound, who prepared this opinion, cited *Hooker v. Hammill,* 7 Neb. 231; Shinn, Replevin, sec. 648.

It would seem that the damages in a replevin suit should be compensation for the interruption of the defendant's possession, the loss of the use of the goods

from the time of the taking under the writ of replevin until they are restored, and their deterioration in value within the intervening time. I think that the judgment of the district court is not sustained by the evidence, and that *Teel v. Miles,* 51 Neb. 542, should be overruled or modified. I think that the majority opinion is against a liberal interpretation of the statute, that it is against public policy, and that it is too technical.

IN RE APPLICATION OF MAX SELICOW.
MAX SELICOW, APPELLANT, v. HENRY W. DUNN, APPELLEE.

FILED DECEMBER 19, 1916. No. 19589.

1. **Habeas Corpus:** REVIEW. Proceedings for a writ of habeas corpus are civil in their nature, and, under the present statute, can be brought to this court for review only by appeal. Petition in error is not the proper remedy.
2. ———: SCOPE OF WRIT. A writ of habeas corpus is not allowed to correct errors of inferior tribunals.
3. ———: RIGHT TO DISCHARGE. If an inferior court has jurisdiction of the proceedings upon complaint of violation of a statute or ordinance, and has not determined the case, the defendant is not entitled to release upon writ of habeas corpus on the ground of alleged invalidity of such statute or ordinance, unless such invalidity appears upon the face of the proceedings.

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

J. E. von Dorn, for appellant.

John A. Rine and *W. C. Lambert, contra.*

SEDGWICK, J.

The petitioner was arrested upon a complaint and warrant in the police court of Omaha, charging him with a violation of a regulation of the health commissioner. He applied to the district court for Douglas county for a writ of habeas corpus. A hearing was had

before the court, and upon the record and evidence the court denied the application and remanded the petitioner to the custody of the officer. The petitioner brought his case to this court for review.

1. We first observe that the record is very much incumbered by an attempt to present the case by the petitioner both as an appeal and as upon a petition in error, counsel for petitioner apparently being in doubt as to the proper method of obtaining a review of the case. The petitioner is entitled to have his case reviewed in this court under the constitutional provision, but the practice to be observed in obtaining such a review is regulated by the legislature. Formerly equity cases only could be brought to this court by appeal. All other cases, civil and criminal, were brought here for review by petition in error. This practice obtained without exception until the act of 1907 (Laws 1907, ch. 162). Shortly before the passage of that act, this court had decided that "the judgment of a district court in a proceeding in habeas corpus will not be reviewed by this court on appeal" (*In re Greaser,* 72 Neb. 612), but the act of 1907 provides that all proceedings to obtain a reversal in this court, "except judgments and sentences upon conviction for felonies and misdemeanors under the Criminal Code," shall be by appeal, and under that act it was decided: "Under the provisions of chapter 162, Laws 1907, providing for appeals to the supreme court, only judgments and sentences upon convictions for felonies and misdemeanors under the Criminal Code may be brought to this court by petition in error." *Brandt v. State,* 80 Neb. 843. The prosecution in that case was for a violation of an ordinance of the city of Hastings, and it was held that, even in such case, an appeal is the proper method of obtaining review in this court. Proceedings in habeas corpus have always been considered in this state as civil, and not criminal, in their nature. *In re Van Sciever,* 42 Neb. 772. In that case it was held that the

method of obtaining review was by petition in error, but under the practice at that time that rule applied to all cases, civil and criminal, except suits in equity. Again, in *State v. Decker,* 77 Neb. 33, it was decided that "the procedure to obtain a review in this court of a final order made by a district court or judge in a proceeding in habeas corpus must be such as is required to be followed for a like purpose in civil actions," and it was said that sections 483 and 515 of the Criminal Code (Rev. St. 1913, secs. 9124, 9185) "are not applicable to such actions as the present (habeas corpus), and this court is therefore without jurisdiction." Section 375 (Rev. St. 1913, sec. 9269) of the habeas corpus act was not mentioned in that decision, and although that section relates specifically to habeas corpus proceedings, and provides that habeas corpus proceedings "may be reviewed as provided by law in criminal cases," and had been in force for very many years when the statute of 1907 was enacted, and had been recognized and enforced by this court (*Atwood v. Atwater,* 34 Neb. 402), it must now be considered that the legislature in the act of 1907 modified this section as well as others at that time in force, and that now the only method of obtaining a review in this court in habeas corpus proceedings is by appeal.

2. There are 33 assignments of error in the appellant's brief, and among them it is assigned that the court erred in holding that the complaint filed against the petitioner stated an offense against the laws of the state of Nebraska. The complaint was in the police court of the city of Omaha. It alleged that the defendant did "disobey rules of the health commissioner in permitting children under 12 years to enter his show house during epidemic of fever, contrary to the city ordinances of the city of Omaha in such cases made and provided, and against the peace and dignity of the state of Nebraska." The complaint is quite informal, and perhaps lacks some of the necessary allegations in charg-

ing such an offense. Upon this complaint a warrant was issued which was less formal in charging the offense than was the complaint. On this warrant the defendant was arrested and brought before the court. No objection was made in the police court to the complaint or the warrant, so far as this record shows. The defendant immediately applied to the district court for a writ of habeas corpus. The district court appears to have taken a large amount of evidence in regard to the ordinances of the city, and the regulations of the board of health, and other similar matters. The district court should have inquired whether the police court had attained jurisdiction of the defendant, and that would have determined the relator's right to a writ of habeas corpus. "A writ of habeas corpus is not a proceeding to correct errors." *In re Balcom,* 12 Neb. 316. "The writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for appeal or writ of error." *State v. Crinklaw,* 40 Neb. 759. *In re Langston,* 55 Neb. 310; *Michaelson v. Beemer,* 72 Neb. 761. A person restrained under an unconstitutional law will be discharged on a writ of habeas corpus. *Ex parte Thomason,* 16 Neb. 238. In this last case a preliminary examination was had, and the accused was held to await the action of the grand jury. He failed to give bail, and was remanded to jail, and applied to this court for a writ of habeas corpus. In *In re Application of McMonies,* 75 Neb. 702, it was held: "The writ of habeas corpus will lie to relieve the relator therefor from arrest and detention for the violation of the provisions of a void municipal ordinance." In that case there had been no trial in a court of original jurisdiction. The opinion does not show whether the question of the validity of the ordinance, under which the prisoner was held, had been submitted to and determined by the justice. The ground of the decision is that the validity of the ordinance in question had just been determined by this court, and had been held to be invalid for the reason that the village

board had no power to enact such an ordinance, and it was held that, it being conceded that the ordinance was void, the relator was entitled to his discharge upon a writ of habeas corpus. In the case at bar the validity of the regulation of the board of health and its force and effect depend upon the construction to be given to various statutes of the state, and an ordinance of the city of Omaha. If the proceedings upon which the health officers were acting were void, that fact did not appear upon the face of the complaint or the warrant, and the question of the validity and force of those regulations was a matter of defense before the police magistrate. The errors of that court, if any, could be corrected by a reviewing court, not by proceedings in habeas corpus. It follows that the errors assigned upon the rulings of the district court in receiving and excluding evidence and other similar matters are immaterial here.

The judgment of the district court is right, and is

AFFIRMED.

STATE, EX REL. NORA M. DEBOLT, APPELLANT, V. IDA M. KELLY, APPELLEE.

FILED DECEMBER 19, 1916. No. 19596.

1. **Insurance:** FRATERNAL SOCIETIES: ELECTION OF OFFICERS. The supreme authority of a fraternal, beneficiary society, which is by the constitution of the order made the "judge of election and qualification of its officers," may at the same meeting, and immediately after an election of an officer is declared, reconsider the election and take another ballot, if the first election is the result of fraud or mistake and irregularity, and generally it is for the voters themselves in such cases to determine the question of fraud or mistake.

2. ———: ———: ———. In such a case, if it appears that the question of fraud or mistake is raised in good faith and is determined by the voters themselves, the courts will not interfere and declare

that the supposed fraud or mistake was not of sufficient importance to justify the action of the voters.

3. ———: ———: ———: RECORDS. If the regular record of the proceedings of such an order is not impeached in the pleadings, nor directly attacked, without objection, in the evidence, the minutes kept by the proper officer and duly certified will control.

4. ———: ———: ———. One who is formally presented as a candidate upon the final ballot, and is voted for without protest on her part, cannot afterwards object that such ballot was without authority, and that she is entitled to the office by the former ballot which was set aside by the action of the qualified voters.

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

John J. Sullivan and *Arthur F. Mullen,* for appellant.

Jefferis & Tunison, contra.

SEDGWICK, J.

The Supreme Forest, Woodmen Circle, as defined by its constitution, is "a secret, fraternal, beneficiary and benevolent order." Its constitution provides that the regular election of officers "shall take place in 1915 at the biennial meeting of the Supreme Forest and every four years thereafter." One of the officers to be elected was "Supreme Banker," which office had been held by this respondent for several years. The "Supreme Banker" was paid a salary of $1,500 per annum. A ballot was taken, and the respondent was declared elected. Afterwards some question was raised as to the ballot, and another ballot was taken and the relator declared elected. The respondent refused to surrender the office, and this action was brought. The respondent insists that the first ballot was regular, and that the electors had no power to disregard it and take another ballot. The trial court found for the respondent and dismissed the action, and the relator has appealed.

The constitution of the order contains this provision: "It (the Supreme Forest) shall be the judge of election and qualification of its officers and members and estab-

lish rules for their government." It also contains the provision: "No reconsideration of a ballot shall be had after the guardian has announced the result thereof." These two provisions might be considered as inconsistent, if it were not for the fact that the former is a general provision of the order, and the latter is a special provision in the rules of the order in regard to application for membership, and must, therefore, to avoid inconsistencies, be construed as applying to these matters only. The power of this Supreme Forest to reconsider the election of an officer in the same meeting at which the election was held is very much discussed in the briefs, and it appears to be generally held that, if the election is questioned for some irregularity or mistake in the procedure, and not for the purpose of enabling the electors to change their vote, such a body may reconsider the election, even without a special provision in its constitution making it the judge of the election of its officers. Some authorities have held that such an election cannot be reconsidered for the purpose of enabling the electors to change their votes and elect another person after a qualified person has been elected and accepted the office.

If such an election is the result of fraud or mistake, it may be reconsidered by a majority of those entitled to participate therein, and generally it must be for the voters themselves to determine the question of fraud or mistake. If it is unanimously conceded by those participating in the election that there has been such fraud or mistake as to require another ballot to determine the will of the voters and another ballot is immediately taken accordingly, it is not the duty of the courts to interfere and declare that the supposed fraud or mistake was not of sufficient importance to justify another ballot. If the person afterwards complaining participates in the second ballot without protest and apparently at the time acquiesces in the result, it ought to be conclusive that the fraud or mistake in the first ballot was

sufficient to justify the taking of another ballot, and that the result of the second ballot expressed the real will of the voters.

There is some evidence which by itself would tend to indicate unfair practice in the second ballot and arbitrary action on the part of the presiding officer, in which she was encouraged by some of the electors; but the correctness of the official records of the proceedings is not challenged in the pleadings, and there is no direct attempt in the evidence to amend or modify the official minutes of the proceedings. These minutes recite that two candidates for the office, the relator and the respondent, were nominated. A ballot was taken, and the tellers announced that 63 votes were cast, that the relator received 31 and the respondent received 32 votes. The presiding officer then announced: "Sovereign Kelly receiving the higher number of votes, you have elected your present banker, Ida M. Kelly, to serve as banker for the next four years." The respondent accepted the election, whereupon a delegate announced: "There were only 63 votes cast when there should have been 65." One of the delegates announced that they found a blank ballot, and the presiding officer declared: "If there is anything that concerns the ballots, they should call the attention of the convention to it, so if it is not a legal ballot another ballot may be taken." A delegate inquired whether anyone had a right not to vote, and the presiding officer then announced: "What is the pleasure of the convention? I think the roll should be called and see if there are 65 votes. I will ask that we commence with Sovereign Toomey and count." The record recites that "this count showed that there were 64 present who were entitled to vote." A delegate then announced that she believed that "Mrs. Kelly would wish the ballot correct," and moved that "we reconsider the ballot." The motion was seconded. The question was then raised whether the former ballot was valid, there being one blank ballot, and the presiding officer announ-

ced: "Every one must vote, unless excused by the convention." A delegate then asked, "Can you reconsider a ballot after it has been announced by the Supreme Guardian?" and the Supreme Guardian, as presiding officer, stated: "I would say that the chairman of the tellers did not report the blank until after it was announced. If there is anything wrong, the chairman of that committee should so announce it, so that this convention may say how the ballots were cast. But it was not announced until after I announced the election." The presiding officer then put the motion whether the former ballot should be reconsidered, to be determined by a rising vote. The vote was taken, and it was announced that there were 36 in favor of the ballot being reconsidered, and the motion to reconsider was declared carried. The presiding officer announced: "Now you will prepare your ballot for Supreme Banker. The candidates are Ida M. Kelly and Nora DeBolt, and all must vote." A delegate requested that the candidates be introduced, "so that every one might know which ones they were." That was then done by the presiding officer, who introduced the relator and the respondent, respectively, as the two candidates. The vote was then taken, and the tellers announced that there were 64 votes cast, and that the relator received 33 votes and the respondent received 31 votes, and the presiding officer announced: "You have by your votes elected sovereign Nora DeBolt for Supreme Banker." The respondent then announced: "I want to congratulate Sovereign DeBolt, and assure her that, if she is banker, she will have my hearty co-operation in her work." The relator then formally accepted the office.

It is then established that, immediately after the result of the first ballot was announced, one of the electors raised a question as to the regularity of the election, and a motion was made to take another ballot. This motion was declared adopted and another ballot ordered. It was then declared that there were two candidates,

and this respondent was formally introduced as one of the two candidates to be voted for. By so offering herself as a candidate she again submitted her claims to the voters. She must have done this voluntarily, since there is nothing to the contrary in the record of the election, nor in any evidence offered at the trial. She could not thus avail herself of the chance of a favorable vote, and afterwards repudiate the result. It is not denied that the votes were correctly counted, and that the relator received a majority and was duly declared elected.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a judgment for relator as prayed in the information.

REVERSED.

LETTON, J., not sitting.

FAWCETT, J., dissents.

HAMER, J., dissenting.

This is the case where they had two ballots. On the first ballot Kelly was elected; on the second ballot DeBolt was elected. I do not like this system of double ballots. I am not satisfied that there was any legal right to take the second ballot. It may have been a scheme concocted in the interest of DeBolt. I have seen irregularities in conventions where that sort of thing seemed to be done, and I do not like to be compelled to adopt it in an election in a fraternal insurance society. The voting of one blank ballot ought not to be enough to set aside an election. If not, Kelly has been elected, and she should be allowed to hold the office.

STATE, EX REL. WILLIAM GANTZ ET AL., APPELLANTS, V. DRAINAGE DISTRICT ET AL., APPELLEES.

FILED DECEMBER 19, 1916. No. 19646.

1. **Statutes:** TITLE OF ACT: VALIDITY. The title of the act (Laws 1911, ch. 145), "An act to amend section fifteen (15), article five (5), chapter eighty-nine (89) of the Compiled Statutes of Nebraska 1909, relating to drainage districts, and to add additional sections to said law, and to repeal said section fifteen (15), as heretofore existing," is broad enough to admit of legislation germane to the subject-matter of the act amended, and not inconsistent with the provisions of that act.

2. ———: ———: ———. The section numbered 44 in this act of 1911 (Rev. St. 1913, sec. 1914) is germane to the original act (Laws 1907, ch. 153), and is not inconsistent with section 20 of the original act, and is not unconstitutional.

3. **Drainage Districts:** ORGANIZATION: ELECTIONS. Under section 1872, Rev. St. 1913, "Any corporation, public, private, or municipal, owning or having an easement in any land or lot, may vote at such election, the same as an individual may." It was not intended to allow double representation of any part of the lands in the district. The easement for which votes may be cast must be of a substantial nature, analogous to ownership. It must include possession under a record right. Landowners cannot be allowed to represent in the election the acres of land lying in a highway which is regularly established.

4. ———: ———: ———. Exclusive possession and a record right of possession and use of the land indefinitely is an easement equivalent to ownership for the purpose of this statute.

5. ———: ———: ———: RATIFICATION. If parties who assume to vote for a railroad company or for a county or township are not formally authorized, their acts may afterwards be ratified by the proper authorities. In an action in which the public authorities represented by such agents are not parties, a general allegation that such agents "were not authorized" pleads only a conclusion.

6. **Quo Warranto:** SCOPE OF STATUTE. *Quo warranto* under our statute (Rev. St. 1913, sec. 8328) is intended to prevent the exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising those powers.

7. **Drainage Districts:** ORGANIZATION: QUO WARRANTO. If the election held under section 1914, Rev. St. 1913, results in rejecting the prop-

osition to proceed with the work under the plans and details proposed, the directors have no power to proceed further to carry out those plans and details, and *quo warranto* is the proper remedy to test the result of such election.

APPEAL from the district court for Merrick county: FREDERICK W. BUTTON, JUDGE. *Reversed.*

Elmer E. Ross and *Prince & Prince,* for appellants.

H. M. Morse and *Martin & Bockes, contra.*

SEDGWICK, J.

A petition was filed with the board of supervisors of Merrick county for the formation of a drainage district in that county under the provisions of article V, ch. 19, Rev. St. 1913. The board of supervisors having acted upon the petition as the statute contemplates, an election was called, which resulted in favor of the formation of the district and the election of a board of directors, who duly qualified. The board of directors then caused plans and specifications to be made for the construction of the drainage ditches, and estimated that the cost thereof would be $16,698. Thereupon an election was called under section 1914, Rev. St. 1913, to determine the question of proceeding with the work and incurring the necessary expense thereof. The election was held, and it was declared by the canvassing board that the result of the election was in favor of proceeding with the proposed plan of drainage. Whereupon this action in *quo warranto* was brought in the district court for Merrick county against the drainage district and the directors thereof to require the directors to answer "by what authority or warrant they claim to proceed further in the premises in the prosecution of said enterprise," and for a judgment that the election so held "resulted in the defeat of said proposition." The prayer of the petition continued: "And that it be further adjudged by the court that the said board of directors have no further authority to proceed except to certify a tax levy

to pay the necessary expenses incurred up to and including said election." The defendants filed a general demurrer to the petition, which was sustained, and the action dismissed, and the relator has appealed. It is contended that *quo warranto* is not the proper remedy in such case, and that section 1914 is unconstitutional and void.

1. The petition, after relating the facts above recited, alleges that the canvassing board of the election found that the total number of the votes cast was 9,132, and that 4,703 votes were in favor of proceeding with the proposed plan of drainage, and 4,429 votes were against so proceeding, and declared that the majority in favor of proceeding was 274. It was further alleged that 349 votes were cast in favor of the proposition as representing the number of acres of land in the right of way of the Union Pacific Railroad Company, that those votes were cast by the station agent at Clarks, and that he was not authorized to act for the railroad company in the premises, and that the total number of acres in the right of way of the railroad company, within said district, was not more than 150 acres, and that "all parties voting in favor of said proposition and having lands through which the right of way of said railroad company extended within said district, such party, or parties, voted the entire tract, or government subdivision, of land, and counted the acreage of the said right of way as the part of said subdivision, all of which they claimed to own, and cast such number of votes therefor as included the land therein owned by them and the said right of way; that approximately 100 votes were thus cast by said landowners in excess of the land actually owned by them, or in which they had any right, title, or interest entitling them to cast any vote or votes therefor, and were counted and included in the return favorable to said proposition." It it also alleged that 280 votes were cast in behalf of Merrick county as representing the number of acres of

land claimed to be within the highways in said district and used for road purposes; that the party who cast such votes was not authorized, and that the "owners of the real estate in said district voted the full number of acres of land by them respectively held without any deductions for road purposes as they were of right authorized to do, and that the total number of acres in said district used for road purposes and not voted by the owners did not exceed 50 acres."

If these allegations were true, there was no majority of legal votes in favor of the proposition, and the proposition was not adopted by the voters. The statute provides: "Any corporation, public, private, or municipal, owning or having an easement in any land or lot, may vote at such election, the same as an individual may." Rev. St. 1913, sec. 1872. The legislature took notice of the fact that the public highways and the right of way of transportation companies would be benefited by drainage. It was intended to make them responsible for their proportion of the expense of the improvement (Rev. St. 1913, sec. 1830), and to allow them a share with the individual landowners in such control as was given to interested parties. This purpose and the nature of these public interests affected must be considered in ascertaining the meaning of the language used by the legislature: "Any person may cast one vote on each proposition to be voted on for each acre of land or fraction thereof and for each platted lot which he may own or have an easement in, as shown by the official records of the county where the land or lots may be." Rev. St. 1913, sec. 1872. It was not intended by the use of the words "which he may own or have an easement in" to allow double representation of a part of the lands in the district. The ownership must be complete; that is, there must be title and the right of possession. The easement must be of the substantial nature of a railroad company's easement in its right of way, or of the public in the highways; that

is, it must include possession under a record right. Therefore landowners could not be allowed to represent in the election the acres of land lying in a highway which is regularly established, or in the right of way of the railroad company. While the public, or railroad company, does not have absolute title to such lands, it has exclusive possession, and has the record right to possession and use thereof indefinitely. This is an easement equivalent to ownership for the purposes of this statute.

The allegations that the "station agent at Clarks" was not authorized to cast the votes of the railroad company and that "the party who cast such votes" for the county were "not authorized" are not sufficiently pleaded to amount to more than conclusions of the pleader. If these parties were not formally authorized, their acts might afterwards be ratified, and there is no allegation that this was not done.

The drainage act under which these proceedings were had was enacted in 1907. Laws 1907, ch. 153. Section 1914, Rev. St. 1913, is a part of the act of 1911. Laws 1911, ch. 145. These two acts are incorporated in Rev. St. 1913, ch. 19, art. V, being sections 1866-1914. It is contended that section 1914 is unconstitutional, as it violates section 11, art. III, Const., which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." The act of 1907 has a very comprehensive title: "An act to provide for drainage districts to drain wet land, * * * and the rights, obligations and powers of such corporations, * * * and defining the duties and powers of public officials." The amendatory act of 1911 is entitled "An act to amend section fifteen (15), article five (5), chapter eighty-nine (89), of the Compiled Statutes of Nebraska 1909 relating to drainage districts, and to add ad-

ditional sections to said law, and to repeal said section fifteen (15), as heretofore existing." Under this title any sections might be added that were germane to the original title of the act. After amending section 15 and repealing the same, the act of 1911 adds several additional sections. One of these additional sections, which is numbered 44, provides: "In all districts hereafter organized the board of directors, having first adopted detailed plans and specifications of the work proposed to be done, and made an estimate of the total cost of such contemplated improvement, and filed said plans, specifications and estimated cost with the county clerk of the county having the largest area of land, shall then publish a notice once each week for three weeks in a newspaper in each county, of an election to vote on the question of proceeding with such work and incurring of the necessary liability, which election shall be held in all respects as other elections, provided for in this article." Section 20 of the original act of 1907 is a definition of the duties of the directors after the district has been regularly organized. It begins with the provision: "Said board of directors shall employ such engineer, surveyor and other help as they may deem necessary and proper and shall proceed according to their best judgment to carry out such work of the character mentioned in paragraph one hereof, as they deem for the public health, convenience and welfare." It is contended that this authorizes the board of directors to proceed with the work in accordance with the plans, specifications and details that they made out, and that as section 1914 limits the discretion of the board and requires that, after the plans and specifications and the details of the improvements are decided upon, the board cannot proceed to incur this expense without the consent of the taxpayers interested, it amounts to an amendment of section 20 of the original act, and, as it does not repeal that section, is a violation of the provision of the Constitution above quoted.

Section 20 of the original act of 1907 will not bear this construction. It appears from a reading of the whole section that it was not intended to provide at what point in the proceedings the board should contract for construction and repair, but to provide how the board should act in making such contracts and proceeding with the work. Section 1914 is a very important provision. If, after the district is organized, it develops that the expense of the drainage would be so great and the difficulties connected with it so important as to render the whole scheme unadvisable, the authority to determine that question is very important and should rest with the owners of the property upon whom these burdens would fall. This provision is not necessarily inconsistent with the section of the original act defining the duties of the directors, and should not for that reason be held unconstitutional.

2. The statute provides: "An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation within this state without being authorized by law, or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law." Rev. St. 1913, sec. 8328.

It is said in *State v. Scott*, 70 Neb. 684: "Since the remedy by information in the nature of *quo warranto* is employed to test the actual right to an office or franchise, it seems that it cannot be extended to relieve against official misconduct which does not work a forfeiture of the office." It is contended that this is decisive of the case at bar. It is true that *quo warranto* under our statute is intended to prevent the exercise of powers that are not conferred by law, and is not ordi-

narily available to regulate the manner of exercising those powers. It is also manifest that, if the work is to be proceeded with, the directors are the proper officers to exercise such powers. Section 1914, Rev. St. 1913, provides: "If a majority of the votes at such election vote against proceeding and incurring the liability, then the board shall abandon the same, and shall thereupon certify to the county clerks a tax levy on all the tracts in the district by valuation, sufficient to pay all the liabilities of said district, and said levy shall be entered and collected as other general taxes, and used to pay said liabilities." If the allegations of this complaint are true, a majority of the votes were against proceeding further and incurring further liability. It was then the duty of the board of directors to abandon the project, and they were without power to proceed with the project and incur further expense. They were attempting then to exercise powers which they did not possess under the law, and an information in *quo warranto* was the proper remedy under the statute.

We conclude that the court erred in dismissing the action without investigation, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

STATE OF NEBRASKA, PLAINTIFF, V. SUPREME FOREST, WOODMEN CIRCLE, ET AL., DEFENDANTS.

FILED DECEMBER 19, 1916. No. 19761.

1. **Insurance:** FRATERNAL ASSOCIATIONS: STATE CONTROL. The authorities of the state, under our statute, are given such control of fraternal beneficiary associations as to require the state to see that the interests of the members of the association are not sacrificed by unauthorized usurpations of authority on the part of officers of the association. Under the circumstances in this case, this court has original jurisdiction of an action in the name of the

state brought by the attorney general, in behalf of the insurance board, to determine the jurisdiction and powers of the contending officers of the association.

2. ———: ———: FORM OF GOVERNMENT. A fraternal beneficiary association must, under our statute, have a representative form of government, that is, the governing powers of the association shall be elected directly or indirectly by the members. The governing body in the defendant association, called the "Supreme Forest," is so elected, and corresponds to the board of directors in an ordinary corporation. It is authorized to "enact laws for its own government and for conducting the business of the order generally." Laws so enacted in harmony with the constitution of the association and statutes of the state are binding upon the association and its officers and members.

3. ———: ———: ———. The constitution of the order creates an executive council which is subordinate to the Supreme Forest. The council could not authorize a committee to conduct "the business of the order generally" without the approval of a specified number of the members of the Supreme Forest, and its attempt to do so is held invalid.

4. ———: ———: CONSTITUTION: CONSTRUCTION. When the language of the controlling writing is at some point ambiguous, the practical construction by the parties themselves must control.

ORIGINAL PROCEEDING by the State against the Supreme Forest, Woodman Circle, and others. Application for injunction. *Injunction allowed.*

Willis E. Reed, Attorney General, for plaintiff.

John J. Sullivan, Arthur F. Mullen, Stout, Rose & Wells, Brogan & Raymond, Jefferis & Tunison and *Frank H. Gaines, contra.*

SEDGWICK, J.

The Supreme Forest, Woodmen Circle, is a fraternal beneficiary association with a large membership throughout the United States. The legislative body of the order is known as the "Supreme Forest," and the constitution provides that it shall have original and appellate jurisdiction in all matters pertaining to the general welfare of the order. The constitution also provides for a supreme executive council, and this council is given

all power and authority of the Supreme Forest when that body is not in session, except as specified in section 30 of the constitution. The chief officer of the Supreme Forest is called the supreme guardian, and the constitution provides that the supreme guardian shall also be a member of the supreme executive council. The Supreme Forest meets biennially, and at its last meeting elected the defendant Emma B. Manchester supreme guardian. She assumes, and now insists, that under the constitution she has the power and duty to "administer the organization or field work of the society." This appears to include the appointment of financial and other agents and attorneys, and other important matters. The supreme executive council appointed a committee of three, of which Mrs. Manchester was one, to take charge of and control this "organization or field work." The defendants Dora Alexander and Mary E. LaRocca, the other two members of the committee, being a majority thereof, assumed to direct the "organization or field work," and so a conflict arose between Mrs. Manchester and these two members of the committee, and it seems to be conceded that this conflict so disorganized the business as to endanger the existence of the association. The attorney general, in behalf of the insurance board of the state, brought this action in *quo warranto* in this court to determine the jurisdiction and powers of these respective authorities, making the association and these three officers, the members of the supreme executive council, and the members of the board of supreme managers, defendants. No brief has been filed on behalf of the state. Mrs. Manchester, as supreme guardian, by her attorneys, represents one side of the controversy, and also briefs have been filed on behalf of the other defendants as representing the other side of the controversy.

1. It is suggested that the court should not entertain jurisdiction of the action because the state is not interested in the controversy, and therefore the insurance

board and the attorney general cannot maintain such proceedings. This question is not much discussed in the briefs, and, without entering into a discussion of the matter, we have concluded that the authorities of the state, under our statute, are given such control of these beneficiary associations as to require the state to see that the interests of the members of the association are not sacrificed by unauthorized usurpations of authority on the part of the officers of the association.

2. There is more or less ambiguity and uncertainty in the articles of association and the by-laws, and, even if we assume that all parties have acted in good faith, it is apparent that these uncertainties have led to this destructive conflict of authority. The constitution provides that the supreme guardian shall appoint deputy supreme guardians and instruct them in their duties. The contending parties do not agree as to the powers and duties of these deputy supreme guardians so appointed. If under the constitution and the laws of the association the supreme guardian and these deputy supreme guardians are "to administer organization or field work of the society," then the contention of Mrs. Manchester as supreme guardian must be sustained; but if the authority of the supreme guardian and the deputy supreme guardians is limited to the more formal duties of the supreme guardian, and does not include the "organization or field work," then the contention of Mrs. Alexander and Mrs. LaRocca, as a majority of the committee appointed by the executive council, must be sustained.

The statute provides that such association shall have a representative form of government, that is, the governing powers of the association shall be elected directly or indirectly by the members, and it appears from its constitution that the Supreme Forest is so elected, and is the governing power of the association. The Supreme Forest is the governing body, and corresponds to the board of directors in an ordinary corporation. The executive council is a subordinate body with limited pre-

scribed powers and duties, and connot be considered in any sense as analogous to the controlling directors of a corporation. The Supreme Forest "shall enact laws for its own government and for conducting the business of the order generally." The regulation of the general business of the order, then, is to be by legislation, and the executive council can legislate only as provided in the constitution. Manifestly the executive council can have no power that shall conflict with the laws so enacted by the Supreme Forest. By the constitution it is provided that the supreme executive council shall have a limited legislative power. In order to exercise such power, it must be determined by unanimous vote of all the members present that an emergency exists, and no legislation shall be enacted unless the same shall receive the affirmative vote of at least seven members of the council, and no legislation of theirs shall be enforced until it is approved in writing by two-thirds of the members of the Supreme Forest other than members of the supreme executive council. In the appointment of this committee the executive council did not comply with these requirements. The council therefore could not clothe this committee with authority to "conduct the business of the order generally." That power is in the Supreme Forest, and must be exercised by enacting laws; that is, by legislation. The executive council can legislate only in the specific manner stated in the constitution. It follows that the committee could not take control of the general business of the order.

A deputy is "one authorized by an officer to exercise the office or right which the officer possesses for and in place of the latter." This brings us back to the question we begin with: Is the supreme guardian authorized to organize groves, or local branches of the order, and to generally administer the "organization or field work?" If so, she might appoint deputy supreme guardians to perform these duties. It is her duty to preside at all meetings of the Supreme Forest and of the supreme ex-

ecutive council and enforce the laws of the order. "She shall appoint all committees not otherwise provided for, and have general supervision over the affairs of the order."

There is no express or definite provision in the constitution and laws of the association as to who "shall generally administer the organization or field work." The most that can be said in favor of the contention that the executive council has this power and duty is that the language of the constitution and laws is ambiguous upon that point. Under such circumstances, the practical construction by the parties themselves must control. For many years the supreme guardian has performed these duties, and all parties have acquiesced in this construction of the constitution and laws without question.

We conclude that, until the Supreme Forest takes action, this construction must control. There will be a meeting of the Supreme Forest soon, and it is to be hoped that such definite and unequivocal action will be taken as to avoid such conditions in the future. In the meantime the supreme council and the committee, of which the defendants Dora Alexander and Mary E. LaRocca are members, are enjoined from interfering with Emma B. Manchester, the supreme guardian, and her deputies regularly appointed in organizing groves, or local branches of the order, and generally administering the organization or field work of the association.

INJUNCTION ALLOWED.

ROSE, J., not sitting.

FAWCETT, J., dissenting.

The resolution of the executive council, which is the crux of this case, was not legislation, but simply a declaration by the executive council of the manner in which the business affairs of the corporation, over which the executive council had general control, should thereafter be managed. It seems to me to be a strained construction of the action of the Supreme Forest, or of the purpose of the elected delegates and other members of

the Supreme Forest in taking such action, to say that the Supreme Forest, by article VI of its amended and substituted articles of incorporation, adopted May 22, 1907, would enact that "the supreme executive council shall have the general control and management of the business affairs of this corporation except during the session of the Supreme Forest," unless the Supreme Forest intended to place in the hands and under the general control of the supreme executive council the management of all the business affairs of the corporation. That the Supreme Forest intended that the supreme executive council should have all the power of the Supreme Forest itself in the general control and management of the business affairs of the corporation is shown by the closing words, "except during the session of the Supreme Forest." It seems to me that it logically follows that the Supreme Forest, which, when in session, has undoubted exclusive, general control and management of the business of the corporation, realized that when the Supreme Forest was not in session there should be some body, composed of more than one person, which should be invested with the powers possessed by the Supreme Forest when in session. To "control" means: "To exercise control over; hold in restraint or check; subject to authority; direct; regulate; govern; dominate: To have superior force or authority over; overpower." To "manage" means: "To control or direct by administrative ability; regulate or administer; have the guidance or direction of: To control, restrain, or lead by keeping in a desired state or condition: * * * To arrange, fashion, contrive, effect, or carry out by skill or art; carry on or along; bring about." Century Dictionary. The Supreme Forest was undoubtedly made up of educated and intelligent delegates, convened to represent a great organization. They must be presumed to have meant just what the language which they employed imports. It thereby wisely gave to the supreme executive council general control and management of all the busi-

ness affairs of the corporation at all times except during the sessions of the Supreme Forest itself. It seems to me that it cannot be doubted that, in giving the supreme executive council general control and management of all the business affairs of the corporation, it thereby made the supreme executive council supreme in the control and management of the business affairs of the corporation, which included the general control and direction of all of the officers and representatives of the corporation through whom the business affairs of the corporation are managed, which would, clearly, include the supreme guardian. Any other construction would be to hold that the Supreme Forest intended to give to the supreme guardian sole and exclusive control of all the important business of the corporation, involving the appointment of field agents, the most important membership producing branch of the business of the corporation, and the arbitrary fixing of their compensation, involving the expenditure of thousands upon thousands of dollars of the corporation's money, and leave this individual official of the corporation in the control and management of substantially all the business affairs of the corporation, independent of and free from the supervision and direction of the supreme executive council, to which council the Supreme Forest gave the general control and management of the business affairs of the corporation, except during the session of the Supreme Forest itself. Clearly, it intended that during the intervals between sessions of the Supreme Forest the supreme executive council should be supreme in its general control and management of every branch of the business affairs of the corporation. The resolution adopted by the supreme executive council was a mere order in the course of the management of the business affairs of the corporation, and not a matter of legislation. It did not create an emergency requiring the unanimous vote of all members of the council present or the submission to referendum vote of the members of the Supreme Forest. Hence, it is immaterial that

one member of the supreme executive council protested that the resolution was in conflict with the laws of the order, and refused to participate in the adoption of the same. If it was simply an act or order in the course of the management of the business affairs of the corporation, and not legislation, the order could be made by the vote of a majority of the supreme executive council, and would be binding upon every official of the corporation charged with the performance of any part of the business affairs of the corporation. In other words, I hold that the supreme executive council, as to the general control and management of all the business affairs of the corporation, is, when the Supreme Forest is not in session, supreme and absolute; and, if any officer or agent of the corporation refuses to obey the directions of the supreme executive council, she or he immediately becomes subject to removal by such council.

The fact that the Supreme Forest created certain offices, including that of supreme guardian, and defined their duties, cannot be construed as a grant to such officers of powers in the management of the business affairs of the corporation, independent of and superior to the supreme executive council, to which, its very name and the language employed clearly show, the Supreme Forest intended to give all the powers in the control and management of the business of the corporation, during its vacation, which it had itself when in session.

The fact that the supreme executive council had, prior to the time now complained of, never deemed it necessary to give directions to the supreme guardian, cannot be construed to mean that it had at all times prior thereto recognized or acknowledged the supreme guardian as being independent of, and not subject to, the direction and control of the supreme executive council.

In view of what I have said, my judgment is that the restraining order granted herein should be discharged and relator's petition dismissed.

HENRY COOK, APPELLEE, v. NATIONAL FIDELITY & CASUALTY COMPANY, APPELLANT.

FILED DECEMBER 19, 1916. No. 18875.

1. **Insurance:** POLICY: CONSTRUCTION. In an action brought upon an insurance policy, where there was a condition to the effect that the defendant insured Henry Cook against loss of life, limb, sight and time in the minimum principal sum of $5,000, and for a minimum weekly indemnity of $25 for 12 months on account of accident, and 12 months, excluding disability due to any disease or illness contracted or suffered within 15 days of the date of the policy, on account of sickness, and the policy also contained a clause touching beneficiary insurance to apply to one person only over 18 and under 60 years of age other than the assured, it will be held that the clause may cover the person named in the policy as such beneficiary, even after the expiration of the age limitation of 60 years.

2. ———: ———: ———. In such case, where an accident occurs to the person named in the policy as the beneficiary, and it occurs after such person is beyond the age of 60 years, and after a renewal of the policy without mention of the beneficiary, the defendant insurance company will be held liable upon the beneficiary clause on the ground that there is a waiver by the defendant of the protection which it might claim.

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

Nye F. Morehouse and *L. H. Blackledge,* for appellant.

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

HAMER, J.

Appeal from Webster county. This is an action on an insurance policy. Arabella Cook, the wife of plaintiff, was fatally burned in a fire which occurred in her home at Red Cloud, Nebraska, on May 22, 1913. Suit was brought on the policy issued by the defendant and appellant, and a verdict and judgment were rendered against it, from which it has appealed.

The questions raised involve a construction of the contract contained in the policy. We deem the following

provisions of the policy essential to an understanding of the questions presented: "National Fidelity & Casualty Company, Omaha, Nebraska, Home Office Merchants National Bank Building, hereby insures Henry Cook, M. D. (the person herein named and described in the schedule of warranties for the insurance) against loss of life, limb, sight and time in the minimum principal sum of five thousand dollars and for a minimum weekly indemnity of twenty-five dollars, under the terms and agreements hereinafter set forth, for twelve months on account of accident, and twelve months, excluding disability due to any disease or illness contracted or suffered within fifteen days after date of this policy, on account of sickness, as hereinafter described, from the 27th day of June, 1910, at twelve o'clock noon, standard time, at the place where this policy is countersigned. This policy is issued in consideration of the premium of forty dollars, and of the statements contained in the schedule of warranties hereinafter given, which statements the assured makes by accepting this policy and warrants to be true."

Then follow stipulations of the policy as to the kind and amount of insurance, and also paragraph L, which is the foundation of plaintiff's case: "L. Beneficiary Insurance. If one person only, over eighteen and under sixty years of age, other than the assured, is specifically named as beneficiary in the schedule of warranties hereinafter given, then and not otherwise, this policy shall also, in consideration of the premium, insure the person so named as beneficiary, subject to the general agreements hereinafter given, against disability or death caused directly in the manner set forth in clause B, as follows:" Here follow stipulations of the policy touching the amount and kind of insurance.

Clause B, referred to, is as follows: "B. Double Indemnity. If said bodily injuries are sustained by the assured while riding as a passenger in or on a public conveyance, provided by a common carrier for passenger

service; or while riding as a passenger in a passenger elevator (excluding elevators in mines); or while in a burning building, the amounts otherwise payable in clause A shall be doubled."

The "schedule of warranties" shows that Mrs. Cook, named as beneficiary, was 59 years of age at the time the policy was issued, while her husband was 61 years of age. She was 61 years and 10 months old at the time of the accident which resulted in her death. The policy having been renewed each year, the question is whether she was to be considered as included in the policy at the time of her death. By the specific terms of the contract it appears that insurance on the beneficiary is limited. The beneficiary is not to be under 18 years of age nor over 60.

(a) If the defendant meant that the policy should terminate on the arrival of the sixtieth birthday of the beneficiary, it should have said so plainly. It did not say so; therefore it is fair to assume that it did not claim when the policy was issued what it now contends for. If it did so claim, then its purpose would have been to deceive, and this we cannot presume.

(b) If it was intended that the terms of the policy should not include the beneficiary in case of renewal, then that statement should have been made. It was not made, and the general terms of the language used are suggestive of the fact that the beneficiary is to be included. There should be no deception of the public by the use of a printed form which is disregarded by the parties in their interpretation of the contract. When the renewal was made and nothing was said about its effect so far as the beneficiary was concerned, then there was a waiver of anything upon the part of the defendant that might be claimed in the policy and which was inconsistent with the fact of renewal.

(c) Every policy written should continue for the full term of its face, except there is some condition by which the company is to be released from the obligation which

it has assumed. If there is a renewal, and it is not intended that the renewal shall apply to the beneficiary, then the fact should be noted, so that the assured may be apprised of the purpose of the insurance company.

(d) That interpretation of the contract should be adopted which upholds the obligation which the parties apparently contracted for. 9 Cyc. 586.

(e) That construction should be put upon the contract which the defendant had a right to expect the plaintiff would reasonably adopt under the circumstances. 1 Chitty, Contracts (11th Am. ed.) 104; *Hoffman & Place v. Ætna Fire Ins. Co.*, 32 N. Y. 405; *Beber v. Brotherhood of Railroad Trainmen*, 75 Neb. 183.

In 1 Chitty, Contracts, *supra*, it is said the contract "must, therefore, be the sense (for there is no other remaining) in which the promisor believed that the promisee accepted the promise."

In *Hoffman & Place v. Ætna Fire Ins. Co., supra*, it is said in the syllabus: "Where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee."

"Conditions and provisos in policies of insurance are to be construed strictly against the underwriters, as they tend to narrow the range and limit the force of the principal obligation."

In *Beber v. Brotherhood of Railroad Trainmen, supra*, it was said: "If the officers of the society, who prepared the by-law in which the contract is set forth, have used ambiguous terms, the ambiguities must be interpreted in the manner most favorable to the insured. If instead of stating in plain and simple language the exact loss they intend to protect against, they propound riddles in a jargon of equivocal phrases, these riddles should be solved most favorably to him who has been the victim of such artifice."

The assured had a right to rely upon the validity of the renewals. *Owens v. Travelers Ins. Co.*, 99 Neb. 560.

Where there are conflicting provisions in the policy, the courts will adopt that which is most favorable to the assured, and which offers a fair interpretation. *Funke Estate v. Law Union & Crown Ins. Co.,* 97 Neb. 412.

It would seem that the defendant resists payment on grounds that are rather technical. The beneficiary, Mrs. Cook, was burned to death on the 22d of May, 1913. The policy was then in force. She and her daughter were laboring to extinguish the flames in the kitchen of their frame dwelling-house. These flames were occasioned by the spilling of alcohol from a kettle on the stove. From the fire thus created, flames were communicated to the woodwork, and her clothing caught fire. She was most severely burned. On the day after she suffered the injury she died. The policy issued showed that the age of Dr. Cook at the time the contract was made was 61, and Mrs. Cook, the beneficiary, was 59 years of age. The contract was renewed for three successive years by payments of the annual premiums, which were paid in advance.

The interpretation which the parties to a contract put upon it should determine their rights under it. *Sibert v. Hostick,* 91 Neb. 255.

The renewals of the policy clearly recognize the fact that Mrs. Cook was over 60 years of age.

The following phrases are to be interpreted: "Under the terms and agreements hereinafter set forth." Third line of policy. "If one person only, over eighteen and under sixty years of age, * * * is specifically named as beneficiary, * * * this policy shall * * * insure the person so named * * * subject to the general agreements hereinafter given." Paragraph L. "Nor does this policy cover or apply to any person (either as assured or beneficiary) under eighteen or over sixty years of age." Agreement 4.

As we understand it, there is no distinction as to the age limit between the assured and the beneficiary. We

think the language used means that a policy may be written for any one over 18 and under 60 at the time of the issuance of the policy, but that no policy shall be written for any one outside of those ages at the date of the policy. 6 R. C. L. 847. In section 237, 6 R. C. L. 847, it is said: "It is a well-settled rule of law that where part of a contract is written and part is printed, and the written and printed parts are apparently inconsistent or there is reasonable doubt as to the sense and meaning of the whole, the words in writing will control the construction of the contract. The reason why greater effect is given to the written than to the printed part of a contract if they are inconsistent is that the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use without reference to particular objects and aims." Many authorities are cited in support of this proposition. Applying the principle, of course not the actual fact, to the instant case, the last thing done, that is, the renewal of the policy, shows what the parties meant. It never was meant there should be no power to renew.

We think it contrary to public policy to permit an insurance company to so conduct itself that the assured has good reason to believe that the policy is in force, both as to himself and the beneficiary, and then avoid the contract of insurance by a forced interpretation of the policy not in accord with the conduct of the parties. It is not right that the company should lead the assured and his beneficiary to believe that the policy is in force and then try to avoid the terms of the contract. The company should not collect premiums without a valid consideration. If there is no insurance, no premium should be paid. No technical construction of uncertain language should be allowed to defeat the assured and

prevent him from getting that to which he is justly entitled.

The judgment of the district court is

AFFIRMED.

ROSE, J., concurring in the conclusion.

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

JOHN J. CRINKLEY ET AL., APPELLEES, v. JOHN T. ROGERS ET AL., APPELLANTS.

FILED DECEMBER 19, 1916. No. 19059.

1. **Devise:** AGREEMENT TO MAKE. An agreement upon sufficient consideration to devise or bequeath property is valid and enforceable." *Teske v. Dittberner*, 70 Neb. 544.
2. ———: ———: CREATION OF TRUST. "In such case, equity will impress a trust upon the property, which will follow it into the hands of personal representatives of the promisor or grantees without consideration." *Teske v. Dittberner*, 70 Neb. 544.
3. **Trusts:** CREATION. "Where a person, knowing that a testator with whom he has confidential relations in leaving him a devise or bequest intends it to be applied for the benefit of another, either expressly promises or by his action at the time implies that he will carry the testator's intention into effect, and the property is left to him with the faith on the part of the testator that his promises will be kept, he will be held as trustee." *Smullin v. Wharton*, 73 Neb. 667.
4. ———: ———: EQUITY. "In such case, the will has full effect by passing an absolute legacy to the legatee, but equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee as a trustee *ex maleficio* to turn over the gift to them. The court acts not upon an express trust created by the testator but, on account of the fraud, upon the conscience of the devisee" *Smullin v. Wharton*, 73 Neb. 667.
5. **Evidence** examined, and found sufficient to sustain the decree of the trial court.
6. **Witnesses:** COMPETENCY. Testimony of witnesses having a direct legal interest in the subject of the controversy, and of the attorney and confidential adviser of the deceased, *held* properly excluded. See sections 7894, 7898, Rev. St. 1913.

7. **Appeal:** EVIDENCE: PRESUMPTIONS. Error cannot be predicated for the admission of alleged incompetent evidence where a cause is tried to the court without a jury; the presumption in such case is that the court considered only competent evidence in reaching his conclusion and judgment.

APPEAL from the district court for Saunders county: EDWARD E. GOOD, JUDGE. *Affirmed.*

R. J. Greene, John H. Barry, Riling & Riling and *Lionel C. Burr,* for appellants.

B. F. Good, B. E. Hendricks, Harding & Owen and *Burkett, Wilson & Brown, contra.*

HAMER, J.

This was an action in the district court for Saunders county brought by the heirs of Christina Rogers to recover their alleged interest in her estate consisting of certain land situated in that county, and personal property which was in her name at the time of her death. The defendants named in plaintiffs' petition were John T. Rogers, James Rogers, Eleanor Johnson Mitchell, Minnie Johnson Hardy, James W. Johnson, Bertha Strahl, Tena S. McGregor, Alexander Dow, and John Martin, as administrator, together with John H. Barry. From a decree for the plaintiffs and the defendant Tena S. McGregor, the other defendants have appealed.

It appears from the record that William Rogers, whose property is the subject of controversy, had for many years been a resident of Saunders county. He first settled on a homestead and afterwards acquired considerable other real estate by purchase. He married Christina E. Stewart in 1883, and from that time until her death, which occurred in 1913, they resided together in Saunders county. Prior to her death William Rogers conveyed all of his property to his wife and the same was in her name when she died. Tena S. McGregor, one of the defendants, was a niece of Mrs. Rogers, and had visited with them for many years and had ministered

to their comfort. The record shows that after her marriage to Mr. Rogers his wife had inherited a considerable sum of money from her people. That money was used to purchase some of the real estate which was conveyed to her by her husband. Other sums were deposited in the bank at Ceresco. There was an oral agreement between Rogers and his wife that on the death of either the survivor should have all of the property, both real and personal, until his or her death, when it should go to Tena S. McGregor and the other heirs of Mrs. Rogers. This fact seems to be clearly established by the evidence of many competent witnesses. Mrs. Rogers, before her death, made a will by which she bequeathed and devised all of her property of every kind to her husband, William Rogers, who survived her. Her will was duly admitted to probate, and thus William became possessed of the whole estate. Before his death, which occurred on August 6, 1913, he made his will disposing of all the property in his name but contrary to the agreement between himself and his deceased wife. Tena S. McGregor presented his will for probate. The heirs of Rogers contested, and the will was set aside on the ground that he was incompetent to make the same. Tena S. McGregor appealed to the district court. Pending the trial in that court all of the parties to that record entered into a stipulation which provided, in substance, that Tena S. McGregor should have one-third of all the estate, both real and personal, after the payment of Rogers' debts and the costs of the administration, and that her appeal should be dismissed. This stipulation was approved by the district court, and the appeal was accordingly dismissed. Afterwards the heirs of Christina E. Rogers commenced this suit. Meanwhile John H. Barry had obtained an interest in the property through some of the heirs of William Rogers, and he was made a party defendant. Tena S. McGregor, being satisfied with the settlement she had made with the contestants of the will of William Rogers, refused to join

as a plaintiff, and therefore she was made a defendant. By the decree appealed from Tena S. McGregor was awarded one-third of the whole estate after the payment of Rogers' debts and the costs of administration. The remainder of the estate was given to the other heirs of Mrs. Rogers.

It is the contention of appellants that the decree is not supported by the evidence and is contrary to law. The rule is well established in this state that equity will fasten a trust upon property in the hands of a person who promised to dispose of it by will in favor of another, which will follow it into the hands of personal representatives or grantees without consideration. *Teske v. Dittberner,* 70 Neb. 544. "Where a person, knowing that a testator with whom he has confidential relations in leaving him a devise or bequest intends it to be applied for the benefit of another, either expressly promises or by his action at the time implies that he will carry the testator's intention into effect, and the property is left to him with the faith on the part of the testator that his promises will be kept, he will be held as trustee." *Smullin v. Wharton,* 73 Neb. 667. "In such case, the will has full effect by passing an absolute legacy to the legatee, but equity, in order to defeat a fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee as a trustee *ex maleficio* to turn over the gift to them. The court acts not upon an express trust created by the testator but, on account of the fraud, upon the conscience of the devisee." *Smullin v. Wharton,* 73 Neb. 667; *Pollard v. McKenney,* 69 Neb. 742, 753; *Schneringer v. Schneringer,* 81 Neb. 661.

Without quoting the evidence, we find that it is clear and convincing that William Rogers agreed with his wife that he would make a will devising and bequeathing the estate which she gave to him by her will to Tena S. McGregor and her other heirs; therefore the court was warranted in decreeing one-third of the property to Tena,

and the remainder of it to the other heirs of Mrs. Rogers.

Mrs. Rogers left all her estate to her husband by will, relying upon his promise to protect her heirs and carry out her intentions as agreed. He obtained title to all of her estate, being all the property which she had, by reason of his confidential relation, the confidence she had in him, and his agreement to carry out her wishes. To decree the estate to others than her heirs would amount to a fraud which a court of equity should not tolerate.

Appellants also contend that the trial court erred in excluding the proffered evidence of John T. Rogers. It is clear that the witness was directly interested in the subject-matter of the controversy, and under the provisions of section 7894, Rev. St. 1913, his evidence as to conversations and transactions with the deceased was properly excluded. The same may be said as to the proffered evidence of C. H. Slama who was William Rogers' attorney and confidential adviser. Rev. St. 1913, sec. 7898.

Appellants further contend that the court erred in refusing to sustain the motion to correct the testimony of witness C. C. Turney. As we view the record, it speaks for itself, and the court properly refused to make the proffered correction.

As to the assignment of error in receiving certain evidence, it may be said that, where the trial is to the court without a jury, the presumption is that the court considered only competent evidence in reaching his conclusion and judgment.

Finally, the record clearly shows that Mrs. Rogers furnished a large part of the money used for the purchase of the real estate; that she and her husband had frequently and publicly declared that their property should go to Tena S. McGregor and the other heirs of Mrs. Rogers to the exclusion of the heirs of her husband. Tena had visited with them for many years, had ministered to their comfort and their wants, and was entitled

to one-third of the property granted her by the stipulation on which she dismissed her appeal in the case relating to the contest of Mr. Rogers' will.

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

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

JOE FELTHAUSER, APPELLEE, v. ROBERT C. GREEBLE, APPELLANT.

FILED DECEMBER 19, 1916. No. 19066.

1. **Trial:** VERDICT: CONSTRUCTION OF CONTRACT. It is for the court to construe and determine the meaning of a written contract; but where the pleader is in doubt and sets out the alleged meaning in his pleading, and evidence is introduced by both plaintiff and defendant on that question, a verdict of the jury under proper instructions, not excepted to, should not be set aside.
2. **Appeal:** AFFIRMANCE. A judgment should not be reversed for a refusal to strike such allegation from the petition, when the jury has correctly determined the meaning of the contract.
3. **Brokers:** COMMISSIONS. Where a real estate broker, employed for a commission, presents to the principal a proposed purchaser, it is for the principal to decide whether the person is acceptable; and, if without fraud or concealment or other improper practice, he enters into a binding and enforceable contract for the sale of the land, the broker has earned his commission, and the seller should not be permitted to say that the broker has not complied with the terms of his agreement.
4. ———: CONTRACTS: SIGNATURE. The fact that the signature of the broker to the contract appears under the name of one who signed it as a witness is not entitled to serious consideration, where the evidence shows that the broker signed it as a binding contract.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

E. F. Warren and *W. F. Moran*, for appellant.

W. W. Wilson, contra.

HAMER, J.

This was an action by a real estate agent to recover from the defendant a sum of money which he alleged to be due him, on a written contract, for the sale of defendant's half section of land in Otoe county. The brokerage contract reads as follows:

"Nebraska City, Neb., May 23, 1913.

"This contract entered into this twenty-third day of May between Robert Greeble, party of the first part, and Joe Felthauser, party of the second part, whereas Robert Greeble is the owner of the north ½ of section 28, township 8, range 14, I appoint Joe Felthauser as my sole and exclusive agent for thirty days for the sale of the same. Party of the first part is to have $48,000, or $150 per acre for the within described land. Felthauser is to have 1% for his commission for selling the said land and all over and above $48,000 should be Felthauser's commission. I further agree to pay Felthauser 1% on any other price agreed upon between me and the purchaser that Felthauser may bring, and I close a deal with and receive such earnest money as I agree upon.

"R. C. GREEBLE.

"Witness: L. F. IMM.

"JOE FELTHAUSER."

Plaintiff alleged: (2) That, pursuant to said agreement, plaintiff on May 24, thereafter sold to one Herman Wickhorst said land for the sum of $50,000, and on said date Wickhorst and said Greeble entered into a valid written contract for the sale of said land, said Wickhorst paying said Greeble in cash the sum of $3,000 and agreeing to pay him the further sum of $19,000 on the 1st day of March, 1914, at which time the said Greeble was to make, execute and deliver to the said Wickhorst a good and sufficient warranty deed for said land, and the said Wickhorst was at the same time to give said Greeble a mortgage on said land for $28,000, that being the remainder of the purchase price, said mortgage to

run for five years at 5 per cent. per annum interest; that said contract between the said Wickhorst and said Greeble was executed in duplicate, each of said parties retaining a copy; that plaintiff has no copy thereof, and is unable to give all the details thereof, but has set forth the substance thereof. (3) That plaintiff's commission for making said sale is $2,480, of which defendant has paid only $480, and that there is still due the plaintiff on account thereof from the defendant the sum of $2,000, no part of which has been paid, though demanded, with interest from March, 1914, at the rate of 7 per cent. Wherefore he asks judgment for $2,000 and interest.

Defendant filed a motion requesting the court to strike that part of the petition alleging the meaning of the contract, which motion was overruled.

Defendant also demurred to the petition, and the demurrer was overruled.

The defendant then filed an answer as follows: (1) Denied each and every allegation of the amended petition, not admitted; (2) that said amended petition does not state facts sufficient to constitute a cause of action against the defendant; (3) admits that he paid plaintiff as commissions on his alleged sale and as payment for his services in said transaction the sum of $480, and alleges that plaintiff received and accepted said sum in full payment for his alleged services, and that this defendant paid the same as and for full settlement, accord and satisfaction for any and all claims the plaintiff had, or might have, against the defendant for any services whatever rendered by plaintiff for the defendant; (4) demands judgment that the action be dismissed and for costs.

The plaintiff replied denying the payment of the $480 was in full of plaintiff's commission; denies that plaintiff received said payment in full for his said services in making said sale. Further replying plaintiff denies each and all allegations of the answer.

On the issues thus joined the cause was tried to a jury. Plaintiff had a verdict for $2,095.22. Judgment was rendered on the verdict, and the defendant has appealed.

It is appellant's first contention that the trial court erred in overruling his motion to strike certain allegations from the petition. As we view the brokerage contract, it was not at all ambiguous and needed no explanation. The matter sought to be stricken from the petition was, to say the most, merely surplusage. The record shows, however, that testimony was received in support of that allegation, and defendant also testified as to his understanding of the contract. This question was submitted to the jury under proper instructions, therefore defendant is not in a position to complain of the ruling.

Appellant next contends that the brokerage contract required plaintiff to sell the land for cash, and he, not having met its requirements, was not entitled to recover. This contention cannot be sustained. The record discloses that, when plaintiff produced the purchaser, the defendant accepted his terms of payment, and a valid and binding contract was entered into for the sale of defendant's land for the sum of $50,000, on which defendant was paid the sum of $3,000 as earnest money when the contract was signed. By its terms the purchaser was to pay $19,000 on March 1, 1914, when he was to have possession of the land, and he was then to execute a mortgage to defendant for $28,000, the remainder of the purchase price, due in five years drawing 5 per cent. interest.

Where a real estate broker, employed for a commission, presents to the principal a proposed purchaser, it is for the principal to decide whether the person is acceptable; and, if without fraud or concealment or other improper practice, he enters into a binding and enforceable contract for the sale of the land, the broker has earned his commission, and the seller should not be permitted to say that the broker has not complied with the terms of his agreement. *Scully v. Williamson,* 26 Okla. 19, 27

L. R. A. n. s. 1089; *Lincoln Realty Co. v. Garden City Land & Immigration* Co., 94 Neb. 346; *Reasoner v. Yates,* 90 Neb. 757; *Wilson v. Mason,* 158 Ill. 304, 49 Am. St. Rep. 162.

It is said in 4 R. C. L. 309: "Once the customer procured by the broker is accepted by the employer, the latter is thereafter estopped from denying the purchaser's ability or willingness to complete the contract, inasmuch as he is not bound to accept the offer of such person without a reasonable opportunity to inquire and satisfy himself in relation to it. Consequently his acceptance should estop him from alleging anything against this claim except fraud on the part of the broker in inducing the acceptance."

The record discloses that defendant paid plaintiff $480, which was 1 per cent. of $48,000, and appellant contends that this was full payment of plaintiff's compensation. The evidence does not sustain this contention. Plaintiff produced a purchaser who entered into a contract with defendant by which defendant sold his land for $50,000. By the terms of the brokerage contract plaintiff was to have all he could obtain for the land above $48,000 as a part of his commission, in addition to the 1 per cent. on the price fixed by defendant for which defendant was willing to sell. When defendant was paid the $3,000 earnest money, he paid plaintiff $480, and nothing was said between them about full payment. That question was submitted to the jury under proper instructions and was resolved against defendant. Therefore we cannot say that the finding of the jury was clearly wrong. The contracts are all in evidence, and were before the jury, and the verdict is sustained by the evidence.

It is further contended that plaintiff only signed the brokerage contract as a witness, because his signature appears at the left-hand side of the agreement under the signature of I. F. Imm, who signed it as a witness. This contention is not entitled to serious consideration,

where the evidence shows that plaintiff signed it as his contract.

After an examination of the entire record, we are unable to say that it contains any reversible error. The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

ELIZABETH L. EVANS, APPELLEE, v. ERNEST L. C. GILMORE, APPELLANT.

FILED DECEMBER 19, 1916. No. 19133.

Landlord and Tenant: LEASE: CONSTRUCTION. Controversy over a lease and contract covering real estate. The substance of the contracts is set out in the opinion. *Held*, the record is free from error, and the judgment is sustained by the evidence.

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

Frank L. McCoy and *Weaver & Giller*, for appellant.

Berge & McCarty, contra.

HAMER, J.

This case comes here on appeal from the district court for Douglas county, Nebraska. The plaintiff and appellee, Elizabeth L. Evans, brought the action against the defendant and appellant, Ernest L. C. Gilmore. The plaintiff seeks an accounting for the rents and profits of a 240-acre farm, which the defendant has been occupying for a period of more than five years. In her petition the plaintiff also asks for the cancelation of a certain written instrument. The defendant placed the instrument of record. The plaintiff alleges that it is void. She alleges that she was the owner of the 240-acre farm, except 40 acres in which she had an undivided half interest, and that she afterwards purchased the other

half interest in said 40 acres. She leased the whole 240 acres to the defendant for five years, commencing March 1, 1910. The defendant was to deliver her one-third of all the crops he raised. The lease provided that the tenant should harvest the crops, put the rent share in the granary, and haul and deliver the same to market as the plaintiff wished it to be done.

It is alleged by plaintiff that the defendant violated this lease; that he would not put the plaintiff's share of the grain in the granary by itself; that the plaintiff could never obtain any settlement with the defendant of the crops grown; that the defendant would sell the grain or feed it to the stock, and, except about 1,000 bushels of corn, he never accounted to the plaintiff, and did not pay her any rent, except a very small portion thereof. He appears to have kept several horses and some cattle and a number of hogs, and he fed them out of the crops without taking any rent share from the same. Much of the time the defendant appears to have been busy with a ditching and grading machine working for the neighbors. He apparently had plans for the future improvement of the farm which he never put into effect. He also claims that he made an arrangement by which he was to improve the condition of the farm and have a certain share in the profits in case he should sell the property for a sum above $16,000. The defendant claims that he took possession under his lease, the lease being for five years, and there was also a contract which, omitting place of execution, date, and signatures, reads:

"It is hereby agreed between the parties, E. L. Evans and E. D. Evans, parties of the first part, and Ernest L. C. Gilmore, party of the second part, to wit: That party of the second part shall have one-half of the sum above sixteen thousand (16,000) dollars for which the land, 220 acres, lying in sections 16 and 21, township 16, range 10, Douglas county, Nebraska, which now is the property of the parties of the first part, may sell. To this estimated value, $16,000, is to be added whatever

sum the Elkhorn Valley Drainage District may levy upon said land by way of cost for drainage in straightening Elkhorn river and making lateral ditches. And it is hereby further agreed that such party of the second part is authorized and given full authority to deal with said land in regard to the drainage and before the drainage board as if it were his own."

At the same time that it is claimed the foregoing contract was made, February 28, 1910, the lease was made. The lease stipulates that the party of the first part, E. L. Evans and E. D. Evans, wife and husband, leased to Ernest L. C. Gilmore the land described for the term of five years after the first day of March, 1910. The party of the second part, Ernest L. C. Gilmore, covenants that he will do the work in a good and workman-like manner and in good season, that he will plant a certain number of acres in corn, a certain number of acres in wheat, and a certain number of acres in barley, and that he will put 65 acres in grass. There are also in the lease the usual covenants with respect to keeping the crops free from weeds. There is also the agreement to haul the plaintiff's share of the grain to the nearest market at such time as the party of the first part may request.

The defendant claimed that on or about August 8, 1914, he made an oral bargain to purchase the farm, and that under this bargain he made certain substantial and valuable improvements, and he claims a right to the premises by virtue of this oral agreement, as also under the contract in writing. He claimed that this agreement to purchase the farm was oral, but that the plaintiff promised to reduce it to writing. He further claimed that, because of this new contract to purchase the farm, he built a new hog house, and hauled some dirt, and built some fences, and also sowed some wheat and grass, and that he was ready to perform the contract of purchase.

The defendant's possession was acquired under and by virtue of his lease, and his right of possession was never changed under or by reason of his other negotiations with the plaintiff. *Bigler v. Baker,* 40 Neb. 325; *Lewis v. North,* 62 Neb. 552. To take an oral sale out of the statute of frauds, there must be both possession and valuable improvements, and both must be under the contract of purchase, or else there must be a full and complete performance by the vendee. *Teske v. Dittberner,* 70 Neb. 544; *Moline v. Carlson,* 92 Neb. 419; *Damkroeger v. James,* 95 Neb. 784; *Cobb v. Macfarland,* 87 Neb. 408.

In *Teske v. Dittberner, supra,* it is said in the fifth paragraph of the syllabus: "Performance of services of such a character that their value cannot be estimated by a pecuniary standard, so that the court cannot restore the promisee to the situation in which he was when the contract was made, or compensate him in damages, is sufficient to take such an agreement out of the statute of frauds." In the same case it is said in the sixth paragraph: "While, in general, a contract for personal service, where full performance rests upon the will of the contracting party, is not specifically enforceable at suit of either party, when such services have been rendered or there has been a substantial performance of his contract on the part of the person agreeing to render them, the reason of the rule ceases, and the contract may be enforced."

In *Moline v. Carlson, supra,* it is said: "The rule is now well settled in this court that a parol contract will be enforced by a court of equity, where one party has wholly and the other partly performed it, and its nonfulfilment on the one hand would amount to a fraud upon the party who has fully performed it."

In *Damkroeger v. James, supra,* it is said in the syllabus: "Specific performance of a parol contract will be enforced by a court of equity, where one party has wholly and the other partly performed it, and its non-

fulfilment on the one hand would amount to a fraud on the party who has fully performed it."

The foregoing language seems to have been first used in *Kofka v. Rosicky,* 41 Neb. 328. Since then similar language has been used in *Hespin v. Wendeln,* 85 Neb. 172; *O'Connor v. Waters,* 88 Neb. 224; *Peterson v. Bauer,* 83 Neb. 405. An examination of the evidence in the instant case shows that the facts required by the authorities cited do not exist.

The defendant is shown by the evidence to have been an undesirable tenant. He was not a very good farmer, and he kept nearly all that he raised. He also let the farm run down. The improvements that he claimed to have made were of no substantial value. He had no opportunity apparently to fail without improving it.

The defendant in this case married the plaintiff's granddaughter. In looking over the evidence it is suggested to the mind of the writer that the plaintiff was very patient with him. How far the defendant has been influenced in his conduct towards the plaintiff by the fact that he is married to the plaintiff's granddaughter can only be surmised. His testimony concerning the number of acres that he put in corn and the number that he put in wheat is most unsatisfactory, as also the number of acres in rye. He testified that he did not feed any corn in 1913 to his own stock. It is in testimony that he fed out of this corn crop by the wagon-load. He made no division; he kept feeding out of the crop. He did not have any idea of how much timothy hay he used in 1914, but he used all of it, whatever it was. He did not deny what he had done, at least he did not always deny it, but he invariably took the crop. He also was very uncertain concerning the improvements that he had made. He sold the wheat crop of 1914 for $1.04 a bushel. He was unable to testify to the fact, but he kept the money.

Perhaps the only matter in controversy is the contract that was made at the time the lease was executed, and

the subsequent oral contract. Remember that the defendant's wife is the mother of the plaintiff's great grandchildren. There are some possible matters of embarrassment about this case. There is no controversy about the contract made at the time the lease was executed, except as to the effect of it. The defendant testified that he told the plaintiff that he would take the place and try to make it salable, and that he would build it up, and that he would take it at a valuation of $16,000, and that the plaintiff should furnish the material, and he would build the place up for sale and receive one-half of the profits above the $16,000, with the expense of drainage added thereto. The plaintiff understood the defendant wanted the land for five years, and wanted it so that he would not have to move off during that time, and if he did have to move off that he would then be paid for his improvements; that if he built the place up and improved it, and it was sold during the term of his lease, he did not want to lose the value of his improvements. It was thought that some ditching should be done and the buildings painted, and that the crops should be rotated, and the place generally should be improved. If sold, the defendant would have as pay for his improvements half of the excess above the $16,000, with the expense of drainage added thereto; if the place was not sold, then the defendants would not be damaged; if the place was sold, then he was to receive the sum above mentioned. The defendant did substantially nothing. He cut some brush which was to be used in making an automobile road. He did a little ditching, but he farmed right over the ditch and sowed oats in the bottom of it. The plaintiff paid for all the paint on the house and barn; she also paid for the new pump and the grass seed and materials used in repairs. The agreement made at the time of the lease would seem to have no application to the controversy between the parties, for the reason that it contemplated that a sale might be made. The five years expired. No sale was made. No sale is con-

templated, and the defendant has done nothing to justify any prospect of a sale. He has nothing in the premises to lose. The defendant has no rights under the contract in writing. When interrogated: "Then you are still claiming under exhibit B, are you? still claiming rights under exhibit B? A. No, sir." Notwithstanding what he said, his main contention is the validity of the contract. In *Manning v. Ayers,* 77 Fed. 690, under a similar contract, the court held that it conveyed no interest whatever in the land. There the defendant wanted the land sold so that he might receive half the price of the same above the agreed value at the time the contract was entered into. The court held he was not entitled to such relief.

In *Campbell v. American Handle Co.,* 94 S. W. 815 (117 Mo. App. 19), the plaintiff and defendant entered into a contract for the cutting and delivery to the factory of certain timber. In that case the court said that the plaintiff was only entitled to pay for the timber which he actually cut and delivered; that the contract lacked mutuality, in that it did not bind him to do anything. The court said in the syllabus: "In a contract under which plaintiff was to cut and deliver at defendant's factory timber of certain dimensions, at a certain price, but which did not bind plaintiff to furnish any specified quantity thereof, but left him at liberty to cease cutting and delivering at any time, there was no mutuality of contract." In the body of the opinion it was said: "We think the contract is void for want of mutuality. Plaintiff was not bound to cut and deliver any specific number of cords of bolts or any specific number of feet of saw stocks, nor was he bound to cut all the ash timber on any particular tract of land, or any tract of land."

In *Steinwender-Stoffregen Coffee Co. v. Guenther Grocery Co.,* 80 S. W. (Ky.) 1170, it was said: "As we have said, it is a fundamental principle of law that there must be mutuality in every contract. If one of the parties is not bound, then the other is not. * * * 'There are

many cases in which the offer is definite enough, yet the acceptor, by merely accepting, has really himself promised nothing in return—has not made himself liable for anything—so that, although one is bound, the other is not, and the engagement lacks what is called "mutuality." In such a case there is not an enforceable agreement. The most frequent example of this principle is when one offers to supply another with such goods of a certain kind as he may choose to order or may wish during a certain time and the other accepts the offer. Here there is no consideration for the promise or offer, for the promisee has not bound himself to anything, and has incurred no legal liability at all.' "

In the contract referred to the defendant did not bind himself to do anything. Even if the contract should be considered as part of the lease because executed at the same time, still the defendant is not bound to do anything in that part of the contract which he signed. As the defendant did nothing which could give him any property in the land, he is not entitled to anything.

In the contract of August 8, 1914, which was oral and was not signed, there was no legal obligation unless defendant did something by reason of the said oral contract which substantially increased the value of the land and which was done because of the contract. The defendant had a lot of hands. They were at work for him in his ditching and grading enterprises. Any increase in the improvements which he made appears to have been made for the purpose of enabling him to take care of these men who were engaged by him to assist him in his ditching and grading work. An examination of appellant's brief and the decisions which he cites shows that the latter are not in point. We refer to the following, and give a statement concerning the cases as we understand them. In *Smith v. Gibson,* 25 Neb. 511, there was a lease for a specific time with rent payable monthly. It contained a proviso that the tenant might purchase the premises for a stipulated price. When notified by the tenant that

he accepted the terms of the purchase, the defendant acquiesced and said that he accepted the offer, but subsequently he refused to convey because, as he alleged, he did not like the man from whom plaintiff was about to obtain the money to complete the purchase. In *Donahue v. Potter & George Co.,* 63 Neb. 128, the contract was not revocable because the parties had gone so far that $3,000 had been paid and the deeds placed in escrow until the proper payments could be computed and made. In *Dickson v. Stewart,* 71 Neb. 424, it was held, in substance, following *Bigler v. Baker,* 40 Neb. 325: "Want of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within its terms."

In *Bigler v. Baker, supra,* if there had been a want of mutuality, it would not be a valid objection to plaintiff's right to recover, because everything was done that it was contemplated might be done. In the instant case nothing was done.

The following statement is, in substance, taken from the appellant's brief: The 240 acres of land in controversy in this case is situated on the Elkhorn river a short distance northeast of Valley. Mr. and Mrs. Evans lived on this land from 1871 to 1891, and were among the prominent farmers in that part of the county. The family consisted of Mr. and Mrs. Evans and six children, among whom were William Evans, the father of the defendant's wife, so that the defendant's wife is the grandchild of the plaintiff. The defendant's father, Captain Gilmore, was also a prominent citizen of Douglas county, and owned one of the best farms between the Evans farm and Valley. His family consisted of several children, among them this defendant, who has been quite active in the affairs of the county, and is at the present time chairman of the drainage board of the Elkhorn Drainage District. A brother, John Gilmore, is president of the Farmers Club at Valley, and another brother is instructor

in the University of Nebraska. So it will be observed at the outset that the families interested in this lawsuit are prominent. Mr. and Mrs. Evans' children, as the court will need to know, are William, Mary (Mrs. T. J.) Oliver, Annie Portlock, Martha Evans, Alvin and Frank. William and Mary were married before the family left the farm, and the others went with their parents to Bethany. William has lived in Nebraska part of the time. The Olivers were for many years at Falls City. The Portlocks were at Havelock or Bethany. Alvin has been for several years at Pullman, Washington, and Frank and Martha have been in Idaho. Alvin has all along been his mother's adviser. This suit was brought by the plaintiff primarily to cancel the contract of February 28, 1910, which gave defendant certain special rights. However, the record in the case is largely made up of testimony with reference to an accounting between plaintiff and defendant for the rents and profits of this farm during the time the defendant occupied it under the aforesaid contract. There are two contracts which form the real basis of this controversy. One is the contract of February 28, 1910, above referred to, providing for the sale of the land and division of the proceeds between plaintiff and defendant; and the other is the contract of August 8, 1914, wherein plaintiff, as alleged, agreed with defendant to sell the farm to him on certain terms and conditions. Both contracts were made at the solicitation of the plaintiff. The former was put into writing and signed. The terms of the latter were agreed upon and set down in a memorandum, but not signed. "The accounting is merely incidental to the main contention of the plaintiff, and was thrown in" to give jurisdiction.

An examination of the evidence shows a long and unsuccessful struggle on the part of the plaintiff to get rid of the husband of her granddaughter. She is justified in not wanting to retain him as a tenant, or in anyway connected with the farm. One of her sons (Alvin) wrote several letters, which are shown by the record and the

briefs. He appears to have been friendly to the defendant until he afterwards lost his patience in attempting to assist the defendant to become reconciled to the idea that his mother should get rid of him as an unprofitable tenant and recover possession of the land. On April 16, 1915, the temporary injunction issued before that time was made permanent. It enjoined the defendant "from asserting, claiming or in any way attempting to enforce any right, claim or title in or to said real estate by reason of a certain agreement dated Bethany, Nebraska, 2/28/10, signed by Elizabeth L. Evans and Ernest L. C. Gilmore, and filed for record by said defendant in the office of the register of deeds of said county of Douglas." The order was to take effect upon the giving of an undertaking in the sum of $1,500, with an approved surety. The bond was approved. The judgment canceled and annulled the instrument referred to, and enjoined the defendant and prohibited him from ever claiming any right, title, claim or interest in or to said real estate, or any part thereof, and that the plaintiff recover of said defendant the possession of all of said real estate and have a writ of restitution therefor, and "that this decree does not abate any action at law now pending between the parties hereto for the possession of said real estate by plaintiff, and that she may pursue her right of possession therefor, either by writ of restitution herein or by action at law." Concerning the alleged sale of the place, it is sufficient to say that there never was any contract in writing, and that there never were any substantial improvements made on the place by the defendant under the said oral agreement. He did certain things with a view to enabling him to take care of a large number of men in his employ in the ditching and grading business. The plaintiff was averse to selling the land without the consent of her children. She was timid about making bargains with the apparently visionary man who had married her granddaughter.

On Friday evening, August 14, the defendant and his wife came to the home of the plaintiff at Bethany. The next day, which was Saturday, they remained there. Certain of the children were present. There were conversations between the plaintiff and the defendant. It was warm weather, and their conversations appear to have been out in the yard. The defendant seems to have wanted to buy the place for $18,500, but he did not have anything to pay down. He only wanted to pay 4 per cent. interest, and then he wanted to make a payment, so he said, of $1,000 a year. The plaintiff and defendant had some conversation. The proposition does not appear to have interested the plaintiff very much, as the terms were not at all satisfactory to her. She said that she would think about it, and the defendant wrote a little paper supposed to contain his offer. The plaintiff appears to have handed this little paper to William, the father of defendant's wife, with a statement that there was Ernest's offer for the land. It is as follows: "Farm Contract of Sale: $18,500, on ten years time, at 4 per cent. interest, payable semi-annually on October 1st and March 1st each year, together with enough of principal to equal $1,000 in all, that part of principal to be paid March 1st each year, with privilege of paying all or any part of principal at any time. Interest to date from March 1st, 1915."

It should be remembered that the trial court had the witnesses before it, and the judge saw them, and had an opportunity to judge of their truthfulness. We are unable to say that the judgment of the district court is wrong, and it is,

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., concur in the conclusion.

IN RE ESTATE OF THOMAS CORMICK.
MARY CORMICK, APPELLANT, v. FIRST TRUST COMPANY OF OMAHA, ADMINISTRATOR, APPELLEE.

FILED DECEMBER 19, 1916. No. 19089.

1. **Executors and Administrators:** CLAIMS: PLEADING. Petition examined, and *held* to plead an express contract between husband and wife, and to state the same cause of action as that stated in the claim filed in the county court.
2. **Husband and Wife:** CONTRACTS. An express contract between husband and wife that she shall receive reasonable compensation for extra and unusual services rendered him outside of her domestic duties is valid, and, when established by a preponderance of the evidence, is enforceable as against him or his estate.

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

Brogan & Raymond and *A. S. Ritchie,* for appellant.

E. W. Simeral, contra.

MARTIN, C.

The plaintiff, Mary Cormick, was married to Thomas Cormick on April 22, 1903. For some time prior to the marriage, said Thomas Cormick was a detective, with headquarters at Omaha. He died on April 15, 1913. The First Trust Company of Omaha was appointed administrator of his estate. Mary Cormick filed a claim on December 13, 1913, against his estate, the nature of which is disclosed by the third paragraph of her petition, which is as follows:

"That on May 1, 1903, following her marriage to the said Thomas Cormick, at the special instance and request of the said Thomas Cormick, your petitioner became employed by the said Thomas Cormick to engage herself in the business of the said Thomas Cormick in the capacity of a private detective and assistant to the said Thomas Cormick; that the duties required of her in said

employment consisted of carrying on all correspondence, making out all reports, soliciting work, outlining and detailing instructions to operators (here follows a detailed statement of services performed); that said services were of the reasonable value of $2 per day."

The administrator filed a motion to dismiss her claim on the grounds: First, that the evidence is not sufficient to establish a claim against said estate in favor of said Mary Cormick; second, that under the facts proved the said Mary Cormick, as the wife of said deceased, is not entitled under the law to make any claim against said estate. The county court found that there was nothing due plaintiff and disallowed her claim. She took an appeal to the district court, and on March 18, 1914, filed her petition in said court, using the same language therein as quoted above. On October 15, 1914, she filed an amended petition in said district court; said amendment consisting of the words, "and the said Thomas Cormick agreed to pay her for her said services what the same were reasonably worth." On November 6, 1914, the administrator filed a motion to strike the said amendment from said amended petition, for the reason that the issues in the district court were changed from what they were in the county court, in that an implied contract was pleaded in the county court and an express contract was sought to be pleaded in the district court. This motion was sustained; and on the same day a demurrer was also sustained, on the ground that the petition did not state facts sufficient to constitute a cause of action. A reversal is asked on the contention that the trial court should have overruled the demurrer to the amended petition, and should not have sustained the motion striking out the amendment to said petition.

Does the petition in the district court state a different cause of action from that stated in the county court? The allegation in both courts is that Mary Cormick became employed at the special instance and request of the said Thomas Cormick to engage herself in the capac-

ity of a private detective and assistant to the said Thomas Cormick. From this phraseology an express contract, rather than an implied one, is alleged, and the word "employed" carries with it an implication to compensate her for the reasonable worth of her services.

"To be 'employed' in anything means, not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it." *United States v. Morris,* 39 U. S. *464, *475.

The amendment, under the liberality of our statute, should have been permitted as an amplification of the original petition, and should not have been considered as a change of the cause of action or the issues presented to the county court.

The important question to determine is whether, under our married woman's act, a husband and wife may contract with each other with reference to any matter not inherent in the contract of marriage itself. The services for which compensation is asked are not those necessarily involved in household duties or the marriage relation. She is taken from the home under the contract and placed in an office, and required to follow an extraordinary business, that of an assistant to a detective, far removed from the duties devolving upon the wife. The employment itself is evidence that the husband released the wife during the time she was to be engaged in office work for him from any domestic duties which he might have claimed from her by reason of their marriage. Is such a contract enforceable in this state? Common-law disabilities were removed and certain general powers were conferred upon women by the legislature of this state as follows:

Section 1560, Rev. St. 1913: "The property, real and personal, which any woman in the state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property, which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage,

and shall not be subject to the disposal of her husband, or liable for his debts (except for necessaries when execution against the husband has been returned unsatisfied)."

Section 1561: "A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner to the same extent, and with like effect as a married man may in relation to his real and personal property."

Section 1562: "Any married woman may carry on trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name."

By these sections, or any part of them, are contracts between husband and wife excepted or prohibited? If not, the husband may contract with the wife, relative to services to be performed by her not inhering in the marriage relation, the same as he may contract with any other person. With reference to such exception, this court has spoken in the case of *May v. May*, 9 Neb. 16, wherein it is said: "This statute defining the rights of married women contains but one allusion to, or exception of, her husband. Property, the gift of her husband, may not remain her sole and separate property, not subject to the disposal of her husband or liable for his debts. In respect to property acquired by her in any other manner than by gift from him, the husband stands in the same relation to her as all the rest of the world. In the grant of general power (if I may ues the language) to her to 'bargain, sell, and convey her real and personal property, and enter into any contract in reference to it, to 'sue and be sued,' to 'carry on trade or business, and perform any labor or service on her sole and separate account,' and to use and invest her earnings in her own name, contracts with her husband are not excepted."

Other courts have taken the same view of similar statutes, and hold that contracts between husband and wife for extra and unusual services are enforceable, as will be seen from the following quotation from the supreme court of Pennsylvania: "Where a husband consents to the employment of his wife and agrees that the wages shall be paid to her, she can recover them as against him, and he forfeits and surrenders to her any claim that he might otherwise have to them. A husband may contract directly with his wife for the performance of extra and unusual services in the course of his business outside of the family relation, and such contract will be deemed a waiver by him of all claim to her wages, and she will be entitled to be paid for such services out of the proceeds of a sale of her husband's property." *Nuding & Schlouch v. Urich,* 169 Pa. St. 289.

The appellate court of Indiana has passed upon a similar question: "Under Horner's Rev. St. 1897, sec. 5115, abolishing all legal disabilities of married women to make contracts, except to convey real estate or enter into a contract of suretyship, and section 5130, providing that the earnings of a married woman, 'other than labor for her husband or family, shall be her sole and separate property,' a contract of a husband to pay his wife for services as clerk in his store is for a consideration, and valid." *Roche v. Union Trust Co.,* 52 N. E. (Ind. App.) 612. See, also, *Powers v. Fletcher,* 84 Ind. 154; *Moore v. Crandall,* 205 Fed. 689. "A husband can make a valid gift of his wife's services to her, for which she can maintain an action." *Farman v. Chamberlain,* 74 Ind. 82.

The distinction between the ordinary duties devolving upon the wife by reason of the marriage relation and the extraordinary services which she may render for the husband in his business is fully recognized in this state. "The married woman's act does not deprive the husband of his right of action for the loss of services or companion-

ship of his wife, and, notwithstanding that act, he may still recover to the extent that the injury sustained by his wife incapacitated her from performing the duties that reasonably devolve upon her in the marriage relation." *Omaha & R. V. R. Co. v. Chollette,* 41 Neb. 578.

In some jurisdictions contracts of this character between husband and wife have been declared invalid. While this court has never passed upon this particular question, it has decided that the husband, under the married woman's act, is not excepted from its provisions bestowing upon the wife general contracting powers with relation to her separate property and earnings. It follows that the wife may contract with her husband for compensation for services to be rendered by her not within contemplation of the married relation, and the husband is therefore bound by the character of the employment alleged in the petition. In case the claimant is able to show an express contract with her husband for compensation for the services rendered in his office by a preponderance of the evidence, she should be permitted to recover the reasonable value of said services. The trial court erred in sustaining the demurrer to plaintiff's petition. We recommend that the case be reversed and remanded for further proceedings.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings, and this opinion is adopted by and made the opinion of the court.

REVERSED.

AUGUSTA BIERBACH, APPELLEE, v. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, APPELLANT.

FILED DECEMBER 29, 1916. No. 19052.

Insurance: CONTRACT: LIABILITY: ESTOPPEL. A contract of insurance in a mutual assessment company ordinarily consists of the articles of incorporation and by-laws of the association, the application and the certificate, but when such an association sets out, as one of the prominent features of its certificate of membership, a synopsis of its by-laws in such form and substance as to lead the insured to believe that it contained all the provisions of the by-laws which applied to his certificate of membership, the insured may rely upon such synopsis, and, if liability accrues, the association will be estopped to deny its liability under a clause of its by-laws which it lead the insured to either overlook or to believe that it had no application to his certificate.

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

Mahoney & Kennedy, Yale C. Holland and *Guy C. Kiddoo,* for appellant.

G. W. Shields & Sons, contra.

MORRISSEY, C. J.

Defendant has appealed from a judgment of the district court for Douglas county, in the sum of $1,000, given on a certificate of membership issued by defendant to one Otto William Bierbach, which certificate was made payable to plaintiff. The first page of the certificate reads as follows:

"Certificate of Membership. Form 10.

"Mutual Benefit Health and Accident Association, Omaha, by this certificate of membership certifies: "That Otto Wm. Bierbach is a member of the Mutual Benefit Health and Accident Association, and while in good standing is entitled to benefits in such amounts, and under such conditions and limitations, as may be provided for in the articles of incorporation and by-laws of said association

in force on the date of the happening of the event on account of which any claim, under this certificate, is made; said articles of incorporation and by-laws, the application for membership and this certificate shall constitute the contract between the holder thereof and said Mutual Benefit Health and Accident Association.

"In witness whereof, we have hereunto affixed our official signatures and impressed the corporate seal of the association at Omaha, Nebraska, this 8th day of November, A. D. 1912.

(SEAL) "(Signed) H. S. Weller, President.
"(Signed) C. C. Criss, Treasurer."

The second page, printed in the same size type, is made up of nine paragraphs, duly numbered and subdivided. Omitting those not material here, it reads as follows:

"A Synopsis of Benefits under By-laws Governing Certificate of Membership, Form 10, now in effect.

"Accident Benefits.

"IV. Specific Losses. Whenever a member of this association shall, through external, violent and accidental means, receive bodily injuries which shall, independently of all other causes, result in one of the following specific losses within thirteen weeks from the date of the accident causing said injuries, payment will be made in accordance with the by-laws, not exceeding the following amounts:

Death, loss of both hands, both feet or both eyes.$1,000
Loss of one hand or one foot 350
Loss of sight of one eye 250

"General Provisions.

"(f) The right of any member, or person claiming under any membership, to claim weekly benefits or indemnity shall be determined by the provisions of the articles of incorporation and of the by-laws in force at the time the accident occurred, or the disability due to sickness commenced.

"(g) Attention is called to these features of the by-laws, so that misunderstandings may be avoided should occasion arise to make claim. If you do not understand your contract as thoroughly as you might wish, write the home office. Any information within the power of the officers of the association to give will be promptly given."

This is followed on the succeeding page by the application for membership, which is in the usual form of applications for membership in such insurance companies, and includes the following provision:

"I hereby agree that I will accept the certificate of memberhip which may be issued to me subject to all the provisions, conditions and limitations contained in the articles of incorporation and by-laws of said association, as the same now are or as they may be legally amended and changed, and I agree to comply with all the provisions thereof. * * * I understand that this application is for a certificate of membership, Form 10, paying benefits in accordance with the by-laws, as shown on back hereof."

The original application is not incorporated in the bill of exceptions, and no by-laws are printed on the back of the copy of the application found on the certificate of membership.

While this certificate was in full force, Bierbach died as the result of accidentally taking carbolic acid. This case was tried on the theory that the unintentional or accidental taking of this poison constituted death through external, violent and accidental means, and the only real question in dispute is whether the recovery shall be for $1,000, as would appear from a casual reading of the synopsis of benefits, or whether the recovery shall be limited to a sum not exceeding $100, as fixed in subdivision A of section 14, article 13, by-laws of the association, entitled, "Restricted Benefits," and providing: "The accidental taking of poison; then, in all such cases mentioned in this paragraph, the limit of the association's

liability for weekly benefits, or other indemnity, shall not exceed the sum of one hundred dollars, anything in the by-laws to the contrary notwithstanding."

Defendant maintains that the contract is made up of the constitution and by-laws, the application and the certificate of membership taken together; while, on the other hand, plaintiff points out that this certificate is all printed on one sheet of paper consisting of four pages. The first page contains the certificate proper. The second contains the laws or synopsis of the laws governing and fixing defendant's liability. The third page contains the application, and the fourth page, the usual indorsements put on a policy of insurance.

The synopsis of benefits occupies a full page, the page usually occupied by the general provisions of an insurance policy, printed in large type and designated in the head notes as "Form 10, now in effect," and conveys the impression, not only that it forms a part of the certificate, but that it contains so much of the by-laws as relates to and governs this particular form of certificate. It says that if the insured dies as the result of external, violent and accidental means, the beneficiary shall receive a sum not exceeding $1,000. There is a total lack of suggestion that the recovery shall not exceed $100. That the insured came to his death through external, violent and accidental means is in effect admitted under the pleadings and on the theory on which the case was tried. Defendant argues at length that the contract of insurance consists of the certificate, the application and the by-laws, but argument on this point is not necessary. Defendant's proposition stands without dispute. The certificate and application are in evidence and speak for themselves. But what is to be taken as the by-laws? Are we to accept the synopsis of by-laws set out by the defendant itself, and constituting the second page of this certificate of membership, or shall we look to a separate document, which is incorporated in the bill of exceptions and claimed by defendant to be the by-laws governing the associ-

ation and which fix a different liability against defendant from the liability fixed in the synopsis printed on the certificate? The synopsis of benefits points out that in case of death the payment will not exceed the sum of $1,000. The statute in force at that time, of which the insured will be presumed to have had knowledge, fixed the recovery in a mutual assessment company, such as defendant, at not to exceed one assessment on each and every member in good standing. Reading this provision of the certificate in the light of the statute, any ordinary man would understand that the amount of recovery would be such amount as one assessment would raise, not exceeding the maximum fixed in the certificate.

The concluding clause of the synopsis of benefits is as follows: "Attention is called to these features of the by-laws, so that misunderstandings may be avoided should occasion arise to make claim. If you do not understand your contract as thoroughly as you might wish, write the home office. Any information within the power of the officers of the association to give will be promptly given." It will be noted that special stress is laid "on these features of the by-laws." Thus the unwary is led to believe that "these features" contain the provisions which are applicable to his form of certificate.

In this class of insurance, a contract consists of the articles of incorporation and by-laws of the association, the application and the certificate of membership, but when this association set out, as one of the prominent features of its certificate of membership, a synopsis of its by-laws in such form and substance as to lead the insured to believe that it contained all the provisions of the by-laws which applied to his certificate of membership, the insured had a right to rely upon this synopsis. Having pursued this course of conduct, defendant is estopped to deny its liability under a clause of its by-laws which, we may assume, it led the insured to either overlook or to believe that it had no application to his

certificate. *Binder v. National Masonic Accident Ass'n*, 127 Ia. 25.

There is only one remaining subject. That relates to the taxation of an attorney's fee. This question has been so thoroughly settled by this court in *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, and cases therein cited, that a discussion of this point will serve no useful purpose. The amount allowed was $75, a reasonable fee for the service rendered.

The record is found free from error, and the judgment is

AFFIRMED.

SARAH GREEN, ADMINISTRATRIX, APPELLEE, v. CUDAHY PACKING COMPANY, APPELLANT.

FILED DECEMBER 29, 1916. No. 19078.

1. **Master and Servant:** INJURY TO SERVANT: PLEADING AND PROOF: VARIANCE. Where it is alleged in a petition that a servant fell into an unguarded hole in the floor of a room adjoining the room in which he worked, and the proof shows that the room with the unguarded hole in the floor is in a separate building from that in which the servant worked, but that the two buildings were connected by a foot-bridge, or viaduct, the variance, if any, between the allegation of the petition and the proof is immaterial.
2. ———: ———: DUTY OF MASTER. It is the duty of a master to use reasonable care to provide a safe way of ingress and egress to the place of employment.
3. ———: ———: PRESUMPTIONS. Where the master has furnished a number of such ways, and has kept them guarded and free from pitfalls, the servant may assume that he will continue to exercise such degree of caution as is necessary to keep these ways safe for passage.
4. ———: INJURY TO SERVANT: LIABILITY OF MASTER. And if the master permits one of such ways to be left in an unsafe condition and, as a result thereof, a servant suffers injury, without negligence on his part, the master will be liable.

APPEAL from the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Affirmed.*

James C. Kinsler, for appellant.

Smyth & Schall, Ed. P. Smith and *Herman Aye, contra.*

MORRISSEY, C. J.

John Green, an employee of defendant, suffered injuries, September 24, 1913, which resulted in his death the following morning. Plaintiff, as administratrix of his estate, brought this action against his employer and recovered a judgment for $4,365, and defendant has appealed.

Plaintiff alleged that on the evening of the 24th of September, 1913, Green was required to work overtime and remained at his task until after dark; that Green came to his death by reason of the carelessness and negligence of the defendant, in that, in order to leave the room where he was employed, through the customary and usual exit, he passed through an adjoining room, and thence down a stairway to the street; that, in the floor of this adjoining room through which he passed, the defendant had cut a large hole or opening about 20 feet square, that this opening was left unguarded, and the room unlighted, and that Green fell through the opening to his death.

The defendant answers, alleging that the hole or opening, as designated in plaintiff's petition, was not in the floor of the building in which Green worked, but that it was cut in the floor of a separate building belonging to defendant; that Green was employed to work in the "new beef house," and that this opening in the floor had been cut in the "old beef house," and that the old beef house had been condemned several months before, and was on the opposite side of the roadway and about 50 feet distant from the new beef house, and that the hole or opening was about 60 feet in length and 15 feet in width; that the interior of the building was being

wrecked and demolished preparatory to reconstruction; and that all of these facts were well known to Green. It further alleged that after Green had finished his work for the day he negligently and voluntarily went upon the third floor of the old beef house, "well knowing that it was unlighted, dark and dangerous, and that in so doing he departed from the line, scope and place of his employment;" alleged that there were several safe exits from the room in which Green worked; that Green knew of these exits; that he wrongfully, negligently and voluntarily failed to use any of them; and that if he received the injuries, as alleged in plaintiff's petition, it was through his own negligence and the negligence of his fellow servants; and further that he had assumed whatever risk, if any, there was in entering the partially destroyed building. The reply was a general denial of new matter alleged.

Defendant has made 63 assignments of error, but we shall not undertake to discuss them separately. Indeed, they do not require separate discussion. The principal point urged is that the petition alleged the opening in the floor was in a room adjoining the room in which Green worked, and that the proof wholly failed to show an opening in the floor of any room adjoining this room. Laying aside technical distinctions, it may be said that plaintiff's petition is based on the assumption that the room in the old beef house is a room adjoining the room in the new beef house, though there is a private alley running between the two buildings. Counsel for defendant would have us hold that it is not an adjoining room. There is no plat or drawing of either building pointed out in the record, but, if we understand the testimony of the witnesses, the Cudahy packing plant has many buildings. Among others are the buildings known as the old beef house, and the building known as the new beef house. As may be inferred from their designations, the old beef house was first erected. Later the new building was erected, and there are a few yards

between the two buildings. There is a discrepancy in the evidence as to the distance they are separated. The testimony varies all the way from 5 or 6 yards to 15 or 20 yards. The distance, however, is not material. The new building stood on higher ground than the old building, and they were connected by a bridge or viaduct leading from the third floor of the old building to the first floor of the new building. The time-keeper's office was so located that many employees in the new building would report at the time-keeper's office in the morning, get their check, or time card, go up the stairs into the old building, pass through this room with the opening in the floor, go over the bridge and into the new building, and return over the same route in the evening to the time-keeper's office. This had been Green's practice for sometime before he met his death. While there were other means of egress from the new beef house, it is made perfectly plain that the route mentioned was at least one of the regular routes followed by the employees of defendant. The opening in the floor had been guarded by putting substantial rails around it, but the men engaged in remodeling the building would, from time to time, remove the guards as they raised or lowered machinery, but when their work was done they would again replace the guards. There is testimony showing that these guards were in place late in the afternoon of September 24, and no person saw Green fall through the opening. Certain conditions are shown, however, and from these it may be assumed that the guards were not in place when he undertook to pass through the room after completing his day's work. One of defendant's foremen was called as a witness for plaintiff, and he testified that about 7 o'clock on the morning of September 25 his attention was attracted to the body of a man lying on the floor below this opening; that he went down and found it to be John Green, who was then alive, but unconscious; that he looked to see if the guards or rails were in place, and that there was, at that time, no guard

or rail on the east end of the hole—"there was no rail there." Another employee testified to the same thing. Indeed, there can scarcely be said to be a conflict of evidence on that point. There is no dispute about the lack of light in the room at the time Mr. Green quit work and when it is assumed that he met this accident. Appellant says in its reply brief: "There were no electric lights in the old beef house at any time after dark." For the purposes of this review, we may assume that the room was dark; that there was no rail around this hole; and that Green fell therein to his death.

Defendant takes the position that these matters are entirely immaterial; that "Green had no business there; that it was not a place where he was employed, nor where his employment required him to be; that the defendant owed him no duty with reference to the condition of the old beef house, and therefore could be guilty of no negligence toward him, no matter whether the railing was up or down on the morning that he was found in the old building." Practically all of its assignments of error are based on this assumption. If defendant is correct in this, the judgment cannot stand. If it is not right in this assumption, there is little left of its assignments of error. Defendant argues that the proof fails to show any hole in the floor, as alleged in the petition; that this hole which we have described in the old building is not in a room adjoining the room in which Green worked. But we are not impressed with the logic of the argument. Perhaps the petition is more specific than is necessary. It might have been sufficient to allege that as he left the room where he was employed, passing over the usual route of exit, he fell into this hole, without saying that it was in a room adjoining the room in which he worked. But it is evident both from the answer and the proof that all parties understood exactly the location of the buildings, the rooms, and the unguarded hole into which Green fell. No one was misled for a single moment. Defendant says there were

other means of ingress and egress, but does not point out the testimony bearing out the statements. However, we will assume it to be true. The proof does show that the route taken by Green was one of those usually and customarily taken, not only by him, but by a large number of the employees, with the full knowledge and consent of defendant's superintendents and foremen. It also appears to be the most convenient route. In fact this bridge, or viaduct, seems to have been constructed for that very purpose. It constituted an invitation to the employees to follow that route. The men were seen to go back and forth there daily, and the foreman engaged in remodeling the old building recognized the danger of leaving the opening unguarded, for he had it inclosed with guards and rails. The deceased passed back and forth there daily, undoubtedly observed the guards and relied upon them. This was a large room with some small lights on a distant side thereof, but not sufficient to light that part of the room through which Mr. Green attempted to pass. It was the duty of the employer to keep this hole guarded.

It is not only the duty of the employer to provide a reasonably safe place for his employees to work, but that duty carries with it the obligation to provide a reasonably safe ingress and egress. Of course, defendant argues that it did furnish a safe way of ingress and egress, and that Green was guilty of negligence in attempting to make his departure through this old building. But where the employer has undertaken to furnish a number of such ways, and has kept them guarded and free from pitfalls, the employee may assume that he will continue to exercise such a degree of caution as is necessary to keep these ways safe for passage, and Green was not guilty of negligence in choosing the route, on that evening, which theretofore he had followed with perfect safety and which he might still have followed in safety had the guards been maintained around this opening.

Neither did he assume the risk of this opening in the floor being left unguarded. He had passed by it from day to day. He had seen it duly protected, and he could not anticipate that it was in a different condition from what he had been accustomed to see it. The workmen employed around this opening might be said to have assumed the risk of such employment, but Green was not so employed, and the assumption of risk cannot be applied.

We cannot undertake to discuss seriatim the numerous assignments made. If we were to adopt defendant's theory of the case, many of them would be good; but we do not adopt that theory, but hold that there is no material variance between the pleadings and the proof, and that this opening in the floor of the old beef house is sufficiently designated in the petition, and, if it is not, the case is one of those falling within section 7706, Rev. St. 1913, providing: "No variance between the allegation in a pleading and the proof is to be deemed material unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits." It follows that each of the assignments based upon this theory are without merit. This applies as well to the exceptions taken to the instructions as to the rulings on the introduction of evidence. The jury were properly instructed. As to the instructions asked by the defendant, they are for the most part based on a theory of the case which we have heretofore said is not sustained, and they were therefore properly denied.

The verdict of the jury is fully sustained, the record is free from error, and the judgment is

AFFIRMED.

FAWCETT, J., not sitting.

GEORGE REUDELHUBER, APPELLEE, v. DOUGLAS COUNTY, APPELLANT.

FILED DECEMBER 29, 1916. No. 19134.

1. **Negligence:** IMPUTED NEGLIGENCE. "One who is injured by reason of a defective bridge while riding in a private vehicle may recover from a county otherwise liable, notwithstanding the negligence of the driver, which may have contributed to produce the injury, the injured party being free from negligence and having no authority or control over the driver." *Loso v. Lancaster County*, 77 Neb. 466.
2. **Evidence** examined, and *held* sufficient to sustain the verdict of the jury.

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

George A. Magney and *Ray J. Abbott*, for appellant.

Albert S. Ritchie, contra.

MORRISSEY, C. J.

May 25, 1913, one D. W. Wiley, with a party of friends, of whom plaintiff was one, in attempting to drive his automobile across one of defendant's bridges, forming a part of the public roadway, collided with a guard, or railing, of the bridge. Plaintiff was thrown out of the automobile and suffered a fractured knee. He brought suit against the county, alleging that the iron guard rail at the west end of the bridge, and on the south side thereof, had become loosed from the clamp by which it had been fastened to the frame of the bridge, and had been so bent that it protruded into the roadway two or three feet; that this condition had existed so long that the defendant county in the exercise of ordinary care and diligence had knowledge of the defect.

The answer denies that the bridge was out of repair; alleges that the guard rail was in its proper place, and that the automobile was negligently driven against the frame of the superstructure of the bridge, thereby breaking the guard rail loose from its fastening.

Appellant in its brief states the issues, as follows: "The question at issue in the case is whether or not Douglas county was negligent in maintaining the bridge upon which the plaintiff was injured, and, if it was negligent, was the plaintiff injured by reason of such negligence on the part of the county, and, if he was so injured, the amount of damages he suffered."

By its third instruction, the court told the jury: "The county is liable for an injury caused by an unsafe and defective condition of a county bridge, notwithstanding the fact that no actual notice of said condition had previous to the occurrence of the accident been given to any officer of the county concerned, where the defects were of such a nature or had existed for such a length of time that by the exercise of ordinary care they might have been discovered and repaired."

Appellant concedes that this instruction correctly states the law, but argues that the evidence is insufficient to sustain the findings.

The driver testified that as he approached the bridge there was another automobile approaching from the other direction, and this compelled him to keep to the right-hand side of the road; that he saw the rail protruding into the roadway at the bridge, but was so close to it that he could not avoid the collision. He says he swung the front of the car toward the center of the driveway, and thus avoided a collision with that part of the machine, but he was so close to the protruding rail that it caught the fender about the middle of the car and wedged itself between the rear wheel and the body of the car, causing the car to stop instantly. In this he is fully corroborated by one of the passengers. Of course, this testimony does not prove that it had been out of condition for such a length of time as would be notice to defendant and its officers; but there is also evidence showing the condition of the clamp designed to hold the rail in place. The clamp was filled with dirt, which indicates that the rod had been loose for some

time. There is also evidence of a bend in the rail and rust spots upon the rail, and these are said to indicate that the bend had existed for a considerable period of time.

Defendant offered the testimony of witnesses who passed over the road frequently, one of whom had walked across the bridge the day the accident occurred. They testified that the bridge was in proper condition; but there was nothing to expressly direct their attention to this rail. The jury, under the direction of the court, made an examination of the bridge. They must have been impressed with the condition in which they found the rail and clamps, and we cannot say that under the evidence, which their observation enabled them to understand, the verdict is so unsupported that it must be overthrown.

In the assignments of error formal complaint is made of the instructions given, but they are not further urged in the brief, and these assignments will be treated as waived.

It is urged, however, that the court erred in failing to submit for the consideration of the jury the question of the contributory negligence of the plaintiff because the proof shows that the automobile, at the time it approached the bridge, was being driven at a rate of speed in excess of 8 miles an hour. It is provided by section 3049, Rev. St. 1913: "Upon approaching an intersection of highways, or a bridge, or a sharp curve, or a steep descent, or another vehicle, or an animal, or person outside of any village or city, the person operating a motor vehicle shall reduce the speed of such vehicle to a rate not to exceed eight miles an hour and shall not exceed such speed until entirely past such intersection."

The statutory rate of speed was not alleged in the pleadings. The answer merely alleged that the automobile was being driven in a careless and reckless manner, and was driven against the superstructure of the bridge. The instructions given by the court are sufficient-

ly explicit to cover all issues raised by the pleadings. If defendant desired a more explicit instruction, it ought to have made a seasonable request. Even had request for the instruction been made, it would not have been error to refuse it. Plaintiff was free from blame, and the rule is laid down in *Loso v. Lancaster County*, 77 Neb. 466: "One who is injured by reason of a defective bridge while riding in a private vehicle may recover from a county otherwise liable, notwithstanding the negligence of the driver, which may have contributed to produce the injury, the injured party being free from negligence and having no authority or control over the driver."

We cannot say that the verdict is unsupported by the evidence. The jury was correctly instructed, and the judgment is

AFFIRMED.

FAWCETT, J., not sitting.

BETTY C. NELSON, APPELLANT, v. FLOYD SPRATT, APPELLEE.

FILED DECEMBER 29, 1916. No. 19016.

1. **Bastardy**: TRIAL: INSTRUCTIONS. In the trial of a bastardy case it is the duty of the court, when requested, to give the jury a cautionary instruction in accordance with section 361, Rev. St. 1913.

2. ———: ———: ———. After giving such an instruction it is prejudicial error to charge the jury that, if they find that the plaintiff has testified falsely in regard to any material fact, they may disregard all of her testimony, unless the same be corroborated by other testimony or evidence.

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

Fred H. Free, for appellant.

Kelsey & Rice, contra.

BARNES, J.

This was an action commenced by Betty C. Nelson, an unmarried woman, against Floyd Spratt, charging him with being the father of her bastard child. The cause was tried to a jury in the district court for Antelope county. The jury returned a verdict of not guilty, and the defendant was discharged. The plaintiff has brought the case to this court by an appeal.

Among the numerous errors complained of, plaintiff contends that the trial court erred in charging the jury as follows: "Instruction No. 3. Requested by defendant. You are instructed that, if you find that the plaintiff has testified falsely in regard to any material fact, you may disregard all of her testimony, unless the same be corroborated by other testimony or evidence."

Appellant's argument is that this instruction is erroneous, because it singles out and calls attention to her evidence alone, and states that the jury may entirely disregard it. It is further contended that the rule, *"falsus in uno, falsus in omnibus,"* is not correctly stated, because the words "has knowingly testified falsely to a material fact" are omitted. This question was before the court in *Argabright v. State,* 49 Neb. 760, where it was said: "The jury are the sole judges of the credibility of witnesses, and it is error for a trial court, in a criminal case, to single out a particular witness for the defense, by name, and give to the jury a cautionary instruction which applies directly to his testimony the rule of *'falsus in uno, falsus in omnibus.'* "

Appellee contends that this rule has no application in civil cases; that, this being a civil case, the rule should be disregarded. In 38 Cyc. 1736, the rule in civil cases is stated as follows: "The instruction must be general and extend to all witnesses, whether testifying in person at the trial or by deposition. A proposition of law laying down a rule of evidence should be given in general terms, and not stated as being applicable to one certain witness or to one class of witnesses." In 1 Thompson,

Trials (2d ed.) sec. 2423, it is said: "It is accordingly error, in formulating a cautionary instruction under this head, to omit the words 'knowingly,' 'wilfully,' 'intentionally,' or some equivalent expression. The judge is not at liberty to say: 'If you find that the testimony of A. B. was false,' etc., 'you may disregard all his evidence.'"

It is defendant's contention that this rule is abrogated by section 361, Rev. St. 1913, and by the declaration of this court in *Stoltenberg v. State,* 75 Neb. 631, and *Quinn v. Eggleston,* 76 Neb. 409.

Section 361 provides: "When such accused person shall plead not guilty, * * * the court shall order the issue to be tried by a jury; and at the trial of such issue the examination before the justice shall be given in evidence, and the mother of the bastard child shall be admitted as a competent witness, and her credibility be left to the jury: * * * and on the trial of the issue the jury shall in behalf of the man accused, take into consideration any want of credibility in the mother of the bastard child; also any variations in her testimony before the justice and that before the jury; and also any other confession of her, at any time, which does not agree with her testimony, or any other plea or proofs made and produced on behalf of such accused person."

In *Stoltenberg v. State, supra,* the provisions of the foregoing section were considered, and it was held: "In a bastardy proceeding in which the defendant denies his guilt, the jury, if the defendant so requests, should be instructed in accordance with the provisions of section 5, ch. 37, Comp. St. 1903, so far as applicable to the testimony, and it is error to refuse to so instruct." The same rule was announced in *Quinn v. Eggleston, supra.* The record in the case at bar shows that the court properly instructed the jury as provided by section 361, and in this no error was committed. It has never been held by us that the trial court should be permitted to give an instruction like the one of which plaintiff complains.

When the trial court has charged the jury as required by section 361, the rights of the defendant will have been fully protected, and it is reversible error to single out the plaintiff and charge the jury that, if they believe she has sworn falsely as to any material fact, they may disregard all of her testimony, unless the same be corroborated by other testimony or evidence.

When we consider the fact that plaintiff's intercourse with the defendant might be known only to the parties themselves, and her testimony as to that fact could not ordinarily be corroborated by the direct testimony of other witnesses, it is apparent that the giving of the instruction complained of might be prejudicial.

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

REVERSED.

MORRISSEY, C. J., not sitting.

PETER KORAN, APPELLEE, v. CUDAHY PACKING COMPANY, APPELLANT.

FILED DECEMBER 29, 1916. No. 19077.

1. **Jury**: IMPANELING: PEREMPTORY CHALLENGES. A custom prevails in Douglas county in civil cases that eighteen jurors who have passed their *voir dire* examination be called into the jury box, and counsel for each side then strike off three names peremptorily. Counsel for defendant, after striking the names of three jurors in this manner, was denied the right to challenge three other jurors peremptorily from the twelve remaining in the box. *Held*, that having acquiesced and participated in peremptorily challenging three men in accordance with this custom, the defendant waived its right to exercise other or further peremptory challenges.

2. **Master and Servant**: INJURY TO SERVANT: LIABILITY OF MASTER. Where a foreman ordered a workman to hurry, and furnished him a defective box to stand upon, in order to facilitate the work he was doing, the defect in which was not obvious to the workman,

he was entitled to rely upon the foreman's selection of the box as a safe place upon which to stand.

3. **Appeal:** CROSS-EXAMINATION. A judgment will not be reversed merely on account of an extended cross-examination on an immaterial matter, unless it clearly appears that the substantial rights of defendant have been prejudiced.

4. **Master and Servant:** ACTION: APPEAL: EVIDENCE. Where there is direct testimony that the plaintiff, who has theretofore been in sound health, received an injury to the abdomen from striking the edge of a vat over which he was working, on account of the slipping of a defective box on which he stood, which resulted in a severe pain and a bruised condition of the lower abdominal region, and was soon followed by hernia, an operation for which was performed in a short time, it was not erroneous to permit certain medical witnesses to testify that hernia might have resulted from such a fall.

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

James C. Kinsler, for appellant.

Herbert S. Daniel, John A. Moore, B. H. Dunham and *Herman Aye, contra.*

LETTON, J.

The plaintiff, a man about 25 years of age, was a workman in the employment of defendant at its packing house in South Omaha. It was his duty two or three times a week to remove sides of pork from certain wooden pickle vats about four feet deep and four feet across, in which the meat was pickled in a solution of salt and water. The water had been let out of the vat about nine days before. Plaintiff used a hook with which to pull the meat out of the vat. He piled it on a truck and took it to the butchers in an adjoining room to be trimmed and prepared for market. He had been engaged in this employment for about three years under the same foreman. On the day of the accident he had emptied one truck-load. He testifies that as he was starting the second load the foreman ordered him to hurry, saying that there were six butchers waiting for

him, without meat, and asked him why he did not take a box to stand on. Plaintiff answered that he had nothing for that purpose. The foreman then kicked a box over to him against the vat and told him to stand on it. The box was a soap box about two feet long, eighteen inches wide, and nine inches deep. While plaintiff was standing on this box with his head down in the vat, reaching to the opposite side, and pulling a piece of meat with the hook, the box tilted and slipped backwards from underneath him, allowing him to fall upon the edge of the vat, bruising his body and causing severe pain in the lower part of his abdomen. After the accident he examined the box and found that a part of the side and one end, about two inches deep, was split off from the bottom edge, so that as he reached over it tilted and slid along the floor, causing the fall. He felt severe pain about three inches below the navel and three inches to the right of it. He felt weak and vomited, and afterwards the parts began to swell and became discolored. He consulted Dr. Riley, the doctor at the plant, about 4 o'clock the same afternoon, and he sent him to Dr. Koenig. The room in which he worked was about 100 feet square filled with tanks in rows, with no windows. It was lighted by small electric lights, apparently carbon lamps about 25 or 30 feet apart. The box was brought into the room by the foreman. After he fell he explained to the foreman that the box tilted, and he said that he saw that box yesterday, it was broken, and he forgot to throw it away. He went to Dr. Koenig's office, to Dr. Chaloupka, and afterwards to Dr. Lord, on Dr. Koenig's recommendation. Under Dr. Lord's direction he was taken to the hospital and operated upon for inguinal hernia. After being out of the hospital eight or nine days Dr. Lord sent him back, and performed a second operation upon him for appendicitis. The accident was on March 13, 1912. In September, 1913, he was sent to the hospital again by Drs. Chaloupka and Tyler, where he was kept in bed for

about a month for rectal treatment. He had never had any pain or difficulty with his bowels before the accident. Since the first operation he has had a lump upon his left side about two inches thick and three or four inches long, and often has cramps on that side. He had this trouble at the time of the operation for appendicitis. He again went to the hospital in March, 1914, where he remained 58 days in bed for treatment for the same trouble, and again in August. He has not been able to work since the injury, except about six days, and has constant pain. At the time he was hurt he was earning 19 cents an hour and worked from 10 to 15 hours a day, making from $56 to $62 a month. He had never been sick before the accident. He has lost 30 pounds in weight. He has spent about $1,296 for doctors and hospital expenses. On cross-examination it was shown that he actually paid but a small part of the fees due for medical care. Two other witnesses corroborated his testimony as to the use of the box, and told of his gestures and of his expressions of pain. For the defense, the foreman denied giving him any directions to use a box that day, denied furnishing him a box to stand on, and denied remarking about its condition afterwards. It was proved without dispute that it was a common thing for men engaged in taking meat from the vats to use boxes to stand on, which they procured from an adjoining room. There was testimony—disputed—to the effect that, when one Hall was sent with plaintiff to inquire into the accident, he did not say that the foreman had given him the box or ordered him to stand on it. A verdict of $20,000 was rendered for plaintiff. Defendant appeals.

In its brief defendant has set forth 204 assignments of error. Many of these relate to matters, as to which, even if it be conceded that error occurred, it was obviously not prejudicial to defendant. The presentation of so many points, many of which cannot have been seriously relied upon for a reversal, entails needless work both upon counsel and upon the court, and is a practice not

to be commended. It is the duty of the court under section 7713, Rev. St. 1913, to disregard any error in the proceedings which does not affect the substantial rights of the complaining party, and no judgment can be reversed for any such error.

The first assignment relates to the refusal by the court to sustain defendant's objection to questions asked on the *voir dire* examination of jurors as to their acquaintance with the Casualty Company of America, and the further inquiry as to whether the juror was a stockholder or officer or in any way interested in a casualty company. Under the circumstances, to the writer's mind it seems that these questions were asked, not for the *bona fide* purpose of ascertaining whether the jurors had a legal interest in the Casualty Company of America, but for the purpose of insidiously and by indirection presenting to their minds the idea that an insurance company was defending the case, and not the Cudahy Packing Company. However, in *Egner v. Curtis, Towle & Paine Co.*, 96 Neb. 18, this court held that such examinations may be permitted, and the district court was justified in following that decision.

It is next assigned that the trial court erred in denying defendant's request for leave to exercise its right of peremptory challenges against three jurors, the request being made before the jury was sworn. It is said that the courts in Douglas county have adopted the practice of calling eighteen jurors into the box to be examined upon their *voir dire,* and counsel for each side are then directed to strike off three names, thus reducing the panel to twelve. Counsel for defendant, after striking the names of three jurors in accordance with this custom, desired to challenge three more from the twelve jurors remaining in the box. Having acquiesced and participated in removing three men peremptorily in accordance with the custom, defendant waived its right to exercise peremptory challenges by the other method.

The next point argued is that, since the box upon which the plaintiff stood was a simple appliance, the case falls under the doctrine announced in *Vanderpool v. Partridge,* 79 Neb. 165, that, while the law requires the master to provide reasonably safe tools and appliances, yet the rule has no application where the servant possesses ordinary intelligence and knowledge and the tools and appliances furnished are of a simple nature in which defects can be easily observed by the servant. But if the plaintiff's testimony is true, the foreman admonished him to hurry, and selected a defective box, which he kicked over toward him, and told him to stand upon it. Plaintiff had no opportunity, and, under such circumstances, it was not his duty to examine the box. He had a right to rely upon the foreman's selection of a safe place upon which to stand. The rule in *Vanderpool v. Partridge, supra,* does not apply.

Several other assignments of error are based upon the contention that the principles set forth in a number of the instructions given by the court are not applicable to the facts in the case, and were therefore prejudicially erroneous, and that the evidence does not sustain the verdict. Of course, if the facts in the case had been found by the jury to be as the defendant insists, then the instructions would have been erroneous; but the evidence warranted the jury in taking a different view. The instructions were not inconsistent with the evidence, viewing it from the plaintiff's standpoint.

Over 30 assignments of error are made with respect to the admission of the testimony of certain medical witnesses. The court permitted a very extended examination of each of these witnesses by defendant. Among the complaints is that the court permitted each of these witnesses to testify that hernia *might* have resulted from a fall that plaintiff describes. There was direct testimony as to the condition of plaintiff for several years before the injury, and as to his appearance and condition almost immediately afterwards. When this

evidence is considered in connection with that of the two doctors, we can see no prejudice to defendant in the admission of their testimony.

It is contended the evidence does not justify a finding that either hernia, appendicitis, or a spastic condition of the colon was the result of the accident. It is shown that in many instances such a fall would not cause a rupture, but there is nothing to show that plaintiff was ruptured before he fell. He was soon afterwards operated upon for hernia. It is also shown that in such cases it is not infrequent that the appendix slips down with the intestines into the scrotal cavity and is often irritated and inflamed as a result of this displacement; that plaintiff suffered from pain on both sides of the abdomen after the operation for hernia; that this was diagnosed as caused by appendicitis, and that he was operated upon and the appendix removed. The pain continued on the left side, and an X-ray examination shows that a spastic condition of the colon continued after both operations, and from which plaintiff still suffers. The medical testimony shows that these contractions of the colon are due to a failure in nerve control of the peristaltic motion. Plaintiff was treated in the hospital for some time for this affection, and the doctors testify it may continue indefinitely.

Considering all the evidence, it is sufficient to justify the finding by the jury that the hernia and resulting complications were caused by the fall. Much complaint is made as to the latitude of cross-examination of a witness who had investigated the accident soon after its occurrence for the attorney for defendant, and of the request or demand made in the presence of the jury that he produce a copy of the report he made to his employer. Much of the examination was immaterial, and, to use a slang expression, the demand for a copy seems to have been "a grand-stand play," and should not have been made, but still we would not be justified in reversing the judgment on that ground.

As to the amount of the judgment, if the doctors are correct, the spastic condition of the colon is apt to continue indefinitely and to cause great pain and annoyance. Plaintiff suffered great pain, had several operations, lay in hospitals for months, and has been unable to work much since. He was 25 years old when hurt and has a long expectancy.

The judgment seems excessive but plaintiff has remitted all damages in excess of $5,000. The judgment is therefore reduced to the sum of $5,000, and, as so reduced, is

AFFIRMED.

STATE, EX REL. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 29, 1916. No. 19004.

1. **Statutes:** CONSTRUCTION. A statute susceptible of a reasonable construction avoiding a conflict with the Constitution should be so construed.
2. **Carriers:** TELEPHONES: STATUTE: CONSTITUTIONALITY. The statute requiring common carriers to furnish adequate telephone connections between their offices, buildings and grounds and the local telephone exchange, provides for a notice and a hearing before the state railway commission as to the reasonableness of such requirement, and is not unconstitutional as depriving the carrier of its property without due process of law or as denying it the equal protection of the laws. Rev. St. 1913, secs. 5988-5990, Laws 1909, ch. 106, secs. 1-3.
3. **Mandamus:** ORDERS OF RAILWAY COMMISSION: PRESUMPTIONS. On application for mandamus to enforce an order of the state railway commission, jurisdiction having been acquired and no appeal having been taken, it will be presumed that the findings of the commission were sustained by the evidence.
4. **Statutes:** CONSTITUTIONALITY. "The failure of the presiding officer of the senate to sign a bill, which was afterwards approved by the governor, and which the journal of the senate shows passed the senate by the constitutional majority, does not affect the validity of the act." *Taylor v. Wilson*, 17 Neb. 88.

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

B. P. Waggener, J. A. C. Kennedy and *Yale C. Holland,* for appellant.

Willis E. Reed, Attorney General, and *George W. Ayres,* contra

ROSE, J.

The Nebraska State Railway Commission, relator, applied to the district court for a peremptory writ of mandamus requiring the Missouri Pacific Railway Company, respondent, to provide telephone service in the station at Panama in compliance with an order made by relator under a statute providing:

"Every railway company, express company or telegraph company doing business in this state shall furnish reasonably adequate telephone connections between its offices, buildings and grounds, and the public telephone exchanges operated in the towns where the same are located.

"The state railway commission is hereby authorized and empowered to require and compel the furnishing of such service. Upon complaint to the railway commission of Nebraska that any telephonic service with any railroad, telegraph or express company's buildings, offices or grounds is inadequate or in any respect unreasonably or unjustly discriminatory or that such service cannot be had, it shall be the duty of the commission to investigate the same, and if upon investigation the commission shall find that any telephonic service is inadequate or unreasonably or unjustly discriminatory or that such service cannot be had, it shall determine and by order fix a reasonable regulation, practice or service to be installed, imposed, observed and operated in the future." Rev. St. 1913, secs. 5988, 5989, Laws 1909, ch. 106, secs. 1, 2.

Respondent resisted the application for the writ on the ground that the act is unconstitutional as denying

respondent the equal protection of the laws and as depriving it of property without due process of law. The trial court upheld the act and allowed the writ. Respondent has appealed.

It is argued that respondent is required by the act to furnish telephone connections between its offices, buildings and grounds and the local telephone exchange without regard to necessity or expense, and *Missouri P. R. Co. v. State of Nebraska,* 217 U. S. 196, is cited to sustain the position thus taken. The reasons for condemning the act assailed in that case are not applicable to the legislation now under consideration. Respondent's construction of the enactment relating to telephones is not the only one of which the act is susceptible. There is a reasonable interpretation which will avoid a conflict with the Constitution and it should be adopted. *State v. Howard,* 96 Neb. 278, 291; *Gaster v. Gaster,* 92 Neb. 6, 10; *State v. Smith,* 35 Neb. 13, 24. The legislation authorizes the state railway commission to exact the service described in the act. There is no penalty prescribed except for a failure to perform a service ordered by the state railway commission. The act seems to contemplate the right to be heard before that body and the determination by it of the reasonableness of the service. This interpretation is a reasonable one and avoids a conflict with the Constitution. Under the act thus construed, respondent had a hearing before the state railway commission and was ordered to install a telephone at Panama.

Does the order deprive respondent of its property without due process of law or deny it the equal protection of the laws? Respondent contends that the service required is not essential to the proper operation of the railroad as a common carrier of persons and property, and that the use of a telephone would be a mere accommodation to the inhabitants of the village at the expense of respondent without benefit to it. The duties

of a common carrier are not limited to the actual transportation of persons and property. There are other obligations incidental to the principal duties. The furnishing of adequate facilities for the transaction of public business is a function of a common carrier. It may be required to establish stations at proper places. *Minneapolis & St. L. R. Co. v. State of Minnesota,* 193 U. S. 53. The duty to provide adequate facilities is not performed by supplying a minimum of service. The state may, within proper limits, require a carrier to furnish facilities for the convenience and comfort of the traveling public. *Missouri P. R. Co. v. State of Kansas,* 216 U. S. 262, 280; *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission,* 206 U. S. 1. The telephone is in general use as a factor in the transaction of public business, and a statute requiring a railroad company to connect a station with a local telephone exchange for the convenience of shippers and passengers does not go beyond the incidental duties of a common carrier. *Atchison, T. & S. F. R. Co. v. State,* 23 Okla. 210. The evidence in the present case tends to show that the telephone is a necessary facility for the proper performance of respondent's duties as a common carrier. While the element of expense should be considered in determining the reasonableness of the requirement, it is not necessarily controlling. *Missouri P. R. Co. v. State of Kansas,* 216 U. S. 262; *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission,* 206 U. S. 1, 26. In the case last cited it was said: "As the primal duty of a carrier is to furnish adequate facilities to the public, that duty may be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result."

The statute under which the state railway commission acted is not unconstitutional. That body had jurisdiction of the subject matter and of the parties affected by the order. The statute not only gave respondent the right to be heard, but authorized an appeal to the district

court. Laws, 1907, ch. 90, sec. 7. The proof does not show that an appeal was taken. Under such circumstances it will be presumed, in an action for mandamus to enforce the order, that the findings of the state railway commission were sustained by the evidence. In resisting the application for the writ respondent has not shown that the requirement was unreasonable or confiscatory.

The conclusion is that the order is not unconstitutional as depriving respondent of its property without due process of law or as denying it the equal protection of the law. *Missouri P. R. Co. v. State of Nebraska,* 217 U. S. 196, relied upon by respondent, is not controlling here. It was there held that an act requiring every railroad company to construct switch tracks to elevators adjacent to the right of way was unconstitutional, because it required the carrier to construct a switch at its own expense, upon demand of an elevator owner, without a preliminary hearing as to reasonableness or necessity, under a severe penalty for noncompliance with the demand. Moreover, the supreme court of the United States indicated that the service required by the elevator statute was not incidental to the duties of a common carrier, but was a service for the benefit of a private individual or a corporation, and not for the general public.

Respondent also contends that the act now under consideration is unconstitutional because the enrolled bill was not signed by the presiding officer of the senate. Const., art. III, sec. 11. This question is settled adversely to respondent by former decisions. It has been held:

"The failure of the presiding officer of the senate to sign a bill, which was afterwards approved by the governor, and which the journal of the senate shows passed the senate by the constitutional majority, does not affect the validity of the act." *Cottrell v. State*, 9 Neb. 125; *Taylor v. Wilson,* 17 Neb. 88.

The judgment is therefore

AFFIRMED.

ROBERT RYAN, APPELLEE, V. CLARK BULLION ET AL., APPELLANTS.

FILED DECEMBER 29, 1916. No. 18953.

1. **Judgment:** RES JUDICATA. The judgment in one action will not bar a subsequent action unless it appears that the subject-matter is the same in both actions, and was or might have been litigated in the former action. The parties to such former action will not be estopped thereby to litigate questions in a subsequent action which the court in the former action refused to determine for want of jurisdiction.
2. **Attorney and Client:** ATTORNEY'S FEES: QUESTION FOR JURY. The defendants, residents of another state, employed an attorney of their place of residence to have full charge of their interests in this state, and it does not appear that they placed any limitations upon his authority to employ local counsel in their litigation here. Plaintiff rendered legal services in defendants' litigation here, with the knowledge of the attorney in the other state, who corresponded with him as one of the attorneys for defendants in that litigation. There is evidence that plaintiff relied upon defendants for compensation, and no evidence that plaintiff had any reason to expect compensation for his services from any one other than these defendants. *Held*, that the question of defendants liability for such services is one of fact to be determined by the jury.
3. **Appeal:** VERDICT. If three persons are sued jointly and there is proof of joint liability for part of plaintiff's claim, a verdict under suitable instructions for so much of the plaintiff's claim as defendants are jointly liable for will not be set aside as unsupported by the evidence, although it appears that there was no joint liability for some part of plaintiff's claim.
4. **Limitation of Actions.** If an attorney undertakes to attend to such litigation as may arise out of the settlement of an estate and to wait for compensation until the proceeds of the litigation are realized, the statute of limitations will not begin to run against the attorney's claim for compensation for services so rendered until the litigation in settling the estate is ended.
5. **Garnishment:** VOLUNTARY PAYMENT. If, upon an attempted garnishment, money is voluntarily paid into court by the defendant's debtor, the order of the court directing that it be applied upon the judgment of the plaintiff against the defendant in the litigation in which the money was so paid in will not be set aside upon appeal on motion of defendant, solely because of insufficiency of the garnishment proceeding.

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

W. G. Hastings and *Anderson & Baylor,* for appellants.

Hall & Bishop and *Robert Ryan, contra.*

SEDGWICK, J.

The plaintiff began this action in the district court for Lancaster county upon a claim for services as an attorney at law rendered for these defendants. He attached to his petition an itemized statement of the services for which he claimed compensation, which contains different items of charges from January 30, 1902, to December 3, 1910. He alleges in his petition that he was employed by the defendants "as their attorney to represent them and protect their interests in the matter of the estate of James M. Bullion, deceased, whose estate was being administered in Saline county, Nebraska, and that Curtis W. Ribble was the duly appointed administrator of said estate; that this plaintiff rendered various and sundry services for the defendants at their request and with their knowledge and consent in the matter of said estate, during the time extending from January 30, 1902, to December 3, 1910; * * * that the plaintiff also advanced certain moneys for court costs and expenses in connection with said litigation," and admitted that $43.65 had been repaid plaintiff "for said advancement." He asked judgment for $809.81 and interest from January 1, 1911.

The defendants answered separately. The defendant Clark Bullion answered that he is, and at all times mentioned in the petition was, a resident and a citizen of the state of New York, and that the statute of limitations in that state is six years, and that all charges prior to June, 1907, were incurred in the year 1904 and prior thereto, and that the plaintiff's action as to this defendant is barred by the statute of limitations, and this defendant denies that he ever employed the plaintiff

"in any manner to look after or protect defendant's interests generally in the estate of James M. Bullion, deceased, and never employed nor requested nor authorized the employment or had any knowledge of the employment of said plaintiff in or about this defendant's interests in said estate in any of the state courts of Nebraska, or in any of the matters mentioned in plaintiff's petition, or in any way, except in procuring an accounting by said Curtis W. Ribble as administrator of said estate in the federal courts of the state of Nebraska, for which services the said plaintiff has received the full amount of his demands."

The defendant Laura A. Ames also pleaded the statute of limitations of New York in substantially the same way, and then alleged that "in the summer of the year 1901 she employed George H. Hastings of Crete, Nebraska, through one J. D. Reed of Richfield Springs, New York, and through one William G. Hastings, then of Wilber, Nebraska, to present for this defendant a claim against said estate arising upon a promissory note for the sum of $500 principal and accrued interest, and on September 24, 1901, said George H. Hastings presented a petition for leave to file said claim, and it was refused by the county court of Saline county on the ground that an order barring presentation of further claims had been entered in said estate August 28, 1901. Pending the hearing of the application to file said claim, the said George H. Hastings, without consultation with either the said J. D. Reed or with William G. Hastings, and without knowledge of this defendant, employed said plaintiff, this defendant is now informed, to assist in procuring the allowance of said claim, and the only matter this defendant ever had pending in any state court of Nebraska before January 1, 1906, was this one for enforcement of the said claim; and the employment of the said plaintiff in and about the enforcement of such claim was wholly unauthorized by this defendant, and any liability for fees and disbursements for such serv-

ices remained at all times and is now against said George H. Hastings and not against this defendant." The defendant Nettie Furmin filed a separate answer, alleging substantially the same defense as the defendant Ames.

The plaintiff for reply alleges: "By way of estoppel and bar to the defenses attempted to be stated in said answers," that his employment by said defendants to represent them in and protect their interests against the estate of James M. Bullion and to enforce their claims against said estate and against Curtis W. Ribble, the administrator of said estate, included his employment in the suit in the federal court, and one of the essential issues in the said action in said federal court, was the employment by the complainants therein of the plaintiff herein for the performance of all of the services covered by the entire bill above referred to, including the bill for services described in the petition herein, which issue of employment was up for consideration and adjudication, and, by said action and decree for the establishment of the attorney's lien, was adjudicated and settled in favor of the employment of the plaintiff by the defendants therein, whereby the defendants are herein estopped to deny said employment by them, and their denial constitutes no defense to said action.

The jury returned a verdict in plaintiff's favor for $426, with interest $98.42, amounting to $524.42.

These defendants were the heirs of James M. Bullion, deceased, who died in Saline county in this state. It appears that there was a variety of litigation arising out of the settlement of this estate in the county court of Saline county, in the district court for that county, in the supreme court of the state, and also in the federal court for this district, continuing during the times stated in the plaintiff's action for professional services. It also appears that the plaintiff rendered the services for which he has charged, and that the value of the services so rendered by the plaintiff is not seriously contested.

It will be seen that the pleadings of the parties are somewhat complicated, and the plaintiff himself with his counsel and the counsel for the defendants have presented full and exhaustive briefs upon questions of law which they assume are involved in this litigation, but we have had some difficulty in ascertaining how some of these questions of law are applicable to the disputed facts involved in this record.

It appears to be conceded that the plaintiff was employed by these defendants to bring an action in the federal court, which was begun in December, 1904, and that he rendered the necessary services for which he charged in that action, and it is also conceded by the plaintiff that he was allowed by the federal court, and had received, compensation for his services in that action. The record shows that the plaintiff presented to the federal court his claim for services, including the charges which are involved in this litigation, and that the federal court allowed him in those proceedings compensation claimed by him for his services in that court, but the federal court refused to allow or consider in that case his claim for compensation in the state courts, for which this action is brought. There was no finding that plaintiff was not employed in the state courts. Such a finding under the order there made would have been dictum only. It would seem, therefore, that the plaintiff is in error in supposing that the order of the federal court and the actions of these defendants in connection therewith would estop these defendants to now contest his claim for services in the state courts.

The defendants present two principal questions for consideration: (1) The defendants contend that the plaintiff was not employed by them in any of this litigation in the state courts or in their behalf by any one who was authorized by them to so employ him, and that they had no knowledge that he had been so employed or was rendering his services with the expectation of being compensated therefor by them. (2) It appears that

they contend that all services rendered by the plaintiff prior to the commencement of the action in the federal court on the 2d day of December, 1904, were completed, and his right of action, if any, thereon accrued prior to the commencement of that action in the federal court, and his claim therefor is barred by the statute of limitations.

It appears that the defendants all reside in the state of New York and have so resided during all of the times of this litigation. They employed one Reed, a local attorney there, who had charge of their interests. Mr. Reed appears to have had full charge for them of their interests, and it does not appear that they placed any limitations upon his authority to act for them in the matter of employing local counsel here. The defendant Ames testified that she had no personal acquaintance with the plaintiff, and had no correspondence with him personally; that all her communications with him had been conducted through Mr. Reed, but that she could not state definitely when she first learned of Mr. Ryan's employment, and that she had never employed *directly* any other person than Mr. Reed, and, when asked the specific question, "State whether or not you have ever authorized the employment of Mr. Robert Ryan on your behalf?" she answered, "I never did *directly*." This of course is an admission that Mr. Reed had authority on her behalf to employ this plaintiff. The defendant Clark Bullion testified that he received all communications from the plaintiff through Reed; that he first became interested in the litigation, "I think about the time my aunt's claim against the estate was sent out there." This was one of the claims filed with the Ames and Furmin claims, and was at the commencement of the litigation for which the plaintiff claims fees. He testifies that he had no personal interest in that claim, and was only interested in it as executor and legatee of his aunt, who died after the claim was filed. He signed a stipulation to dismiss those claims, and he

testified that the attorney, Reed, suggested that he sign it. He also testified that he never authorized any general employment of plaintiff to represent or look after his interests in the estate, and that he had no knowledge that he was looking after it, except in the matter of the action in the federal court, in which the witness was a party plaintiff. The correspondence in evidence shows that Mr. Reed knew that this plaintiff was actively assisting in all of this complicated litigation in behalf of this estate of which these three defendants were the heirs, and there is no evidence of any circumstances indicating that Mr. Reed had contracted with any other attorney here to render all necessary services, or to procure them to be rendered, or to suppose that this plaintiff was relying on any one other than these defendants for compensation for his services. So far as we have observed, the evidence is not very satisfactory as to when the defendant Clark Bullion, through his attorney Mr. Reed, made himself responsible for services rendered by this plaintiff. The litigation which he authorized, and which was brought in his name in the federal court, recognized the former litigation and attempted to realize the results thereof, so that this defendant made himself responsible jointly with the other defendants for a considerable part of the services rendered by the plaintiff.

The questions presented were difficult and complicated, and it was perhaps unfortunate that it was required to submit them to the consideration of the jury under such exhaustive instructions covering all of the various issues in the case. The trial court might perhaps have determined many of the questions presented, and so might have simplified the instructions given to the jury, but it does not appear that any more simple method of submitting the case was suggested and insisted upon, and the jury by the verdict allowed the plaintiff only for a part of the services rendered. Under the instructions the jury might render a joint verdict against all of the

defendants for such services as they found they were all jointly liable for, and it does not clearly appear that this verdict is for a larger amount than that for which these defendants were jointly liable. The jury under the instructions were not allowed to find against any of the defendants except for those services for which they were all liable, and the defendants Ames and Furmin cannot, of course, complain that by reason of this fact they have been relieved from some liability.

As to the statute of limitations, we find that the record shows that the plaintiff wrote Mr. Reed in the latter part of 1904 in regard to costs advanced. "They amounted to almost $100 which General Hastings and I will try to carry until we get something out of the estate." This seems to have been acquiesced in by Mr. Reed, and indicates an understanding that settling with the attorney would be postponed until the litigation was ended. There were other circumstances from which the jury might find that the employment was a continuing one. The result of the whole litigation was that these defendants realized a considerable amount as heirs out of the estate of James M. Bullion, which at times during the progress of the litigation seemed very doubtful. While the facts in the case are complicated, and not very clear, we cannot say we have found such errors in the trial of the case as to require a reversal.

It appears that, after the judgment had been rendered in the district court in favor of the plaintiff, some of the proceeds of the Bullion estate had come into the hands of the court, and a motion was made by the plaintiff to apply these proceeds upon his claim. This motion was sustained and the court ordered the proceeds to be so applied. From that order the defendants also appealed to this court, and upon motion that appeal was consolidated with this case. It appears that in the order so consolidating it, by a clerical error, the record was made to show that this case was consolidated with case No. 18403 that had already been determined by

this court. It is therefore ordered that that clerical error be corrected so as to show the fact as above stated.

Some questions are presented in regard to the proceedings in the nature of attachment and garnishment, by which the proceeds of the Bullion estate were brought into the trial court. If we were required to reverse the principal judgment of the trial court, those questions might become of importance, but this money was voluntarily paid into court. It is conceded that it belongs to defendants, and, as it will require an order of the trial court to dispose of the money in its hands belonging to these defendants, we think that court has jurisdiction to order so much thereof as is necessary to be applied on the plaintiff's claim.

The judgment of the trial court, and the order applying the money in the hands of the court upon that judgment, are both

AFFIRMED.

FAWCETT, J., not sitting.

JOHN D. FOLTZ ET AL., APPELLEES, v. CHARLES H. MAXWELL, ET AL., APPELLANTS.

FILED DECEMBER 29, 1916. No. 18970.

1. **Homestead.** If man and wife reside in a building upon two ordinary town lots owned by them for several years and have no other home, such building will, while they make their home therein, constitute their homestead as against their creditors, although they have, during their residence therein, conducted a hotel in such building.

2. ———. Under such circumstances no formal declaration that they have selected such property as their homestead is necessary.

3. **Executors and Administrators:** SALE OF HOMESTEAD: LACHES. A homestead is not subject to administrator's sale to pay debts of the deceased owners thereof as against their children and heirs;

but, if such sale is duly ordered and is in all respects regular, and the children and heirs, with knowledge of the sale to an innocent purchaser, acquiesce therein for more than five years after becoming of legal age, knowing that the purchaser is in the meantime making valuable and permanent improvements of the property, such conduct and laches will estop them to maintain an action in equity to establish an interest in the property.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Reversed, with directions.*

R. E. Evans, for appellants.

J. J. McAllister and *W. V. Steuteville, contra.*

SEDGWICK, J.

These plaintiffs began this action in the district court of Dakota county to set aside an administrator's deed and to establish and quiet their title in two lots in the town of Dakota City in that county. Their father and mother owned these lots, and died intestate. An administrator was appointed of their respective estates, and, upon proceedings brought for that purpose, the administrator sold the lots at public sale to pay claims allowed against the estate of the decedents. The district court determined that the lots constituted the homestead of the decedents, and that the administrator's sale was void, and quieted the title of the plaintiffs in the property. The defendants have appealed.

It is conceded that the proceedings that resulted in the administrator's sale were regular in form and were sufficient to pass the title if the property had been subject to the debts of the decedents. The plaintiffs contend that the property constituted the homestead of the decedents and was not subject to sale for their debts. The defendants present two questions: First, they contend that it is not sufficiently shown that the property was the homestead of the decedents; and, second, that the plaintiffs are estopped by their conduct and their laches to claim any interest in the property as against the defendants.

1. The decedents occupied the property and conducted a hotel therein. They had done so for several years, and it is contended by the defendants that their occupancy was only for the purpose of conducting a hotel, and that they, nor either of them, had never selected the property as a homestead. These decedents had lived in this property for more than five years, and had made it their home, and there is no evidence that they had any other home or any other property. No outward act of selection of a homestead is necessary under such circumstances, and we are satisfied that the property was the homestead of the decedents, and was not of greater value than $2,000, and was therefore not subject to the payment of their debts.

2. The other question is a more difficult one. At the time of the sale of the property by the administrator some of these plaintiffs were of legal age, and the others became of legal age soon thereafter. The property was in a dilapidated condition, and its use was of little if any value, and the defendants at once began substantial and permanent improvements. The finding of the trial court that they expended a large amount for such improvements is fully justified by the evidence, and after they had made most of these substantial improvements, and while they were continually improving the property, and after these plaintiffs had arrived at full legal age, the plaintiffs watched the progress of these improvements, saw them from day to day, and delayed the commencement of this action for more than five years. The plaintiffs' attorney alleges that both the plaintiffs and the defendants knew that the defendants' title was void, and that the plaintiffs were continually asserting their rights to the property, and that the defendant Maxwell was seeking by negotiations to complete his title; but the plaintiffs' attorney does not refer us to parts of the record that will establish this condition of things, and we have not found such evidence in the record. On the other hand, the defendants in their

briefs refer us to evidence which tends to show that the plaintiffs, some of them, assisted in making the improvements in the employment of the defendant Maxwell, and were by him paid in full for their services in so doing, and that the other plaintiffs made no claims to the property until this action was begun, and that the defendant Maxwell bought the property in good faith, and paid its value therefor at the time, and considered that his rights were perfect, as his generous investment in improving the property would also indicate. Under these circumstances we think that the plaintiffs, by their conduct and their silence, encouraged the defendant Maxwell in making these improvements, and, by their laches in so long delaying their action, are not now in a position to assert any equities in the property.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree quieting the defendants' title in the property.

REVERSED.

FAWCETT and HAMER, JJ., not sitting.

STATE, EX REL. W. H. BARNUM, APPELLEE, v. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 29, 1916. No. 18981.

1. **Municipal Corporations:** USE OF STREETS. A city of the metropolitan class has control of its streets, and, while it cannot prohibit the general and ordinary use for which the streets are constructed, it is within the reasonable discretion of the authorities of such city to prescribe the uses to which a street may be put and to regulate the traffic thereon.

2. ———: ———. Moving a building along a street, although not for the benefit of the city itself or its inhabitants generally, may be considered a public use of the streets in the sense that the public generally may be permitted to so use the streets; and the city authorities may allow such use of the streets.

3. ———: ———. Under a general ordinance of the city requiring companies using or operating poles and wires to temporarily remove the same to allow the passage of buildings which it may be necessary to move along or across any street, an ordinance giving a franchise to a street car company, which provides that such company shall so construct its track "as to present the least possible obstruction to the ordinary and public use" of the street, may be construed to include the moving of buildings along the street as a public use of the street, and to require the company to temporarily remove its wires to allow the passage of buildings, when found by the proper authorities to be necessary.

4. **Constitutional Law.** Under such conditions, an ordinance requiring the company to pay the necessary expense of such removal of the wires is not unconstitutional as depriving the company of its property without due process of law.

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

John L. Webster and *William Ross King,* for appellant.

John P. Breen, contra.

SEDGWICK, J.

The district court for Douglas county granted the relator a peremptory writ of mandamus commanding the respondent "to forthwith temporarily hoist or elevate or, if necessary, temporarily remove the overhead electric wires and wire works maintained by it at the crossing or intersection of Eighteenth street and Burt street, in the city of Omaha, so as to allow the passage and moving of the building now in the street at said intersection and about to be moved across said crossing by the relator, Barnum, the cost of so elevating or removing, temporarily, said wires and wire works shall be borne by the respondent, Omaha & Council Bluffs Street Railway Company." The respondent has appealed to this court.

The relator is a house-mover, and is licensed as such under an ordinance of the city of Omaha, which provides: "It shall be unlawful for any person other than a licensed house-mover to move, raise, lower or support on temporary blocking or jacks or wedges any building or any wall or a part of a wall of any building within the corporate limits of the city of Omaha. * * * The

bond required to be filed by any applicant for a license as house-mover shall be in the sum of three thousand dollars ($3,000) with good and sufficient securities. * * * Before moving any building upon, along or across any public street, alley or any public ground in the city of Omaha, a permit shall be first obtained from the building inspector by such licensed house-mover, which permit must be countersigned by the city engineer, authorizing and allowing such house-mover to move the building designated upon, along or across the streets necessary to be crossed. It shall be the duty of the city engineer to determine upon what streets it shall be necessary for the house-mover to cross in the moving of any structure, and he shall designate the streets upon, over and across (which) such building or structure shall be moved. * * * It shall be unlawful for any such house-mover under the permit to move the structure for which permit is given over, upon or along any other street than the streets mentioned in the permit. * * * Before a permit is issued for any of the operations defined by this article, and before any of the operations defined therein shall have been begun, the building inspector shall examine the building, structure or part thereof on which it is desired to perform such operations, and said building inspector shall refuse to grant a permit for same if any of the following conditions are found to exist. No building shall be moved, in the city of Omaha, which is in such condition that it is worth less than fifty per cent. of the cost of a similar new one. * * * Whenever it shall be necessary for any licensed house-mover to move along or across any street, alley, or other public thoroughfare or public property, any building or other structure of such height or size as to interfere with any wires, cables or other overhead work or the poles or other supports of such overhead work belonging to any individual, association or corporation operating and maintaining same in accordance with any ordinance of the city of Omaha relating thereto, such party or parties,

firm or corporation or as many of them as are jointly operating such overhead work and the supports thereto shall, within twelve hours after written notice has been served severally upon each local manager, agent, or other person authorized to accept legal service, temporarily remove such overhead work and such supports thereto as shall be necessary to allow such building or structure to pass. The expense created by such removal and replacing of said overhead work and the supports thereto shall be born by the person, association, firm or corporation, or all of them, operating and maintaining such overhead work and the supports thereto."

The respondent contends that this provision requiring them to bear the expense of removing and replacing their wires is unconstitutional and void, because it amounts to taking of their property without compensation. Many cases are cited from various courts holding that the moving of buildings along the public streets of a city is an extraordinary and unusual use of the streets, and also cases are cited holding that, when a city has granted a franchise to a corporation to construct a public improvement requiring the erection of poles and wires over the streets of the city, and requiring the corporation, in consideration of the franchise, to render specified services to the city and the inhabitants thereof, and the corporation has accepted the franchise, and in compliance therewith has erected and maintained its poles, and wires and is performing the duties imposed upon it by its franchise, it is beyond the power of the authorities of the city to allow any extraordinary and unusual use of the streets that will interfere with the necessary poles and wires, properly placed and used by the corporation in accordance with the terms and regulations of its franchise, to the damage of the property of the corporation so being used. These authorities hold that, under such conditions, the franchise constitutes a contract between the city and the corporation that is binding upon the city and its authorities. The respondent

says in the brief: "We would be free to admit that, if the franchise of this appellant company required it to remove the wires at its own expense for a house-mover we would not be in a position to complain." For the purpose of this decision, then, we may concede the principle announced in these authorities, without committing ourselves to their general application to conditions in our state, and dispose of the case upon the construction of the provisions of the franchise of the respondent corporation and the ordinances of the city. The respondent corporation purchased the rights of three several corporations under their respective franchises. Each provided that the grantee should so construct its railway tracks and appliances "as to present the least possible obstruction to the ordinary and public use of said streets." These franchises were granted in 1887 and 1888, and subsequent to the enacting of an ordinance in 1886 which provided: "Whenever it shall be necessary for any person to move along or across any street or alley any vehicle, structure or buildings of such height or size as to interfere with any telegraph, telephone or electric wire poles or wires, the company or companies using or operating such poles and wires shall, upon receiving twelve hours notice, temporarily remove such poles or wires as will allow or admit of the passage of such vehicle, structure or building." The question is whether this ordinance of 1886 and these provisions of the franchise ordinances enacted thereafter, and the ordinance above quoted which required such companies to pay the expense of removing their obstruction to the passage of buildings along the street, can be construed together so as to give force to them all and render them consistent with each other. The two ordinances, if construed together without reference to the franchise ordinances, would of course require the companies to pay such expense. The argument of the respondent corporation is that these franchise ordinances, in the provisions that the "track of said company shall

be so constructed and maintained as to present the least possible obstruction to the ordinary and public use of said streets and avenues," exclude the idea that it can be held to avoid obstruction of extraordinary and unusual use of the streets. It is said that the movement of buildings along highways is neither an ordinary nor a public use of the highway. It appears that two licensed house-movers were examined as witnesses on the trial of the case. One of them testified that from 1887 about 500 or 600 houses were moved each year across the streets of the city. The public use of the streets may mean either a use for the benefit of the public, or a use by the public generally. As the city has control of its streets, and, using a reasonable discretion, can regulate the traffic thereon and prescribe the uses to which a street may be put, not, of course, prohibiting the general and ordinary use for which the streets are constructed, it is manifest that the authorities of the city may within reasonable limits determine what is and what is not a public use of the streets. In providing, as these ordinances do, that under suitable regulations and restrictions the public may use the streets for the movement of buildings, it must be conceded that the authorities have not exceeded their power nor abused their discretion. The ordinance of 1886, therefore, in the light of the subsequent franchises, must be held to declare that the movement of buildings along the streets is a public use of the streets, and that the provisions of the respective franchises of the respondent corporation's constitutent companies that they must not with their appliances obstruct the public use of the streets forbids their preventing such movement of buildings. Under such a franchise contract it is not an abuse of authority to require the corporation to bear the necessary expense of preventing such obstruction. The trial court has so construed these franchises, and the judgment is therefore

AFFIRMED.

ROSE and FAWCETT, JJ., not sitting.

PHILIP FASSLER, APPELLANT, v. RUDOLPH STREIT ET AL., APPELLEES.

FILED DECEMBER 29, 1916. No. 19036.

1. **Equity:** SUIT FOR PURCHASE PRICE: EQUITABLE DEFENSE. In an action in equity to recover the remainder of the purchase price of land, the general rule that he who seeks equity must do equity applies, and the purchaser of the land may show any equity in his favor which will reduce the amount of the recovery.

2. **Pleading:** CONSTRUCTION. Doubtful language in a pleading will be construed against the pleader. The reply in this case amounts to an admission that the land in question was the homestead of the deceased owner and his family, and that an administrator's sale to pay debts of the deceased was invalid and not sufficient of itself to convey the interests of the heirs.

3. **Vendor and Purchaser:** ACTION: NOTICE: JUDGMENT. One who has conveyed land with covenants of title is entitled to notice and an opportunity to defend an action against his grantee contesting such title. But if he has notice of the pendency and character of the action, and fails to defend, he will be bound by the judgment therein.

4. ———: ———: OFFSET. In such case, if the judgment determines that parties contesting the title of the grantee under his deed have an interest in the land in derogation of the title guaranteed by the deed, and determines the value of that interest, the grantee in the deed may pay such adverse claim and offset the same against his unpaid purchase price of the land.

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

Bernard McNeny, for appellant.

L. H. Blackledge, contra.

SEDGWICK, J.,

A former trial of this case in the district court for Webster county resulted in a judgment for the defendant. Upon appeal to this court the judgment was reversed, 92 Neb. 786. It was determined that the plaintiff was not an innocent holder of the note in suit under the law

of negotiable paper, and the cause was remanded to the district court for a trial of the alleged defense. Upon the second trial the judgment was again in favor of the defendant, and the plaintiff has appealed. The principal facts in the case are sufficiently stated in the former opinion. Several questions are now presented as to the sufficiency of the defense.

The question whether an action can be maintained for breach of a covenant of title in a deed before there has been an eviction is discussed in the briefs. That question frequently becomes of much importance, but does not seem to have any application in an action in equity to recover the balance of the purchase price of the land. In such action the general rule that the plaintiff in an action of equity must do equity applies with full force, and there can be no question that, in an action in equity to establish a lien upon land for the remainder of the purchase price, the purchaser may show any equity in his favor which will reduce the amount of recovery. The judgment hereinafter referred to in favor of the heirs of Paulson established such equity in favor of the defendant.

The defendant bought this land of Johnson for the agreed price of $1,800. He paid $500 cash, and the note and mortgage in this suit were given for the remainder of that agreed purchase price. Afterwards Streit paid $300 on the note. Johnson deeded the land to the defendant with a general covenant of title. Johnson derived his title through an administrator's deed. It is alleged by the defendant that the administrator's deed did not convey a complete title. He alleges the land was a homestead, and was not subject to sale for the debts of the deceased owner, and that some of the heirs of the deceased had brought and were prosecuting an action to establish their interest in the land. The question whether the land was a homestead and the administrator's sale was void is discussed in the briefs, but we do not regard that as an open question under the pleadings

and evidence in this case. The defendant alleged that the land was the homestead of the deceased, and the plaintiff in reply alleged that the widow and children "concluded to abandon said land and seek a home and living elsewhere, * * * their homestead right in said land was of no value," and other similar allegations, and while there was a formal denial of "the allegations in the first four paragraphs of section six of said answer except as herein admitted," which sections of the answer included the allegation of homestead, he admits "the ownership and occupancy of said land by Nels Paulson at the time stated." No act of selection of homestead is necessary, and an intention of removing from the land and seeking a homestead elsewhere will not divest the land of its homestead character before such removal is effected. Taken together with the other allegations in the reply, and this admission of ownership and occupancy at the time of his death, if it was intended to take issue upon the homestead character of the land, there should have been more specific allegations explaining how he owned and occupied it with his family and still the land was not a homestead. We must therefore consider under these issues that the land was a homestead, and that the administrator's sale for the payment of debts of the intestate was ineffectual to pass the title.

It is contended that Johnson was not a party to an action in which the interest of the heirs was determined, and that Johnson was a necessary party because that judgment would fix the amount of his liability for the breach of covenant in his deed. This contention of the plaintiff cannot be sustained. There is no doubt that Johnson was entitled to notice of the pendency of that action, and was entitled to an opportunity to defend it, but this he had. There was an attempt made to bring him into the action. A summons was issued against him, and he had other express notice of the pendency and character of the case which gave him an opportunity to appear and defend his interests in the case if he de-

sired to do so. This is all that was required. Johnson was at liberty to either appear and defend the case in his own interests, or to leave the defense to other parties interested. That action of the heirs was defended by the present defendant Streit, and was pending at the same time with the case at bar. Judgment was rendered therein in the district court before the first judgment was rendered in the case at bar, and the defendant in this case answered that he was intending and preparing to appeal to this court from the judgment in favor of the heirs. This defendant failed to perfect his appeal in that case, and, when this case was remanded to the district court, the suit of the heirs had been finally determined. It is alleged that the conduct of this defendant in failing to perfect his appeal from the judgment of the heirs was fraudulent, and that he purposely prevented Johnson and this plaintiff, as assignee of Johnson's mortgage, from contesting the claim of the heirs. But it does not appear that there was any legal defense against the claims of the heirs. In fact the contrary appears, since the land was the homestead of the deceased and his wife, and the administrator's sale could not convey the interest of the heirs to Johnson.

The judgment in favor of the four children of the decedent gave them a four-fifths interest in the land subject to their mother's life estate, so that, as to the four-fifths of the land, the title conveyed by Johnson to Streit entirely failed. The court in the case at bar found that the land, when the heirs obtained their judgment, was of the value of $4,000. It is not clear what the value of the mother's life estate was, but it evidently was not of great value. How much, then, should be deducted from $3,200, the value of four-fifths of the land, on account of the mother's life estate, is uncertain. The proceeds of the administrator's sale were used in payment of a mortgage placed upon this land by Nels Paulson and his wife. The defendant Streit was, by the decree of the court, subrogated to the right of the mort-

gagee in this mortgage, which was superior to the interest of the heirs in the land. This mortgage amounted to $1,200 when the interest of the heirs in the land was determined, and when the defendant Streit settled with these four heirs under the decree of the court he paid them $1,500 for their interest, which was, as we have said, subject to the $1,200 mortgage. On the theory that the value of their interest at that time was $2,700, this payment of $1,500 was the amount the heirs were entitled to. As we have said, it is difficult to tell the precise value of the interest of these heirs at that time, and we are not referred to any evidence in the record which tends to show that this was an unfair settlement. Defendant, then, was compelled to release the mortgage to which he was subrogated and pay $1,500 to perfect his title. His damage, because of failure of his title was $1,500 and unavoidable expenses which, together with the $1,500, amounted to more than the note and mortgage in suit. The trial court correctly canceled the note and mortgage.

The judgment of the district court, therefore, canceling the mortgage sued upon and quieting Streit's title to the land is sustained by the evidence, and is

AFFIRMED.

LETTON and FAWCETT, JJ., not sitting.

ALLAIRE, WOODWARD & COMPANY, APPELLANT, v. PERFECTION REMEDY COMPANY ET AL., APPELLEES.

FILED DECEMBER 29, 1916. No. 18887.

Judgment: CONCLUSIVENESS. A cause of action, once fully determined between the parties on the merits, cannot afterwards, so long as such judgment remains in force, be litigated by new proceedings, either before the same or another tribunal.

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

W. A. Meserve, for appellant.

W. D. Funk, contra.

HAMER, J.

Appeal from Knox county. The plaintiff and appellant brought suit against the Perfection Remedy Company, a partnership, and the members of the partnership, alleging the execution and delivery by the defendant company of an order for certain goods, wares and merchandise; that the goods described in the written order were manufactured expressly for the defendant, upon the receipt of the order; that the goods were made ready for shipment to the defendant within a reasonable time from the receipt of the order; that the defendant was notified by plaintiff that said order had been filled, and that the plaintiff was ready to ship the same, but that the defendant refused to accept and receive said goods. Judgment was prayed for $342.50, with interest thereon at 7 per cent. per annum from September 15, 1909.

The defendant in its answer pleaded a prior adjudication, alleging that all of the same matters and things in controversy in this action were actually and fully determined in a former suit had in the county court of Knox county, in the state of Nebraska, on the 20th day of September, 1911, wherein the same party was plaintiff, and the same parties were defendants, which judgment has never been appealed from, and remains in full force and effect. A certified copy of the proceedings in the trial of the case in the county court was made a part of the answer. The plaintiff demurred to the answer. This demurrer was overruled. It elected to stand upon its demurrer, and has appealed from the judgment rendered against it.

The plaintiff contends that the adjudication in the county court is not a bar to its claim, for the reason that the purpose of the petition in the county court was to recover for a sale of the goods, while the purpose of this action is to recover for a breach of the contract

in refusing to accept the goods. It is the theory of the plaintiff that there might be one suit to recover for a sale of the goods, and then another suit to recover for a breach of the contract in refusing to accept the goods, and that one suit would not be a bar to the other, although judgment might be rendered in the first suit. It is not necessary to consider what the law is with respect to this contention—that is, whether an adjudication in favor of the defendant in an action for the purchase price of the goods would constitute a bar to an action for damages in refusing to accept them—for the reason that the pleadings in the action brought in the county court show that that action, as well as the instant case, was brought upon the refusal of the defendant to accept the goods. It was alleged in the petition while in the county court: "4. That the plaintiff has duly performed all the conditions of said contract on his part to be performed and has tendered said goods to the defendants and demanded payment for the same, which was refused." This is in substance the allegation made in the petition in the instant case. The action brought here is quite plainly the same action which went to judgment in the county court. Whenever this condition appears, there must be an end to the litigation. As said by Mr. Herman in his work on Law of Estoppel and Res Judicata, sec. 108: "The finality and inviolability of judgments of a court of competent jurisdiction, not assailed on error or appeal, rests on an inflexible and conservative principle of law. The judgment between the same parties or their privies is conclusive of the matter directly in question. It is beyond question; it is final and absolute, however erroneous, or whatever of injustice it may work; it is a conclusive determination of the particular controversy. And in this there is no difference between a verdict and judgment in a court of common law and a decree of a court of equity. Both stand on the same footing. The rule has found its way into every system of jurisprudence, not only from its

obvious fitness and propriety, but because, without it, an end could never be put to litigation."

In *Bement v. Smith,* 15 Wend. (N. Y.) 493, the plaintiff built a sulky for the defendant, according to an agreement, tendered it to him, and, on his refusal to accept it, deposited it with a third person on his account, giving the defendant notice of the deposit, and brought an action of assumpsit. It was held that the plaintiff was entitled to recover the contract price. We think that in all cases where it is held that the contract price may be recovered, it will be found that the article sold was completed and ready for delivery and a tender made. "The true rule is that where everything has been done by the vendor which he is required by his contract to do, and the manufactured property in its completed condition is tendered to the purchaser, and he refuses to receive it, and it is held by the vendor for the purchaser, then the vendor may recover the contract price." *Moline Scale Co. v. Beed,* 52 Ia. 307.

Plaintiff could elect to sell the goods manufactured or specially prepared for defendant's use on defendant's formula, under the order, and, after tender made, sue for the contract price. *Funke v. Allen,* 54 Neb. 407.

The case once determined on the merits cannot, while the judgment remains in force, be litigated by new proceedings either before the same or any other tribunal. *Trainor v. Maverick Loan & Trust Co.,* 92 Neb. 821.

"A judgment on the merits constitutes an absolute bar to a subsequent action founded upon the same claim." *Triska v. Miller,* 86 Neb. 503.

"The doctrine of *res judicata* is that a question once determined by a judgment on the merits is forever settled, so far as the litigants and those in privity with them are concerned." *Herpolsheimer v. Acme Harvester Co.,* 83 Neb 53.

"A cause of action, once fully determined between the parties on the merits, cannot afterwards, so long as such judgment remains in force, be litigated by new proceed-

ings, either before the same or any other tribunal." *Yates v. Jones Nat. Bank*, 74 Neb. 734.

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

SEDGWICK, J., concurs in the conclusion.

FRED A. TAYLOR, APPELLEE, V. OVANDO KENESTON, APPELLANT.

FILED DECEMBER 29, 1916. No. 19037.

Appeal: CONFLICTING EVIDENCE. The jury are the judges of the credibility of witnesses who testify before them and of the weight of their testimony, when properly admitted, and, where there is a conflict of evidence, their verdict will not be set aside unless it is clearly wrong.

APPEAL from the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

W. T. Wills, for appellant.

D. A. Harrington, contra.

HAMER, J.

This case comes from Boyd county on appeal. The plaintiff was injured by being run over by an automobile driven by the defendant, and brought suit to recover damages for his injury. He recovered a judgment of $238.60. The injury occurred as the parties were leaving the fair grounds at the town of Butte, where they had been watching a ball game and horse race. There was a trial in the district court before Judge Robert R. Dickson and a jury. It is argued by the appellant that the evidence is insufficient to sustain the verdict. It is claimed by the plaintiff that, as he was leaving the fair grounds, he thought that the defendant negligently failed to give any warning of his approach

in his automobile, and that he was driving at a high rate of speed, and that he neglected to use his brakes, and that he ran his automobile over the plaintiff.

The evidence is conflicting. The defendant and his wife, who was with him, testified that when they were leaving the fair grounds they observed the plaintiff walking in the road a short distance ahead of them; that they were driving at a very low rate of speed, not exceeding four or five miles an hour; that the defendant, as the car approached the plaintiff, gave a warning signal, whereupon the plaintiff left the road and indicated that he knew of the approach of the automobile; that as the automobile approached for the purpose of passing the plaintiff, and while still running at a very slow rate of speed, plaintiff stepped in front of the automobile and was then injured. In many of these particulars the defendant is corroborated by numerous witnesses. Especially is this so as to the rate of speed at which he was proceeding as he approached the plaintiff. There is, however, evidence on the part of the plaintiff to show that no warning of the approach of the car was given; that the automobile was being driven at from 12 to 15 miles an hour, a rate of speed which under the circumstances, and in view of the crowded condition of the grounds and number of people using the road at the point where the injury occurred, might be held by the jury to be a dangerous and negligent rate of speed. This testimony is corroborated, because it is shown that the automobile ran a considerable distance after it struck the plaintiff and passed over his body. It is also in testimony that the defendant tried to stop the automobile and was unable to do so. Lloyd Carmichael and three young men or boys were in a buggy two or three rods north of the fair grounds gate. Carmichael testified to seeing the car strike the plaintiff; that the car struck the plaintiff just as he was coming through the gate and carried him along or pushed him about two rods, when he fell down head first "in front of the car," and that

the car "went on over him, and he was lying there in the road." Carmichael also testified that it was about 30 feet or a little more from where the car struck him to where he was lying; that it was about 150 feet from where the car struck him to where the car stopped. Carmichael's testimony seems to be fully corroborated by other witnesses, some of whom appeared for the defense. There is, however, evidence tending to show that the defendant tried to get the plaintiff to step out of the road, and that the plaintiff did so, and then stepped back in again. The defendant's wife testified: "Well, we—I think we were in about 12 feet of Taylor when I first seen him. He stepped down into the road, and I gave a yell and said, 'Get back!' and he stepped right back up out of the road and looked right at us. * * * Q. And now, after he did that, go on and tell the jury what he did then. A. Then he stepped right back into the road. I don't think he was more than three feet from the front of the car. He went kind of angling then that way. He hadn't any more than struck the center of the road until the car was shoving him."

The defendant strenuously contends that the plaintiff was in fault, and that his injury was due to the fact that he stepped in front of the automobile. In view of the facts as they appear from the evidence, we cannot very well determine that the verdict is without support. In *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 394, this court said, as stated in the syllabus: "If the evidence is substantially conflicting upon a material issue, it presents a question for the jury." In *Oleson v. Oleson*, 90 Neb. 738, it was said in the syllabus: "All material questions of facts are for the consideration of the triers of fact; if in a trial by jury, the jury must determine them." In *Lukehart v. State*, 91 Neb. 220, it is said in the syllabus: "Questions of fact on conflicting testimony are for the solution of the trial jury." In *Dore v. Omaha & C. B. Street R. Co.*, 97 Neb. 250, it is said in the syllabus: "The jury are the judges of the credibility of

witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of the jury thereon is clearly wrong, their verdict will not be molested."

In view of the well-known rule which makes the jury triers of fact and puts upon them the responsibility of determining the controversy, we are unable to disturb the verdict.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1917.

MAUDE M. HENDERSON, ADMINISTRATRIX, APPELLEE, v. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JANUARY 3, 1917. No. 19047.

1. **Master and Servant:** INJURY TO SERVANT: DEFECTIVE APPLIANCES: ASSUMPTION OF RISKS. A workman has the right to assume that his employer has used due diligence to provide suitable appliances in the operation of its business. Ordinarily, he does not assume the risk of the employer's negligence in performing such duties. If, however, the defect is known to the employee or is so patent and obvious as to be readily observed by him, and he continues to use the defective appliance with full knowledge and without objection, he assumes the risk of injury incident to such a situation.
2. ———: ———: QUESTION FOR JURY. At the time the platform to certain stock-yards at a station on defendant's line was built, sufficient clearance was left between it and the side of an ordinary box car so that a brakeman riding on the ladder at the side of such a car could pass; afterwards a wider model of car was put in use, whereby only eight inches of space was left between the side of the car and the platform. *Held*, that it was for the jury to determine whether the lack of space caused by the increased width of the car left a reasonably safe place for a brakeman to work.
3. ———: ———: ———. The question whether the employee had such knowledge of the defective appliance that he assumed the risk of injury from the same is, if properly pleaded, a question for the jury.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Edson Rich, A. G. Ellick and *B. W. Scandrett,* for appellant.

Mahoney & Kennedy and *Philip E. Horan, contra.*

LETTON, J.

On September 15, 1913, the plaintiff's intestate, Edward C. Henderson, was a brakeman on a local freight train of defendant running from Columbus, Nebraska, to Council Bluffs, Iowa. At Elkhorn, Nebraska, it became necessary to place a coal car loaded with sand at a point west of the station in order to be unloaded. In so doing the engine, a Rock Island box car of ordinary width and Union Pacific coal car No. 11088 were backed by the engine in and upon a side track known as the house track. The yards for loading stock were situated contiguous to and on the south side of this track. The method used in switching was to back the engine quite rapidly, and, while running, a signal was given to the engineer, the engine was stopped, the coal car uncoupled and carried by its own momentum to the point where it was desired to place it. The operation is generally known as "kicking in." It is necessary for the coupling pin to be pulled while the cars were in motion. For this purpose Henderson, when last seen alive, was riding with his foot in a stirrup which projected below the ladder on the side of the coal car, holding to a round or handhold on the side of the car with his left hand, stooping over, and with his right hand upon the lever with which to raise the pin. He was riding on the engineer's side so as to give signals. As the train backed at a speed of about 12 miles an hour, the circumstances clearly indicate that he was struck by the projecting platform of the stock-yards and knocked from the car. His foot was cut off and he was dragged by the engine about 40 or 50 feet and killed. The distance from the outside edge of the rail to the edge of the platform was three feet. The distance from the edge of the rail to the

outside of the coal car upon which Henderson was riding was two feet four inches, leaving only eight inches between the platform and the side of the car. An ordinary box car is quite a little narrower, but the exact width is not in evidence. Henderson had been on this run between three and four months, but he had worked for the defendant on a train which ran twice a week, and which transported live stock between Grand Island and other Nebraska points and Council Bluffs, for some years previous to being placed upon the local freight. The wide coal cars had only been used by defendant for about four or five years before the accident, but now practically all the coal and sand hauled over the line is hauled in cars of this class.

The petition alleges negligence in the placing of the cattle chute so close to the track, that the car was of excessive width, and that the train was operated at a negligently high rate of speed. The answer denies that the death occurred in the manner alleged in the petition on account of any negligence or carelessness on the part of the defendant, and further alleges that the death of Henderson was "due to causes to which his own carelessness and negligence proximately contributed, and resulted from dangers and risks which were incident to his employment, and open, apparent, obvious and known to the said Edward C. Henderson at the time of said injuries, and which were assumed by him." The jury returned a verdict for $11,000, for which amount judgment was rendered.

The stock yards were erected at a time prior to the use of the wider coal cars. At the time the platform was erected it was probably reasonably safe and the company had fulfilled its whole duty, but by the subsequent use of the wider cars the distance between the car and the platform was lessened and the danger greatly increased. Accidents owing to the use of wider or higher cars than were usual when permanent structures near the track were built have occurred before. In one

case a brakeman riding upon a furniture car was missed from the train after passing a station where the iron spout to a water tank projected, and the circumstances showed that he had been struck by the overhanging spout, which would not clear a car higher than the average car by the height of a man above the roof of the car. *Choctaw, O. & G. R. Co. v. McDade,* 112 Fed. 888, affirmed 191 U. S. 64. Other cases are *Chesapeake & O. R. Co. v. Cowley,* 166 Fed. 283; *Keist v. Chicago G. W. R. Co.,* 110 Ia. 32; *Harvey v. Texas & P. R. Co.,* 166 Fed. 385, and cases cited in opinion.

In *Texas & P. R. Co. v. Swearingen,* 196 U. S. 51, the side of a scale box erected near the track was shown by the evidence to be only 9½ inches from a ladder on the side of a car moving upon the track. A brakeman was riding on a box car with his foot in the stirrup under the ladder and was looking backwards for a signal from the yardmaster, as it was his duty to do. His shoulder struck the scale box and he was knocked down and severely injured. He was riding on the north side of the car so as to signal the engineer. The evidence in that case was much the same as in this. It was shown that the customary position of a switchman while riding on a car ladder is to swing out from the car with his body, and that a well-developed man could not pass the scale box on the ladder. The plaintiff admitted that he knew of the nearness of the scale box, but said he was not thinking about it. It was contended in that case that the jury should have been instructed to find for the defendant for the reasons that the scale box was erected at a reasonably safe distance from the track, that the plaintiff knew of its location with reference to the track, that the danger was open and obvious and he assumed the risk therof. It was said in the opinion by Mr. Justice White: "*Prima facie,* the location of scales where the tracks were only the standard distance apart, and where a space of less than two feet was left for the movements of a switchman between the side of a freight

car and the scale box, incumbered, as he would be in the nighttime, with a lantern employed for the purpose of signaling, did not incontestably establish the performance by the defendant company of the duty imposed upon it to use due care to provide a reasonably safe place for the use of the switchmen in its employ." It has also been said: "It is undoubtedly true that many duties required of employees in the transaction of the business to be carried on by a railroad company are necessarily attended with danger, and can only be prosecuted by means which are hazardous and dangerous to those who see fit to enter into such employment. Where no necessity exists, as in the present case, for the use of dangerous appliances, and where it is a matter requiring only due skill and care to make the appliances safe, there is no reason why an employee should be subjected to dangers wholly unnecessary to the proper operation of the business of the employer. *Kelleher v. Milwaukee & N. R. Co.*, 80 Wis. 584; *Georgia P. R. Co. v. Davis*, 92 Ala. 300; 1 Shearman & Redfield Negligence (5th ed.) sec. 201, and cases cited." *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64. See, also, *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249.

Defendant insists that the evidence shows that the deceased, from having been employed on the stock pick-up and afterwards upon the local train, must have been sufficiently familiar with the situation of the platform so that he assumed the risk. We think there is not sufficient proof that Henderson knew of the dangerous condition, or that it was so patent and obvious that he would be charged with notice of it. This being the case, the question was for the jury, and was properly submitted by the instructions of the court. The defense of contributory negligence is not sustained by the evidence if Henderson was not aware of the dangerous proximity of the platform, as the jury must have found.

Complaint is made that the verdict is excessive. It is shown that for nearly two years Henderson had no regular

run, but was a member of what is known in railroad parlance as the "chain gang," i. e., train crews that are called in rotation. In June, 1913, he was assigned to a regular run upon the local freight train, and his wages were thus increased. After this change he received an average of about $107 a month. He was 38 years of age. His life expectancy was 29.62 years, and his wife's was greater. He used for his own expenses and clothing about $25 or $30 a month. He delivered to his wife the remainder of his salary each month for the support of his wife and child. The verdict of $11,000, under these circumstances, is not excessive.

The case seems to have been fairly submitted to the jury, and the judgment of the district court is

AFFIRMED.

R. C. ROPER, APPELLEE, v. A. L. MILBOURN, APPELLANT.

FILED JANUARY 15, 1917. No. 19851.

Appeal: LAW OF THE CASE. When on the review of a law action this court finds that the evidence in support of plaintiff's cause of action is overwhelming, but remands the case generally for a retrial because of errors in the record, and on a retrial substantially the same evidence, on the question formerly reviewed, is offered by the respective parties, it is not error for the trial court to direct the jury to find for the plaintiff on that issue.

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

H. M. Sinclair, W. A. Stewart and *T. F. Hamer,* for appellant.

W. D. Oldham, G. C. Gillan and *R. C. Roper, contra.*

MORRISSEY, C. J.

This is the third appeal from the district court for Dawson county. The first opinion is found in 93 Neb.

809, and the second in 98 Neb. 466. The facts are sufficiently stated in the former opinions. In the opinion in 98 Neb. 466, it was said that by the overwhelming weight of the evidence it was shown "that defendant, when he agreed to buy the land, contemplated with plaintiff the profits of the resale, knowing the price at which Naslund had sold the land." The verdict was set aside and the cause remanded. On motion being filed to modify the judgment, the following order was made: "The judgment does not determine questions of fact except for the purpose of the decision, reversal of the judgment being generally for a retrial of all questions of fact." On a retrial the court took all questions from the jury except the amount of recovery, and its action in this regard is the main issue presented.

Appellant insists that the jury ought to have been left to determine whether the parties at the time the contract was made had contemplated the profits of the resale, as well as the value of the land lying north of the track. This question was in fact tried out. Each party submitted substantially the same evidence as that offered on the former trial, and, so far as that issue is concerned, the record stands in the same condition as it did when this court said that the evidence was overwhelming in behalf of the plaintiff. After making a re-examination of the evidence, we find no reason for changing the former holding. It would serve no useful purpose to set out the testimony. The evidence being "overwhelming" on that branch of the case, a verdict for the defendant could not be permitted to stand.

"A trial court should not instruct a jury to return a verdict for either party where, under the evidence, there is any doubt about the propriety of such action; but where the duty to do so is plain it should be performed without hesitation." *U. P. Steam Baking Co. v. Omaha Street R. Co.*, 4 Neb. (Unof.) 396.

"On a former appeal from a judgment in favor of the plaintiff, the case was reversed on the ground that the

verdict was not sustained by the evidence. On a second trial of the case, the evidence offered by the plaintiff was substantially the same as on the first trial, the plaintiff failing to adduce any new material testimony. The trial court directed a verdict for the defendant. *Held*, no error." *Anderson v. Union Stock Yards Co.*, 84 Neb. 305.

"Where the evidence is insufficient to sustain a verdict in favor of plaintiff, it is error for the trial court to overrule a motion for a peremptory instruction in favor of defendant." *Ward v. Ætna Life Ins. Co.*, 91 Neb. 52.

The evidence on this trial being substantially the same as that on the former trial, and this court having previously held that under that evidence defendant's liability was conclusively shown, the trial court would not have been warranted in submitting that question to the jury. Under proper instruction the court submitted the only remaining question of fact to be determined.

The verdict of the jury is amply sustained by the evidence, and the judgment is

AFFIRMED.

HAMER, J., not sitting.

HENRY W. S. PALMER, APELLANT, v. MARY J. PALMER, APPELLEE.

FILED JANUARY 15, 1917. No. 18925.

Fraudulent Conveyances: RELIEF IN EQUITY. He who seeks equity must come into court with clean hands, and where a conveyance of land was made without consideration in order to defeat a judgment in an anticipated suit for divorce and alimony, a court of equity will not lend its aid to the fraudulent grantor to set aside the conveyance, but will leave the parties as it finds them.

APPEAL from the district court for Dundy county: ERNEST B. PERRY, JUDGE. *Affirmed.*

W. C. Dorsey and *David G. Hines,* for appellant.

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

LETTON, J.

This action was brought to set aside a conveyance of 320 acres of land made by the plaintiff to his mother, Mary J. Palmer. The district court found that 160 acres of the land was the family homestead of plaintiff, at the time it was conveyed; that his wife did not join in the deed, and the conveyance was therefore void. As to the other tract, the court found generally for the defendant. From a decree based on these findings, plaintiff appeals.

Summarized, the petition alleges that shortly before September, 1902, the plaintiff's wife deserted him without just cause, and that, while he was prostrated both physically and mentally on account of her conduct, his mother solicited and advised him to convey to her the 320 acres of land, stating that, unless such a conveyance were made, the plaintiff's wife might deprive him of all his property and leave him and his minor children destitute; that he yielded to his mother's influence, and, relying on her statements and promises, he made a conveyance of the land to her without any consideration, and intended only to vest the title in her as trustee for himself, and upon her express promise to reconvey to him on his demand; that the land was then worth $4,500; that no consideration was paid; that he has ever since been the owner of the land, paying taxes, and keeping up the improvements, and has been in the open, notorious, exclusive and adverse possession of the premises for more than ten years last past. He pleads the homestead character of 160 acres; that the conveyance constitutes a cloud upon his title; and prays for relief.

In substance, the answer alleges that at the time the conveyance was made the plaintiff intended to obtain a divorce from his wife and deprive her of all interest in his property; that he feared that his wife would file

a cross-petition asking for alimony and would obtain a judgment; that he had been guilty of cattle stealing and feared that a judgment would be rendered against him by the owners of the cattle he had stolen; that he was without money, and, in order to hinder, delay and defraud his wife and the owners of the cattle and to obtain funds for use in the divorce suit and criminal prosecution, he induced his father, who is now deceased, to purchase the land, the consideration being that his father should cancel about $500 indebtedness and pay about $2,500 more, and that plaintiff should convey the land to whomsoever his father should direct; that his father was indebted to defendant, and in payment of the same directed a conveyance to be made to her. It pleads the payment of a consideration to plaintiff, the abandonment of the homestead, the expenditure of money upon improvements on the lands, and that defendant had been in the exclusive and adverse possession of the land ever since the execution of the deed. The reply denies the new matter in the answer, and pleads the payment of a judgment for alimony.

We are satisfied the evidence does not sustain the defense of a purchase by the father and conveyance to the mother by his direction in payment of a debt. It is clear that one tract was the homestead, and that the attempted conveyance of this was void since the wife did not join in it.

Shortly after the conveyance was made the plaintiff was taken to Lincoln and confined in the Nebraska penitentiary upon a charge of cattle stealing. He was released upon parole, when he returned to Dundy county and remained there until this suit was begun. His father's lands, those belonging to him, and other lands were inclosed with a fence constituting the home ranch. The plaintiff worked with his father upon the ranch until the latter's death in 1907, and since that time until about a year before the beginning of the suit he seemed to have conducted the business of the ranch, with or for his

mother, signing checks in her name, selling cattle, and acting as business manager generally. Apparently no attempt was ever made to dispossess him of the premises, and, so far as the record shows, since his father's death he has been in receipt of the income from the property, but it was treated as the income from the other ranch property was.

We are satisfied from the evidence that the original intention of all the parties at the time the deed was made was that the land should be conveyed in order to put it out of the reach of the wife of plaintiff in case she should file a cross-petition for divorce, and that the district court was right in holding that the plaintiff does not come into a court of equity with clean hands. But it is shown that after his father's death plaintiff released and conveyed all his interest in his father's estate to his mother, the defendant in this case, and there is proof that the land was considered and spoken of by defendant as "Will's land." There was no adverse possession by either party.

From a consideration of the evidence, we have arrived at the same conclusion as did the district court. The action is not a possessory one, but is merely to quiet title. The possession of the land seems to be in the plaintiff, and while the judgment in this action does not remove the cloud from the title to 160 acres of the land, on the other hand it does not give the defendant any right to possession. In such a case a court of equity will not lend its aid to either party, but will leave matters as it finds them.

The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. FRED H. ROHRS, APPELLEE, V. A. N. HARRIS ET AL., APPELLANTS.

FILED JANUARY 15, 1917. No. 19868.

Counties and County Officers: DEPUTIES: APPOINTMENT. The act requiring the county commissioners to "furnish the sheriff with such deputies as they shall deem necessary" and to "fix the compensation of such deputies" does not repeal by implication the former enactment conferring upon the sheriff the power to appoint deputies, the statutes as they now exist requiring the county board to determine the number of deputies and to fix their compensation and authorizing the sheriff to make the appointments. Rev. St. 1913, secs. 2443, 5735.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed.*

H. A. Lambert and *Fred G. Hawxby,* for appellants.

Kelligar & Ferneau and *R. F. Neal, contra.*

ROSE, J.

Relator applied to the court below for a writ of mandamus to compel respondents as county commissioners of Nemaha county to approve his bond as deputy sheriff. The county board had made an order allowing the sheriff a deputy at a salary of $1,000 a year. There being a vacancy in the office of deputy, the sheriff filled it by the appointment of relator, who tendered a bond which the county board declined to approve, on the ground that the legislature had taken from the sheriff the appointing power. An alternative writ was issued, and the trial court overruled a demurrer thereto. Respondents refused to plead further, and from an order allowing a peremptory writ they have appealed.

The authority of the sheriff to make the appointment is the question presented. Relator relies upon the following statutory provisions:

"The state auditor, treasurer and librarian respectively, and each county register of deeds, treasurer, sheriff,

clerk and surveyor, may appoint a deputy, for whose acts he shall be responsible and from whom he shall require a bond, which appointment shall be in writing, and shall be revocable by writing under the principal's hand." Rev. St. 1913, sec. 5735.

"The sheriff may appoint such number of deputies as he sees fit." Rev. St. 1913, sec. 5738.

Respondents contend that the provisions conferring upon the sheriff the appointing power were by implication repealed by a later act entitled, "An act fixing the salaries of sheriff and the manner of appointing and paying their deputies." Laws 1907, ch. 54.

Respondents rely upon the following section: "The board of county commissioners or supervisors shall furnish the sheriff with such deputies as they shall deem necessary and shall fix the compensation of such deputies who shall be paid by warrant drawn on the general fund." Laws 1907, ch. 54, sec. 2.

Unless the enactment quoted repeals by implication the former provisions empowering the sheriffs to appoint their own deputies, the position of respondents is untenable. The law relating to repeals by implication has been stated as follows:

"A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable." *Lawson v. Gibson,* 18 Neb. 137. *Albert v. Twohig,* 35 Neb. 563; *Beatrice Paper Co. v. Beloit Iron Works,* 46 Neb. 900; *Dawson County v. Clark,* 58 Neb. 756; *City of Central City v. Marquis,* 75 Neb. 233.

"Repeals by implication are not favored, and a construction of a statute which, in effect, repeals another statute will not be adopted, unless such construction is made necessary by the evident intent of the legislature." *Schafer v. Schafer,* 71 Neb. 708.

"Statutes *in pari materia* should be construed together, and their provisions harmonized, if possible." *State v. Dunn,* 76 Neb. 155.

The provision that "the sheriff may appoint such number of deputies as he sees fit" is, of course, repugnant to, and inconsistent with, the later enactment conferring upon the county commissioners power to "furnish the sheriff with such deputies as they shall deem necessary," but a reasonable construction may harmonize the other legislation relating to deputies as it appears in the two acts. Respondents take a different view, however, and argue that the later provision, requiring the county commissioners to "furnish the sheriff with such deputies as they shall deem necessary," when considered with the title referring to the "manner of appointing" deputies, confers the appointing power upon the county board. The subject as expressed in the title may be broader than the enactment. In the body of the act itself the word "furnish" is used. The legislature of 1907 did not insert a repealing clause, and evidently intended to authorize the county's administrative body to determine the number of deputies needed and to fix the compensation, leaving the appointment to the sheriff, according to the terms of the former act. The word "furnish" is properly used in that sense. The action of the board in determining the number of deputies necessary and in fixing the salary is consistent with the sheriff's appointing power. In this view of the law the writ was properly allowed.

AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF, V. STANTON COUNTY, DEFENDANT.

FILED JANUARY 15, 1917. No. 18902.

1. **Decision Adhered to.** The decision in *State v. Douglas County*, 18 Neb. 601, holding that sections 46, 47, ch. 31, Gen. St. 1873 (Ann. St. 1911, secs. 10094, 10095) are valid, is adhered to.

2. **Limitation of Actions:** ACTION BY STATE: STATE FUNDS. Money levied and collected by county authorities under those sections, and transferred to the general fund of the county, belongs to the state and is a part of the revenue of the state within the meaning of section 7581, Rev. St. 1913. The statute of limitations does not apply to an action to recover the same from the county.

3. **States:** PUBLIC FUNDS: APPROPRIATIONS: CONSTITUTIONAL PROVISIONS. Those sections of the statute do not constitute appropriations of the public money within the meaning of the constitutional provisions in regard to appropriating the money of the state.

4. **Insane Persons:** CLAIM AGAINST COUNTY. The trustees are by those sections required to fix the amount to be paid by each county for "board and care" of patients domiciled in such counties, respectively, by computation of the "sum actually paid" by the state. When no question is raised as to whether the amount so determined is accurate and right, it is not necessary to determine what remedy, if any, exists for correcting the amounts so charged.

5. ———: ———: ACTION. It is not necessary to present the state's claim for such money to the county board of the delinquent county under section 5638, Rev. St. 1913, before bringing action to recover the same. Such action is not based upon an account or claim against the county within the meaning of that section.

6. ———: ———: INTEREST. The county is properly charged with interest upon money so collected and wrongfully withheld by the county.

Action to recover for care of insane persons. Case referred, with report that plaintiff recover, and defendant excepts. *Exceptions overruled, report confirmed, and judgment entered.*

Willis E. Reed, Attorney General, and *George W. Ayres,* for plaintiff.

T. J. Doyle and *Virgil L. Horton, contra.*

SEDGWICK, J.

This action was begun in this court to recover from Stanton county for the board and care of patients committed to the state hospital for the insane from said county, under sections 10094, 10095, Ann. St. 1911. The case was referred to J. H. Broady, Esquire, as referee to report his findings of fact and conclusions of law. The

referee reported that the state ought to recover $2,214.65, with interest thereon to the date of the report, April 7, 1916, amounting altogether to $5,448.96. The defendant filed exceptions to the report and argument was duly had thereon.

The first contention is that the statute is unconstitutional and void. The sections referred to are as follows: "Section 10094. The board of trustees shall from time to time fix the sum to be paid per week for the board and care of patients, and to arrive at such sum shall estimate the total outlay as far as possible from the sums actually paid per annum; and the weekly sum so fixed shall be the sum said hospital shall be entitled to demand for the keeping of any patient, and the certificate of the superintendent, attested by the seal of the hospital, shall be evidence in all places, as the amount due as fixed.

"Section 10095. The superintendent shall certify to the auditor of state on the first days of March, June, September, and December the amount (not previously certified by him) due to said hospital from the several counties having patients chargeable thereto, and said auditor shall pass the same to the credit of the hospital. The auditor shall thereupon notify the county clerk of each county so owing, of the amount thereof, and charge the same to said county, and the board of county commissioners shall add such amount to the next state tax to be levied in said county, and pay the amount so levied into the state treasury."

The question of the constitutionality of this statute was involved in the early case of *State v. Douglas County*, 18 Neb. 601, and was discussed quite at large both in the majority opinion, in which it was held that the statute was constitutional, and in the dissenting opinion. This case was cited in a later case in which it was said: "There was filed in that case a dissenting opinion by Chief Justice Maxwell, so that the propositions therein discussed cannot as yet be recognized as

settled beyond question; indeed, having regard simply to the weight of argument, we believe the views of the chief justice should have prevailed." *Baldwin v. Douglas County,* 37 Neb. 283. It is now strenuously insisted that, as the opinion in *State v. Douglas County* was not unanimous, and in view of the later criticism, that decision should be overruled and the statutes held to be unconstitutional. This argument is based largely upon the proposition that the Constitution forbids double taxation. It appears that the state has continually levied taxes sufficient to support the state hospital for the insane and pay all its expenses. The citizens of Stanton county paid their just proportion of the taxes so levied, and to now levy a county tax upon the citizens of that county to be paid to the state for the same purpose, it is contended, is double taxation upon that county. This argument is presented at large by Chief Justice Maxwell in his dissenting opinion in *State v. Douglas County, supra.* The evidence shows that the supervisors of the county of Stanton levied taxes from year to year under this statute; that some of the taxes so levied were remitted to the state treasury pursuant to the statute, and other taxes so levied in various years were retained in the county insane fund until a sufficient amount had accumulated with which to pay this claim of the state, and was afterwards by order of the county board transferred from the county insane fund to the county general fund. It seems very doubtful, to say the least, whether the county, after having levied these taxes under this statute with which to reimburse the state as the statute provides, could, after the money was collected and in the county treasury, for the purpose of retaining the money in its general fund, assert the unconstitutionality of the statute under which the money had been levied and collected. As the question of the constitutionality of this statute is necessarily involved and is also urged in the case of *State v. Gage County,* p. 753, *post,* which is submitted with this case, and it appears that other counties in the

state are interested in the same question, we have upon examination concluded that we are not required to overrule the decision in *State v. Douglas County, supra.* Clearly the question whether the state shall by general taxation support and provide for the poor, the insane, and the unfortunate, or this duty shall be devolved upon each county as to the citizens domiciled therein, is a question of public policy to be determined by the legislature.

The statute under consideration appears to determine that question and to devolve that duty upon the respective counties. The state may not levy more taxes than necessary for public purposes. If all the counties of the state had promptly complied with this statute, the necessary state levy for the support of the insane would have been reduced. In such case state levy would be necessary to maintain the institutions and to care for the strangers not domiciled in the state. For these purposes the citizens of each county of the state would be required to contribute their proportion. Many of the counties have complied with this statute. If others now comply with it, necessary state levies for the support of these institutions will be reduced and there will be no necessary inequality of taxation.

It is also urged that the statute of limitations has run against the claim of the state: "Every claim and demand against the state shall be forever barred, unless action be brought thereon within two years after the claim arose. Every claim and demand in behalf of the state, except for revenue, or upon official bonds, or for loans or moneys belonging to the school funds, or loans of school or other trust funds, or to lands or interest in lands thereto belonging, shall be barred by the same lapse of time as is provided by the law in case of like demands between private parties." Rev. St. 1913, sec. 7581. If this demand is to recover revenue of the state, it comes within the exceptions, and the statute of limitations does not apply. "Revenue" is thus defined in

Webster's New International Dictionary: "The annual or periodical yield of taxes, excise, customs, duties, rents, etc., which a nation, state or municipality collects and receives into the treasury for public use; public income of whatever kind." In *State v. Ewing,* 22 Kan. 708, it is said that the word "revenue" is "broad and general, and includes all public moneys which the state collects and receives, from whatever source and in whatever manner." This definition is approved in *City of Omaha v. Hodgskins,* 70 Neb. 229. In this case, when this money had been collected under this statute, there was a continuing duty on the part of the county to turn the money over to the state, and, as this court said in *City of Chadron v. Dawes County,* 82 Neb. 614; "In such a case, as between the county and city or village, the county does not hold such collections in its own right, but the possession of the one is the possession of the other." In *New Orleans v. Fisher,* 180 U. S. 185, it was said: "As the collections were held in trust, the statute of limitations constituted no defense." In any view of the case the statute of limitations has no application here.

The statute, by requiring each county to pay for the board and care of insane patients who are domiciled in the county, does not make an appropriation of public money, and is not affected by the constitutional provisions in regard to appropriations. When the legislature makes the annual appropriations for the support of the insane, it takes into consideration the payment made by the counties, and should make appropriation only for the probable deficiency.

When the trustees from time to time fix the sum to be paid per week for the board and care of patients, they are required to fix it as the "sum actually paid," that is, the counties shall be charged the actual cost of the "board and care" of the patients which the policy of the statute was to require the counties to provide for. It is not necessary in this case to determine what the

remedy of the taxpayer would be if the amount fixed was excessive, as no such question is presented.

It was not necessary to present this claim to the board of county commissioners. It is not an action in contract; it is not based upon an account or claim against the county within the meaning of section 5638, Rev. St. 1913. The money was collected for and belonged to the state, and was wrongfully withheld by the county. While so wrongfully held the county is properly chargeable with the use of the money, and should pay interest thereon, as found by the referee. It was not withheld by the taxpayers, but by the county itself in its corporate capacity by action of its board of commissioners. The exceptions to the report of the referee are overruled, the report is confirmed, and judgment entered accordingly. Interest will be added from the date of the report of the referee to the date of this judgment.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA, PLAINTIFF, v. GAGE COUNTY, DEFENDANT.

FILED JANUARY 15, 1917. No. 18901.

1. **Decision in Former Case.** The principal questions in this case are determined in the companion case, *State v. Stanton County, ante, p.* 747.
2. **Asylums:** STATUTORY PROVISIONS. The act of 1885 (Laws 1885, ch. 55) for the construction of an asylum for the insane at Norfolk, and the act of 1887 (Laws 1887, ch. 48) providing for an asylum at Hastings, were both enacted in view of the general act of 1873 (Gen. St. 1873, ch. 31), and it was intended that all hospitals for the insane of the state should be governed by the act of 1873 so far as applicable.
3. **Insane Persons:** LIABILITY OF COUNTIES: STATUTE. The provisions of the act of 1873 requiring counties to pay for board and care of insane persons domiciled therein governed the three institutions, when constructed so far as applicable.

Action to recover for care of insane persons. Case referred, with report that plaintiff recover, and defendant excepts. *Exceptions overruled, report confirmed, and judgment entered.*

Willis E. Reed, Attorney General, and *George W. Ayres,* for plaintiff.

T. J. Doyle and *Fred W. Messmore, contra.*

SEDGWICK, J.

This case was submitted with *State v. Stanton County, ante,* p. 747, and in the main involves the same questions. The constitutionality of the statute involved is there upheld, and it is determined that the statute of limitations does not apply, that it was not necessary to present this claim to the county board for adjudication, and that the state is entitled to interest on the money withheld by the county.

A part of the claim in this case was for patients cared for in the state hospital for the insane at Hastings. It is contended that sections 10094, 10095, Ann. St. 1911, have no application to such patients. These sections are a part of the act of 1873 (Gen. St. 1873, ch. 31), entitled "Insane." The title of the act is: "An act for the government of the hospital for the insane; defining the legal relations of insane persons, and providing for their care and protection." It is a comprehensive act including 60 sections. The first section provides: "That the hospital for the insane, located at Lincoln, in the county of Lancaster, shall be known under the name and by the title of the 'Nebraska Hospital for the Insane,' and shall be under the charge of three trustees, two of whom shall constitute a quorum for the transaction of business." In 1885 an act was passed entitled "An act to establish, locate, erect and maintain a hospital for the insane within the state of Nebraska, and appropriate the necessary funds therefor." Laws 1885, ch. 55. In that act (section 3) it was provided that regulations

should be adopted "in regard to what patients or class of patients shall be admitted to and provided for in the respective hospitals, or from what portion of the state patients, or certain classes of patients, may be sent to each or either hospital." It was clearly the intention of the legislature to make this new hospital a part of the general provision for caring for the insane of the state. In 1887 the legislature established an asylum for the incurable insane. Laws 1887, ch. 48. It contained no provisions for the government of the institution, nor regulations for the admission or discharge of patients. All matters except the construction of the building were referred to the former acts. These three, then, constituted the provision of the state for the care of the insane, and they were all governed by the general and comprehensive act of 1873 so far as its provisions were applicable. This contention of the defendant cannot be sustained.

A question is raised as to the condition of the accounts of the state, and the statement thereof by the referee. It appears that, exceptions being made to the first report of the referee, that report was by him set aside and a new computation made with a different result. The accounts are somewhat complicated, and we cannot attempt to state here a complete analysis of them. So far as we have observed as to those matters specified in the brief, the referee has reached a right conclusion.

The exceptions to the report of the referee are overruled, the report is approved, and judgment will be entered accordingly. Interest is to be added from the date of the report.

JUDGMENT ACCORDINGLY.

GEORGE R. CHITTENDEN, APPELLANT, v. CHARLES W. KIBLER, MAYOR, ET AL., APPELLEES.

FILED JANUARY 15, 1917. No. 19725.

1. **Statutes:** CONSTITUTIONALITY. Chapter 86, Laws 1915, is not invalid as a violation of section 4, art. III of the Constitution.
2. **Municipal Corporations:** STREET PAVING: IMPROVEMENT DISTRICTS. Under section 4916, Rev. St. 1913, as amended by chapter 86, Laws 1915, relating to cities of the first class having 5,000 to 25,000 people, the street specified to be paved and the property abutting thereon constitute the paving district. An ordinance specifying the street or part of street to be paved sufficiently describes the proposed paving district.

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

H. M. Sinclair and *T. F. Hamer,* for appellant.

Warren Pratt, John P. Breen and *W. W. Wilson, contra.*

Willis E. Reed, Attorney General, and *C. E. Abbott, amici curiæ.*

SEDGWICK, J.

This is an application for an injunction to restrain the mayor and city council of Kearney from ordering the paving of a street on which plaintiff owns abutting property; it being alleged that the act authorizing the formation of the improvement district is unconstitutional. Laws 1915, ch. 86. From a judgment dismissing the action, plaintiff has appealed.

Plaintiff contends that the act violates the following constitutional provision: "After the expiration of twenty days of the session, no bills nor joint resolutions of the nature of bills shall be introduced, unless the governor shall by special message call the attention of the legislature to the necessity of passing a law on the subject-matter embraced in the message, and the introduction of bills shall be restricted thereto." Const., art. III, sec. 4.

The record shows that on the 5th day of the session of the legislature which convened in 1915, senate file No. 21 was introduced under the following title: "A bill for an act to amend section 5110, Revised Statutes of Nebraska for 1913, relating to paving streets and making assessments therefor, to repeal said original section 5110 and all acts and parts of acts in conflict herewith, and to provide for an emergency." On the 32d day of the session the committee on municipal affairs, to which the bill had been referred, recommended that it be indefinitely postponed, and the report was adopted. On the 33d day the bill was recommitted to the standing committee for amendment, and on the 35th day the committee on municipal affairs recommended that the title of the bill be amended by striking out "section 5110" and inserting "section 4916," the body of the bill also being changed. The act was subsequently passed under the following title: "An act to amend section 4916, Revised Statutes of Nebraska for 1913, relating to paving streets and making assessments therefor, to repeal said original section 4916 and all acts and parts of acts in conflict herewith, and to provide for an emergency." Section 5110 related to paving in cities of the second class and villages, while section 4916 related to paving in cities of the first class having more than 5,000 and less than 25,000 inhabitants. Plaintiff contends that the substituted bill is a new bill introduced after the 20th day of the session.

It is not the province of this court to determine the policy or salutary character of legislation. But there are constitutional limitations upon the power of the legislature that must be observed, and the unpleasant duty is at times devolved upon this court to determine that attempted legislation exceeds those limitations. An act of the legislature, however, will not be held invalid unless it plainly violates the fundamental law of the state or nation.

The original title of the act as introduced recited that its purpose was to amend a statute "relating to paving streets and making assessments therefor." This title seems to give notice that it is considered that paving in general is a subject of legislation, and that it will be so treated in the consideration of the act. If the title had recited that the proposed legislation related to paving in cities of the second class and villages, it would be a more specific exclusion of paving in cities of a higher class. There seems to be little ground for different proceedings for paving streets and making assessment therefor in towns of 5,000 inhabitants from those required in towns of less than 5,000. As the act was passed with an emergency clause, it may be presumed that paving has been done in many of the cities affected since this act was approved, and much confusion might follow if this legislation is declared invalid. In *State v. Ryan,* 92 Neb. 636, it was held: "Where a bill has been introduced into the legislature within the time limited by the Constitution for the introduction of bills, amendments which are within the general purpose of the bill may be made after that limit has expired." The legislature evidently considered that the recital in the title of the act that it related "to paving streets and making assessments therefor," without limiting it to any class of towns, made that "the general purpose of the bill." We do not feel required to hold that the legislature was wrong in so regarding it.

The ordinance defined the proposed district as follows: "All that part of Twenty-fourth street commencing on the west side of Ninth avenue running thence west to the tailrace." It is contended that this is an insufficient description of the district, and that property owners would be unable to know whether or not their property lies within the district. The statute for cities of this class, prior to the act of 1915, was section 4916, Rev. St. 1913. It was amended in 1915 (chapter 86) and contains the following provisions: "That unless a

majority of the owners of property abutting on said district shall file written objection to such paving, repaving or macadamizing, the council shall forthwith proceed to construct such paving, repaving or macadamizing." This language shows without uncertainty that the legislative intention was that the street named as the district, together with the property abutting thereon, might constitute the district, and would do so unless otherwise specified in the ordinance. The paving district, therefore, in this case is that part of Twenty-fourth street specified, together with the property abutting thereon.

The judgment of the district court is

AFFIRMED.

ROSE, and CORNISH, JJ., dissent.

HAMER, J., not sitting.

LETTON, J., concurring.

At the argument of this case the writer raised the question whether he was qualified to participate in the decision as to the constitutionality of the act of 1915, on account of the fact that he is the owner of a small piece of property liable to be assessed in paving proceedings pending in another city of the same class. Both parties agreed in open court that, if his vote became necessary to a determination of the case, the writer should sit. One judge is disqualified under the statute by reason of his son being of counsel in the case. Three judges are of the opinion that the act is valid, while two are of the contrary opinion. Since under section 2, art. VI of the Constitution, no decision can be had of the questions presented without the writer participating, it becomes necessary for him to act.

The question whether the amendment is germane to the subject-matter of the act is a very close one, and is by no means free from doubt. It is the duty of courts not to declare a law unconstitutional unless it is clearly so. Every act comes before the court with the presumption of constitutionality, and if there is any doubt it

should be resolved in favor of the validity of the statute.

Undue strictness and literalness of construction ought not to be resorted to in order to defeat the will of the legislature; and, where there is a substantial doubt as to whether the title of an act is sufficiently broad to include an amendment, the act should not be declared invalid for that reason alone.

Since the case was first argued there has been a change in the personnel of the court. It has been considered here by seven judges other than the writer. Four of these believed the statute valid, and three were of opinion that the amendment was not germane. The district court held the statute to be valid. In this state of the case the doubt should be resolved in favor of the validity of the act. I therefore concur in the opinion.

FRANK A. PATTERSON, APPELLANT, v, JOHN H. MOREHEAD ET AL., APPELLEES.

FILED JANUARY 15, 1917. No. 19867.

1. **Appeal:** PLEADING: DEMURRER. When a general demurrer is filed to a petition, the court will pass upon the sufficiency of the petition without receiving evidence by affidavit or otherwise, and this court upon appeal from an order sustaining such demurrer will consider only the sufficiency of the petition.

2. **Injunction:** PRACTICE OF DENTISTRY: RIGHT TO SUE. One who had no license to practice dentistry, nor any permit under section 2806, Rev. St. 1913, could not maintain an action in equity to enjoin the state board from interfering with him in attempting to so practice.

3. **Quære.** Whether mandamus will lie in a proper case to compel the state board to grant an application for examination is not decided.

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

Allen G. Fisher and *William P. Rooney,* for appellant.

Willis E. Reed, Attorney General, Dexter T. Barrett and *Brogan & Raymond, contra.*

SEDGWICK, J.

The plaintiff began this action in the district court for Sheridan county against these defendants as the state board of health and the state board of dental secretaries, and asked for an injunction restraining them "from instituting, in person, or by agent, servant, deputy, or employee, and from proceeding by complaint or information or injunction against the plaintiff in any manner for any alleged violation of the statutes of the state of Nebraska relative to the exercise or practice of the dental science," and to restrain the defendants Pierce and Wallace "from exercising in relation to plaintiff any powers, duties, or functions of membership of the board of dental secretaries of the state of Nebraska," and to enjoin the defendant Jackman from canceling an alleged "agreement and dissolving the relation of preceptor to the plaintiff as apprentice." A temporary injunction was allowed substantially as prayed for. The defendants filed answers in the case, and afterwards depositions were taken. Later on the defendants asked leave to withdraw their answers and to file a demurrer. Leave was granted, and a demurrer was filed on the two grounds that "several causes of action are improperly joined," and "the petition does not state facts sufficient to constitute a cause of action." The court sustained the demurrer and dismissed the petition, and the plaintiff has appealed.

The plaintiff's brief does not comply with rule 12 (Supreme Court Rules, 94 Neb. p. XI), but he makes four assignments of error. The first assignment is that the court erred in considering an affidavit filed by one of the defendants when the demurrer was presented. We will not presume that the court did consider anything

but the petition and the demurrer in passing upon the same, and, if the trial court did, this court would not be required to consider such affidavits.

The second assignment is an allegation that "the plaintiff has acted in good faith, and is entitled to continue as apprentice, under our statutes, until examined and licensed to practice." The statute referred to in this assignment is section 2809, Rev. St. 1913. That section was repealed by the act of 1915. Laws 1915, ch. 50, sec. 11. The allegations of the petition do not show a compliance with that statute which would require us to interfere with the discretion of the state board.

The third assignment is: "The fact of advertising in Minnesota is not such bad morals as will deny license upon due examination and showing of qualifications in the state of Nebraska, his present residence." The allegation of this assignment cannot be successfully controverted, but it does not seem to throw any light upon the sufficiency of this petition to state a cause of action.

The fourth assignment of error is: "The statutes of 1915, confiding the appointment of dental examiners or secretaries to the recommendation of the state dental society, is void and unconstitutional." The matters involved in this petition are all prior to the act of 1915. We cannot find from anything suggested in the brief that the sufficiency of this petition to state a cause of action depends in any respect upon the constitutionality of the act of 1915 referred to. The plaintiff is not entitled to a license to practice dentistry in this state without an examination by the proper board as the statute requires.

Whether the board upon proper application could be compelled by mandamus to grant such an examination is not presented by this record. The plaintiff had no temporary permit under section 2806, Rev. St. 1913, and these defendants could not be enjoined from interfering with the plaintiff in attempting to practice dentistry unless and until the plaintiff had been duly licensed as the statute

requires. We do not find in this somewhat lengthy petition an allegation that the plaintiff had been licensed to practice dentistry in this state. This petition cannot be construed as a petition in mandamus to issue such permit or to require the proper authorities to grant the petitioner an examination and to determine his qualifications for a license. The general demurrer to the petition was therefore properly sustained.

The judgment of the district court is

AFFIRMED.

HAMER, J., dissenting.

This is apparently a controversy between dentists. The state board of health and the state board of dental secretaries are necessarily connected with the struggle. The applicant is a Dane who has been in the United States many years, and has been engaged in the work of dentistry at St. Paul, Minnesota, from which state he comes to Nebraska. He has also done dental work elsewhere. If I understand his petition, he has been for more than 14 years engaged in dental work. He has lived by his labor in this capacity. He has a family dependent upon him for support, and he craves the seemingly modest privilege of being an apprentice to one Dr. E. A. Jackman, a competent and licensed practitioner of dentistry at Gordon, Nebraska. It is claimed that there is a rival dentist across the street from Dr. Jackman, and that Dr. Jackman is getting the benefit of the labor of the applicant to the great disadvantage of the dentist across the street. We have nothing directly to do with the controversy between rival dentists, no difference which side of the street they occupy. The applicant shows a certificate of one M. F. Andrews, "Official Examiner for the Ohio State School Commissioner." This certificate certifies his admission to "The Cincinnati College of Dental Surgery, Dental Department, Ohio University." There are also some other exhibits, including the photograph of the applicant. It

shows the face of a courageous and patient man. The state board of health and the state board of dental secretaries filed answers to the plaintiff's petition, and evidence was taken by leave of the court.

In the answer of the state board of dental secretaries it is set forth that a "temporary permit to practice dentistry" was issued to the applicant on or about April 14, 1914; that this "permit granted to plaintiff the right to practice dentistry until the next regular meeting of the dental secretaries;" that at said meeting the applicant would be allowed to present satisfactory evidence of his eligibility "for examination for permanent license to practice dentistry, * * * as required by section 2807, Rev. St. 1913." He was ordered "to furnish surgical instruments for use in operative dentistry." The applicant seems to have appeared, but did not produce "satisfactory evidence." Nothing is said about whether he produced the instruments. It is claimed in this answer that the applicant's arrangement with Dr. Jackman to become his apprentice was for the purpose of continuing "his illegal practice of dentistry" in violation of section 2811, Rev. St. 1913. It is claimed by the defendants that plaintiff is violating section 2809, Rev. St. 1913, and allied sections. This brings that section up for consideration, although it is now repealed, because the applicant begun his efforts under it and the other sections of that act. Rev. St. 1913, secs. 2795-2820. The act referred to regulates the practice of dentistry in this state. No one questions the right of the dental profession to prescribe reasonable rules and regulations concerning the practice of their profession.

While the district court permitted the defendants to withdraw their answers and to demur to the petition, it had before it the evidence offered, and it seems to have been willing that the evidence taken should be considered by this court, and the judge certifies: "Be it remembered that at the trial of this cause, had before the Honorable William H. Westover, judge of said court,

the plaintiff offered in evidence the papers herein set out; and the plaintiff also offered to take and file as evidence herein the certain depositions which are now hereunto attached; and it was ordered that he might take those depositions and include them in the proposed bill of exceptions." In the journal entry it is said: "And now the said defendants, excepting Jackman, having asked to withdraw their joint answer herein and file demurrer in lieu thereof, plaintiff objects to granting such permission, for the reason that upon the issues joined the defendants have taken depositions and the plaintiff has cross-examined thereon, so that he is entitled to a trial on the merits herein; but the court, having heard the argument of counsel, and being fully advised in the premises, doth overrule said objection, to which plaintiff excepts, and said permission is granted, and accordingly the answer of all defendants is withdrawn, and the defendants, comprising the state board of health and the state board of dental secretaries, and J. E. Woolm, file herein their demurrer to the petition of plaintiff; and now the court, having heard the argument of counsel, and being fully advised in the premises, doth sustain said demurrer in its entirety." The usual 40 days is given to settle the bill of exceptions. One hundred dollars was fixed as the supersedeas bond.

The majority opinion in this case is necessarily based on section 2809, Rev. St. 1913. That section contemplates that the apprentice "desiring to enter upon the practice of dentistry in the state of Nebraska, without graduating from a reputable college in the United States, or producing satisfactory evidence of having been a licensed practitioner in some other state for at least five years, must file with the dental secretaries an affidavit * * * of his intention to begin an apprenticeship with a licensed practitioner of this state." It is then said in this section that "said affidavit must show that the affiant has regularly graduated from a high school or similar place of learning in the United States."

The objection to the section is that the applicant must be a graduate of a reputable college in the United States, or must have been a licensed practitioner in some other state (than Nebraska) for at least five years (a very long time), or he must show that he "has regularly graduated from a high school or similar place of learning in the United States." One or the other of the above things must exist before he can "begin an apprenticeship." I do not object that the dentist shall be possessed of a fair amount of education (the more the better), but it is hard upon an apprentice to say that he shall not start until he has been educated. It ought to be enough if he comes out with an education before he is turned loose as a dentist. If he works while he is an apprentice, he does so under the direct instruction, supervision and direction of the proprietor or another competent dentist. This ought to be enough. The purpose of this section is apparently to cut down the number of dentists and to prevent those who have not received their instruction in the United States from engaging to learn the profession with a practitioner in Nebraska. No difference how competent the proposed apprentice in dentistry might be, he would be excluded under this section.

The section is also objectionable because the proposed apprentice must have received his education in a Nebraska high school or similar place of learning, unless he is a graduate of a reputable college in the United States, or has been a licensed practitioner in some other state (of the United States) for at least five years. The purpose is apparently the creation of an exclusive class in which skilled workmanship, resting on its merits, shall not be entitled to any place. The statute aims at the creation of a monopoly. Nor is it to the interest of the people at large that a proposed apprentice may not be a beginner unless he can produce "satisfactory evidence of having been a licensed practitioner in some other state for at least five years." I think the section

is clearly against public policy. Please to remember that the applicant has up to date been beaten under this section. This section would deprive the whole people of workmen in dentistry who may come from other states and from other countries. It was an un-American section. Canadians speak English very much as we speak it. They are born in a country very much like that in which we live. Very many of them come across the line and make their homes with us. They are found in nearly all the professions and in many of the useful occupations. The Englishman, Scotchman and Irishman come here speaking our tongue and thinking many of the thoughts which we think. They fight battles of the same sort which we fight—battles against ignorance, oppression and vice. The German is said to be the Englishman's cousin. The Scandanavian is related to all of us. All these people readily assimilate with our people. They ought not to be barred out, or driven away by hostile legislation. I do not want the time to come when all the learned professions and the best occupations shall be in the hands of a privileged aristocracy living off of the necessities of the American people. While the section named has been repealed and most of the allied sections have been amended, the whole tendency of the act is yet to exclude good people from becoming dentists. It is one of the most necessary professions.

Our court in *State v. Sperry & Hutchinson Co.*, 94 Neb. 785, 49 L. R. A. n. s. 1123, has announced a principle which seems to be inconsistent with the section referred to. In that case the question was the right of the Nebraska legislature to pass an act prohibiting the business of giving and redeeming trading stamps. The act was held to be violative of section 1 of the Nebraska Bill of Rights, and also Amendment XIV of the Constitution of the United States. Section 1 of the Nebraska Bill of Rights reads: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. To

secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." Section 13 of the Nebraska Bill of Rights reads: "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay." That part of article XIV of Amendments to the Constitution of the United States, which seems applicable to the instant case, reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

If a dentist may not take an apprentice into his office with a view to getting the benefit of his labor, and with a view to instructing the apprentice, then both are denied liberty and property without due process of law. Nor do they receive the equal protection of the laws. A similar question has been before the supreme court of North Dakota, in the case of *Malin v. La Moure County*, 27 N. Dak. 140, 50 L. R. A. n. s. 997. In that case they undertook to make proceedings in the courts so expensive as to be prohibitive. By a decision of the courts they were promptly opened to the public.

The applicant in this case comes from Minnesota, where it is claimed by his counsel he had earned a diploma and was engaged in the practice of dentistry. He attacks the constitutionality of the whole act. He charges that it creates a trust or monopoly such as is denounced in subdivision 5, sec. 4017, Rev. St. 1913. It is a novelty to try a case on the merits and then to withdraw the answers and stand on a demurrer.

It is objected that the plaintiff has availed himself of the remedy of injunction. I express no opinion about this, but I call attention to the fact that section 2815b,

of the act of 1915 (Laws 1915, ch. 50), amending and repealing certain sections of the act relating to the practice of dentistry, provides: "Whenever any person is found violating any of the provisions of this act, the state board of dental secretaries, or any citizen, may maintain an action in equity in the name of said state board of dental secretaries or said citizen, to perpetually enjoin said person from doing any of the acts above described." It is suggestive that, if an injunction may be used on one side, it possibly might be used on the other side. It would seem that the act ought to be still further amended and more objectionable sections cut out.

If the evidence taken in the district court and certified to us in the bill of exceptions may properly be considered here then it would seem that the applicant ought to be admitted to practice dentistry. He seems to have attended a dental school, to have stood well in his examinations, and to have done much dental work, and is probably an efficient workman, but I am not certain that he has ever had a license. In any event it appears to the writer that the district court erred in failing to overrule the demurrers of the defendants to plaintiff's petition.

FRANK E. CLARK ET AL., TRUSTEES, APPELLEES, v. WILLIAM W. BIRGE, TRUSTEE, ET AL., APPELLANTS.

FILED FEBRUARY 5, 1917. No. 19158.

1. **Mortgages:** FORECLOSURE: SALE. Where a decree of foreclosure contains no direction to the officer charged with its execution touching the appraisement and sale of the mortgaged property, and the property is contiguous, and was mortgaged as a single tract, its appraisal and sale as such will not be disturbed, in the absence of a showing of prejudice to the complaining party.
2. ———: ———: APPRAISAL: REVIEW. "A finding of the court, on the objection that the appraisement of property sold at judicial sale is too low, based on a conflict of evidence, will not be disturbed or reviewed, unless the evidence clearly shows that there was fraud in the appraisement." *Andrews v. Lindley*, 63 Neb. 692.

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

Wilcox & Halligan, for appellants.

Stout, Rose & Wells, Hoagland & Hoagland and *W. H. De France, contra.*

MORRISSEY, C. J.

The district court for Lincoln county entered a decree of foreclosure and directed the sale of the mortgaged premises, consisting of 1,124 acres. The decree was silent as to whether the property should be appraised and sold in separate tracts or *en masse.* It was appraised as one tract for the sum of $20,000. Objections to the appraisal were filed alleging that the lands were fraudulently appraised much below their actual value, and that the appraisal ought to have been by government subdivisions of 160 acres or less. The objections were overruled, and the tract was sold to the plaintiffs for $30,000, a sum a little less than the amount due on the decree.

Defendants have appealed on substantially the same grounds set out in their objections. The lands are contiguous and were mortgaged as a single tract. The record is not specific, but we infer that the property had been used as a single tract.

In *Laughlin v. Schuyler,* 1 Neb. 409, it is held: "Each lot or parcel of ground must be appraised and sold separately, or the sale will be set aside." But in *Kane v. Jonasen,* 55 Neb. 757, it is pointed out that there are exceptions to this general rule, and the court held: "Where a decree of foreclosure contains no direction to the officer charged with its execution touching the appraisement and sale of the mortgaged property, he is vested with a discretion in regard to the matter which will not be disturbed, in the absence of a showing of prejudice to the party complaining."

"Where lands constituting one body are used as a single tract, ordinarily they may for judicial sale be appraised together." *Smith Bros. Loan & Trust Co. v. Weiss*, 56 Neb. 210.

In the instant case no prejudice to defendants is shown. A number of affidavits are filed setting out that the mortgagees were the only bidders at the sale, and that, had the tract been sold in parcels, other parties might have bid. But defendants do not undertake to show that the entire property would have brought more money if sold in parcels than it brought when sold *en masse*. The fact that the property was mortgaged as a single tract and kept and used in that way for a great many years may indicate that it sold to better advantage as a single tract than if divided into many parcels.

As to the assignment that the property was appraised too low, the sheriff and his appraisers fixed the value at $20,000, but the plaintiffs evidently realized that this property was all they could get in payment of their liens, and bid $30,000. Thus it will be seen that defendants have not been prejudiced by the appraisal, unless the value of the property exceeded $45,000. The valuation placed on the property varies all the way from $17.50 an acre to $60. One witness testified that he had had a wide experience in the land and loan business throughout central and western Nebraska. After giving a general description of the property, he placed its value at $31,000. Another witness, who has had several years experience in the real estate business at North Platte, placed the value at $35,000. One witness for defendant placed the value as high as $67,440, but the defendant himself placed it at $56,200. These estimates are irreconcilable, but when we take into consideration the fact that more than three years have elapsed since the decree was entered, and that defendants might have redeemed at any time by paying the amount due, we are constrained to believe that the defendant and his witnesses have greatly overestimated the value of the property. The trial

judge, who overruled the objections to the appraisement and confirmed the sale, has resided at North Platte, within 7½ miles of this land, for more than 30 years, and has served on the district bench more than 21 years. He must, in the very nature of things, have a general knowledge of land values in his county, and with this knowledge, together with his acquaintance with the appraisers and witnesses, he overruled the objections and confirmed the sale.

When all of the evidence on the question of value is fairly considered, it appears that the objections to the appraisal and confirmation are not well taken. The judgment is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

SIEMON GOEMANN V. STATE OF NEBRASKA.

FILED FEBRUARY 5, 1917. No. 19816.

1. **Criminal Law**: TRIAL: SPECIAL COUNSEL. It is not error for the trial court, at the request of the county attorney, to appoint special counsel to assist in the prosecution of a misdemeanor.
2. ———: INSTRUCTION: REASONABLE DOUBT. Instruction set out in the opinion *held* free from error. In so far as *Burnett v. State*, 86 Neb. 11, is in conflict with this holding, it is overruled.
3. ———: WITNESSES: CROSS-EXAMINATION: DISCRETION. "The scope of the cross-examination of a witness rests largely in the trial court, and its ruling will be upheld, unless an abuse of discretion is shown." *Peterson v. State*, 63 Neb. 251.

ERROR to the district court for Wayne county: ANDREW R. OLESON, JUDGE. *Affirmed.*

C. H. Hendrickson and *J. A. Singhaus*, for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe*, *contra.*

MORRISSEY, C. J.

Plaintiff prosecutes error from a conviction on an information charging him with selling liquor without a license. The county attorney filed a request in writing for the appointment of A. R. Davis, a member of the Wayne county bar, to assist in the prosecution. Defendant filed objections alleging that Davis was employed by private parties to help conduct the prosecution, that he had theretofore been engaged in numerous cases against the defendant, and that by reason thereof he was prejudiced against the defendant, and would not conduct the prosecution in a fair and impartial manner. These objections were supported by an affidavit of the defendant in which he set out the cases wherein Mr. Davis had appeared as counsel against him. The county attorney filed a counter showing admitting that Davis had appeared as counsel in the cases mentioned, but specifically denying all other allegations. The statute does not forbid the employment of counsel by private parties to assist in the prosecution of misdemeanor cases, but in the instant case it is conclusively shown that Mr. Davis was not employed by private parties. The mere fact that he had appeared as counsel in other lawsuits in which Mr. Goemann was a party does not raise a presumption of personal malice, and the showing is sufficient to justify the court in finding that he was a proper and suitable party to assist in the conduct of the state's case. Furthermore, an examination of the entire record fails to show any improper conduct on his part.

The court gave the jury the following instruction: "The term 'reasonable doubt' used in these instructions is a term often used, probably pretty well understood, but not easily defined. It does not mean a mere possible doubt, because everything relating to human affairs and depending upon mortal evidence is open to some possible or imaginary doubt. It means some actual doubt having some reason for its basis.

"A reasonable doubt that entitles the defendant to an acquittal is a doubt reasonably arising from all the evidence, or the lack of evidence, or from a conflict in the evidence, in the case.

"The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress your reason and understanding as ordinarily prudent men and leave your minds in that condition that you can say you feel an abiding conviction to a moral certainty of the truth of the charge made against this defendant."

The giving of this instruction is assigned as error. We fully agree with the trial judge that "the term 'reasonable doubt'" is "pretty well understood, but not easily defined." This court has often been called upon to pass on instructions undertaking to define the term. In *Cowan v. State*, 22 Neb. 519, 525, an instruction which told the jury that a reasonable doubt is "a doubt for having which the jury can give a reason, based upon the testimony," was held to be erroneous. The question was again before the court in *Carr v. State*, 23 Neb. 749, and the court said: "It is error to charge a jury that it is a doubt for the having of which the juror can give a reason derived from the testimony." In this opinion the holding in *Cowan v. State* is adhered to, but it is pointed out that the instruction in that case is not wholly without support. It is also said that the clause in the instruction requiring the reversal was one which required the jury to be able to give a reason for entertaining the doubt. An instruction in *Childs v. State*, 34 Neb. 236, differs in phraseology, but the holdings in *Cowan v. State* and *Carr v. State* were adhered to. In *Whitney v. State*, 53 Neb. 287, the court approved an instruction in the following language: "You are instructed that a reasonable doubt is an actual, substantial doubt arising from the evidence, or want of evidence, in the case. That by reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means some actual doubt having

some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt reasonably arising from all the evidence, or want of evidence, in this case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the reason and understanding of ordinarily prudent men with a conviction on which they would act in the most important concerns or affairs of life."

Some confusion has arisen owing to the decision in *Burnett v. State,* 86 Neb. 11. But this court has frequently refused to reverse a judgment of the district court solely on account of an instruction worded as in the case at bar. In so far as *Burnett v. State* is in conflict with this holding it is overruled.

There are a number of other assignments directed against the rulings of the court on the cross-examination of witnesses for the state. Fred Lerner was called as a witness, and testified that upon the date charged in the information he purchased a pint of whiskey from the defendant. On cross-examination defendant's counsel asked him if he had not been arrested on a criminal charge the year before. Objection to this question was sustained, whereupon defendant's counsel made the following offer: "We offer to prove by the witness that he was arrested on a criminal charge in county court of Wayne county, Nebraska, during the year 1915, and was tried for the same offense before the county judge of Wayne county, Nebraska." Objection was sustained to this offer. It is argued that the evidence was offered for the purpose of testing the credibility of the witness. The offer does not undertake to show that the witness was convicted. An arrest and trial without a conviction could not discredit him before the jury or affect his credibility. Arthur O'Connell, another witness for the state, testified that he, together with the witness Lerner, and two others, drove to defendant's livery stable in an automobile; that Lerner went into the barn, but soon returned, and had with him a pint of whiskey, that he

offered witness a drink from the bottle, which witness refused. On cross-examination defendant's counsel undertook to show that Lerner at other times and places had offered O'Connell whiskey, and that Lerner kept whiskey in Goemann's livery barn. To these questions objection was made and the evidence excluded.

The scope of the cross-examination of a witness rests largely within the discretion of the trial court. Ordinarily it is better to permit considerable latitude. But the matters sought to be elicited on cross-examination were outside the scope of the witness' testimony in chief, and if proper and material in behalf of defendant they might have been shown in defendant's case in chief.

There is a further assignment that the court excluded evidence calculated to impeach the witness Lerner. This impeachment was directed to an immaterial matter that was drawn out on his cross-examination, and the evidence was properly excluded.

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

Finally, it is insisted that the evidence does not sustain the verdict. We have read the entire record, but it would serve no useful purpose to set out the evidence at length. The story told by the state's witnesses is sufficient to sustain the verdict, if true. It was denied by defendant, and he was corroborated in the main by another witness. All of these witnesses were residents of Wayne county. They were probably personally known to most of the jury. The jury heard them testify and saw fit to believe the witnesses for the state. The evidence would sustain a verdict either way. We cannot set our judgment up against that of the jury, and the judgment is

AFFIRMED.

HAMER, J., dissenting.

I am not quite able to agree with the majority opinion. The information charges that on or about the 18th day of September, 1915, in the city of Wayne, county of Wayne, and state of Nebraska, one Siemon Goemann unlawfully and feloniously sold to one Fred Lerner one pint of whiskey, and that at the time he sold the same he did not have a license to sell intoxicating liquors in said city or county. The same charge is made against Goemann for selling whiskey to Lerner on the 26th of September. "Bootlegging"—that is, the selling of intoxicating liquor without license—is generaly regarded with much disfavor and as deserving of certain punishment. The plaintiff in error, Goemann, hereafter called the defendant, was fined $250 for selling the pint of whiskey mentioned in the first count. He was acquitted on the second charge. An offender charged with "bootlegging" is, in the eyes of the law, entitled to a fair trial. He should be tried just as fairly as if charged with a more serious infraction of the law. The rules of evidence are just the same as applied to all alleged violators of the law. It is not enough that the evidence is sufficient to raise a suspicion to the effect that the defendant is guilty. To justify a verdict of guilty the evidence should be strong enough to convince the reason of an impartial juror, after a consideration of all the facts and circumstances pertaining to the case, and regardless of consequences. If the evidence fails to establish the guilt of the accused beyond a reasonable doubt, then he should be acquitted. Certain witnesses testified that the defendant was in sight, and that he did not go to the back of the barn, where Lerner says the transaction took place. It was for the jury to say whether they believed Lerner, or whether they believed the witnesses who testified for the defendant. All that the defendant is entitled to is a fair trial, and, if the evidence justifies his conviction, then he must pay the penalty.

If an improper instruction was given which was prejudicial to the defendant, then he is entitled to a new trial. In the instant case the court has taken the occasion to justify an instruction that seems to be vicious in the extreme. The objectionable instruction, as it appears in the majority opinion, is divided into three paragraphs, a part of which we will present as we discuss the instruction. In the first of these paragraphs it is said: "It (a reasonable doubt) does not mean a mere possible doubt, because everything relating to human affairs and depending upon mortal evidence is open to some possible or imaginary doubt. It means some actual doubt having some reason for its basis." This was telling the jury that before they could acquit the accused they must give "some reason" for such acquittal. So far as this part of this instruction is concerned, there might be all sorts of doubts in the mind of the juror as to the guilt of the accused, and reasoning the best he might, and closely analyzing the evidence, he might be uncertain of the guilt of the accused, but this part of the instruction compels the juror to give a reason. He is required to explain why he dares to doubt. It was never intended that the juror should be placed by the court in such a position that he would have to explain what he had done.

It is next said: "A reasonable doubt that entitles the defendant to an acquittal is a doubt reasonably arising from all the evidence, or the lack of evidence, or from a conflict in the evidence, in the case."

The burden of proof is upon the state, and, if the state fails to establish its case by sufficient proof, then it is the duty of the jury to acquit the defendant, and whether they can say that the doubt which they entertained reasonably arises from the evidence, or the lack of evidence, or from a conflict in the evidence, is immaterial. The question is whether the juror doubts the guilt of the accused. The juror is oftentimes a strong citizen with the clearest sort of perception concerning those things

with which he is familiar, but to load him up with a task like that contained in the second paragraph of this instruction is altogether too much. Besides, it is dangerous, and that sort of a rule is likely to result in the conviction of a good man or a good woman. If this defendant is supposed to be a "bootlegger," there may be a feeling, an unconscious feeling, that he is not entitled to the same protection that other persons charged with violating the law may clearly be entitled to. But a bad rule established in this case is likely to be used against your best citizen when he is put on trial upon the charge of murder, although what he has done was done in self-defense. A bad rule once started out never loses its power to do harm.

The instruction justified in the case at bar is not unlike an instruction given in *Flege v. State,* 93 Neb. 610. In that case the defendant was charged with murder. The obnoxious instruction reads: "And, if you believe the defendant not guilty, and that he did not shoot and kill the said Louise Flege, as alleged in the information, or in the event that the evidence introduced in the case is so evenly balanced that you cannot tell whether defendant or some other person shot and killed the deceased, as alleged, then you should acquit the defendant, or if you entertain any reasonable doubt of the guilt of the accused of the crime charged in the information, then you should give the defendant the benefit of such doubt and acquit him."

Touching this instruction, this court said that the instruction was "objectionable in several particulars: First, if the jury believe the defendant not guilty, they should acquit; second, if they believe he did not shoot and kill the deceased, they should acquit him; third, if the evidence is evenly balanced, they should acquit; fourth, if they cannot tell whether defendant or some other person committed the crime, they should acquit; or, fifth, if they have any reasonable doubt of his guilt, they should acquit. We know of no rule of law that

requires the jury to 'believe the defendant not guilty,' or that he 'did not shoot and kill' the decedent before they could acquit." In the instant case the jury are treated by the instruction given as if they were trying to shirk a duty. Oftentimes the jurors are fairly intelligent, and sometimes the learning which they possess is superior to that of the man who assumes to instruct them, although he may have had more training along a particular line than they. There is also in the paragraph quoted the idea that the defendant is guilty. No court has any business to say that, even when the offense is so small as the sale of a pint of whiskey.

In *Bartels v. State,* 91 Neb. 575, the defendant was charged with stealing a lot of chickens, 56 of them, I believe. The trial court properly looked on this offense with great disfavor. He therefore charged the jury: "The rule which clothes every one accused of crime with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty to escape, but is a humane provision of the law intended, so far as human agencies can, to guard against the danger of an innocent person being unjustly punished. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of a doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt."

In that case Judge Sedgwick, delivering the opinion of the court, said: "If we consider that the witness Phillips was by his own testimony an accomplice in guilt, and that his evidence is wholly uncorroborated, it would seem probable that the jury by the eleventh instruction above

quoted were led to believe that there must be some special circumstances in the case 'to justify an acquittal' and 'authorize a verdict of not guilty.'" It will be noticed that the first sentence of the instruction last above quoted from treats the subject of reasonable doubt as if made for innocent persons alone, and not intended to let the guilty escape. There is also in it the same theory that the jury are not at liberty to render a verdict of acquittal unless they "justify" themselves.

In *Burnett v. State,* 86 Neb. 11, this court seems to have condemned the following instruction: "A reasonable doubt, as used in these instructions, to justify an acquittal, must be a reasonable one arising from a candid and impartial investigation of all of the evidence in the case. A doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and the juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suspicions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors if, free from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. That by reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means some actual doubt having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt reasonably arising from all the evidence or want of evidence, in this case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the reason and understanding of ordinarily prudent men with a conviction on which they would act in the most important concerns and affairs of life."

The opinion in that case was prepared by Judge Barnes. There was only one dissent. The judgment of the court below was reversed. While the instruction

in that case is different from the very obnoxious instruction in this case, there is some similarity. The similarity is in the language which holds the jury up as if it were guilty and likely to go wrong, and that a court, because it was a court, had a right to talk to the jurors as if it possessed the sum total of human virtues. I hope that the syllabus in this case, which seems to justify the use of the instruction in the *Burnett* case, may be overruled at once. We cannot afford to use any part of the instruction used in Chicago to hang the anarchists. *Spies v. People,* 122 Ill. 1. Although the opinion in the foregoing case was filed only 30 years ago, it is as much a historical relic in several states as the hanging of innocent women at Salem, Massachusetts, on the charge of witchcraft. Of course, the judges in the witchcraft cases were no more to blame than their neighbors. The instructions in the *Spies* case were:

"(12) The court instructs the jury, as a matter of law, that in considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

"(13) The court further instructs the jury, as a matter of law, that the doubt which the juror is allowed to retain in his own mind, and under the influence of which he should frame a verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror, in view of the consequences of his verdict, is not a reasonable doubt, and a

juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible states of fact differing from that established by the evidence. You are not at liberty to disbelieve as jurors, if, from the evidence, you believe as men. Your oath imposes on you no obligation to doubt, where no doubt would exist if no oath had been administered."

The foregoing instructions were the outgrowth of a state of war in Chicago, and they were no doubt intended and constructed to secure the conviction and execution of the anarchists on trial. We have no state of war in Nebraska, and these instructions should not be followed.

It is an invasion of the province of the jury in a criminal case when the court lectures the jury and gives it to understand that it must render a verdict in a particular way. The jurors are there for the purpose of exercising their best judgment, and a court has no business to attempt to crowd them out of the exercise of their peculiar functions. It is also very objectionable when the court indicates that it has any opinion touching the merits of a criminal case. We all know how ready the jurors are to catch the words of the trial court and to be controlled by them.

FRED PIERSON, APPELLANT, v. DAVID A. LAWLER ET AL., APPELLEES.

FILED FEBRUARY 5, 1917. No. 19029.

1. **Aliens:** RIGHT TO INHERIT. Under a treaty removing the statutory disqualification of a nonresident alien to inherit land in Nebraska and providing that he "shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary," the disqualifying statute is suspended, but if the alien fails to sell the land within the prescribed period the title vests in those to whom it would have de-

scended in absence of a treaty. Rev. St. 1913, sec. 6273; 31 U. S. St. at Large, art. I, p. 1939.

2. ———: ———. Under a treaty suspending the statute disqualifying a nonresident alien from inheriting land in Nebraska and providing that he "shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary," it is a question for the judiciary whether the circumstances were such as to prolong the prescribed period. 31 U. S. St. at Large, art. I, p. 1939.

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

J. G. Beeler, for appellant.

Hoagland & Hoagland, contra.

ROSE, J.

This is an action to partition the northwest quarter of section 34, township 13, range 35 west, in Keith county. The case was presented to the trial court on controverted issues relating to title and to the respective shares of the owners. When the land belonged to Josiah Weir, he died intestate September 20, 1901, leaving as his only heirs a brother, John C. Weir, and two sisters, Grace Beveridge and Mary Young, the latter being an alien residing in Scotland. Grace Beveridge died in September, 1906, leaving as her only heirs nine children. Through conveyances from John C. Weir, Mary Young and three Beveridge heirs, plaintiff claims an undivided seven-ninths of the land. Defendant, David A. Lawler, concedes that plaintiff owns the interests of three Beveridge heirs, but, subject thereto, claims title to the land through foreclosure of a mortgage, a decree quieting title, and conveyances from six Beveridge heirs. From a decree confirming in defendant David A. Lawler an undivided eight-ninths, plaintiff has appealed.

At the time of Josiah Weir's death the land was incumbered by a mortgage. The Farm Land Company, as holder of the mortgage, commenced a foreclosure suit February 23, 1903, making Grace Beveridge, Mary Young

and John C. Weir defendants; summons being served upon the latter, but not upon the other two. A decree of foreclosure and an order of sale followed. In the publication of the notice of sale, in the appraisal, in the sale, and in the sheriff's report of the sale, the land was described as the northeast quarter instead of the northwest quarter. The sale was confirmed by the district court, and the sheriff executed and delivered to the Farm Land Company, as purchaser, a deed correctly describing the mortgaged premises. In 1908 the Farm Land Company commenced a suit to quiet its title and brought into court as defendants John C. Weir, Mary Young and the Beveridge heirs. John C. Weir employed an attorney to make a defense for all of the defendants. After issues were joined by the pleadings the trial court, upon a stipulation by counsel, entered a decree quieting in the Farm Land Company title to an undivided one-half and in the Beveridge heirs title to an undivided one-half. The stipulation recited that Mary Young was a subject of Great Britain residing in Scotland, and provided further: "That the said Mary Young was incapable of inheriting any interest in said real estate, and that the said John C. Weir and the said Grace Beveridge each succeeded to an undivided one-half of said land." The interest acquired by the Farm Land Company was subsequently sold to defendant David A. Lawler, who purchased also the interests of six Beveridge heirs.

It is contended that the error in the description of the mortgaged land invalidated the sheriff's sale, that the interest of John C. Weir was not foreclosed, and that plaintiff acquired it by purchase. The determination of the question thus raised is not necessary to a decision, since it is conclusively established by the decree in the suit to quiet title that John C. Weir had no interest in the land. He had been fully informed of the action his attorney would take in entering into the stipulation and he acquiesced therein. It follows that he is bound by the decree, that he did not thereafter have any interest in the land, and that he conveyed nothing to plaintiff.

The principal question presented by the appeal relates to the rights of Mary Young, from whom plaintiff procured a quitclaim deed. It is argued that, under a treaty between the United States and Great Britain, she inherited one-third of the land of her deceased brother, and that the decree barring her inheritance in the suit to quiet title is void as to her for the reason that it was based on an unauthorized stipulation. The treaty upon which plaintiff relies provided:

"Where, on the death of any person holding real property (or property not personal), within the territories of one of the contracting parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn." 31 U. S. St. at Large, art. I, p. 1939.

In the absence of a treaty, the inheritance of land by a nonresident alien would be defeated by a statute of Nebraska. Rev. St. 1913, sec. 6273. The nature of the interest acquired by a nonresident alien under the terms of the treaty and the descent of title are subjects which have been explained as follows:

"There is much discussion in the cases as to the nature of the title which nonresident aliens held under the terms of this treaty. Some authorities denominate it a base or qualified fee, and others as a terminable fee. The terminology is not of controlling importance. That the right to sell carried with it the ownership as a necessary incident to the power of sale is held by all the authorities.

That such ownership was something less than a fee simple absolute is also quite beyond discussion. That the remainder of such title vested in the resident heirs, and that such remainder drew the full fee-simple title into such resident heirs upon failure of the condition upon which the nonresident aliens took their title, seems to us clear. The authorities are quite uniform, also, in holding that, upon failure of the condition imposed by the treaty, the title of the nonresident alien would fail by operation of law. Under such circumstances the treaty furnishes no further impediment to the statute. It ceases, so to speak, to suspend the statute, and the full fee-simple title vests in the persons upon whom the statute undertook to cast it in the first instance. This is the net result in all the cases, although it may be reached by a different course of reasoning, and by the use of a varying terminology." *Ahrens v. Ahrens,* 144 Ia. 486. *Wunderle v. Wunderle,* 144 Ill. 40, 64-67.

In this view of the law, Mary Young, notwithstanding the statute prohibiting a nonresident alien from inheriting land in Nebraska, acquired under the treaty the right to sell an undivided one-third of the land in controversy within three years, "this term to be reasonably prolonged if circumstances render it necessary." Did she make the sale within that period? She attempted to sell her interest in the land May 8, 1912, more than eleven years after the death of her brother Josiah Weir. Plaintiff argues that the treaty is not self-executing, and that the right of sale continues until a time limit is set by the legislature—a step not taken by the lawmakers. The time for exercising the right, however, is fixed by the treaty itself, and the necessity for prolonging the period is a question for the judiciary. *Scharpf v. Schmidt,* 172 Ill. 255. Do the circumstances require a finding that the time should be prolonged more than eight years beyond the three-year period specified in the treaty? Plaintiff insists that climatic and financial conditions and clouds on the title made the land unsalable

and justified the delay. In the light of the evidence this position seems to be untenable. While there is evidence tending to show that the land was unsalable in 1903 and 1904, it is not shown that the same conditions prevailed from 1905 to 1908 or that Mary Young attempted to make a sale prior to 1912. The record of the foreclosure fails to show service of process upon Mary Young, the nonresident alien. As to her the decree of foreclosure was void on its face. Notwithstanding the decree in the suit to quiet title she found a purchaser. Circumstances showing a necessity for prolonging the period a sufficient length of time to uphold the conveyance from Mary Young to plaintiff are not proved. She in fact lost her interest in the land before the suit to quiet title was instituted. It follows that defendant David A. Lawler acquired from the Farm Land Company an undivided three-sixths and from six Beveridge heirs an undivided two-sixths, making in all an undivided five-sixths of the land in controversy. An undivided one-sixth was acquired by plaintiff from three Beveridge heirs. The judgment of the district court is modified to confirm the shares in the manner indicated, and as thus modified it is affirmed.

MODIFIED AND AFFIRMED.

LETTON, J., not sitting.

STATE, EX REL. E. H. LUTT ET AL., APPELLEES, v. RAYMOND TOWNSHIP ET AL., APPELLEES; CHRIS JOHNSON, APPELLANT.

FILED FEBRUARY 5, 1917. No. 19140.

Highways: DEDICATION: ACT OF CONGRESS. The act of the Congress of March 2, 1889, which "reserved public highways four rods wide around every section of land allotted, or opened to settlement," in the Sioux Indian reservation, amounted to a grant or a dedication for highway purposes. 25 U. S. St. at Large, ch. 405, sec. 21, p. 897.

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

W. A. Meserve, for appellant.

M. F. Harrington and *E. A. Houston, contra.*

ROSE, J.

This is an appeal from an order allowing a peremptory writ of mandamus commanding Chris Johnson, as road overseer of Raymond township in Knox county, to open a public highway four rods wide on a section line in what was a part of the Sioux Indian reservation which was allotted to Indians and opened to settlement by the act of Congress of March 2, 1889. 25 U. S. St. at Large, ch. 405, p. 888. The act provides: "There shall be reserved public highways four rods wide around every section of land allotted, or opened to settlement by this act, the section lines being the center of said highways; but no deduction shall be made in the amount to be paid for each quarter-section of land by reason of such reservation. But if the said highway shall be vacated by any competent authority the title to the respective strips shall inure to the then owner of the tract of which it formed a part by the original survey." 25 U. S. St. at Large, ch. 405, sec. 21, p. 897.

Most of the lands along the highway in controversy are Indian allotments, the title to which is being held by the United States as trustee for the allottees.

Respondent contends that the Congress did not grant or dedicate land for highways on Indian allotments, and that the word "reserved," in the connection in which it is used in the statute, means that the United States retained the title to land intended for highway purposes. The Congress "reserved" a piece of land "four rods wide around every section of land allotted, or opened to settlement." The word "reserved" should be construed in connection with the context and the obvious purpose of the legislation. The object was to permit Indians to

hold allotted lands in severalty and to open the remainder of the reservation to settlers under the homestead laws. For these purposes highways were necessary. It was the intention of the lawmakers to allow allotted lands and homesteads to pass in due time from the control of the Congress to private individuals. It was not the intention to retain a narrow piece of land around each section. This is shown by the act itself, which declares: "But if the said highway shall be vacated by any competent authority the title to the respective strips shall inure to the then owner of the tract of which it formed a part by the original survey." 25 U. S. St. at Large, ch. 405, sec. 21, p. 897.

It is also contended that, under a later act, a highway over allotted land in an Indian reservation cannot be opened without the consent of the secretary of the interior, and that his consent was not procured. The new legislation is found in the act of March 3, 1901, and provides: "The secretary of the interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper state or local authorities for the opening and establishment of public highways, in accordance with the laws of the state or territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation." 31 U. S. St. at Large, ch. 832, sec. 4, p. 1084.

The enactments do not contain contradictory or inconsistent provisions. The act of 1889 contains a special provision relating to highways in the Sioux Indian reservation. The act of 1901 is a general one and does not in direct terms or by implication amend or repeal the former law. Both may be enforced as enacted. *Jackson v. Washington County,* 34 Neb. 680; *State v. Clarke,* 98 Neb. 566.

Respondent contends further that there has been no proper acceptance of the highway. The grant or dedication by the Congress respects the public policy of Nebraska as declared by an act providing that "the section lines are hereby declared to be public roads in each county," and that "the county board may, whenever the public good requires it, open such roads." Rev. St. 1913, sec. 2899. The county board of Knox county, July 16, 1908, made an order for the establishment of the highway in controversy. Acceptance of the grant or dedication is shown.

Notice to file claims for damages was given, but no claims were filed. The necessity of making provision for the payment of damages as a condition of opening the highway is therefore not determined.

The peremptory writ was properly allowed.

AFFIRMED.

IN RE ESTATE OF SWAN JOHNSON.

ANNA LOVISA JOHNSON ET AL., APPELLEES, v. ALBERT JOHNSON ET AL., APPELLANTS.

FILED FEBRUARY 5, 1917. No. 18741.

1. **Witnesses:** CROSS-EXAMINATION. In a contest of a will on the ground of undue influence, if a proponent of the will, who is a beneficiary thereunder, is alleged by the contestants to have used undue influence to obtain the execution of a will favorable to himself, and becomes a witness in his own behalf and contradicts evidence of circumstances tending to prove undue influence on his part, the court should allow a free and complete cross-examination of the witness as to his conduct toward the testator prior to and in connection with the making of the will.
2. **Wills:** CONTEST: UNDUE INFLUENCE: EVIDENCE. If the proposed will recites a reason for disinheriting a son who is contesting the will on the ground of undue influence by those who are beneficiaries therein, it is competent, in connection with other evidence tending to show such undue influence, to prove that no such reason in fact existed.

3. **Trial:** OFFER OF PROOF. When a question is asked that does not "indicate to the trial court the relevancy of the testimony," it is not error to exclude the testimony, unless the party propounding the question informs the trial court as to the relevancy of the testimony, and an offer of proof will enable the trial court to determine whether the evidence is competent. When the condition of the record and the form of the question itself show that it is relevant and competent, no offer of proof is necessary. The many decisions of this court in regard to requiring an offer of proof should be so understood.

4. **Wills:** CONTEST. Every one is entitled to the control of his property while living, and by will to direct its use after his death. The trial of a proposed will is to determine whether it is in fact the will of the decedent rather than the will of interested parties who have procured its execution by undue influence.

5. ———: ———: UNDUE INFLUENCE: EVIDENCE. Evidence of statements of the decedent, not made at the time of executing the will, are generally held incompetent as substantive proof of undue influence, but such statements are received in evidence if they tend to prove the condition of mind of the decedent as to his unbiased inclination in the disposition of his property, and are not otherwise objectionable.

6. ———: ———: ———: INSTRUCTIONS. It is not in all cases true that "influence that amounts to undue influence must be such as to compel, overpower, and coerce one to do something which he does not want to do." Under the circumstances in this case it was error to so instruct the jury.

7. ———: ———: ———: ———. If undue influence is established by a preponderance of the evidence, the proposed will must be rejected. An instruction which tells the jury that unless they are convinced thereby they cannot reject the will is not accurate, and under some circumstances may be prejudicial.

8. ———: ———: APPEAL: TRIAL DE NOVO. Upon appeal to the district court from the judgment of the county court admitting a proposed will to probate, the district court tries all questions *de novo*. That court must determine whether the proposed will has been altered and the consequences of such alteration, if any.

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

Brown, Baxter & Van Dusen, Lewis C. Paulson and *Thomas F. Hamer,* for appellants.

Hague & Anderbery, contra.

SEDGWICK, J.

The proposed will of Swan Johnson, deceased, was contested in the county court of Kearney county and there admitted to probate. Upon appeal to the district court for that county the probate of the will was sustained, and the contestants have appealed to this court.

The deceased was a retired farmer, living at the time of his decease at Axtell, in Kearney county, and he died about the 29th day of September, 1912. He left surviving him his wife, one of the proponents, Anna Lovisa and four sons, Edward H., Arthur G., Hardie L., and Albert Johnson, and one daughter Annie E. Jacobson, and two children of a deceased son, and Charles F. Johnson, a son of the decedent by a former wife. The decedent left property, real and personal, of value variously estimated from $36,000 to $50,000. This property consisted mainly of three farms of 160 acres each, and a house and lot in the town of Axtell. The proposed will devised the three farms, one to Edward H. Johnson, one to Arthur G. Johnson, and one to Hardie L. Johnson. To his wife he gave the town property, and a life interest in the three farms and all of his personal property. To his his daughter, Annie E. Jacobson, and his son, Albert Johnson, he gave each the sum of $3,600, and provided that these bequests should be paid by the devisees of the land, and that they should constitute a lien upon the land devised subject only to the lien of the widow's life estate. The principal grounds of contest were that the deceased "was not possessed of sufficient mental capacity to make a valid will," and "was not of sound mind and disposing memory," and that the execution of the proposed will "was brought about through undue influence" by his wife and his sons, Edward H., Arthur G., and Hardie L. Johnson, and that the deceased at the time of executing the proposed will was laboring under delusions and mistakes in regard to the value of his property and in regard to "certain indebtedness which he believed to be due from his son, Charles F. Johnson," with no such

indebtedness existing. It is now contended that the judgment of the district court is not supported by the evidence, and that the court erred in excluding evidence and in restricting the cross-examination of one of the proponents of the will.

At the time of signing of the proposed will, Charles F., the decedent's son by his former wife, was nearly 50 years of age, and was residing with his wife and children in Omaha. The decedent was about 70 years of age, and had been for several months suffering with a fatal disease, which caused him much suffering and caused his death a few weeks after the signing of the proposed will. The proponent, Edward, was residing on one of the farms of the decedent, a few miles from the town of Axtell, where the decedent was residing, and on Sunday, the day before the proposed will was signed, he, with the other sons to whom the farms were devised, were at the home of their father and mother, and the next morning Edward took the decedent to a lawyer's office, where the will was drawn and executed. There is evidence that Charles and Edward were not on friendly terms, and it is the theory of the contestants that Edward, with the assistance of his mother and the other substantial beneficiaries under the will, unduly influenced the decedent in executing the same. The proposed will states as the reason for disinheriting Charles that "I relinquish all right and cancel all indebtedness from Charles F. Johnson to me. * * * The indebtedness due me from Charles F. Johnson constitutes notes and debts which I paid for him about twenty-four years ago in the principal sum of about seven hundred dollars no part of which he has ever paid me." There is evidence that when Charles was a young man his father assisted him to obtain title to a piece of land, and that Charles occupied the land for some time and became indebted, the land being incumbered, and unable to finish paying for the land. It was thereupon arranged between Charles and his father,

at about the time mentioned in the foregoing quotations from the will, that Charles should convey title to his father and his father pay the indebtedness. This was done, and the decedent occupied the land for about two years and paid off all the indebtedness, and then sold the land, realizing about $1,000 more than he had invested in the land and the indebtedness, so that the recital in the will of the reason for disinheriting Charles was entirely contrary to the fact. No other reason is shown, and the evidence is that the decedent visited Charles and his family at Omaha, and that Charles, shortly before the death of the decedent, was at the home of the decedent for some weeks and took care of his father, and that the relations between them were all that could be desired between father and son. The fatal disease with which the deceased was suffering was not of such a nature as to impair his mental faculties, but he had been a vigorous, active man, he had suffered for months, and fully realized that this disease and the suffering caused thereby would very soon end his life. Edward was then about 36 years of age, had not been living with his father for several years, but saw him frequently, and it would seem that their relations also were pleasant. The theory of the contestants is that, in this consultation of the family with the dying man on Sunday, the terms of the proposed will were arranged for him, and that he yielded to the dictation of his wife and her children, who caused to be repeated in his will the ungrounded reason for disinheriting Charles. It was therefore very important to know the nature of that consultation and the matters discussed and the manner of discussing them. On the trial evidence had been introduced of hostilities on the part of Edward toward his half-brother Charles, and tending to show that Edward had at times remonstrated with his father against any assistance to Charles. Other circumstances appeared in the evidence that might be considered to indicate that Edward was much interested

in preventing his father from recognizing Charles as an object of his bounty. The theory of the contestants was that these circumstances, in connection with the fact of this family consultation so soon before the proposed will was executed, and the fact that Edward was preferred in the proposed will tended to prove that Edward had used undue influence with his father. To rebut this theory Edward was called as a witness by the proponents and was asked, "You have heard the testimony of Albert concerning statements made by you, or purporting to have been made by you, at your father's home, upon various occasions?" and answered, "Yes, sir." He was asked: "Q. Did you at any time or at any place protest to your father in reference to extending credit to Albert? A. No, sir. Q. Or to Charley? A. No, sir. * * * Q. You heard Mrs. Vath's testimony, did you not? A. Yes, sir. Q. State whether or not you stated that Albert and Charles were not to have anything, as testified to by her. A. No, sir; I never said so. Q. Did you at any time make such a statement? A. No, sir. Q. You heard the testimony of Mrs. Albert Johnson? A. Yes, sir. Q. You heard her state that you have said on several occasions that neither Albert nor Charles should have anything? A. I never said so. Q. Did you at any time or to any person make such statements? A. No, sir." This evidence of Edward's amounts to a denial that he had used influence with his father in regard to the disposition of his property. It was clearly relied upon for that purpose, and on the cross-examination he was asked, "Q. You are the Ed. Johnson who came with your father to Minden the day this will was drawn? A. Yes, sir. Q. What time in the day did you get here?" This question was objected to as improper cross-examination, the objection was sustained, and exception taken to the ruling. He was then questioned, and answered, as follows: "Q. How frequently did you visit at your father's house during the last few months of his life? A. Whenever I would go

to town I would go down there and talk to him a few minutes; and we would go to church Sundays, and go there for dinner, and stay there a little while in the afternoon, and then go home. Q. Were you there on Sunday, the 2d of July? A. Yes, sir. Q. Was Arthur there? A. Yes, sir. Q. Was Hardie there? A. Yes, sir. Q. Was Albert there? A. No, sir. Q. Was Charley there? A. No, sir. Q. Was Mrs. Vath, the mother of Emil's children, there? A. No, sir. Q. Was your mother there? A. Yes, sir. Q. Now, at that time did you make an arrangement with your father to come to Minden the next day?" This question was objected to as improper cross-examination, and the objection sustained, and the ruling excepted to. He was then asked, "At that time was the subject of the change of the will discussed?" to which a similar objection was sustained.

It is contended that the contestants cannot now object to this ruling because no offer of proof was made, and the following is quoted from the decision of this court in *Blondel v. Bolander*, 80 Neb. 531: "In order to predicate error upon the rejection of testimony, the party complaining of its exclusion must have made an offer of what he expected to prove, which would indicate to the trial court the relevancy of the testimony, and, in the absence of such offer, the action of the court in rejecting the testimony will not be reviewed." Many of the rules of evidence are necessarily precise and technical. The purpose of these rules is to elicit the truth, and not to set traps for the unwary. When a question is asked that does not "indicate to the trial court the relevancy of the testimony," it is not error to exclude the testimony, unless the party propounding the question informs the trial court as to the relevancy of the testimony, and an offer of proof, that is, a statement of the nature of the evidence sought by the question, will enable the trial court to determine whether the evidence is competent. This rule is sometimes, though rarely, enforced in cross-examination. When the condition of the rec-

ord and the form of the question itself shows that it is relevant and competent, no offer of proof is necessary. The many decisions of this court in regard to requiring an offer of proof should be so understood.

In *Isaac v. Halderman,* 76 Neb. 823, it was said by COMMISSIONER DUFFIE: "No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of that right. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. The law wisely secures equality of distribution where a man dies intestate, but the very object of a will is to produce inequality and to provide for the wants of the testator's family, to protect those who are helpless, to reward those who have been affectionate, and to punish those who have been disobedient. * * * He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law." This, of course, is true if the document presented is in fact the will of the testator. The object of the trial is to ascertain whether it is his will, or is rather the will of those around him who seek to obtain the property for themselves.

When a man realizes that he is stricken with a fatal disease, a disease which causes excruciating suffering and must destroy his life in a short time, no matter how strong a man he may have been in health, he clings nervously to those of his relatives who may be around him. They represent to him all of the earthly support he has. If he alienates them, he must face the "King of Terrors" alone so far as things of earth with which he is familiar are concerned. And he is not always in a position to resist their influence. To take advantage of such a situation to have a brother unjustly disinherited is a fearful act, and yet it too often happens. The question then is whether the result is the will of the

deceased, or the will of those who surround him when the details are arranged. This question frequently places a difficult and embarrassing duty upon courts and juries. There can be no doubt that the testimony of Edward, offered in behalf of the proponents, was intended to rebut the conclusions indicated by the circumstances in evidence, that he had assisted in so influencing his father. There should have been the freest cross-examination in regard to the consultation on the Sunday preceding the execution of the proposed will, and the conduct of this witness generally as indicating whether he had attempted to influence the father to disinherit Charles and the children of another son deceased. The trial court erred in refusing to allow such cross-examination.

Albert Johnson, testifying for the contestants, was asked: "Q. On or about this time, Mr. Johnson, did you have any conversation with your father concerning the provisions of the will in so far as they related to your brother Charley? A. Yes, sir. Q. What was said at that conversation?" This was objected to, and the objection sustained. The contestants then offered "to prove by this witness that at this conversation the father stated to the witness that he had always wanted to give Charles something, but that he was no longer his own boss, and had been prevented by the boys from doing so." The objection was still sustained, and the contestants excepted to the ruling. Such evidence, it is almost universally held, is not competent as substantive proof of undue influence; but, if the proponent had declared "that he had always wanted to give Charles something," evidence of that fact was competent as tending to show the condition of his mind and feeling toward Charles, and that part of the evidence offered should have been allowed.

The court also erred in striking out evidence as to the result of taking over Charles' farm by his father.

The court instructed the jury that "influence that amounts to undue influence must be such as to compel, overpower, and coerce one to do something which he does not want to do," and also that if they "find from a preponderance of the evidence that the proponents, Arthur G. Johnson, Ed. H. Johnson, Hardie L. Johnson, and Anna Lovisa Johnson, or some of them, exercised such influence over him at the time of signing the will that he was forced, coerced, and compelled against his will and against his judgment, * * * then and in that event said will would be executed under undue influence." This language was substantially repeated in other instructions. Under some circumstances, if it was contended that the testator had been threatened with bodily injury and through fear of such physical injury had been compelled to execute the will, then such language as this might be appropriate in the instructions to the jury. It was decided by the supreme court of Alabama that, where the principal legatee had occupied a confidential relation to testator, the burden is on him to show the absence of the exercise of undue influence. *Moore v. Spier,* 80 Ala. 129. When a party to be benefited by the will has the controlling influence in its formal execution, it is considered by the supreme court of Iowa to require close scrutiny and full explanation. *In re Will of Donnely,* 68 Ia. 126. The decedent, knowing that he was stricken with a fatal disease and that he could not live long, was surrounded by these four or five persons who are the beneficiaries under this proposed will, with whom he was living and upon whom he depended for support and consolation in his last hours, and under such circumstances it was not necessary that force, coercion, and compulsion should be used in order to amount to undue influence.

It is complained that the court instructed the jury that, unless they were convinced by a preponderance of the evidence that there was undue influence, they could not reject the will on that ground. There is some

merit in this complaint. If there was a preponderance of the evidence of undue influence, it would be sufficient to establish that fact, and the language of this instruction might allow the jury to remain still unconvinced, although there was such preponderance of evidence. When it appears from other instructions given and from the manner of the trial that the jury were probably misled by such an instruction, it will be held to be prejudicial.

It seems that the county court in admitting the proposed will to probate found that it had been altered since its execution. This was an appeal from that decision to the district court, and upon such appeal the district court tries all questions *de novo*. No question as to the alteration appears to have been submitted to the jury, and we are not referred to evidence in the record upon which the court acted in admitting the proposed will in evidence. This matter is not made very plain in the briefs, and it is difficult to tell what are the contentions of the parties in that regard.

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

REVERSED.

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

ELIZABETH L. KRISS, ADMINISTRATRIX, APPELLEE, v. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED FEBRUARY 5, 1917. No. 19065.

1. **Appeal:** ARGUMENT OF COUNSEL: FAILURE TO OBJECT. The general rule is that counsel cannot remain quiet and seemingly acquiesce in remarks of opposing counsel in his argument to the jury, and after verdict obtain a reversal because of matters not objected to at the time.
2. **New Trial:** ARGUMENT OF COUNSEL: FAILURE TO OBJECT. When counsel in his argument to the jury assumes that prior remarks

of opposing counsel justify and make necessary the reply which he is making thereto, opposing counsel may by objection take the ruling and instructions of the court thereon. If he makes no objection and appears to acquiesce in the assumption of counsel, he will not after verdict ordinarily be granted a new trial because of alleged impropriety of his opponent's argument.

3. **Stipulations:** WITHDRAWAL. When in the course of a jury trial the parties agree upon two stipulations, one of which tends to increase the amount of the plaintiff's claim and the other tends to diminish it, neither party should be allowed, after the cause has been submitted to the jury upon such stipulations, to withdraw the stipulation against his interest and enforce the other.

4. **Trial:** REFUSAL OF INSTRUCTIONS. When the trial court gives a general instruction upon a matter involved in the issues, and a more specific instruction is requested, such request should fairly present the matter as it affects all parties to the litigation. If it fails to do so, to refuse the request will not be prejudicial error requiring a reversal, unless it appears from the entire record that the jury probably misunderstood the real issue for want of a more specific instruction.

5. **Damages:** REMITTITUR. In an action for damages, the burden is upon the plaintiff to prove by a preponderance of the evidence each element of damage sustained. If it appears that the verdict includes an item of damage not so proved, a remittitur will be required.

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

Edson Rich and *A. G. Ellick,* for appellant.

Sullivan, Rait & Thummel, contra.

SEDGWICK, J.

The plaintiff, as administratrix of the estate of her deceased husband, John J. Kriss, brought this action in the district court for Douglas county to recover damages for the alleged negligence of the defendant causing the death of the decedent. She recovered $18,137.16, and the defendant has appealed.

The decedent lost his life in a collision of two of the trains of the defendant, and the defendant submitted the case to the jury, conceding its liability, and contesting only the amount of the recovery.

The principal ground urged by the defendant for a reversal is the misconduct of the plaintiff's attorney in his closing address to the jury. The plaintiff's attorney, among other things, urges that his remarks complained of were induced by the prior remarks to the jury by the defendant's attorney. These respective attorneys are, and long have been, among the leading and influential members of the bar of this state, and, from the view that we take of this record, we are fortunate in not being required to comment upon the propriety of the language complained of. The address to the jury of the defendant's attorney is not in the record; but the plaintiff's attorney insists that the character of his address sufficiently indicates the conditions which he was required to meet as brought on by the defendant's attorney. No objections were made to the remarks complained of, and no rulings of the court were asked thereon by the defendant's attorney. Under ordinary circumstances, the general rule is that counsel cannot remain quiet and seemingly approve of what is being done, or at least to acquiesce in it, and afterwards obtain a reversal of the case because of matters not objected to at the time. The exception to this rule in cases of this kind is well stated by SULLIVAN, J., in *Chicago, B. & Q. R. Co. v. Kellogg,* 55 Neb. 748: "We do not, however, wish to be understood as holding that a rebuke from the court, or even a complete retraction by the offending counsel, is in all cases of this kind a sovereign remedy. If the transgression be flagrant—if the offensive remark has stricken deep, and is of such a character that neither rebuke nor retraction can entirely destroy its sinister influence—a new trial should be promptly awarded, regardless of the want of an objection and exception." The address of plaintiff's attorney to the jury is quoted at length in the record, and it appears that he continually assumed, at least in this address, that the condition of the record and the prior remarks of the defendant's attorney justified the language which he was using. If a seasonable

objection had been interposed to these remarks, this question of justification in using them would necessarily have been presented to the court, and the decision thereon of the learned judge who tried this case would have carried great weight with this court, and the determination of the trial court as to the rights of the respective counsel and the propriety of the remarks complained of would, without doubt, have been regarded and complied with by all counsel interested in the case. We think that without regard to the general character of these remarks, which appear to have run through the entire address, the defendant is not now in a position to ask for a reversal of the judgment on these grounds.

The question whether the judgment is excessive remains to be considered. The defendant contends that the damages allowed by the jury were augmented by an error of the court in an instruction to the jury. The court prepared instruction No. 11 to be given to the jury, in which he told the jury: "To enable you to better understand the method of arriving at the present worth of a given sum, the court gives you an illustration by way of example: If it was desired to find what the present worth of $100 due in one year on the basis of money being worth 5½ per cent. (the amount agreed on by the parties for the purposes of this case), you would divide $100 by $1.055, that being the interest on $1 for one year plus the $1. The result of such division would be $94.78 plus, which is the present value of $100 due in one year. If $100 is due in two years, on the basis of 5½ per cent. the present worth would be found by dividing $100 by $1.11; the $1.11 being the interest for two years plus the $1. For the period of three, or subsequent years, the present worth may be found by applying the same rule. The aggregate of these sums for the different periods would be the present worth." The parties entered into a stipulation: "It is agreed that neither party will except to the formula as a basis upon which to figure the present worth as given by the court in

its instruction No. 11." After the jury had considered the case for some time, they sent to the court an inquiry in writing: "Honorable Judge—Sir: Please give us, the jury in this case, the present value of $31,620, and oblige the jury. Ed Porter, Foreman. P. S. Life expectancy 31 years at $85 per month. E. P." It appears from the request for information submitted by the jury that the jury had already determined the expectancy of the decedent, and the amount of his contribution to the support of the widow and her children. It was when the counsel attempted to estimate the present worth of the sum indicated by the jury upon the basis of the court's instruction No. 11 that the question arose. Thereupon the defendant's counsel asked to withdraw from the agreement not to except to instruction No. 11 containing the formula, and asked for time to prepare a showing in support of the application. The court denied "the right to make any further showing at this time," because the jury, after having deliberated for some time, had agreed upon the facts necessary to a complete verdict, and had merely asked for instruction as to the legal method of calculating the amount of the present worth. It was also stipulated by the parties: "That in figuring the present worth of a given sum to be paid in annual instalments in the future the jury may base their calculations upon the rate of 5½ per cent."

The plaintiff's counsel contends that the rate of interest at 5½ per cent. is altogether too large, and that, if the stipulation in regard to the formula for computing the present worth was withdrawn and the correct rule for such computation was given to the jury, the stipulation fixing the rate of interest at 5½ per cent. ought also to be changed. There is evidence in the record that these two stipulations were both agreed upon during the trial of the case and that one is the consideration for the other. This evidence, so far as we have observed, is not denied. There is room for a difference of opinion as to the rate of interest that may be obtained upon investments.

There is evidence tending to show that the rate of 5½ per cent. is altogether too large. Because of these two stipulations the plaintiff neglected to produce evidence as to the proper rate. It may be that if the correct rule of computing the present worth had been given to the jury, instead of the rule agreed upon as announced in instruction No. 11, and evidence had been taken as to the usual rate of interest upon such investments, the result would have been substantially the same; that is, it seems to have been assumed by counsel that one stipulation would offset the other, and perhaps they were not far wrong in so considering. At all events, the court was right in refusing to allow one stipulation to be withdrawn and the other to stand.

The defendant asked the court to instruct the jury that the "children at a certain age may become self-supporting and would not have received any pecuniary benefit from the said John J. Kriss at that time had the said John J. Kriss lived," and, that "you are entitled to consider whether or not the annual earning power of the said John J. Kriss near the end of his probable life expectancy would be as great as it was at the time of his death, and as to whether or not the amount that he would probably contribute to the support of his wife and children would have been as great near the end of his life expectancy as it was at the time of his death." The instructions given by the court were general and contained the following: "In considering this, it is proper for you to consider the age of the deceased, and the age of his widow and children, and from all the facts and circumstances proved determine what sum the deceased would probably have contributed to the financial benefit of his wife and children during the remainder of his life had he lived." It would have been quite proper to have informed the jury that decedent's earnings might have increased or decreased, and that the children might have become more or less dependent upon their father as time went on. But this seems to

have been made clear to the jury during the trial, and the instructions requested did not so fully state the propositions as to make them competent without further instructions. We do not think it is so clear that the refusal of this request was prejudicially erroneous as to require a reversal.

Decedent was earning $110 a month. The jury found that he would devote $85 to the support of his family and $25 to his own support. From a computation, taking the amount they allowed the widow as a basis, they must have found that something over $50 a month would be devoted to her support. The evidence will not justify the finding that more would be devoted to the support of the widow than to the support of the deceased himself. If we conclude that the amount that would be devoted to the support of the children is correctly found, then $75 a month would be devoted to the support of the widow and the decedent, $37.50 each. The amount found in favor of the widow, $10,137.16, is at least 25 per cent. too large.

If the plaintiff remits $2,534.29 from the judgment in favor of Elizabeth L. Kriss within 30 days, the judgment will be affirmed; otherwise, the judgment will be reversed and the cause remanded for a new trial as to the recovery in behalf of Elizabeth L. Kriss. The court will allow either party to withdraw from the two stipulations stated.

JUDGMENT ACCORDINGLY.

HAMER, J., dissenting.

I am unable to agree with the views expressed in the majority opinion, and feel called upon to register an earnest dissent.

I have read eloquence all my life and generally with much admiration. An examination of the speech of senior counsel for the plaintiff shows rare ability. Counsel talks most eloquently, I might say most seductively, of facts not shown by the testimony in the case.

The question to be tried was whether there was negligence upon the part of defendant's servants which resulted in the death of plaintiff's decedent. Counsel first said that no corporation could have either the virtue or benevolence that counsel for the defendant would "want you to think it possesses. I admire virtue wherever I see it, and virtue is worthy of reward, but, gentlemen, I am not willing that they should be compensated for their virtue at the expense of this woman and her five children." This is followed by the statement that notwithstanding the fact that counsel were very sorry, yet, nevertheless, "why did they kick us down stairs." Again this is followed by a statement that in times gone by the value of a human life was limited to the right to recover $5,000. Then comes the statement that the corporations put that law upon the statute book. I have not noticed any testimony of that kind in the record. Afterwards comes the consideration of something which counsel for the plaintiff say does not permit a recovery. "These children will miss their father, they will miss his friendly assistance in preparing them for life's battle. Who can estimate the value of it? Money won't measure it. All the counsel and moral instruction, advice and help and the encouragement that a good father can give to his children, that is gone, gentlemen, and they can never have it. We ask nothing for that because the law don't give compensation for that loss, great as it is; we get nothing for that." Of course, the purpose was to excite sympathy for the plaintiff and the children by this sort of a reference. Soon this is followed by a statement that one of the counsel for the plaintiff used to receive for his services only $1,200 a year. Counsel estimated that five years before this trial the particular counsel had only been receiving 60 per cent. of what he was then getting. The next picture in the panorama was of the manager of the railway company as a brakeman with a brakeman's salary. Then came a picture of the president of the company when he

was a telegraph operator and was alleged to be earning $75 a month. Then the jury were told that the manager's salary was $25,000 a year, while the president was drawing $50,000 a year. Then came the picture of another railroad man alleged to have been a brakeman on another railroad, but who was now claimed to be the owner of untold millions. Examination of the record and briefs will show that the rhetoric and literature of counsel for the plaintiff was seemingly inexhaustible on the subjects that were *not* before the court, and with which the jury had nothing whatever to do.

In *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 127, counsel for Kellogg in his argument to the jury after the close of the testimony said, among other things: "The defendant company forces its parasites to swear in its behalf. The employees of the defendant are surrounded by superintendents and assistant superintendents, who hold them by the neck and say to them: 'Oh, how easy I can drop you, how easy I can drop you!'" This court said: "That the language is totally unwarranted by the record and not within the range of the legitimate inferences and deductions which might be drawn from the evidence; that it was calculated to arouse the passions and prejudices of the jury, too easily excited in cases like this, and instead of assisting them to calmly inquire as to whether the plaintiff below had been injured through the negligence of the railway company, and, if so, the extent of such injury and what amount of money would compensate him therefor, and render a verdict accordingly, this language was calculated to inspire the jury with a desire to punish the railway company for the injury which its negligence had inflicted upon the plaintiff. That these poisonous shafts of fiery invective did their work we think is manifest from the amount of the $9,000 verdict which the jury did render. Judgments have been often assailed in this court because of the alleged misconduct of counsel for the parties in whose favor the judgments were ren-

dered." A large number of authorities are cited in support of this position. It is then said: "These cases establish that a lawyer charged with the conduct of a case is invested with certain rights and charged with certain duties. It is his duty to use all honorable means to protect his client's interests; and in argument, within the limits of the evidence and the legitimate deductions and inferences to be drawn therefrom, he may not be limited, but may comment on the conduct and credibility of witnesses and parties to the suit. On the other hand, he must act honorably and fairly with the court, opposing counsel, the jury, and the parties to the litigation. But he may not, in his conduct of the case or in his argument to the jury, go outside the record, the evidence, and the legitimate inferences deducible therefrom, and ask questions, make statements or arguments for the purpose of misleading and prejudicing the jury; and if he does so, such misconduct, if properly preserved in the record and assigned here, will cause a reversal of the judgment procured."

In that case no relief was given at the first hearing, but there was a rehearing, and a rather elegant criticism of the conduct of counsel for the plaintiff was placed in 55 Neb. 748. There this court said: "Had the court, in response to a proper objection, vigorously condemned the remarks of counsel, we think they would have left no prejudicial impression on the minds of the jury. By prompt action the defendant's counsel might have obtained an effective antidote for the poison in Shaffer's speech; but he failed to act, and is, therefore, not in an attitude to have his complaint now considered. We do not, however, wish to be understood as holding that a rebuke from the court, or even a complete retraction by the offending counsel, is in all cases of this kind a sovereign remedy. If the transgression be flagrant—if the offensive remark has stricken deep, and is of such a character that neither rebuke nor retraction can entirely destroy its sinister influence—a new trial

should be promptly awarded, regardless of the want of an objection and exception." The true rule could not possibly be more aptly expressed than in the language above quoted. It is certainly true that, when counsel winces and dodges under the blows of his adversary, the jury takes sides, and they are not for the man who runs away or who claims protection. The people like a fighter and they despise a coward. If the counsel who is attacked calls on the court for help, then the jury are likely to say, "Well, he knew where the shoe pinched, didn't he?" or, "He got it in the neck and hollered, 'Ouch'," or, "He knew when he was licked." The number of expressions that might be used by the jury under these circumstances is simply unlimited. The only adequate remedy is to give counsel on the other side "hot stuff." When it is apparent that the verdict rendered by the jury is wrong, then it becomes the duty of a reviewing court to give a new trial or to cut down the judgment to reasonable limits. That is what was done in the case last cited. This court apparently did not like to establish a rule that it would in such case set aside the verdict and grant a new trial, but it reversed the judgment unless the plaintiff would remit $2,500. The court said: "In view of the condition of the record, we are not warranted in reversing the judgment on account of misconduct of counsel; but we have concluded, after a through consideration of the evidence, that the damages are excessive, and must have been assessed while the jury were yet under the sway of counsel's superheated eloquence." The particular member of this court who wrote the language quoted knew what he was about, and this court seems to have fully indorsed what he did, because there is no dissent.

In *Ashland Land & Live Stock Co. v. May,* 51 Neb. 474, counsel for the plaintiff said to defendant's counsel: "He (referring to defendant's witness then on the stand) has been to you; of course, you fixed him; you have to depend upon fixing witnesses." The trial judge appears

in that case, as stated in the opinion, to have some of the time sustained the objections of counsel for the defendant, but at other times he failed to make any ruling, nor did he rebuke counsel for the plaintiff. This court reversed the judgment of the district court and said: "The misconduct of counsel for the prevailing party in this case could not have been otherwise than prejudicial to the defendant, especially in view of the conflicting character of the evidence."

In *Stratton v. Nye,* 45 Neb. 619, counsel for the defendant in his opening statement to the jury said: "W. A. Nye in 1889 was the owner of one-half interest in a corn sheller, in connection with Robert Gilchrist; that some time in July of that year he sold that half interest to Mr. Gilchrist, and after this he came to town and mortgaged the same half interest which he had sold to Mr. Gilchrist." In that case CHIEF JUSTICE NORVAL delivered the opinion of this court. He said in the opinion: "In such opening statement it is the duty of counsel to refrain from rehearsing irrelevant and prejudicial matters or facts which are foreign to the issues; and, where counsel abuses the privilege of advocacy in his opening by rehearsing irrelevant and prejudicial matters, the court should, especially when objection is made, reprove the practice in the hearing of the jury, and as far as possible remedy the mischief by instructing the jury to disregard the prejudicial statement. The trial judge must necessarily have a broad discretion in such matters; but, if counsel abuse their privilege, or the trial court its discretion, to the prejudice of a party, it is sufficient ground for a reversal of the case."

In *Hennies v. Vogel,* 87 Ill. 242, the supreme court said: "It is the duty of the circuit court, in conducting trials by jury, to restrain every effort of the parties to bring before the jury matters which are foreign to the issues to be tried, and especially and scrupulously to exclude all such matter when the same has a tendency to excite the prejudices of the jury against a party to the

issue." In that case there was a petition for a rehearing, "on the consideration of which, we became satisfied that the damages found by the jury were excessive, and a rehearing was accordingly granted." Then the court went over the whole case on the rehearing. It was said PER CURIAM: "The majority are satisfied that they (the damages) are out of all proportion to the injury inflicted." The judgment was reversed and the cause remanded.

In *Tucker v. Henniker,* 41 N. H. 317, it was said in the body of the opinion: "No fault of the opposite counsel could justify a repetition of that fault by his opponent. The jury are sworn to render a true verdict in every case, according to law and the evidence given them, and the well-established rule of judicial proceedings confines the arguments of counsel before them to comments upon and suggestions in relation to that law and evidence. * * * It is irregular and illegal for counsel to comment upon facts not proved before the jury as true, and not legally competent and admissible as evidence." The verdict was set aside, and a new trial granted.

In *Martin v. State,* 63 Miss. 505, the prosecuting attorney said: "Martin is a man of bad, desperate, and dangerous character. But I am not afraid to denounce the butcher boy, althought I may, on returning to my home, find it in ashes over the heads of my defenseless wife and children." The court said: "The prisoner was on trial for a specific offense, and it was his right under the law to be tried for that offense, upon competent evidence confined to that issue. We are of opinion that the counsel for the prosecution in the matter above quoted, passed the bounds of legitimate advocacy, and that, under the circumstances of the case, the prisoner may have been, and probably was, thereby injured. Such declarations uttered by distinguished counsel, of high moral and social standing, in any case, would inevitably tend to prejudice the jury against the prisoner." The

judgment was reversed because of the argument of counsel.

In *Rudolph v. Landwerlen,* 92 Ind. 34, counsel for the plaintiff said in his closing argument: "It is in evidence that this defendant is a Catholic priest, and all of his witnesses are members of his church, and it is a strange coincidence that they track the evidence of the defendant with that minuteness and precision in the use of words and language that cannot be accounted for, except, as shown by the evidence, they heard the defendant from the pulpit detail his version of the case, and they can come here and swear to his version of the case, and the defendant can absolve them from the sin. If it is one of the doctrines of the Catholic church that one of the members may swear falsely as a witness, and the priest can forgive him his sin for such false swearing, so as to absolve him from all moral guilt, it is the privilege and duty of the jury" to consider this. The court sustained an objection, and the same counsel proceeded: "The defendant is here, and, if it is not a doctrine of the Catholic church, let him stand up here and deny it, and that shall be the end of it." The trial court refused a new trial, but a new trial was granted by the supreme court, whereupon there was a petition for a rehearing. It was overruled, and the court said: "We adhere to the conclusions reached in our original opinion."

In *Coble v. Coble,* 79 N. Car. 589, counsel for the plaintiff said: "That no man who had lived in defendant's neighborhood could have anything but a bad character; that defendant polluted everything near him, or that he touched; that he was like the upas tree shedding pestilence and corruption all around him." There was a new trial.

I have been unable to find in the bill of exceptions any sort of justification of the remarks made by counsel for the plaintiff. It is said in the majority opinion: "The plaintiff's attorney, among other things, urges

that his remarks complained of were induced by the prior remarks to the jury by the defendant's attorney." There is nothing said in the record or in the opinion concerning the substance of these "prior remarks." It is further said in the opinion: "These respective attorneys are, and long have been, among the leading and influential members of the bar of this state, and, from the view that we take of this record, we are fortunate in not being required to comment upon the propriety of the language complained of." I quite agree with the majority opinion touching the fact that the respective attorneys are "among the leading and influential members of the bar of this state," but, notwithstanding that fact, I do not see how I can conscientiously avoid making this dissent. The high social and professional standing of these gentlemen seems to the writer to have nothing to do with the subject.

One may readily understand how statements like the foregoing, which, for lack of space are not set forth in their entirety, might influence a jury, although not in any way material to the case on trial, and wholly unsupported by the evidence. This is especially true when the counsel using the language here employed is a man of fine standing in the community, of sterling integrity, of much more than average scholarship, and possesses in addition a pleasing personality along with much charm of manner and rare powers of expression, both literary and legal. The majority opinion treats the offense mildly and imposes no punishment by compelling the plaintiff through the use of a remittitur to reduce the judgment to reasonable limits. A reduction of one-third might not be out of the way in view of the pictures drawn and the seductive, impassioned, and prejudicial language used. Then other counsel by the rule which the majority opinion establishes, in other cases yet to be tried, are invited to draw pictures, on one side, of wealth, and, on the other side, of penury. In the next case that may be tried against a railroad com-

pany for damages because of personal injuries this case will be referred to. It is cases of this kind where the courts are called upon to preserve the rights of litigants, however unpleasant it may be to punish counsel through their clients in the way suggested. The high standing of a lawyer socially and professionally, and the fact of his exceeding good fellowship, but emphasizes the necessity for a proper observance of rules which should not be broken.

I have no attempted criticism to make of the plaintiff's right of recovery if the case had been fairly tried under proper instructions. But where this court permits counsel in the court below, while making his closing address to the jury and after he is safe from reply, to discuss the humble origin of counsel for the defendant, the small fees they received early in their professional life, the supposed fees that they receive now, the fact that the manager of the defendant company was once a brakeman and its president once a telegraph operator, and that each now receives an immense salary, and counsel then closes with a peroration touching a millionaire never connected with the defendant railroad company and not in the railroad business for half a lifetime, and all this is done without criticism or condemnation upon the part of this court, which says it may be done again under like circumstances, I feel that I am compelled to protest. The district court should have stopped the plaintiff's counsel at once, whatever the charm of his voice, whatever his wit or his humor, however graphic the pictures he drew, and however high his standing as a citizen and at the bar. As defendant's case was damaged, there should be a new trial.

I do not consider that the record in any way justifies the second paragraph in the syllabus.

As to the fourth paragraph in said syllabus, it does not attempt to state in what way the instruction requested by defendant's counsel was deficient, and if no fact, or no absence of testimony concerning supposed

facts are referred to, then there is nothing to consider. It seems to the writer that the paragraph should be cut out.

GEORGE WHITNEY ADAMS ET AL., APPELLEES, v. R. V. MCGREW, APPELLANT.

FILED FEBRUARY 5, 1917. No. 19109.

1. **Fraud:** IMPUTED NOTICE. Although the defendant may have had no direct actual knowledge of the fraud and misrepresentation of a third party who procures an exchange of valuable land for worthless corporation stock of the defendant, still the law may impute such notice to him from circumstances strongly indicating it, if he received title to the land and disposed of it for his own profit.
2. ———: ———. In such case, if it clearly appears that false representations were made inducing the exchange, and the circumstances are such that the law will impute to defendant notice of that fact, he will be liable to plaintiff for the value of the land so obtained, and the jury should be so instructed.
3. **Appeal:** IMMATERIAL ERRORS. If under the competent evidence the only question for the jury is the value of the land, errors of the trial upon other issues become immaterial.
4. ———: REMITTITUR. And in such case, if the amount of the verdict and judgment is clearly more than the evidence warrants, a remittitur will be required as a condition of affirmance.

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

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

W. H. Miller, George S. Redd and *George A. Adams, contra.*

SEDGWICK, J.

The plaintiffs brought this action in the district court for Franklin county to recover damages against the defendant for fraud and deceit in an exchange of corporation stock of the defendant to the plaintiffs for an equity in a piece of land in Colorado. There was a verdict and judgment for the plaintiffs, and the defendant has appealed.

The defendant had 200 shares of the capital stock of the National Realty Company, a Colorado corporation. The plaintiffs, through one Maloney, exchanged their equity in 120 acres of land for this stock. The evidence shows that Maloney misrepresented the value of the stock, and it also shows that the corporation was fraudulent and that the stock was entirely worthless. In January, 1911, the defendant purchased some of this stock and paid $1,000 therefor. He then became vice-president of the corporation and remained connected with the corporation in that capacity for perhaps ten weeks. He then resigned his office in the corporation and ceased any active management or participation in the business. Shortly afterwards Mr. Maloney asked the defendant if he still had the stock in the corporation and if he wanted to sell or trade it. The defendant told Maloney that he still had the stock and would trade it. It appears that these plaintiffs had employed Maloney as their agent to dispose of their equity in the land in question by sale or trade, and Maloney induced the plaintiffs to execute a contract of exchange of their interest in the land for the stock in question. He then presented the contract to the defendant, who also signed it. The principal question in the trial was whether the defendant was responsible for the misrepresentations of Maloney and of the parties to whom Maloney sent the plaintiffs for information in regard to the value of the stock. The defendant was a witness in his own behalf and his testimony seems to be straightforward and reliable. He made no attempt to deny his former relations with the company. He knew that the corporation was fraudulent and insolvent, and that the stock was entirely worthless. From his testimony it would appear that he was swindled when he obtained the stock, and that he must have known that Maloney contemplated a swindle when he disposed of it; and, while we must believe from this evidence that the defendant had no direct actual knowledge of the particular misrepresenta-

tions that Maloney and others made to the plaintiffs, yet there are many circumstances in the evidence of the defendant himself, as well as other witnesses, from which the law will impute notice to the defendant that Maloney was using improper methods to dispose of the stock. The evidence is so strong upon this point that a finding to the contrary could not be supported. Under this evidence the court would have been justified in submitting to the jury the one question as to the value of the property that the defendant received in exchange for the stock. It is therefore unnecessary to consider alleged errors of the court in the trial of other issues.

The important question in the case then is whether the evidence will support so large a verdict and judgment. The defendant took the title subject to a mortgage for $4,450, upon which there had accumulated at least $100 interest and taxes. This interest and taxes the defendant paid. The evidence was conflicting, but not very satisfactory, as to the value of the land. There is no evidence of disinterested witnesses as to its value. We have only the evidence of one of the plaintiffs and the evidence of the defendant. Neither shows any special knowledge as to value. Taking their evidence together, and considering that the burden of proof was upon the plaintiffs to show affirmatively the value of the property they parted with, it cannot be said that this evidence proves the land was worth more than $7,500. If we deduct the incumbrances, $4,550, the most that the evidence will warrant as a judgment against the defendant would be $2,950. The verdict was $5,866.25, which exceeded the value of the interest conveyed to the defendant by at least $2,916.25. If the plaintiff enters a remittitur of $2,916.25 within 30 days, the judgment of the district court will be affirmed; otherwise it will be reversed. Costs in this court will be taxed against the plaintiffs.

AFFIRMED ON CONDITION.

LETTON, J., not sitting.

MODERN WOODMEN OF AMERICA, APPELLANT, v. WALTER BERRY, GUARDIAN, APPELLEE.

FILED FEBRUARY 5, 1917. No. 19100.

1. **Insurance:** FORFEITURE: WAIVER. "A forfeiture incurred by the holder of a life insurance policy or contract is waived, if the company, with knowledge of the facts, subsequently collects premiums, dues or assessments on account of the contract, and retains them without objection until after the death of the insured." *Modern Woodmen of America v. Colman*, 68 Neb. 660.
2. **Principal and Agent:** NOTICE TO AGENT. "It is the duty of an agent to make known to his principal all facts concerning the service in which he is engaged that come to his knowledge in course of his employment, and this duty he is, in a subsequent action between his principal and a third person, conclusively presumed to have performed. This is the foundation of the rule, necessary to the public safety, that notice to an agent in the course of his employment is notice to his principal." *Modern Woodmen of America v. Colman*, 68 Neb. 660.
3. **Insurance:** PROHIBITED OCCUPATIONS. A decedent who had not been employed and who had not received compensation as a bartender, though he may for another occasionally have waited upon the customers of a saloon as an accommodation to the proprietor, was not a saloon bartender within the meaning of the prohibitive provision of the contract between plaintiff, a mutual benefit insurance society, and the insured.
4. **Trial:** MOTIONS FOR DIRECTED VERDICT: FINDING OF COURT. Where, at the close of the trial of a law action, each party moves for a directed verdict, the motion of one of the parties being sustained, the finding of the court takes the place of a verdict by the jury and will be so treated on appeal.

APPEAL from the district court for Seward county: EDWARD E. GOOD, JUDGE. *Affirmed.*

T. S. Allen, Truman Plantz and *J. J. Thomas*, for appellant.

Norval Bros. and *B. F. Good, contra.*

DEAN, J.

This action was begun by plaintiff against defendant, Walter Berry, guardian, in the district court for Seward

county, to recover $3,000 paid by plaintiff to defendant in pursuance of the terms of a beneficiary certificate in that amount that had been issued by plaintiff to Zack Berry, the insured, father of Walter G. Berry, his minor son, the ward of defendant. Recovery is sought on two grounds: First, that the insured had violated the terms of his application for membership, the by-laws of the order, and the terms of the beneficiary certificate by having engaged in a prohibited occupation, namely, that of selling intoxicating liquors as a saloon bartender after he had become a member of the society; and, second, because the $3,000 named in the policy was obtained from plaintiff by the deceit and fraud of defendant, in that the fact of Zack Berry's having been engaged in the prohibited occupation was by the defendant concealed from plaintiff by the use of false and fraudulent statements and affidavits in the proofs of death that were submitted to plaintiff. To properly dispose of the issues involved, we find it necessary to consider only the first ground of plaintiff's contention. In the trial court the suit was dismissed and judgment rendered in favor of defendant on a directed verdict, and plaintiff appeals.

At the close of the testimony both parties moved for a directed verdict. Plaintiff's motion was overruled. Defendant's motion was sustained. For the purpose of review, the action is thus brought within the rule which provides that, where at the close of a trial in a law action both parties move for a directed verdict, and the motion of either party is sustained, the findings of the court in such case upon questions of fact have the same force and effect that the verdict of a jury would have on like questions, and will be so regarded upon appeal to this court. *Dorsey v. Wellman,* 85 Neb. 262; *Martin v. Harvey,* 89 Neb. 173; *Krecek v. Supreme Lodge, F. U. A.,* 95 Neb. 428. The pertinent facts upon which plaintiff relies for reversal appear in the discussion following.

Zack Berry, the insured, became a member of the plaintiff society in February, 1899, while engaged in the occu-

pation of farming. He died on May 3, 1914. The required dues and assessments of the order had been paid by him yearly in advance, and at the time of his death all that were due or to become due until January 1, 1915, had been paid. Some time after Berry became a member of the society, he quit farming and became manager of a telephone company, and at a later period, leaving that employment, he engaged in the real estate business. He was engaged in the three occupations named from the time that his membership began until sometime in the fall of 1911, a period of about 13 years, when he entered the employ of Louis Hartwig, a saloonkeeper at Seward, and as a subordinate in the Hartwig saloon engaged more or less actively for his principal in the sale of intoxicating liquors over the bar to the customers. His employment continued in and about the saloon until sometime early in 1913, when he was discharged, and he followed no other regular employment between that time and his death, being mostly occupied in assisting in the care of an invalid wife. It seems that the insured was at the saloon of Hartwig frequently between the time of his discharge and until shortly before he died, a period of a little over a year, and that during this time he occasionally assisted his former employer, who was his friend, in the sale of intoxicating liquors to the customers of the saloon, but for these services he received no compensation. Within a convenient time after Zack Berry died, proofs of his death were submitted to plaintiff by defendant on the usual blank forms furnished by the society, and soon thereafter, in pursuance of the terms of the policy, $3,000 was paid to the defendant Walter Berry as guardian.

Zack Berry's application for membership, the by-laws of the society, and the beneficiary certificate or policy that was issued to him, together form the contract that is the basis of this suit. The application that is in evidence, among other things, provides that the applicant will conform to the by-laws then in existence or that

may thereafter be adopted, and that he will not, while a member of the order, engage in certain prohibited employments, among them being that of a wholesaler or manufacturer of liquors, saloon-keeper or saloon bartender, and that an engagement by him in any of the prohibited occupations will release the plaintiff society from liability upon the beneficiary certificate.

Section 5 of the beneficiary certificate in evidence provides: "If the member holding this certificate shall be expelled from this society or become intemperate in the use of alcoholic drinks, or in the use of drugs, or if he shall be or become engaged in the manufacture or sale of malt, spirituous, or vinous liquors as a beverage, in the capacity of proprietor, stockholder, agent, or servant, * * * then this certificate shall be null and void, and of no effect, and all moneys which have been paid, and all rights and benefits which may have accrued on account of this certificate, shall be absolutely forfeited, and this certificate become null and void."

The insured was regularly employed as a saloon bartender by Louis Hartwig, beginning in the fall of 1911, and his employment continued until the spring of 1913. And it is clearly in evidence that after he quit work in that capacity he was frequently at the saloon, sometimes as a patron, and when occasion presented sold intoxicants for his former employer over the bar, but he received no compensation for such services as he rendered in the saloon after he quit Mr. Hartwig's regular employ in the spring of 1913. Plaintiff argues that the fact of the insured having engaged in the prohibited occupation of a saloon bartender either for pay or gratuitously, after he became a member of the society, made his contract of insurance void.

In view of the decisions of this court and those of sister jurisdictions, the contention of plaintiff cannot be sustained. No other decision than that rendered by the trial court would have been right, in view of the record before us and of the authorities herein cited. Plainly

the plaintiff is bound by the knowledge of the local camp clerk, Borden, with respect to the employment of Zack Berry in a prohibited occupation, notwithstanding the contrary provisions in the application, the by-laws, and the certificate. To hold otherwise in view of the citations would be to ignore some of the elementary principles of agency. There is nothing in the record before us to show any collusion between Mr. Borden, the local camp clerk of plaintiff, and Berry, but the clerk is clearly shown to have had knowledge of his employment in the prohibited occupation at and before the time that the dues and assessments were collected. His knowledge is shown, not only by his own testimony, but as well by statements that he made to others on this subject some time before the beginning of the suit, and with which at the trial he was confronted. Mr. Borden seems to have acted within the scope of his authority. He accepted payment of dues and assessments tendered. In the present case he did so with knowledge of Zack Berry's occupation.

We adhere to the rule announced in *Modern Woodmen of America v. Colman*, 68 Neb. 660: "A forfeiture incurred by the holder of a life insurance policy or contract is waived, if the company, with knowledge of the facts, subsequently collects premiums, dues or assessments on account of the contract, and retains them without objection until after the death of the insured.

"It is the duty of an agent to make known to his principal all facts concerning the service in which he is engaged that come to his knowledge in course of his employment, and this duty he is, in a subsequent action between his principal and a third person, conclusively presumed to have performed. This is the foundation of the rule, necessary to the public safety, that notice to an agent in the course of his employment is notice to his principal."

The following cases in this and other jurisdictions seem fairly to support the rule invoked by defendant:

Pringle v. Modern Woodmen of America, 76 Neb. 384, 388; *Modern Woodmen of America v. Lane,* 62 Neb. 89; *Knights of Pythias v. Withers,* 177 U. S. 260; *Distilled Spirits,* 11 Wall. (U. S.) 356; *Supreme Tent, K. M. W., v. Volkert,* 25 Ind. App. 627; *Order of Columbus v. Fuqua,* 60 S. W. (Tex. Civ. App.) 1020; *High Court, I. O. F., v. Schweitzer,* 171 Ill. 325; *McCormick v. Catholic Relief & Beneficiary Ass'n,* 39 App. Div. (N. Y.) 309; *Supreme Lodge, Knights of Honor, v. Davis,* 26 Colo. 252; *Supreme Council, C. B. L., v. Boyle,* 10 Ind. App. 301; *Modern Woodmen of America v. Breckenridge,* 75 Kan. 373; *La Dow v. North American Trust Co.,* 113 Fed. 13; *Downs v. Knights of Columbus,* 76 N. H. 165; *Callies v. Modern Woodmen of America,* 98 Mo. App. 521; Richards, Insurance Law (3d ed.) sec. 356; 1 May, Insurance (4th ed.) sec. 213.

Stevens v. Modern Woodmen of America, 127 Wis. 606, construes a by-law having substantially the same prohibitive provision with respect to a saloon bartender that is involved herein. It is there held that one who occasionally waited on customers in a combination restaurant and saloon and sometimes sold intoxicants as an accommodation to his employer, but without any compensation for the services so rendered in the saloon, is not a saloon bartender, even though his regular duties in and about the saloon were those of a chore boy.

Plaintiff cites *Krecek v. Supreme Lodge, F. U. A.,* 95 Neb. 428: The *Krecek* case is scarcely applicable to the case at bar for the reason that it therein appears that, "When the applicant for membership conspires with the secretary and others of the subordinate lodge to deceive the company and to withhold from it knowledge of facts disqualifying the applicant for membership, the presumption of knowledge of such facts on the part of the company is overcome." In the *Krecek* case the membership certificate of the applicant had been procured by the fraud of Krecek and the secretary of the local lodge who conspired together to deceive the lodge, and

in the application for membership the statement was made that the applicant had not been engaged in a prohibited occupation, but such was not the fact. Krecek was a saloon-keeper when he made application. After his death the secretary, upon inquiry, frankly stated that the "purpose was to conceal the real facts." In that case, too, the case of *Modern Woodmen of America v. Colman,* 64 Neb. 162, and on rehearing, 68 Neb. 660, and *Pringle v. Modern Woodmen of America,* 76 Neb. 384, and, on rehearing, 388, are distinguished.

There is some conflict in the testimony, but the facts in dispute were passed on by the trial court, and there being sufficient testimony to support the judgment it will therefore not be disturbed. The judgment of the district court is right, and is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

STATE OF NEBRASKA, PLAINTIFF, V. STANDARD OIL COMPANY ET AL., DEFENDANTS.

FILED FEBRUARY 13, 1917. No. 19518.

1. **Constitutional Law:** INSPECTION FEES: REASONABLENESS. The fee of ten cents a barrel, chargeable for the inspection of oils, under section 2555, Rev. St. 1913, although reasonable at the time of its first enactment, is now, and for many years has been, clearly in excess of the amount reasonably necessary to effectuate the lawful purposes of the act.
2. ———: ———: PRESUMPTION. Where the inspection fees exacted under the state statute average largely more than enough to pay expenses, the presumption is that the state will reduce them to conform to the constitutional authority to impose fees solely to reimburse for expense of inspection.
3. ———: ———. The amount of the excess over what is reasonably necessary to pay the expenses of oil inspection, giving to the law the character of a revenue measure, rather than merely a police measure, has been a matter of public record for many years, and

the legislature, although it has amended the law, has failed to reduce the amount charged for inspection. *Held*, that that portion of section 2555, Rev. St. 1913, fixing the fee at ten cents a barrel as an inspection fee, is void as violative of section 1, art. IX of the Constitution, providing for equal taxation.

Action by the State involving the validity of the Oil Inspection Law. *Judgment for defendants, determining the law invalid.*

Willis E. Reed, Attorney General, J. J. Sullivan and *Arthur F. Mullen*, for plaintiff.

W. D. McHugh and *Amos Thomas*, contra.

CORNISH, J.

This action involves the validity of the oil inspection law, in so far as it fixes a fee of ten cents a barrel for inspecting oil. In practical operation the receipts for inspection are so far in excess of the cost of inspection as to make the law a revenue measure, rather than one under the police power providing merely for the reasonable expenses of inspection.

The law has been in force since 1895. In April, 1913, the oil department was consolidated with the food, drug and dairy department. The following is a statement of receipts and expenditures:

Total receipts from oil inspection to April, 1913	$438,647.51
Total expenses for oil inspection	217,359.26
Excess of receipts over expenses (50.4 per cent.)	$221,288.25
Total receipts from oil inspection alone since the consolidation, April, 1913, to May 1, 1916	$271,521.33
Total combined expenses for all purposes for same period	134,672.24
Excess of oil inspection receipts over combined expenses (50.4 per cent.)	$136,849.09

Total receipts from all sources from time of consolidation to May 1, 1916	$325,918.28
Total combined expenses	134,672.24
Excess of all receipts over all expenses (58.7 per cent.)	$191,246.04

It is agreed by the parties that the present excess of receipts over expenditures gives the law the character of a revenue measure, and as a present enactment would be unconstitutional. It would be violative of section 1, art. IX of the Constitution, providing for equal taxation. *State v. Bartles Oil Co.*, 132 Minn. 138; *State v. Poynter*, 59 Neb. 417; *State v. Savage*, 65 Neb. 714; *Bartels Northern Oil Co. v. Jackman*, 29 N. Dak. 236; *State v. Cumiskey*, 97 Kan. 343. It would be violative of the United States Constitution as an attempt to regulate or interfere with interstate commerce. *Foote & Co. v. Stanley*, 232 U. S. 494; *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380.

It is the contention of the state that the law does not cease to be valid until the legislative department of the state, with knowledge that in its operation the inspection fee is excessive, fails or refuses to modify or repeal the law; that it is a question of good or bad faith of the legislature. While it is admitted by the defendants and cross-petitioners that no complaint was made by them of the operation of the law before this suit was instituted, they contend that the state and its legislative department have at all times had notice and knowledge of the wrongful operation of the law; that bad faith is shown, so far as it is necessary to be shown, when the law itself in operation proves to be bad; that it is a question rather of the power of the state to impose such a tax than of legislative intent. They are not asking the refunding of money unlawfully paid, but are objecting to further payment.

The knowledge or notice that the state has had is evidenced by the following facts: From 1907 to May,

1913, the excess averaged 63 per cent., reported monthly to the state auditor and to the governor. In 1913 the state oil inspector, in his printed report to the governor, used this language: "We of this department are considerably gratified after paying all the expenses of every kind, we are able to turn over to the state treasury for the years 1911 and 1912 something over $76,000." In the printed report of January 1, 1915, 2,500 copies of which were circulated over the state, attention is called to the fact that, since the consolidation of the two departments, $80,000 has been collected over and above the cost of operation of the two departments. The Nebraska Blue Book and Historical Register for 1915, a copy of which was delivered to each member of the legislature, contained a statement, covering the years 1886 to 1912, inclusive, showing: Total receipts for oil inspection $470,004.75. Total salaries and expenses $228,240.35. Total amount paid to state treasurer $214,238.38. The evidence further shows that, although the legislature has a number of times amended the law governing oil inspection since the first enactment, the ten-cent rate, here involved, has remained the same.

We are of the opinion that these facts show that the state had knowledge, if indeed it is not charged with constructive knowledge, of the practical operation of the law; that, while amending the law, it has seen fit to leave the inspection fee as originally established; that there is no room for indulging the presumption that the legislature has any intention of reducing the inspection fee.

As bearing upon its contention as to bad faith, and the necessity of directly challenging the legislature's attention to the situation, plaintiff cites *Red "C" Oil Mfg. Co. v. Board of Agriculture, supra, Wadhams Oil Co. v. Tracy,* 141 Wis. 150, and *State v. Bartles Oil Co., supra.* In the case first cited the plaintiff attempted to enjoin the enforcement of an act two days after it went into effect. The court, through Chief Justice White, uses language as follows (p. 391): "The mere designation of

the exaction as a tax is not sufficient to warrant the deduction that the charge authorized for the inspection was not one really for such purpose. We cannot lightly attribute improper motives to the law-making power." The court would not pronounce the law invalid before trial of it. The question of failure to reduce a fee because it had proved excessive, and of the presumptions arising therefrom, was hardly under consideration. The counterpart of the same question, however, is stated in the syllabus as follows: "If the inspection fees exacted under a state statute average largely more than enough to pay expenses, the presumption is that the state will reduce them to conform to the constitutional authority to impose fees solely to reimburse for expense of inspection."

In *Wadhams Oil Co. v. Tracy, supra,* the plaintiff sought to enjoin the execution of the law for various reasons. A demurrer to the petition was sustained. While the petition contained a general allegation that the fees were exorbitant, the court did not treat it as a case where, in its operation, the law had proved to be a revenue measure. The court disposes of the question in paragraph 6 of its syllabus as follows: "An allegation in a complaint, challenging the legitimacy of an ostensible police regulation on the ground that the fees provided for are so large as to show, clearly, that the object thereof was revenue, does not tender an issue of fact for confession or denial by the adverse party, when it can be clearly seen from the face of the pleading, in the light of common knowledge and established judicial rules, that the fees are within reason as mere expenses of executing the law."

The case of *State v. Bartles Oil Co.* 132 Minn. 138, attaches more importance to legislative bad faith or intention than others cited. In the body of the opinion, *Foote & Co. v. Stanley, supra,* and *Red "C" Oil Mfg. Co. v. Board of Agriculture, supra,* are cited as holding: "That the courts do not interfere immediately upon it

being made to appear that the amount collected is beyond what is needed for inspection expenses, because of the presumption that the legislature will reduce the fees to a proper amount." Both of these are cases where the court was considering merely the language of the statute, and not its workings in actual operation. The Minnesota opinion recites the fact that from 1903 to 1913, inclusive, the expenses fluctuated from 53 to 98 per cent. of the receipts, averaging 82 per cent.; that these expenses covered only the actual expenses of oil inspection, with no allowance for incidental services rendered by the other departments of the state. It recites that its last legislature had reduced the fee from ten to seven cents. While admitting that the record shows that the fees have been higher than necessary to meet the expenses of an economical inspection, the court say that, under the rules fixed for its guidance, it cannot say that the statute is invalid.

It will be noted that in the Minnesota case no question of what notice or knowledge the legislature needed to have was considered. So far as the opinion shows, the legislature at all times knew the operation of the law. The facts in that case, as will be noted, are radically different from those in the case in hand, both as to the excessive fees and as to legislative action. We think that a careful consideration of the opinion in the Minnesota case, not the law of it as expressed in the syllabus, will show that about all the court has stated, touching this question, is as follows: It recognizes the law to be that the fixing of an inspection fee is a matter within the reasonable discretion of the law-making body; that the courts have no right or authority to interfere until the law, either on the face of it or in its operation, shows that there has been an abuse of discretion on the part of the legislature. Ordinarily, the legislature at the time of enacting a law cannot know beforehand exactly what its working results will be. It follows that the courts will not ordinarily interfere immediately with its execu-

tion because that would be to say that a law which was reasonably within the discretionary power of the legislature was really enacted in bad faith and intended as a revenue measure. This may be the law. The legislature having a discretionary power and having used it fairly, the courts will always wait until the law is proved bad in operation, and even then will wait until that department of the state, charged with the duty of making and amending its laws, has had time and opportunity to act. Suppose this to be the law. It has no application to a case like the one in hand where for many years the receipts for inspection have been so grossly in excess of expenses of inspection as to give the law the character of a revenue measure, to the knowledge of the state, as shown by the public records.

Whether or not knowledge or good or bad faith of the legislature is a material issue in a case of this kind, we do not decide. It is the opinion of the writer that the legislative intent of members of the legislature is quite immaterial. The legislature must be presumed to intend that the statute will operate as experience demonstrates that it does, in fact, operate.

Let us add that, while it is within the power of the state, for economy or other reasons, to consolidate departments, as was done here, the legislature, in fixing its fees for inspection, should so fix them for each department or business that neither can complain that an unfair proportion of the burden of inspection is placed upon it. The guiding rule for the legislature is to so exercise its discretionary power that the fee established in each business or occupation will, as near as may be, yield an amount not more than reasonably sufficient to pay the cost of inspection in such business or occupation.

We are therefore of the opinion that the inspection fee of ten cents was unenforceable as against the defendants at the time they filed their answer and cross-petition objecting thereto.

Inasmuch, however, as the law requires that inspection should be had before oil can be sold in the state, and it is equitable that the expenses of inspection should be paid by the defendant oil companies, it is ordered that the inspection fees, heretofore collected and now in the hands of the clerk of this court, be retained until the further order of the court.

JUDGMENT FOR DEFENDANTS.

MATTIE A. ELLIOTT, ADMINISTRATRIX, APPELLANT, V. ÆTNA LIFE INSURANCE COMPANY, APPELLEE.

FILED FEBRUARY 21, 1917. No. 18822.

Garnishment: LIABILITY OF INDEMNITOR. Where, according to the terms of an indemnity policy, an insurance company has taken sole and exclusive charge of the defense of an action against the insured for damages for the death of the latter's employee and a judgment has been rendered against the insured, the liability of the insurance company is subject to garnishment where the insured is insolvent, notwithstanding a provision that "no action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue."

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE, *Reversed.*

W. C. Lambert and *S. L. Winters,* for appellant.

Gurley & Fitch, contra.

MORRISSEY, C. J.

Plaintiff recovered a judgment against the General Construction Company for the death of her son while in its employ, and in garnishment proceedings summoned the Ætna Life Insurance Company, which had insured the General Construction Company against loss resulting

from claims for damages on account of injuries or death suffered by any employee. The garnishee denied liability to the judgment debtor, on the ground that the latter was insolvent and had not paid the judgment, the policy providing: "No action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue."

The garnishee was discharged. This action was brought to recover from the Ætna Life Insurance Company for an unsatisfactory answer in the garnishment proceedings. From an order sustaining defendant's demurrer and dismissing the action, plaintiff has appealed.

In addition to the provision quoted, the policy also provided: "Upon the occurrence of an accident the assured shall give immediate written notice thereof with the fullest information obtainable to the home office of the company at Hartford, Connecticut, or its duly authorized agent. If a claim is made on account of such accident the assured shall give like notice thereof with full particulars. The assured shall at all times render to the company all co-operation and assistance in his power.

"If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the company's home office every summons or other process as soon as the same shall have been served on him, and the company will, at its own cost, defend such suit in the name and on behalf of the assured, unless the company shall elect to settle the same or to pay assured the indemnity as provided for in condition A hereof.

"The assured, whenever requested by the company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses, and in pros-

ecuting appeals, but the assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at his own cost, without the written consent of the company previously given, except that the assured may provide at the company's expense such immediate surgical relief as is imperative at the time of the accident."

The petition alleges that the insured complied with the provisions of the contract and surrendered control of the action, that defendant herein conducted all negotiations for settlement, took sole charge of the action against the General Construction Company, and from a judgment in plaintiff's favor took an appeal to the supreme court, where the judgment was affirmed. *Elliott v. General Construction Co.*, 93 Neb. 453. It may also be inferred from the petition that the insured was insolvent when the action against it was commenced.

The question presented seems to be: Where, according to the terms of an indemnity policy, an insurance company has taken sole charge of the defense of an action against the insured for damages for the death of the latter's employee and a judgment has been rendered against the insured, is the liability of the insurance company subject to garnishment where the insured is insolvent, where the policy provides that "no action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue?"

Defendant contends that the policy is an indemnity contract, and that under the terms of the provision just quoted it is in no case liable to the insured until the latter has actually paid the judgment. In the interpretation of a contract an admissible and a reasonable construction which will not render it invalid should be adopted. The general purpose of the contract should also be considered. The general object of the indemnity

was that losses arising from injuries to employees should not fall upon the employer, but upon the insurer, who by the collection of premiums creates a fund with which to pay such losses. To cheapen the cost of insurance the insurer agreed to defend at its own cost all actions which it should be unable to compromise. The employer surrendered control of the litigation, and the insurer, through its attorneys, resisted the claim of plaintiff, was unsuccessful, and appealed to the supreme court, where the judgment was affirmed. *Elliott v. General Construction Co.*, 93 Neb. 453. For every purpose except that of paying the judgment the insurer has been the real litigant. After it has exhausted all legal measures in attempting to defeat plaintiff's claim, it attempts to deprive her of the fruits of the litigation by relying upon the failure of the insolvent employer, the judgment debtor, to pay the judgment, as required by the following provision of the contract: "No action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue."

This is a proper provision to protect the insurer from claims of the employer before the latter has paid the judgment, since the purpose of the contract was to reimburse him, and not to provide him with funds which he might or might not use to pay a judgment recovered by an employee. This protection is not denied the insurer when through garnishment proceedings after judgment it is compelled to pay a judgment rendered against an insolvent employer. Its obligation under the contract is discharged as fully as if it had paid the employer after he had paid the judgment. Any other construction can serve no purpose except to defeat the collection of plaintiff's judgment. Where the insurer has been the actual litigant it will not be permitted to defeat the collection of the judgment

by insisting upon such a construction. The conclusion here reached has been justified by the supreme court of Minnesota in the following language:

"Upon the record did it appear that the company, the garnishee, was indebted to the defendant when the disclosure was had? It may be conceded that the company intended so to frame the policy that not every avenue of escape from payment in case of a loss should be closed. The main purpose of its business is to obtain and retain the premiums. The object of the assured is to get protection. The object and purpose of the contracting parties is not to be lost sight of in construing a contract, nor is the rule that in case of ambiguity it must be resolved against the one who prepared the instrument."

"If suit is brought on a claim intended to be covered by this policy, the company, after notice, agreed to defend; but, not only that, it reserved to itself the exclusive right to settle or carry on the litigation, excluding the assured from any interference therewith. On these provisions the company acted, assumed the defense, and has carried on the litigation to the bitter end, even after defendant left this jurisdiction. The assured retained no voice or interest in the litigation. The company substituted its interests and its judgment for that of the assured in the action. By so doing it assumed a relation to this plaintiff, and to every plaintiff where under its policy it steps into a suit, which must be considered in construing the contract. Neither public policy nor legal principles can be invoked against the validity of these provisions, if they mean no more than an undertaking to contest an asserted claim against the assured, for which it is liable when established; but if, under the pretense of an insurance obligation, the company carried on litigation in the name of one who has neither voice nor interest therein, and which does not affect the company itself, because the assured is

unable or unwilling to pay if plaintiff is awarded judgment, it would seem the company becomes an officious intermeddler. Public policy does not permit a litigant to so surrender control of his lawsuit to one who has no interest in the cause of action. A contract between client and attorney, although the attorney has a lien for his fees on the cause of action, is void, if the client is excluded from control of the cause of action. The policy here should be so interpreted, if possible, that its provisions do not run contrary to law, and that result is reached by holding that the undertaking to defend means something more than carrying on litigation in court. * * * We therefore hold that, in a policy such as this, where the company has come into the litigation and assumed exclusive control thereof under its contract, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment it so permits to be established, not exceeding the sum stipulated in the policy, and also that, as to the plaintiff, it should be considered that such judgment is a debt due the assured from the company, and not dependent on any contingency. Payment of the judgment, so far as the rights of the company are concerned, in such case, is a mere *pro forma* matter, and not a condition precedent to its liability to defendant under plaintiff's garnishee proceeding." *Patterson v. Adan,* 119 Minn. 308.

It must be conceded that the majority of courts passing upon this question have taken a different view. The cases are reviewed in *Fidelity & Casualty Co. v. Martin,* 163 Ky. 12. The conclusion reached in the present case, however, is in harmony with the general purpose of the contract, promotes justice, and deprives the indemnitor of no legitimate protection.

The judgment of the district court is therefore reversed and the case remanded.

REVERSED.

CORNISH, J., dissenting.

The maxim, "no wrong without a remedy," refers to legal wrongs. In a free state, where men buy, sell, contract, and mingle with each other, inequities arise of which the law takes no cognizance. My brothers of the bench feel sure that the plaintiff, if defeated, would suffer wrong. I think they are mistaken, and, whether mistaken or not, I feel sure that the decision does the defendant a legal wrong.

Stripped of legal verbiage, the question is: Will the courts permit a contract wherein the insurer promises to indemnify the employer against loss from accident to employees on condition that he shall be notified, shall consent to any settlement made, be permitted to defend the lawsuit, if any, and also on condition that it shall be so far an indemnity contract that the insurer shall not be liable until the employer has actually paid the loss sustained, as determined in settlement or in court?

If such a contract will be permitted, then the contract under consideration will be permitted. One can safely challenge opposition to find a term or provision lacking for such a contract. Its history is that it was carefully drawn with a view to the "payment-first" provision and agreed to by the parties to it. Now, when parties have freely contracted, the courts must abide by the terms of the contract, or tell why not; otherwise, the court makes the contract for the parties and becomes a legislative body. A mere inequity as between the parties is not sufficient. Some ambiguity or repugnancy must be shown, or that it is unconscionable, against public policy, or otherwise forbidden by law. Hard cases make bad law.

In the body of the opinion the court reaches its conclusion through an interpretation of the contract, and gives as a reason for its interpretation that to require payment by the employer of the judgment, before liability of the insurer arises, would make the contract

one against public policy. In the syllabus, which is supposed to state the law of the case, the rule is not made to depend upon interpretation at all, but applies to any contract containing the provision quoted in it. Suppose the next contract which comes before us should be one containing a provision like the one quoted in the syllabus, with these words in addition: "Let no one, either the courts or anybody else, construe this contract to mean that in a certain event the insurer is liable before payment of the loss by the employer; it means, as of course we always intended it to mean, that in no event, the parties having lived up to their contract, shall the insurer be liable until the employer has suffered the loss; that is, has paid it." Will the court then, contrary to the opinion, refuse to call the contract void as against public policy? Will it, in accordance with the rule stated in the syllabus, hold that the liability still exists, even though the contract is against public policy? Probably not; for if, in any such case, the quoted provision is against public policy, then the whole contract, being inseparable, fails. The courts will not perforce give a contract the construction that its language will not permit, to prevent its being void as against public policy.

In the opinion, interpreting the contract, it is thought its provisions may "mean no more than an undertaking to contest an asserted claim against the assured, for which it (the insurer) is liable when established." The "undertaking to contest" is squarely and fully provided for in a section preceding the quoted provision. The quoted provision is the only one in the contract which undertakes to tell when the liability for payment arises against the insurer. Read it again. It seems to the writer that it can have but one possible meaning; that is, that the employer must pay the loss before he is entitled to be indemnified.

It is argued, not as a matter of estoppel, but of interpretation, that the quoted provision may have in

mind a case where the insurer has refused to defend, in which case he will not be liable until the employer has paid the judgment. This suggestion does violence to the terms of the contract. The undertaking to defend is absolute. It forgets that the policy throughout is one to indemnify against loss, and not against liability. The insurer has no right of election to defend or not. By its plain terms, the insurer must either settle, defend, or pay. Under such an interpretation, the insurer can defend only on penalty of assuming the entire liability of the suit.

Would a provision making liability contingent on payment by the employer, combined with the provision that the insurer shall have control of the defense, make the contract void as against public policy? Not, I think, unless we are to make new law. As said by one of the early judges, "Public policy is an unruly horse and dangerous to ride." "Judges are more to be trusted as interpreters of the law." Public policy extended might lead us anywhere, just as would the practice, in deciding cases, of not applying the general rules of the law, but following our sense of equity in the individual case.

So far is the provision requiring notice to the insurer and a right to defend from being against public policy, that what is most valuable in that provision for him would be his, if the provision were entirely left out of the contract. He is the real party in interest, the one who should defend, the one who may have to pay the judgment. At common law, one who has to pay the judgment is entitled to notice, has a right to be present and even be given a voice in the trial. The court would protect his interest to see that no unjust judgment was obtained. The insurer's case is not that of an intermeddler, or of a lawyer, buying a lawsuit, stirring up a lawsuit, or preventing settlement. Probably, at common law, without any contract for it, the employer could not hold him to a settlement without his consent. Under

this contract, the employer is as free to settle as if he had never paid his $30 premium.

How can it be said that the insurer has no interest in the lawsuit when the employer is insolvent? That is to say that insolvents have no credit. Ordinarily, or at least in half of the cases, the insolvent will find it easy to get the money to pay the judgment. The argument assumes that the insurer will know of the insolvency.

Much time is spent in discussing the propriety and purpose of the quoted provision requiring payment first. I do not care how hard this provision may appear to be in the present case. In my opinion, its meaning being clear and unambiguous, the particular purpose or reason which the parties had for inserting it is not the business of the court. The fact that, as free contracting parties, they placed it there is sufficient. If reasons are necessary, they are at hand. The insurer wished to make a strictly indemnity contract. He did not care to be subrogated to a loss which the employer was released by his insolvency from paying. The insurance world recognizes the fact that the irresponsible man is a greater risk than the responsible one. In cases like the one in hand the danger of collusion between employer and employee at once arises. Again, the insurer, on grounds of business policy, may prefer to make sure that the money goes to the injured employee. Without the provision, it may go elsewhere. The opinion itself says: "This is a proper provision to protect the insurer" against the misapplication of the fund. But such need for this protection could only arise in case of insolvency. So we have the court, at this point, making the provision a proper one for this purpose, but, later on in the opinion, holding that it never has any use or application except when the insurer has not conducted the defense. If the provision is in for one purpose, it is in for all purposes within its expressed meaning. The court cannot say it shall apply for this purpose, and

justify itself in refusing it for other purposes because, in the individual case, it would work a hardship, contrary to its notions of justice. The laws are adapted to those cases which more frequently occur. It seems to me the opinion exhibits a strained construction of the contract, due to the particular circumstances of the case. If these contracts work a hardship on employees, that is a consideration for the legislature, not the courts of justice.

The contract, on simple view, is clear and easily understood. Argument about it and the refinements of logic, to make it mean something else, are only confusing. Twenty-four courts, besides the trial court, have passed upon this contract. All but three of them have construed it to be an indemnity, not a liability contract. For a review of the cases, see the recent case entitled *Fidelity & Casualty Co. v. Martin,* 163 Ky. 12.

The courts must remember that they are neither lawmakers nor contract-makers, and that contracts not prohibited by law are the law between the parties to them. As said by Sir Frederick Pollock, in his article on Contracts, 7 Ency. Brit. p. 35, the enforcement of contracts is among "the most important functions of legal justice." Page 38: "The business of the law, therefore, is to give effect so far as possible to the intention of the parties, and all the rules for interpreting contracts go back to this fundamental principle and are controlled by it. * * * A rule which can take effect against the judicially known will of the parties is not a rule of construction or interpretation, but a positive rule of law." If we deviate from this rule of construction, there will arise general confusion and uncertainty as to what the law is, not conducive to the ends of justice.

JOHANNA SPRATLEN, ADMINISTRATRIX, APPELLANT, V. JAMES C. ISH, ADMINISTRATOR, APPELLEE.

FILED FEBRUARY 21, 1917. No. 19123.

Negligence: INJURY: PROXIMATE CAUSE. The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

De Bord, Fradenburg & Van Orsdel and *John O. Yeiser,* for appellant.

W. W. Slabaugh, contra.

MORRISSEY, C. J.

In December, 1909, Fred Spratlen and his family were tenants of Martha M. Ish. The house was equipped with gas fixtures, and was lighted by gas. One of the pipes which ran through the cellar was so constructed that there was a sag or bend therein, and as the moisture in the gas became cooled during the cold weather it settled in this sag and froze. The ice thus formed stopped the flow of gas. Some member of the Spratlen family notified the gas company, and the company sent a man to remedy the trouble. He opened a number of gas jets (among others the one in the bedroom in which plaintiff's decedent slept), and poured alcohol into the pipes for the purpose of thawing the ice. The jet in decedent's bedroom was left open, but, owing to the ice in the pipe, no gas escaped at the time. Mr. Spratlen came in during the night and retired as usual. Some time afterwards, by the action of the alcohol and the rising temperature, the ice thawed, the gas flowed through the pipe, escaped through this jet which the gas company's agent had left open, and Mr. Spratlen was asphyxiated.

The widow, as administratrix of his estate, filed suit against the gas company and Mrs. Ish, the owner of the house. Subsequently plaintiff made a settlement with the gas company, which paid $3,000 into court and was discharged of all liability, and the case against Mrs. Ish was dismissed. Plaintiff then filed this suit against Mrs. Ish and her son, James C. Ish. The petition seeks to attach liability to Martha M. Ish on the theory that she, as the owner of the house, maintained this defective and improperly drained pipe in which the liquid froze; that this freezing prevented the flow of the gas; that the gas company's employee undertook to eliminate the trouble; that in doing so he left the gas jet open; that the gas company was negligent in leaving the jet open; and that Mrs. Ish was negligent in maintaining these sags or traps in the gas pipes.

James C. Ish, it was alleged, was not a licensed plumber, but that he had done the plumbing in this instance, and was therefore liable for its defective condition. James C. Ish denied that he had done the plumbing. The cause of action against him seems to have been abandoned on the appeal. At the conclusion of plaintiff's evidence, the trial court, on defendants' motion, directed the jury to return a verdict for both defendants. Motion for new trial was overruled, and the plaintiff appeals.

Plaintiff argues that this accident would not have happened if the defendant had not trapped the water in the pipe; in other words, had the pipes properly drained, the agent of the gas company would not have been called and the jet would not have been left open; that the negligent construction of the pipe and the negligent conduct of the gas company were concurrent, and therefore Mrs. Ish and the gas company are jointly and severally liable. Perhaps this case might be disposed of under the rule in *Davis v. Manning*, 98 Neb. 707, but we think it better to meet the direct question: Was the alleged negligent plumbing the proximate

cause of the injury? If this question is answered in the negative, it is unnecessary to determine the rights of landlord and tenant.

The alleged negligence, it will be noted, consisted in permitting one of the gas pipes to sag so that it did not drain properly, and the liquid therein froze and shut off the flow of gas which was desired for illuminating purposes. Had the gas jet been left closed, this would merely have caused inconvenience in lighting the house, but would have caused no other injury. Asphyxiation does not occur from shutting off the flow of gas, but from permitting it to escape. No stretch of the imagination will permit a holding that asphyxiation of plaintiff's decedent was the natural and probable result of such plumbing. If it was not, plaintiff is not entitled to recover.

"An injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated." *Chicago, St. P., M. & O. R. Co. v. Elliott*, 5 C. C. A. 347, 20 L. R. A. 582.

"The concurring negligence of another cannot transform an act of negligence which is so remote a cause of an injury that it is not actionable into a cause so proximate that an action can be maintained upon it. It cannot create a liability against one who does not legally cause it, or make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence." *Cole v. German Savings & Loan Society*, 59 C. C. A. 593, 63 L. R. A. 416.

Even assuming that defendant had knowledge of the defective plumbing, that she knew that the liquid in the gas might not drain off properly, that the pipes would freeze and the flow of the gas be intercepted,

yet she could not have foreseen that the gas company's agent would open the jet and remove therefrom the porcelain tip, and leave the jet open, that plaintiff's decedent would return home during the night and retire without observing the condition of the gas jet, that while he slept the temperature would rise and thaw the ice, that the flow of gas would be resumed and the fatal consequences follow. The defect in the plumbing is legally too remote to contribute to the death, or to impose liability upon the landlord. It was not the proximate cause of the injury. That the trap or sag in the pipe furnished the causation or condition which rendered the accident possible is not to be disputed, but it cannot be logically and reasonably maintained that the landlord should have foreseen or anticipated the negligent conduct of the gas company's employee.

The judgment is

AFFIRMED.

LETTON, J., not sitting.

CHARLES A. RICHEY, APPELLEE, V. OMAHA & LINCOLN RAILWAY & LIGHT COMPANY, APPELLANT.

FILED FEBRUARY 21, 1917. No. 19889.

1. **Contracts:** CONSTRUCTION. Technical terms in a contract may be given a nontechnical meaning relied upon by one party, where the other party had reason to suppose the former so understood them. Rev. St. 1913, sec. 7909.
2. **Injunction.** An injunction may be granted to prevent a public service corporation from wrongfully cutting off a supply of electricity which it is under contract to furnish.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Brome & Brome for appellant.

Vinsonhaler, McGuckin & Caldwell, contra.

ROSE, J.

Plaintiff is a dealer in sand, and by means of pumps procures his supply from the Platte river near Louisville. Defendant operates an electric railway between Omaha and Papillion, and transmits and sells electricity for power and other purposes. Under a contract dated February 6, 1914, the parties agreed that plaintiff should be supplied with electricity for the term of two years, and that he should have the privilege of extending the period to five years—an option which he has exercised. For a time plaintiff operated his pumps with electricity furnished under the contract. Claiming that he refused to pay for power used, defendant severed the wires and removed the appliances employed in delivering currents. Plaintiff resorted to equity. From a decree requiring defendant to restore the abandoned service and enjoining further interference therewith in violation of the contract, this appeal is taken.

The appeal presents these questions: Was plaintiff in default in paying for electricity furnished? Was he entitled to the equitable remedy of injunction? Whether he was in default depends on the contract. The material provisions are:

"The rate to be charged for this current will be 2½ cents per kilowatt-hour for the first 60 hours use per month of the maximum demand; 2¼ cents for the second 60 kilowatt-hours, and 2 cents for all current in excess of 120 hours' use of maximum demand per month. In addition to the above a fixed charge of $1.50 per horse-power of maximum demand per month will be charged; said maximum demand to be determined by taking the highest average for 15 consecutive minutes (measured by a maximum-demand meter of standard make) during the month for which bill is rendered; said average to be figured on a kilowatt-hour basis. All current to be measured by standard make electrical meters. You to guarantee us a minimum revenue of $9 per annum per horse-power connected, based upon

the rated capacity given by the manufacturer of the motor. * * *

"We will guarantee that at the above rate your total net cost of operating your 75 horse-power motor on an 8″ sand pump shall not exceed $1 per hour, and it is agreed that should, at the above rate, the total amount of your bills exceed the above guaranty, then you are to make payment to us on the guaranty basis. Should the amount not equal the guaranty basis, you are to remit in accordance with the rates in the foregoing paragraph. You to report the actual number of hours motor is operated each month; we to retain the privilege, however, of installing a registering meter at any time. All installations to be based on the same guaranty, in proportion to the horse-power connected. * * *

"Each of your plants are to be dealt with as a separate proposition, but each to be operated under the foregoing conditions."

The trial court found that plaintiff was required to pay for electric power furnished at a rate not exceeding $1 an hour for each 75 horse-power motor, "based upon the rated capacity given by the manufacturer of the motor," and that payments for additional power should be made on the same basis. If this construction is correct, plaintiff, as shown by the proofs, paid for all the power used by him before bringing suit. Defendant contends, however, that plaintiff was required to pay for the power actually used at the rate specified in the first paragraph of the contract copied herein; the guaranty, as understood by defendant, being that the cost of operating a pump one hour should not exceed $1 for each 75 horse-power used, without regard to the manufacturer's rated capacity of the motor. Evidence on defendant's behalf shows that electrical engineers use the term "horse-power connected" as meaning the power actually used, which may be twice the manufacturer's rated power of the motor. Under such a construction of the contract the amount due for

power used each month would exceed the amount for which plaintiff has paid. In view of the entire record, however, the construction adopted by the trial court seems to be correct. Prior to the execution of the contract, defendant proposed the rate mentioned in the first paragraph quoted herein, but plaintiff said that he knew nothing about electrical terms, and that he had been operating a 60 horse-power oil-engine at a cost of 65 cents an hour. The guaranty clause, the second paragraph copied herein from the contract, was then inserted and the contract executed. Under the circumstances the guaranty clause controls conflicting provisions. The contract was drafted by defendant's agents. They were familiar with their technical terms and they knew that plaintiff was not. They had occasion to learn his understanding of the guaranty clause, when considered with the entire contract and the surrounding circumstances. The sense in which they had reason to suppose he understood the contract must prevail. Rev. St. 1913, sec. 7909. He was not in default in paying for electric power used under this construction of the contract.

Was plaintiff entitled to an injunction? Defendant contends that an action at law for damages would afford plaintiff adequate relief. Defendant is a corporation organized under the laws of Nebraska, relating to the organization of railway companies. Rev. St. 1913, secs. 5927-5935. The articles of incorporation authorize it "to generate, sell and transmit electricity for power, light and heating purposes, and for general use to persons, corporations, or municipalities." It is operating an electric railway from Omaha to Papillion. Under authority of statute it transmits "over its right of way currents of electricity for the purpose of * * * supplying power for the use of such railroad and the use of others." Rev. St. 1913, sec. 5930. In its answer defendant admits that it is "engaged in the transmission and sale of electricity to serve individ-

uals and corporations." The proofs justify a finding that defendant in transmitting and selling electricity is a public service corporation. In that event, defendant insists that plaintiff has an adequate remedy by mandamus. That is the proper procedure to compel a public service corporation to furnish service to the public. *State v. Nebraska Telephone Co.*, 17 Neb. 126. The writ of injunction is, however, a proper remedy to prevent it from wrongfully discontinuing service which it is under contract to furnish. *Seaton Mountain Electric Light, Heat & Power Co. v. Idaho Springs Investment Co.*, 49 Colo. 122, 33 L. R. A. n. s. 1078; *United States Electric Lighting Co. v. Metropolitan Club*, 6 App. D. C. 536; *Egyptian Packing Co. v. Olney Gas Co.*, 183 Ill. App. 447; *Graves v. Key City Gas Co.*, 83 Ia. 714; *Sickles v. Manhattan Gas-Light Co.*, 64 How. Pr. (N. Y.) 33.

The judgment of the district court is therefore

AFFIRMED.

ORA ROOKSTOOL, APPELLANT, V. CUDAHY PACKING COMPANY ET AL., APPELLEES.

FILED FEBRUARY 21, 1917. No. 18647.

1. **Pleading:** CONSTRUCTION. If a petition of a minor by his next friend to recover damages for personal injury alleges the age of the minor at the time of the injury was 14 years, another allegation in the petition that he was under 15 years at that time must be construed as against the pleader as also alleging that he was 14 years old at the time of the injury.
2. ———: CAUSE OF ACTION: REVIEW. If such petition counts only upon a common-law liability of the employer, and the evidence and all proceedings upon the trial are consistent only with that construction of the pleadings, and the case is, upon that theory, submitted to the trial court, this court upon appeal will so consider it, and the statute which prohibits the employment of minors between the ages of 14 and 16 years has no application.

3. **Master and Servant:** INJURY TO SERVANT: ACTION: REVIEW. In such action, if the petition does not allege any defect in the machinery or appliances by which the plaintiff was injured, and no question was suggested upon the trial, it will not be considered in this court upon appeal.

Opinion on motion for rehearing of case reported, *ante,* p. 118. *Former judgment of reversal vacated, and judgment of district court affirmed.*

SEDGWICK, J.

The trial court instructed the jury to find a verdict for the defendant, and by our former opinion, *ante,* p. 118, the judgment of the trial court was reversed. On motion for rehearing the case has been again submitted upon an additional brief and oral arguments.

The plaintiff, who was a minor, brought the action by his mother as next friend to recover damages caused by an injury in an elevator while the plaintiff was in the employment of the defendant company. The petition alleged, "plaintiff herein is a minor of the age of 18 years," and alleged that the accident occurred on the 22d day of May, 1910, and that "plaintiff was at that time less than 15 years of age." As the action was begun on the 23d day of October, 1913, the allegation that he was then 18 years of age was an allegation that when the accident occurred he was more than 14 years of age, and the direct allegation that when the accident occurred he was less than 15 years of age must also, as against the pleader, be construed to mean that he was past 14 years of age. The petition counts entirely upon a common law liability, and not upon the statute which prohibits the employment of a child under 14 years of age, or the statute which prohibits the employment of one under 16 and over 14 years of age, except on certain conditions. The allegation in the petition in that regard was: "Plaintiff further alleges that at that time, and on the date aforesaid, plaintiff herein was a minor, and was not familiar with nor did he appreciate the dangers incident to the operation of

said elevator, nor did this minor plaintiff understand or appreciate the specific danger, the danger of looking into the elevator shaft in the manner hereinbefore set forth. And plaintiff further avers and alleges that the defendant company failed and neglected to warn plaintiff of the danger of looking into the shaft of said elevator; nor did the defendant company warn this plaintiff of the danger of being caught by the descending elevator while looking into the shaft thereof." If the employment of a child under 14 years of age is the cause of his injury, his employer would be liable for damages. It is not necessary to determine in this case whether the employer of such a child would be liable for any and all injuries that might occur to him while in such employment, without regard to whether said injuries depended upon his tender years, since this record is conclusive that the plaintiff was more than 14 years of age. The plaintiff was himself asked upon the witness-stand to state his age, and stated that he was 18 years of age. If he was 18 years of age at the time of the trial, he must have been more than 14 years of age at the time of the injury, according to the allegations of the petition. The plaintiff and his mother testified that at the time of the accident the plaintiff was 13 years of age. But this was several years after the injury, and must be considered as an error in computation on their part, rather than a deliberate intention without any explanation to deny the allegations of the petition, which were also under oath. This statute has not been frequently construed by this court. The section that prohibits employment between the ages of 14 and 16 years is followed by several sections from which it might be contended that this provision is rather in the interest of the education of the child than to protect it from unnecessary dangers as the former section does. However that may be, this court has said: "Plaintiff, having induced the court to adopt one theory, ought not to complain because a dif-

ferent doctrine was not followed." *Hankins v. Reimers*, 86 Neb. 307. In that case the petition alleged that the deceased was under the age of 16 years, but the case was tried and submitted to the jury by the court under instructions upon the theory that the action was for the common-law liability, and, as no objection was made to so submitting it, the plaintiff was not allowed to count upon the fact that the deceased was under 16 years of age. As we have already said, the petition in the case at bar counted strictly upon the common-law liability. There was nothing in the evidence or in the manner of trial that indicated any other theory of liability. It was upon that theory that the defendant asked the court to instruct the jury to find a verdict in defendant's favor. No objection was made to the assumption that it was submitted as upon the common-law liability, and the question of the effect of the statutes now being considered was first presented in this court. The *Reimers* case is therefore in point.

The petition alleges that it was customary when the elevator was lowered to give a signal before passing each floor, and that in this case the operator of the elevator neglected to give such signal. This, however, would not justify placing oneself in the shaft to observe the location of the elevator. The plaintiff testified that there was a place at each floor to ring a bell and call the elevator; that there was a bell on the floor where he was hurt, and that he did not ring the bell, but stood there watching his friend; that a man on one floor who wanted the elevator to come to his floor would "ring the bell—push the button." "Q. If he was on floor one he would give it one bell, or number two, two accordingly? Is that the way it was operated? A. Yes, sir. Q. And the elevator did not move unless that bell was sounded? A. Wasn't supposed to, was the way I understood it." This evidence shows that he fully understood how to use the elevator, and that putting his head into the elevator shaft had nothing

to do with the use of the elevator, but was a matter of idle curiosity.

It is now contended that it was negligence to leave an opening in the shaft that permitted plaintiff to insert his head. But there is no allegation in the petition that raises that question. Nothing is alleged about this opening in the shaft, and no defect in the construction of the elevator or shaft is counted upon. The alleged negligence of the defendant is not proved. The plaintiff's unnecessary act, prompted by curiosity, was the cause of the accident.

Our former judgment is vacated, and the judgment of the district court is

AFFIRMED.

HAMER, J., dissenting.

This case was tried upon the theory that the boy employed in the packing house was under 15 years of age. The petition alleged that at the time of the injury he was "less than 15 years of age." The boy's mother testified: "As a matter of fact his age was 13, going on 14." The defendant answered: "Defendant is not informed as to the exact age of the plaintiff." There was then a denial of the averments contained in the petition "in that regard." They appear to have gone to trial upon the plaintiff's allegation contained in "in that regard." They appear to have gone to trial upon the plaintiff's allegation contained in the petition that he was less than 15 years of age at the time of the accident. There is no evidence which attempts to dispute or in any way to contradict the mother's testimony that the boy was "13, going on 14." She also testified that the truant officer, McAuley, "knew it positively." Nobody denies that. She also testified that her son "went to school in South Omaha ever since he was five years old." The truant officer undoubtedly knew this. He does not deny it.

The case is to be considered here upon the same theory that it was tried in the district court. We have no business to hear the case in this court upon a different theory than that upon which it was tried in the court below. While the petition may not be very artistic, it states the facts in a way that they can be understood. The petition alleged that the boy, Ora Rookstool, was employed in the hog-killing department of the packing plant; that he "was a minor, and was not familiar with nor did he appreciate the dangers incident to the operation of said elevator, nor did this minor plaintiff understand or appreciate the specific danger * * * of looking into the shaft of said elevator, nor did the defendant company warn this plaintiff of the danger of being caught by the descending elevator while looking into the shaft thereof."

The plaintiff and defendant went to trial upon the plaintiff's allegation that he was less than 15 years of age at the time the accident happened, and the defendant's denial of that allegation. There was undoubtedly an issue to try. Whether the boy was between 14 and 16 or less than 14 might not be material, but, in any event, there would be a liability under the statute.

Section 3575, Rev. St. 1913, forbids the employment of a child under 14 years of age in certain places specified, among which are a manufacturing establishment or a factory or a workshop. The second clause in the section provides that it shall be unlawful for any person, firm or corporation to employ any child under 14 years of age in any business or service "during the hours when the public schools of the town, township, village or city in which the child resides are in session."

It will be noticed that the foregoing section makes the employment of a child under 14 years of age unlawful. It is clearly unlawful, and if the truant officer connived at such employment knowing that the boy was

under 14 years of age, the thing which he did was unlawful, and, whatever his motive may have been, his conduct was still unlawful, and so was the employment of the boy by the packing house.

The next section is a long and labored effort to provide that, where the child is between 14 and 16, he may be permitted to be employed in certain places specified, including a manufacturing establishment or workshop, provided that the person or corporation employing him procures and keeps on file and accessible to the truant officers of the town or city, and certain other officers, an employment certificate.

Section 3577 provides: "An employment certificate shall be approved only by the superintendent of schools of the school corporation in which the child resides, or by a person authorized by him in writing, or, where there is no superintendent of schools, by a person authorized by the school district officers."

Section 3578 provides that the person authorized to issue an employment certificate shall not issue such certificate until he has examined, approved and filed the school record of such child, showing that the child has completed the work of the eighth grade of the public schools or its equivalent, or is regularly attending night school; also "a passport or duly attested transcript of the certificate of birth or baptism, or other religious or official record showing the date and place of birth of such child." It is also provided that an "attested transcript of the birth certificate filed according to law with a registrar of vital statistics, or other officer charged with the duty of recording births, shall be conclusive evidence of the age of such child." It is also provided that the affidavit of the parent or guardian or custodian shall be required only in case the other documents named cannot be produced. It is also provided that such employment certificate shall not be issued until such child has personally appeared before and has been examined by the officer

issuing the certificate, and, then, when such officer shall sign and file in his office a statement "that the child can read and legibly write simple sentences in the English language, and that, in his opinion, the child is 14 years of age, or upwards, and has reached the normal developement of a child of its age, and is in sound health and is physically able to perform the work which it intends to do." There is then a provision for examination of physical fitness by a medical officer of the board or department of health, or by a physician provided by the state board of inspection. There is then a provision that, whenever the person authorized to issue the employment certificate is in doubt about the age of the child, he may require the party or parties making the application for the certificate to appear before the judge of the juvenile court or the county judge, where the question of the age of the child shall be determined, and the judgment of the court shall be final and binding upon the person issuing the certificate. This section provides: "Every employment certificate shall be signed in the presence of the officer issuing the same by the child in whose name it is issued."

Section 3579 provides that the certificate shall state the date and place of birth of the child, describe the color of the hair and eyes, the height and weight and any distinguishing facial marks, and also the statement that the papers required by section 3578 have been duly examined, approved, and filed, and that the child named in the certificate has appeared before the officer signing the certificate and has been examined.

The act also provides a form of certificate, a limit of the number of hours of employment; the limit to be not more than eight hours in any one day, and not more than 48 hours in any one week.

Section 3585 provides a penalty of $50 where any one employs a child under 16 years of age, and in violation of this article, and also provides a like penalty

where one having a child in his control under such age permits it to be employed in violation of the article. There is also a penalty of not less than $5 a day nor more than $20 where the party employing the child continues to employ it after being notified by the truant officer or other proper person. There is also a provision for punishing those who make oath to material false statements, by a fine not to exceed $50. There is also a provision touching the right of an officer to visit any person, firm or corporation employing such children. Upon refusal to permit the officer to make such visit, there may be a fine of $50, or imprisonment not exceeding 30 days. The presence of a child under 16 years apparently at work in any of the places enumerated in this article is made evidence of his employment in such place. The deputy commissioner of labor and the truant officers are in duty bound to enforce the provisions of the article, and the county attorney shall file complaints against those supposed to be guilty, when informed that the law has been violated. Truant officers are required to visit the places where child labor is employed.

Section 3586 provides that the governor shall appoint a board of five inspectors, two of whom shall be women, and the chairman shall be the executive head of the board, and shall reside in that county employing the largest number of children under the age of 16. Any member of the board shall have power to demand the examination of any child under 16 years by a regularly licensed physician with a view to ascertaining whether the child is able to perform the labor in which it is employed. "No child under sixteen shall be employed who cannot obtain a certificate of fitness from such physician."

Section 3587 provides: "No child under the age of sixteen years shall be employed in any work which by reason of the nature of the work, or place of performance, is dangerous to life or limb, or in which its health

may be injured or its morals may be depraved. Any parent, guardian, or other person, who, having under his control any child, causes or permits such child to work or be employed in violation of this section, shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars, or be imprisoned not exceeding ten days."

In this case the child was alleged to be under 15 years, and the mother swore that it was 13, going on 14. It was employed in a packing house, which must be conceded to be a dangerous place. Under the testimony the truant officer and the packing company were all of them guilty. The employer should be fined $50, or be imprisoned not exceeding ten days. While engaged in this unlawful performance the boy came near losing his life, his scalp was lifted up, his teeth were knocked out, yet it is the purpose of the majority opinion that there shall be no liability, and that the thing done is made legitimate.

Whether the purpose of the truant officer was to enable the boy to assist his mother in making the living, or whether it was to get an additional hand for the packing house, no one may tell from the record. She says in her testimony that she furnished the school authorities a certificate showing the boy's birthday to have been July 26, 1895. When asked if she had done so, she said: "Yes; because Mr. McAuley wanted him to be a little bit older on account of helping me out." On redirect examination she testified: "Q. But as a matter of fact his age was 13, going on 14 years old? A. Yes, sir; and the truant officer knew it positively. He went to school in South Omaha ever since he was five years old."

The petition charges that the employment of the boy was at a time when he "was a minor, and was not familiar with nor did he appreciate the dangers incident to the operation of said elevator, nor did this minor plaintiff understand or appreciate the specific danger * * *

of looking into the shaft of said elevator; nor did the defendant company warn this plaintiff of the danger of being caught by the descending elevator while looking into the shaft thereof." It will be noticed that it was the purpose of the pleader to state that the boy did not appreciate the specific danger of looking into the shaft, and that he had not been warned concerning the danger of being caught by the descending elevator. His youth and lack of experience were emphasized. All the facts showing that it was wrong to have the boy employed in such a place are set forth. Of course, everybody knows that a boy at the age of 13, or any where between 13 and 15, might do just such a reckless thing as this boy did, and the purpose of the statute is to keep such boys from doing such acts and from being placed by employers where they are likely to do such acts. The judge of the district court does not appear to have paid very much attention to the child labor law. He seems to have been looking for an opportunity to relieve the defendant from liability. He said: "Now this young man went out of his way to put his head over into that elevator shaft, and I do not see that the defendant was guilty of any negligence, and it seems to me that the plaintiff himself would be guilty of contributory negligence." He then says that he will have to sustain the motion. Of course, the boy went out of his way. All boys do when they are of the age of this boy. The child labor statute was passed because the legislature knew that such boys were likely to get hurt because of their recklessness, and to keep them from being employed in places of this kind. Of course, the learned judge of the district court is a very fair-minded sort of man, but he conceived that the defendant was being tried because of negligence alone, and not because the boy was within the limits of the child labor law. He overlooked the age of the boy, because he spoke of him as "this young man." He could not have been much of a young man at the age of 13.

Section 7662, Rev. St. 1913, provides: "The rules of pleading formerly existing in civil actions are abolished, and hereafter the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this Code."

Section 7664, Rev. St. 1913, provides: "The petition must contain: First, the name of the court and county in which the action is brought, and the names of the parties, plaintiff and defendant; second, a statement of the facts constituting the cause of action in ordinary and concise language, and without repetition; third, a demand of the relief to which the party supposes himself entitled."

All the requirements of the above section are complied with in the petition, and the undisputed facts show that the boy is 13 years old. It requires a technical construction of the petition to wipe out the boy's claim.

This court in *Hankins v. Reimers*, 86 Neb. 307, held: "Allegations in a petition that a master unlawfully, wrongfully and negligently directed his infant servant to dig a cave in the side of a hill under circumstances particularly alleged, making it dangerous to life and limb to work in said excavation, in effect charges that the master had knowledge or in reason ought to have known of the danger surrounding such work." The court further held: "If the employment of an infant under the age of 16 years, contrary to the provisions of the statute, is the proximate cause of an injury to the child, his master is liable therefor."

The action was one brought against a master for damages following from the death of his infant servant, alleged to have been caused by the master's negligence. The defendant prevailed, and the plaintiff appealed to this court, and this court reversed the judgment of the court below and remanded the case for further proceedings. In that case there was an allegation in the petition that the deceased at the time of the accident

was under the age of 16, and that the work he was directed to do was dangerous to life and limb. The court gave all of the instructions requested by the plaintiff, and they were prepared on the theory that the case was controlled by the general law of master and servant independently of the servant. If there were facts enough stated in that case, it would seem that facts enough have been stated in the instant case. In the opinion it was said: "It is competent for the legislature in the exercise of the police power to fix an age below which children may not lawfully be employed in dangerous occupations. *Lenahan v. Pittston Coal Mining Co.,* 218 Pa. St. 311; *Stehle v. Jaeger Automatic Machine Co.,* 220 Pa. St. 617." The report fails to show a dissent in that case, and at that time this court consisted of Judges Reese, Barnes, Letton, Root, Rose, Fawcett and Sedgwick. If that was good law then, it ought to be good law now.

In *Moran v. Dickinson,* 204 Mass. 559, it was held that using an elevator in the course of employment is dangerous to life and limb within the statute.

The tendency to disregard the provisions of the law in a child labor case, or in any case of that nature, is very strong. The community may be very impatient of any sort of restrictions or attempted regulation in the management of what it considers is its own affair. That even judges and jurors may have sympathy with this feeling would not be strange, and especially the judges, for they are the last to give up the things that have been. To illustrate: It is not a great while since the judges down in Massachusetts were engaged in an attempt to suppress witchcraft. They authorized the whipping of parents and children with equal impartiality. The congressman from the south is said to be against all child labor laws. That the rosy flush of health will fade from the cheeks of the children of the neighborhood if they are kept indoors is no difference to him. They are not his children. It is not

his affair that play, the natural inheritance of children, has been taken away from them by the big factory on the bank of the creek, and that they no longer frequent the shady woods, the rippling brooks, or rove in the fields and lanes. These children, working in the factory and shut off from the sunlight, are a source of revenue to his big constituent, the owner of the factory.

STATE, EX REL., F. M. WOOLRIDGE ET AL., APPELLEES, V. JOHN H. MOREHEAD ET AL., APPELLANTS.

FILED FEBRUARY 21, 1917. No. 19764.

1. **Banks and Banking:** BANK CHARTER: POWER OF BANKING BOARD. A statute regulating banks and banking does not justify the refusal by the banking board of a bank charter where the proposed stockholders have paid in the banking capital of the proposed new bank, and possess the qualifications required by the statute, and have in all respects complied with the law.
2. ———: ———: ———. The state banking board cannot adopt rules concerning the granting of charters to proposed new banks, which are in contravention of the statute, and, if it does, such rules are void.
3. **Statutes:** CONSTRUCTION. The statute conferring authority upon an officer or board under the police power of the state should be strictly construed, and all powers not specifically granted or necessarily implied are reserved.
4. **Banks and Banking:** BANKING BOARD: DUTIES. Where privileges are granted by a board created by statute, such privileges should be open to the enjoyment of all upon the same terms and conditions.

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

Willis E. Reed, Attorney General, and *Charles S. Roe,* for appellants.

Morning & Ledwith, contra.

HAMER, J.

Appeal from a judgment of the district court for Lancaster county. The relators allege an incorporation for the purpose of conducting the Nebraska State Bank at Sidney, Nebraska. They demanded of the state banking board a charter authorizing said corporation to conduct a commercial banking business at Sidney, Cheyenne county, Nebraska, and tendered the payment of the fee of $25. They also offered to furnish the necessary proof to satisfy said board that the incorporators were all persons of integrity and financial responsibility. The said banking board heard the application of the relators and then, on the 12th day of June, 1916, refused to grant the charter demanded. The banking board concluded that the conditions and existing business in the city of Sidney, and territory adjacent thereto, would not justify the issuance of such charter and the establishment of said bank at said point, and, for that reason alone, refused to issue said charter. It is alleged that said banking board is without legal authority to limit the number of banks in any given locality, and that, in rejecting the application of relators and in refusing to grant said charter, said board exceeded its legal authority, and assumed to exercise a power which it does not possess under the statute. The prayer is that a writ of mandamus issue commanding the said respondents, and the state banking board, forthwith to convene as such board, and to approve said articles of incorporation, and to grant and issue to said Nebraska State Bank a charter authorizing it to transact a commercial banking business at Sidney, Cheyenne county, Nebraska. An alternative writ was issued, and to this the respondents returned that it was proposed to establish a commercial state bank at the city of Sidney; that the city of Sidney has a population of from between 1,500 and 1,600, and that it is supplied with three substantial banks which provide ample and satisfactory banking facilities for the people of Sidney and

vicinity, and that there is no demand or desire on the part of the people of Sidney for an additional fourth bank; that a fourth bank in the city of Sidney will oversupply said city to the detriment of the banking business there located, and will jeopardize the guaranty fund of the state and the public welfare. The respondents in their answer denied that the banking business legitimately done at the city of Sidney was large enough to accommodate an additional bank without injuring the interests of stockholders or directors in existing banks or in such additional bank. A trial was had in the district court of Lancaster county, and a peremptory writ of mandamus was issued commanding the respondents, as the state banking board of the state of Nebraska, "forthwith to approve the application of the relators, and to grant a charter to them authorizing them to establish the Nebraska State Bank at Sidney, Nebraska, as prayed in the petition." The district court also made a finding for the relators: "That the respondents refused to grant a charter to the relators applying therefor for the reason that in the opinion of the board there were already sufficient banking facilities in the town of Sidney, Nebraska, and that the establishment of another bank in that community was unnecessary and would be detrimental to the public interests, and to the banking interests of the state in particular, and would endanger the bank guaranty fund of the state; that said charter applied for by the relators (to the state banking board) was denied for no other reason." The district court also found: "That under the laws of this state the banking board is without power to deny a charter to persons applying therefor for such reason alone; that the banking business is a lawful business and in no way deterimental to the interests of the state; that under the law as it now exists, when persons apply for a charter giving them the privilege of doing a banking business, and are in every way qualified to do the banking business, and have complied with all conditions

and requirements of the law to enter into the banking business in a particular community, the board is without power to deny them the privilege of entering into the banking business and give such banking business in a community exclusively to others, thereby creating a monopoly of banking business in that community."

The following was received from the banking board: "Your favor of the 24th instant, addressed to Hon. John H. Morehead, has been referred to this department, and in reply will say that the banking board rejected the application for the proposed fourth bank at Sidney after carefully considering the same and being fully satisfied that there was no call or need for additional banking facilities at that place, and that it was for the best interests of the depositors and the people of the community generally to disapprove the application and to withhold the issuance of a charter for the proposed bank; too many banks being a detriment." It appears that the board rejected the application on the ground that there was no demand for an additional bank; that is, that an additional bank at Sidney would not be justified.

Section 295, Rev. St. 1913, is apparently directed at the power attempted to be conferred upon the board: "Whenever, after the examination and approval by the state banking board of the statement provided for in the next preceding section, the corporation shall file with the state banking board the oath of the president, or cashier, that the capital stock has been paid in as provided for, and in compliance with section 13 of this chapter, then the state banking board, if, upon investigation, it shall be satisfied that the parties requesting said charters are parties of integrity and responsibility, shall, upon the payment of certain fees as hereinafter provided, issue to said corporation the certificate provided for in section 14 and a charter to transact the business provided for in its articles of incorporation."

This section would seem to be mandatory. If the corporation files with the state banking board the oath of the president or cashier that the capital stock has been paid in, as provided for, and in compliance with section 13 of the chapter, then the banking board shall investigate, and if the parties are parties of integrity and responsibility, and they pay the fees, then the board shall "issue to said corporation the certificate provided for in section 14 and a charter to transact the business provided for in its articles of incorporation." If the legislature had intended to confer upon the banking board the jurisdiction to determine how many banks there should be in any locality, or whether there should not be any, it would have said so. To say that there is some sort of hidden intent in the language used, which does not appear there, would be, upon our part, an invasion of the power which is conferred upon the legislature.

It is claimed that the questions involved in this case were determined in *State v. Morehead,* 99 Neb. 146. An examination of that case shows that the question before the banking board was whether a charter should issue to a bank wherein "the relators intended to conduct the business of a state savings bank in the same room, or in a room immediately adjacent to the room, occupied by the First National Bank of Clarks, and that the officers and directors of the two banks would be the same persons, or practically so." It was not a very wide question that was before the board. The board declined to issue the charter apparently on the ground that the business of the two banks would, under the circumstances, be interlaced, and the fact that they were conducted in such close proximity, and by the same persons, or substantially so, would necessarily lead to confusion. In the opinion it is said: "The act fixed a maximum rate of interest; two or more banks transacting business in the same city are forbidden to use the same name, or names so nearly alike as to cause confusion in transacting business, and, in case such condition did exist at the

time the act became effective, the board is empowered to require such change or modification as will prevent the confusion."

It is further said: "Again, it may be said that when two banks are conducted in the same room, and managed by the same people, depositors may easily be mistaken as to which bank has their account. They may believe that it is deposited under the provisions of this act, while in reality their account is carried in the other bank. Again, it may complicate examinations. National banks are not subject to examination by the state examiners. State banks are not under the control of the federal goverment, nor subject to examination by its examiners. Experience has shown that, where the banking business is conducted as proposed by the relators, it is easy to transfer funds from one bank to another. If one of the banks finds itself in straightened circumstances, the temptation is great to draw on the other bank to tide it over an examination. Indeed, it is stipulated in the record that, in the year 1913, where a national bank and a state savings bank were conducted under conditions such as are proposed, the failure of the national bank caused the failure of the state bank with a loss to the guaranty fund in the sum of $54,000." Further discussing the danger of running two banks in such proximity, and by the same persons, the opinion states: "If the guaranty fund does not directly guarantee the deposits in the national bank, yet the fact that in the same room, or in the room adjacent, the same parties are operating a state bank under the guaranty fund may lead the general public to believe that the money deposited in the national bank is also guaranteed."

In adopting that opinion the only thing this court had before it was whether the proposed new bank should start up when its stockholders were stockholders and officers in the national bank, and where there was danger that the guaranty fund would suffer because of the drafts which indirectly, or even directly, might be made upon

it through the stockholders and officers of the national bank. This court said, in substance, that it was for the board to determine whether it would be unsafe to trust the management of a state bank to the officers and stockholders of the national bank, and in a room so close to the national bank that the officers of one bank might readily be mistaken for the officers of the other bank, or the same men might be officers in both banks. This court sustained the banking board when it determined as a matter of safety that the proposed new bank could not start out when its welfare was likely to be attacked by the stockholders and officers of the old bank. That is not this case. This court did not there decide that a charter for a state bank could not be issued in that town, or that it could not be issued to other and different stockholders, incorporators and officers. The banking board was afraid to take the risk of tempting the stockholders and officers of the state bank when possibly their interests were at stake in the other bank. It also considered that there was danger that depositors would mistake one bank for the other. In substance, it said to the applicants for the charter: "You cannot start out with your proposed new bank when there is a possible millstone hanging about its neck in the shape of the old bank." This was the judgment of business men of experience. They knew the danger of what they were talking about.

It is also said in the opinion: "By the Nebraska banking act, article I, ch. 6, Rev. St. 1913, banking is declared to be a quasi-public business, subject to regulation and control by the state, and it is made unlawful to engage in this business, except by means of a corporation duly organized for that purpose." Also: "The act creates a banking board, giving it general supervision and control of all banks coming within its provisions. It is made the duty of the governor to appoint a secretary for the board, and examiners, who are empowered 'to make a thorough examination into all the banks, papers and

affairs of any corporation transacting a banking business in this state.' "

The examiners are empowered to summon witnesses, and also to administer oaths, and to make detailed reports to the banking board, and if the bank is found to be insolvent or conducting its business in an unsafe or unauthorized manner, or is endangering the interests of the depositors, then the examiner may retain possession of the money and property of every description belonging to the bank until the banking board can act upon his report. There is no doubt that the act provides for shutting up a bank and taking care of the interests of the depositors. But that is a very different matter from determining whether one or more banks shall be allowed in a neighborhood. There is no misunderstanding what the legislature has said about regulating the bank and shutting it up for the protection of the stockholders. But that is a very different thing from determining whether a new bank shall be authorized to commence business.

It is strenuously argued that the guaranty fund is to be protected. That is undoubtedly right, but there is no provision that the banking board shall refuse to issue a charter to the proposed new bank simply because members of the board think that there are enough banks in the town or village. When the legislature concludes, if it does, that it will confer the power to limit the number of banks upon the banking board, it may then have the right to do so, but at present there is no act which seems to confer this power.

In the last sentence contained in section 295, Rev. St. 1913, it is said: "On payment of the required fees and the receipt of the charter the proposed bank may begin to transact a banking business." It would seem that, on compliance with the requirements of section 294 in making the preliminary statement and the examination of such statement by the board, and the filing of the oath of the president or cashier that the stock has been paid in, and it shall be further found that the parties seeking

the charter are parties of integrity and responsibility, then the charter shall be issued. And there is nothing after that except the payment of the fees before the bank may begin business.

We are not called upon to determine whether the legislature has the power to confer upon the banking board the authority to limit the number of banks in any particular locality. It will be time enough to pass upon that question when it is reached.

The powers of the board not granted by the statute are withheld. *Morrill v. Jones,* 106 U. S. 466; *Scribner State Bank v. Ransom,* 35 S. Dak. 244; *State v. Cook,* 174 Mo. 100.

Police regulations with no other guide than the uncontrolled discretion of a board are discriminatory, and when so applied that all persons may not engage in legitimate callings upon equal terms, are void. *Iler v. Ross,* 64 Neb. 710; *Yick Wo v. Hopkins,* 118 U. S. 356. A statute passed in the exercise of the police power of the state should be strictly construed. *People v. Sommer,* 106 N. Y. Supp. 190; *People v. Marx,* 99 N. Y. 377.

The judgment of the district court is

AFFIRMED.

CORNISH, J., not sitting.

ROSE, J., dissenting.

Relators complied with the statutory provisions in regard to the incorporation of banks, and applied to the state banking board for a charter to conduct a commercial bank at Sidney, where there are already three substantial banks with facilities sufficient for the accommodation of the entire community. A charter was refused, and to coerce the board into issuing one the district court for Lancaster county, upon motion of relators, granted a peremptory writ of mandamus. Respondents appealed. In reviewing the judgment of the trial court a majority of my associates hold that the board was without power to deny the application of relators. I

dissent. The board in declining to issue a charter to relators acted under a grant of power from the legislature. The majority opinion to the contrary is a departure from the doctrine of a recent decision by a unanimous court. Rev. St. 1913, secs. 284, 339; *State v. Morehead,* 99 Neb. 146.

The question is: Had the board discretionary power to refuse a charter? The act relating to this subject creates a board with power to regulate banks and banking, makes provision for a guaranty fund for the protection of state bank depositors generally, and, among other things declares: "Said board shall have general supervision and control of banks and banking under the laws of this state and no person or persons shall be permitted to engage in or transact a banking business save corporations having complied with the provisions of this article." Rev. St. 1913, sec. 284.

"The state banking board shall prescribe all such forms as may be useful or necessary in carrying out the provisions of this article, and shall have power to make such rules and regulations, not inconsistent with the provisions of this article, as may be necessary or proper to carry it into effect according to its true intent." Rev. St. 1913, sec. 339.

These statutory provisions grant the power exercised by the board in refusing a charter, since the action taken was not unreasonable nor arbitrary. The board's control extends to both "banks" and "banking." The power to limit the number of competitive banks in a community is included in the power to control banks and banking. In *State v. Morehead,* 99 Neb. 146, it was held that the banking act should be liberally construed, that "the intention of the legislature was to vest the banking board with general control and with authority to do all things reasonably necessary for the protection of depositors throughout the state," and that the banking board had discretion to refuse a charter though the applicants had complied with the provisions of the

statute. The doctrine of that case is in harmony with new conditions and modern thought. A lawyer and statesman recently said:

"There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. The necessities of our situation have already led to an extensive employment of that method. The interstate commerce commission, the state public service commissions, the federal trade commission, the powers of the federal reserve board, the health departments of the states, and many other supervisory offices and agencies are familiar illustrations. Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight." 2 American Bar Ass'n Journal, 749.

Under the new banking act each state bank is assessed to create funds to protect the depositors in state banks generally. The guaranty feature of the law introduced a new element into the business of banking. Additional safeguards became imperative. Power to limit the number of banking institutions in a community has been granted to administrative boards in other states. In discussing this subject a writer on economics said:

"The guaranty of deposits is so powerful an inducement to depositors, legislators believe, that for fear of its misuse by the incompetent or unscrupulous the banking departments are empowered not only to regulate and supervise banks, but to say what rates of interest they shall pay, and whether the citizens shall establish more

banks. In some states both these powers are exercised." 28 Quarterly Journal of Economics, 111.

The supreme court of Kansas, in upholding the power to limit the number of banks spoke as follows:

"An unnecessary bank in a community is not a thing of passive uselessness only, and so merely of no benefit. It is an active disturber of the financial peace, to the detriment of the public welfare; and it is not very material whether we say that public harm will be prevented or that public good will be promoted by its suppression." *Schaake v. Dolley*, 85 Kan. 598, 609.

The safety of banking institutions, the prevention of failures, and the protection of depositors are subjects of public interest and may be affected by an excess in the number of banks. The failure of an unnecessary bank may destroy all other banks in the vicinity. The old process of elimination through bank failures often resulted in riot and bloodshed. It produced maniacs and paupers. In addition, its fruits were suspicion, distrust and litigation. In conferring upon the state banking board power to supervise and control banks and banking, the legislature meant that a proper limitation on the number of banks should precede, and thus prevent, disaster. To that end the lawmakers authorized the state banking board to lay its restraining hand on applicants for charters, where a new and unnecessary bank may become a menace to the banking business. All of these subjects are fairly within the legislative grant of "general supervision and control of banks and banking." In refusing to issue a charter the board acted under a rule which was "necessary" or "proper" for the purpose of carrying the act "into effect according to its true intent." Rev. St. 1913, sec. 339.

The general purposes of the act should be considered in determining the meaning of the statutory terms used by the lawmakers, including the enactment that the board "shall" issue a charter, if satisfied upon investigation that the applicants are persons of integrity and responsibility

and that they have complied with the statutory requirements in regard to the incorporation of state banks. Rev. St. 1913, sec. 295. When the general powers of the board are considered with the obvious purposes of the act, the word "shall" is consistent with discretionary power of the board to reject a charter. *State v. Taylor*, 208 Mo. 442; *State v. Strait*, 94 Minn. 384; *In re O'Hara*, 82 N. Y. Supp. 293.

Believing that the board acted within its powers, and that there is nothing in the record to show that its decision was unreasonable or arbitrary, I dissent from the affirmance of the judgment allowing the writ, and from the opinion of the majority.

MORRISSEY, C. J., concurs in this dissent.

W. W. MARSHALL & COMPANY, APPELLEE, V. KIRSCHBRAUN & SONS, APPELLANT.

JOHN FRITZ, APPELLEE V. KIRSCHBRAUN & SONS, APPELLANT.

A. K. BROWN, APPELLEE, V. KIRSCHBRAUN & SONS, APPELLANT.

FILED MARCH 3, 1917. NOS. 19295, 19296, 19297.

1. **Principal and Agent:** AUTHORITY OF AGENT. Defendant is a manufacturer of creamery butter at Omaha. F. M. Woods was its agent in charge of its cream station at Niobrara. The agent purchased a quantity of cream, paying therefor $2.01 a pound, when the market value was only 30 cents. For the cream so purchased he issued defendant's checks to the vendors on blanks furnished by it, which, when presented, defendant refused to pay, on the ground that the agent had exceeded his authority in the premises. The evidence examined and discussed in the opinion, and *held* that the agent's acts in the premises were in excess of the real and the apparent scope of his authority, and defendant is not liable for any sum in excess of the market price of 30 cents a pound.

2. ———: ———: RATIFICATION. Where in such case the agent, without authority of his principal, mingled the cream so purchased with other cream that belonged to defendant, and the entire mass was afterwards shipped to such principal, who made a salable commodity out of the shipment, which prevented a total loss of the cream to plaintiffs, *held*, not to be a ratification of the agent's acts.

3. **Bills and Notes:** BONA FIDE HOLDERS. *Held*, that the check that was purchased by Marshall & Company, one of the plaintiffs, was bought under circumstances that were sufficient to place the purchaser upon inquiry as to the changes made upon its face, and that he was not a holder in due course.

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

Switzler, Goss & Switzler and *E. A. Houston,* for appellant.

W. A. Meserve and *P. H. Peterson, contra.*

DEAN, J.

W. W. Marshall & Company, John Fritz, and A. K. Brown, hereinafter called plaintiffs, began separate suits against the defendant in the district court for Knox county. The actions were all consolidated and tried there as one case, and they will be so treated here. Plaintiffs obtained judgment, and the defendant has appealed.

The defendant company is an Omaha concern engaged in the manufacture of creamery butter, having many cream stations in this and other states. On April 12, 1913, and for a few months prior thereto, F. M. Woods was the agent of defendant in charge of its station at Niobrara. On that date the market price of the cream product called butter fat was 30 cents a pound at Niobrara, and Mr. Woods purchased about 600 pounds, giving checks therefor representing a price paid of $2.01 a pound. For the product so purchased he issued approximately 50 checks to the several patrons of the cream station on printed forms furnished by defend-

ant to the amount of $1,204.81. When the checks were presented to defendant, payment was refused on the ground that the agent exceeded his authority in purchasing the cream at a figure so greatly in excess of its market value.

The plaintiffs in their brief argue "There are but three questions involved: First. Did F. M. Woods, in the purchase of said cream and the issuance of said drafts, act within the apparent scope of his authority? Second. If he did not act within the apparent scope of his authority, were his acts afterwards ratified by the defendant? Third. Were the contracts of Woods as to the price agreed to be paid prohibited by the anti-discrimination laws of the state, and, if they were, can the defendant be heard to complain?" We find it necessary to discuss only the first and second of the foregoing assignments.

One of the witnesses called by plaintiffs is Mrs. Cora Woods, the wife of the agent, who died before the trial. S. B. Blair is a traveling agent of defendant who called on Mr. Woods at Niobrara a few days before the cream in question was bought. Plaintiffs contend that Mr. Woods received certain instructions from Mr. Blair on the occasion of his visit from which Mr. Woods derived authority to pay the prices for cream on April 12 that are in dispute. Mrs. Woods, in her examination in chief, testified that she was not present during all of the conversation between her husband and Mr. Blair. She also testified that Mr. Blair in 1909 or 1910 told her husband that the card prices sent to agents by the company "were not intended to govern in case of a fight, * * * but to meet the price and go them one better, 'never to follow, always to lead.'" She testified that Blair told her husband in the winter of 1913 to pay "one cent more than the other companies were paying." Mrs. Woods testimony is not only fragmentary, but some of it is remote as to time, and all of it that is material is contradicted by Mr. Blair.

On April 12 there were four cream stations at Niobrara. A rivalry arose among three of the agents with respect to the purchase price of cream. In the morning the market price was 30 cents a pound, or thereabouts, but at noon the buyers were paying 70 cents. In the afternoon one buyer paid $1 a pound and shortly thereafter another paid $2 and before night Mr. Woods and one or more of his rivals were paying $2.01 a pound. Clearly this was not the market price, but one that was artificially inflated for some purpose not altogether clear. But it is not without significance that before the day closed Woods was the only agent who had on hand any of the cream bought that day at more than $2 a pound; all of the other agents by some means having contrived to dispose of their respective purchases to the unsuspecting agent of defendant. The record shows that one rival agent bought 80 pounds at $2.01 a pound, and that immediately he employed three men to take the cream so purchased in three separate lots and sell it to Mr. Woods, who paid $2.01 a pound. One other agent purchased about 9 pounds at $2 a pound, but soon after the vendor took the cream back, returning the cream check to the agent. The record fails clearly to disclose the identity of the final purchaser at Niobrara of the 9-pound lot, but from a similarity of names and of the quantity involved in the purchase that appears elsewhere in the record there is much more than an inference that it too found its way to the cream station of defendant and that Woods bought it at $2.01 a pound.

Plaintiffs show that the agent Woods sent a telegram to his principal that was received at the home office by R. L. Kent, an employee there, about 2 o'clock in the afternoon of the day the cream was bought, and insist that the telegram was sufficient to charge defendant in the premises and to be a ratification of the agent's conduct unless promptly repudiated by the principal. Following is a copy of the telegram: "Niobrara, Neb., April 12, 1913. Kirschbraun & Sons, Omaha, Neb.

Fight is on, am paying 34 cents for cream. F. M. Woods."

Mr. Kent, who was called by plaintiffs on this point, testified that the telegram was received at defendant's office between noon and 2 o'clock on Saturday, April 12. The telegram was not answered, but, in view of the record before us, to hold that it was notice to defendant that he was paying such an extortionate price for cream would be an absurdity. Mr. Kent, in direct examination, testified that he never authorized the agent to pay more than the "card price" for cream, and that he first learned that the agent had paid $2.01 a pound on Sunday evening, the 13th, at about 8 or 9 o'clock. He also testified that he called Mr. Woods up by telephone on Monday, April 14, and in behalf of the company notified him that he was relieved of his agency.

Following is a copy of the postal card notice sent by defendant to Mr. Woods shortly before April 12, authorizing him to pay 30 cents a pound for butter fat:

"Omaha, Neb., April 7, 1913.

"STATION OPERATORS:

"Effective Wednesday morning, April 9th, put your price of butter fat to 30c. This is an extraordinarily high price under the existing market, so do not, under any consideration, exceed this figure, without first taking it up with this office. If you have trouble in buying on this quotation, call us up by 'phone.

"KIRSCHBRAUN & SONS, INC."

Plaintiffs argue that "no presumption of want of authority would arise by reason of the fact that $2 and $2.01 a pound was paid and offered for butter fat." With the record before us, it appears that the presumption points in the opposite direction. A purchasing agent, having authority to buy for his principal a common article of commerce that is worth, when bought, approximately 30 cents a pound, without authority pays $2.01 a pound, an abnormal price that is almost seven times more than its real or market value at the time,

and so known to those dealing with the agent. Can it be that such conduct on the part of an agent is not sufficient to put a reasonably prudent man on inquiry as to the authority of the agent to do a thing so unusual? Apply the rule contended for by plaintiffs to the purchase or sale of wheat or sugar or coal or flour or farm implements or clothing or any of the innumerable necessities of life, and, in the absence of the agent's authority in a like case, the entire lack of fairness, the absurdity of the transaction, is at once apparent. Such conduct on the part of the agent cannot be upheld except upon the clearest proof of authority or proof of ratification by the principal, and both are lacking in the present case.

Plaintiffs argue that, even if the agent was not authorized to purchase the butter fat at the price of $2.01 a pound, defendant ratified the unauthorized act by accepting the shipment on arrival at Omaha; but they clearly fail to establish their position. Defendant did right in taking the cream and converting it into a salable commodity. Butter fat and kindred dairy products are perishable goods, which, in brief, impose a duty upon the party who is in possession of the goods in a proper case of so disposing of them as to prevent loss. 30 Cyc. 1394, note 69. The agent's purchase of cream at $2.01 a pound was not only unauthorized, but he without authority mingled the cream so purchased by him with cream belonging to defendant of the value of 30 cents a pound, so that it could not be separated and plaintiffs' cream returned to them in kind, as they insist should have been done. The defendant converted perishable property into a salable article of commerce. Obviously on this point plaintiffs' protest is not well grounded.

The record before us shows that defendant acted fairly from the inception of the trouble. In its answer it offered to pay to plaintiffs 30 cents a pound for the butter fat in dispute, but the offer was not accepted. It is not denied that the company even tried to "buy its peace,"

which it had a perfect right to do without compromising or waiving its defense, by offering the plaintiffs 50 cents a pound for the cream in dispute, "rather than have any trouble about it," as the president of the company testified. This too was not accepted.

Another feature remains. Two of the drafts in suit are in excess of the printed limitation of $15 that appears on the face of each. Following is the form of the draft:

"Kirschbaum & Sons, Inc. Manufacturers of Fancy Creamery Butter, Wholesale Butter & Eggs, Cold Storage and Freezing, 1209-1211 Howard Street. Original. Station —. Date—, 19—. No. 2665. Creamery Department. This check for cream only. Not good for more than $15. At sight, pay to the order of——,——dollars.

"To Kirschbraun & Sons, Inc., Omaha, Neb., or payable through First National Bank, Omaha, Neb.———, Operator."

Marshall & Company, appearing as plaintiffs herein, are merchants, who sue to recover $37.98 as innocent purchasers of a check for that amount issued to G. Summers for cream on April 12, 1913, at $2.01 a pound. The check, properly filled in and with the name "F. M. Woods" appended thereto over the word "operator," that was introduced in evidence is the same as the check shown above, except that a line was drawn through the words, "This check for cream only. Not good for more than $15." The words beneath the line are plainly discernible. The check in question is in such condition as to put the purchaser on inquiry, and he could not be an innocent purchaser. It contained two limitations: First, it was by its printed terms good for only $15; second, the $15 limitation was defaced. There is no testimony as to the time when, nor by whom, the Marshall & Company check was changed. But there is testimony showing that a like check was changed in a like manner by Mrs Woods, by direction of her husband, on April 12, in payment for cream at $2.01 a pound. The president

of the defendant company testified that no authority was ever given to any agent of defendant to enlarge the $15 limitation on the check. From all the facts in evidence we conclude that Marshall & Company, even if they did not have actual knowledge, were put upon inquiry as to the validity of the check on which they brought suit, and as to them they are only entitled to recover the same as the other defendants, namely, 30 cents a pound for the cream that was sold to agent Woods by G. Summers, from whom Marshall & Company purchased the check in suit. 1 Parsons, Notes and Bills (2d ed.) p. 119; 1 Randolph, Commercial Paper (2d. ed.) sec. 386.

It is the judgment of this court that plaintiffs, respectively, recover from defendant 30 cents a pound for all cream delivered on April 12, 1913, by A. K. Brown, J. Fritz, and G. Summers, respectively, to F. M. Woods. The judgment of the district court is reversed, with directions to enter judgment in that court in harmony with the views expressed in this opinion.

REVERSED.

HAMER, J., not sitting.

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2. Under a treaty suspending the statute disqualifying a nonresident alien from inheriting land in Nebraska and allowing three years within which to sell the same, with reasonable extension of time if circumstances require it, whether circumstances require extension of time is a question for the courts. *Pierson v. Lawler* 783

Animals. See CONSTITUTIONAL LAW, 1, 2.

Appeal and Error. See COSTS, 1. DAMAGES, 5. HABEAS CORPUS, 2. MASTER AND SERVANT, 6. REPLEVIN, 3. WILLS, 13.

Appeal and Error—*Continued.*

1. When the law of the case is determined on appeal, the trial court is bound thereby, and its judgment accordingly will not ordinarily be disturbed on another appeal. *Home Savings Bank v. Shallenberger* 113
2. In an action on a liquor dealer's bond, an instruction that liability of surety is coextensive with that of the principal, *held* not prejudicial, where judgment against surety was limited to amount stipulated in the bond. *Hauth v. Sambo* 160
3. To warrant reversal of a judgment for error, it must affirmatively appear that the error was prejudicial. *Johnson v. Lane* 177
4. When a bill of exceptions has been quashed, no question can be considered, a determination of which involves an examination of the bill. *Kriebs v. Kriebs* 180
5. Appeal to the supreme court does not deprive the district court of jurisdiction to grant a new trial. *Smith v. Goodman* 284
6. In a law action tried to the court, his findings are entitled to the same weight as a verdict. *State Bank v. Huffman* 396
7. The overruling of a motion to bring in as an additional defendant another wrongdoer, alleged to be liable as an indemnitor, is not a final order under sec. 8176, Rev. St. 1913. *Kaplan v. City of Omaha* 567
8. That the jury errs in its judgment of the amount of damages is not such conclusive evidence of prejudice as to admit of no other conclusion. *Van Dorn v. Kimball* 590
9. Error cannot be predicated on the admission of incompetent evidence in a cause tried to the court. *Crinkley v. Rogers* ... 647
10. In a trial to the court, it will be presumed that the court considered only competent evidence. *Crinkley v. Rogers* 647
11. Refusal to strike allegation of meaning of a written contract *held* not ground for reversal, where the jury correctly determined such meaning. *Felthauser v. Greeble* 652
12. Where three persons were sued jointly and there was proof of joint liability for part of the claim, a verdict for such part will not be set aside. *Ryan v. Bullion* 705
13. Where the supreme court finds the evidence overwhelming in plaintiff's favor, but reverses and remands the case because of other errors, it is not error on a retrial, the evidence being substantially the same, to direct a verdict for plaintiff. *Roper v. Milbourn* 739
14. On appeal from an order sustaining a general demurrer to the petition, the supreme court will consider only the sufficiency of the petition. *Patterson v. Morehead* 760

Appeal and Error—*Continued.*

15. Counsel cannot question on appeal remarks of opposing counsel, where no objection was made at the trial. *Kriss v. Union P. R. Co.* 801
16. Where a judgment is clearly excessive, a remittitur will be ordered, and, if not filed, the judgment will be reversed. *Nutter v. Standard Land Co.* 548
17. Where the amount of the judgment is more than the evidence warrants, a remittitur will be required. *Adams v. McGrew* 817
18. Where the only question in issue is the value of land, errors of the trial upon other issues become immaterial. *Adams v. McGrew* 817
19. Where the petition in an action for injuries to a minor counts only on the employer's common-law liability and the case is tried on that theory, the supreme court on appeal will so consider it, so that the statute prohibiting employment of minors between 14 and 16 years of age will not apply. *Rookstool v. Cudahy Packing Co.* 851
20. Where the petition in an action for injuries does not allege any defect in the machinery or appliances, and where no question thereof was suggested on the trial, it will not be considered on appeal. *Rookstool v. Cudahy Packing Co.* 851
21. The finding of a court in a law action based on conflicting evidence is entitled to the same weight as the verdict of a jury. *First Nat. Bank v. Baldwin* 25
22. Though, on appeal in equity, the case is tried *de novo*, where witnesses appeared before the district court and their testimony was conflicting, conclusions of the trial court as to credibility of testimony are entitled to consideration. *Enterprise Planing Mill Co. v. Methodist Episcopal Church* 29
23. In a trial to a jury on appeal from justice court, it is error to admit in evidence a transcript containing detailed findings of fact and the judgment of the justice. *Miller v. Swift & Co.* 44
24. A verdict will not be set aside where there is a substantial conflict in the evidence. *Roden v. Williams* 46
25. A verdict on conflicting evidence will not be set aside unless manifestly wrong. *Mundy v. Meyer* 296
    Shapiro v. Omaha & C. B. Street R. Co. 452
    Taylor v. Keneston 730
26. Where the evidence is conflicting, judgment supported by competent evidence will not be disturbed, though a different conclusion might have been reached. *Dohner v. Barr* 172
    Johnson v. Lane 177

Appeal and Error—*Concluded.*

27. Where both parties have tried the case as if an essential element was proved, judgment will not be reversed for lack of evidence of such fact. *Underwood v. Chicago & N. W. R. Co.* 275

28. Admission of incompetent evidence on a trial to the court is not ground for reversal if there is sufficient competent testimony to sustain the judgment. *In re Estate of Enyart* 337

29. The question of competency of an expert witness is within the discretion of the trial court, and a judgment will not be reversed for a technical omission in laying the foundation unless prejudice affirmatively appears. *Daggett v. Drainage District* 379

30. A general objection to a hypothetical question as to value will not be considered unless attention of the trial court was directed to an omission, or the omission was of such importance that it must have been considered. *Daggert v. Drainage District* 379

31. A party cannot complain of a hypothetical question where questions asked his own witnesses were of the same nature and assumed substantially the same facts. *Sandall v. Otto* 263

32. The use of the word "might" in a hypothetical question to a medical expert, while not to be approved of, is not so prejudicial as to require a reversal. *Van Dorn v. Kimball* 590

33. In an action by holder against indorsers of a note, a finding on conflicting evidence in favor of one defendant and against the other will not be disturbed. *State Bank v. Huffman* 396

34. Jury's finding as to damages will not be disturbed unless clearly unsupported by evidence. *Van Dorn v. Kimball* 590

35. A judgment will not be reversed because of extended cross-examination on an immaterial matter, where defendant's rights were not prejudiced. *Koran v. Cudahy Packing Co.* .. 693

Assignments.

A power of attorney authorizing assignment of wages does not authorize an assignment of wages under a contract thereafter made. *Richards v. Chicago, R. I. & P. R. Co.* 505

Asylums.

Ch. 55, Laws 1885, providing for construction of an asylum for insane at Norfolk, and ch. 48, Laws 1887, providing for an asylum at Hastings, were both enacted in view of the general act (Gen. St. 1873, ch. 31) governing all hospitals for the insane of the state. *State v. Gage County* 753

Attorney and Client. See LIMITATION OF ACTIONS, 2.

In an action by an attorney for compensation, his right thereto is a question for the jury. *Ryan v. Bullion* 705

Banks and Banking. See CONTRACTS, 2.

1. Where, on a sale of bank stock, the bank's president agreed to pay to the purchaser notes held by the bank, to be selected by the purchaser, the contract may be enforced after the purchaser has made a selection. *Galt v. Hildreth* 15

2. An agreement by the seller of bank stock to pay to the purchaser three-fifths of the difference between the profits of the bank for a designated year and $8,000 net profit is enforceable. *Galt v. Hildreth* 15

3. In estimating net profits of a bank, the guaranty fund required by law to be set apart may be deducted from the gross profits. *Galt v. Hildreth* 15

4. The state banking board cannot refuse a bank charter where proposed stockholders have fully complied with the law. *State v. Morehead* 864

5. The state banking board cannot adopt rules as to granting of charters to proposed new banks in contravention of statute. *State v. Morehead* 864

6. Privileges to be granted by a state board created by statute should be open to all upon the same terms and conditions. *State v. Morehead* 864

Bastardy.

1. In a bastardy case, it is the duty of the court, when requested, to give a cautionary instruction as to conflicting statements of prosecutrix, in accordance with sec. 361, Rev. St. 1913. *Nelson v. Spratt* 690

2. In a bastardy case, after giving cautionary instruction pursuant to sec. 361, Rev. St. 1913, it is prejudicial error to charge that, if the jury should find that plaintiff had testified falsely in regard to any material fact, they might disregard her testimony, unless corroborated. *Nelson v. Spratt* 690

Beneficial Associations. See INSURANCE, 7-22.

Bills and Notes. See JUDGMENT, 1.

1. A clause in a note waiving demand, notice, and protest, and defenses based on extension of time of payment, *held* not to render the note nonnegotiable. *First Nat. Bank v. Baldwin* 25

Bills and Notes—*Concluded.*

2. A payee who by indorsement guarantees payment of the note and waives demand and notice of protest becomes an indorser, and may be sued with the maker. *First Nat. Bank v. Baldwin* 25
3. Where a banker was directed to pay a note out of a special deposit of the maker, payment will be held to have been made at time of direction. *Belk v. Capital Fire Ins. Co.* 260
4. An accommodation maker is one who executes commercial paper without consideration to enable the payee to obtain credit. *State Bank v. Huffman* 396
5. A controversy between joint indorsers of a note as to whether one is an accommodation indorser is no defense as to the holder of the note. *State Bank v. Huffman* 396
6. Defenses to action on note *held* to go to the merits and not personal. *Galt v. Hildreth* 422
7. Holder of check bearing the words, "not good for more than $15," through which line had been drawn, *held* not an innocent purchaser. *Marshall & Co. v. Kirschbraun & Sons* 876

Bonds. See INTOXICATING LIQUORS, 7, 8.

Brokers.

1. An oral contract between the owner and a broker for sale of lands cannot be enforced. *In re Estate of Brockway* 281
2. In an oral contract by a broker to assist in finding and purchasing personal property, a provision that certain real estate shall be used as part payment will not make the contract one for the sale of land within sec. 2628, Rev. St. 1913. *In re Estate of Brockway* 281
3. In an action for commission on an oral contract for the purchase of personalty, where defendant denies the contract as alleged and alleges that the contract was for the sale of realty, the court should hear the evidence and determine the real nature of the contract. *In re Estate of Brockway* 281
4. Instruction as to liability for commission for sale of land approved. *Mundy v. Meyer* 296
5. Where a real estate broker employed for a commission presents to his principal a proposed purchaser, and the principal enters into a binding contract with him, the broker is entitled to his commission. *Felthauser v. Greeble* 652
6. Where the signature of a broker to a contract was written under the name of a witness thereto, *held* that such signing would not prevent recovery on the contract. *Felthauser v. Greeble* 652

Burglary.

Evidence *held* to sustain verdict of burglary. *Coons v. State* .. 414

Carriers. See EVIDENCE, 4.

1. To entitle a shipper to recover for delay in transporting live stock, he must show the time ordinarily required to transport the shipment, and that longer time was consumed than was necessary. *Cohn v. Chicago & N. W. R. Co.* 7
2. It is error to refuse to withdraw from the jury a charge of negligent delay in transportation of live stock, where no competent evidence is introduced to support it. *Cohn v. Chicago & N. W. R. Co.* 7
3. Evidence, in action for delay in shipment of live stock, *held* insufficient to sustain verdict for plaintiff. *Cohn v. Chicago & N. W. R. Co.* 7
4. A contract exempting a carrier from liability, valid where made but contrary to the public policy of Nebraska, will not be enforced in the courts of Nebraska. *Maucher v. Chicago, R. I. & P. R. Co.* 237
5. A contract to relieve a carrier from liability for negligence resulting in injuries to passengers *held* not governed by federal statute, but by state law, and void. *Maucher v. Chicago, R. I. & P. R. Co* 237
6. A contract limiting liability of a carrier to circus employees traveling in cars of the circus company *held* not to relieve the carrier from liability for injuries in a rear-end collision. *Maucher v. Chicago, R. I. & P R. Co.* 237
7. Where, on application to restrain a railroad company from violating a maximum rate statute, it is shown that the company has obeyed it for a long term of years, and there is no proof that it intends to violate it, the application will be denied. *State v. Chicago, R. I. & P. R. Co.* 268
8. Secs. 5988-5990, Rev. St. 1913, requiring common carriers to furnish adequate telephone connections between their offices and the local telephone exchange, is not unconstitutional. *State v. Missouri P. R. Co.* 700

Compromise and Settlement.

Settlement of a controverted matter between officers and directors of a bank and debtors *held* binding on all parties. *Galt v. Hildreth* 15

Constitutional Law. See CARRIERS, 8. CORONERS. MUNICIPAL CORPORATIONS, 9. STATUTES.

1. Secs. 2 and 9, ch. 170, Laws 1915, restricting sale of anti-hog cholera serum, *held* unconstitutional. *Hall v. State* 84

Constitutional Law—*Concluded.*

2. Sec. 2, ch. 170, Laws 1915, restricting sale of anti-hog cholera serum, *held* unconstitutional, as granting a monopoly to serum-manufacturing plant licensed under the federal act, 37 U. S. St. at Large, ch. 145. *Hall v. State* 84
3. Ch. 224, Laws 1915, requiring the county attorney to perform the duties of coroner, is not unconstitutional as clothing an administrative or executive officer with judicial power. *State v. Moorhead* 298
4. The Supreme Court Commission Act (Laws 1915, ch. 184) *held* constitutional. *In re Supreme Court Commissioners* ... 426
5. That portion of the Supreme Court Commission Act (Laws 1915, ch. 184) requiring the appointment of commissioners recommended by the governor is void. *In re Supreme Court Commissioners* 426
6. An ordinance requiring companies maintaining poles and wires in streets to remove same to allow passage of buildings is not unconstitutional as depriving the companies of property without due process of law. *State v. Omaha & C. B. Street R. Co.* 716
7. Sec. 2555, Rev. St. 1913, fixing fee of ten cents a barrel for inspection of oils *held* violative of sec. 1, art. IX, Const., providing for equality of taxation. *State v. Standard Oil Co.* .. 826
8. Where inspection fees exacted are largely in excess of expenses, the presumption is that the state will reduce them to conform to constitutional authority to impose fees solely for reimbursement of expenses. *State v. Standard Oil Co.* 826

Contracts. See BANKS AND BANKING, 1, 2. CARRIERS, 4-6. EVIDENCE, 1, 6. HUSBAND AND WIFE.

1. On refusal to perform a contract for exchange of properties, the injured party may treat the contract as terminated and sue for the value of property he has delivered. *Smith v. Lohr* 4
2. An agreement between two banks that notes should be transferred by one to the other to make it falsely appear that the transferor has not violated the law by making excessive loans is illegal and unenforceable. *Exchange Bank v. Clay Center State Bank* 278
3. Where a grantee assumes a mortgage and allows foreclosure, he cannot rescind on the ground that he was deceived as to the land and that the grantor held no title; the title not being questioned except by enforcement of the mortgage. *Crowell v. Skillicorn* 429

Contracts—*Concluded.*

4. Technical terms in a contract may be given a nontechnical meaning relied upon by one party, where the other party had reason to suppose the former so understood them. *Richey v. Omaha & Lincoln Railway & Light Co.* 847

Coroners. See CONSTITUTIONAL LAW, 3. STATUTES, 4, 5.

The powers and duties of coroner are not judicial, within the meaning of art. II, Const., dividing governmental powers. *State v. Moorhead* 298

Corporations.

1. In determining whether rates of a public service corporation are remunerative, the validity of an occupation tax must be considered. *City of Lincoln v. Lincoln Gas & Electric Light Co.* 188
2. In a suit alleging misrepresentations as to value of bonds of a corporation by its stockholders, directors and officers, where there was no evidence that the president made any representations or that he was derelict, he will not be held liable. *Horn v. Abbott* 403

Costs.

1. Under sec. 6063, Rev. St. 1913, making a common carrier liable for an attorney's fee where a shipper recovers damages for loss of freight, the shipper cannot recover such fee for services on appeal. *Northcutt v. Missouri P. R. Co.* 1
2. Sec. 8168, Rev. St. 1913, relating to costs in district court in cases cognizable before a justice, does not apply to costs in the supreme court. *Underwood v. Chicago & N. W. R. Co.* ... 507
3. Under sec. 8168, Rev. St. 1913, plaintiff cannot recover costs in an action begun in the district court which is cognizable before a justice of the peace. *Underwood v. Chicago & N. W. R. Co.* 507
4. The supreme court will not retax costs on appeal, though a remittitur is required reducing the judgment within the jurisdiction of a justice of the peace. *Underwood v. Chicago & N. W. R. Co.* 507
5. Where appellant recovers a better judgment than the one appealed from, he is ordinarily entitled to costs of appeal. *Underwood v. Chicago & N. W. R. Co.* 507

Counties and County Officers. See TAXATION, 9.

1. To justify removal of a county officer under sec. 5698, Rev. St. 1913, it must be clearly shown that his action was prompted by evil intent or legal malice, or at least without sufficient grounds to believe that he was properly performing his duty. *Hiatt v. Tomlinson* 51

Counties and County Officers—*Concluded.*

2. Sec. 35, ch. 19, Laws 1866 (Rev. St. 1913, sec. 2461), is superseded by sec. 37, p. 366, Laws 1879 (Rev. St. 1913, sec. 965). prescribing the verification required to be attached to claims filed against a county. *Uttley v. Sievers* 59
3. In constructing a bridge as part of a county road, the county must provide not only for ordinary vehicles, but for what may be fairly anticipated in the locality, including the driving of cattle over the bridge and its approaches. *Miles v. Richardson County* 294
4. Where a visible defect in the approach to a bridge had existed for such length of time as to charge the county with notice, the county is liable for injury caused thereby. *Miles v. Richardson County* 294
5. Where governmental authorities have recognized for many years a boundary line between counties established by a void legislative act, courts will not change the boundary line. *State v. Clary* 324
6. It is not the duty of a county attorney to prosecute one charged with violation of a village ordinance, where prosecution is not based on violation of any state law. *State v. McDonald* 332
7. County *held* liable to one injured on a defective bridge while riding in a private vehicle, notwithstanding negligence of the driver. *Reudelhuber v. Douglas County* 687
8. In an action against a county for injuries resulting from a defective bridge, evidence *held* to sustain verdict for plaintiff. *Reudelhuber v. Douglas County* 687
9. Sec. 2443, Rev. St. 1913, requiring the county commissioners to determine the number of deputies of the sheriff and to fix their compensation, *held* not to repeal by implication sec. 5735, Rev. St. 1913, empowering the sheriff to appoint deputies. *State v. Harris* 745

Courts. See EXECUTORS AND ADMINISTRATORS, 1.

A state court will deny an application for injunction, where the federal court has taken jurisdiction of the subject-matter. *State v. Chicago, R. I. & P. R. Co.* 268

Criminal Law. See BURGLARY. INFORMATION. INTOXICATING LIQUORS, 1-3. LARCENY.

1. In a prosecution for selling liquor to a minor, it is no defense that accused acted in ignorance of the minor's age and without intent to violate the law. *Steinkuhler v. State* 95
2. Sec. 1162, Rev. St. 1913, requires criminal trials to be held in the court-room. *Roberts v. State* 199

Criminal Law—*Concluded.*

3. Requirement that trials be public is satisfied by admitting those who can conveniently be accommodated in the court-room. *Roberts v. State* 199
4. It is not proper to adjourn the trial of a capital offense from the regular court-room to the stage of a public theater without sufficient cause. *Roberts v. State* 199
5. Where the witnesses for the state are near relatives, or are so associated that it is not improbable that some may be under the influence of others, it is error to refuse request that they be separated. *Roberts v. State* 199
6. While it is improper to allow a witness to the principal facts to conduct the trial, judgment will not necessarily be reversed because an attorney who was also a witness assisted the prosecuting attorney in the preparation and details of the trial. *Roberts v. State* 199
7. Where, in a trial for felony, the bailiff, without an order of court, took a quantity of miscellaneous articles, including exhibits, to the jury-room, where they were examined by the jury, it is ground for a new trial. *Roberts v. State* 199
8. Where evidence of crime is direct and corroborated, accused is not entitled to an instruction that, if the evidence is reconcilable with innocence upon any reasonable hypothesis, accused is entitled to acquittal. *Casper v. State* 367
9. Where the right of a deputy county attorney to sign an information is not questioned until after arraignment and plea, and while a plea of not guilty is pending, his appointment and right to sign will be presumed, in absence of a showing. *Holland v. State* 444
10. It is not error for the court, at request of county attorney, to appoint special counsel to assist in the prosecution of a misdemeanor. *Goemann v. State* 772
11. Instruction as to reasonable doubt *held* free from error. *Goemann v. State* 772
12. Ruling on the scope of cross-examination will be upheld, unless abuse of discretion is shown. *Goemann v. State* 772

Damages.

1. Verdict for $16,000 in favor of widow under the federal employers' liability act for death of a conductor who was earning $113 a month and had an expectancy of 34 years, plaintiff being younger, *held* not excessive. *Phillips v. Union P. R. Co.* 157
2. Award of $10,000 for personal injuries *held* not excessive. *Maucher v. Chicago, R. I. & P. R. Co.* 237

Damages—*Concluded.*

3. Award of $15,000 for personal injuries *held* not excessive. *Croghan v. Chicago, R. I. & P. R. Co.* 253
4. Verdict for $5,275 for injuries to laborer *held* not excessive. *Sadt v. Sunderland Bros. Co.* 350
5. Where a verdict includes an item of damage not proved, a remittitur will be required. *Kriss v. Union P. R. Co.* 801

Divorce.

Where a decree in a divorce assigns custody of children, such disposition will control until the decree is modified, and cannot be disregarded in habeas corpus for possession of the children. *State v. Elifritz* 320

Domicile.

Where the owner of a home in one county sells it with the intention of removing to another county, his final removal will relate back to the time of the sale. *In re Estate of Getchell* 579

Drains. See QUO WARRANTO. STATUTES, 10, 11.

1. Interest received by a county treasurer on drainage district funds is money of such district and should not be credited to the county general fund. *Nemaha Valley Drainage District v. Nemaha County* 64
2. Under sec. 1858, Rev. St. 1913, requiring a drainage district to pay fees of county officers rendering it services, the county is entitled to retain fees fixed by statute for taxes and special assessments collected by the county treasurer. *Nemaha Valley Drainage District v. Nemaha County* 64
3. Owners of lands outside proposed drainage district cannot intervene and object to the organization of the district on the ground that the improvement will injure their lands. *Latham v. Chicago, B. & Q. R. Co.* 173
4. Sec. 1872, Rev. St. 1913, permitting corporations owning or having an easement in land to vote at elections for drainage improvements, does not allow double representation of land, but the easement must be of a substantial nature, analogous to ownership. *State v. Drainage District* 625
5. Where persons who assume to vote for a railroad company or for a county or township in an election for drainage improvements are not formally authorized, their acts may be ratified. *State v. Drainage District* 625
6. Under sec. 1872, Rev. St. 1913, landowners cannot represent in an election for drainage improvements land lying in a public highway. *State v. Drainage District* 625

Drains—*Concluded.*

7. If an election under sec. 1914, Rev. St. 1913, results in the rejection of the proposition to proceed with work, the directors of the drainage district have no power to proceed. *State v. Drainage District* 625

Easements.

Exclusive possession and a record right of possession to use land indefinitely is an easement equivalent to ownership. *State v. Drainage District* 625

Election of Remedies.

One who with knowledge of the facts has chosen an appropriate legal remedy and obtained full satisfaction cannot ordinarily afterwards resort to a remedy inconsistent therewith. *Brady v. State Ins. Co.* 497

Eminent Domain.

1. The right of eminent domain cannot be exercised for a purely private purpose. *Vetter v. Broadhurst* 356
2. Land of one proprietor cannot be condemned for a reservoir site solely to irrigate land of another. *Vetter v. Broadhurst* 356
3. Trial in condemnation may be had in name of person as plaintiff who owned the land when proceedings were commenced, but the court should order payment of award to party entitled to damages. *Sternberger v. Sanitary District* 449
4. Award for taking of land for ditch *held* excessive. *Sternberger v. Sanitary District* 449

Equity.

1. In a suit to recover remainder of price of land, the rule that he who seeks equity must do equity applies, and the purchaser may show any equity authorizing reduction of amount of recovery. *Fassler v. Streit* 722
2. Where a conveyance was made without consideration to defeat a judgment in an anticipated suit, equity will not aid the grantor to set aside the conveyance. *Palmer v. Palmer* 741

Evidence. See APPEAL AND ERROR, 21-35. HUSBAND AND WIFE, 1, 3. LIENS. NEGLIGENCE, 2-4. NEW TRIAL. TRUSTS, 1. WITNESSES.

1. In absence of fraud, mistake or ambiguity, parol evidence is inadmissible to vary terms of a written contract. *Roden v. Williams* 46
2. Where settlement with one joint wrongdoer is in writing, oral evidence is competent to show the intent of the parties in an action against one not a party to the settlement. *Hauth v. Sambo* 160

Evidence—*Concluded.*

3. In a hypothetical question a party may assume facts in accordance with his theory, if there is evidence to sustain it, though there may be a conflict of evidence. *Sandall v. Otto*. 263
4. To recover for shrinkage in weight of cattle caused by delay in transportation, the shrinkage must be proved by competent evidence, and cannot be established by opinion evidence. *Underwood v. Chicago & N. W. R. Co.* 275
5. Where notes were transferred by one bank to another to make it appear that the transferor had not made excessive loans, the illegality of the contract may be proved by correspondence between the banks, and oral evidence is admissible to prove that the transfer was pursuant to such contract. *Exchange Bank v. Clay Center State Bank* 278
6. Where a contract is ambiguous, evidence of the construction placed on it by the parties is admissible. *In re Estate of Enyart* 337
7. In an action on an insurance certificate, where the defense was that insured was killed while committing an assault, evidence of the slayer cannot be disregarded when corroborated. *Bosler v. Modern Woodmen of America*..... 570
8. Where the evidence is conflicting as to a material matter, a hypothetical question may assume the existence of such matter, it being for the jury to determine whether the hypothesis is warranted. *Van Dorn v. Kimball* 590
9. Where there was direct testimony of injury to the abdomen, expert testimony that hernia might have resulted *held* admissible. *Koran v. Cudahy Packing Co.* 693

Executors and Administrators.

1. The district court has jurisdiction over executors and others holding a fiduciary relation, and may compel proper application of trust funds. *Wunder v. Crane* 446
2. Amount found due from executors *held* sustained by the evidence. *Wunder v. Crane* 446
3. Where a husband was delayed in removing from one county to another by the sickness and death of his wife, *held* that her estate might be administered in the county to which he removed. *In re Estate of Getchell* 579
4. Petition in district court *held* to state the same cause of action as that stated in the claim filed in the county court. *In re Estate of Cormick* 669
5. Where a homestead is sold at administrator's sale to pay debts, and the heirs, with knowledge of the sale to an innocent purchaser, acquiesce therein for more than five years

Executors and Administrators—*Concluded.*

after becoming of age, knowing that the purchaser is making permanent improvements, they are barred from recovering the property. *Foltz v. Maxwell* 713

False Imprisonment.

1. In an action for damages for false imprisonment, whether the arrest and mental strain and worry could under ordinary circumstances occasion the troubles complained of is material. *Van Dorn v. Kimball* 590
2. In an action for false imprisonment of one wrongfully accused of felony, whether defendant had sufficient ground to believe plaintiff guilty was an important question to be submitted to the jury. *Van Dorn v. Kimball* 590
3. In an action for false imprisonment, whether the arrest was made wholly upon the officer's responsibility or was caused by defendant is a question for the jury. *Van Dorn v. Kimball*.. 590

Fraud.

Although defendant had no actual notice of the fraud of a third party who procured an exchange of valuable land for defendant's worthless stock, the law may impute such notice to him if he received title to the land and disposed of it for his own profit, and hold him liable to plaintiff for the value of the land. *Adams v. McGrew* 817

Garnishment.

1. Where, on attempted garnishment, money is voluntarily paid into court by defendant's debtor, an order directing that it be applied on plaintiff's judgment will not be set aside on appeal solely because of insufficiency of the garnishment proceeding. *Ryan v. Bullion* 705
2. Insurance company *held* liable as garnishee for money due on a judgment against the insured, notwithstanding a provision of the policy that no action would lie unless brought by the insured for loss or expense actually paid. *Elliott v. Ætna Life Ins. Co.* 833

Habeas Corpus.

1. In habeas corpus proceedings for custody of children, where it is shown that the children were not detained by respondent, but were in the custody of the juvenile court, no judgment should be rendered against respondent. *State v. Elifritz*.... 320
2. A judgment in habeas corpus can be reviewed only by appeal. *In re Application of Selicow* 615
3. The writ of habeas corpus is not allowed to correct errors of inferior tribunals. *In re Application of Selicow* 615

Habeas Corpus—*Concluded.*

4. Where an inferior court has jurisdiction of proceedings upon complaint of violation of a statute or ordinance, and has not determined the case, defendant is not entitled to release on habeas corpus on the ground of invalidity of such statute or ordinance, unless such invalidity appears on the face of the proceedings. *In re Application of Selicow* 615

Highways.

Sec. 21, Act of Congress of March 2, 1889 (25 U. S. St. at Large, ch. 405) which "reserved public highways four rods wide around every section of land allotted, or opened to settlement," in the Sioux Indian reservation, amounted to a grant or a dedication for highway purposes. *State v. Raymond Township* 788

Homestead. See EXECUTORS AND ADMINISTRATORS, 5.

Where a husband and wife reside in a building on two town lots and have no other home, such building will constitute their homestead, though they conduct a hotel therein, and no formal declaration that it is their homestead is necessary. *Foltz v. Maxwell* 713

Husband and Wife.

1. The burden is on the husband or his representatives to show that an antenuptial contract, apparently unjust to the wife, was fairly procured. *In re Estate of Enyart* 337
2. In making an antenuptial contract, the prospective husband must make full disclosure as to the amount and value of his property. *In re Estate of Enyart* 337
3. Where the provision for the intended wife by antenuptial contract is grossly disproportionate to the interest she would acquire by law, the burden is on those claiming the validity of the contract to show full disclosure to her, before she signed it, of the extent and value of the property. *In re Estate of Enyart* 337
4. That an intended wife knows in a general way that her prospective husband is reputed to be wealthy does not satisfy the equitable rule requiring full disclosure in making an antenuptial contract. *In re Estate of Enyart* 337
5. Courts will rigidly scrutinize an antenuptial contract, apparently unjust, where it deprives the wife of her interest in the husband's estate without providing for her in case she survives him. *In re Estate of Enyart* 337
6. Antenuptial contract *held* invalid. *In re Estate of Enyart* .. 337

Husband and Wife—*Concluded.*

7. An express contract between husband and wife that she shall receive reasonable compensation for extra and unusual services rendered outside her domestic duties is valid. *In re Estate of Cormick* 669

Indemnity.

Indemnitor of surety on bond of a saloon-keeper *held* liable for counsel fees and expenses in defending an action on the bond, where the surety had reasonable cause to believe such expenditure was necessary, though the principal on the bond had employed competent counsel. *Bankers Surety Co. v. Cross* 98

Information.

1. Objection to verification of an information will not be considered after arraignment and plea unless the plea is withdrawn. *Holland v. State* 444
2. Under sec. 5599, Rev. St. 1913, a county attorney may appoint deputies, and a deputy so appointed may sign a criminal information. *Holland v. State* 444

Injunction. See CARRIERS, 7. COURTS. TAXATION, 3, 4.

1. Publication of political matter cannot be enjoined merely because it is false or misleading. *Howell v. Bee Publishing Co.* 39
2. A valid agreement in restraint of trade must be clearly established to warrant restraining its breach by injunction. *Plamondon v. Lindsey* 318
3. One who had no license to practice dentistry, nor any permit under sec. 2806, Rev. St. 1913, cannot enjoin the state board from interfering with him in so practicing. *Patterson v. Morehead* 760
4. An injunction may be granted to prevent a public service corporation from wrongfully cutting off a supply of electricity which it is under contract to furnish. *Richey v. Omaha & Lincoln Railway & Light Co.* 847

Innkeepers.

1. Where the owner of a hotel building does not provide fire-escapes and other safety devices, he is liable for damages for the death of a guest brought about by his negligence. *Hoopes v. Creighton* 510
2. A guest in a hotel does not assume the risk of injury from want of fire-escapes from the building, though he knew of the dangerous condition of the building. *Hoopes v. Creighton* .. 510

Insane Persons. See ASYLUMS. INTEREST. STATES.

The general act (Gen. St. 1873, ch. 31) requiring counties to pay for care of insane persons *held* to govern the three state insane institutions. *State v. Gage County* 753

Insurance.

1. Where a building was destroyed by fire and wind, insurer *held* liable under a fire policy containing a clause exempting it from loss by wind. *Wiig v. Girard Fire & Marine Ins. Co.* 271

2. In an action to recover burglary insurance, evidence *held* insufficient to show liability of insurer under the contract. *Grayson v. Maryland Casualty Co.* 354

3. An insurance policy is a contract, and neither party can make a new contract for the other without his knowledge or consent. *Stephenson v. Germania Fire Ins. Co.* 456

4. The owner of a fire policy who had parted with title to premises cannot assign the policy after a fire, without the knowledge and consent of the insurer, so as to make the insurer liable to a third person for the loss. *Stephenson v. Germania Fire Ins. Co.* 456

5. Sec. 3187, Rev. St. 1913, relating to liability in case of breach of warranty or condition, *held* not to apply where insurer has never entered into contractual relations with the person claiming under the policy. *Stephenson v. Germania Fire Ins. Co.* 456

6. Where assured had received payment under a tornado policy for total destruction of a building, she could not recover under a fire policy covering the same building. *Brady v. State Ins. Co.* 497

7. A provision in a certificate of membership in a fraternal insurance society that, if death result from violation of law the certificate shall be void, is valid. *Bosler v. Modern Woodmen of America* 570

8. Where the holder of a certificate of insurance was killed by one upon whom he was committing a violent and unprovoked assault, *held* that his beneficiary could not recover. *Bosler v. Modern Woodmen of America* 570

9. The supreme authority of a fraternal society may reconsider the election of an officer and take another ballot at the same meeting, if the first election is the result of fraud or mistake. *State v. Kelly* 619

Insurance—*Continued.*

10. Where the question of fraud or mistake in the election of an officer of a beneficial society is raised in good faith and determined by the voters, courts will not interfere. *State v. Kelly* 619
11. Where the records of proceedings of a fraternal order are not impeached nor directly attacked, they are conclusive. *State v. Kelly* 619
12. One who is formally presented as a candidate for office in a fraternal order upon final ballot and is voted for without protest cannot object that such ballot was without authority and maintain that she was elected upon a prior ballot. *State v. Kelly* 619
13. State officials have authority to protect members of fraternal beneficiary associations from unauthorized usurpation of authority by officers. *State v. Supreme Forest, Woodmen Circle* 632
14. The supreme court has original jurisdiction of a suit by the state to determine the jurisdiction of contending officers of a fraternal beneficial association. *State v. Supreme Forest, Woodmen Circle* 632
15. Laws enacted by the governing body of a fraternal beneficiary association in harmony with its constitution and state statutes are binding. *State v. Supreme Forest, Woodmen Circle* 632
16. Where the constitution of a fraternal association creates an executive council subordinate to the supreme body, the council could not authorize a committee to conduct the business of the order generally without the approval of a specified number of the members of the supreme body. *State v. Supreme Forest, Woodmen Circle* 632
17. When language of the constitution and by-laws of a fraternal beneficial association is ambiguous, a practical construction by the parties will control. *State v. Supreme Forest, Woodmen Circle* 632
18. Where a clause in a policy provided that, if one person only over 18 and under 60 years of age should be named as beneficiary, the policy should insure such person, *held* that the clause applied to the beneficiary after expiration of the age limit of 60 years. *Cook v. National Fidelity & Casualty Co.* . 641
19. Limitation in a policy as to age of beneficiary *held* waived by a renewal of the policy after expiration of age limit. *Cook v. National Fidelity & Casualty Co.* 641

Insurance—*Concluded.*

20. Where a mutual assessment company sets out in its certificate of membership a synopsis of its by-laws, insured may rely on such synopsis, and the company is estopped to claim exemption from liability under by-laws which insured was led to overlook or to believe inapplicable. *Bierbach v. Mutual Benefit Health & Accident Ass'n.* 675
21. Merely waiting on customers of a saloon as an accommodation *held* not to constitute insured a "saloon bartender" within a prohibitive provision of his contract with insurer. *Modern Woodmen of America v. Berry* 820
22. Forfeiture of a policy is waived where the insurer with knowledge of the facts subsequently collects premiums. *Modern Woodmen of America v. Berry* 820

Interest.

A county is chargeable with interest on money collected for care of insane persons and wrongfully withheld. *State v. Stanton County* 747

Intoxicating Liquors. See APPEAL AND ERROR, 2. TRIAL, 1-3.

1. A saloon-keeper is responsible for acts of his employees in sale of liquors to minors, unless made in defendant's absence and in violation of his orders. *Steinkuhler v. State* .. 95
2. Whether instructions by a saloon-keeper to his employees not to sell liquors to minors are in good faith is a question for the jury. *Steinkuhler v. State* 95
3. Evidence *held* to sustain conviction of sale of liquors to minors. *Steinkuhler v. State* 95
4. In an action on a liquor license bond by a widow and minor children for causing the death of the husband and father on a railroad track, negligence of the railroad company or contributory negligence of the decedent is immaterial. *Hauth v. Sambo* 160
5. Where, in an action against a saloon-keeper and his sureties, the verdict is in excess of the penalty in the bond, the court may render judgment against the principal for the full amount of the verdict and against the surety for the sum stipulated in the bond. *Hauth v. Sambo* 160
6. Licensed liquor dealers and their sureties may be joined in one action for damages resulting from the sales. *Hauth v. Sambo* 160
7. The obligation in a liquor license bond must be interpreted in the light of the law regulating the traffic, and is not primarily to indemnify a private party, but is a public bond to

Intoxicating Liquors—*Concluded.*

the state as a condition precedent to engaging in the traffic. *Hauth v. Sambo* 160

8. A statutory bond given for observance of a law authorizing a business only under specified conditions is not contractual, requiring strict construction. *Hauth v. Sambo* 160

Judgment. See VENDOR AND PURCHASER, 3.

1. A defense successfully made by one of the signers and indorsers of a note, if not made on purely personal grounds, will bar a future action by the same plaintiff against another joint defendant. *Galt v. Hildreth* 15
2. Judgment in an action for conversion *held* a bar to a subsequent action between the same plaintiffs and one of the former defendants. *Slimmer v. Hoffman* 330
3. Judgment in excess of amount prayed for *held* improper *Galt v. Hildreth* 422
4. A judgment is not a bar to a subsequent action unless the subject-matter is the same and might have been litigated in the former action, or where the court refused to determine the matter for want of jurisdiction. *Ryan v. Bullion* 705
5. A cause of action fully determined on the merits cannot thereafter be litigated by new proceedings. *Allaire, Woodward & Co. v. Perfection Remedy Co.* 726

Jury.

1. The trial court in determining the qualification of a juror is not confined to his answers, but may consider his demeanor. *Phillips v. Union P. R. Co.* 157
2. The ruling on a challenge of a juror for cause will not be disturbed unless an abuse of discretion is shown. *Phillips v. Union P. R. Co.* 157
3. Where counsel for plaintiff and defendant each struck three jurors from eighteen called, pursuant to local practice, *held* that defendant's right to exercise other challenges was waived. *Koran v. Cudahy Packing Co.* 693

Landlord and Tenant.

1. Where the landlord's agent promised to keep premises in repair, the tenant had a right to expect that she might walk safely from one part to another in her apartment. *Rankin v. Kountze Real Estate Co.* 69
2. Janitor of a building *held* to be the servant of the proprietor in making repairs, rendering the proprietor liable for injuries to tenant due to his negligence. *Rankin v. Kountze Real Estate Co.* 69

Landlord and Tenant—*Concluded.*

3. Proprietor *held* liable for injuries to tenant due to negligence of servant in repairing a threshold. *Rankin v. Kountze Real Estate Co.* 69
4. Where a landlord's servant nailed a thin, elastic board over a threshold and a tenant was injured by a protruding nail, landlord *held* liable. *Rankin v. Kountze Real Estate Co.* ... 69
5. A five-year lease giving lessee an option to renew *held* to entitle lessee to but one renewal. *Powell v. Cone* 562
6. Though a contract granting the right to remove sand and gravel from leased premises uses the term "lease and demise," subsequent provisions may show that it was a lease for that purpose only. *Powell v. Cone* 562
7. In a suit for possession of leased land and for an accounting, *held* that lessee had no rights in the land. *Evans v. Gilmore* 657
8. In an action against a landlord for death of a tenant from asphyxiation, evidence *held* not to show that defective plumbing was the proximate cause of death. *Spratlen v. Ish*.... 844

Larceny.

1. A person convicted of larceny from the person may not be placed under probation by the district court. *Casper v. State* 367
2. Evidence *held* to support conviction of larceny from the person. *Casper v. State* 367
3. Instruction *held* to sufficiently state the essential elements of larceny from the person. *Casper v. State* 367

Libel. See INJUNCTION, 1.

Liens.

1. The burden of proof is on one who seeks to establish an equitable lien on real estate to produce facts authorizing the interposition of a court of equity. *Enterprise Planing Mill Co. v. Methodist Episcopal Church* 29
2. Evidence *held* insufficient to establish an equitable lien. *Enterprise Planing Mill Co. v. Methodist Episcopal Church* 29

Limitation of Actions.

1. Limitations begin to run in favor of a trustee *ex maleficio* from time of discovery of the wrong, but not in favor of the trustee of a resulting trust until he repudiates his trust. *Johnson v. Petersen* 255
2. Where an attorney undertakes litigation which may arise out of settlement of an estate and to wait for compensation until proceeds of the litigation are realized, the statute of limitations does not begin to run until the litigation is ended *Ryan v. Bullion* 705

Limitation of Actions—*Concluded.*

3. Money levied and collected by county authorities under secs. 10094, 10095, Ann. St. 1911, for care of insane persons and transferred to the county general fund is revenue of the state within the exception in sec. 7581, Rev. St. 1913, and the limitation therein does not apply to an action by the state to recover same. *State v. Stanton County* 747

Mandamus.

1. Under sec. 3, ch. 212, Laws 1915, requiring the consolidated city of Omaha to perform all valid subsisting contracts of the city of South Omaha, mandamus will lie to compel such performance. *State v. Dahlman* 416
2. On application for mandamus to enforce an order of the state railway commission, jurisdiction having been acquired and no appeal taken, it will be presumed that the findings of the commission were sustained by evidence. *State v. Missouri P. R. Co.* 700

Master and Servant. See APPEAL AND ERROR, 19, 20. PLEADING, 1.

1. Where employment of a child under 14 is the proximate cause of injury to such child, the employer is liable. *Rookstool v. Cudahy Packing Co.* 118
2. Petition for compensation under the workmen's compensation act should set out the extent and character of the injury, and the judgment should conform thereto, determining whether the disability is permanent, and the time for which periodical payments must be made. *Hanley v. Union Stock Yards Co.* 232
3. If a workman is disqualified to continue his regular employment, the fact that he procures temporary employment is not conclusive that disability has ceased. *Hanley v. Union Stock Yards Co.* 232
4. An order under the workmen's compensation act limiting time of payments to six months is final; but, if the time fixed exceeds six months, after that time either party may apply for a change of the order. *Hanley v. Union Stock Yards Co.* 232
5. Application to modify order for compensation to workman made before expiration of six months *held* properly dismissed. *Hanley v. Union Stock Yards Co.* 232
6. If the time limited for payments to a workman is not more than six months, a bill of exceptions must be settled with reference to the term at which the order is made. *Hanley v. Union Stock Yards Co.* 232

Master and Servant—*Continued.*

7. In an action under the employers' liability act, the court may consider how far the injury will probably disable the employee from engaging in his former occupation and award damages in the sum of 50 per cent. of the difference between wages received at time of injury and his earning power thereafter, for the term fixed by statute. *Stoica v. Swift & Co.* 434

8. In an action for personal injuries, instructions considered, and *held* without error. *Wunrath v. Peoples Furniture & Carpet Co.* 539

9. Evidence, in an action by a servant for injuries from falling into an elevator shaft, *held* to sustain verdict for plaintiff. *Wunrath v. Peoples Furniture & Carpet Co.* 539

10. Where a master employs a servant in a room in which the air is impregnated with poisonous fumes, he is not relieved from liability by merely furnishing the servant with an appliance to be worn over the mouth and nose to prevent danger, without instruction as to the danger of failure to constantly wear the same. *Wiseman v. Carter White Lead Co.* 584

11. In an action for injuries from poisonous fumes, evidence *held* to sustain verdict for plaintiff. *Wiseman v. Carter White Lead Co.* 584

12. Variance between petition and proof as to place of accident *held* immaterial. *Green v. Cudahy Packing Co.* 680

13. It is the duty of a master to use reasonable care to provide a safe way to place of employment. *Green v. Cudahy Packing Co.* 680

14. Where a master has furnished a number of ways, and has kept them guarded and free from pitfalls, the servant may assume that he will continue to keep them safe. *Green v. Cudahy Packing Co.* 680

15. Where a master permits a way to become unsafe, and a servant suffers injury without negligence, the master is liable. *Green v. Cudahy Packing Co.* 680

16. Defendant *held* liable for injuries to servant occasioned by a defective box furnished by foreman, with direction to servant to hurry. *Koran v. Cudahy Packing Co.* 693

17. A workman may assume that his employer has used due diligence to provide suitable appliances, and ordinarily does not assume the risk of the employer's negligence in performing such duties. *Henderson v. Union P. R. Co.* 734

18. Where a defect in an appliance is known to the employee or is obvious, and he continues to use it without objection, he assumes the risk. *Henderson v. Union P. R. Co.* 734

Master and Servant—*Concluded.*

19. In an action for death of a brakeman knocked from a freight car by a platform, *held*, that the question whether a reasonably safe place was furnished was for the jury, the car being of extra width. *Henderson v. Union P. R. Co.* 734

20. Whether a brakeman killed when knocked from a freight car by a platform had such knowledge of the situation that he assumed the risk of injury, *held* a question for the jury. *Henderson v. Union P. R. Co.* 734

Mortgages.

1. Where the decree of foreclosure contains no direction as to the appraisal and sale, and the mortgaged property is contiguous, its appraisal and sale as a single tract will not be disturbed, in the absence of showing of prejudice. *Clark v. Birge* 769

2. A finding that the appraisal of mortgaged property was not too low, based on conflicting evidence, will not be disturbed, in absence of fraud. *Clark v. Birge* 769

Municipal Corporations. See CONSTITUTIONAL LAW, 6. PARTIES, 3.

1. In making estimate of cost of street pavement, a city engineer need not separately estimate the cost of each item. *Wurdeman v. City of Columbus* 134

2. A contract for street pavement is not in violation of the statute relating to competitive bidding merely because it requires the use of a patented top coating. *Wurdeman v. City of Columbus* 134

3. The duty of city officers in awarding a contract for street paving is not merely ministerial, but partakes of a judicial character, requiring exercise of discretion. *Wurdeman v. City of Columbus* 134

4. Unless expressly authorized by the legislature, a municipal corporation cannot contract to deprive the state of the right to regulate rates of a public service corporation. *Marquis v. Polk County Telephone Co.* 140

5. Contracts for paving made by the city of South Omaha before consolidation with the city of Omaha *held* obligatory on the consolidated city, though the statutory time in which to select material had not expired. *State v. Dahlman* 416

6. Where a city charter provided that property owners might designate material for paving by petition within 20 days from advertisment of bids, council could contract for the improvement on filing of petition, though within the 20 days. *State v. Dahlman* 416

Municipal Corporations—*Concluded.*

7. In an action for death by drowning in a pond in a city park, petition *held* not to state a cause of action. *Robbins v. City of Omaha* 439
8. A new assessment may be made where the first assessment has been adjudged void because the ordinance creating the improvement district failed to properly define its limits. *Wiese v. City of South Omaha* 492
9. Subds. IV, XVIII, sec. 128, of the South Omaha charter in 1905, *held* not unconstitutional as authorizing assessment of lands for local improvements in excess of the benefits *Wiese v. City of South Omaha* 492
10. Though a city of the metropolitan class cannot prohibit the general and ordinary use of streets, it may regulate traffic. *State v. Omaha & C. B. Street R. Co.* 716
11. City authorities may allow use of streets for moving of buildings. *State v. Omaha & C. B. Street R. Co.* 716
12. Under a general ordinance requiring temporary removal of wires to allow passage of buildings, a provision of a franchise to a street car company providing that it shall so construct its track as to obstruct the streets as little as possible may be construed to require the company to remove its wires to allow passage of buildings. *State v. Omaha & C. B. Street R. Co.* 716
13. Under sec. 4916, Rev. St. 1913, as amended by ch. 86, Laws 1915, an ordinance specifying a street or part of street to be paved *held* to sufficiently describe the proposed paving district. *Chittenden v. Kibler* 756

Negligence. See RAILROADS. STREET RAILWAYS.

1. The rule of the "last clear chance" is that, when a person is in danger, whether negligent or not, one who knows, or ought to know, of the danger must use every precaution to avoid injuring him. *Johnston v. Delano* 192
2. There is no presumption of ordinary care induced by the instinct of self-preservation when there is evidence of negligence. *Johnston v. Delano* 192
3. There is no presumption of ordinary care induced by instinct of self-preservation when there is controverted evidence of plaintiff's negligence. *Hutton v. Missouri P. R. Co.* 382
4. The fact that a statute or ordinance does not in terms impose a civil liability for its violation does not affect such evidence of its violation as may go to show negligence. *Hoopes v. Creighton* 510

Negligence—*Concluded.*

5. The violation of any statutory or valid municipal regulation, established for the protection of the public, is ground for a private action for negligence, if the other elements of actionable negligence concur. *Hoopes v. Creighton* 510

6. The proximate cause of an injury is that cause which in natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *Spratlen v. Ish* 844

New Trial. See CRIMINAL LAW, 7.

1. If the supreme court affirms a judgment, the time for application for a new trial begins to run from date of judgment in the district court, but if the supreme court directs a different judgment, the time runs from the entry of the judgment directed. *Smith v. Goodman* 284

2. Requisite allegations of petition for a new trial for newly discovered evidence under sec. 8207, Rev. St. 1913, stated. *Smith v. Goodman* 284

3. Newly discovered evidence must be material and not merely cumulative, and must be of such a substantial nature as to render a different judgment probable. *Smith v. Goodman* .. 284

4. Public records will rarely be admitted as newly discovered evidence. *Smith v. Goodman* 284

5. Records and written documents relied on as newly discovered evidence should be described, and so much of them set out that the court can determine whether they call for a new trial. *Smith v. Goodman* 284

6. That a witness who testified at the trial will vary or contradict his former testimony is not ground for new trial. *Smith v. Goodman* 284

7. Petition for new trial *held* insufficient to show abuse of discretion in sustaining a demurrer thereto. *Smith v. Goodman* 284

8. Remarks of counsel, not objected to, *held* not ground for new trial. *Kriss v. Union P. R. Co.* 801

Parties. See BILLS AND NOTES, 2. DRAINS, 3. INTOXICATING LIQUORS, 6.

1. To intervene, party must have such direct and immediate interest that he will either gain or lose by the direct legal operation of the judgment, and this interest must arise from a claim to the subject-matter of the action or a lien on the property. *Latham v. Chicago, B. & Q. R. Co.* 173

Parties—*Concluded.*

2. Sec. 7604, Rev. St. 1913, providing for bringing in of additional parties, applies to cases where there are other persons whose rights must be ascertained and settled before the rights of the parties to the suit can be determined. *Kaplan v. City of Omaha* 567
3. In an action against a city for personal injuries, *held* that a contractor who was liable to the city as an indemnitor need not be made an additional defendant. *Kaplan v. City of Omaha* 567

Partition.

1. Equity may decree partition sale of personalty owned in unequal shares by two parties, each of whom has a right of possession. *Riley v. Whittier* 107
2. Evidence *held* to sustain decree for an accounting and partition of personalty. *Riley v. Whittier* 107

Pleading. See EXECUTORS AND ADMINISTRATORS, 4. NEW TRIAL, 2. TRIAL, 9.

1. Assumption of risk not usually and ordinarily incident to service must be specially pleaded. *Phillips v. Union P. R. Co.* 157
2. Reply, in suit by a vendor for price of land, *held* to admit that the land was the homestead of the deceased owner, and that an administrator's sale to pay debts was invalid and not sufficient to convey interests of heirs. *Fassler v. Streit* 722
3. Where a petition alleged that a minor, when injured, was 14 years of age, another allegation that he was under 15 must be construed against the pleader as also alleging that he was 14 at time of injury. *Rookstool v. Cudahy Packing Co.* 851

Principal and Agent.

1. It is an agent's duty to inform his principal of all facts coming to his knowledge in the course of his employment, and in a subsequent action between his principal and a third person it will be conclusively presumed that he performed such duty. *Modern Woodmen of America v. Berry* 820
2. Notice to an agent in the course of his employment is notice to his principal. *Modern Woodmen of America v Berry* ... 820
3. Principal *held* not liable for unauthorized acts of agents in the purchase of cream. *Marshall & Co. v. Kirschbraun & Sons* 876
4. Where an agent mingled cream purchased at an unauthorized price with other cream belonging to his principal and shipped it to his principal, who made a salable commodity and prevented a total loss, *held* there was no ratification of the agent's acts. *Marshall & Co. v. Kirschbraun & Sons* 876

Principal and Surety. See APPEAL AND ERROR, 2. INDEMNITY. INTOXICATING LIQUORS, 5. SUBROGATION.

Process.

Application for order for service by publication *held* sufficient. *Younie v. Specht* 133

Quo Warranto.

1. *Quo warranto* under sec. 8328, Rev. St. 1913, is intended to prevent the exercise of powers not conferred by law, and is not ordinarily available to regulate the manner of exercising those powers. *State v. Drainage District* 625
2. *Quo warranto held* to lie to test right of directors of drainage district to proceed with work, where the electors rejected the proposition. *State v. Drainage District* 625

Railroads. See MASTER AND SERVANT, 19, 20. STATUTES, 7, 8.

1. Where conditions proved are such that one who looked and listened must have seen an approaching train, the conclusion necessarily follows that in attempting to cross the tracks he was guilty of negligence. *Johnston v. Delano* 192
2. A person going on a railroad crossing without looking and listening for a train, without reasonable excuse, is guilty of negligence, barring recovery for any injury. *Johnston v. Delano* 192
3. Where two persons of equal authority drive on a railroad track in front of an approaching train in full view, it is immaterial which person drove, since, if either looked, he must have seen the train. *Johnston v. Delano* 192
4. Travelers at a private crossing are guilty of negligence if they assume to know when trains will be run, and so fail to look and listen. *Johnston v. Delano* 192
5. In the absence of proof of opportunity to avoid injuring a person after his danger was, or ought to have been, discovered, the last clear chance doctrine does not apply. *Johnston v. Delano* 192
6. Erection and maintenance of convenient structures at a railroad station is not negligence as to one entirely familiar with the situation. *Rickert v. Union P. R. Co.* 304
7. Testimony of witnesses that they did not hear signals *held* not to sustain finding that signals were not given, where other witnesses testified positively that signals were given. *Rickert v. Union P. R. Co.*, ... 304
8. Plaintiff *held* guilty of contributory negligence in attempting to cross a railroad track in front of an approaching train. *Rickert v. Union P. R. Co.* 304

Railroads—*Concluded.*

9. It is the duty of a traveler approaching a railroad crossing to look and listen for trains, and if he fails, without reasonable excuse, to do so, no recovery can be had for his death. *Rickert v. Union P. R. Co.* 304

10. Whether engineer signaled before crossing highway as required by sec. 6023, Rev. St. 1913, is a question for the jury where the evidence is conflicting. *Campbell v. Union P. R. Co.* 375

11. Railroad company *held* not liable for injuries to a wilful trespasser. *Hutton v. Missouri P. R. Co.* 382

Replevin.

1. Where a contract of sale of merchandise provides that the seller shall retain possession until he has received a stated sum, and that the purchaser shall manage the business, their possession is joint, and neither can maintain replevin against the other. *Whittier v. Riley* 104

2. Under sec. 7833, Rev. St. 1913, providing that, where the finding is for defendant in replevin, the judgment shall be for a return of the property, or its value if a return cannot be had, the value should be the equivalent of the property as at the time of trial. *Wallace v. Cox* 601

3. Where judgment for defendant in replevin is affirmed on appeal, and the property is returned, in an action on the appeal bond plaintiff cannot recover damages occuring prior to the original judgment. *Wallace v. Cox* 601

Sales.

Whether the description in a contract, together with inquiries which the contract suggests, will enable third persons to identify the property is ordinarily a question for the jury; but, where only one conclusion can reasonably be drawn, it is a question for the court. *Crancer Co. v. Cooper* 335

Schools and School Districts. See STATUTES, 2.

1. Ch. 252, Laws 1913, providing for establishment of county high schools, was not repealed by ch. 120, Laws 1915. *Peterson v. Anderson* 149

2. Where two *ex officio* members of a school board appointed a third member, and the three filled the other two vacancies, *held*, that the members constituted a *de facto* board and their action was valid; and that an estimate made by the full board furnished sufficient authority for the county board to levy a tax for a county high school. *Peterson v. Anderson*.. 149

Schools and School Districts—*Concluded.*

3. That an estimate made by regents of a county high school for a tax was communicated in an informal manner to the county board is a mere irregularity, and not a jurisdictional defect. *Peterson v. Anderson* 149
4. Subd. 3, sec. 6703, Rev. St. 1913, *held* to confer authority on the county superintendent of schools to organize unorganized territory into new districts or to attach it to adjoining districts without petition or notice. *State v. Frye* 364

Specific Performance. See WILLS, 3.

Specific performance of a land contract may be denied the vendor, where he misled the vendee as to the quantity to be conveyed, even though he acted innocently. *Bentley v. Space* ... 486

State Railway Commission.

Secs. 6128, 6139, Rev. St. 1913, provide that, in appeals from the railway commission as to rates, their decision is *prima facie* evidence that the rates fixed are reasonable, and they shall remain until revised by the commission, or adjudged to be unreasonable by the court. *Marquis v. Polk County Telephone Co.* 140

States.

Secs. 10094, 10095, Ann. St. 1911, authorizing county boards to levy and collect money for care of insane persons, do not constitute appropriations of public money of the state within the constitutional provisions. *State v. Stanton County* 747

Statute of Frauds. See BROKERS, 1-3.

Statutes. See SCHOOLS AND SCHOOL DISTRICTS, 1, 4.

1. Changes of existing statutes as an incidental result of adopting a new law covering the whole subject are not forbidden by sec. 11, art. III, Const. *Uttley v. Sievers* 59
2. The provision in sec. 6831, Rev. St. 1913, for free tuition for all pupils of the county in the county high school is invalid as to pupils residing in districts not taxed to support the school; but, not being the inducement to the passage of the act, does not render the act void. *Peterson v. Anderson* 149
3. An act complete in itself is not unconstitutional because it incidentally modifies, changes or destroys the effect of existing statutes. *State v. Moorhead* 298
4. Ch. 224, Laws 1915, providing that the county attorney shall be *ex officio* coroner, incorporates in the new law the existing laws defining the duties of coronor. *State v. Moorhead* 298
5. Ch. 224, Laws 1915, requiring the county attorney to perform the duties of coroner, is complete in itself, and does not vio-

Statutes—*Concluded.*

late sec. 11, art. III, Const., relating to amendment of laws. *State v. Moorhead* 298

6. A statute may be upheld on one ground and be declared unconstitutional upon a subsequent attack by another litigant for other grounds. *Davison v. Chicago & N. W. R. Co.* 462
7. A statute regulating speed of carriage of live stock is a proper exercise of police power, if it is reasonable and practical in its operation, and does not impose an undue burden on the carrier. *Davison v. Chicago & N. W. R. Co.* 462
8. Secs. 6018, 6019, Rev. St. 1913, relating to speed of carriage of live stock, *held* unconstitutional, as being unreasonable and in permitting no defense, and violating constitutional rights. *Davison v. Chicago & N. W. R. Co.* 462
9. A simultaneous repeal and re-enactment of a statute is an affirmance of the original, and not a repeal. *Wiese v City of South Omaha* 492
10. The title to ch. 145, Laws 1911, entitled "An Act to amend sec. 15, art. V, ch. 89, Comp. St. 1909, relating to drainage districts," *held* broad enough to admit legislation germane to the subject-matter of the act amended, and not inconsistent therewith. *State v. Drainage District* 625
11. Sec. 44, ch. 145, Laws 1911 (Rev. St. 1913, sec. 1914), *held* germane to the original drainage act (Laws 1907, ch. 153), and not inconsistent with sec. 20 thereof, and valid. *State v. Drainage District* 625
12. Failure of presiding officer of senate to sign a bill *held* not to affect its validity. *State v. Missouri P. R. Co.* 700
13. A statute susceptible of a reasonable construction avoiding a conflict with the Constitution should be so construed. *State v. Missouri P. R. Co.* 700
14. Ch. 86, Laws 1915, *held* violative of sec. 4, art. III, Const., relative to time of introduction of legislative bills. *Chittenden v. Kibler* 756
15. A statute conferring authority upon an officer or board under the police power should be strictly construed, and all powers not specifically granted or necessarily implied are reserved. *State v. Morehead* 864

Stipulations.

Where parties agree upon two stipulations, one tending to increase the amount of plaintiff's claim and the other to diminish it, neither party, after submission of the case on such stipulations, can withdraw the one against his interest and insist on the other. *Kriss v. Union P. R. Co.* 801

Street Railways.

Where a motorman in an emergency, acting on his best judgment, attempts to stop the car instead of lowering the fender, he is not negligent as a matter of law. *Shapiro v. Omaha & C. B. Street R. Co.* 452

Subrogation.

Where a bank fails while having on deposit county funds in excess of the amount of its depository bond, and the surety on the bond pays the full amount of its liability and the treasurer's surety pays the over-deposit, the sureties may share ratably the dividends paid on the county's claim. *Cole v. Myers* 480

Taxation. See SCHOOLS AND SCHOOL DISTRICTS, 2, 3.

1. Under ch. 73, Laws 1903, a county board of equalization may without complaint by a taxpayer add omitted property to the assessment list or increase valuation, but in such case a complaint should be framed by the assessor or the board, and the taxpayer must be notified, if found in the county. *Farmers Co-operative Creamery & Supply Co. v. McDonald* 33
2. Under secs. 6437, 6442, Rev. St. 1913, the 20 days' session of a county board of equalization need not run 20 consecutive days. *Farmers Co-operative Creamery & Supply Co. v. McDonald* 33
3. Where an assessment is increased by the county board of equalization without jurisdiction, collection of taxes based on the increased valuation may be enjoined. *Farmers Co-operative Creamery & Supply Co. v. McDonald* 33
4. Unless a tax is levied for an illegal or unauthorized purpose, its collection cannot be stayed by injunction. *Peterson v. Anderson* 149
5. The constitutional inhibition against levy of taxes by county authorities in excess of $1.50 per $100 valuation does not apply to taxes levied for county high school purposes. *Peterson v. Anderson* 149
6. A tax levy made by a majority of the county board is not void for want of jurisdiction, though the record recites that it was made by the board of equalization. *Peterson v. Anderson* ... 149
7. That one public service corporation furnishes heat, light and power by electric current conveyed by wires and another by gas conveyed by mains does not justify levy of an occupation tax on one and not on the other. *City of Lincoln v. Lincoln Gas & Electric Light Co.* 182
8. Taxes cannot be recovered on the ground of double assessment, where the tax receipt neither shows payment under

Taxation—*Concluded.*

protest nor any ground of protest. *Black Bros. v. Logan County* 478

9. The state's claim against a county for money levied and collected for care of insane persons need not be presented to county board under sec. 5638, Rev. St. 1913, before suit to recover same. *State v. Stanton County* 747

Telegraphs and Telephones.

1. A contract in a franchise ordinance fixing maximum rates to be charged for use of telephones is subject to the right of regulation. *Marquis v. Polk County Telephone Co.* 140
2. Since adoption of the constitutional amendment creating the state railway commission and passage of the law specifying their duties, the commission has power to regulate telephone rates in cities of the second class. *Marquis v. Polk County Telephone Co.* 140
3. Evidence *held* to show that the rate of $2.50 a month for a business telephone in the city of Stromsburg is not unreasonable. *Marquis v. Polk County Telephone Co.* 140

Torts.

Settlement with one joint wrongdoer is no defense to an action against another, unless it was agreed that such settlement was in full of all damages. *Hauth v. Sambo* 160

Trial. See ATTORNEY AND CLIENT. BASTARDY. BROKERS, 4. CARRIERS, 2. CRIMINAL LAW. FALSE IMPRISONMENT, 2, 3. SALES. WILLS, 10, 11.

1. Instruction defining "intoxication" *held* sufficient, where evidence of intoxication was so strong that the jury could not have been misled. *Hauth v. Sambo* 160
2. In an action on a liquor dealer's bond, refusal of instruction that, if the accident which caused death would have happened whether decedent was intoxicated or sober, and liquor furnished did not contribute to the accident, verdict should be for the defendants, *held* not error; the first part calling for speculation, and the latter covered by instructions given. *Hauth v. Sambo* 160
3. Refusal of instruction eliminating recovery for loss of society and companionship of decedent, and for injury to feelings and sentiments, *held* not error. *Hauth v. Sambo*..... 160
4. Copying the pleadings in an instruction in an action for negligence *held* not error, where the issues were correctly submitted by other instructions. *Shapiro v. Omaha & C. B. Street R. Co.* 452

Trial—*Concluded.*

5. Unless the evidence tends to show that a witness has wilfully sworn falsely, an instruction that, if he has intentionally sworn falsely to any material matter, the jury may disregard his entire testimony, *held* not justifiable. *Wunrath v. Peoples Furniture & Carpet Co.* 539
6. The refusal of a requested instruction which assumes the existence of a material fact upon which the evidence is conflicting is not ground for reversal. *Van Dorn v. Kimball* ... 590
7. Complaint cannot be made that more detailed instruction was not given, where none was requested. *Van Dorn v. Kimball* 590
8. Instructions as to reasonable cause *held* not to be so inconsistent as to require a reversal. *Van Dorn v. Kimball* 590
9. Where the pleader sets out the alleged meaning of a written contract in his pleading, and evidence is introduced on such issue, a verdict under proper instructions, not excepted to, will not be disturbed. *Felthauser v. Greeble* 652
10. When the condition of the record and the form of the question itself show its relevancy, no offer of proof is necessary *In re Estate of Johnson* 791
11. When a general instruction on an issue is given, request for more specific instruction should fairly present the matter as it affects all the litigants. *Kriss v. Union P. R. Co.* 801
12. Where, at the close of trial of a law action, each party moves for a directed verdict and the motion of one party is sustained, the court's finding takes the place of a verdict. *Modern Woodmen of America v. Berry* 820

Trusts. See LIMITATION OF ACTIONS, 1.

1. In a suit to declare a trust in lands, declarations of the ancestor, through whom defendants acquired title without valuable consideration, are admissible in evidence. *Johnson v. Petersen* 255
2. Where a testator bequeathed property, the legatee promising to hold it for the benefit of another, he will be held as trustee: *Crinkley v. Rogers* 647
3. Where a testator bequeathed property for the benefit of another, equity will compel the legatee as trustee *ex maleficio* to deliver it to the beneficiary. *Crinkley v. Rogers* 647

Vendor and Purchaser. See CONTRACTS, 3. PLEADING, 2.

1. A prospective purchaser is not put on inquiry relative to the ownership of customary outbuildings on a farm, though he knows that the farm is occupied by a tenant. *Roden v. Williams* 46

Vendor and Purchaser—*Concluded.*

2. Where the owner, without reserving outbuildings, contracts in writing to sell a farm, and receives the full consideration, he is liable to the purchaser for the value of such outbuildings, if owned and removed by a tenant. *Roden v. Williams* 46
3. One who has conveyed land with covenants of title is entitled to notice and opportunity to defend a suit against his grantee contesting title; but, if he has notice and fails to defend, he is bound by the decree. *Fassler v. Streit* 722
4. Where a decree is adverse to a grantee under a deed with covenants of warranty, the grantee may pay the adverse claim and set off same against the unpaid price of the land. *Fassler v. Streit* 722

Waters.

1. To the extent that a landowner, under a prior appropriation, uses water of a river for irrigation when actually needed, diversions by upper appropriators are not adverse. *Maranville Ditch Co. v. Kilpatrick Bros. Co.* 371
2. A village having for years maintained a lateral ditch for irrigation purposes in a street, a landowner who irrigated his land for a long time from such lateral cannot be deprived of his rights by the village in the regulation of its streets, unless it furnish him another lateral. *Thornton v. Kingrey* 525
3. A village may require one using water from a lateral for irrigation to receive water from another lateral, where it provides suitable connection. *Thornton v. Kingrey* 525

Wills.

1. While a limitation repugnant to a devise of the fee is void, a subsequent clause disposing of the property on the death of the devisee may be considered an indication of the testator's intent to devise a life estate only, where such previous clause does not clearly devise the fee. *Schminke v. Sinclair* 101
2. A devise to testator's widow so long as she shall remain unmarried, the property in the event of her marriage or death to be divided among testator's children, *held* to vest a life estate only. *Schminke v. Sinclair* 101
3. An oral contract to devise land and bequeath money in consideration of services: *held* enforceable, where the beneficiary has performed the services, the value of which cannot be determined. *Rine v. Rine* 225
4. A statute fixing the time for election to take under an antenuptial contract or under the statute pertains to the remedy, and compliance with the statute in force at husband's death or at filing of election is sufficient. *In re Estate of Enyart* 337

Wills—*Concluded.*

5. An agreement upon sufficient consideration to devise or bequeath property is valid. *Crinkley v. Rogers* 647
6. In case of a contract to devise and bequeath property, equity will impress a trust on the property, which will follow it into the hands of personal representatives of the promisor or grantees without consideration. *Crinkley v. Rogers* 647
7. Every one is entitled to control his property while living, and to direct its use by will after his death. *In re Estate of Johnson* 791
8. The trial of a proposed will is to determine whether it is in fact the will of the decedent rather than the will of interested parties who have procured its execution by undue influence. *In re Estate of Johnson* 791
9. Statements of decedent, not made at time of executing a will, are generally incompetent as proof of undue influence, but are admissible if they tend to prove the condition of his mind as to unbiased disposition of his property. *In re Estate of Johnson* 791
10. An instruction that "influence that amounts to undue influence must be such as to compel, overpower, and coerce one to do something which he does not want to do," *held* erroneous in view of the circumstances of the case. *In re Estate of Johnson* 791
11. Where undue influence is established by a preponderance of the evidence, the proposed will must be rejected, and an instruction that, unless the jury are convinced thereby, they cannot reject the will is inaccurate, and may be prejudicial. *In re Estate of Johnson* 791
12. If a proposed will recites a reason for disinheriting a son who is contesting it on the ground of undue influence by beneficiaries, it is competent, in connection with other evidence of undue influence, to prove that no such reason existed. *In re Estate of Johnson* 791
13. Upon appeal from a judgment admitting a will to probate, the district court tries all questions *de novo*, and must determine whether the proposed will has been altered and the consequences of alteration, if any. *In re Estate of Johnson* ... 791

Witnesses. See EVIDENCE.

1. Where a witness testifies at the trial at variance with his deposition, the party calling him may, after interrogating him as to the deposed statements, use the deposition to show such inconsistent statements. *Hauth v. Sambo* 160

Witnesses—*Concluded.*

2. It is error to take unsworn statements of an interested party as to the qualifications of a witness seven years old and exclude her testimony without examination by the court. *Roberts v. State* 199
3. In a suit for specific performance of a contract to devise land, counsel for plaintiff and her son *held* not disqualified to testify as to conversations with decedent. *Rine v. Rine*..... 225
4. Where checks and receipts for annual payments under an antenuptial contract have been received in evidence on behalf of representatives of the deceased husband, the widow may testify to the same transactions. *In re Estate of Enyart*.... 337
5. Testimony of witnesses having a direct legal interest in the subject in controversy, and of the attorney and confidential adviser of the deceased, *held* properly excluded under secs. 7894, 7898, Rev. St. 1913. *Crinkley v. Rogers* 647
6. Where proponent, a beneficiary, alleged by contestants to have used undue influence, contradicts evidence of his undue influence, the court should allow full cross-examination as to his conduct toward the testator. *In re Estate of Johnson* ... 791