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CASPER MOELLER ET AL., APPELLANTS, V. LOGAN DRAINAGE DISTRICT, APPELLEE.

FILED APRIL 19, 1919. No. 20413.

1. **Drains:** MANDATORY INJUNCTION. Courts will not ordinarily, by means of a mandatory injunction, direct a different method of drainage from that adopted in good faith by the district board.
2. ———: DISSOLUTION OF DISTRICT: OBJECTION: LACHES. The dissolution of a drainage district, according to law, will not be interfered with at the suit of certain property owners in the district who desire another plan of drainage, who paid their assessments, and who participated in the benefits of the drainage of the district for a number of years, and who did not begin such action until notice of an election to dissolve the district was being given.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

F. Dolezal and *Allen Johnson*, for appellants.

Courtright, Sidner & Lee, contra.

LETTON, J.

The petition alleges the incorporation of the Logan Drainage District; that it built a ditch on the east side of Logan creek near plaintiffs' lands; that by excavation of the ditch Logan creek in this vicinity became filled with silt and destroyed as a watercourse, becoming a series of stagnant pools and destroying the drainage of plaintiffs' lands; that plaintiffs were assessed to pay for such construction and have paid the assessments; that before the excavation of the ditch the plaintiffs' lands were sufficiently drained by Logan creek; that the majority of the landowners in the district own lands up stream from plaintiffs, and have confederated together to dissolve the district for the purpose of evading plaintiffs' rights, and have called an election for the dissolution of the district; that it was the duty of the district to drain the unused portions

of Logan creek and to restore the drainage of plaintiffs' lands.

The prayer of the petition is to require the defendant to restore the drainage of Logan creek in the vicinity of plaintiffs' lands within a reasonable time, and in an equitable and just manner in regard to assessments; that it be restrained from taking any steps to dissolve itself or proceeding with an election for that purpose; and that it be enjoined "from maintaining and from suffering said stream along and in the vicinity of plaintiffs' lands from being a collection of stagnant pools."

The answer amounts to a plea of laches, estoppel, and want of power to change the flow of drainage. It also pleads acquiescence in the work since 1909, and that plaintiffs have accepted damages and compensation for right of way.

The district court found generally for defendant. No supersedeas bond was filed, and by supplementary proceedings in this court defendant has shown that at an election held by the electors of the district in November, 1917, the district was dissolved unanimously.

In 1909 the defendant drainage district was created to drain the valley of Logan creek. In 1910 ditches were excavated in order to straighten the channel of the creek and prevent overflow. Plaintiffs are landowners living in the district below the intersection of the ditch with the old channel of Logan creek in section 29. The evidence shows that at least two of the plaintiffs, before the ditch was constructed, had tile-drained a part of their lands into the old bed of the creek. Plaintiff Moeller testifies that since the new channel has been constructed the stream below this intersection has ceased to flow in its old channel except during flood; that it is gradually filling up with silt and leaving stagnant ponds; that he had expended a large amount of money in tile-draining his land into the old bed before the ditch was made; that the partial filling of the creek has rendered his tiling useless; the value of his lands

has been depreciated; and that it is impossible for him to extend his tiling across the old bed to the new channel. He desires a new ditch from three to five miles long dug on the west side of the old channel.

In December, 1909, a petition was presented to the drainage district board, signed by several of these plaintiffs, asking that, in constructing the ditch, the board make provision for keeping the channel of the creek open from the south line of section 29 to where Logan creek crosses the Chicago, Burlington & Quincy Railroad. The board voted not to take any steps to close the old channel, but to leave it open to the course of nature, and, as is usual in such conditions, the old channel is gradually filling up with silt deposited by flood waters.

An examination of the record shows that, while plaintiffs all desire some change made in the plan of drainage, they do not seem to agree as to the manner in which the change shall be made. One wants a new ditch west of the old channel, another only wants a larger outlet under a railroad bridge, while still another wants the old bed of the stream cleaned and kept from filling up. For years these plaintiffs acquiesced in the plan of drainage. Just as the district was about to be dissolved, they come into court attempting to compel a change in the plan. There is not sufficient proof to justify the action as one to abate a nuisance. Furthermore, whatever injuries to their land were liable to be suffered by reason of the construction of the ditch were proper elements of damages which plaintiffs had the right to claim from the district at the inception of the proceedings. If the construction of the new channel intercepted the tile drain already in place, this should have been compensated in damages, or a new outlet furnished at that time. It is not shown these were not considered at that time. The failure to make a claim for damages is no ground for staying the orderly process of administration of the defendant's affairs,

or its dissolution. At this time no such action is pending, and there is no proof that the dissolution is sought to avoid the payment of damages. We agree with the district court that no cause of action has been established.

AFFIRMED.

CORNISH, J., not sitting.

TILLIE CHAMBERLAIN ET AL., APPELLEES, V. WILLIAM FRANK ET AL., APPELLANTS.

FILED APRIL 19, 1919. No. 20449.

1. **Deeds:** MENTAL CAPACITY: VALIDITY: PRESUMPTION. Where a deed was executed, with practically no consideration, by a father over 80 years of age, of nearly all of his property, which was worth about $30,000, to one son, with whom he lived, excluding his other children from all but a small share of his estate, under a misconception of the real value of the property, and without any apparent reason for such action, the transaction will be closely scrutinized, and the presumption is against the validity of the deed.

2. ———: ———: EVIDENCE: SUFFICIENCY. Evidence examined and set forth in the opinion, *held* to be insufficient to uphold the conveyance.

3. ———: SUIT TO ANNUL: LACHES. The invalid conveyance was made about six years before the death of the grantor. The action was brought by the other heirs of the deceased a few months after his death. *Held*, that there was no laches on their part in bringing the action.

4. **Appeal in Equity:** TRIAL DE NOVO. The petition sought to set aside a deed on the ground of mental incompetency of the grantor and undue influence. The district court found that the grantor was mentally incompetent to execute the conveyance. The appeal in such a case brings up the entire record for review, and if either ground, or both, are found by this court, upon a trial *de novo* to be sustained by the evidence, it may base its decision upon such grounds, irrespective of the fact that the decree of the district court was based upon a finding of mental incompetency alone.

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

W. M. Hopewell and *Brome & Ramsey,* for appellants.

J. A. Singhaus and *Smith, Schall & Howell, contra.*

LETTON, J.

Action to set aside a deed to about 200 acres of land in Burt county, made by one George Frank to his son William Frank, on the ground of mental incapacity and undue influence. The district court found for the plaintiffs, and defendants appeal.

The specific finding of the court was that no consideration passed from the defendant William Frank to his father, George Frank; that at that time the real estate was of the fair and reasonable value of $150 an acre; that George Frank was at the time wholly incompetent to execute a deed and to transact business, and did not comprehend the effect of the transaction.

George Frank and his wife came to Burt county in 1882, and settled upon the land in question. There they reared the family, consisting of three daughters, Tillie Frank, now Tillie Chamberlain, Louise Frank, now Louise Lewis, Barbara Frank, and two sons, Matt Frank and William Frank. William Frank was the younger son, and is now about 48 years of age. Mrs. Frank died in 1900. William was married to the defendant Alvina Frank in 1901. The other children had moved from the farm some years before. Before the mother died, and afterwards, William resided at home with his father, and worked upon the farm. He took his wife there when they were married. After the marriage George continued to reside upon the farm with his son and his wife.

On August 24, 1910, when he was over 80 years of age, George went to a firm of lawyers in Tekamah, and procured them to prepare a deed of conveyance to William of all his real estate. In the afternoon of the same day William and his wife and father went to

the same lawyers, and William entered into an agreement to support and care for his father thereafter and during his lifetime, and to pay at his death $25 to the daughter Barbara, and $400 to each of the other children, securing the same by a mortgage to the defendant Burdic, as trustee. None of the other children knew of this transaction with William until after its consummation. In November, 1910, an action was brought in the name of George Frank by the plaintiffs, Tillie Chamberlain and Louise Lewis, as his next friends, in the district court for Burt county, seeking to have the deed to William set side on account of his incompetency. In this case George Frank filed a motion supported by his own affidavit and that of others as to his competency, asking to dismiss the suit as unauthorized. This action was dismissed by the plaintiffs, without prejudice, without coming to a hearing.

In 1912 an action in ejectment was brought by William Frank against Tillie Chamberlain to eject her from 60 acres of this land upon which she was living with her husband, and which she had occupied for a number of years without paying rent, with the permission and consent of her father, George Frank. In 1913 the testimony of George Frank was taken at the trial, and has been introduced in evidence in the present case in order to show his mental condition at that time. For some years before the death of his wife; he did but little work upon the farm, most of it being performed by William. After his wife's death, he almost entirely ceased to attend to business or work of any nature. He carried a bank account up to about 1904, when he ceased to have any banking transactions, and the whole management of the farm, cultivation, buying and selling of stock, marketing of crops, and receipt and disbursement of money, was thereafter carried on by William, who apparently assumed to own all the farm and live stock; the father having very little money and being poorly provided with clothing.

The evidence in regard to his competency to transact business at the time the deed was made is conflicting. A number of credible witnesses testified that in their opinion he was as well able to transact business at that time as he ever was, while several others, most of whom, however, formed their judgment from what they saw of him after the deed was executed, testified they believed he was incompetent to transact business. This evidence was considered because of other testimony that there was no material change in his mental condition between the time spoken of and the time the deed was made. A significant fact is that in his testimony in the ejectment case George Frank testified that he believed the farm was worth from $15 to $20 an acre, and in substance that when he gave the farm to William, and specified the amount of payments to the other children, he believed that he had very little property. If this had been the fact, the estate would have been somewhat equitably divided among his children. The family physician, who had testified that George was of sound mind when the deed was made, on cross-examination said that such testimony as to value would indicate that the witness was "either prevaricating, or was a little off in his upper story." The testimony is undisputed that at that time the land was worth $150 an acre.

From a consideration of all the testimony, we are satisfied that George Frank, while perhaps competent to transact small affairs of business, from his isolation on the farm, from his lack of carrying on any business transaction for years, and perhaps from a gradual breaking down of his faculties, partly occasioned by the use of intoxicating liquors, did not understand the nature and character of the act he was performing; at least he had no proper conception of the value of the real estate, the land at that time being worth nearly $30,000, instead of $3,000 to $4,000, as he evidently believed. There is no testimony that he said he intended that William should

have the farm on account of the expressed wish of his wife before she died, but it seems clear he intended a somewhat equitable division by charging the land with a fair share of the estate, considering all the circumstances, to be paid to the other children.

The district court made no finding with respect to the existence of undue influence. The appellants insist that, this being the case, the only question here is whether the finding as to incompetency is supported by the evidence. Appellees say that the whole case is before us for trial *de novo,* and that this court is entitled to examine the evidence and render such decree upon either issue as it deems warranted by the proofs. We take the latter view.

In the nature of the evidence in this case, we cannot well dissociate these two grounds for relief set forth in the petition. It is true there is no direct evidence of undue influence exerted upon the mind and will of George Frank; but the courts have repeatedly decided that a conveyance made by one well stricken in years, living under such circumstances as to place him under the control and domination of a son, or other person with whom relations of trust and confidence would naturally exist, will be closely scrutinized, and when from all the evidence, or lack of evidence, in the case, the court is satisfied, either that the grantor was incompetent to transact business of that nature, or that his mind had been so overborne by influences, which in its weakened state it was unable to resist, that he made a conveyance disregarding the natural ties of affection to his other children, and which he would not have made if uninfluenced, or that a combination of both weak mentality and undue influence existed, it will set aside the deed. *Gibson v. Hammang,* 63 Neb. 349; *Winslow v. Winslow,* 89 Neb. 189; *Nelson v. Wickham,* 86 Neb. 46.

Under such circumstances, the burden of proof to establish that no undue influence or improper pressure

upon the mind of the grantor was exerted is upon him who profits by the conveyance. In this case it may be questioned whether the evidence as to mental incompetency, standing alone, would justify the setting aside of the conveyance; but, when all the circumstances in the case are considered, we have reached the conclusion that George Frank was in such a condition of mind at the time the deed was made as not to have been a free agent. We cannot set aside the impression that, though the conveyance was not executed in the presence of William Frank, and though ostensibly it was the independent act of George, he was not acting with full knowledge of the value of his estate, and of the extent to which his other children should share in its disposition. There is no proof that any estrangement or lack of affection existed between George and his other children, though he did not care much for the husband of Tillie, and there had been friction between the children of William and Tillie, which extended to the parents, and prevented Tillie from visiting the home thereafter.

The appellants insist plaintiffs were guilty of laches in not trying the action soon after the deed was made. Plaintiffs had no interest in the land other than a mere expectancy at that time. Their father might have sold and disposed of it in his lifetime if competent to do so; hence they had no such present and vested interest in the land that they could set up undue influence as a ground for setting the deed aside. The action was brought in a few months after their father's death.

When the whole record is considered, we have reached the conclusion that the judgment of the district court is right, and should be

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

LAURA A. MARTIN, APPELLANT, V. CHARLES A. LEININGER, APPELLEE.

FILED APRIL 19, 1919. No. 20516.

Bastardy: PATERNITY: QUESTION FOR JURY. Where the evidence of complainant in a bastardy proceeding, if undisputed, would be sufficient to make a *prima facie* case, and a direct conflict in the evidence appears, the issue of fact as to the paternity of the child must be submitted to a jury to determine.

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

F. S. Baker and *J. E. Porter*, for appellant.

Earl McDowell, contra.

LETTON, J.

Appeal from a judgment of dismissal in a bastardy proceeding. The trial court at the conclusion of the evidence sustained a motion for a directed verdict in favor of the respondent.

The complainant, who was a girl between 16 and 17 years of age and whose education had only proceeded to the fifth grade, resided with her parents in Sioux county. In May, 1916, she went with her sister and brother-in-law to Scott's Bluff county in an automobile. On the way they stopped at the home of respondent's father, with whom he resided, and were allowed to spend the night in an unoccupied tenant house not far away. Later in the evening complainant went back after some milk for her sister's baby, and after the milking was done respondent accompanied her on her return. He was an unmarried man about 28 years of age. It is not disputed that the young people diverged from the path, and went to the banks of a nearby stream, and it was there that complainant testifies the first act of intercourse occurred. According to her evidence, they were equally desirous of the association. According

to his testimony, the old story of Potiphar's wife was reenacted; respondent taking the part of Joseph. No tangible results followed. In June complainant wrote respondent a loving and rather salacious letter, and early in November she sought and found employment at a hotel in Gering. She left the hotel the next day, went to Mitchell, hired a conveyance, and was taken to respondent's home, arriving in the evening. She did not see respondent that night. The next morning respondent was about to go rabbit hunting. She says that he invited her to accompany him. He says she forced her company upon him. Complainant testifies that on this expedition they went to the unoccupied house mentioned, and that there several acts of intercourse took place, which resulted in the birth of a child. Respondent admits they went near the house, but denies they went inside, or that acts of intercourse occurred. This was about November 6 or 7. The child was born August 12, 1918, after the usual period of gestation.

The motion to instruct was upon the ground that complainant omitted to call her sister and brother-in-law as witnesses, and did not try to obtain their testimony, and that her evidence was in contradiction to her former testimony.

The omission to take the depositions of the sister and her husband, who resided in another state, as to the time complainant returned to the house in May, was not so material as to justify a dismissal, and the statements made by complainant were not so inconsistent as to warrant such procedure. Her story at least has the merit of frankness, in that she does not make the not uncommon plea of being overcome by force, but openly confesses submitting to a man whom she had just met for the first time.

There is nothing to show that complainant had intercourse with any other man about the time conception must have taken place. Whatever may be said of the

conduct of this adolescent girl, it forms no defense to an action whose purpose is to protect society against the liability to support the child. This is a civil case which must be decided by a preponderance of the evidence, and where such a conflict of evidence appears, the issue of fact is committed by the law to a jury to determine. While the defense against such an accusation is a difficult one to make, and no doubt wrongs are sometimes committed by juries, the lawmakers have left the statute as it is for a long time, and we are not at liberty to change it.

REVERSED.

CORNISH and ALDRICH, JJ., not sitting.

WILLIS L. HAND, APPELLANT, V. WILLARD F. BAILEY COMPANY ET AL., APPELLEES.

FILED APRIL 19, 1919. No. 20359.

1. **Public offices are not subjects of lawful barter and sale.**
2. **Libel: CHARGE OF BARTERING A PUBLIC OFFICE. Under the common law of the United States and the public policy of Nebraska, two rival candidates for a public office cannot lawfully make a contract or a political deal that one of them shall withdraw his candidacy in favor of the other and that the latter, if elected, shall appoint the former to a public office; and a newspaper article naming a candidate and charging him with being a party to such conduct is of itself libelous.**

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

Fred A. Nye and *John A. Miller,* for appellant.

N. P. McDonald and *E. B. McDermott, contra.*

ROSE, J.

This is an action to recover $7,500 in damages for libel. The article on which the suit is based was published by defendants in the Kearney Times, a daily

newspaper, on the morning of a city election. At the preceding primary plaintiff, M. N. Troupe, K. R. Andrews, and Frank Arbuckle, among others, had been nominated for city councilmen, and their names appeared on the official ballots as candidates at the city election. Troupe, Andrews, and Arbuckle had led the others at the primary, and in the newspaper comment they are called the "Three Highest Candidates." The published article is here reproduced:

"Hand Out of Race: Is Promised Appointment.

"Candidate for Commission Attempts to Throw Support to 'Three Highest Candidates' With Assurance of Reward.

"Discouraged by the fact that he had found it only too evident that he could not be elected as one of the city commissioners, Willis L. Hand yesterday withdrew from the race for councilman, and according to one of his friends he did it after an agreement that he would be given an appointment if the Andrews-Troupe combination was elected.

"According to this friend of Mr. Hand's, it was thought by Mr. Andrews and Mr. Troupe that a withdrawal of the candidate would mean extra support to the Andrews-Troupe contingent. This friend was strong in his belief that the public could not blame Mr. Hand for renouncing his candidacy when he would have run a forlorn race on the one hand and could be rewarded on the other provided these men were elected.

"So evident is the alarm of the two retrogressive candidates, because of the eleventh-hour certainty of the success of the Arbuckle, Burroughs, Hawley ticket, running on a program of progress, that they maneuvered the Hand withdrawal in a last desperate effort to save themselves."

The trial court sustained a demurrer to the petition, and from a judgment of dismissal plaintiff has appealed.

Plaintiff takes the position that defendants charged him with making an unlawful pre-election contract to sell his candidacy and political influence to rival candidates for their promise to appoint him, in the event of their election, to a lucrative public office, and that the imputation is of itself libelous.

To justify the sustaining of the demurrer, defendants argue that the newspaper publication is not libelous *per se,* that special damages are not pleaded in the petition, and that therefore the facts therein pleaded do not state a cause of action.

What did the reading public generally understand the publication to mean as it appeared in the daily press on the morning of the city election? The import of the article is plain. Under the circumstances it would generally be understood by those who read it to mean that plaintiff, while a candidate for councilman, had entered into a pre-election contract to sell his candidacy and influence to rival candidates in consideration of an agreement on their part, if elected, to appoint him to a lucrative public office. In other words, the newspaper article would generally be understood in common parlance to contain the charge that plaintiff as a candidate for councilman had sold out to rivals. In any event, the political deal described by defendants includes the making of a pre-election contract to influence the appointment to a public office. Was the conduct imputed to plaintiff unlawful? The rivals with whom he is said to have bargained had not been elected. They were not then clothed with official power or responsibility for municipal acts. They were not bound by an oath of office or an official bond; but, according to the published accusation, they had nevertheless agreed in advance to exercise official power for personal advantage by appointing plaintiff to a public office, thus closing the door to other aspirants and destroying the political right of citizens generally to voluntarily recommend official appointments in the interests of the public ser-

vice. It is unnecessary to search for a statute forbidding the odious conduct imputed to plaintiff. Such conduct is denounced as unlawful by the common law of the United States and by the public policy of Nebraska. Purity of public elections and untrammeled officialdom are imperative demands of the government. Public offices are not subjects of lawful barter and sale. All contracts tending to influence appointments to public office are unlawful and void. *Exchange Nat. Bank v. Henderson,* 139 Ga. 260, 51 L. R. A. n. s. 549, note 2; *Meacham v. Dow,* 32 Vt. 721; *Filson's Trustees v. Himes,* 5 Pa. St. 452; *Eddy v. Capron,* 4 R. I. 394; *Haas & Co. v. Fenlon,* 8 Kan. 601; 9 R. C. L. 1177, sec. 164. The charge that a candidate for a public office sold out to his rival is of itself actionable. *Post Publishing Co. v. Hallam,* 59 Fed. 530.

In this view of the law, the newspaper publication pleaded in the petition is of itself libelous. The demurrer, therefore, was erroneously sustained. It follows that the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

CORNISH, J., not sitting.

EDMUND S. CUMMINGS, APPELLEE, V. ARTHUR J. KEATING & COMPANY ET AL., DEFENDANTS: ARTHUR J. KEATING, APPELLANT.

FILED APRIL 19, 1919. No. 20844.

1. **Limitation of Actions:** NOTE: PETITION. A promissory note showing on its face that it is outlawed does not render demurrable a petition pleading it in full and praying for judgment thereon, where plaintiff alleges that his failure to begin his action within the statutory period of five years was due to the absconding and the concealment of defendant.

2. ———: CONCEALMENT OF DEBTOR: EVIDENCE. The sufficiency of the evidence to sustain a finding that a debtor absconded, con-

cealed himself, and thus arrested the running of the statute of limitations, must be tested by the circumstances and the conditions of each case in which that issue is tried.

3. ———: ———: ———. In an action on unpaid, promissory notes executed and delivered in Chicago, the evidence outlined in the opinion *held* sufficient to sustain a finding that defendant absconded from Illinois, concealed himself in Nebraska, and thus arrested the running of the statute of limitations.

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

Smith, Schall & Howell, for appellant.

Brome & Ramsey and *J. P. Uvick, contra.*

ROSE, J.

This is an action on two promissory notes in form as follows:

"$1,000. Chicago, Ill., Nov. 1st, 1899.
"Thirty days after demand, for value received, we promise to pay to the order of E. S. Cummings, the sum of one thousand dollars, at 120 Randolph St., Chicago, Ill., with interest at the rate of seven per cent. per annum, after date.

"A. J. Keating & Co.,
"John Collins."

"$1,000. Chicago, Ill., Dec. 1st, 1899.
"Thirty days after demand, for value received, we promise to pay to the order of E. S. Cummings the sum of one thousand dollars at 120 Randolph St., Chicago, with interest at the rate of seven per cent. per annum, after date.

"Arthur J. Keating & Co.
"Per John Collins."

Payment of interest to January 1, 1900, is indorsed on the back of each note. Otherwise the principal and the interest are unpaid. Arthur J. Keating and John Collins were partners, the firm name being Arthur J. Keating & Company. In Chicago the partnership had been engaged in buying municipal paper and in making

loans. The original petition was filed in the district court for Douglas county, Nebraska, June 19, 1915, and an amended petition was filed February 16, 1918. There was service of summons on defendant Keating alone. He pleaded in his answer that the action was barred by the statute of limitations. On a trial of that issue the jury rendered in favor of plaintiff a verdict for $4,569.19. From a judgment thereon for that sum defendant has appealed.

The petition is assailed as fatally defective. It is insisted that the statutory period of five years for the bringing of the suit had expired, as shown on the face of the notes, and that an exception to the general rule is not pleaded. The specific defects in the petition, as construed by defendant, are failure to allege that plaintiff was diligent in attempting to discover the whereabouts of defendant and absence of a reason why discovery was not made sooner. In support of the position thus taken, defendant invokes the doctrine that, in an action based on fraud, if commenced after expiration of the statutory period for instituting such an action, plaintiff, to avoid the bar of the general statute of limitations, must plead facts showing that he exercised due diligence in discovering the fraud. This is a rule of equity which does not determine the question here involved. Plaintiff's suit is not founded on fraud. The notes were executed and delivered in good faith and were never paid. The action is based on the notes. The fraud relates alone to the remedy—the right to maintain the suit after the five-year period for bringing it expired. Plaintiff relies on statutory exceptions in the following language:

"If, when a cause of action accrues against a person, he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed; and if, after the cause of action accrues, he depart from

the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought." Rev. St. 1913, sec. 7577.

Does the petition show that defendant concealed himself in Nebraska within the meaning of the language quoted? Following detailed pleas of the execution, delivery and nonpayment of each note, it is alleged in the petition:

"That at the time said note was executed, the said defendant Arthur J. Keating was a citizen and resident of the state of Illinois, residing at the city of Chicago in said state, and transacting business as hereinbefore recited with one John Collins, under the firm name and style of Arthur J. Keating & Company in said city and state; that Arthur J. Keating was the real and true name of said defendant Keating, and the name borne by him from his birth and continuously until some time during the year 1900, when said Arthur J. Keating absconded from said state of Illinois and concealed himself in the state of Nebraska; that for the purpose of such concealment, and to the end that his identity and whereabouts might not be known by this plaintiff and other creditors of said Arthur J. Keating, he, the said Arthur J. Keating, from and after the time that he absconded from the state of Illinois, as hereinbefore recited, and at all times thereafter, adopted the name of Henry J. Keating, and at all times since said Arthur J. Keating came to the state of Nebraska, during the year 1900, as hereinbefore recited, he has adopted and used said name Henry J. Keating, and represented and stated to his neighbors, associates and persons with whom he came in contact in the state of Nebraska, that Henry J. Keating was his true name; that this plaintiff did not learn, and did not know, that the person calling himself Henry J. Keating, residing in the state of Nebraska, was the same person who conducted business in the city of Chicago and state of Illinois

during the year 1899 as a member of the firm of A. J. Keating & Company until the 10th day of February, 1915; that no demand for the payment of said note or the interest due thereon was or could be made prior to said 10th day of February, 1915, by reason of the aforesaid absconding and concealment of said defendant Arthur J. Keating as hereinbefore recited."

While this plea does not conform to the rules of pleading, it states facts sufficient to show that defendant absconded from Illinois and concealed himself in Nebraska, and thus prevented the general statute of limitations from barring plaintiff's action, within the meaning of the statutory exceptions quoted. The issue of concealment was understood and tried by both parties, and defendant was not prejudiced by imperfections in the petition.

The principal argument by defendant is directed to the proposition that there should have been a peremptory instruction for defendant on the ground that the evidence is insufficient to sustain a verdict in favor of plaintiff. In this connection it is argued by defendant that concealment is not shown; that defendant lived and transacted business in Omaha openly without any attempt to conceal his identity or whereabouts from defendant or others; that his friends and business associates in Omaha knew his real name and former connections in Chicago; that while making his home in Omaha he openly visited his relatives and others in Chicago two or three times a year and reappeared at will in his former haunts, which include the neighborhood of plaintiff's residence; that proof of diligence on the part of plaintiff is wanting, and that he had knowledge equivalent to notice of defendant's place of residence. There is evidence tending to prove the theory of defendant, but the jury and the trial court found the issue in favor of plaintiff. Is their finding sustained by the evidence?

In testing the sufficiency of the evidence to prove concealment for the purpose of arresting the general statute of limitations, the issue must be determined by the circumstances, the proper inferences being questions for the jury. The evidence, for the purposes of review, should be considered in the light of the following observations:

"If one eludes his creditors, then he can be held to the intent of evading process, and all the law requires in order to constitute an absconding debtor is that he shall put himself in such a position that he can and does successfully evade the service of process. In one case it may be by concealment in his own house. It may consist in going from place to place so quickly as to evade meeting with service of process anywhere. There is a limit to the creditor's search for him, else he might never be served with process, and no attachment would ever be sustained. The creditor is bound to ascertain, if he can do so by all natural ordinary means at hand, his debtor's whereabouts, in order to serve him with process; but this obligation has its limits in reason and common sense. A debtor may, by a careful watch of the action of his creditors, or by information from others, elude his creditors for an indefinite time, and yet he might produce proof of having been seen in so many places that it would seem reasonable that service of process could be made. So it can be perceived that concealment with intent to defeat or delay his creditors has a relative significance. It must depend upon the facts of each case, and they must be such, and of such probative force and effect, that the court can conclude that the debtor was eluding the service of process; that he intended to do it, and that his conduct or concealment was such as to lead his creditors to the natural belief that he absconds." *Stafford v. Gaiser*, 57 N. J. Law, 574.

The record contains evidence tending to prove the following facts: Before the notes in suit had been matured by a demand for payment, defendant left Chi-

cago February 8, 1900. There remained unpaid creditors who were not notified in advance of his contemplated departure or destination. He had not arranged for the payment of his debts and he did not leave available assets for that purpose. He was married, but his wife did not know where he had gone. His father and mother were likewise left without knowledge of his plans and destination. He went to British Columbia, Washington, California, Texas, Missouri, Wyoming, and other places. His name was Arthur J. Keating, and when he left Chicago he had never been known by any other. Late in August, 1900, he arrived in Omaha. There, as "Henry Keating," he registered at a hotel, procured saloon-keeper's licenses from year to year, dealt in intoxicating liquors, received mail, reported to the publishers of the telephone and the city directories, acted as secretary of the Retail Liquor Dealers' Association, and bought a home and corporate stock. By that name he was generally known in Omaha when sued by plaintiff June 19, 1915, though his wife and some friends and relatives publicly called him "Art." After his departure from Chicago and before his wife had joined him a few months later, plaintiff asked her where he had gone, but did not get the desired information. Without avail plaintiff also made inquiries of some of defendant's business associates and friends in Chicago. After making further inquiry, at several different times, plaintiff in 1914 first heard of defendant's residing in Omaha and wrote to an attorney there for particulars. The reply contained the advice that there was no such person as Arthur J. Keating in Omaha. Learning later of the death of defendant's father, plaintiff examined the probate records in Chicago and found a reference to Arthur J. Keating, Omaha, a son of decedent. An investigating bureau followed this clue and discovered that defendant was living in Omaha as "Henry Keating." From evidence tending to prove the facts outlined, it may fairly be inferred that de-

fendant concealed himself in Nebraska within the meaning of the statute of limitations.

The probative force of this evidence is not necessarily destroyed by other evidence, adduced during the trial, that defendant openly returned to Chicago two or three times a year and there freely mingled with his former associates, many of whom lived in plaintiff's neighborhood; that defendant used the name of Henry Keating to conceal from his father and others his connection with the saloon business; that plaintiff never asked the parents of defendant where the latter resided, though they were his friends and neighbors; that plaintiff did not pursue his search continuously or diligently after defendant left Chicago. The jury and the trial court were at liberty to view this evidence in a light different from that in which defendant sees it. Defendant in fact conducted the saloon business in the name of "Henry Keating"—the name of his father who was the subject of his solicitude in his attempt to conceal the fact that he was a saloon-keeper. While visiting in Chicago, defendant did not call on plaintiff, who had given him credit, or notify him of the home in Omaha. Plaintiff did not see defendant on these occasions or know that he had been returning to his old haunts. From the viewpoint of plaintiff, as he considered the circumstances and conditions under which defendant departed from Chicago in 1900, continuous inquiries, if directed to the parents and to the former associates of defendant, evincing anxiety and vigilance, might have prolonged the search or prevented the discovery. The course pursued by plaintiff may have stimulated the freedom to which defendant testified in mingling with his old friends around the home of plaintiff. The conclusion is that the evidence is sufficient to sustain the finding that defendant concealed himself in Nebraska. No error prejudicial to defendant has been found.

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

DURLAND TRUST COMPANY, APPELLANT, V. HOWELL M. UTTLEY ET AL., APPELLEES.

FILED APRIL 19, 1919. No. 20100.

1. **Judgment:** MOTION TO VACATE: PAYMENT. After a judgment has been paid in full and the cause dismissed, a motion to set it aside presents no issue.
2. **Appeal:** THEORY OF CASE. A motion that states sufficient facts for a petition for damages on account of fraud will be regarded as a petition for that purpose if the parties appear and try the issue presented.
3. **Appearance.** The district court has jurisdiction of actions for fraud, and may obtain jurisdiction of the person of the defendant if he appears and asks a dismissal wholly upon untenable grounds.
4. **Pleading:** SUFFICIENCY AFTER JUDGMENT. If a pleading alleges facts which entitle the pleader to relief, and there is a complete trial of the issue which it was plainly intended to present, without objection which would challenge technical defects in the pleading, such pleading will be regarded sufficient after judgment.
5. **Appeal:** AFFIRMANCE. When a common-law action is tried to the court without demand for jury, the findings and judgment upon substantially conflicting evidence will not be reversed upon appeal unless it is clearly wrong.

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

Mapes & McFarland, for appellant.

H. M. Uttley, contra.

SEDGWICK, J.

The plaintiff recovered a judgment against these defendants in the district court for Holt county foreclosing a real estate mortgage. An order of sale was issued on the judgment. Sale was made and duly reported to the court. Objections to the confirmation were filed, and, before the sale was confirmed, the judgment was paid in full and the cause formally dismissed

upon the record. Afterwards the defendants filed a motion to reinstate the case upon the docket, and to set aside and cancel the decree and judgment "for fraud practiced by the plaintiff in said action upon the court as well as upon these defendants." The motion closed with a prayer that upon the final hearing the defendants may have judgment against the plaintiff for "the sum of $274.99, the amount by them so wrongfully and unlawfully received and collected."

The motion states no ground for relief, unless it may be regarded as a petition for damages on account of the alleged frauds, and for that purpose, of course, fails to state a cause of action in not alleging when the frauds were discovered and why they were not sooner brought to the attention of the court. When the defendants, who were virtually the plaintiffs in the proceeding, offered their evidence, the plaintiff objected to proceeding with the trial "for the reason the court has no jurisdiction over the person of the plaintiff or over the subject-matter." It was then stipulated that the foregoing objection should apply to all of the evidence, and the trial proceeded. The court, of course, had jurisdiction of the action for fraud, and defendants had already taken such steps as amounted to an appearance. The whole proceeding is a peculiar one, and we cannot say that, upon the issues actually submitted to and tried by the court, the evidence is insufficient to support the findings of the trial court.

The judgment of the district court is therefore

AFFIRMED.

JOHN H. KRAUSE ET AL., APPELLEES, v. T. E. STEVENS, APPELLANT.*

FILED APRIL 19, 1919. No. 20193.

*First heard before commission, and reversed without opinion.

1. **Lease:** CANCELATION: PARTIES. One who executes a lease of real estate, and afterwards sells and conveys the same to another grantee with covenants of title, is a proper party to an action to cancel the lease for fraud and concealment, and may contest the validity of the lease on those grounds.
2. **Deeds:** CANCELATION. The consideration for a conveyance of a valuable interest in real estate must itself have some value, and if it is merely nominal, and there are indications of fraud or concealment of essential facts, equity will cancel such conveyance.

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

McGilton & Smith and *Boyd & Metz,* for appellant.

Lee Bayse, Macfarland & Macfarland and *Gray & Brumbaugh, contra.*

SEDGWICK, J.

In August, 1913 the defendant Joseph Krall executed a lease of mineral rights in over 400 acres of land and two lakes thereon to the defendant Stevens. He afterwards executed a lease of the same lands to these plaintiffs, and still later sold and conveyed these same lands to these plaintiffs for the agreed price of $4,600. The plaintiffs began this action in the district court for Sheridan county to cancel the Stevens lease and to complete and quiet their title as against the defendant Krall. Krall filed an answer and cross-petition, and also asked to cancel the Stevens lease. The district court found generally for the plaintiffs, canceled the Stevens lease, and quieted the title in the plaintiffs. The defendant Stevens has appealed.

The question presented is as to the validity of the lease from Mr. Krall to Stevens. The appellant urges

*First heard by Commission, and reversed without opinion.

that, since his lease was recorded prior to that of the plaintiffs, they are not in a position to attack the appellant's lease. As the defendant Krall sold and conveyed the land to the plaintiffs with full covenants of title, he is now interested in making that conveyance good, and as he was made a party to the action, and tendered thereon the issue of the validity of the lease to Stevens, and was made appellee in this appeal, and has apparently appeared in this court, as the brief filed herein purports to represent all of the appellees, it cannot be said that his interest in canceling this lease is not before the court.

The grounds alleged for canceling the lease, both by the plaintiffs and by the defendant Krall, are that the lease was without consideration, and was procured by fraud, undue influence, misrepresentation, and concealment. The consideration named in the lease is $1, and the evidence shows that there was no other consideration to the defendant Krall. The evidence as to whether the $1 named in the lease was actually paid is somewhat conflicting. The evidence quoted in the appellant's brief is that Krall is of foreign birth, and, although he could read the English language to some extent, he was not able to converse readily therein; that Stevens and his companion, who was also interested, went to Krall's residence and represented to him that they were sent by the government to make arrangements to take alkali out of lakes, and they wanted to obtain a lease from him for that purpose. Krall, not knowing that they were expecting to experiment with potash, and knowing that the alkali in the waters of the lakes was injurious to his stock, consented to the arrangement and executed the lease. It is not contended that his evidence was in any way contradicted or explained. It is contended that a mineral lease of the lands at that time was of no value, but it is conceded that shortly afterwards a mineral lease of these lands would have been of at least the value of

$2,000. If such a lease would be worth $2,000 at the time this action was begun, the contention that it was not worth anything when the lease was made amounts to contending that its actual value was unknown to the parties. We have, then, a lease worth $2,000 obtained by representations that were quite peculiar, if not intentionally fraudulent, for the nominal sum of $1. "It is an ancient and well-established principle that, whenever *suppressio veri* or *suggestio falsi* occur, and more especially both together, they afford sufficient ground to set aside any release or conveyance." *Smith v. Richards,* 38 U. S. 26.

Whether a consideration is adequate depends to some extent upon the circumstances of the case. "But it must have some real value; and if this be very small, this circumstance may, even by itself, and still more when connected with other indications, imply or sustain a charge of fraud." 1 Parsons, Contracts (9th ed.) sec. 436.

In this case the consideration was nominal, and in view of that fact the evidence clearly establishes that it was induced by concealment and undue influence. Our former judgment is set aside.

The judgment of the district court is

AFFIRMED.

F. E. KEELER, APPELLEE, V. ESTATE OF JAMES W. HILES ET AL., APPELLANTS.

FILED APRIL 19, 1919. No. 20327.

1. **Probate Court:** APPEAL: PLEADINGS. Upon appeal from the probate court, the district court may, in a proper case, direct that the cause be tried upon the transcript of the proceedings. No further pleadings are necessary unless the district court so directs.
2. **Bill of Exchange:** VALIDITY. Bank checks may be made payable at a fixed time after the occurrence of an event that is certain

to happen. Rev. St. 1913, sec. 5322. A check made payable one day after the death of the maker is technically a bill of exchange, and is valid if given for a sufficient consideration.

3. **Appeal:** INCOMPETENT EVIDENCE. The findings of the district court upon the evidence will not be reversed because incompetent evidence was allowed, if there is sufficient competent evidence to require such findings.

4. **Executors and Administrators:** CLAIMS: EVIDENCE. The evidence indicated in the opinion is considered sufficient to support the findings of the trial judge.

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

Hoagland & Hoagland and *F. J. Byrd,* for appellants.

H. M. Sinclair and *W. A. Stewart, contra.*

SEDGWICK, J.

After the death of James W. Hiles, this appellee presented a claim against his estate for $8,000 upon two checks, which are printed in appellants' brief in the following form: "Gothenburg, Neb. Dec. 21, 1914. Bank of Brady. One day after my death pay $5,000 to my sister, F. E. Keeler. Five thousand and no/100. J. W. Hiles." Upon contest in the county court, the claim was allowed, and an appeal was taken by the estate to the district court. Upon trial in that court the claim was again allowed, and the case is appealed to this court. No pleadings were filed in the county court other than the claim itself with the two checks attached.

The appellants contend that the appellee filed a petition in the district court, and that her counsel, without leave of court, took the petition from the files and refused to return it. No such petition appears in the record, and, if the facts were as represented in the brief, the appellants' remedy would have been an order of the court upon counsel to return it, which might be compelled by the trial court. No attempt of this kind appears to have been made.

The son of the decedent files an answer in the district court in which he denied that the checks were ever signed or delivered by the decedent to the claimant, and alleged that there was no consideration for the checks, and that the claimant fraudulently caused the checks to be written and presented as the checks of the decedent. The trial court ordered that the cause be tried upon the transcript of the probate court, and, although this is complained of in the briefs, there is nothing in the record to show that any proper steps were taken to make the issues more definite.

It is objected that, the checks being payable after the death of the decedent, they must be considered as "of a testamentary nature," and therefore void as not in accordance with the law of wills. This depends upon whether the checks were given for a sufficient consideration. "Commercial paper may be made payable on any event, however remote, which must inevitably happen some time or other. Thus, it may be payable *on the death* of a certain person, or 'on demand after my decease,' or 'one day after date, or at my death.'" 1 Randolph, Commercial Paper (2d ed.) sec. 113. Rev. St. 1913, secs. 5319, 5322. There is no evidence that it was intended or considered as a gift.

It appears from the evidence that the decedent, being old and rather feeble, and having no one to care for him in his old age, wrote to the appellee, who is his half-sister and was residing in another state, urging her to come and make him a home and care for him. She accordingly came to Nebraska, and established a home, and the decedent lived with her, and she cared for him for three or four years. The decedent had property, including more cash in the bank than the amount of these checks, amounting in all (as shown by inventories on file) to $116,418, and his liabilities were something less than $4,000. He had no family, except one son of middle age, who was well provided for. The evidence sufficiently shows that, when he induced this

appellee to come to this state and care for him, both parties understood that he would compensate her for her services.

The evidence is quite indefinite as to the total value of the services of appellee, but that they were of considerable value is clearly shown. There was no agreement between them as to the amount that should be paid therefor, but it was understood by both parties that there would be compensation. The decedent fixed the amount of compensation, and, from his point of view, considering his condition and the necessity of some arrangement of the kind, and his financial resources, and that no one appears to have been dependent upon his bounty, the payment he made might seem a fair equivalent for the services rendered. Both parties to the contract appear to have been satisfied as to the compensation, and strangers to the contract are not in a position to contest it.

Objection is made to the competency of the appellee to testify as to transactions with the deceased. But she was first called as a witness for appellants, and if some testimony was allowed in her own behalf that was not fairly explanatory of her evidence offered by appellants, still the competent evidence was sufficient to support the findings of the trial judge. The admission of other evidence objected to as incompetent will not require a reversal, for the same reason. The findings of the trial court will not be reversed because of the admission of incompetent evidence, if the competent evidence is sufficient to support such findings. It will not be presumed that the court based its decision on incompetent evidence.

The judgment of the district court is

AFFIRMED.

FRANCIS C. WELCH ET AL., APPELLANTS, V. DOUGLAS COUNTY, APPELLEE.

FILED APRIL 19, 1919. No. 20346.

1. **Taxation**: ASSESSMENT: CORRECTION. A county board of equalization may upon proper notice raise or lower the valuation of real estate for taxation to correct an apparent gross injustice. Rev. St. 1913, sec. 6437.
2. ———: ———: ———. In such case, no complaint is necessary. When it appears to the board that there has been an apparent gross injustice in undervaluation, the valuation should be raised. If real estate of the value of $175,000 has been valued at only $110,000, there is an apparent gross injustice. *Dixon County v. Halstead*, 23 Neb. 697, and *Woods v. Lincoln Gas & Electric Light Co.*, 74 Neb. 526, distinguished.
3. ———: ———: INCREASE: BURDEN OF PROOF. When the action of the board of equalization in raising or lowering an assessment is attacked, the burden is upon the person attacking it to show that it is wrong.

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

Crofoot, Fraser & Connolly, for appellants.

George A. Magney, Ray J. Abbott and *A. V. Shotwell, contra.*

SEDGWICK, J.

The assessor valued certain real estate of the appellants for taxation at $110,000. Upon complaint filed with the board of equalization, it was raised to $175,000. The appellants appealed to the district court, where the action of the board of equalization was affirmed, and an appeal is taken to this court.

The assessment was in 1915, and the statute (Rev. St. 1913, sec. 6437) provides that the board of equalization, "At its meeting in 1912 and every second year thereafter (shall) equalize the valuation of real property of the county by raising the valuation of such tracts and

lots as are assessed too low, and lowering the valuation of such tracts and lots as are assessed too high; but in cases of evident error of assessment or of apparent gross injustice in overvaluation or undervaluation of real property, the county board of equalization may at its annual meetings consider and correct the same by raising, after due notice has been given to the interested party, or parties, or by lowering the assessed valuation of such real poperty."

The complaint filed with the board of equalization was simply that the property "is assessed too low," and, as it was in an odd year, such assessment could only be raised when there was an "apparent gross injustice" in undervaluation. It is contended that this complaint was insufficient as it did not specify any gross undervaluation. This is the only question presented. *Dixon County v. Halstead*, 23 Neb. 697, and *Woods v. Lincoln Gas & Electric Light Co.*, 74 Neb. 526, are principally relied upon. The statutes in regard to the powers and duties of the county boards of equalization have been frequently re-enacted, and in some respects radically changed, during the history of the state. The above cited *Dixon County* case was decided under section 70, ch. 77, Comp. St. 1887, which provides: "On the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, they shall review the assessment and correct the same as shall appear to be just. No complaint that another is assessed too low shall be acted upon until the person so assessed, or his agent, shall be notified of such complaint, if a resident of the county."

Our present statute does not require that any complaint shall be made. The board of equalization can act upon its own motion. The assessment of property at $110,000, when it should be assessed at $175,00, is an "apparent gross injustice" in undervaluation, and the board of equalization was justified in changing the valuation, no matter in what way its attention was

called to the matter. In *Woods v. Lincoln Gas & Electric Light Co., supra,* the language of the syllabus would seem to support the contention of the appellants. But the opinion shows that the board of equalization did not change the valuation, but refused to do so, and in such case it was very proper to hold that "the burden was upon the complainants before the board of equalization to show that the property of the corporation should have been assessed at a higher rate." When the action of the board of equalization in raising or lowering an assessment is attacked, the burden is upon the person attacking it to show that it is wrong. The first paragraph of the syllabus in the *Woods* case is not applicable to the case at bar. There was no evidence before the district court, and we cannot presume that the property was of less value than that fixed by the board of equalization.

The judgment of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed June 28, 1919. *Rehearing denied.*

PER CURIAM.

The "case stated" says that the only question presented to this court is whether there was a sufficient complaint before the county board. Our former opinion says that this was the only question presented, and the opinion must not be considered as authority upon any other question. In the brief upon the motion for rehearing, it is conceded that the present statute "authorizing the board of equalization to increase valuation on account of an apparent gross injustice in undervaluation does not require a complaint," which concedes, as stated in our opinion, that the county board of equalization has jurisdiction without regard to the complaint. The district court so held, and we affirmed the decision.

REHEARING DENIED.

GEORGE A. MCCANDLESS, APPELLEE, V. JOHN O. GREUSEL ET AL., APPELLANTS.

FILED APRIL 19, 1919. No. 20365.

Fraud: MISREPRESENTATION. If representations are made by a vendor of material facts as to the value of real estate sold or exchanged by him, and the vendee must resort to an independent investigation to ascertain the truth, and such representations are false, the vendee may rely upon such representations and recover the damages, if any, suffered by him on account of the fraud.

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

Bruce Fullerton and *John J. Ledwith,* for appellants.

T. J. Doyle, contra.

ALDRICH, J.

In the district court for Lancaster county, plaintiff recovered a judgment against the defendants in the sum of $3,000 as alleged damages growing out of alleged false representations of the value of certain real estate. From this judgment and verdict of the jury, defendants appealed.

This statement in a brief way gives the gist and pith of the issue involved. Plaintiff was a practicing physician doing business at Eagle, had but little, if any, experience in real estate matters, and, as the record shows in this case, was easily gullible, and was deceived in the sale complained of.

It is unnecessary for us in the instant case to carefully review all the authorities *pro* and *con* upon this subject, as it would make an opinion out of all proportion. All we will attempt to do is to point out the admitted facts and propositions in the case, and to discuss very briefly the decisions of this court that apply to the case in hand. The defendants are expert real

estate men and have had much experience in buying and selling and exchanging real estate. It seems defendants represented to plaintiff that they had an elegant up-to-date property here in Lincoln, and had sold it several times for $15,000, and could easily cash it in for that amount at almost any time. It is claimed these statements were false and fraudulent.

The plaintiff by reason of these statements was induced to look the property over. At the same time he was no judge of real estate, had had no experience, but nevertheless would accommodate them by seeing the property. At the same time, in connection with this investigation, the defendants led the plaintiff to believe that one Mr. Miller was the owner of the property in Lincoln, and had placed a mortgage thereon of $3,000 due in six months; that he would purchase the grain elevator and would give as security therefor a mortgage due in six months, and then the plaintiff's elevator would be paid for on a payment of $1,000 a year for five years until the agreed purchase price of $5,000 was canceled. Plaintiff, it is claimed, in giving a description of a Mr. Miller, who was the owner of the real estate in question that was being taken as security for the purchase price of the elevator, identifies him as being none other that a wealthy and substantial grain man of Lincoln, and that this same Mr. Miller had extensive interests in elevators and other grain houses throughout southern Nebraska and northern Kansas, and from the statement of the defendants the plaintiff believed that Mr. Miller, the grain man, was the owner of defendants' real estate in question; while as a matter of fact this man Miller turned out to be none other than the son of Miller, the defendant, and was the stenographer for the real estate firm of the defendants, being a mere young man, and had no property interests whatever. Plaintiff believing representations as to value of the property given for security and that Miller was the grain dealer mentioned, and relying upon

these representations, executed a deed to Joseph Vance Miller for his elevator property at Waverly and turned it over to the defendants.

It would seem, from the record, that the only thing that was impressed upon plaintiff's mind was that it did not matter whether defendants' property was sufficient security, or of the value they represented it to be, for the reason that he had Mr. Miller, the wealthy grain man, behind the whole proposition, and the amount would be paid when due. The defendants, from the conversation, knew that plaintiff was relying upon and believed the representations that Miller, the grain man, was the party getting this elevator at Waverly, rather than the stenographer of the defendants.

There was a mortgage of $3,000 on the elevator, held by the Union Loan & Trust Savings Association. The defendants herein paid the first interest that became due six months after the transaction in question. This interest was in the amount of $150. This was according to the agreement made between the plaintiff and the defendants. This would seem to indicate that the instrument given was a mortgage to secure the payment of the purchase price of the elevator. This was the last payment made. When further interest became due, the Union Loan & Trust Savings Association foreclosed, and plaintiff was made a party to that action, together with the defendants. Plaintiff, in that proceeding, set up his agreement as a mortgagee, and took a decree of foreclosure for the same. The Lincoln property under foreclosure and decree was afterwards sold. The property did not sell for enough to satisfy the first mortgage of $3,000.

The misrepresentation as to the value of the Lincoln property in question was so excessive and so gross that it would seem that it could be scarcely recorded as an honest opinion of the value of the property. The record appears to show that there was a very exaggerated estimate of the financial standing of the party

who was buying this elevator. This case in many respects is not unlike the case of *Latta v. Button Land Co.*, 91 Neb. 689.

This court has held that if representations are made as to the truth or falsity of material facts, and an investigation would have to be made to discover the truth, the party to whom they were made may place reliance on them. *Foley v. Holtry*, 43 Neb. 133; *Olcott v. Bolton*, 50 Neb. 779; *Hamilton Brown Shoe Co. v. Milliken*, 62 Neb. 116; *Perry v. Rogers*, 62 Neb. 898; *Dwinell v. Watkins*, 86 Neb. 740; *Brucker v. Kairn*, 89 Neb. 274. On the whole record we are satisfied that plaintiff was deceived and misled as to the real nature, or value, of the property, and, if the true facts as to the actual ownership had been disclosed to him, he would never have taken this Lincoln property as security for payment of the purchase price for his elevator, and it would seem that the representations made with reference to who was the real owner of the Lincoln property were misrepresentations and fraudulent.

Therefore it would seem that the finding and judgment of the district court should be

AFFIRMED.

CHARLES T. MEYERS, APPELLEE, V. FRED SCHMIDT, APPELLANT.

FILED MAY 3, 1919. No. 20409.

Injunction: REPEATED TRESPASSES. "Concerning simple acts of trespass equity has, in most cases, no jurisdiction, but, if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted." *Sillasen v. Winterer*, 76 Neb. 52.

APPEAL from the district court for Red Willow county: ERNEST B. PERRY, JUDGE. *Affirmed.*

W. R. Starr, for appellant.

J. L. Rice, contra.

MORRISSEY, C. J.

Plaintiff procured an injunction restraining defendant from trespassing on a tract of farm land to which plaintiff held a lease from the lawful owner. Defendant appears to have claimed the right to enter upon and farm the land under permission given by a former lessee. The evidence conclusively shows that he had no lease to the farm or lawful claim to enter thereon. Defendant seems to claim by his appeal that injunction is not the proper remedy, but that plaintiff must have recourse to an action at law. The rule seems to be that, where the nature and frequency of the trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted. *Sillasen v. Winterer,* 76 Neb. 52; *Hackney v. McIninch,* 79 Neb. 128. This rule is applicable to the instant case and the judgment is

AFFIRMED.

LETTON, SEDGWICK and CORNISH, JJ., not sitting.

CITY OF FREMONT, APPELLEE, V. POSTAL TELEGRAPH-CABLE COMPANY, APPELLANT.

FILED MAY 3, 1919. No. 20419.

1. **Constitutional Law:** OCCUPATION TAX. Where a proper basis for classification exists, a tax imposed upon all persons or companies engaged in a certain occupation does not deny the equal protection of the law guaranteed by the Fourteenth amendment.
2. **Licenses:** REASONABLENESS. The reasonableness of a tax does not depend upon whether or not a hardship may be worked in an isolated case, but upon the general operation of the tax in the class to which it applies.

3. ———: AMOUNT. In imposing an occupation tax for revenue purposes upon a telegraph company doing an intrastate business, a city is not limited to the mere rental value of the city's property occupied by defendant's poles and wires and the expenses arising from their supervision, but the extent of the tax is a matter for the judgment and discretion of the municipal government, subject only to the restriction that it must not be prohibitory.

4. ———: REASONABLENESS. Mere proof of loss in operation for a period of two years by an individual telegraph company, without showing what the volume of business available in the municipality is, or what portion thereof is done by such company, or what facilities it has for handling the business offered, is insufficient to show that an annual occupation tax of $60 imposed for revenue purposes on the privilege of doing an intrastate business in a city of over 8,000 inhabitants is unreasonable.

5. ———: OCCUPATION TAX: TELEGRAPH COMPANY. In imposing an occupation tax for revenue purposes, a municipality acts as the agent of the state, and where such tax is imposed on a telegraph company doing both an intrastate and an interstate business, any deficit arising from the payment of a tax on the privilege of doing an intrastate business within the municipality becomes a charge on the revenue such company obtains from its intrastate business as a whole, and the tax does not become a burden upon the company's interstate business merely because the amount imposed by the municipality is greater than the company's net receipts in that municipality for intrastate business.

6. ———: INTERSTATE COMMERCE. The tax imposed *held* not to be a charge on interstate commerce.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Dysart & Dysart and *William W. Cook*, for appellant.

J. F. Rohn and *C. E. Abbott, contra.*

MORRISSEY, C. J.

In 1903 the Postal Telegraph-Cable Company applied for a franchise in the city of Fremont and was granted the right to carry on a telegraph business therein for a period of 25 years. At that time the city had an ordinance, which is still in force, imposing an occupation tax of $60 a year on the business of transmitting and receiving interstate telegraph messages. The telegraph

company paid this tax, without protest, up to 1910, when it refused to make further payments. It did, however, through an alleged mistake on the part of one of its departments, make payment of the tax for the year 1914. The city now sues to collect the tax for the years 1915 and 1916. The court directed a verdict for plaintiff, and the telegraph company appeals.

The right of a municipality of the class to which plaintiff belongs to impose an occupation tax of this character, if it be reasonable, has already been determined by this court. *Western Union Telegraph Co. v. City of Fremont,* 39 Neb. 692; *Western Union Telegraph Co. v. City of Fremont,* 43 Neb. 499. And where a proper basis for classification exists, such a tax, if made applicable to all persons or companies in the occupation taxed, as in the present instance, does not deny the equal protection of the law guaranteed by the Fourteenth amendment. 6 R. C. L. 375, sec. 370.

On behalf of defendant it is argued that this tax is unreasonable; that the intrastate message receipts of defendant's Fremont office, after payment of other expenses, are insufficient to pay the tax; that a part of such tax must be paid from the proceeds of interstate messages; that such payment casts a burden upon interstate commerce, and the tax is therefore violative of the federal Constitution.

The proof in support of these allegations shows that during the years 1914 and 1915 defendant's Fremont office was operated at a loss, and that a payment of the tax for these two years would occasion deficits on defendant's intrastate business at Fremont of $143.73 and $128.45, respectively. No figures are offered for any of the preceding years. But, even if the evidence at hand is sufficient to warrant us in assuming antecedent and prospective losses in the operation of defendant's business at Fremont, we do not regard this as a satisfactory test of the reasonableness or unreasonableness of the tax involved. Defendant's losses may be due to

conditions for which it is itself responsible. The reasonableness of a tax does not depend upon whether or not a hardship may be worked in an isolated case, but upon the general operation of the tax in the class to which it applies. *Ohio River & W. R. Co. v. Dittey,* 203 Fed. 537. As said by Justice Lumpkin in *Mayor & Aldermen of Savannah v. Cooper,* 131 Ga. 670: "A city tax on an occupation must be reasonable with reference to such vocation. This does not mean that it must be adjusted to the amount of business of each individual, or limited exclusively by the receipts of some particular individual, but, considering that business within the municipality as a whole, the tax must be reasonable, and not arbitrarily discriminatory."

The tax in question is not a mere license or regulation measure, but one designed for revenue purposes. The statute authorizing its imposition and the ordinance fixing its amount both clearly so designate it. The city is not limited to the mere rental value of the public property occupied by defendant's poles and wires and the expenses arising from their supervision, and hence defendant's evidence on these points can only be of incidental significance. The extent of the tax is a matter for the judgment and discretion of the municipal government, subject only to the restriction that it must not be prohibitory. 2 Cooley, Taxation (3d ed.) 1139, 1140.

Is the tax in question, when considered as a revenue measure, so unreasonable in amount as to be prohibitory? Mere proof of loss in operation for a period of two years by an individual telegraph company, without showing what the volume of business available in the municipality is, or what portion thereof is done by such company, or what facilities it has for handling the business offered, is insufficient to show that an annual occupation tax of $60 imposed for revenue purposes on the privilege of doing an intrastate business in a city of over 8,000 inhabitants is unreasonable.

Defendant further contends that the tax is violative of the commerce clause of the federal Constitution. The argument on this point may be summarized as follows: Section 7408, Rev. St. 1913, requires a telegraph company to transmit messages, on demand, between its several offices in Nebraska. The intrastate receipts at defendant's Fremont office are insufficient to pay this tax together with other expenses. A portion of the tax must therefore be paid from the receipts on interstate messages. Such payment casts a burden on interstate commerce and is violative of the federal Constitution.

Defendant's proof shows that not only its intrastate, but also its interstate, business at Fremont was conducted at a loss during the years for which figures are given. Is this tax, then, a burden on interstate commerce? In imposing an occupation tax for revenue purposes, a municipality acts as the agent of the state, and where such tax is imposed on a telegraph company doing both an intrastate and an interstate business, any deficit arising from the payment of a tax on the privilege of doing an intrastate business within the municipality becomes a charge on the revenue such company obtains from its intrastate business as a whole, and the tax does not become a burden upon the company's interstate business merely because the amount imposed by the municipality is greater than the company's net receipts in that municipality for intrastate business. If this revenue is insufficient section 7409, Rev. St. 1913, provides a remedy.

The judgment is

AFFIRMED.

CORNISH and SEDGWICK, JJ., not sitting.

MORRIS & COMPANY, APPELLANT, V. MICHAEL FRANCIS CUSHING, APPELLEE.

FILED MAY 3, 1919. No. 20677.

Master and Servant: WORKMEN'S COMPENSATION ACT: INJURY. Action under the Workmen's Compensation Law, sections 3642-3696, Rev. St. 1913, as amended by chapter 85, Laws 1917. Under the facts set forth in the opinion, *held*, that the accident complained of arose out of and in the course of the workman's employment.

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

James C. Kinsler, for appellant.

T. A. Donohoe and *M. L. Donovan, contra.*

MORRISSEY, C. J.

Action under sections 3642-3696, Rev. St. 1913, as amended by chapter 85, Laws 1917, known as the "Workmen's Compensation Law."

Michael Francis Cushing, a boy of 16, while employed as a common laborer in and about the packing plant of Morris & Company, suffered the loss of four fingers. He made application for compensation under the statute. The employer denied liability, whereupon Cushing filed a petition with the compensation commissioner, as provided in section 15, ch. 85, Laws 1917. On hearing, the compensation commissioner awarded the employee compensation at the rate of $10 a week for 100 weeks. Morris & Company instituted this proceeding, which is in the nature of an appeal from the order of the compensation commissioner, in the district court. Under the peculiar provisions of the statute the titles of the parties are transposed, Morris & Company being designated as plaintiff and Cushing being designated as defendant. From a judgment in favor of defendant, Morris & Company has prosecuted an

appeal to this court, where the parties retain the same titles they had in the district court.

The employment and the injury are admitted. There is no complaint as to the amount awarded, provided defendant is entitled to any award. Plaintiff alleges, however, that Cushing had departed from the line and scope of his employment, and that his accident was not one arising out of and in the course of his employment.

In April, 1917, Cushing was employed by one of plaintiff's foremen, who, when a witness for plaintiff, gave the boy's duties as follows: "His duties were to carry the boards from the saw, and carry boards from the printing press, and when there would not be any work of that kind to do he was supposed to truck boxes to the various departments and handle lumber and sweep up the floor, in fact, do anything in the line of common labor around the shop." The boy continued in this line of employment until the day of the injury. On that morning he was directed to assist in unloading a car of lumber that was to be used in the box department where the boy worked. He remained during the forenoon at that task, In the noon hour he ate his luncheon in the box factory. When the hour arrived for the men to resume work, he was met by a laborer from the cooper's shop, who said he would like to have defendant cut some hoops for him. Defendant consented to do this work, and testifies: "I thought if he needed the hoops and wanted to get the barrels out right away, I would saw them." He took a coil of hoops, went into the box factory where he was generally employed, and began to cut the hoops with a hatchet. While he was thus employed, Mr. McCleary, the foreman in the oleomargarine department, came into the room and stated that he wanted a box. There is some discrepancy in the testimony of defendant, the foreman, and the elevator operator, who was present, but it appears that this foreman made it known that he needed a box and inquired if he could have one

made. The elevator operator testifies that he suggested that defendant might make one; that defendant consented, and began work on the box. During defendant's employment, a considerable portion of his time had been taken up in carting boxes away from a circular saw which was in use in the factory and generally operated by a "straw boss" named Altman. Defendant now undertook to operate this saw in order to prepare boards for the box. While thus engaged, his hand came in contact with the saw and he suffered the injury for which recovery is sought.

Plaintiff contends that defendant was not acting within the scope of his employment in undertaking to make the boxes; that he had no right to undertake the operation of the saw; and that, had he followed the instructions of his foreman, he would then have been engaged in unloading lumber from the car. Defendant testifies that on one or two other occasions he had used the saw under instructions from Altman, and his testimony in this respect is not disputed. The record shows that he was subject to the orders of different foremen. These several foremen may have differed in rank, but defendant had during his employment taken orders from each of them. He was only a boy of immature years. As shown by the quoted testimony of the foreman who employed him, it was his duty to "do anything in the line of common labor around the shop." This being true, he cannot be held to strict accountability for his acts. Accustomed as he was to take orders first from one foreman and then from another, when the foreman of the oleomargarine department signified his desire that defendant make a box, he might well assume that it was his duty to obey, and that that order countermanded the order given by the other foreman earlier in the day to assist in unloading the car of lumber. It is clear that he was engaged about the premises where his services required his presence, during proper hours of service, and that

his labor was calculated to promote the master's business. He had theretofore used the saw under the eye, if not under the direction, of his immediate foreman, Altman, and at the time the accident occurred he was carrying out the order, implied, if not directly expressed, of one of plaintiff's foremen, who stood watching him as he worked.

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

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

BURL C. KIRK v. STATE OF NEBRASKA.

FILED MAY 3, 1919. No. 20748.

1. **Homicide:** MURDER: INSTRUCTION: CONSPIRACY. On the trial of a defendant charged with the shooting and killing of a police officer, it is proper for the court to instruct the jury that they may find the defendant guilty if they find from the evidence beyond a reasonable doubt that the defendant, together with other persons with whom he stands charged, prior to the shooting, formed a common purpose to resist arrest, and that the shot which killed deceased was fired by one of the parties in pursuance of such common purpose or design, when the other necessary elements of the crime of murder are properly defined, and there is evidence to sustain such theory of the killing.
2. ———: ———: USE OF DEADLY WEAPON. When several persons are jointly engaged in resisting police officers who attempt to place them under arrest, and in making such resistance use deadly weapons, each individual who assists in their employment is *held* to have intended the natural and probable consequences of their use.
3. **Criminal Law:** INSTRUCTIONS. Instructions to a jury must be taken as a whole. A phrase, a clause, or a sentence may not be segregated from the context in order to give it a different meaning from that intended by the trial court.
4. **Homicide:** INFORMATION: INSTRUCTIONS. An information charging murder in the first degree charges also murder in the second degree, and, when from the evidence it appears that defendant may have participated in the killing of deceased, but, if so, without

premeditation and deliberation, it is not error to instruct the jury on the lesser degree of the crime charged and permit a consideration of that crime.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Harry B. Fleharty and *Baker & Ready*, for plaintiff in error.

Willis E. Reed, Attorney-General, and *George W. Ayres, contra.*

MORRISSEY, C. J.

Defendant prosecutes error from a conviction of murder in the second degree, under which he was sentenced to the penitentiary for a term of twenty years.

January 30, 1918, a jewelry store in the city of Omaha was entered by a band of robbers. The employees of the store were put in fear of their lives and compelled to stand by while the bandits gathered up a large quantity of jewelry and carried it away. The police officers of the city were soon informed of the robbery, and within a few hours several policemen and detectives went to the home of defendant, where, in a bedroom in the second story, they found defendant and four others, named Martin, Stone, Williams, and McKay. In this bedroom was also found the jewelry which had been stolen.

A police officer named Dolan entered the room, closely followed by another officer named Rooney. Dolan testified that he told the men they were under arrest and directed them to throw up their hands, and that there was immediate confusion. "McKay opened up with a shot. * * * Williams fell to the floor, threw himself right around the bed and started to shoot through the bed, and Stone by that time was over there, and he was shooting from the bed, and Kirk made his way over to the head of the bed. * * * Up to that time there was two lights. * * * One was on

the dresser here, while the other was kind of a reading light they used on the head of the bed, which Kirk immediately jerked out of the socket when he got as far as the head of the bed. * * * After the light was pulled out, then it seemed like all the men were shooting. * * * I saw him (Kirk) make a motion there, and I figured he was going after his gun." The officers returned the fire, and in the duel officer Rooney was shot and killed.

There is no direct proof that defendant fired the fatal shot. The court submitted the case to the jury on the theory that if defendant, together with his associates, prior to the shooting, had formed a common purpose and design to escape arrest, and, if necessary, to kill the officers intending to arrest them, and that deceased was killed by a shot fired by one of the parties in the furtherance of the common design, and that defendant was present, aiding and abetting, he would be guilty, whether he fired the shot or the shot was fired by one of his associates. This and other instructions in support of the theory which the trial court adopted are criticized. Clauses are singled out and construed, and, from the construction placed upon them by defendant's counsel, it is argued that the jury were confused and misled into returning a verdict that is contrary to law and does not find support in the evidence. Defendant was not a mere idle bystander, but there is positive evidence of his active participation in the resistance to the officers. True, no witness has sworn to his actually firing the shot, but the record shows that shortly after this store had been robbed defendant and his companions were in possession of the stolen goods in defendant's house; that after they had been directed to surrender by the peace officers defendant's companions opened fire upon the officers, and defendant destroyed one of the lights in the room. This act placed the peace officers at a disadvantage, in that they were standing in the light shed by another

lamp, while defendant and his companions were left in partial darkness. If defendant did not actually shoot, he did that which may have been more effective. He shielded the would-be assassins and exposed the officers of the law. They were all engaged in an effort to escape arrest, and in furtherance of that object were employing deadly weapons. The legal presumption is that each individual who assisted in their employment intended the natural and probable consequences of such use.

The instructions to the jury must be taken as a whole. A phrase, a clause, or a sentence may not be segregated from the context in order to give it a different meaning from that intended by the court. When these instructions are so considered, they appear to be clear and explicit and to safeguard every right of the defendant.

Complaint is made of instruction No. 14, defining the crime of murder in the second degree. As we understand the brief, it is not claimed that the instruction is improper in form, but rather that the evidence does not warrant the submission of this degree of homicide to the jury. While the evidence would, no doubt, sustain a conviction of murder in the first degree, there may be a question as to the proof of deliberation and premeditation, and it was entirely proper to submit the question of second degree murder for the consideration of the jury.

There is no error in the record, and the judgment is

AFFIRMED.

ROSE, J., not sitting.

HANS J. NIELSEN, APPELLEE, V. NEBRASKA GAS & ELECTRIC COMPANY, APPELLANT.

FILED MAY 3, 1919. No. 20477.

Negligence: VERDICT: FINDING: EVIDENCE. In an action for damages caused by negligence of a manager of a corporation, a verdict against the corporation is inconsistent with a finding that the agent was not negligent, but such verdict may be sustained, if there is evidence of negligence of other agents of the corporation, which caused the damages.

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

Morsman, Maxwell & Crossman and *Clark O'Hanlon*, for appellant.

B. H. Dunham and *Herman Aye, contra.*

ROSE, J.

This is an action to recover damages for negligence resulting in a fire which destroyed buildings, lumber, coal and other property owned by plaintiff in Blair. He pleads damages of $11,000, payment of $3,500 in the form of insurance, and demands judgment for the remainder $7,500. There are two defendants. One is the Nebraska Gas & Electric Company, a corporation operating an electric light plant at Blair, and the other is Paul Sprecher, who was the foreman in exclusive control of the corporate property and business and its only representative at that place. According to the petition, the fire started in a coal pile on the premises of the electric light plant, and by means of kindling and frame buildings spread to plaintiff's lumber and coal yards on adjacent lots. It is alleged that defendants were negligent in causing the coal pile to take fire; in placing the kindling near and upon the burning coal pile; in failing to remove the kindling; in failing

to watch and guard the fire; in failing to extinguish the fire. Defendants denied negligence, and pleaded that the fire was of incendiary origin, and that persons unknown to defendants had tampered with the water hydrants near the electric light plant, thus causing them to freeze up and destroying the means of extinguishing the fire. There was a finding in favor of defendant Sprecher. From a judgment on a verdict in favor of plaintiff and against the Nebraska Gas & Electric Company alone for $4,284.66, the latter has appealed.

The controlling question presented by the appeal is based on the proposition that the verdict is in irreconcilable conflict with itself, and therefore cannot stand. The argument of the corporation may be summarized as follows: The negligent acts pleaded and proved are jointly and concurrently attributable to defendants. One of the defendants is a corporation and the other is its foreman and sole representative at Blair, where the fire occurred. The foreman performed, or is responsible for, all of the acts pleaded and proved as negligence. In this situation the corporation is not chargeable with any negligence not attributable also to its foreman. The jury found that the foreman had not been guilty of negligence. The corporation, therefore, was likewise free from negligence, and the verdict against it and in favor of the foreman contains inconsistent and self-destructive findings. The argument is formidable, but not conclusive.

Defendants are charged jointly with the acts of negligence herein outlined, but the petition contains in addition allegations that persons other than defendant Sprecher, while they were acting for the corporation, stored kindling between the pre-existing, burning coal pile and the frame buildings subsequently destroyed. In this respect there was no request for a more specific statement, and the petition is held sufficient on appeal to charge the corporation with negligence not attribu-

table to defendant Sprecher. On this issue there is evidence tending to prove that the kindling, under the direction of foreman Sprecher's predecessor, was placed where it became the means of conducting the fire from the burning coal pile to plaintiff's property. This view of the testimony, which the jury were at liberty to adopt, reconciles the finding against the corporation with the finding in favor of its foreman and codefendant. There is sufficient evidence to sustain the verdict rendered.

Errors relating to rulings on evidence and to instructions are also assigned, but no error prejudicial to the corporation has been found in the record.

AFFIRMED.

CORNISH, J., dissents.

STATE BANK OF BLADEN, APPELLANT, V. ANNA STRICKLER, APPELLEE.*

FILED MAY 3, 1919. No. 20204.

1. **Principal and Agent:** UNAUTHORIZED CONTRACT: REPUDIATION. If one repudiates an unauthorized contract entered into by his agent, he must reject it as a whole. He cannot avail himself of those provisions favorable, and reject others.
2. **Bills and Notes:** EVIDENCE: SUFFICIENCY. The evidence indicated in the opinion will not justify this court in setting aside its former judgment on the ground of failure of evidence.
3. **Appeal:** INSTRUCTIONS. A judgment will not be reversed upon appeal because of the giving of an indefinite or incomplete instruction, unless the party complaining offered and requested a more definite instruction, or it appears from the whole record that the jury may have been misled by the instruction given.

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

L. H. Blackledge and *Stiner & Boslaugh*, for appellant.

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

*First heard before Commission. No opinion.

SEDGWICK, J.

After the judgment had been entered, the motion for rehearing was argued before the court.

1. The point most discussed in the brief is the contention that the cashier of the bank did not have authority as such cashier to make the contract alleged as a defense in the answer and testified to by the defendant. If the contract was made as the defendant testified, it must be considered as a whole. We cannot hold it valid in part and invalid in part. It included the cancelation of the note given by the deceased, and extending the time for payment of the same. If the cashier did not have power to make the contract, then these provisions would of course fall with the rest of the contract. In that case there would be no consideration for the defendant's note, and the bank should have disregarded the invalid contract of the cashier, and filed its claim against the estate.

2. The brief also strenuously argues that the evidence was not sufficient to support the verdict of the jury as to the cause of action on the principal note. When the note of the deceased became due, the cashier, Bennett, notified this defendant, the widow, of that fact. She called immediately, and, according to his testimony, she stated that she did not know that there was such a note against the deceased and asked him what she should do. He had drawn the will of the deceased; had been their family adviser in business matters for several years; and, according to his own testimony, the suggestion came from him that she give her note, and the note of the deceased be canceled. Why he made that suggestion is not apparent. The estate was abundantly good; the note of the deceased was drawing interest at a good rate; he says the bank had money to loan and did not care about getting the money. All they had to do was to file the note, if it was valid against the estate, and it would be allowed with interest; and yet he suggested to her to have that

note canceled and give her own note in place of it. The note against the deceased was canceled. The cashier, Bennett, canceled it, and, after he had so canceled it, it would be natural for him to answer her next question as she says he did. She asked him what to do with the old note, and he said, "Take it and tear it up, and throw it away, or anything." She accordingly tore off the name of the deceased and kept the old note. This woman in her testimony made some statements as to what took place that are in some respects inconsistent; but, when she was asked questions in regard to these statements, she stated frankly that she could not remember all of those details, and made the statements that she made as her best recollection in regard to it. We cannot say that the evidence does not support the verdict of the jury on that issue. A good deal is said in the briefs in regard to what the bank did afterwards. Bennett, the cashier, who did this business, had left the bank. Just why perhaps the record does not show, and the remaining officers appear to be honest men. They did not know what motives Bennett had, nor why he should suggest some exchange so as to get that note, for which he had virtually taken credit in his management of the accounts of the bank, out of the way. We cannot derive any assistance from what the other bank officers did afterwards when Bennett was gone and before they knew what his motives were in trying to get rid of this note.

3. The motion attacks instruction No. 1 given by the court. It presents two objections to this instruction: The first is predicated upon the assumption that the cashier did not have authority to do what he did, which has already been answered. The second objection to this instruction is that it is not complete enough, and it is not contended in the briefs that any more complete instruction was offered.

Our judgment reverses the finding of the jury on the smaller claim, and directs judgment against the defend-

ant on that claim. If that claim included interest upon the indebtedness of the principal note, it was to that extent probably not a valid claim against the defendant, but it mostly, if not all, was for money actually loaned to the defendant, and the defendant is not asking for a rehearing.

The motion for rehearing is

OVERRULED.

LETTON and CORNISH, JJ., not sitting.

JOHN A. SINGHAUS, ADMINISTRATOR, APPELLEE AND CROSS-APPELLANT, V. JOHN F. PIPER ET AL., CROSS-APPELLEES: RILEY S. HART ET AL., APPELLANTS AND CROSS-APPELLEES.

FILED MAY 3, 1919. No. 20445.

1. **Corporations: NOTICE OF INDEBTEDNESS: RIGHT OF ACTION.** The liability of a stockholder in a corporation for failure of the corporation to publish notice of indebtedness required by section 577, Rev. St. 1913, is in the nature of a penalty for neglect of duty. One stockholder, who is equally in fault in that regard with all other stockholders, cannot maintain such action, as creditor of the corporation, against the other stockholders.
2. ———: ———. In such case, there is no default under the statute until one year after the organization of the corporation.
3. ———: ———: QUÆRE. Whether such notice is sufficient without the signatures of a majority of the directors, *quære*.
4. ———: EXCHANGE OF ASSETS FOR STOCK. A corporation may exchange property in purchase of its outstanding shares, but the transaction must be in entire good faith, and in no manner injure the rights of its creditors or its stockholders.
5. ———: ———: RIGHTS OF STOCKHOLDERS AND CREDITORS. The relation between stockholders under such circumstances may be regarded as confidential, and, if they are creditors of the corporation, their right to object to such a transfer is analogous to the right of creditors to object to transfers of property by their debtors.
6. ———: ———: FRAUD: EVIDENCE. If the transfer is made with the view of securing stockholders against loss on account of

existing indebtedness of the corporation, the transfer might be held invalid as against such creditors; but, if at the time of the transfer the remaining corporate property is of such value as to afford ample security for the debts of the corporation, and the business of the corporation continues for several years, the fact that in the meantime the business has become unprofitable and new debts incurred so that the corporation has become insolvent is not conclusive that the transfer complained of was made with the intention of defrauding existing or subsequent creditors.

7. ———: ———. In such case, a creditor and stockholder at the time, with knowledge of the transfer and of the business and assets of the corporation, cannot complain of the transfer because after three or four years the business of the corporation has become unprofitable, and new debts have been incurred exceeding the value of the assets.

APPEAL from the district court for Burt county: GEORGE A. DAY, JUDGE. *Affirmed in part, and reversed in part.*

John J. Sullivan, Herbert Rhoades and *James A. Clark, for* appellants.

Montgomery, Hall & Young and *J. A. Singhaus, contra.*

SEDGWICK, J.

The plaintiff, as administrator of the estate of Swan M. Nelson, deceased, obtained a judgment against the Nebraska Improvement Company, a corporation, and, execution thereon being returned unsatisfied, brought this action in the district court for Burt county to recover the amount of the judgment from the stockholders of the corporation because of the alleged failure to publish the annual notice of indebtedness required by statute, and to recover from certain of the stockholders real estate taken by them in exchange for shares of stock in the corporation. The trial court found against the plaintiff on the first cause of action, and in favor of the plaintiff against certain of the defendants upon the second cause of action. These defendants, who had exchanged their shares of stock for property of the

corporation, appealed, and the plaintiff has filed a cross-appeal from that part of the judgment which released the defendants from liability because of the alleged failure to publish the statutory notice.

The plaintiff was himself a stockholder in the corporation, and the first question presented upon his cross-appeal is whether that fact would prevent his recovery against the other stockholders because of the failure to publish notice. The statute makes all of the stockholders responsible for the failure to publish the statutory notice. They may compel the directors, by mandamus, to comply with the statute in that respect and so protect themselves from liability. *Smith v. Steele,* 8 Neb. 115. If they fail to see that the notice is published they become liable for debts of the corporation as specified in the statute. This amounts to a forfeiture for failure to perform a duty, as stated by Judge Maxwell in *Porter v. Sherman County Banking Co.,* 36 Neb. 271: "A forfeiture is not favored in law because it tends to rob a party of his just rights; and the same rule applies where it is sought to charge a party personally with a debt which he did not assume, but is imposed because of some alleged wrongdoing on his part. In such case the acts of omission or commission must clearly bring the case within the penal provisions of the statute."

If one stockholder who has incurred this penalty could recover of other stockholders similarly situated, it would seem that his recovery ought at least to be reduced by the amount of his own liability, or his judgment should be against himself as well as against the other stockholders. In that case, the easiest way for him to liquidate it would be to cancel the judgment which he had obtained. This leads to such extravagant conclusions that it seems impossible that the legislature could have intended such a result. The point was decided under a somewhat similar statute in *Potter v. Stevens Machine Co.,* 127 Mass. 592, and *Thacher v.*

King, 156 Mass. 490. *Bennison v. McConnell*, 56 Neb. 46, is not in point.

The second question presented is whether the statute gives this remedy to creditors whose claims accrued when the corporation was not in default for the statutory notice. Before the statute was amended in 1891, this court several times decided that stockholders were not liable under the statute for claims that accrued before the corporation was in default for the notice *Smith v. Steele*, 8 Neb. 115; *Howell Bros. v. Roberts*, 29 Neb. 483; *Porter v. Sherman County Banking Co.*, 36 Neb. 271; *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548. The amendment of 1891 (Laws 1891, ch. 13) does not change the meaning of the statute in this respect.

The corporation was organized on the 7th of March, 1907, and within one year thereafter the indebtedness of the plaintiff's decedent was incurred. It was not necessary that a notice should be published during the year 1907. There was no default under the statute until one year after the organization of the corporation.

It is objected that the notice published on the 12th of March, 1908, was invalid because it was not signed by a majority of the directors. The trial court found that this was a sufficient notice, and as this plaintiff's decedent was in equal default with other stockholders in regard to the publication of this notice, and plaintiff cannot for that reason recover upon this ground, it is not necessary to consider whether this notice was sufficient under the statute and in view of the language used in the decision of *Smith v. Steele*, 8 Neb. 115.

The remaining question is as to the liability of the stockholders who surrendered their stock to the corporation in consideration of the property of the corporation which they received therefor. The courts of this country are divided as to the validity, under any circumstances, of an attempted transfer of the property of the corporation to its shareholders in consideration of a return and

cancelation of their shares. The circuit court of appeals of the United States, in *Burnes v. Burnes,* 70 C. C. A. 357, declares the law to be: "In the absence of constitutional or statutory prohibition, corporations have the inherent power to buy, to retire, and to sell their own stock." And this court appears to have adopted that view: "A corporation, when not prohibited by its articles or by statute, may buy and sell its own stock, and hold, reissue or retire the same, provided such act is done in entire good faith and in no manner injures the rights of its creditors or its stockholders." *Fremont Carriage Mfg. Co. v. Thomsen,* 65 Neb. 370.

It is necessary that the law should be well settled and thoroughly understood upon such a question, and we do not consider it advisable to re-examine the question now, after 18 years. The return of stock by shareholders to the corporation in consideration of property of the corporation must, however, be "in entire good faith and in no manner injure the rights of its creditors or its stockholders." The relation between stockholders under such circumstances may be regarded as confidential; and, if they are creditors of the corporation, their right to object to such a transfer is analogous to the right of creditors to object to transfers of property by their debtors.

The plaintiff contends that "it makes no difference that the Nebraska Improvement Company, at the time it transferred its corporate property to appellants in exchange for their shares of stock, had other assets, as the presumption is that such assets were properly used in liquidating the indebtedness of the corporation." The trial court in its findings appears to have adopted this view of the law, and held these defendants liable upon that theory. If the transfer was made with a view of securing themselves against loss on account of existing indebtedness of the corporation, the transfer might be held invalid as against such creditors; but,

if at the time of the transfer the remaining corporate property is of such value as to afford ample security for the debts of the corporation, and the creditor who is himself a stockholder and supposed to be more or less familiar with the business and assets of the corporation, with full knowledge of the transfer, recognizes it as valid and delays for years to make any complaint, and in the meantime the business of the corporation becomes unprofitable, there would seem to be no reason for holding the transfer invalid if otherwise made in good faith. In this case the judgment of this stockholder against the corporation was not obtained until about four years after the transfer was made, and something more than three years after his claim against the corporation had matured. So that, in determining the good faith of the transfer, it was important to know the conditions of the assets of the corporation at the time of the transfer and during this delay. The case was tried in the district court upon an extensive stipulation of facts, and we have not found in that stipulation evidence that there was a probability of insolvency of the corporation at the time of the transfer. The trial court made detailed findings of fact, but did not find that the corporation was insolvent at the time of the transfer, nor find any substantial fact from which bad faith on the part of these defendants in making the transfer could be inferred.

The judgment of the trial court against the plaintiff upon his cause of action alleged against the stockholders in general is affirmed; and the judgment in favor of the plaintiff against the defendants Oliver Waite, James Robbins, and Riley S. Hart is reversed, and the cause remanded for further proceedings upon that cause of action, with leave to the parties, if so advised, to amend their pleadings and introduce further evidence.

JUDGMENT ACCORDINGLY.

CORNISH, J., not sitting.

MARY ETHEL THIES, APPELLEE, v. PERRY JOSEPH THIES, APPELLANT.

FILED MAY 3, 1919. No. 20198.

Appeal in Equity: BILL OF EXCEPTIONS. This court will not entertain an appeal, in an equity case, involving findings of fact made by the trial court, unless the record presented contains the evidence, bearing upon the issue, preserved in a bill of exceptions.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Leave to file bill of exceptions; otherwise, appeal dismissed.*

A. H. Murdock, C. C. Sheppard and *F. P. Marconnit,* for appellant.

H. A. Dano and *Kelso A. Moran, contra.*

CORNISH, J.

This is a divorce action in which both of the parties prayed for absolute divorce and such other relief as might be just and equitable. The trial court entered a decree of separate maintenance for the wife, who is plaintiff. The defendant appeals.

The power of the trial court to enter a decree for separate maintenance in divorce actions, where the evidence justifies it, has been decided by this court, and we are not disposed to overrule our previous decisions. *Sample v. Sample,* 82 Neb. 37, and cases cited.

The defendant (appellant) further contends that the findings of fact made by the court are not sufficient to sustain the decree. The record brought to this court by defendant does not contain the evidence preserved in a bill of exceptions. The question arises whether this court will entertain an appeal involving, in any way, findings of fact based upon the evidence when the evidence is not presented to the court. Section 8198, Rev. St. 1913, provides that in appeals in equity cases, wherein review of some or all of the findings of fact is asked by the appellant, the supreme court

is required "to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

"Trial *de novo*" means to try anew; for a second time. Where the contention is that the evidence will not support the findings and decree entered, then of course an issue is presented which this court could not determine without having the evidence before it. If the contention is that some finding of the court was not supported by the evidence, then so much of the record and evidence as bears upon that issue should be brought to this court; and, if the contention is that a necessary finding to support the decree has not been made, we are still of opinion that the statute contemplates a consideration by the court of the pleadings and the evidence, for the purpose of making the proper findings and decree, or, in its discretionary power, remanding the case for further proceedings. *Hanson v. Hanson*, 4 Neb. (Unof.) 880, 887; *Colby v. Foxworthy*, 80 Neb. 239, 244; *In re Littlefield*, 61 Wash. 150; *Taffe v. Smyth*, 62 Or. 227; *In re Estate of McVay*, 14 Idaho, 56.

When the review sought in no way involves the findings of the court upon the evidence, then it would not be necessary to preserve the evidence in a bill of exceptions.

It is possible that the evidence has been preserved in a bill of exceptions, properly certified to, in which event the defendant has leave to file the same in this court within 20 days; otherwise, his appeal to stand dismissed.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed December 26, 1919. *Former judgment adhered to.*

Appeal in Equity: TRIAL DE NOVO. Under section 8198, Rev. St. 1913, if "a finding of fact" is "complained of" on appeal from the district court in an equity case, this court must try *de novo* the issue of fact "involved in the finding," and for that purpose must have "the evidence preserved in the bill of exceptions."

SEDGWICK, J.

In our former opinion in this case, *ante*, p. 499, the judgment of the lower court was affirmed, on the ground that it was sought to review the findings of fact of the trial court, and the evidence was not contained in the record so that the court could retry the issues of fact involved, as the statute requires. Upon the motion for rehearing it was contended that this question had not been presented by the parties, and that, therefore, the defendant had had no opportunity to discuss the question. A rehearing was granted and additional briefs were filed and argument heard thereon.

The trial court made the following finding: "The court * * * finds that the evidence is not sufficient to justify the court in granting the plaintiff an absolute decree of divorce on any of the grounds alleged in her petition, but that it is for the best interests of the plaintiff and the defendant and their minor child that a decree of separate maintenance should be granted the plaintiff, and that the defendant should be required to separately maintain and provide for his said wife and minor child, and that for this purpose should be required to pay to the plaintiff on the first day of February, 1917, and on the first day of each and every month thereafter until the further order of this court, the sum of $35 for the support and maintenance of the plaintiff and Marie Adaline Thies, the said minor child of the plaintiff and defendant," and entered a decree accordingly.

The appellant contends that this finding is insufficient to support the decree. The defendant appears to con-

tend that under section 8198, Rev. St. 1913, it is only when it is sought to review the evidence in support of some of the findings of fact that this court is to try the questions *de novo*. If we consider the early practice upon appeals in equity, and the language of this section of our statute, it will not admit of such a construction. "The court * * * finds that the evidence is not sufficient to justify the court," etc. If the appellant seeks a "review" of a finding of fact, this court must retry the issue involved in the finding "complained of" upon the evidence preserved in the bill of exceptions. When in an action in equity a finding of fact by the district court is complained of, and a party appeals seeking to review it, as in this case, this court must try the issue of fact "involved in the finding," and for that purpose must have "the evidence preserved in the bill of exceptions." This would seem to be especially so when the finding itself suggests an examination of the evidence. If all parties concede that the findings are correct and based upon the evidence, and the court has made some order or entered a decree inconsistent with those findings, a very different question is presented, as in *Shelby v. Creighton*, 2 Neb. (Unof.) 264. It must be remembered, however, that the opinion in that case was not made official, as the court was not then ready to be bound by it as a precedent.

Sowerwine v. Central Irrigation District, 85 Neb. 687, is not exactly in point in this case. In that case the parties agreed that the facts were as found in the findings, and the appellant stated in his brief, as quoted in the opinion: "We think that the court's findings show that the land was, in fact, nonirrigable." In answer to this the opinion says: "We cannot add to or take from the language of the court, or enlarge the scope of its findings, *by construction*." The words "by construction" are omitted from the third paragraph of the syllabus. Whether this is merely accidental does not appear, but the nature of the case and admissions of the

parties show that that was really what the court meant.

In our case, as stated in our former opinion, the contention was that "the findings of fact made by the court are not sufficient to sustain the decree." That is, the trial court did not find enough facts. Some of the evidence was not properly considered and passed upon by the trial court. It is exactly the same as though the trial court had entered a judgment without making any findings. We would not, in such a case, reverse the judgment because there were no findings, without seeing what the evidence was. Under our statute, as properly construed, we would say that, if the judgment is right upon the evidence before the court, we will not reverse it, whether there are any findings or not; and, if the judgment was right and in accordance with the evidence and the pleadings, we would not reverse the case for any defect, omission or error in the findings. That is the question presented in this case.

The statute requiring this court to decide appeals in equity *de novo* was enacted in 1903. *Brown v. Williams,* 34 Neb. 376, and *City of Omaha v. Bowman,* 63 Neb. 333, and other cases decided under the old practice, are not in point. *McMillan v. Diamond,* 77 Neb. 671, decided under the present statute, is precisely in point, and is followed—"If the judgment of the district court is one which might be supported by competent testimony on questions of fact arising on the pleadings, in the absence of a bill of exceptions containing the testimony, we will presume that the judgment is supported by the evidence." And, in the opinion: "If a demurrer had been sustained to the petition, or if on a demurrer *ore tenus* the court had excluded the evidence offered by plaintiffs, the record would then present the question of the jurisdiction of a court of equity to grant the relief prayed for." That is, if the judgment is supported by the pleadings and evidence, it will, upon trial *de novo,* be affirmed "without reference to the conclusion" of the trial court. If the facts, as stated in the petition, do not entitle the

plaintiff to the relief given in the judgment, and a demurrer is filed, or objection to receiving any evidence is made by a demurrer *ore tenus*, "the record would then present the question of the jurisdiction of a court of equity to grant the relief prayed for."

We are satisfied that our former decision is right, and it is therefore adhered to.

APPEAL DISMISSED.

MORRISSEY, C. J., and LETTON, J., dissent.

LINCOLN COMMERCIAL CLUB, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED MAY 3, 1919. No. 20284.

1. **Carriers:** ORDER OF STATE RAILWAY COMMISSION: REVIEW. This court will not reverse the order of the state railway commission, on appeal, unless it is found to be clearly unreasonable. Rev. St. 1913, secs. 6127, 6128.
2. ———: SWITCHING CHARGES: DISCRIMINATION. Where unjust discrimination arises as between individuals or localities, by reason of the absorbing of switching charges in certain instances and not in others under like circumstances and conditions, the carrier may be required to remove the discrimination by a change in tariff schedule eliminating the charge.

APPEAL from State Railway Commission. *Affirmed.*

J. A. C. Kennedy, Max V. Beghtol and *E. S. White*, for appellant.

John J. Ledwith, contra.

CORNISH, J.

The defendant, under its tariff No. 4778, absorbed the switching charges of carload shipments in and out of Lincoln, arising at or destined to what it designates as competitive points on its line. When, however, the shipment arises at or is destined to stations reached exclusively by the defendant (except in the case of

brick and lime shipments), it refused to absorb such switching charges. The state railway commission found such charge to be unjust, discriminatory, and unreasonable, and ordered the cancelation of that portion of the tariff so providing. The defendant appeals.

It appears that the Burlington, Northwestern, and Rock Island railroads make provision for the absorption of such switching charge. A shipper at Lincoln, having a warehouse located upon the tracks of these last-mentioned roads, is thus put to a disadvantage in competition with one whose warehouse is upon defendant's track. The producer shipping from a noncompetitive point is put to a disadvantage in competition with another producer at a point not reached exclusively by the defendant, although the circumstances and conditions may be otherwise the same.

This court will not reverse the order of the railway commission unless it is found to be clearly unreasonable. Rev. St. 1913, secs. 6127, 6128; *Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission*, 85 Neb. 818. We are of opinion that the order herein is not of that character. The charge made by other roads for the service and the charge made by the defendant in the case of brick and lime shipments are by statute made *prima facie* evidence of what is a reasonable charge. Argument is not needed to show that the charge, as it affects the patrons of the road, is discriminatory in its effect.

The contention of defendant that the order is confiscatory in its nature is not sustained by the evidence. The separate incomes of freight and passenger traffic and between state and interstate business were not shown. In any event, the discrimination complained of should be avoided.

The order appealed from was in existence prior to the time of the president's proclamation by which the control of the railroads was taken over by the general government. We are of opinion that the situation in

that respect ought not to cause a reversal of the order. *Chicago, W. P. & S. R. Co.*, 37 I. C. C. 408, 415; *Union P. R. Co. v. Updike Grain Co.*, 222 U. S. 215; *National Dock & Storage Warehouse Co. v. Boston & M. R. Co.*, 38 I. C. C. 643; *Manufacturers & Merchants Ass'n v. Aberdeen & A. R. Co.*, 24 I. C. C. 331; *Bennett & Son v. Chesapeake & O. R. Co.*, 38 I. C. C. 310; *Corporation Commission of Virginia v. Chesapeake & O. R. Co.*, 40 I. C. C. 24.

AFFIRMED.

HUGH L. GAUNT, APPELLEE, V. GEORGE P. SMITH, APPELLANT.

FILED MAY 3, 1919. No. 20422.

1. **Appeal in Equity**: TRIAL DE NOVO: CONFLICT OF EVIDENCE. "Upon appeal in actions in equity, this court is required by the statute to try the issues *de novo*, without reference to findings of the trial court; but, when the testimony of witnesses orally examined before the court upon the vital issues in the case is conflicting, so that it would be impossible that both versions of the transaction can be true, this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." *Shafer v. Beatrice State Bank*, 99 Neb. 317.
2. **Evidence** examined, and *held* to support the judgment of the trial court.

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

Hoagland & Hoagland, for appellant.

Beeler & Crosby, contra.

DEAN, J.

This is an action for an accounting. Plaintiff and defendant were partners in a meat market from February 3, 1913, to September 4, 1913, when the partnership was dissolved; plaintiff on that date having sold

his interest in the partnership, except the book accounts, to G. S. Arnold for $575. Arnold is not a party to this suit. On June 14, 1915, plaintiff repurchased Arnold's undivided one-half interest. Thereafter a disagreement respecting settlement of the partnership affairs having arisen between plaintiff and defendant, this action was begun, and plaintiff recovered a judgment for $337.23, from which defendant appealed.

A partnership account book is in evidence, over defendant's objection of incompetency, because it "requires explanation." He complains that "no man on earth could figure up any true account between the plaintiff and the defendant from that book." It must be admitted that the book, which consists of about 200 pages of accounts, is not a model of its kind, but, when considered in connection with the evidence of the parties, it serves to shed light on the partnership business. The entries for the most part, if not all, were apparently made by plaintiff while the partnership was in operation, and the book was always accessible to defendant, who had active charge of the sales and of the shop generally. The court did not err in overruling defendant's objection.

A slaughterhouse was bought, and defendant argues that plaintiff used $186.80 of the firm's money for its purchase and construction. He says plaintiff received $36 as rental for its use by a tenant, and finally sold the property for $125. Referring to these items, that total $347.80, defendant says in his brief: "No mention is made on the firm books of the slaughterhouse transaction, yet it is clear that the firm should be credited with $347.80, an amount which was not considered by his Honor, Judge Grimes, in deciding the case." It is obvious that plaintiff should not be required to account for the partnership funds expended for the slaughterhouse property, and also for the proceeds received from the rental and sale of such property. At most $93.40 is defendant's due, and he is so credited here.

Plaintiff borrowed $300 at the McDonald State Bank, for which he gave the firm note. The bank president testified that the money was placed to the credit of the firm, and that after the dissolution plaintiff paid the note. Plaintiff testified that defendant knew of and authorized the loan, but he denied all knowledge of the transaction. It plainly appears that, over defendant's objection, plaintiff was entitled to a credit of $150 on this item.

The decree takes into account plaintiff's repurchase, without defendant's consent, of Arnold's interest in the partnership. At the time of the trial defendant was in possession of the partnership property and was using it in his business. The testimony of the parties respecting its value ranged approximately from $300 to $800. It is fundamental that, when one partner sells his interest in partnership property to another without the consent of the copartner, the purchaser becomes the owner of the share his vendor held in the partnership after the closing up of the partnership and the payment of partnership debts. 20 R. C. L. 983, sec. 217.

A more extended discussion of the record does not seem to be necessary. The evidence supports the judgment of the trial court. *Shafer v. Beatrice State Bank*, 99 Neb. 317. Error has not been shown. The judgment is

AFFIRMED.

LETTON, J., not sitting.

BANK OF BENSON, APPELLANT, V. W. A. GORDON ET AL., APPELLEES.

FILED MAY 3, 1919. No. 20918.

1. **Corporations: NOTES: INDORSEMENT.** It is within the apparent scope of the authority of an officer of a trading corporation to indorse a negotiable instrument, that is payable to the order of the corporation, only in furtherance of the business of such corporation.

2. ———: ———: ———: NOTICE. When a negotiable instrument is payable to the order of a corporation and is indorsed by a corporate officer in the corporate name and given as collateral security for a loan to himself individually, or to some other corporation in which he is interested, such facts are sufficient to put the lender on inquiry as to the actual authority of the corporate officer to make such transfer.

3. Appeal: DIRECTION OF VERDICT. Evidence examined and *held* sufficient to support the judgment of the district court.

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

D. L. Johnston, for appellant.

Byron G. Burbank and *William Baird & Sons, contra.*

DEAN, J.

Plaintiff sued W. A. Gordon, as maker, and "Brodegaard Jewelry Stores, Incorporated," and Fred Brodegaard, as indorsers, to recover on a promissory note for $5,000 executed by Gordon on September 26, 1914, due in six months and payable to the order of "Brodegaard Jewelry Stores, Inc." When the taking of testimony was concluded the jury were directed to return a verdict in favor of all defendants. The suit was thereupon dismissed, and plaintiff appealed.

This is the second appearance here of this case. On the first appeal it was submitted to the commission, which found for plaintiff. Upon rehearing before the court we remanded the case for trial *de novo*. *Bank of Benson v. Gordon*, 102 Neb. 481.

Fred Brodegaard was president and general manager of two corporations that were separately engaged in the jewelry business at Omaha. The initial store was a corporation engaged in the retail trade and known as "Fred Brodegaard Jewelry Company." Subsequently a wholesale house, namely, "Brodegaard Jewelry Stores, Incorporated," was organized by Fred Brodegaard and others. The business of each corporation was entirely separate from the other. Brodegaard owned

and sold stock in "Stores Incorporated" to various persons, and, among others, 50 shares to Mr. Gordon at $100 a share, for which Gordon gave the note in suit. The note, instead of running to Brodegaard, the owner of the stock, was made payable "to the order of Brodegaard Jewelry Stores, Inc."

A few days after the Gordon note was delivered to Brodegaard, namely, on October 3, 1914, he obtained a loan of $3,000 from the plaintiff bank, for which he gave a negotiable promissory note payable to its order and signed: "Fred Brodegaard Jewelry Co., by Fred Brodegaard, Pres. Fred Brodegaard." The cashier of the plaintiff bank testified in substance that Brodegaard, when he obtained the loan, delivered the note in suit to the bank as collateral security, and that in his presence Brodegaard indorsed on the back of the Gordon note the words: "Brodegaard Jewelry Stores, Inc., by Fred Brodegaard, Pres. Fred Brodegaard." The cashier also testified that at the request of Brodegaard he placed the $3,000 so borrowed to the credit of the "Fred Brodegaard Jewelry Company."

The record shows that Brodegaard deceived Gordon in that the stock so purchased was owned personally by Brodegaard, and was not the stock of the corporation as represented, and, as hereinbefore pointed out, the money obtained on the Gordon note did not go into the treasury of "Stores Incorporated," but by direction of Brodegaard was placed to the credit of another corporation in which he was interested. When Brodegaard obtained the note in suit, as stated in the former opinion, it was pleaded by Gordon that Brodegaard agreed "that the note was conditional; it being agreed in writing that he could return the stock and take up his note within a limited period." This agreement is in the record. It provides that Gordon was to have six months or a year, at his option, in which to return the stock and have his note and money returned to him with interest. When Brodegaard placed the note

in plaintiff's bank as collateral security and put it beyond his power to return it to Gordon, this of course was a violation of the agreement. As between the original parties to the note Gordon had a complete defense. It also appears that, under the law applicable to the facts, "Brodegaard Stores, Incorporated," is relieved from liability on the note in suit because the act of Brodegaard in the premises was without authority, unless it can be shown that plaintiff is a holder in due course.

In plaintiff's brief it is said that "there is but one issue in this case, namely: Is the plaintiff a holder in due course?"

From the facts before it at the time the loan was made, plaintiff was put upon inquiry respecting the authority of Brodegaard to use the Gordon note, payable to one corporation, as collateral security for a loan of money made to another corporation in which he was interested. It is within the apparent scope of the authority of a president and general manager of a trading corporation to indorse a negotiable instrument that is payable to the order of the corporation, only in furtherance of the business of such corporation. Where such instrument is indorsed by a corporate officer in the corporate name and given as collateral security for a loan to himself individually, or to some other corporation in which he is interested, as in the present case, this it seems is sufficient to put the lender on inquiry as to the actual authority of the corporate officer to make such transfer. 8 C. J. 521; *Mee v. Carlson,* 29 L. R. A. n. s., 351, and note (22 S. Dak. 365); *Kenyon Realty Co. v. National Deposit Bank,* 31 L. R. A. n. s., 169, and note (140 Ky. 133). A rule less stringent would jeopardize the interests of all corporate stockholders. We conclude that the bank had knowledge of such facts that, without further inquiry, its action in taking the instrument amounted to bad faith. Rev. St. 1913, sec. 5374.

Plaintiff places reliance upon the finding of the commission that there was apparently a course of dealing between the plaintiff bank and Brodegaard of which "Stores Incorporated" must have had knowledge, and that the corporation is therefore bound. This reliance is based in large part upon the fact that Brodegaard on three or four occasions discounted notes at the plaintiff bank that were payable to "Stores Incorporated," the proceeds of such notes being placed to the credit of "Fred Brodegaard Jewelry Company." But on this point it clearly appears that plaintiff never made inquiry of any person except Fred Brodegaard respecting his authority in the premises. The testimony at this trial shows that "Stores Incorporated" never knew of, nor at any time acquiesced in nor authorized, Brodegaard's course of dealing in the respects noted. Its officers were entirely unaware that he, as an officer of the corporation, was indorsing its name upon its notes as collateral security for loans that were not in furtherance of the business of the corporation. There is an entire lack of evidence that actual authority was ever given to Brodegaard to so indorse the notes of the "Stores Incorporated."

At the close of the testimony plaintiff and defendants Gordon and "Stores Incorporated" each moved separately for a directed verdict. Plaintiff's motion was overruled, and the motions of the defendants were sustained. It follows that the judgment of the district court has the same force and effect respecting controverted questions of fact that the verdict of a jury would have in a like case. *Modern Woodmen of America v. Berry*, 100 Neb. 820, Ann. Cas. 1918D, 302. The judgment should not be disturbed unless clearly wrong.

Finding no reversible error, the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

IN RE ESTATE OF BRIDGET A. KELLY.
GEORGE T. KELLY, APPELLEE, V. THOMAS J. KELLY ET AL., APPELLANTS.

FILED MAY 3, 1919. No. 20466.

Wills: PROBATE: NOTICE. In getting service upon heirs and all interested parties in the probate of a will, it will be sufficient to give the county judge plenary jurisdiction if he "shall cause public notice thereof to be given by personal service on all persons interested, or by publication under an order of such court, in such newspaper printed in this state as the judge shall direct." Rev. St. 1913, sec. 1303.

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

Field, Ricketts & Ricketts, for appellants.

Berge & McCarty, contra.

ALDRICH, J.

On August 25, 1913, Bridget A. Kelly made a last will and testament bequeathing all of her property to her then living children. The names of the children who were objects of her bounty, and the parties to this case are as follows: William Kelly, aged 49 years; Thomas Kelly, aged 39 years; George T. Kelly (appellee herein) aged 36 years; Mary Josephine Dawson (afterwards known as Mary Josephine Gilbert) aged 40 years; Margaret Kelly Harr, aged 38; Alice Kelly Clare, aged 34. These children comprise the family of the testatrix, and it is to determine the validity of the last will and testament of the deceased testatrix that this action is brought. It is claimed on the part of the appellee that the instrument probated in the county court was not the last will and testament of deceased; that the same had been written

and the signature of the deceased secured on August 25, 1913, at which time, and for many months prior thereto, the said Bridget A. Kelly was suffering from paralysis, etc. It appears from the record that Bridget A. Kelly had had a stroke of paralysis at the time she made the purported will on August 25, 1913. That she was in a weakened mental and physical condition appears to be true. Afterward a settlement was had among the children named and provided for in the alleged will, and all participated in this settlement with the exception of George T. Kelly. The settlement was had and entered into, and all agreed with one exception, as above stated, that the will should be probated and the following distribution should be had: To George T. Kelly, cash, $10; to Margaret Harr, cash, $2,250 and one-half of lot 7, block 2; to Alice Clare, cash, 2,250 and one-half of lot 7, block 2; to William Kelly $1,000, and an undivided half of lots 8 and 9, $1,250, total, $2,250; to Thomas Kelly, cash, $1,000, an undivided half of lots 8 and 9, $1,250, lot 8, block 2, $2,500, total 4,750; to Mary Josephine Gilbert, lot 7, block 22, $6,000, household goods and furniture, $250, residue of personal property, subject to debts, $7,390, total, $13,640.

It will be noted that in this distribution, under the will, George T. Kelly, contestant and plaintiff herein, received $10. Under the settlement finally agreed to between the heirs above mentioned, the will of Bridget A. Kelly was duly probated; all proceedings had as by law provided; executors discharged, and the proceedings in the settlement of the estate according to the provisions of the will were had entire. Then the absent son, George T. Kelly, comes back from California, where he had been residing for a year or more, and asks to have the probate of said will set aside, and the entire proceedings gone into again for the reasons heretofore set out. A trial was had, and the proceedings were dismissed, and plaintiff ap-

peals to the district court, where trial was had and the finding made for the plaintiff, George T. Kelly. The other children (defendants herein) appealed from the decision of the district court to the supreme court, and we are now called upon to determine the issue, Was this will in question the last will and testament of the deceased testatrix? Was she of sound mind and disposing memory at the time this instrument in issue was executed? And did the county court have jurisdiction in the premises? Was the service by publication sufficient notice for the court to acquire jurisdiction to proceed to probate the will?

The will of the deceased testatrix as probated in the first instance does not make any other or different provision for the plaintiff, George T. Kelly, than was made for him in the settlement between the other heirs. Really, the one issue that is decisive of this case, and beyond which we do not have to go, is, Was there service, as required by statute, made on the absent heir, George T. Kelly, who at the time of his mother's death was residing somewhere in California?

In probating a will, and in giving notice of such proceedings, the service is usually constructive. The provisions of the statute under which we are proceeding make it optional with the probate judge to get personal service by publication. The almost universal rule in this state in probate proceedings is to get service by publication in any legal newspaper printed in the county which the judge may select. This is a matter of precaution and of general interest to all parties concerned, for the reason that personal service only reaches the person served, and the statute requires that all parties claiming an interest, or interested parties, shall be served with a notice to appear at the proceedings in probate, and it is impossible for a judge, or the heirs, to know all interested parties, and so it is unsafe to depend upon personal service, in this kind of a legal proceeding, and therefore it

is necessary to notify every one who might be interested, however small their interest may be. The safe thing is to get service by publication, and that operates to the same extent and is equally authoritative in giving to the court plenary jurisdiction upon every person who might be interested. The interest may be confined to heirs, devisees or legatees, or it may extend to others unknown to the county judge and to the petitioner.

Personal service jurisdiction would not be had unless the interested party was personally served, and by giving notice by publication this danger is avoided. In the instant case, the plaintiff claims that he never had any actual knowledge, or notice, of his mother's death, or of the hearing of the probate of her last will and testament, and therefore the court at that time (which is the position of the plaintiff) had no jurisdiction to hear and determine whether or not the probated will and testament was the last will and testament of the deceased testatrix. It is claimed that it was not her will, and that the court had never obtained jurisdiction over the plaintiff, and that the admitting of the will to probate, because of alleged defective service, gave to the court no jurisdiction to try and determine the issue here involved.

This identical question was before this court in the case of *In re Estate of Sieker*, 89 Neb. 216. Also this court has quoted with approval 2 Black, Judgments (2d ed.) sec. 635, the following: "The action of a probate court having jurisdiction, in admitting a will to probate or in rejecting it, is in the nature of a proceeding *in rem*, and so long as it remains in force, it is conclusive as to the due execution and the validity of the will, both upon all the parties who may be before the court and upon all other persons whatever, in all proceedings arising out of the will or where the parties claim under or are connected with it."

The supreme court of Vermont said: "The proceeding is, in form and substance, upon the will itself. No process is issued against any one; but all persons interested in determining the state, or condition, of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money, or do any particular act, but that the instrument is, or is not, the will of the testator. * * * The judgment is upon the thing itself, and when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to all the world (at least so far as the property of the testator within the state is concerned), just what the judgment declares it to be." *Woodruff v. Taylor*, 20 Vt. 65.

The statute under which we are proceeding is the decedent law of this state, and the procedure is different from that of ordinary civil actions as provided for in the Code of Civil Procedure. So it appears to us that, as a matter of law, the county court having fully complied with all the requirements of the decedent law of this state in the matter of probate of a will, and having plenary jurisdiction to probate the will in question and to distribute the property under the plain provisions of this document as signed and executed by the deceased testatrix, August 25, 1913, makes the proceeding in probate valid. To sustain the judgment and decree of the district court would simply overturn a uniform procedure in determining the rights of parties to real estate in the probate of a will.

The procedure taken, then, in this case at the time the will was first probated were proper statutory steps, and having jurisdiction over all the defendants at the time, and having acquired jurisdiction of the plaintiff by publication, and of other interested parties, as by statute of this state provided in such cases, it fol-

lows that the proceedings were regular and legal, and should not be disturbed.

We have carefully examined the record in this case and fully investigated the briefs and the many authorities cited, and we come to the conclusion, after full investigation, that the provisions of the Code of Civil Procedure cited by plaintiff cannot be followed; that the publication of the notice in this case was such as is contemplated by the decedent statute, and the order of the county court directing the publication was sufficient authority and gave it ample jurisdiction to proceed in probate as of and for the last will and testament of the testatrix. All of the heirs to this estate stipulated by and between themselves (with the exception of the plaintiff) to withdraw objection to the receiving of this will in probate, and to take their share in accordance with the terms and provisions of the will, and of the settlement entered into; and under these terms and conditions, the court, having full jurisdiction in the premises, settled the matter by distributing the property, and the executrix and the executor were discharged; and if the court had jurisdiction to hear and determine these matters and to make necessary orders to distribute and divide this property among the heirs at law in accordance with the terms and provisions of the will, then it follows that the question of fraud, or undue influence, and lack of testamentary capacity are immaterial, and were in effect passed upon by the court in admitting the will to probate, for it was the judgment in the probate proceedings that the testatrix had testamentary capacity; that she knew and remembered her relations, and obligations to her children, and determined for herself what share each one should have in the distribution of the estate. And the county court having jurisdiction to hear and determine this matter, it follows that the judgment and decree of the district court must be reversed and remanded in accordance with this opinion, and the

probate of the will and the distribution of property thereunder made by the county judge must stand as of and for the last will and testament of Bridget A. Kelly, testatrix herein.

REVERSED AND REMANDED.

LETTON, J., not sitting.

ROSE, J., dissents.

CORNISH, J., concurring.

I have concurred in this opinion. I have not considered the law to be, nor have I considered the opinion to hold, that an heir cannot invoke the provisions of the Code (Rev. St. 1913, sec. 8207) for the purpose of having vacated the judgments or final orders of the county court in probate proceedings.

SEDGWICK, J., dissenting.

The syllabus is perhaps indefinite, but the opinion says: "We come to the conclusion after full investigation that the provisions of the Cole of Civil Procedure (Rev. St. 1913, sec. 8207), cited by plaintiff, cannot be followed." "Really the one issue that is decisive of this case, and beyond which we do not have to go, is: Was there service, as required by statute, made on the absent heir?" "The safe thing is to get service by publication, and that operates to the same extent and is equally authoritative in giving to the court plenary jurisdiction upon every person who might be interested." And the opinion of the majority, though in some respects perhaps indefinite, is written and the case decided upon that proposition.

Section 8215, Rev. St. 1913, provides: "The provisions of this chapter shall apply to the supreme court and county court, so far as the same may be applicable to the judgments or final orders of such courts." This section was enacted prior to the adoption of the present Constitution, and section 15, art.

XVI of the Constitution, makes county courts the successors of probate courts. *Martin v. Grover,* 9 Neb. 263. In *Oakdale Heat & Light Co. v. Seymour,* 78 Neb. 59, it is said: "This makes the provisions of section 602 of the Code applicable to probate courts, and also the following sections which prescribe the practice to be pursued in the court in which it is sought to vacate or modify judgments and orders." And so there can be no question that the county court has jurisdiction to vacate its judgments after the term under sections 8207 and 8215, Rev. St. 1913. In *Western Assurance Co. v. Klein,* 48 Neb. 904, it is said: "If these provisions of the Code did not exist, still the district courts of the state, in the exercise of their general equity powers, might, in a proper case and on sufficient grounds, set aside a judgment after the term at which it was rendered." There is no reason, in the nature of things, why this provision of the Code should not apply to probate proceedings as well as to any other proceedings where service is had by publication only. The case of *In re Estate of Sieker,* 89 Neb. 216, which seems to be relied upon in the majority opinion, involves only the question whether service by publication is *prima facie* sufficient, and does not determine or consider whether section 8207, Rev. St. 1913, applies, and holds that such service, "so long as it remains in force," is valid. These words are a plain indication that it may not remain in force, and it will not if under section 8207, Rev. St. 1913, it ought to be set aside.

The record in this case is not properly represented in the statement that "all of the heirs to this estate stipulated by and between themselves (with the exception of the plaintiff) to withdraw objection to the receiving of this will in probate and to take their share in accordance with the terms and provisions of the will." Under this fraudulent agreement of settlement,

without the knowledge of this contestant, none of the parties to the stipulation took a "share in accordance with the terms and provisions of the will." The daughter, who was accused of obtaining this will by undue means, took, by this settlement, about one-third less than the alleged will gave her, and every other of the parties to the stipulation received by the settlement substantially more than the alleged will provided, so that this stipulation of settlement is a confession that the will was not genuine. And the county court did not distribute the estate according to the provisions of any will, but only as stipulated by the interested parties who benefitted thereby, and without the consent or knowledge of this appellee.

This appellee was in California at the time of his mother's last illness and death, and did not learn of her decease until the last part of December, 1914. In October, 1915, he filed this petition to set aside the probate of the will. Even if he had notice of this order which was entered in November, 1914, he would have 2 years' time in which to make application to set aside this order under subdivisions 4 and 7 of section 8207, Rev. St. 1913, and 3 years' time under subdivision 3. When the appellee heard of his mother's death, which occurred in January, 1914, he immediately wrote to his sister, Mrs. Harr, in regard to his interest in the estate, also to his brother Thomas Kelly, and to the attorney who was interested in having the will probated. The deceased had made a former will in which she gave this appellee a substantial interest in her property. The will in question was made in August, 1913. The deceased was then 75 years of age and was suffering from paralysis. She was living with her son, Thomas Kelly, and her daughter, Mary Josephine Gilbert. When the will in question was offered for probate, it was found to give a large portion of the estate to the said Mary Josephine Gilbert; and two children

of deceased, Margaret Harr and Alice Clare, filed objections to the probate of the will, alleging that it was not the will of the deceased; that her signature was obtained by fraud, duress, and intimidation on the part of Mrs. Gilbert and Thomas Kelly; and in making these objections, without the consent of or any notice to this appellee, they included his name as one of the objectors. The appellee knew nothing of their action in this regard. Without any hearing upon these objections, the stipulation of settlement was filed, in which it was recited that appellee was a party to the stipulation, and that they would allow the will to be probated, and the terms of the will were entirely disregarded by the parties in the distribution of the estate, and the estate was divided according to the stipulation, giving appellee $10, and all the heirs, except Mary Josephine and Thomas, who it is alleged in fact made this will, much larger shares in the property than the will stipulated, and giving the said proponents of the will a very much smaller portion; thus perpetrating a manifest fraud upon the court in making it appear that this appellee was one of the objectors and consented to this distribution of the property. "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." *In re Estate of Johnson*, 100 Neb. 791.

The concealment of a material fact by a brother or sister which results in his or her advantage in excluding another brother is a constructive fraud. All these parties knew that this appellee had no notice of this attempted probate of the will, and had no notice that it was represented to the court that he was connected with the proceedings when he was not, and had no notice of the settlement and distribution of the prop-

erty by the stipulation; and instead of notifying him of his mother's death and the proceedings, as they had ample opportunity to do, they purposely kept knowledge of these facts from him.

The majority opinion is: "We are now called upon to determine the issue, Was this will in question the last will and testament of the deceased testatrix? Was she of sound mind and disposing memory at the time this instrument in issue was executed?" The statute requires that, before a judgment is set aside on these grounds, the court must find that there is good defense. But that is not the principal question for determination. "Before a plaintiff is entitled to have a judgment against him and an order overruling his motion for a new trial vacated at a succeeding term for irregularity, it must be adjudged by the court that he has a cause of action which is *prima facie* valid." *Gavin v. Reed,* 73 Neb. 237. The opinion cites the statute, and says: "This requires the court to adjudge that the cause of action is *prima facie* valid before it would be authorized to take any action upon the motion. *Gilbert v. Marrow,* 54 Neb. 77." It is not necessary that there should be a preponderance of the evidence upon that point. If it shows a *prima facie* defense, it is sufficient.

It seems to follow that (1) the county court and supreme court must grant a new trial under section 8207, Rev. St. 1913; (2) the admission of the alleged will to probate was procured by fraud; (3) the order of distribution was not under the will, but under the fraudulent stipulation; and (4) in the absence of any statutory authority, equity will set aside such order so obtained, and allow appellee to be heard.

It appears to me that the judgment of the district court is fully sustained by the evidence, and ought to be affirmed.

The following opinion on motion for rehearing was filed December 15, 1919. *Rehearing denied.*

1. **County Court: PROBATE: VACATION: FRAUD.** The county court has power to vacate a probate procured by fraud and to permit a contest of the will.
2. **Wills: PROBATE: VACATION.** A judgment of probate, entered upon a proper petition after legal notice, and not challenged for a year and a half, should not be vacated on doubtful or equivocal proofs on the issue of testator's incompetency or of undue influence.
3. ———: ———: ———: **EVIDENCE.** Evidence on the issues of incompetency of testatrix and of undue influence in the making of a will *held* insufficient to sustain findings in favor of plaintiff on his petition to vacate the judgment of probate and to contest the will.

ROSE, J.

This is a proceeding commenced in the county court by George T. Kelly, plaintiff, October 1, 1915, to set aside the probate of his mother's will and to contest it. She left him $10 only, and made substantial bequests to his brothers and sisters. The will was dated August 25, 1913. Testatrix died January 6, 1914. The decree of probate was entered March 17, 1914. One son, Thomas J. Kelly, was executor and one daughter, Mary Josephine Gilbert, was executrix. Their final report was approved and the estate, with the exception of plaintiff's share, was distributed November 17, 1914. They were discharged by order of the county court November 18, 1914. They are sued by plaintiff, both in their representative and individual capacity, and as defendants are joined with Margaret Kelly Harr, Alice Agnes Clare, and William Kelly. These defendants and plaintiff are the only children of testatrix. The grounds upon which plaintiff demands relief may be summarized as follows: He did not have actual notice or knowledge of his mother's death or of the offering of her will for probate. These facts were fraudulently concealed from him. The probate was procured by fraud. Testatrix was stricken with apoplexy October 1, 1912, and was not competent to make her will August 25, 1913. In at-

tempting to do so, she was unduly influenced by her daughter, Mary Josephine Gilbert, who alone lived with her mother. To the petition praying for relief on the grounds mentioned, there was an answer denying incompetency and undue influence, and containing pleas that plaintiff had due notice by publication, and that he was negligent in delaying his litigation. There was a trial in the county court. After considering the evidence, including that relating to incompetency and undue influence, the county court found that sufficient cause for granting plaintiff relief had not been shown, and the petition was dismissed. Plaintiff appealed to the district court, where there was another trial, but it resulted in a decree setting aside the probate and permitting a contest. From that decree proponents appealed to this court. In an opinion here published, notice of the presenting of the will for probate was held sufficient to give the county court jurisdiction, and the decree of the district court was reversed. *In re Estate of Kelly, ante,* p. 513. On motion of plaintiff a reargument was granted. After a second hearing on appeal the case was again taken under advisement.

The power of the county court to set aside the probate is earnestly affirmed by plaintiff and vehemently controverted by proponents. The petition invoking the exercise of this power was filed after the judgment of probate had remained unchallenged for more than a year and a half. Plaintiff insists that the power of the county court to grant him relief is found in the statute authorizing the district court to vacate a judgment at a subsequent term for fraud practiced by the successful party in obtaining such judgment. Rev. St. 1913, sec. 8207. While this enactment by its terms applies to district courts, another provision in the same chapter declares:

"The provisions of this chapter shall apply to the supreme court and county court, so far as the same may be applicable to the judgments or final orders of such courts." Rev. St. 1913, sec. 8215.

To relieve innocent parties from judgments procured by the fraud of prevailing parties, county courts have long exercised the power granted by the statutes cited. Such authority was recognized in early decisions. In *Oakdale Heat & Light Co. v. Seymour,* 78 Neb. 47, reference is made to some of the former cases, and it is there held that the statutory power to grant relief from a judgment procured by fraud extends to the county court in the exercise of its probate jurisdiction. Adherence to this rule is unanimous.

Independently of statute, however, the county court has power to set aside a probate procured by fraud. For that purpose the equity powers of the county court as the court of exclusive original jurisdiction in probate matters are ample. *Genau v. Abbott,* 68 Neb. 117; *Youngson v. Bond,* 69 Neb. 356.

Should the county court have vacated the probate? For the purpose of obtaining such relief, plaintiff is required to make a *prima facie* case on the merits. In doing so the burden is on him to show that testatrix was incompetent, or that her will was the result of undue influence. If the evidence on the affirmative of these issues is insufficient, the probate should not be disturbed. It is incumbent on plaintiff to overthrow the presumption of regularity and validity raised by the judicial proceedings and records. In probate matters the county court is the court of original jurisdiction. A will valid on its face was presented to that court. It had been prepared and witnessed by an attorney of high standing and recognized integrity who knew testatrix, and her children. He afterwards made oath that testatrix was competent and free from coercion when she made her will. The will was also witnessed by another upright lawyer and by a reputable physician. Due notice that it had been offered for probate was given by publication pursuant to statute. A judgment probating it was formally entered on the records of the county court. Testimony adduced by plaintiff under his petition herein to prove incompetency and undue

influence was rejected by the county court as insufficient for that purpose. Under such circumstances the judgment, from which there was no appeal, should not be set aside at this late day on doubtful or equivocal proofs. There must be cogent reasons for opening judgments affecting titles and distributing estates. The testimony on behalf of plaintiff on these issues comes from two daughters of testatrix and is similar in character. It shows hostility and bitterness toward the sister who is charged with undue influence while living with her mother. This testimony was given after the witnesses had entered into a stipulation to allow the probate, and after they had accepted their distributive shares of their mother's estate under their stipulation, which did not increase the share of plaintiff beyond $10. The import of their testimony is that their mother was stricken with apoplexy October 1, 1912; that she failed rapidly thereafter, in body and mind; that her mind at times was blank; that she was not herself; that she could not converse intelligently; that she was constantly under the influence of the daughter who lived with her; that the latter told others of her purpose to influence her mother in the making of a will; that the daughter who lived with her mother excluded one of her sisters from her mother's home, and knew, but refused to disclose, the address of plaintiff, who was absent, and refused to notify him of his mother's condition, fatal illness and death. Other testimony from the same source, however, has a different import. Referring to a period beginning after the affliction of testatrix and extending almost to the time of her death, these same witnesses testify to incidents indicating that their mother at times had a clear perception of her relation and duty to plaintiff. Testimony of this nature tends to prove that the mother spoke of hearing from plaintiff; of his "getting along fine;" of her love for him; of her wish to do right by him and to leave him something. These sound like utterances prompted by a disposing mind. They were reproduced by a daughter who could have called at any time her

mother's attorney—a neighbor who passed the home of testatrix almost daily. There is no direct evidence that testatrix was incompetent or under duress at the time she made her will. The attorney who drew it made oath to the contrary. Circumstances disclose a reason for cutting plaintiff off with $10. Before leaving home he had used intoxicants to excess. Thereafter he had been a wanderer along the Pacific coast. At a time when the competency of testatrix was not in question, she made a former will bequeathing for plaintiff's benefit $1,000, but the legacy was entrusted to the care of a sister. In the meantime this sister lived with and took care of her mother. Considering the evidence as a whole, it seems clear that plaintiff has not made a *prima facie* case.

The judgment of the district court is reversed and that of the county court affirmed.

JUDGMENT ACCORDINGLY.

CHARLES E. CHURCHILL, APPELLEE, V. PENNSYLVANIA COMPANY, APPELLANT.

FILED MAY 3, 1919. No. 20536.

Appeal: EVIDENCE: SUFFICIENCY. Where negligence is fairly inferable from the evidence, and that it was the proximate cause of damage complained of, the verdict of the jury will not be set aside for insufficiency of the evidence, where reasonable men may draw diverse inferences from the evidence adduced.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

Brome & Ramsey, contra.

ALDRICH, J.

This is an action at law brought by the plaintiff against the defendant to recover damages resulting from the death of a thoroughbred cow.

This cow was shipped from Mansfield, Ohio, to Chicago, Illinois, over the Pennsylvania route, and from Chicago to Hartington, Nebraska, over the Chicago & Northwestern Railway Company's and the Chicago, St. Paul, Minneapolis & Omaha Railway Company's roads. The shipment was made in extremely hot weather, starting from Mansfield, Ohio, on the 27th day of June, and arriving at Hartington, Nebraska, on the 3d of July. The animal died before it reached its destination. Defendant insists the death of the animal was caused by extremely hot weather and natural causes. The plaintiff claims that its death was due solely to lack of water.

Then here we have an issue of fact simply, and, being such, it is purely a question for the jury to consider. Evidence of the plaintiff, practically undisputed, shows that the cow in question arrived from Mansfield, Ohio, in the Chicago stock-yards, in good healthy condition, and that she was shipped out of the stock-yards at Chicago at midnight, June 28, 1916, and arrived at East Clinton, Illinois, at 10 a. m. on June 30, 1916, being a shipment of 34 hours. During this trip it was intensely hot and sultry, and the record shows that the animal did not receive any water from the time she left Chicago until she arrived at East Clinton, Illinois. The record shows that at East Clinton, Illinois, it was the duty of the bill clerk to make a record of the feeding and watering of stock, and that he did make a record of feeding and watering this cow in question, and the record shows that the cow was fed and watered at East Clinton, Illinois, and thus it is admitted that the animal went without water during this intensely hot weather for a period of 34 hours. The record further discloses that the train carrying this cow arrived at East Clinton at 10 a. m. and that this was the busiest time for the bill clerk, and that some other employee watered the stock and reported to the clerk,

and the record shows that the animal was watered. The trouble with this sort of evidence is that it was repeated, or told, to the clerk, that they had watered this animal in question. They told this to the clerk through the window, or came into the office and said so; but the clerk himself had no actual or personal knowledge as to whether or not the animal was watered. The only thing he knew about it was that some one, another employee, reported to him. There is no evidence convincing in its character that the cow in controversy was watered at East Clinton, Illinois. The car containing this animal left East Clinton at 11:50 a. m. on June 30, 1916, and arrived at Belle Plaine at 6 o'clock on the same day. It is not claimed that food or water was given it during this haul. It is in evidence that the car containing the animal in question left Belle Plaine at 6:46 p. m. on June 30, and arrived at Boone, Iowa, at 11:40 the same day. There is no evidence that during this haul the animal was either fed or watered, but remained at Boone until the morning of July 1, 1916. There is no evidence, or claim made, that the animal received either feed or water while in the yards at Boone. Thus we are led to the conclusion from the evidence that nothing but carelessness and neglect caused her death. It is safe to say that, had the defendant exercised the same care and diligence during the latter part of the journey that it did from Mansfield, Ohio, to Chicago, there would have been no bad results. The defendant knew of the animal's value, and of the importance and necessity of proper watering during this intensely hot weather, and, knowing these things, failed wholly and utterly to give the animal any care at all. The fact is, an individual treating a domestic animal as this company treated this cow in question would have been prosecuted for cruelty to animals.

Reliable veterinarians had different theories. The defendant's veterinarian claimed the cow died of over-

heat; another claimed that the *post mortem* showed she died from lack of water. The heat may have been a contributing cause, but it is also true that a scarcity of water from which the cow suffered would make the heat infinitely more effective and more debilitating than had she had plenty of water. The evidence establishes the fact that, had the cow been properly watered, she would have stood the latter part of the trip as well as she did the first part. The evidence is amply sufficient that the death of the animal resulted from negligent caretaking. The defendant knew of the necessity of plenty of water to an animal caged in a box car in as intensely hot weather as it was on this occasion, and the jury, in our judgment, had ample evidence to warrant it in finding that the animal died from the negligence of the defendant caused by not giving it proper care during its long shipment.

The verdict and finding of the jury is therefore

AFFIRMED.

ROSE and SEDGWICK, JJ., concur in affirmance.

LETTON, J., not sitting.

VINCENT GRAIN COMPANY, APPELLEE, V. JOHN E. ENGLISH, APPELLANT.

FILED MAY 17, 1919. No. 20364.

1. **Grain Exchange:** RULES: NOTICE. A rule of the Omaha Grain Exchange, or a custom of its members, that contracts for the sale and delivery of grain sold to its members do not expire until canceled by a party to the contract cannot bind a seller of grain who had no knowledge of such rule, or custom, and only had occasional dealings with a member of the exchange.
2. **Evidence** examined, and *held* to sustain the verdict.

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

Jacob Fawcett and *John J. Ledwith,* for appellant.

B. F. Good, A. W. Richardson and *Paul F. Good, contra.*

LETTON, J.

Action for damages for failure to deliver grain. The jury returned a verdict for $718.53, a smaller amount than plaintiff claimed. Defendant appealed, and plaintiff filed a cross-appeal.

Plaintiff is a grain dealer in Omaha, and defendant is a farmer living near Cheney. On July 11, 1916, at plaintiff's office in Omaha, they entered into a written contract, whereby defendant sold to plaintiff two 80,000-pound capacity cars of No. 2 hard wheat, to be delivered in 30 days on track at Cheney, Nebraska, at the price of 95½ cents a bushel. This contract also specified the quantity as "about 3,000 bushels."

Defendant was not able to get his wheat threshed until late in July. On August 5 he ordered two cars from the station agent at Cheney in which to ship the wheat. These cars did not arrive until August 17. On August 7 defendant wrote plaintiff that he had ordered cars, and asked plaintiff to order them also, also saying that he had only 2,603 bushels of wheat, and had to keep about 150 bushels for seed. Plaintiff replied the same day, saying it would take up the question of cars with the railroad company, but insisting that the contract called for two cars of 80,000-pound capacity, but was willing to make it 2,900 bushels. No reply was received to this letter. On August 21 plaintiff again wrote, stating that they had been looking for the cars, and were making an extension of time under the rules of the grain exchange. The next day, having received information in the meantime from the railroad company that defendant had canceled his order for cars, plaintiff wrote him that, if the grain was not shipped at once, it would consider the contract canceled, and

would purchase on the market on Friday of that week. The grain not being shipped, plaintiff purchased enough wheat on August 25 to fill the contract, paying $1,412.69 more than the contract price. This is the amount which it seeks to recover.

Plaintiff pleads a custom to extend known to the defendant. The contract contains no provision for any extension of time.

Defendant pleads that plaintiff agreed to furnish cars.

The evidence fails to support the contention of plaintiff that such a custom was known to the defendant. There was no proof that he had ever dealt upon the Omaha Grain Exchange, or was familiar with its rules, or had ever had more than one or two isolated transactions of this nature. Apparently he was dealing with plaintiff without reference to the operations of the Grain Exchange. He could not therefore be bound by its rules, or by a custom among grain brokers not known to him or brought to his attention. *Blakemore, Mayo & Co. v. Heyman,* 6 Fed. 581. The evidence also fails to support the contention of defendant that plaintiff agreed to furnish cars.

The amount of the verdict indicates that the jury considered that defendant breached the contract by failure to deliver on or before August 11, as the contract required, and that plaintiff was entitled to recover the difference between the market price at Cheney on August 11 and the contract price. We find no prejudicial error in the record. There is a disparity of a few dollars in the amount rendered in the verdict and this amount, but not enough to justify the court in setting aside the judgment.

The judgment of the district court is therefore

AFFIRMED.

CHARLES A. KLUGE, APPELLANT, V EMMA KLUGE ET AL., APPELLEES.

FILED MAY 17, 1919. No. 20993.

Wills: DEVISE: CONSTRUCTION. A devise to A of a designated tract of land "in Lancaster county, state of Nebraska, to remain his and all benefits of same, and not to be transferred by him while he lives, and at his death to go to his wife and children," is construed to convey a life estate to A, with remainder over to his wife and children.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Dexter F. Barrett, for appellant.

W. T. Thompson, contra.

LETTON, J.

This is an action to quiet title to certain land in Lancaster county. Plaintiff claims to be the owner in fee simple of the land by virtue of a certain devise in the will of Wilhelmina Kluge, deceased. Being presented in the form of a case stated, the appeal has been advanced under rule 14 of the supreme court (94 Neb. XIII).

The stated case shows that plaintiff is a son and heir at law of the testatrix, Wilhelmina Kluge, deceased; that by her last will and testament she provided as follows: "'Second. After the payment of such funeral expenses and debts I give, devise and bequeath to my son Charles Kluge, the old home place known as the southwest quarter (SW¼) of the northwest quarter (NW¼) of section 33-9-7, containing forty acres (40) in Lancaster county, state of Nebraska, to remain his and all benefits of same, and not to be transferred by him while he lives, and at his death to go to his wife and children.'

"That the plaintiff, Charles A. Kluge, and the defendant, Emma Kluge (his wife), testified, in substance, that the testatrix, Wilhelmina Kluge, intended to give them all of said land, and did not intend to tie them up in handling it and making it a hardship on them, and that it would work a great hardship upon plaintiff and his family to be limited or restrained as to this land; that they desired to be put in position to dispose of the land and get a larger farm, so that their growing boys might be able to farm and stay on the farm."

Upon these facts the trial court found that the plaintiff took a life estate only, that the remainder in fee simple vested in the defendants, and rendered judgment accordingly.

Section 6191, Rev. St. 1913, provides: "The term 'heirs,' or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple." This statute applies to wills as well as to deeds. *Little v. Giles*, 25 Neb. 313; *Schnitter v. McManaman*, 85 Neb. 337.

Section 1287, Rev. St. 1913, is as follows: "Every devise of land in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will, that the devisor intended to convey a less estate." Under these provisions the first portion of the second paragraph of the will, if it stood alone, would be sufficient to devise an estate in fee simple, the word "heirs" not being necessary in order to create a fee.

It is argued that, since the estate first granted was a fee simple, subsequent clauses cannot operate to cut it down, citing *Loosing v. Loosing*, 85 Neb. 66.

Section 6195 Rev. St. 1913, provides that as to such an instrument, "It shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the

whole instrument, and so far as such intent is consistent with the rules of law."

It is also argued that the intent mentioned in this statute must be consistent with the rules of law governing the construction of wills, and that the principle above stated applies. A similar argument was made in *Albin v. Parmele,* 70 Neb. 740, but it was met in the opinion as follows: "That which the statute expressly requires shall be consistent with the general rules of law is not the construction of the instrument, but the intent of the parties. In a general sense, doubtless, the construction must also have a like consistency. That is to say, the language used in the instrument will be understood as intended to express a lawful purpose, rather than an unlawful one, and technical words and phrases will, in the absence of anything indicative of the contrary, be presumed to have been chosen for their technical meaning; but nevertheless in instruments, especially wills, which are often drawn by persons not 'learned in the law,' language such as is in common use will be presumed to have been employed in its ordinary and popular sense. It follows that if such language, manifestly so used, is inconsistent with the technical signification of particular words and phrases, the former ought, so far as it is necessary to effect the 'true intent' of the parties or testator, to prevail over the latter."

As a part of the devising sentence are found the words limiting and defining the extent of the devise: "And not to be transferred by him while he lives, and at his death to go to his wife and children." The contiguity and sequence of these words to the words of devise to the son show that the testatrix had in mind the interests of his wife and children, and intended to grant him only a life estate, with remainder over to them. We find ample authority in our previous decisions for arriving at this conclusion.

In *Schimpf v. Rhodewald,* 62 Neb. 105, the will was written in German. The translation recorded in the probate court was as follows: "I, Christian Ertman Schimpf, do will and bequeath to my wife, Frederike Schimpf, all my property. She has entire control over the same after my death so long as she lives. That is my will. In testimony whereof I have hereunto set my hand." This was held to convey a life estate only to the widow.

In *Little v. Giles,* 25 Neb. 313, the will gave the widow the entire estate, "the same to remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she shall marry again, then it is my will that all of my estate herein bequeathed, or whatever may remain, shall go to my surviving children." The question in the case was whether conveyances executed by the widow during widowhood were valid, and not whether the devise over was void. It is pointed out by Commissioner Ames in *Schimpf v. Rhodewald, supra,* that the supreme court of the United State in *Roberts v. Lewis,* 153 U. S. 367, involving the same will, evidently took the view that the widow took a life estate only, and that the devise over was not void for repugnancy.

In *Moran v. Moran,* 101 Neb. 386, a deed conveyed land to R. C. Moran subject to the following conditions: "That the said R. C. Moran shall have, hold, use, occupy, and enjoy the aforesaid premises with all rents, issue, profits, and proceeds arising therefrom, for his own use and benefit, shall have authority to lease said premises, but shall not bargain, sell or mortgage said premises during his natural lifetime, but upon his death said premises shall be the property of his lawful heirs. * * * Together with all the tenements, hereditaments and appurtenances to the

same belonging, and all the estate, right, title, interest, dower, claim or demand whatsoever of the said Robert Moran and Sarah Moran of, in, or to the same, or any part thereof." This was held to convey a life estate, with remainder to the heirs of grantee.

Appellant relies largely upon the case of *Loosing v. Loosing*, 85 Neb. 66. When the facts in that case are considered, the decision is not inconsistent with the holding here. It is pointed out in *Moran v. Moran, supra,* that in that case, "The title in the remainder therefore does not pass through the grantee in the deed, but from the grantor himself, which is considered of vital importance in construing the conveyance in the *Loosing* case." This is the fact in the case under consideration. *Schnitter v. McManaman,* 85 Neb. 337, is also easily distinguishable upon its facts.

Appellant has cited cases from other states taking a contrary view, but we believe the true intent of testators in the disposition of their property will be more nearly reached by adhering to the views expressed in *Albin v. Parmele, supra,* and the other cases cited.

AFFIRMED.

MORRISSEY, C. J., not sitting.

RICHARD C. HUNTER, APPELLEE, V. HARRY WEINER, APPELLANT.

FILED MAY 17, 1919. No. 20521.

1. **Appeal:** REPLY. "Where, in the trial of a cause, both parties treat an affirmative defense as traversed, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment." *Missouri P. R. Co. v. Palmer,* 55 Neb. 559.
2. ———: CONFLICT IN EVIDENCE. Where there is a substantial conflict in the evidence on an issue of fact, the finding of the jury thereon will not be set aside on appeal unless clearly wrong.

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

Weaver & Giller, for appellant.

James O'Hara, contra.

ROSE, J.

The claim of plaintiff consists of the three items, as follows: Note for $600 with interest at the rate of 6 per cent. per annum from its date, November 16, 1914; note for $200 with interest at the rate of 6 per cent. per annum from its date, July 1, 1915; money lent, $50, with 7 per cent. interest from date of loan, April 2, 1915. Defendant pleaded payment. The jury rendered a verdict in favor of plaintiff for $986.51. From judgment thereon, defendant has appealed.

Defendant contends that the trial court erred in refusing to direct a verdict in favor of defendant on the ground that the plea of payment was not denied by a reply. The question was not presented to the trial court until after both parties had adduced their proofs in full on the issue of payment.

A rule long followed was stated in *Missouri P. R. Co. v. Palmer,* 55 Neb. 559, as follows:

"Where, in the trial of a cause, both parties treat an affirmative defense as traversed, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment." *Western Horse & Cattle Ins. Co. v. Timm,* 23 Neb. 526; *Schuster Hingston & Co. v. Carson,* 28 Neb. 612; *Pokrok Zapadu Publishing Co. v. Zizkovsky,* 42 Neb. 64; *Minzer v. Willman Mercantile Co.,* 59 Neb. 410; *In re Estate of Cheney,* 78 Neb. 274; *Krbel v. Krbel,* 84 Neb. 160; *American Freehold Land Mortgage Co. v. Smith,* 84 Neb. 237; *Crilly v. Ruyle,* 87 Neb. 367; *Gruenther v. Bank of Monroe,* 90 Neb. 280; *Loan & Trust Savings Bank v. Stoddard,* 2 Neb. (Unof.) 486.

The controlling question presented is the sufficiency of the evidence to sustain the verdict. Defendant contends that payment is established by his proofs, and that there is no evidence to justify a finding to the contrary. On the issue of payment there is a substantial conflict in the evidence, and an examination of the entire record shows that the evidence fully sustains the verdict of the jury.

AFFIRMED.

MARGARET BROWN, PETITIONER, V. E. T. MANNING ET AL., RESPONDENTS.

FILED MAY 17, 1919. No. 20962.

1. **Health: DETENTION.** Under sections 4082 and 4094, Rev. St. 1913, the city of Omaha is authorized to provide for the detention in the detention home in that city of persons "found to be infected with communicable venereal virus," for such reasonable time "as to prevent the danger of * * * communicating such infection to others."
2. **Habeas Corpus.** Under such circumstances, such person will not be entitled to a writ of habeas corpus for release from such detention.

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

Macfarland & Macfarland and *Gray & Brumbaugh*, for petitioner.

Frank L. Weaver, W. C. Lambert and *H. L. Mossman, contra.*

SEDGWICK, J.

This is an original application in this court for a writ of habeas corpus. The petitioner was quarantined in the detention home in the city of Omaha under an ordinance of that city, and the question presented is whether such detention under the circumstances was

justifiable. The case was presented to this court upon a stipulation of facts and without other evidence. The stipulation shows that the petitioner had been arrested upon a charge of "being an inmate of an ill-governed house;" that she was tried upon this charge and found guilty, and appealed the case to the district court; and thereupon the court trying her approved of her bond on appeal, and notified the keeper of the jail to release her from confinement "on the ground that she had furnished an appeal bond as provided by law." These facts are immaterial in this case, because it is further shown by the stipulation that the health commissioner of the city of Omaha "caused said petitioner to be examined, and under his direction said examination was made and said petitioner found to be infected with communicable venereal virus; that thereupon said health commissioner ordered said petitioner to be isolated and quarantined by the proper authorities in the detention home of the city of Omaha for treatment for such reasonable time and in such reasonable manner as to prevent the danger of said petitioner from communicating such infection to others, and until the danger of the infection should be removed."

The petitioner cites and relies upon *Wragg v. Griffin*, 170 N. W. (Ia.) 400. In that case their statutes are cited, and the rules of the local board of health referred to, and the law is stated to be that they "do not authorize the board of health to deprive of his liberty one *suspected* of venereal disease for the purpose of forcing the exposure of his body to examination and compelling the extraction of blood from his veins in search of evidence of the disease." And, in the opinion, it is said: "It may be said at the outset that the objection raised by this petitioner does not necessarily challenge the validity of any statute or any rule of the board of health by which authority is given to quarantine persons who are afflicted with

contagious disease, or to remove or segregate a person so diseased from his own home for detention in a separate house or detention hospital and there detain him until he has so far recovered his health as to be no longer a menace to the health of the community."

In this case the stipulation shows that the petitioner was "found to be infected with communicable venereal virus," and that she was only detained "for such reasonable time and in such reasonable manner as to prevent the danger of said petitioner from communicating such infection to others, and until the danger of the infection should be removed." There can be no doubt that under our statute (Rev. St. 1913, secs. 4082, 4094), the city could by ordinance provide for such detention, and the ordinance as quoted in the petitioner's brief provides for such detention.

The writ is therefore denied, and the cause dismissed.

WRIT DENIED, AND CAUSE DISMISSED.

GENEVIEVE B. WEICHEL ET AL., APPELLEES, V. ALBERT H. WEICHEL, APPELLANT.

FILED MAY 17, 1919. No. 20479.

1. **Husband and Wife:** CONTRACT FOR SUPPORT: VALIDITY. A contract between the husband and wife, providing for payments for support of wife and child, made pending a prosecution of the husband for wife and child abandonment under the criminal statute (Rev. St. 1913, sec. 8615), and further providing that the criminal proceedings should be "indefinitely suspended" until default of a payment, is not void as against public policy.

2. ———: ———: BOND: VALIDITY. A bond, given in the principal sum of $1,000, "and more if required," to secure the payments promised in such contract, is not void because in excess of the amount prescribed by the statute, providing for such a bond, limiting it to $1,000 Rev. St. 1913, sec. 8615.

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

D. O. Dwyer, for appellant.

W. A. Robertson, contra.

CORNISH, J.

The question for decision is whether the bond, given to secure certain weekly payments for the support of the husband's wife and child, provided for in a contract had between husband and wife, is void.

The wife had instituted proceedings against the husband for wife and child abandonment. The contract provided that it should not operate against criminal proceedings for abandonment, and that the case pending should be "indefinitely suspended" until default in a payment. The bond was in the sum of $1,000 "and more if required," to cover the payments promised.

The surety on the bond assigns error in the court's overruling of his demurrer to plaintiffs' petition. His contention is that the contract and bond were void as against public policy in agreeing to indefinitely suspend the prosecution of a criminal proceeding, and also that the bond is void in that the liability under it is greater than the amount limited in the wife abandonment statute, to wit, $1,000. Rev. St. 1913, sec. 8615.

The statute invoked, although criminal in form, is really a species of civil action enacted for the purpose of coercing the husband into doing his duty toward his family. The public is interested only as the family may become a public charge. The wife may maintain an action for separate maintenance. The statute provides that the parties may agree upon payments for support, and the defendant, upon giving bond for support approved by the court, may be released from custody. We are of opinion that such a contract and

bond are supported by sufficient consideration, and are not such an interference with the administration of justice as to be against public policy. 13 C. J. 454, sec. 396.

By the statute the bond may be not less than $200 nor more than $1,000. The $200 limitation is for the benefit of the wife; the $1,000 for the benefit of the husband. If we say that the bond in question was for more than $1,000, then, in accordance with the statute, the husband might have gone into court and had it reduced. This he did not do. Why should the wife be required to do it upon penalty of the bond otherwise being declared void? This would be to let the husband profit by his own wrong. Should we not say that the bondsman waived the provision by not objecting to it at the time? Or, if we treat the bond as a statutory bond, must we not hold, as the courts do in such cases (if not inconsistent with the statute), that the clause, creating the contingent liability in excess of $1,000, is surplusage, and not available to either party for the purpose of defeating the bond? *United States Fidelity & Guaranty Co. v. McLaughlin,* 76 Neb. 307; 4 R. C. L. 54, sec. 14; *Maxwell v. Campbell,* 8 Ohio St. 265; *Hoit v. Cooper,* 41 N. H. 111; *Gunkle v. State,* 71 Kan. 76.

The judgment was for $41. The limitation of liability is not argued in the briefs. We are of opinion that the bond is valid, at least to the extent of $1,000 liability.

In *Peters v. Killian,* 63 Neb. 57, cited by appellant, the holding is that the settlement, pleaded by the defendant in a bastardy case, would not stay the prosecution in behalf of the mother because the settlement was not of such a character, or attested in the manner prescribed by the statute. The wife could not and does not make such a plea here.

AFFIRMED.

SEDGWICK and ALDRICH, JJ., not sitting.

ANNA MOHR, APPELLEE, V. HANS HARDER, APPELLANT.

FILED MAY 17, 1919. No. 20491.

1. **Remainders:** LIMITATIONS. The statute of limitations does not begin to run against a remainderman until knowledge is clearly brought home to him that another is claiming title adversely.
2. **Wills:** MISTAKE. When a testator has named in his will as a beneficiary a child who died before the will was written, and without heirs, and it clearly appears that he intended to name another child, then living, as such beneficiary, but by inadvertence or mistake the name of the deceased child was inserted instead of that of such living child, the district court has power in a proper case to construe the will to express the real intent of the testator in that regard as shown by the evidence.
3. **Partition:** JURISDICTION: CONSTRUCTION OF WILL. "The district court has jurisdiction in an action of partition to construe a clause in a will determining the rights of the parties to the land under the will." *Fisher v. Fisher*, 80 Neb. 145.
4. ———: EVIDENCE. Evidence examined, and *held* that it sustains the judgment of the district court.

APPEAL from the district court for Dodge county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

John J. Sullivan, Frank Dolezal and *Henry M. Kidder*, for appellant.

W. M. Cain, contra.

DEAN, J.

Joachim Harder died testate in Dodge county in 1894. His widow, Margaretha Harder, since deceased, and their two children, namely, Anna Mohr and Hans Harder, plaintiff and defendant, respectively, survived him. Hans died after this appeal was perfected, and the action was revived here in the name of his widow, Myrtle Harder. The record title to 120 acres of farm land in Dodge county stood in Joachim's name when he died. Joachim's widow was a life tenant

under his will. Within two months after her death in 1916 plaintiff began this action in partition. Upon return of the referee's report the court ordered the land sold and the proceeds divided equally between the parties. Defendant appeals.

Joachim's will was written about a year before he died. This clause in the will is the basis of the action: "Third. I give and devise all of the real property of which I may die seized, after the decease of my said wife, equally to my son Hans Harder and my daughter Catherine Lutthans, share and share alike to them and their heirs forever. I hereby appoint my son Hans Harder, the sole executor of this my last will and testament."

Catherine Lutthans who is named in the will was a married daughter who died childless seven years before the will was written. Neither the attorney who wrote it in 1893 nor a subscribing witness who testified could explain how or why Catherine's name came to be written in the will and plaintiff's name omitted. This circumstance may perhaps be explained from the fact that the testator was a German who spoke very little English and imperfectly understood our language, and the scrivener spoke English and very imperfectly spoke or understood German. No sufficient reason appears for omitting Anna's name.

Plaintiff testified that her brother Hans knew and repeatedly said that her name was omitted from the will by mistake, and that on the same day that Hans offered the will for probate and immediately on his return from Fremont he had a talk with her. She testified: "He come out to the farm to me and he said, 'Well, there was a mistake or something: instead of your name should be in there, there was Katie's name in there.'" When she asked him if she would have to go to Fremont, presumably to have the apparent mistake rectified, he said: "You need not to; you get

your half, anyhow." Subsequently, in talks she had with him about dividing the land, she testified that Hans said he wanted the half "with the buildings," and that he told her she should take "that other without the buildings."

When a testator has named in his will as a beneficiary a child who died before the will was written and without heirs, and it clearly appears that he intended to name another child, then living, as such beneficiary, but by inadvertence or mistake the name of the deceased child was inserted instead of that of such living child, the district court has power in a proper case to construe the will to express the real intent of the testator in that regard as shown by the evidence. *Second United Presbyterian Church v. First United Presbyterian Church,* 71 Neb. 563; *Siegley v. Simpson,* 73 Wash. 69, 47 L. R. A. n. s. 514, and notes.

It is argued by defendant that Hans paid the purchase price for the land, but had the legal title taken in the name of his father to hold for him. In their brief it is said that Hans' possession was, "from date of purchase to the filing of this suit, adverse, continuous, uninterrupted, exclusive, peaceable and notorious, and being such for more than ten years immediately preceding the commencement of this action." The circumstances as detailed in the record do not support defendant's contention. The contract for the purchase of the land in suit was made in the name of Joachim Harder. About the same time Hans bought land for himself from the same company and took the contract, and later the deed, in his own name. The receipts for the money paid for the land involved herein were issued to Joachim, and the deed named Joachim as grantee. Hans was present when his father made the will in question that gave to him one-half of the land in suit subject to his mother's life estate. In

the verified inventory of his father's estate, filed by Hans as executor, he listed the land as the property of the estate. Hans charged himself $300 for rent of the land and charged the estate for taxes that he paid on the land. A codicil to Hans' will is in the record under date of April 29, 1915. Therein he devised his "one-half (½) interest" in the 120-acre tract in suit "to my daughter Martha Harder." These are only a few of the circumstances that we find in the record that seem to plainly indicate that Hans never claimed more than one-half interest in the land in suit until about the time this action was commenced, and that his possession of the land while his father lived was merely that of a tenant.

Defendant argues that "plaintiff's cause of action, if she ever had any, accrued immediately upon the death of Joachim Harder, either for a construction of the will or for a judicial determination of her claim of title." This argument is not tenable. Plaintiff was not bound to assert her claim nor to take steps to protect her interest before the death of the life tenant until knowledge was clearly brought home to her that her brother Hans was making claim to the entire estate. *Criswell v. Criswell*, 101 Neb. 349. Constructive notice is not sufficient. *Maurer v. Reifschneider*, 89 Neb. 673. Hans did not make claim to the entire estate, as defendants now contend, but continuously by word and conduct announced to the world that he claimed title to only one-half of the estate, subject solely to the life estate of his mother. Plaintiff, having commenced the present action within about two months after the death of the life tenant, cannot be charged with laches.

Defendant argues: "That the trial court erred in assuming jurisdiction of construction of the will of Joachim Harder." This point has been decided adversely to defendant's contention in *Fisher v. Fisher*,

80 Neb. 145, wherein it is expressly held: "The district court has jurisdiction in an action of partition to construe a clause in a will determining the rights of the parties to the land under the will." In *Gotchall v. Gotchall*, 98 Neb. 730, the rule in the *Fisher* case is cited with approval.

Finding no reversible error, the judgment is

AFFIRMED.

JOHN B. ANDERSON ET AL., APPELLEES, V. MARY A. MILLER ET AL., APPELLANTS.

FILED MAY 17, 1919. No. 20537.

1. **Life Estates:** LIMITATIONS. The statute of limitations does not begin to run in favor of a life tenant who claims the entire estate in his own right as against the remainderman until such claim of the life tenant is clearly brought home to the remainderman.
2. ———: POSSESSION: PRESUMPTION. "The presumption of fact is that the possession of the life tenant, or one holding under or through the life tenant, is lawful and not adverse. Remaindermen have the right to act on that presumption, and not be charged with the duty of keeping their estate under constant observation." *Criswell v. Criswell*, 101 Neb. 349.

APPEAL from the district court for Kearney county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

M. D. King and *Charles A. Chappell*, for appellants.

L. W. Hague and *C. P. Anderbery, contra.*

DEAN, J.

Sven G. Anderson died intestate in 1900 at Chicago. When he died the record title to 160 acres of farm land in Kearney county stood in his name that was bought in 1885. His widow and a brother and sister survived him. After his death Ellen Anderson, his widow, leased the land and collected the rentals until she was adjudged insane. Thereafter a guardian as-

sumed control of the land in behalf of her estate. The widow died in Chicago in 1913. The land was not a homestead. The estate of Sven Anderson was not probated, and it follows that no judicial finding of heirship was had. The Andersons were childless. In 1916 this action to quiet title was begun by the surviving brother and sister of Sven Anderson, namely, John B. and Josephina Anderson. The defendants are three sisters and a brother of Ellen Anderson, who are her sole heirs. Plaintiffs obtained judgment quieting title in them, and defendants appealed.

Plaintiffs argue that upon the death of their brother they became his sole heirs, and that, subject only to the life estate of his widow, they became owners of the land in fee. They insist that, under the law in force when Sven Anderson died, his wife acquired merely a life estate in the land. Comp. St. 1905, ch. 23, sec. 30. It is contended by defendants that Ellen Anderson, the widow, acquired title to the land by adverse possession, and that upon her death and as her heirs they acquired the title in fee.

Defendants point out that Mrs. Anderson used language in certain leases indicating sole and exclusive ownership in herself, and which contained a clause providing for termination of the lease "in case of sale of the farm." But it is obvious that this provision would inure to the benefit of all persons owning an interest in the land if they desired to join in a conveyance. As life tenant Mrs. Anderson was entitled to the rentals.

It is also claimed by defendants that Mrs. Anderson's father furnished the money to buy the land. But testimony was introduced by defendants themselves tending to prove that any money advanced by him was merely a loan, and that he "wanted his money back," and that Sven Anderson "said he would never pay him; pay it back." It seems clear

that such money as Mrs. Anderson's father may have furnished was a loan to his son-in-law. If he bought the land for Mrs. Anderson, no reason is assigned for placing the title in her husband's name.

Plaintiff John Anderson testified that he lived at Minneapolis continuously from 1893 until 1911. Mrs. Anderson knew where John lived, and when her husband died she had a telegram and a letter sent to him at Minneapolis merely informing him of his brother's death. There is no proof that the widow or any other person ever brought the knowledge home to either of the plaintiffs that she claimed title to the entire estate, nor that either of them knew of her claim until this action was begun.

In *Maurer v. Reifschneider,* 89 Neb. 673, it is said: "The possession of land by a life tenant will not be construed to be hostile and adverse to a remainderman unless the knowledge is clearly brought home to the latter that the life tenant claims the entire estate in his own right, adverse and hostile to any claim or interest in the land by the remainderman or others claiming under him." This language is quoted with approval in the recent case of *Criswell v. Criswell,* 101 Neb. 349. In that case it is well said: "The presumption of fact is that the possession of the life tenant, or one holding under or through the life tenant, is lawful and not adverse. Remaindermen have the right to act on that presumption, and not be charged with the duty of keeping their estate under constant observation."

The statute of limitations does not begin to run in favor of a life tenant who claims the entire estate in his own right as against the remainderman until such claim of the life tenant is clearly brought home to the remainderman. The evidence does not support defendant's claim of title to the land.

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

AFFIRMED.

HAZEL ADAMS, APPELLANT, V. POLICE & FIREMEN'S INSURANCE ASSOCIATION ET AL., APPELLEES.

FILED MAY 17, 1919. No. 20488.

1. **Insurance: CHANGE OF BENEFICIARY.** If the holder of a fraternal beneficiary certificate desires to change the beneficiary named therein, and has done all within his power and knowledge to procure such change to be made by the society, a court of equity, as between conflicting claimants, will treat the change as having been made.
2. **Cases Distinguished.** The controlling statute having been amended, the cases of *Counsman v. Modern Woodmen of America*, 69 Neb. 710, and *Urick v. Western Travelers Accident Ass'n*, 81 Neb. 327, are distinguished.

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

Switzler, Goss & Switzler, for appellant.

Will H. Thompson & Son, Kenneth S. Finlayson and *Baldrige & Saxton, contra.*

ALDRICH, J.

This is an action in equity for the purpose of declaring that a change of beneficiaries was made in a fraternal beneficial certificate, changing the beneficiary from Mary Elias, the deceased mother of John Q. Adams, the insured, to Hazel Adams, his wife, and, in case that such a change should be held to have been made, awarding plaintiff, Hazel Adams, the whole proceeds of the certificate. If there was no change of beneficiaries, then the heirs of the insured are entitled to the proceeds of the certificate, one-quarter to the surviving wife, who is not the parent of the surviving child, and three-quarters to the defendant Cora Frances Adams, a minor. Therefore it is seen that this litigation is between the plaintiff and the defendant Cora Frances Adams.

The insurance company, it appears, recognized its liability, paid the amount of the insurance policy into court, and decided to let the court determine who were the rightful claimants to the proceeds of the policy sued upon. The defendant insurance company is in the nature of a fraternal insurance association. It only takes risks on the lives of policemen and firemen, hence its name, Police & Firemen's Insurance Association, a corporation, etc.

Mary Elias, the beneficiary named, died in the lifetime of the insured. After her death the insured spoke to Martin J. Dineen, a member of the advisory board of the defendant company, with regard to changing the beneficiary. Dineen instructed him to bring the certificate to his office and he would make the desired change. Some time about the middle of July, 1916, the insured brought the policy to Dineen at his office, Dineen then drew a line through the name of the mother, wrote in the name of the wife, and told the insured that the change was made. The certificate was then delivered to his wife by the insured, who kept it in her possession until his death. There was no other officer of the defendant in the state, and Dineen transacted all its business in connection with the delivery of certificates and the collection and remittance of premiums. He testifies that he had no copy of the by-laws of the association, though he had often requested a copy from the head office, and it is not shown that the insured ever saw or received a copy of them. This was the first change of beneficiary that Dineen had ever been asked to make. After the change was made the insured continued to pay premiums to Dineen until his death. The home office was not informed of the change made in the policy until after the death of Mr. Adams.

The by-law with regard to the right of changing beneficiaries is as follows: "Every member of this

association shall have the right to change his beneficiary or beneficiaries by making a request in writing to the association for such change and designating the name or names and address or addresses of the new beneficiary or beneficiaries, (which beneficiary or beneficiaries must be related to or dependent upon the member), which change shall become effective when approved by the executive committee, and the member so changing his beneficiary or beneficiaries shall be entitled to have a new policy issued to him in accordance therewith, upon delivering to the secretary of the association the old policy, or in case of the loss of such old policy, of making such satisfactory proof of such loss."

It is within the power of the insured to change the beneficiary in a fraternal benefit insurance certificate without the consent of the beneficiary, but as a general rule, in order to effect such change, the insured must follow the manner pointed out in the certificate, or in the by-laws of the association. The statutes in some states expressly require that the consent of the society be obtained, and ordinarily in such states an attempted change made without the consent of the society will not operate to change the beneficiary. Formerly in this state the statute provided that any member of such a society "shall have the right at any time *with the consent of such corporation, association, or society* to designate a new and different beneficiary without requiring the consent of such beneficiary." Ann. St. 1903, sec. 6638.

The provision requiring the consent of the society was repealed, and the statutes of Nebraska at this time make no such requirement. While this statute was in force, the cases of *Counsman v. Modern Woodmen of America*, 69 Neb. 710, and *Urick v. Western Travelers Accident Ass'n*, 81 Neb. 327, were decided. In both these cases it was held that the attempted change was ineffectual; the consent of the society not

having been given. This statute having been repealed, it seems clear that the legislature intended to make it easier for the insured to make a change of beneficiaries, and these cases can no longer be considered as authority. Ordinarily, however, the procedure specified by the society should be followed.

In *Supreme Conclave, Royal Adelphia, v. Cappella,* 41 Fed. 1, Mr. Justice Brown says the general rule that the insured is bound to make such change of beneficiary in the manner pointed out by the policy and by-laws of the association is subject to three exceptions: "(1) If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. * * * (2) If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. * * * (3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued."

The case at bar seems to us to fall under the second or third exception. There is nothing to show that the insured ever had received a copy of the by-laws of the society, and there is nothing upon the certificate itself to apprise him of any particular manner in which the change of beneficiaries was required to be made. The only officer of the society within the state had no copy of the by-laws in his possession, and the society had failed and refused to furnish him one, notwithstanding his requests. The insured died before he had any knowledge that the action of Dineen was not in

accordance with the provisions of the by-laws. He had done all that he could under the circumstances. The society itself is not denying liability on account of the irregular action of its representatives, but is willing to pay the money to the party whom the court declares is entitled to it.

With these facts in evidence, a court of equity will decree that to have been done which ought to be done, and will determine and declare that the change has been effected. Plaintiff is therefore the proper beneficiary, and is entitled to receive the entire proceeds of the certificate. The judgment of the district court is reversed and the cause remanded, with directions to render judgment in accordance with this opinion.

REVERSED.

SEDGWICK, J., not sitting.

FIRST NATIONAL BANK, APPELLEE, v. GEORGE J. HUNT, ET AL., APPELLANTS.

FILED MAY 17, 1919. No. 20936.

APPEAL from the district court for Morrill county: RALPH W. HOBART, JUDGE. *Affirmed.*

G. J. Hunt, for appellants.

John W. Parish and *Morrow & Morrow, contra.*

ALDRICH, J.

The record in this case discloses that the issues and proceedings are precisely the same as those involved and passed upon by this court in *Norris v. Tower,* 102 Neb. 434, and the law as announced in that case is authority for the affirmance of this case. The record shows that the price brought at this sale was reasonable, and that the proceedings were regular.

The decree of the trial court is therefore

AFFIRMED.

MORRISSEY, C. J., not sitting.

NANDA C. DUNN ET AL., APPELLANTS, V. PHYSICIANS CASUALTY ASSOCIATION OF AMERICA, APPELLEE.

FILED JUNE 23, 1919. No. 20061.

1. **Insurance:** MUTUAL ASSOCIATION: BY-LAWS: ADOPTION. Where the officers of a mutual accident insurance company, in whom the articles vest the authority to enact all necessary by-laws, fail to formally adopt any by-laws, but act upon and publish as such by-laws adopted at a meeting of members, these by-laws cannot be assailed for want of formal adoption by a member who accepted his certificate thereunder, or by those claiming as beneficiaries under him.
2. ———: ———: ———: INTENTIONAL INJURY. A by-law of defendant association provided: "The Association shall not be liable * * * for injuries, fatal or nonfatal, of which injuries there are no visible external marks upon the body, * * * voluntary exposure to obvious danger, intentional injuries inflicted by the member while sane or insane or by any other person, assaults by burglars or highway robbers excepted." *Held*, that this by-law relieved defendant from liability for fatal injuries intentionally inflicted upon the insured by a third person.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

Gurley & Fitch, for appellants.

Nolan & Woodland, contra.

MORRISSEY, C. J.

Plaintiffs brought this action as beneficiaries under an accident insurance policy issued by defendant, a mutual insurance company, on August 6, 1906, to Dr. D. Winton Dunn in the sum of $5,000. June 7, 1914, while the policy was in full force, Dr. Dunn was shot and killed by one Jesse Jopling. Defendant alleged that the killing was intentional on the part of Jopling, and denied liability under the following provision of its by-laws: "The Association shall not be liable * * * for injuries, fatal or nonfatal, of which injuries there are no visible external marks upon the body, * * * voluntary

exposure to obvious danger, intentional injuries inflicted by the member while sane or insane or by any other person, assaults by burglars or highway robbers excepted." The court directed a verdict for defendant.

On this appeal plaintiffs contend that the by-law was never properly enacted and did not become a part of the contract of insurance; that it did not become effective because no copy thereof was filed in the proper office of the state; and that by its terms it does not relieve defendant from liability.

Defendant was organized on a mutual assessment plan under chapter 42, Laws 1895, entitled "An act to regulate the organization and operation of mutual benefit associations, life insurance, and life insurance companies." The articles of incorporation were filed April 26, 1902. They created and designated the usual officers, including a board of directors, made provision for subsequent annual elections by members, and authorized the officers "to adopt such by-laws as are necessary for the government of the association." On April 23, 1902, three days prior to the filing of the articles of incorporation, a meeting of the board of directors was held. The minutes of this meeting recite that, in the absence of the president and vice-president, a member of the board was elected to preside, and that by-laws submitted by the secretary were adopted. No other by-laws were attempted to be passed until 1906, when, on February 24, five months prior to the issuing of the certificate in suit, at an annual meeting of the members, at which the president and secretary were present and participating, the by-laws of 1902 were amended, and the provision under which defendant claims to be relieved from liability was adopted. Plaintiff argues that, since the by-laws of 1902 were passed prior to the time of incorporation, and by the directors instead of the officers, and since those of 1906 were adopted by the membership instead of the officers, as provided in the articles of incorporation, the section relied upon never became operative as a by-law, and hence could not relieve from liability.

The association never undertook to amend or re-adopt its purported by-laws until 1913. Under plaintiffs' contention, defendant could have had no valid by-laws in force from the date of its organization in 1902 until 1913. By-laws may in some cases become binding upon a corporation and its members without an express formal adoption. Where, as in the present instance, the officers of a mutual benefit insurance company, in whom the articles of incorporation vests the authority to enact all necessary by-laws, fail to formally adopt by-laws, but act upon and publish as such by-laws adopted at a meeting of members, these by-laws cannot be assailed for want of formal adoption by a member who accepted his certificate thereunder, or by those claiming as beneficiaries under him. *Graebner v. Post,* 119 Wis. 392; *Pfister v. Gerwig,* 122 Ind. 567.

As to the contention that the by-law was not operative because a copy was not filed with the auditor of public accounts, it is sufficient to say that chapter 42, Laws 1895, the statute under which defendant was organized, did not require such filing. Plaintiffs have confused this statute with chapter 47, Laws 1897, which relates to fraternal beneficiary societies, and not to societies such as defendant.

The remaining question to be determined is the effect to be given to the by-law. It is argued (1) that this by-law does not refer to fatal injuries, and (2) that defendant is not exempted from liability under its terms when the injury is intentionally inflicted by a person other than the insured. As to the first point, the language employed is plain and unambiguous; its reading clearly indicates that it was intended to cover, and does cover, injuries whether fatal or nonfatal. On the second point, this court has held that a provision in a policy limiting liability for injuries resulting "from the intentional act of the insured or any other person" is available to the insured where the evidence shows that the insured's injury resulted, in part, from the intentional act

of a third party. *Ryan v. Continental Casualty Co.*, 94 Neb. 35, 48 L. R. A. n. s. 524, and notes. These cases are decisive of the present question. The showing is conclusive that Dr. Dunn was intentionally killed by Joplin, and no recovery can be had under the by-law.

There was no question of fact to submit to the jury, and the court properly directed a verdict for defendant. Our former judgment, entered on a memorandum by the court commission, is set aside and the judgment of the district court is affirmed.

AFFIRMED.

LETTON, J., not sitting.

ALBERT CAHN ET AL., APPELLEES, V. GERTRUDE C. PARKE ET AL., APPELLANTS.

FILED JUNE 23, 1919. No. 20588.

Adverse Possession. The evidence as to actual occupancy under claim of right of the strip of land in controversy by plaintiffs and their predecessors in title is sufficient to establish title in them by adverse possession.

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

McGilton & Smith, for appellants.

William Baird & Sons, contra.

LETTON, J.

This is an action to quiet title to a strip of land 4.8 feet wide fronting on Farnam street, in Omaha, and extending south to a depth of 134 feet. The plaintiffs claim title through mesne conveyances from John I. Redick to Caroline Cahn, and also by adverse possession since 1883. The defendants also claim title by mesne conveyance from John I. Redick. In 1874 Redick conveyed to Sexauer a tract of land described as follows: Beginning at the northwest corner of the east 1.33 acres

of lot 7, Capitol addition, thence east 130 feet along the south side of Farnam street, thence south 300 feet, thence west 130 feet, thence north 300 feet to the place of beginning. This tract was conveyed by Sexauer to one Hellman. On March 6, 1886, Hellman conveyed the same frontage on Farnam street, running south 134 feet. In 1883, before this deed was executed, Mr. Cahn had an interest in the property and had taken possession of a tract 130 feet wide fronting on Farnam street, and completed the erection of his home thereon in the year 1884.

Defendants claim title through a deed from John I. Redick to William C. Chambers, describing a parcel of land beginning at the northeast corner of the land conveyed by Redick to Sexauer (being the Cahn property), thence running east along the south side of Farnam street 82 feet, thence south 300 feet, west 82 feet, north 300 feet to the place of beginning.

Mr. Chambers took possession of a tract 82 feet wide fronting on Farnam street, immediately east of the property occupied by Cahn. These neighbors lived side by side for many years. A high board fence was erected extending from the rear part of the tract toward the front, and an ornamental wire fence, uniform in design, was built in front of their respective properties, with an extension to the south connecting the fence along the street with the board fence. Each grantee occupied the full quantity of land which his deed called for. In January, 1910, Mr. Chambers leased for 50 years to Mr. Dresser part of the land described in his deed fronting on Farnam street. He afterwards died, and the title vested, subject to the lease to Dresser, in his daughters, who are defendants in this case.

After this lease was made, Dresser erected a building occupying the full 82 feet. He, with other defendants, insist that the deeds under which plaintiffs claim describe a tract the east boundary of which lies 4.8 feet to the west of the land occupied by Chambers.

From a consideration of all the evidence, the main conflict in which is as to the position of the boundary fence, it seems apparent that the tract of which Mr. Cahn took possession actually extended 4.8 feet to the east of that which is described in the original deed from Redick, and that a like error was made by Mr. Chambers and other owners east of Twenty-fourth street. While the evidence is in dispute as to the exact location of the fence erected between the respective properties, it seems clear that plaintiffs and their predecessors in title had been in the actual and continuous occupation of the land claimed by them under claim of title, open, notorious and adverse for more than 20 years before any attempt was made to oust them. This being the fact, their title to that particular parcel 130 feet wide facing upon Farnam street, and including the 4.8 feet in dispute, is superior to that of defendants. The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

ISABELLE E. CAMPBELL, APPELLANT, V. HARVARD STATE BANK, APPELLEE.

FILED JUNE 23, 1919. No. 20595.

1. **Process**: RETURN: PRESUMPTION. Where the return of a sheriff recites that he served the summons, upon which the return is indorsed, the presumption is that he has done so, and the burden of proof is upon one seeking to impeach the same to establish the falsity of the return by clear and convincing proof.
2. **Judgment**: VACATION: EQUITY. Equity will not enjoin the collection of a judgment at law, in which the defendant has been served by legal process, unless it clearly and conclusively appears that the default of the defendant was without fault or negligence on the part of the person complaining, and that a valid and legal defense exists against the judgment rendered in the law action.

APPEAL from the district court for Clay county: RALPH D. BROWN, JUDGE. *Affirmed.*

Ambrose C. Epperson, for appellant.

H. G. Wellensiek & P. E. Boslaugh, contra.

LETTON, J.

Action in equity to set aside a decree of foreclosure, in so far as it affects plaintiff's marital rights in the land described in the mortgage and deficiency judgment, and to be permitted to defend upon the ground that no service of summons had ever been made upon her; that she was fraudulently induced to sign the mortgage and notes; and that she did not bind her separate estate. The court found for defendant and dismissed plaintiff's action.

In its answer defendant alleges personal service of summons upon the plaintiff; appearance in the action by her regularly employed attorneys; that plaintiff had full notice and knowledge of all the proceedings in the foreclosure case, and is therefore estopped from maintaining the action.

The presumptions are all in favor of the correctness of the return of the officer, and the burden of proof is upon one seeking to impeach the same to establish its falsity by clear and satisfactory evidence.

Has sufficient evidence been introduced by the plaintiff to impeach successfully the return of the summons made by the sheriff of Clay county? The return recites:

"I hereby certify that on the 24th day of January, 1917, I served the within writ of summons on the within-named John Campbell, Isabelle E. Campbell, and Charles Campbell by handing to each of said defendants a true and certified copy of this writ with all indorsements thereon, all in Clay county, Nebraska.

"Paul G. Bonnifield, Sheriff."

Plaintiff testified that the sheriff came to the door of her home on January 24, 1917, asked for her husband, and said, "Here is a summons for John Campbell;" that she took it and put it on the clock shelf in the home; that he asked her where Charles Campbell and his mother lived, and she told him the locality of their home; that she was never served with summons and did not know she was a party to the action; that she never em-

ployed counsel, or authorized such employment, and had no notice or knowledge of the trial, of the sale of the property or the confirmation; that her husband was not served personally, and did not receive the summons until after he came home from Hastings. She also testified that, when she gave her husband the summons, she asked, "Do you suppose they will bother me any?" and he told her they would not, since she was not summoned; that she knew about her husband speaking to Corey & Stewart, attorneys, about the matter, but she did not know when the suit was tried.

John Campbell testifies he did not see the sheriff that day, and did not get the summons until he took it from the clock shelf; that he went to see Mr. Corey about it, but they wanted a $50 fee, and he did not have the money.

Charles Campbell testifies that he lived in another part of the town; that the sheriff handed him two copies of the summons, saying one was for him and one for his mother. His mother's name is Sarah Campbell. He produced two copies at the trial, one of which he said he had handed to his mother. He also testified that he never knew there was a lawsuit, and never spoke to his mother about it, but cast the summons aside. The mother testified that she remembers the sheriff coming to the home about January 24, 1917, with some papers at a time when she was sick in bed; that she saw the papers, but did not read them.

On the other hand, the sheriff testifies that he remembers serving the summons upon the plaintiff, Isabelle Campbell, but that he does not remember how he served John, whether personally or not. Afterwards he said he served it according to the return. He thought he served Sarah Campbell in another action, but was unable to remember in what case. He testified on cross-examination that he knew that Isabelle Campbell was the wife of John Campbell, and he knew that the mother was Sarah Campbell; that he had served several papers upon John Campbell; that he served this one in the fore-

noon; that he had 27 people to serve on the trip he made. Both plaintiff and Sarah Campbell were present in court, and he indentified plaintiff as the young lady he served.

An answer was filed in the foreclosure case by Corey & Stewart, purporting to be on behalf of all the defendants. One of the lawyers appeared on behalf of the defendants at the trial, and received notice of the motion for confirmation and for deficiency judgment. Mr. Stewart testified that he had several conversations with John Campbell about the case over the telephone, and that John Campbell had talked to him several times about representing both him and his wife; that when Campbell was told the fee would be $25, and asked if he wished a stay to be filed, he said he would go and see his wife about it, but witness never heard from them afterwards.

It is apparent that plaintiff and her husband had talked about this action both at the time when the summons was received and afterwards. The impression we draw from the evidence is that both believed they had no property subject to an execution, and hence concluded to pay no attention to the suit.

It is a general rule that a court of equity will not set aside a judgment rendered in a case where the party complaining had full notice and knowledge of the pendency of the suit and took no steps to protect his interest at that time. *Dorwart v. Troyer*, 2 Neb. (Unof.) 22; *Rowland v. Standiford*, 78 Neb. 343; *Losey v. Neidig*, 52 Neb. 167.

We are of the opinion that the evidence is insufficient to support the defenses pleaded, other than the plea that plaintiff did not intend to, and did not, bind her after-acquired property when she signed the notes. The proof is direct and undisputed that she had no such intent and signed no such agreement.

Considering all the facts, the judgment of the district court must be

AFFIRMED.

SEDGWICK, J., not sitting.

ETHEL KERR, APPELLEE, V. TRAVELERS INSURANCE COMPANY, APPELLANT.

FILED JUNE 23, 1919. No. 20947.

Appeal: REVERSAL: LAW OF THE CASE. Where a judgment rendered on a verdict directed for the defendant is reversed on appeal, and this court, in adopting the report of the supreme court commission, has held that the cause should be submitted to a jury on its merits, the law of the case, as thus declared, ordinarily will control in the subsequent trial in the lower court.

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

Kennedy, Holland, DeLacy & Horan, for appellant.

Brome & Ramsey and *J. C. Robinson, contra.*

LETTON, J.

Upon a former appeal from a judgment for plaintiff in an action upon a policy of insurance, a judgment in favor of defendant was reversed. A new trial was had, and from a judgment then rendered in favor of plaintiff, defendant appeals. It appeared that a peremptory instruction to the jury to find for the defendant had been given by the district court, and judgment of dismissal entered. In the memorandum opinion by McGirr, C. (not officially reported) reversing the judgment and remanding the case for a new trial, which states the facts, it was said: "The question to be determined is whether there is sufficient evidence in the record to sustain a verdict for the plaintiff, either upon the ground that the policy in suit was reinstated, or upon the ground that reinstatement was waived by the defendant, by its acts." And it was said upon the issue as to reinstatement: "We think there is sufficient evidence in the record to warrant a finding in favor of the plaintiff."

Upon the question of waiver, after setting forth and considering the evidence to the effect that a notice that the quarterly premium due July 23, 1915, was mailed to the insured by defendant's Omaha office on June 26, 1915, it was said: "Defendant's employees in charge of the Omaha office knew that the insured had applied for reinstatement on the regular form required of policyholders who were in default for less than 60 days, and had no reason to believe otherwise than that the insured was duly reinstated when the notice of the July assessment was mailed to him. In the state of the evidence, we think that the question as to whether the mailing of the notice of the July quarterly premium by defendant to insured constituted a waiver on the part of the defendant was a question of fact which should have been submitted to the jury." These statements constitute the law of the case.

Upon the first point the court instructed the jury as follows: "In this behalf, you are instructed that the defendant could not arbitrarily refuse to reinstate said policy upon said application, and if the insured was in good health at the time he made his application for reinstatement, then it was the duty of the company to reinstate him, provided he had paid the delinquent premiums, with interest." And the jury were further instructed that the payment of the past-due premiums by checks, their acceptance and retention by defendant's agent, and the receipt and retention of the money, would constitute sufficient payment. Upon the question of waiver, they were instructed that the mailing of the notice of the July premiums would not amount to a waiver of the prior default in the payment of the April premiums, unless it was mailed out with the intention of so doing, or with the intention of recognizing the policy in force, and the sending it out by inadvertence, or mistake, would not be such a waiver. This was as favorable an instruction on this point as the defendant could ask. The bill of exceptions in the former trial is

not before us. While there is some evidence that the notice was sent out by mistake, or inadvertence, there was other evidence in the record which tended to show that the policy was considered and treated by the Omaha agency as in full force until a short time before the death of the insured.

Upon the issue as to whether deceased was in good health at the time the application for reinstatement was made, we gather from the briefs that there was new and additional evidence at this trial. The evidence, however, indicates that, while the disease from which the deceased died may have existed at the time the application was made, it may also have developed after that time. The insured was apparently in perfect health and so conducted himself. He attended a dinner dance at the country club the next night, and a family picnic the day following. The application was made on Friday, and it was not until Tuesday that he first exhibited symptoms of the disease of which he afterwards died. There was sufficient evidence to sustain the verdict of the jury on this point. We find no prejudicial error in the record.

AFFIRMED.

MORRISSEY, C. J., not sitting.

GEORGE RICHARDSON BOGUE ET AL., APPELLANTS, V. NEW YORK LIFE INSURANCE COMPANY, APPELLEE.

FILED JUNE 23, 1919. No. 20239.

1. **Insurance: CONTRACT: PAYMENT OF PREMIUMS.** Upon a contract for insurance from year to year for a specified term, and payable upon the death of the insured within the term, a provision that it shall not be payable unless such death occurs within a year for which the premium has been paid is binding upon the parties.

2. ———: ———: ———. In such policy, the agreement that such payment by the insurer shall be "less any indebtedness hereon to the company and any unpaid portion of the premium for the

then current policy year" is not inconsistent with the further condition that "the payment of a premium or instalment thereof shall not maintain the policy in force beyond the date when the next premium or instalment thereof is payable."

3. ———: LAPSE. A provision in a contract of insurance that the policy after it takes effect as aforesaid shall constitute the entire contract between the parties will not prevent a subsequent agreement upon sufficient consideration modifying the terms of the contract; and in such case, if the time of paying the final instalment of the annual premium is afterwards extended to a certain day by agreement, and such payment is not made as agreed, the policy lapses.

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

Brown, Baxter & Van Dusen, for appellants.

Switzler, Goss & Switzler and *James H. McIntosh, contra.*

SEDGWICK, J.

This action was brought in the district court for Douglas county by the guardian on behalf of the minor children of Charles B. Bogue, Jr., upon a policy of insurance upon the life of their father. A jury was waived and the court found the issues in favor of the defendant, and entered a judgment of dismissal. The plaintiff has appealed. The policy was a ten-year term policy for $10,000, payable upon the death of the insured within the ten-year limitation. The premium was payable annually in advance. The first premium, $133.60, was paid for the year commencing July 27, 1908, and for subsequent years to and including the payment due July 27, 1913. Prior to July 27, 1914, the deceased received from the company a memorandum of a dividend, to which he was entitled, in the sum of $27.40. He receipted for this dividend and returned the receipt to the company with the request that they apply it on the premium due July 27, 1914, "and give me as much time as you can on the balance." The company accepted this proposition and inclosed a note for the deceased to exe-

cute to the company for $106, the remainder of the premium lacking 20 cents, and asked that the deceased send the 20 cents "to make the note for even dollars." The deceased executed the note and inclosed the 20 cents as requested. The note was payable by its terms on the 27th of November, 1914, and the insured died in the following March without having paid the note. The defense of the company is that by the terms of the contract, which included the application, the policy and the note as explained by a receipt accompanying and attached to the note, the policy terminated by the nonpayment of the note when it became due. The trial court found for the defendant, and there is no such substantial conflict in the evidence as requires a review of the same.

The question presented is upon the construction of the contract. The note and the receipt that the company attached thereto both recited: "This note is accepted by said company at the request of the maker, together with Twenty-seven & 60/100 Dollars in cash, on the following express agreement: That although no part of the premium due on the 27th day of July, 1914, under policy No. 4090238, issued by said company on the life of Charles B. Bogue, Jr., has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the date it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made, except only that the time within which the owner may make a choice of benefits after lapse, as

provided in said policy, is hereby extended for three months after the due date of this note, but no longer." It would seem that this language would be decisive of the rights of the parties unless a different construction is required on account of the terms and conditions of the application and policy.

The application for insurance contained the provision "that the policy after it takes effect as aforesaid shall constitute the entire contract between the parties;" but this would relate to the contract as then contained in the application and policy, and would not prevent a modification of the contract afterwards by agreement of the parties upon sufficient consideration.

The policy provided for payment upon "due proof of the death within ten years from the date this policy takes effect, of Charles B. Bogue, Jr., herein called the insured, ten thousand dollars less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy year." The contention of the plaintiff is that this provision of the policy, together with the payment of $27.60, made the policy binding for the year beginning July 27, 1914, with the right on the part of the company to deduct the remainder of the premium for that year from any liability of the company upon the policy. But the policy also provided: "Except as to the period of grace herein provided, the payment of a premium or instalment thereof shall not maintain the policy in force beyond the date when the next premium or instalment thereof is payable." When the $27.60 was offered as part payment of the premium for the ensuing year, the company might have insisted that the remainder of the premium then due be paid, or it might accept the amount tendered and extend the time of payment of the remainder. *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb. 572. By special agreement it accepted the amount tendered and extended the time of payment of the remaining "instalment thereof," as evidenced by the note and special agree-

ment accompanying it, and this would "not maintain the policy in force beyond the date when" the instalment was "payable." The insured received full value for the $27.60 payment by maintaining the policy in force one-third of the ensuing policy year upon paying much less than one-third of the annual premium, and this agreement furnished a sufficient consideration for the note which by its express terms enabled the insured to delay payment of the premium due, and in case of his decease before the maturity of the note the company might deduct the amount of this unpaid portion of the premium from its liability upon the policy.

If there was doubt about the proper construction of these provisions of the application and policy, the contract executed when the part payment was received is a clear and final construction of the contract by the parties. This is a contract for insurance from year to year, for ten years, and is only payable in case of death of the insured within the ten-year period, and within the year for which the agreed premium has been paid, and without further payment only to the date when any "instalment" of the annual premium is, by some special agreement of the parties, made payable.

The final instalment of the premium for the current year being past due and unpaid, the policy was not in force at the time of the decease of the insured.

The judgment of the district court is

AFFIRMED.

DEAN, J., dissents.

ELMER PARKS, APPELLEE, V. W. H. BURNEY, DEFENDANT: ALICE SMITH GOODNOW ET AL., APPELLANTS.

FILED JUNE 23, 1919. No. 20457.

1. **Wills: CONTRACT TO DEVISE: VALIDITY.** An agreement to take a six year old boy "as a son" and give him "a child's share of my property" is sufficiently definite as to what the boy is to receive

in case he performs the contract on his part. The fact that a child may be disinherited by will, or that it is uncertain how many children there will be to inherit the property, does not render such contract void for uncertainty.

2. **Statute of Frauds:** CONTRACT: PERFORMANCE. If such contract is definite, and is clearly proved, and substantial performance is proved by clear and unequivocal evidence, it has the same force as if written.

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

Files & Paxson, J. M. Sheets and *B. Ready*, for appellants.

H. E. Burkett, contra.

SEDGWICK, J.

When this plaintiff was six years old, his mother made arrangements to place him in the home of Jay L. Smith. He remained there until he was 24 years old—about 18 years—and after Smith's decease he brought this action, alleging that the contract between his mother and Smith was that Smith should take the plaintiff as his own son, and that the plaintiff should have a child's share in his estate. The trial court found the issues for the plaintiff, and the defendants have appealed.

1. The first question presented is on the sufficiency of the petition. A general demurrer was filed, which was overruled, and it is insisted that this was erroneous, and that the petition does not state a cause of action. The allegation of the petition is: "That during the fall and winter of 1893 the said Jay L. Smith, being anxious to get a boy, requested of the plaintiff's mother, and also her parents, the privilege of taking this plaintiff, who was then a mere boy about six years old, and raising and bringing him up just as though he was his own son and to do by him as though he was his own child. That the plaintiff's mother, being a widow with small and scant means, carefully and fully considered the matter, and having full and great confidence that the

plaintiff would receive at the hands of the said Jay L. Smith, and his wife Flora E. Smith, the love, care and affection which is due from parents to child, consented to said request, but only upon the well-understood condition that the said Jay L. Smith and Flora E. Smith would receive and take the plaintiff as their own child, and that he have their love and affection, and that at the death of the said Jay L. Smith the plaintiff was to receive the child's share of his property just as though he was his own son." The substance is that Smith was anxious to have the boy, six years old, to raise just as though he was his own son and treat him as his own child, and that his mother consented to Smith having the child upon the well-understood condition that Smith and his wife would take the child as their own child, and that the child should receive a child's share of the property just as though he was Smith's own son. Allegations in the other parts of the petition are to the effect that with this understanding the deceased took the child, and he remained in their family until he was 24 years of age. It is possible that the petition might have been subject to a motion to make it more definite and certain, but it cannot be found that it wholly fails to state a cause of action under our former decisions.

2. The principal contention is that the evidence is not sufficient to support the decree. When this boy was taken into the Smith family, the family consisted of Smith and his wife. They had no children, and never had any children of their own. The defendants are the brothers and sisters of Smith and the children of deceased brothers and sisters. The plaintiff's mother and Mrs. Smith testified as to the arrangements when the boy was taken into the family. There is no other direct evidence as to the understanding of the parties at the time. Their evidence is that the Smith family had heard of this boy, and that his mother was a widow with other children, and they wrote a letter to his mother requesting an interview and to see the boy. In answer to this

letter the mother took the boy to the Smith home and the arrangements were made. Mr. and Mrs. Smith agreed that they would treat this boy as their own son, and that if he remained with them as their son he should have "a child's share in the property." It is seriously contended that this evidence as to what he should have is too indefinite to amount to a contract. It is urged that a child has no share in his parents' property if the parents see fit to dispose of the property otherwise, and that if Smith and his wife were then young people it is very indefinite and uncertain as to what any particular child's share would be if there should be other children. If, however, we apply the rule of construing this contract as the parties themselves then evidently understood it, and intended, these objections are not well taken. If the agreement to treat this boy as his son and give him a child's share of the property would not prevent the Smiths from disposing of their property or a part thereof to others by will, it at least was equivalent to a contract to make him an heir, and, as such, he would inherit with other heirs, if any, such property as Smith owned, undisposed of, at his death. The evidence shows that Smith was very much attached to this boy, and that he was not on good terms with his brothers and sisters, but declared that none of them should ever have any part of his property. To treat him as his son and give him a child's share in the property means that the boy should inherit as though he was their own child, which is equivalent to a formal legal adoption, provided that the boy and his mother performed their part of the contract which the mother had made. The evidence is ample that Smith and his wife regarded this boy as their son and that the boy so regarded it. At the time of his adoption Mr. Smith had very little, if any, property. The boy was an active, energetic, and dutiful boy. They procured some land, farmed it, and developed it. Smith himself was not able physically to do much farm work, but the boy was vigilant, active, and competent,

and they were successful in accumulating property continuing in the same manner until the boy was 24 years old and was married, and then they all moved to town, and Smith and the young man established a business in town in the name of "J. L. Smith & Son."

This court has been frequently required to construe and apply our statute of frauds. Its application in cases of this character has been pretty thoroughly defined in *Kofka v. Rosicky*, 41 Neb. 328, and other similar cases. The contract must be definite, and must be clearly proved. If there is but one witness to the terms of the contract, the circumstances of entering into the contract must be entirely consistent with its existence as testified to by this witness. The proof of part performance under section 2626, Rev. St. 1913, must be clear and unequivocal, and such part performance must be without other sufficient consideration and be so related to the contract as to render it clear that it was performed with reference to the contract.

When the evidence is clear and satisfactory, the duty of a court of equity is also clear. The law is as vigilant to guard against the fraud of designing persons who may obtain the consideration for a verbal agreement without the intention of performing as agreed and so obtain something for nothing, as it is to prevent obtaining property by false testimony of the existence of a contract that was in fact never made.

In this case we have the evidence of two witnesses to the contract, one of whom is apparently wholly disinterested. The circumstances render it highly probable that such a contract would be in the interest of both parties to it. The performance of the contract by the plaintiff is equally clear. He performed all duties of a son until he became of age, without wages or other compensation than his support and the kindness of his protectors, and was regarded as a son by both Mr. and Mrs. Smith. If we say that he might have done all this for the benefits he received while rendering those services,

the fact that he still continued as a son and rendered valuable services after he became of legal age, without any consideration except this contract, cannot be referred to any other than the contract alleged, and it must be regarded that he had performed the contract on his part. The fact that when he was married and left the farm Mr. and Mrs. Smith, not having any other children, left the farm also, and they all established a business together in the partnership name of "J. L. Smith & Son," is corroboration of the existence of the contract and performance thereof.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

TONY NANFITO, ADMINISTRATOR, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED JUNE 23, 1919. No. 20501.

1. **Master and Servant:** FEDERAL EMPLOYERS' LIABILITY ACT: ACTION: PLEADING. In an action against the employer under the federal employers' liability act, some specific act of negligence on the part of the employer must be alleged and proved.
2. ———: ———: NEGLIGENCE. The fact that an engine was moving four or five miles an hour in the switching yards of a railroad company, is not in itself evidence of negligence.
3. **Evidence.** The testimony of witnesses, who were near the place of the accident at the time, that they did not hear the bell, without further explanation, is not sufficient to overcome positive evidence of reliable and competent witnesses that the bell was ringing.

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

Gaines & Van Orsdel, for appellant.

Bryon Clark, Jesse L. Root and *J. W. Weingarten, contra.*

SEDGWICK, J.

Cirino Dimauro, an employee of the defendant company, was struck by an engine of the company and killed in its yards in Gibson, Nebraska; and the administrator of his estate brings this action to recover damages under the federal employers' liability act. That act provides for liability "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 35 U. S. St. at Large, ch. 149, sec. 1, p. 65. It seems that the federal courts have so construed this act that there is no liability thereunder without proof of negligence of the defendant which was the proximate cause of the injury complained of. In *Missouri, K. & T. R. Co. v. Foreman,* 174 Fed. 377, the law is stated in the syllabus to be: "The fact of an accident in which a railroad employee is injured carries with it no presumption of negligence on the part of the company; but, in order to render it liable, some specific act of negligence must be affirmatively shown." And in the opinion it is said: "It was incumbent upon plaintiffs, before such recovery could be had, to both allege and prove, not only the cause which operated to produce the death, but, also, that such cause had its origin in some specific and particular negligent act of the defendant, for the result of which it was legally liable." The rule of evidence is, in that case, quoted from an opinion of the supreme court of the United States, in *Patton v. Texas & P. R. Co.,* 179 U. S. 658, by Justice Brewer: "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & Pacific Railway v. Barrett,* 166 U. S. 617. * * * It is not sufficient for the employee to show that the employer may have

been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident, justifies any departure from settled rules of proof resting upon all plaintiffs." *Seaboard A. L. R. Co. v. Horton,* 233 U. S. 492, 501, 502. The allegation in the petition is that the "company so carelessly and negligently operated, through its agents, the engine hereinbefore referred to and described, along the main line of its railroad at a careless and high rate of speed and without giving any signals, either by whistle or bell, to said Cirino Dimauro. That the said railroad company, with its engine, did on the date hereinbefore mentioned, at 9 a. m., run over and instantly kill the said Cirino Dimauro." There is no other allegation of negligence or misconduct of any kind on the part of the railroad company, or of any defect or insufficiency due to negligence of the defendant.

The court instructed the jury to find a verdict for the defendant, and the question presented is whether there is sufficient evidence that the engine was being run at a careless and high rate of speed, or without giving any signal by whistle or bell, from which the jury might find negligence on the part of the defendant. Our attention has not been called to any evidence of a higher rate of speed than from four to five miles an hour. There is direct evidence that the bell was automatically

ringing from the time that the engine "started to move." One witness, who was working in the yards at the time, was questioned by the plaintiff, and answered, as follows: "Q. What were you doing? A. I was cleaning snow off the switches. Q. On the main track or on a side track? A. On the main line of the station. Q. Had the engine come through the switch, or passed through the switch, and was it on the main track when it passed you? A. I was just raising myself up to take a little rest, and I saw the engine coming, going towards Omaha on the main line. Q. Did you hear this engine give any signal of any kind prior to the time it passed the station at Gibson, Nebraska? If so, what kind of signal did it give? A. Didn't heard none signals. Q. Did you hear it whistle? A. No, sir; nothing. Q. Did you hear the bell ring? A. No, sir." Other witnesses testified in the same manner, but no witness testified directly that the bell was not ringing, or even that his attention was attracted to the matter and that he had no recollection of hearing the bell. Such testimony does not contradict the positive evidence that the bell was ringing. *Kielbeck v. Chicago, B. & Q. R. Co.*, 70 Neb. 571; *Hoffard v. Illinois C. R. Co.*, 138 Ia. 543, 16 L. R. A. n. s. 797.

As there was not sufficient evidence to justify the finding of negligence on the part of the defendant which was the proximate cause of the injury, the court was right in instructing a verdict for the defendant.

The judgment of the district court is

AFFIRMED.

ARTHUR J. KOENIGSTEIN v. STATE OF NEBRASKA.

FILED JUNE 23, 1919. No. 20696.

1. **Criminal Law**: EVIDENCE: ADMISSIBILITY. When a witness has been previously examined in open court with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be procured for examination at the second trial, the

evidence so given upon a former trial for the same offense may be used on the second trial.

2. ———: ———: ———. In such case, it must affirmatively appear that the personal attendance of the witness at the trial cannot be had.

3. ———: ———: ———: DISCRETION OF COURT. This question is in the sound discretion of the trial court, and that discretion will not be interfered with upon appeal unless an abuse of discretion is affirmatively shown.

4. ———: REASONABLE DOUBT: INSTRUCTION. In a criminal trial, it is error to instruct the jury to take into consideration "all the circumstances established beyond a reasonable doubt by the evidence, bearing on the respective questions and facts testified to by the witnesses."

5. ———: ———: PROOF. The ultimate facts necessary to a conviction must be established beyond a reasonable doubt, but it is not necessary that the minor circumstances relied on by the state to establish such ultimate facts should be proved with the same degree of certainty.

6. ———: EVIDENCE: REPETITION. If a witness in rebuttal is erroneously allowed to repeat the evidence given by him in his direct examination, such error will not require a reversal unless it affirmatively appears that the defendant may have been prejudiced thereby.

7. ———: EXCLUSION OF EVIDENCE. It is not reversible error to refuse to allow proof of matters that are conceded by all parties.

8. ———: MOTION TO ACQUIT. A motion to direct an acquittal should not be sustained if the evidence is such that reasonable minds might differ as to the guilt of the defendant under the evidence and instructions of the court.

ERROR to the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

Reese & Stout and *Jack Koenigstein,* for plaintiff in error.

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

SEDGWICK, J.

The defendant was convicted of accepting a bribe from Nannie Meyers, who was keeper of a house of prostitution at Norfolk, while he was county attorney, in con-

sideration of protecting her from prosecution for violation of the law. A former conviction upon the same information was reversed by this court. 101 Neb. 229. In that opinion the nature of the evidence in support of the charge is fully stated, and the evidence on this second trial is similar in character. The witness Nannie Meyers was not present in court at the trial, and her evidence given upon the former trial was by the court allowed to be read in evidence over the objection of the defendant.

The first question now presented, and the one principally relied upon in the brief of defendant, is as to the competency of this evidence. The constitutional provision that "the accused shall have the right * * * to meet the witnesses against him face to face" (Const., art. I, sec. 11) guarantees a very important right for the protection of the defendant. When a witness has been previously examined in open court, with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be procured for examination at the second trial, the evidence so given upon a former trial for the same offense is universally held to be competent, and may be necessary to prevent a failure of justice. *Hair v. State,* 16 Neb. 601. The important question in such a case is whether it sufficiently appears that the personal attendance of the witness at the trial cannot be had. If it appears that the personal attendance of the witness might have been obtained by diligence on the part of the prosecution, the reading of the former evidence will not be allowed, and if it appears probable that the witness may be found and his examination be had in open court within a reasonable time, the trial will ordinarily be delayed for that purpose. In this case the trial had been adjourned from a former term of court and an order had been entered that the witnesses for the state should give an undertaking for their appearance at the trial. Pursuant to this order, the witness in question had deposited money in the

amount of the required recognizance as fixed by the court in lieu of bond. When she failed to appear, a formal forfeiture of her recognizance was entered and the money paid into court. The case had been set down for trial on Monday, the 18th of February, 1918, and on Friday, the 15th, a subpœna was issued for this witness and placed in the hands of the sheriff for service. This subpœna was returned by the sheriff, and on the return it was said that after diligent search the witness could not be found. On Monday, the 18th, a capias was issued for this witness, and again returned by the sheriff that he was unable to find the witness. The sheriff was also examined as a witness, and testified that he went to the residence of the witness, and found no one there and the doors were locked, and that he had made inquiries in regard to the whereabouts of the witness, and was unable to find her. There was also evidence that the witness had recently been known to be in places outside of the state of Nebraska. It is strenuously insisted that under these circumstances it was an abuse of discretion on the part of the trial court to permit the reading of the former testimony. It appears that there are different statutes in the various states in regard to reading former testimony of an absent witness.

"If the witness has disappeared from observation, he is in effect unavailable for the purpose of compelling his attendance. Such a disappearance is shown by the party's inability to find him after diligent search. The only objection to recognizing this ground of unavailability is the possibility of collusion between party and witness; but, supposing the court to be satisfied that there has been no collusion and that the search has been *bona fide*, this objection loses all its force. For former testimony this cause of unavailibility has long been recognized." 2 Wigmore, Evidence, sec. 1405.

In 17 C. J. pp. 240-242, it is said: "The discretion of the court is very broad in determining questions relating to the reception of evidence and is reviewable only for

abuse. The broadest application of this principle covers the rulings of the trial court on the relevancy of evidence, especially with respect to its remoteness. Similarly, the trial court's rulings on the admissibility of circumstantial evidence are treated with great respect, and the general rule applies with peculiar force to the reception or rejection of testimony given at prior proceedings. * * * Similarly, it is peculiarly the province of the trial, as distinguished from the appellate, court to pass on the preliminary proofs essential to the admission of certain kinds of evidence, such as evidence received in prior proceedings, dying declarations, and secondary evidence generally."

This presents two very important questions: (1) Have the officer and prosecuting attorney acted in good faith in attempting to find this witness and procuring her at the trial; (2) Is there any ground to suppose that the defendant connived at her absence? The text-writers agree that the matter of allowing the former evidence to be read is in the discretion of the trial court. From the two foregoing propositions that are very prominent in this case, the necessity of leaving the matter to the discretion of the trial court is very apparent. The trial judge, knowing the witnesses, knowing what evidence has been offered, and knowing the conditions and appearance of the parties and the facts surrounding the trial so far as it has gone, can form an opinion as to whether the prosecuting attorney and officer have acted in good faith and are unable to find the witness, and so her presence is not available. And, if the trial judge sees the conduct of the defendant and his counsel, and knows all the conditions surrounding the case, he can estimate whether there is a probability that the defendant at least consented to her being absent. We suppose, therefore, all will agree that we ought not to reverse the action of the trial judge upon such questions as this, unless the facts proved make it clearly appear that he has abused his discretion. We cannot find that

there was such an abuse of discretion as to require a reversal. The evidence was very important. If it was rejected, there was probability of a failure of justice. On the other hand, the right to have the witness present in court with opportunity to cross-examine, and to impeach her evidence if necessary—a right given the defendant by our fundamental law—cannot be lightly disregarded. This witness had been going from place to place within and without the state for some time before the trial, and yet no attempt was made to have subpœna served. Was the state attempting to prevent further cross-examination and so avoid the risk of impeaching evidence which might have been different after the former trial, or was the defendant in collusion with the witness for the very purpose of avoiding her evidence? The trial court had named the proper amount of an undertaking necessary to procure the attendance of this witness at the trial, and she had deposited that amount as a guaranty that she would be present. A few days before the time set for trial, the prosecuting attorney had called this witness at the telephone and she had assured him that she would be present. When she failed to appear, a writ was issued, and the sheriff reported that she could not be found. Her deposit was forfeited and her evidence at the former trial read to the jury on the trial. Such conditions clearly make a case for the exercise of the discretion of the trial court.

The court instructed the jury: "In determining whether or not the defendant is guilty of the crimes charged in any count of the indictment, you will take into consideration all the evidence bearing thereon which has not by the court during the progress of the trial been stricken, and all the circumstances established beyond a reasonable doubt by the evidence, bearing on the respective questions and facts testified to by the witnesses." The instruction is without doubt erroneous.

"While each and every ultimate and essential fact necessary to a conviction in a criminal case must be

established beyond a reasonable doubt, where a conviction depends entirely on different circumstances, arranged linkwise, connecting the defendant with the crime charged, yet it is not necessary that the minor circumstances relied on by the state to establish such ultimate and essential facts should be proved with the same degree of certainty, as some of these may fail of proof, and yet those essential to conviction be found from other evidence beyond a reasonable doubt." *State v. Cohen,* 75 Am. St. Rep. 213 (108 Ia. 208). In the opinion it is said: "It is not necessary that each essential fact in the chain of circumstances solely relied on to connect the accused with the commission of the offense, when separately considered, be found beyond reasonable doubt. Such a fact, though having little to sustain it when standing alone, may derive such support from others immediately connected therewith as to exclude all doubt of its existence."

The conviction in this case did not in any sense depend "entirely on different circumstances, arranged linkwise, connecting the defendant with the crime charged." There were "minor circumstances relied on by the state to establish the ultimate and essential facts." Many cases are cited in the opinion above referred to, and in the note in the American State Reports, illustrating the proper application of the rule that the guilt of the defendant in a criminal prosecution must be established beyond reasonable doubt. The error in this instruction was principally prejudicial to the prosecution. There were many circumstances in the evidence, no one of which taken by itself was established beyond reasonable doubt, and yet, considered together the effect of each circumstance upon the evidence relating to other circumstances in the case is not to be disregarded. When we consider the character of the evidence offered by the defendant and the instructions of the court as a whole bearing upon the presumptions of innocence and the burden of proof, it does not so clearly appear that the

defendant might have been prejudiced by the instruction as to require a reversal on that account.

An attempt was made by the defense to impeach one of the witnesses for the prosecution. The foundation for this impeachment appears to have been laid in the cross-examination of the witness, who denied that he had made the statements attributed to him. After the defendant had introduced evidence tending to show that such statements had been made by the witness, the prosecution was allowed to recall the witness in rebuttal, and it is contended that, as the witness simply reiterated his denial, the court erred in allowing him to be recalled in rebuttal over the objection of the defendant. If this contention was well founded, it would follow that the rebutting testimony was unnecessary, and in that sense immaterial; but in what manner it prejudiced the defendant is not pointed out in the briefs.

It is complained that the court refused to allow the defendant to prove that, while he was necessarily absent from the state, "he arranged with his brother, Mr. Jack Koeningstein, a member of the bar, to look after the legal business of Madison county." It is admitted that, while the defendant was absent, his brother did attend to his business, including his duties as county attorney. Whether he was regularly appointed by the defendant and the county commissioners to do so would not seem to be material.

The court properly refused the defendant's motion for a directed verdict, and, as we have found no prejudicial error requiring a reversal, the judgment of the district court is

AFFIRMED.

CARL O. SCHLANBUSCH, APPELLEE, V. FRED SCHLANBUSCH, APPELLANT.

FILED JUNE 23, 1919. No. 20910.

1. **Appeal:** ARBITRATION: EFFECT. When an ordinary law action is pending in this court on appeal, and the parties by agreement settle and dispose of the whole controversey, it becomes, so far as this court is concerned, a moot case, and will not be further investigated, but will be dismissed. An arbitration under the statute, without order of court, amounts to such settlement.
2. ———: ———: DISMISSAL: LAW OF THE CASE. Such order of dismissal becomes the law of the case and will be so regarded upon appeal from a subsequent judgment of the district court on the arbitration, and the judgment of the district court upon such arbitration will, upon appeal to this court, be considered as though there had been no prior litigation between the parties.
3. ———: ARBITRATION AND AWARD: BILL OF EXCEPTIONS. In such arbitration, the arbitrators must state their findings of fact and conclusions of law. When the agreement for arbitration specifies the particular questions to be determined, and the award substantially meets these requirements, and evidence is taken before the district court upon objection that the award is defective in this respect, and such evidence is not preserved in a bill of exceptions, we cannot find that the court erred in holding the award sufficiently specific in that regard.
4. ———: WAIVER. When objections raised in this court are not discussed in the brief, they will ordinarily be considered as waived.

APPEAL from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

A. M. Post, Frank D. Williams and *J. S. Armstrong*, for appellant.

A. E. Garten and *Vail & Flory, contra.*

SEDGWICK, J.

After this appellee, Carl O. Schlanbusch, had taken an appeal to this court from a judgment rendered in the district court for Boone county in a suit between himself and his brother, Fred A. Schlanbusch, the two

brothers agreed to submit all the matters between them to arbitration, which was done, and the findings of the arbitrators were filed in the district court. The fact of this arbitration having been brought before this court, the judgment that had been entered before the arbitration was had was reversed, and that cause dismissed. 102 Neb. 462. Afterwards, upon the application of the appellee, the district court entered judgment upon the award of the arbitrators, and the appeal is from that judgment.

The appellant contends that "the provision for arbitration of pending suits by order of court is mandatory and exclusive, and its observance essential in order to invest the proceeding with the character of a statutory arbitration." If this arbitration had been while the case was pending in the district court, this contention would require careful consideration. This court, however, is without original jurisdiction of such controversies between parties, and the district court had lost jurisdiction of the matter by the appeal to this court. When an ordinary law action is pending in this court on appeal, and the parties by agreement settle and dispose of the whole controversy, it becomes, so far as this court is concerned, a moot case, and will not be further investigated, but will be dismissed. An arbitration is the most formal kind of agreement to adjust matters without further litigation, and, when the controversies between the parties had been thus disposed of, this court dismissed the case with the following statement: "The statute provides the practice in the court to which the arbitration is returned, and that practice and the jurisdiction of the district court therein are not affected by this decision. The parties cannot longer litigate in this case, after they have agreed upon the matters involved." This is "the law of the case," and disposed of the litigation and relegated the parties to their arbitration under the statute.

Fred A. Schlanbusch filed in the district court objections to the arbitration, assigning three grounds of objection: (1) That the court had "no jurisdiction over said cause and the subject-matter thereof; (2) that the evidence is insufficient in law to support said award and the findings therein;" and (3) "that there is no evidence to support said findings and said award." And Carl O. Schlanbusch filed a motion to confirm the report of the arbitrators, and for judgment thereon.

The record recites that on the 24th day of July, 1918, "this cause came on to be heard on the motion of plaintiff to confirm the award," etc., that trial was had on the issues thus presented. Evidence was taken in open court, but the evidence is not preserved in a bill of exceptions, and is therefore not before us. After the court had taken this under advisement, Fred A. Schlanbusch filed a motion to set aside the award, and also a supplemental motion to amend objection numbered 17 of this motion to set aside the award. Additional evidence was taken but not preserved for our consideration. The court allowed the amendment of objection 17, and overruled the objections to the award, with "leave to attach to his said objections certified copies of the affidavits of Fred A. Schlanbusch and S. B. Morehead, clerk of district court, and the same, when so attached, to be held and considered as originals thereof;" but no effort was made to preserve the oral evidence formally taken. The court then entered an order confirming the award of the arbitrators. Under the former decisions of this court, this arbitration is to be considered as a statutory arbitration in all respects as though there had been no prior litigation between the parties.

The first objection now insisted upon is that "the arbitrators failed to separately state their findings of fact and conclusions of law." This is necessary, as held in *Burkland v. Johnson,* 50 Neb. 858. The agreement for arbitration specified the particular questions to be determined, and the award substantially meets these re-

quirements. Upon consideration of the oral testimony taken, the court found that the award was sufficiently specific, and, not having that evidence before us, we cannot say the court erred in so holding.

Two other objections are suggested, but not discussed in the brief, and we have discovered no sufficient reason in the record for reversing the order of the district court in overruling those objections.

The judgment of the district court is

AFFIRMED.

LETTON J., not sitting.

WILLIAM MILLER V. STATE OF NEBRASKA.

FILED JUNE 23, 1919. No. 20939.

1. **Criminal Law**: VARIANCE. A conviction under section 8767, Rev. St. 1913, defining adultery, will not be set aside because the charge was that the accused, being an unmarried man, had sexual intercourse with the prosecuting witness, a married woman, when the evidence showed that the accused was a married man and the woman a married woman. The variance, if any, would be harmless error.

2. ———: EVIDENCE. The charge being sexual intercourse in circumstances constituting adultery, which the defendant denied, the state was permitted, over the objection of defendant, to introduce his alleged child in evidence; the man being colored and the woman and her husband white. *Held*, not error. In the circumstances of the case, the evidence was properly admitted as bearing upon the question whether the accused had sustained improper relations with the prosecuting witness.

3. **Adultery**: EVIDENCE: CORROBORATION. Evidence examined, and *held* that the evidence of the prosecuting witness was sufficiently corroborated.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

R. J. Green, for plaintiff in error.

Clarence A. Davis, Attorney General, John B. Barnes and *George W. Ayres, contra.*

CORNISH, J.

Defendant (plaintiff in error), convicted of adultery, appeals.

A variance is urged as follows: The charge was that the defendant, "being an unmarried man," had sexual intercourse with the prosecuting witness, a "married woman." It is urged that the conviction must be set aside because the evidence indicates that at the time defendant was a "married man." It will be observed that the variance urged is quite technical, because, from a moral standpoint, if he were in fact married, the greater the offense. The statute (Rev. St. 1913, sec. 8767), in defining adultery, in one clause instances the case of the "unmarried man" sustaining the relation with a "married woman," but in another clause instances the case of the "married man" sustaining the relation with "another woman," and either of these instances, as well as others described, constitutes the offense known as adultery. While it is true that the accused ought not to be convicted if innocent, and, as a matter of procedure, ought not to be convicted of one offense, when charged with another, it is difficult to see how he can claim prejudicial error in not being permitted to escape conviction by proving a fact which, if true, does not acquit him of the offense, but which still leaves him guilty of the same offense, committed under circumstances more aggravated than those charged. We are of opinion that, if there was error in this particular, it is harmless error.

It is urged that the status of the prosecuting witness as a married woman was not proved. We do not think we could so find without invading the province of the jury. The evidence does not show that the defendant at the time believed that she was a widow.

The accused is a colored man. The woman is white. Consistent with the time during which the illicit relation was sustained, a child was born. This infant in arm

was offered as corroborative evidence to show the accused to be its father. This is assigned as error. We have held that this is not ordinarily permissible in bastardy cases. It is ordinarily unnecessary, and may improperly influence the jury in its deliberations. It is very possible that in this case it should not have been permitted, had the defendant objected, admitting at the same time that the prosecuting witness had given birth to a child bearing evidence that its father was of colored blood. There was evidence that he was at her house daily at about the time. We are of opinion that the evidence was properly admissible as a circumstance bearing upon defendant's guilt. 2 Ency. of Evi. 254; *Clark v. Bradstreet,* 80 Me. 454.

It is further urged that the evidence of the prosecuting witness is not corroborated. The woman's son, 14 years old, testified that the accused was at her home daily, both in daytime and nighttime, showing that he had opportunity to commit the offense. The circumstances were suspicious, and the fact that the colored child was born was also corroborative.

The defendant raises the question whether one of the jurors, a man of foreign birth, was an elector. It is not contended that he was otherwise disqualified. This is an objection which should have been raised at the time of impaneling the jury. Otherwise, it is waived.

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

JOHN F. BARNUM, APPELLEE, V. JOE HANDSCHIEGEL, APPELLANT.

ALBERT R. KENNEDY, APPELLEE, V. JOE HANDSCHIEGEL, APPELLANT.

FILED JUNE 23, 1919. NO. 20483.

1. **Waters: "STORAGE RESERVOIR."** A dam built across a creek channel from bank to bank to impound water comes within the exception noted in section 3444, Rev. St. 1913, which provides that "a reservoir constructed for the purpose of holding water back and raising it in order that it may be applied to lands of a higher level or given a greater head for power, shall not be considered a storage reservoir."
2. ———: BREAKING OF DAM: LIABILITY. An upper riparian owner who constructs a dam across a creek channel is not liable for damages arising from the breaking thereof, unless the dam has been negligently constructed or maintained.
3. ———: ———: DAMAGE: BURDEN OF PROOF. When damage ensues from the breaking of a dam across a creek channel the burden of proof is upon the plaintiff; but, when he has established the breaking and resulting injury, he has made a *prima facie* case. The defendant must then show that the dam was not negligently constructed or maintained.

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

B. P. McKelvey, E. D. Crites and *F. A. Crites,* for appellant.

J. E. Porter, contra.

DEAN, J.

John F. Barnum and Albert R. Kennedy are lower riparian owners on White Clay creek in Dawes county. They began separate actions against three upper riparian owners to recover for damages sustained, as alleged in plaintiffs' petition, by the breaking of "an earth dam or embankment" erected by defendants across the channel of White Clay creek and the consequent escape of a

large and destructive body of water over and upon plaintiffs' land. The suits were dismissed as to all defendants except Joe Handschiegel, against whom Barnum recovered a judgment for $210, and against whom Kennedy recovered a judgment for $442. Defendant Handschiegel appealed.

The issues in both cases are identical. Pursuant to agreement in the district court, they were heard together, and they will be disposed of here as one case.

Plaintiffs alleged that defendants maintained on their land "a water storage reservoir formed by placing across the channel and from bank to bank of said White Clay creek an earth dam or embankment about twenty (20) feet high, whereby a large body of the waters of said stream were held back upon defendants' said land in storage as an ice and fish reservoir and for irrigation and other uses beneficial to defendants." It was alleged, too, that the dam was not properly constructed so as to prevent "injury and breaking by the ordinary high waters to which said creek is subject in springtime of each year and during heavy rains," and that in March, 1917, because of defective construction, the dam broke and plaintiffs respectively sustained the damage complained of.

The answer alleged that the plans of the dam were submitted to and approved by the state board of irrigation, and that it was constructed and installed under the supervision and direction of the board "with reasonable and ordinary care and skill, so that said dam was at all times capable of resisting the waters of said stream in times of ordinary, usual and reasonably to be anticipated freshets, and such extraordinary flows of water as the defendant might reasonably have expected would flow down said creek." It was also pleaded that the break in the dam was caused by "an unusual and extraordinary and unprecedented freshet and high water on said White Clay creek, and its said affluent, not reasonably to be expected, anticipated and provided for by any

ordinarily prudent person, and that the same was not to be and was not anticipated by said defendant Joe Handschiegel in the exercise of reasonable and ordinarily prudent care." It was also alleged that the flood that caused the dam to break was in part increased in volume by an "unusual and unprecedented melting of heavy snows." Defendant also pleaded that the breaking of certain dams of upper riparian owners caused such a volume of water to rush down White Clay creek that his dam was thereby destroyed "without any fault or negligence on his part." That the dam was destroyed by the act of God, and not because of defendant's negligence, was sufficienty pleaded. 1 C. J. 1177.

Before any evidence was submitted, plaintiffs moved "to withdraw from the consideration of the jury all questions in the case except the amount of damages, if any, sustained by plaintiffs." The court ruled: "The motion will be sustained for the following reasons: That section 3444 of the Revised Statutes of 1913 provides for the construction and maintenance of storage reservoirs for irrigation or any other useful purpose, and among other things provides that 'the owner or owners of such storage reservoir shall be liable for damages arising from the leakage or overflow of the water therefrom, or from the breaking of the embankment of such reservoir.' In the opinion of the court this statute abrogates the common-law rule in cases of this kind, and makes the owner of the reservoir and of the dam absolutely liable for damages, and all damages resulting from the breaking of his dam. Under the pleadings in these cases, the building and ownership of the dam is admitted, also its breaking and destruction, and in the judgment of the court the other defenses introduced herein and set up in defendants' answers do not constitute a defense as to the liability of the owner of the dam for all damages resulting from its breaking."

The court in its ruling apparently overlooked the concluding part of section 3444, Rev. St. 1913, which reads:

"Provided, however, a reservoir constructed for the purpose of holding water back and raising it in order that it may be applied to lands of a higher level or given a greater head for power, shall not be considered a storage reservoir." The bank to bank structure complained of by plaintiffs was erected in the creek channel "for the purpose of holding water back and raising it." Hence it comes within the exception of the act which provides that such construction "shall not be considered a storage reservoir." In view of the exception noted, we hold that the provision of the act in question that imposes liability for the breaking of the embankment of a "storage reservoir" does not apply to the breaking of a dam built across a creek channel such as that described in the pleadings. We do not, however, decide the question of the liability of an upper riparian owner in respect to damage arising, either from the construction of a "storage reservoir" as designated in the statute, or from the breaking of an embankment thereof, that has been constructed under section 3444, Rev. St. 1913, because such questions are not involved here.

The exception in the statute apparently recognizes a distinction that has been generally recognized as between a "storage reservoir" into which water is diverted from a natural stream and a dam that is built across a creek channel to raise water; the former being a use less usual, while the latter is a use that has been recognized and practised from time immemorial. At common law the rule is that the owner is not relieved of liability for damage that accrues to a lower riparian owner from the breaking of the bank of a storage reservoir into which water has been diverted unless such breaking is caused by the act of God or *vis major*. *Rylands v. Fletcher*, L. R. (Eng. & Irish) 3 H. L. 330; *Nichols v. Marsland*, L. R. (Eng.) 2 Exch. Div. 1.

It seems that the owner of a dam erected across a natural stream for the purpose of raising water for

irrigation, or power, or other useful purposes, in the event of damage from breaking, is liable only for negligent construction or maintenance. The act of God is of course always a defense. 3 Farnham, Water and Water Rights, sec. 875; *City Water Power Co. v. City of Fergus Falls*, 113 Minn. 33; *Lapham v. Curtis*, 5 Vt. 371; *Mayor of New York v. Bailey*, 2 Denio (N. Y.) 433; *Pollett v. Long*, 56 N. Y. 200; *Inhabitants of Wendell v. Pratt*, 12 Allen (Mass.) 464; *Inhabitants of Shrewsbury v. Smith*, 12 Cush. (Mass.) 177; *Gray v. Harris*, 107 Mass. 492; *Moore v. San Vicente Lumber Co.*, 175 Cal. 212; *Parker v. Larsen*, 86 Cal. 236. Teller, J., in a dissenting opinion in *North Sterling District v. Dickman*, 59 Colo. 169, aptly says: "The basis of the Rylands rule is the distinction between the natural and the nonnatural use of land, and it applies only in the latter case. From time immemorial streams have been the source of power, and the placing of dams on them is a natural use of them. Hence, it has been generally held that for the breaking of such a dam there is no liability in the absence of neligence."

The burden of proof is upon the plaintiff; but, when he has established the breaking of a dam and resulting injury, he has made a *prima facie* case. The defendant must then show that the dam was not negligently constructed or maintained. From the nature of the case it would be difficult, if not impossible, for a plaintiff to prove the existence of a defect in a dam that caused it to break. The facts attending the construction and maintenance of a dam being peculiarly within the knowledge of the owner, he should be required to show the exercise of a degree of care commensurate with the injury that might occur in the event that the dam should break.

The building of dams in creeks for the purpose of raising water and the construction of irrigation projects for the advancement of agriculture, or to obtain power, or for other useful purposes, is a matter of increasing importance in the development of the natural resources

of the state and of the west generally. This enterprise has been fostered by wise legislative enactment and its growth encouraged by such means as are consistent with safety to life and property. It is common knowledge that the artificial accumulation of a large body of water above the ordinary level by means of a dam or by diversion to a "storage reservoir" may become a dangerous element if permitted to break its barriers and escape. Doubtless with some such thought in mind the legislature enacted section 3421, Rev. St. 1913, which provides: "Any person, corporation or association hereafter intending to construct any dam for reservoir purposes or across the channel of any running stream, shall, before beginning such construction, submit the plan of the same to the state board of irrigation, highways and drainage for their examination and approval, and no dam shall be constructed until the same shall have been approved by such board." For a violation of the act by a riparian owner a severe penalty is provided. The law imposes a very great responsibility on the board, and it follows that the utmost care and viligance devolves upon that body in the exercise of its duty in the premises.

In view of the pleadings and the authorities, the trial court erred in refusing to permit defendant to submit proof of the allegations of his answer. The judgment is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

E. P. TITMAN, APPELLEE, V. W. C. COOPER, APPELLANT.

FILED JUNE 23, 1919. No. 20317.

Bills and Notes: DIRECTION OF VERDICT. In an action on a promissory note, when the defense pleaded is failure of consideration, it is not error for the trial judge to direct a verdict for plaintiff, when the proof adduced by defendant in support of his plea is merely speculative and contingent, and has no basis of fact.

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

Fawcett & Mockett and *M. F. Stanley,* for appellant.

J. H. Grosvenor, contra.

ALDRICH, J.

This is a law action instituted to recover on a promissory note given February 8, 1913, the sum of $275 and interest at 7 per cent. This note was given in part payment for the purchase price of one certain stallion. There was a trial to the jury, with the result that the trial court directed a verdict for plaintiff for the full amount of his claim. Defendant appeals.

The execution and delivery of the note are admitted, and, as a defense to plaintiff's action, defendant alleges no consideration. The horse in question was purchased on Ferbruary 8, 1913, and died March 18 of the same year. It is claimed that the plaintiff misrepresented the health and general condition of the horse, and that at the time of the purchase, or thereabouts, the horse was afflicted with a rupture "along the diaphragm in the rib tissue—along the back and upper part of the intestines and as far back as the kidneys, and the lungs were somewhat abscessed; the breach was right over the lungs, and that seemed to be the seat of the inflammation." This was shown by a *post mortem* examination which was had by a competent veterinarian. All parties agree that the conditions as found by this *post mortem* was the real cause of the animal's death. Now, the question is: Did the horse have this rupture at the time of the purchase, or thereabouts? Was it afflicted with this fateful situation at the time the contract was made and the horse delivered?

There is no fact brought out as to whether the horse was afflicted with the rupture that caused his death at the time of purchase. When the horse was afflicted with this rupture and these conditions which led to its death is only a theory, and not a fact. There is no question

but what the horse died from the inflammation arising from the rupture; but the question is: What was the ultimate cause of this rupture, and, further, when was it produced? From the evidence as disclosed in the record, that is a mere theory, a mere speculation, so remote and so contingent as to be wholly unreliable as a basis for a verdict. This rupture, it is admitted, was from six to ten inches long, and just ahead of the stomach, over the lungs, and it was lengthwise of the stomach through the inner tissue and inner muscle, and it did not break through the outer tissue, and consequently left a sack there, and the food had leaked through. This appears from the evidence of Dr. Powers, it being admitted that the time this affliction of the horse occurred it was mere speculation, and is only an opinion at the best as to what was his condition in regard to this malady at the time of purchase. This being true, there could be no ultimate fact for the jury to pass upon. "From your examination of the breach, or this cut, and from the circumstances of it, what is your opinion as to how long a horse affected that way would survive a wound of that kind?" This was a question propounded to Dr. Powers, veterinarian. His reply was: "That is a pretty hard question to answer, Judge, because as I said—the conditions—he might last much longer under certain conditions than others; it would only have to be a matter of opinion, that is all. Q. What is that opinion, Mr. Powers? A. Why, the condition of that breach, in my opinion— The Court: I don't think that is the question. The question is, how long he would live. A. I can give my opinion; and I say that, in the condition I found the breach, the horse might live, in my opinion, he might live two weeks, and he might die in three or four days: Inflammation would have to set up and get to the vital parts, and he might live quite awhile. I wouldn't want to make a statement as to how long he would live." Further on in the questions propounded to Dr. Powers, this question was

asked: "Do I understand from your statement that this is merely a matter of opinion, or conjecture? A. Just simply an opinion, because it is the first case I ever had like it and I couldn't find any very good authority on it. Q. And do you mean for the jury to understand that from that examination you were not, in that particular case, able to tell how long that breach had existed? A. No, sir, I don't know."

This is the evidence of the defendant's witness, and he would be presumed to give the most favorable view possible under the facts, and from the defendant's own theory, and from his own witness, we are unable to state whether this breach, or rupture, afflicted the horse at the time of the purchase, or whether it was in the condition that it was found at the time of the *post mortem*. There is nothing definitely known as to the cause of this breach or rupture, or *when it occurred*. Then a proposition like this submitted to the jury would simply allow them to delve into the realm of speculation, and if they found a verdict it could not be based upon fact, but upon mere speculation. In our opinion, in this theory of the defendant's case, he has not made a successful defense.

The next proposition, although rather remote, and we hardly see what materiality there is in it, is on the question of the insurance. It appears from the record that one Call, a member of the association that owned the horse, wrote insurance on domestic animals, and that he solicited the defendant for insurance upon this horse, and it was agreed that the horse should be insured for $500, with a premium of $50. The record disclosed that is as far as the transaction ever got; that neither party ever solicited the other to complete the transaction, and it was left entirely open, with the result that at the time of the horse's death, through the carelessness of both parties, the horse was never insured. Then, from all the record and the evidence of the case, we think the trial judge was right in directing a verdict for the

plaintiff, as the defendant did not offer any tangible evidence productive of real facts that would in any way show why he should not be held as liable on the note he gave for the purchase price of this horse.

Therefore we conclude the verdict of the jury and the finding of the court must be

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

STATE, EX REL. GEORGE H. HUGHES, RELATOR, V. FRANKLIN R. HOGEBOOM, RESPONDENT.

FILED JUNE 23, 1919. No. 20949.

Elections: NONPARTISAN JUDICIARY ACT: WRITING NAMES ON BALLOT. Under the nonpartisan judiciary act, the voter may write in upon the primary election ballot the name of any person as his choice for nominee for the office, and such votes shall be counted; and "the two persons who received the highest number of votes in said primary" shall have their names placed on the ballot for the general election as the nominees for judges on the nonpartisan judiciary ballot. Rev. St. 1913, sec. 2211.

Original application in *quo warranto* to determine right to office of county judge. *Writ allowed.*

J. B. Barnes, George W. Ayres and *W. E. Hill,* for relator.

Henry E. Dress and *John A. Miller, contra.*

ALDRICH, J.

This is an original action in *quo warranto,* brought in this court to test the right to the office of county judge of Logan county, of the respondent, Franklin R. Hogeboom. The relator and claimant to the office is George H. Hughes.

At the primary election on August 21, 1918, the name of the respondent was printed on the primary ballot as a candidate for the nomination of county judge in and for Logan county.

The relator did not file for this office, but nine voters wrote his name in and put a cross opposite his name, and the canvassing board counted these votes for him. The respondent received 191 votes at this nonpartisan primary election, and the relator received 9 votes, and at the general election following in November the names of the respondent and the relator were printed upon the official ballot and voted for at the regular November election; the relator receiving 200 votes and the respondent 180. The relator at the close of the primary election and within ten days paid his filing fee of $10 as is required by the statute. At the close of the official election in November, 1918, both respondent and relator filed the required oath and bond as county judge, and the county board approved both bonds, not knowing to whom the office belonged. The respondent is in possession of the office and refuses to relinquish it to the relator, and the relator brings this action. The county clerk, notwithstanding the relator received a majority of the votes cast at the election for county judge, had nevertheless issued a certificate of election to the respondent.

One of the issues to be determined herein is: Was the relator, George H. Hughes, legally nominated at the primary? The second question is: Should the ballots cast for relator at the general election be considered as legally electing him? It is obvious in the general election laws of this state that nonpartisan law predominates and must be taken into consideration in the election laws of our state, and that these laws must be so interpreted as to provide that a voter shall have his free and untrammeled choice of a candidate for office. This is fundamental and one of the essential requisites to a citizenship that is the responsible architect for free institutions. *State v. Yankee,* 129 Wis. 662.

In order that a voter may exercise his free choice in a candidate for public office, and in order that he might not further be hemmed in and bound by some arbitrary

rule, the law provides, among other things, in section 1995, Rev. St. 1913: "In each division, and beneath all candidates placed there by nomination or petition, a blank space shall be provided, into which electors may write the name of any person for whom they wish to vote and whose name is not printed upon the ballot." So it was never the intention of the legislature to limit the voter to the candidate whose name is printed on the ballot, but left him to the choice of writing in the name of any person for whom he wished to vote. Section 2211, Rev. St. 1913, amended in chapter 37, Laws 1917, being a portion of the nonpartisan judicial act, provided: "In all other respects the general laws in force in this state respecting the holding, conducting and declaring the results of any such general election shall apply so far as the same are applicable and not inconsistent with the provisions of this article." Thus it is plain this judicial act provides that every section of the election laws of this state shall be read into and become a part of this act in so far as they are not in conflict with the provisions of the act, and necessary to its plan and purpose, and every printed official ballot of this nonpartisan judicial act provides, according to law, a blank space for the voter to write in the name of any one whom he wishes to vote for. In other words, it is the statutory provision of the election laws of this state that a blank space be left for persons not named "in each division, and beneath all candidates placed there by nomination or petition, a blank space shall be provided, into which electors may write the name of any person for whom they wish to vote and whose name is not printed upon the ballot." Rev. St. 1913, sec. 1995. Thus it is the policy of the election laws of this state to make the provision so liberal and unhampered that a voter can exercise the right of suffrage for whomever he pleases, and shall not be bound to vote exclusively for those whose names are printed on the ballot, but for any one whom he chooses to vote for, by writing in his name and placing a cross opposite.

Section 2209 provides: "All candidates for * * * county judge, shall file with the officer whose duty it is to issue the certificate of election to the aforesaid officers, a statement of such candidate in substantially the following form." Then follows the form and petition of affidavit for judge. In section 2210 there is provided the form and the nonpartisan ballot for judiciary officers; also this same section provides: "In all other respects the paper ballot to be used in such primary shall be the same as authorized by the 'Australian ballot law' of this state. In printing the aforesaid ballot, the names shall not be arranged alphabetically, but shall be rotated according to the following plan." It is also provided in this same section that "the general primary laws of the state, except in so far as the same have been modified and changed by the provisions of this article, shall govern and control." Thus it is clear that these sections of the nonpartisan judiciary act are to be considered as a part of the general primary law of the state, except in so far as the primary law has been modified and changed by the provisions of this section just quoted.

Then it is plain under the provisions of the section just quoted and the provisions of the primary election law that, when the voter at the primary election wrote in the name of the relator and placed a cross opposite, the voter was exercising, not only his statutory right, but as well the right recognized by the general election laws of this state.

The respondent and the relator appeared to have been the only candidates who received the highest number of votes at the primary election, and therefore were entitled to have their names printed upon the ballot for the general election that followed in November. This section 1995, Rev. St. 1913, provides for a "blank space to be left to vote for persons not named." Thus when the name of the relator was written in by nine voters at the primary election, these votes were cast in and by authority of a statutory provision that gave the author-

ity to the officers to place the name of the relator, together with that of respondent, upon the ballot for the general election in November. It thus appears from the various provisions and from the general election laws of this state that the relator was duly and legally nominated at the election held on August 21, 1918. Now the respondent had from the 21st of August, 1918, up to any time before the general election to raise the objection that he raised in this proceeding. This court has held that, if an objection is to be raised, it must be done before the general election. *State v. Norris,* 37 Neb. 299.

The general purpose of holding an election is to determine the intention and choice of electors of the state and nation as to what is their manifest desire, and as to who shall perform the duties of a certain political office, and the only way to ascertain this is from the ballot, and whatever there may be in the preparation of such ballot, these cannot be urged for the first time after the election, because this method would clearly defeat the express intention of the voter, and that is the fundamental purpose of holding an election; so then it follows that the voters of the state cannot be limited to those candidates who have filed their names or their petitions to be placed on the ballot at the primary, and, in order to have the proceeding free and untrammeled, it is permissible both by statute and by custom for a voter to name his own candidate, and the name of the person so written in and voted for by the elector has the same standing as though his name were printed on the ballot. This proceeding then was commenced some time after the election in November, when it is the law of the state that, whatever objection respondent might have to urge, it should be instituted in the proper forum sometime between the primary election in August and the general election in November.

To allow proceedings to be instituted any time after election would simply mean the defeat of the clearly expressed intention of the voter. *Tutt v. Hawkins,* 53 Neb. 367. So important is the policy that a voter shall

have the privilege of voting for whomever he pleases that some states have gone so far as to hold that where at the same election a county judge was to be elected for an unexpired term, and one for a succeeding full term, and after several nomination papers were signed by qualified electors, the candidate changed them by interlining the words for the unexpired term, though by reason of such alteration the party was not legally nominated to fill the unexpired term, the votes cast for him for such office at the election should nevertheless have been counted in his favor. *State v. Bunnell*, 131 Wis. 198. It would therefore seem as a matter of law that the relator had the right to have his name placed upon the ballot at the general election in November. Thus it appears from the record that the relator and the respondent were both nominated at the general primary election. Then it follows that at the general November election he would be elected who received the highest number of votes cast at this election. The record discloses that at the general election in November following the primary in August, 1918, the relator received the majority of all the votes cast at this general election, and therefore was elected, and is entitled to hold the position of county judge in and for the county of Logan, this state, and the county clerk in issuing the certificate of election to the respondent did so without authority of law, and this arbitrary, illegal act cannot be sanctioned or recognized by this court. The title, possession, honor and emoluments of the office of county judge in and for Logan county belong to the relator herein; he having received a majority of the votes cast at the last general election for this position. The respondent is herewith ordered to turn over to the relator herein all books, records and property belonging to the office of county judge of Logan county, and the county clerk of this same county is hereby ordered and directed to issue to the relator herein a certificate of election.

JUDGMENT OF OUSTER.

SEDGWICK, J., concurs in the conclusion.

JOHN E. BAIRD, APPELLEE, V. UNION MUTUAL LIFE INSURANCE COMPANY, APPELLANT.*

FILED JUNE 28, 1919. NO. 20529.

1. **Insurance**: AUTHORITY OF AGENT: ESTIMATE. "An agent of a life insurance company, the limitation of whose power is set forth in the application for insurance, which limitation is expressly called to the attention of the applicant, cannot vary the terms of the policy by an estimate of results of the policy attached by him thereto." *Kaley v. Northwestern Mutual Life Ins. Co.*, 102 Neb. 135.
2. ———: TENDER: SUFFICIENCY: WAIVER. An insurance company offered to pay insured the amount due him under its contract of insurance, but did not make a formal tender of the money. Insured refused to accept the sum offered and demanded a greater amount. *Held*, a more formal tender was not necessary to relieve insurer from liability for interest and attorney's fees; it appearing that a more formal tender of the money would not have been accepted.

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

Hainer, Craft & Lane, for appellant.

Lincoln Frost, contra.

MORRISSEY, C. J.

Action to recover on a tontine life insurance policy. The amount in dispute is $1,439.55, being the difference between the sum claimed by plaintiff from the surplus under a "rider" or slip attached to the policy and the amount found due by the company's actuary on the policy without the rider. The item of $2,579.25 payable from the reserve is not in dispute. There was judgment for plaintiff for the full amount, and defendant appeals.

What is the contract between the parties? November 17, 1896, plaintiff made application to defendant for a policy in the sum of $5,000 under the tontine plan, payable in 20 years. The application contained the follow-

*On rehearing, interest, costs and attorney's fees allowed. See 104 Neb. p. ——

ing provisions: "I hereby agree that this application and the policy hereby applied for, taken together, shall constitute the entire contract between the parties hereto * * * and that the distribution of surplus which may be adopted and approved by the company is hereby accepted by me in my own behalf, and for every person who shall have any interest in the policy now applied for." The policy contained the following provision prominently displayed in large type: "No agent nor any other person except the president, vice president, secretary or actuary, has power to alter or change in any way the terms of this contract, or waive any of its terms or conditions or any forfeiture. Any change in, or waiver of, the terms or conditions of this contract by said officers, must be in writing."

The policy is dated Portland, Maine, November 25, 1896. It was mailed to Mr. A. D. Workman, the managing agent of defendant at Kansas City, Missouri. It was forwarded from Mr. Workman's office to plaintiff with the rider, partly printed and partly written, attached.

Plaintiff claims that this rider forms a part of the contract and seeks to recover thereunder. Defendant tenders payment under the terms of the policy as it left its home office executed by the officers of the company, and denies the authority of Workman to change the terms of the policy, or that it had any knowledge of such attempted change until after the expiration of the tontine period, when the insured made his claim thereunder. It points to the language of the application signed by plaintiff wherein he agreed that the application and the policy, taken together, should constitute the agreement between the parties; that the policy expressly provides that no agent should have authority or power to alter or change the terms of the contract; and that in the application plaintiff agreed that "the distribution of surplus which may be adopted and approved by the company is hereby accepted by me in my own behalf and for every person who shall have interest in the policy now applied for."

There is some dispute as to the construction to be given the rider; but unless it became a part of the policy its language is not material. First, it may be noted that the policy is dated Portland, Maine, November 25, 1896, while the rider is dated Kansas City, Missouri, December 1, 1896. The policy is executed by the president and the secretary of the company, officers authorized under the terms of the policy to write such contract. The rider shows upon its face that it was not executed at the home office of the company and that it was executed six days subsequent to the execution of the policy. It is not signed or executed by any officer of the company, but is signed by a mere agent. Plaintiff, however, asserts that the company had notice that this rider was attached because, when he received the policy, he discovered that in making a copy of his application an error had occurred; that he thereupon wrote the agent, Workman, calling attention to this error; that Workman then wrote plaintiff to send the policy to him and he would have this correction made at the home office. Plaintiff testifies that thereupon he sent the policy to Workman, and that subsequently it was returned to him with the correction made, and that all the time this rider was attached. Whether these circumstances, if standing alone, would be sufficient to bring home to the company knowledge of the existence of this rider, it is not necessary to decide, for the record contains the positive testimony of the secretary of the company that such knowledge was not brought home to the company. Nor does the record show that the policy was sent to the home office by Workman. If this rider is not a part of the contract, then the amount tendered by defendant, if it was a full and complete tender of that amount, is admitted to be all that was due.

In *Kaley v. Northwestern Mutual Life Ins. Co.*, 102 Neb. 135, was presented a question similar to that presented in the instant case. A Wisconsin contract was in suit, and both parties relied upon the decisions of the

Wisconsin courts. The opinion points out the holdings, not only of the Wisconsin courts, but of other courts of last resort where riders are attached by an agent. The concluding discussion is applicable here, but we quote only from the syllabus: "An agent of a life insurance company, the limitation of whose power is set forth in the application for insurance, which limitation is expressly called to the attention of the applicant, cannot vary the terms of the policy by an estimate of results of the policy attached by him thereto." Adhering to this rule, we hold that the rider in this case did not become a part of the contract between the parties.

The sole remaining question is whether the tender made by defendant is sufficient to relieve it from liability for attorney's fees and interest due since the date of tender. It does not appear that a formal tender of the amount was actually made in cash, but the testimony of plaintiff and his attorney is to the effect that defendant offered to pay the amount we find to be due. Plaintiff insisted upon payment of the amount for which this suit was brought. The parties were unable to agree upon an amount. It appears that defendant was ready and willing to pay the amount thus fixed, but plaintiff refused to accept it in full settlement. Under these conditions, an actual tender of the amount in money would not have been accepted, and a more formal tender than that which was made was waived by the conduct of plaintiff.

It follows that plaintiff is not entitled to a judgment for attorney's fees, interest, or costs. The judgment of the district court is reversed and the cause remanded.

REVERSED.

LETTON, J., not sitting.

LAURA S. LIERMAN, APPELLANT, V. CARL VIDRA, APPELLEE.

FILED JUNE 28, 1919. No. 20543.

Forcible Entry and Detainer: DIRECTION OF VERDICT. When on the trial of a suit in forcible entry and detention it appears from the evidence of plaintiff that she had neither the title nor the right to possession of the real estate when suit was instituted, it is not error to direct a verdict for defendant.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Edward H. Whelan, for appellant.

D. L. Jouvenat, contra.

MORRISSEY, C. J.

This suit originated in a justice court, where plaintiff instituted proceedings in forcible entry and detention to recover possession of a tract of land. Suit was filed August 21, 1917. On appeal to the district court there was an instructed verdict for defendant. Plaintiff appeals.

Plaintiff alleged that, on or about August 11, 1917, defendant entered upon and took possession of the premises involved. Plaintiff holds title under a deed executed by the former owner, bearing date August 8, 1917. The exact date of delivery is not shown. Defendant claims under a lease from the former owner. On the trial plaintiff admitted by her testimony that she had not received the deed, and that the consideration therefor had not been paid, until after the institution of the suit.

In order to recover, plaintiff must show her right to possession on the date suit was commenced. The deed not having been delivered, nor the consideration paid, there was no question for the court to submit to the jury, and a verdict was properly directed for defendant.

AFFIRMED.

NYE-SCHNEIDER-FOWLER COMPANY, APPELLANT, V. J. F. ROESER ET AL., APPELLEES.

FILED JUNE 28, 1919. No. 20437.

1. **Schools and School Districts:** PUBLIC BUILDING: BOND OF CONTRACTOR: CONSTRUCTION. The statute which requires public officials to take a bond from a contractor to pay for labor and materials used in constructing a public building is absolute, and the contract and the bond will be construed to protect such laborers and materialmen if the terms of the contract and bond are ambiguous, or if they will admit of such construction.
2. ———: CONTRACT: BOND: PRESUMPTION. If the contract provides that a bond shall be given, but does not name any conditions to be inserted in the bond, it will be presumed that the intention of the parties was that the statutory bond should be given.
3. ———: ———: ———: CONSTRUCTION. In such case, if the bond contains the conditions usually inserted in a bond for construction of a private building, with a proviso that of itself would imply that it was for the protection of laborers and materialmen, the contract and bond, taken together, will be so construed.
4. ———: CONSTRUCTION OF SCHOOLHOUSE: BOND: LABOR AND MATERIALS. A contract and bond "for the erection and completion of a school building" contemplates that the contractor will furnish the labor and materials, and the bond undertakes that he will do so, and, liberally construed as an attempted compliance with the statute, it includes payment by the contractor for the labor and materials.
5. ———: ———: ———: SURETIES: WAIVER. The statute requires two sureties upon such bond, but if there is but one surety, and the bond names him as the sole surety, and he knows that it is not intended that any other shall join him as surety, by signing he waives the defect.
6. ———: ———: ———: ACCEPTANCE: VALIDITY. If a bond is accepted and acted upon by the school board, it amounts to approval, and the bond will not be held void because the contract provides that it may be approved by the cashier of a bank, nor because it nominally runs to the district by name instead of to the board.

APPEAL from the district court for Fillmore county: RALPH D. BROWN, JUDGE. *Reversed.*

Courtright, Sidner & Lee, for appellant.

George H. Hastings, Charles H. Sloan, Frank W. Sloan and *J. J. Burke, contra.*

SEDGWICK, J.

The defendant Roeser contracted with the school district to erect a school building, and gave a bond as contractor, and this action is by the materialman and is against the principal and surety on the bond. The defendants demurred generally to the petition, which was sustained, and the action dismissed, and the plaintiff has appealed. The contract is very indefinite, uncertain, and incomplete. Some of the necessary provisions of any such contract are supplied in the terms of the bond, but the bond is not a compliance with the statute. It contains no provision for the payment of laborers and materialmen as the statute (Rev. St. 1913, sec. 3840) requires; and it is contended that the law will not "read into such an attempted bond all that it should contain."

There are many decisions of this court which announce principles or use language that might be applicable to some phases of a case like this. Before our statute (Rev. St. 1913, sec. 3840) was enacted in 1889 (Laws 1889, ch. 28), the laborer or materialman who furnished labor or material for the erection of a public building had no protection except the responsibility of the contractor, and such bond as the contractor and the public officials might see fit to provide. A laborer who was in the habit of relying upon the mechanics' lien law frequently found that he had worked upon public buildings without compensation. Then the statute was enacted requiring absolutely that one who contracted to build a public building which would not be subject to mechanics' liens must give bond to pay laborers and materialmen. Contractors have not always obeyed this statute. Some have tried to evade it and so profit by the work of a laborer without paying for it. Others have intended to comply with the law, but have failed to condition the

bond given as the statute requires. Cases of the latter kind have led to divergent decisions. Courts of the different states are not in harmony, and it may be that even the decisions of this court are not altogether consistent. If the case is that of a laborer who has performed a few days' labor relying upon the public to pay for the public improvement, and the public has paid the wrong party and has not required him to secure the laborer, his case will be presented with great earnestness and will generally be supported by citations of authorities. On the other hand, if the contractor succeeds in getting an inexperienced surety who is led to suppose that the public officials will see that the laborer is paid for his work, as an individual would be compelled to do by the mechanics' lien law, his case will be as earnestly and vigorously presented. The one case may be disposed of with consideration of the text, "The laborer is worthy of his hire." In the other, the legal maxim will be invoked that a surety is the favorite of the law.

In the case at bar, it must be remembered that the statute is absolute. It requires that when public buildings are to be constructed, not subject to mechanics' liens for the protection of laborers and materialmen, a bond must be given for their protection in lieu of the mechanic's lien upon the private buildings. The bond in this case refers to the contract, and is an attempt to comply therewith. The contract is very inartistically worded. The contractor expressly agrees to give bond, and names the amount of the bond, but does not state the conditions of the bond. Any trifling conditions of the bond which the contractor might see fit to specify therein would be a compliance with his contract, upon the present theory of these defendants. Both parties to the building contract were required to know that the law requires a bond and directs its conditions. It was therefore unnecessary to state in the contract what the conditions of the bond shall be. This language of the con-

tract shall have all the force of an express agreement to give a bond conditioned as the statute provides.

The bond contains a formal statement of the conditions, as follows: "The conditions of the foregoing obligation is (are) such that if the principal shall, well and truly, indemnify and save harmless the said obligee from and (any) pecuniary loss resulting from the breach of any of the terms, convenants and conditions of the said contract on the part of the principal to be performed, then this obligation shall be void." This statement of the conditions of the bond might be proper in case of a contract between private individuals, and, as said in *Sailling v. Morrell*, 97 Neb. 454, it was apparently inserted by mistake in this bond. In that case the bond recited: "The surety shall not be liable under this bond to any one except the owner." And the court said: "If this clause in the contract is to be upheld in a case where the contract is for work upon public property, against which no lien can ever exist, then the entering into such a bond is a delusion and a snare. * * * It is too evident for serious thought to the contrary that the bond used in this case was the form of bond generally used for contractors under contracts for the construction or repair of buildings for individuals or private corporations, where, in case of a default on the part of the contractor to pay for the materials furnished and labor performed, a lien would attach. Such a clause has no place in a bond given for the faithful performance of a contract upon a public building. That it was not stricken out of the form of bond used in this instance may have been an oversight on the part of all parties concerned at the time the bond was executed." This language is more applicable to the present case, the contract here being to give a bond without naming the conditions, which would clearly be a statutory bond; and this formal statement of the conditions in the bond is followed in the same sentence by the following: "Provided, however, that this bond is subject to the following

conditions and provisions: First, that no liability shall attach to the sureties unless in the event of any default on the part of the principal in the performance of any of the terms, covenants, or conditions of the said contract." Under the circumstances, the statement that no liability shall attach unless there is a default on the part of the principal in the performance of the terms of his contract shows clearly that the understanding of the parties was that in case of such default there should be liability.

The contract was "to erect a school building" for a specified price, and the bond construes this to mean that the contractor was bound "for the erection and completion of the school building." He could not erect and complete the school building without furnishing the labor and materials, and the bond undertakes that he will do so. Labor and materials were furnished under this contract, and it must be construed that they were furnished according to the contract by the contractor himself. The labor and materials would not be his to furnish without payment therefor, and therefore the contract and the bond include payment by the contractor for the labor and materials. We have frequently decided that, if a bond is given with "reference" to a statute, the provisions of the statute will be considered as in the bond. It appears that the contractor and his surety knew that they were contracting with reference to a public building, and that the statute requires in such case that a bond should be given. For the reasons stated, we conclude that they contemplated and intended to comply with this statute in giving the bond. If so, of course the bond was given with reference to the statute.

The statute requires two sureties on such bond, and, when signed by only one surety, "he is not liable thereon; the bond not being perfect on its face, unless he waive the defect." *Cutler v. Roberts*, 7 Neb. 4. But when a surety signs a bond that specifies upon its face that only one surety will sign, the party who is recited

in such bond as surety does by signing it "waive the defect." The fact that the obligee named in the bond is the district itself instead of the district board, and that the contract provides that the bond may be approved by the cashier of a bank, will not relieve the surety from liability thereon, since the board accepted the bond and acted thereon, which amount to approval. The board might have refused to accept such a bond.

In this view of the case, the petition states a cause of action and was not subject to a general demurrer.

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

REVERSED

CORNISH, J., dissenting.

The promise in the contract was to "save harmless the said obligee from pecuniary loss resulting from the breach," etc. The obligee has suffered no pecuniary loss, and yet we are holding the surety on the bond liable for loss suffered by third parties, strangers to the contract, and in a case where it cannot be said that any promise was made for their benefit, unless we say that the parties intended the statutory bond. The opinion says: "It (the contract) contains no provision for the payment of laborers and materialmen as the statute requires." Is not the situation then clear? A provision intended, or possibly intended, is not inserted. Must we not then say to the plaintiff, as we said, in substance, to the plaintiff in *Perkins County v. Miller,* 55 Neb. 141: "You can recover only upon the contract as made and alleged. If written contrary to the intention of the parties in omitting a provision intended by them, then your remedy is to have the contract reformed so as to express the true intent of the parties." This has been the law from time immemorial. For a special statute or another writing to become part of the written contract, it must be incorporated in it, in words clearly showing an intention to do so. The opinion agrees that it was not so incorporated, but appears to hold that we can read the

statute into the contract, because, by a process of what I regard as unsound reasoning or innuendo, we persuade ourselves that the parties may have or should have so intended. Do we not know that the fact, in all probability, is to the contrary—that this surety, an ignorant man, signing for his friend without consideration, and heretofore a favorite of the law, never knew of the statute, and only thought he was promising to save the obligee harmless? There is no rule of law that a statute like this can be read into the contract, whether incorporated or not. I know of no text-book writer or decisions of other states so holding. This is because the statute does not undertake to say what the contract shall be between the school officers and this particular surety. It prescribes a duty for the school officers alone, who may be liable for negligence to any person injured by their failure to perform. A contractor does not "disobey" the law, as the opinion says, in failing to give the statutory bond. He may refuse to give it, or be unable to give it, or ignorantly fail to give it, in any of which cases he is only liable on his contract as made. But his (the contractor's) intention or liability is not in point. Surely the surety cannot be held liable for some secret intent of the contractor, undisclosed to him, and, as the opinion says, not expressed in the contract. The law is read into any and all contracts only in so far as the law is applicable to the contract as written. If a contract is ambiguous or uncertain, then it is either void or subject to testimony to explain the ambiguity. Here we are denying to the surety the right to prove by the testimony of all the parties that he did not intend to have inserted in the contract the provision in question; the opinion itself showing that it was not so inserted.

Let us suppose that testimony were taken which would show (as it probably would not) that at the time the surety signed the bond he was told of the statutory bond and had peremptorily refused to sign such a bond. Then, I would like to know by what law he could be held

liable except upon the bond which he does sign. The law never makes the contract between the parties except in those cases where the law undertakes to say what the contract shall be, as sometimes in insurance law. The citizen is left free to contract in his own way and is bound only by the terms of the contract as made.

When courts begin to interpret contracts differently from their true intent, they enter a most dangerous field of innovation. Following such a rule, it will easily come about that the citizen's rights in his dealings with others will be determined by his or the others' social status. Labor will be degraded, not helped, and the citizen's most valuable right of freely contracting denied. I have discussed one phase of the question involved in my dissent in *Forburger Stone Co. v. Lion Bonding & Surety Co. ante*, p. 202, 208.

OTTO RADDATZ, APPELLEE, V. JOHN H. CHRISTNER, DEFENDANT; CHARLES A. READY, APPELLANT.

FILED JUNE 28, 1919. No. 20461.

1. **Appeal:** STATUTE LIMITING TIME. Statutes shortening the time within which appeals or proceedings in error can be taken do not, in the absence of language showing clearly a legislative intention to the contrary, apply to judgments, decrees, or orders rendered or entered before such statutes took effect.
2. **Action:** VENDOR AND PURCHASER: JOINT CONTRACT. A contract "by and between John H. Christner and Charles A. Ready . . . of the first part," and the plaintiff, "of the second part," agreeing that the party of the one part sells to the party of the other part certain described lands, is the joint contract of Christner and Ready; and an action for failure to perform the same may be brought against them jointly, although it appears on the face of the contract that the lands described therein are owned by them in severalty.
3. **Vendor and Purchaser:** CONTRACT: ABSTRACT. The agreement to "give a good and sufficient warranty deed and abstract" contemplates that the abstract will present a merchantable title, which is clear as shown by the record, and does not require litigation to complete it.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed.*

H. A. Lambert, Fred G. Hawxby and *Charles A. Ready,* for appellant.

C. A. Robbins, contra.

SEDGWICK, J.

There was a motion in this case to dismiss the appeal on the ground that the same was docketed in this court within the time prescribed by statute. The legislature amended the statute in regard to the time for docketing an appeal (Laws 1917, ch. 140), changing the time from six to three months. This court has heretofore followed the rule announced in the note under *Wilson v. Kryger,* 26 N. Dak. 77, in 51 L. R. A. n. s. 760, as follows: "It is a general rule of construction that statutes shortening the time within which appeals or proceedings in error can be taken do not, in the absence of language showing clearly a legislative intention to the contrary, apply to judgments, decrees, or orders rendered or entered before such statutes took effect"—and, applying that rule, we overruled the motion in this case.

This plaintiff contracted to purchase from the defendants a tract of land of about 400 acres in Hayes county, Nebraska. When the abstracts of title were presented, the plaintiff refused to accept the title as not marketable, and brought this action to recover from the defendants the amount which he had paid upon the contract.

The action was brought in Nemaha county, where the defendant Christner resided, and summons was sent to Hayes county and served upon the defendant Ready there, where he resided. The defendant Ready objected to the service on the ground that there was no joint liability of the defendants under the contract. This objection was overruled, and it is now insisted that this ruling was erroneous. It appears that these defendants

did not own the land jointly, but each held title to a distinct portion thereof, and it would seem from the evidence that the parties all understood that each defendant was to receive a certain part of the purchase price as the consideration for his land; but the contract was a joint contract on the part of the defendants. It recited that the contract was "by and between John H. Christner and Charles A. Ready of the town of Hayes Center, county of Hayes, and state of Nebraska, of the first part, and Otto Raddatz of the town of Pleasant Dale, county of Seward, and state of Nebraska, of the second part," and, also, that the "party of the second part convenants and agrees to and with the said party of the first part to sell the South East Quarter of Sec. 20-in Township (8) North of Range 35-in Hayes Co. Neb. And the North East Quarter and the East Half of the North West Quarter of Section 20-in Township (8) North of Range 35-all in Hayes Co. Neb. Said John H. Christner is to give a good and sufficient warranty deed and abstract to the South East Quarter (S. E. 1/4) of Sec. 20-Twp (8) North Range (35). Said Charles A. Ready is to give a good and sufficient warranty deed and abstract to the North East Quarter and the East Half of the North West Quarter of Sec. 20-in Twp. (8) North of Range (35). And the said party of the second part covenants and agrees to pay to the said party of the first part for the same the sum of Thirty Seven Hundred and no/100 ($3,700.00) Dollars as follows, viz.: Five Hundred Cash the receipt is hereby acknowledged. $200.00 payable on or before February 1st 1908. $500.00 payable on or before February 1st 1909 each year until the above sum is paid in full with interest."

This constituted a joint contract on the part of the defendants, and the fact that it is recited in the contract that one of the defendants was to give a deed to a certain part of the land and the other defendant to make deed to the remainder will not change its character as a joint

contract, nor will the provision that "the parties to these presents bind themselves, each unto the other, in the penal sum of Fifteen Hundred and No/100 $1,500.00 Dollars as liquidated damages, to be paid by the failing party." The parties to these presents are the party of the first part, these two defendants, and the party of the second part, this plaintiff. The trial court was right in overruling this objection.

There were various objections to the title, as presented in the abstract. The title to part of the land was through foreclosure proceedings. The defendants' brief upon this point is devoted to the question whether the titles were fatally defective, and it is argued extensively that none of these apparent defects in the title were fatal; but this was not the question to be determined by the trial court. A purchaser of land is not required to purchase a lawsuit, but the agreement to "give a good and sufficient warranty deed and abstract" contemplates that the abstract will present a merchantable title, which is clear as shown by the record, and does not require litigation to complete it. This title was so plainly not merchantable that we do not find it necessary to discuss the defects presented by the abstracts. The case was tried to the court without a jury, and it cannot be said that the findings are not amply supported by the evidence.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

HELEN C. MARBLE ET AL., APPELLANTS, V. CITY OF TECUMSEH, APPELLEE.

FILED JUNE 28, 1919. No. 20579.

1. **Wills: DEVISE FOR PUBLIC PARK: ESTATE CREATED.** A will contained this provision: "Third. I give and bequeath to the city of Tecumseh in Johnson County, Nebraska, lots eight (8) nine (9) ten (10) and eleven (11) in block one (1) in Graff & Ellsworth's Addition to said city, the same to be known as Brandon Park, and always to be used as a public park; and I also give and bequeath to said city the sum of five hundred ($500.00) dollars to be used to improve the same under the direction of the city council of said city of Tecumseh and request that donations of work, etc., be made by the citizens to assist in improving same." *Held*, that the devise created an estate upon a condition subsequent, namely, that the lots and money be used for the purpose expressed in the will.

2. ———: ———: **BREACH: RECOVERY BY HEIRS.** In such case, upon failure by the city to comply with the condition attached to the gift within a reasonable time, the heirs of the testatrix can maintain an action to recover the property.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed.*

S. P. Davidson, for appellants.

L. C. Chapman, contra.

DEAN, J.

This action was brought to recover four town lots and $500 devised to the city of Tecumseh by Sarah B. Brandon. Defendant's demurrer to the petition was sustained, and plaintiffs appealed.

The plaintiffs are two sisters and a brother of the testatrix. The petition alleges that they are her sole heirs; that her will was probated in November, 1906, and contained, among others, this provision: "Third. I give and bequeath to the city of Tecumseh in Johnson County, Nebraska, lots eight (8) nine (9) ten (10) and eleven (11)

in block one (1) in Graff & Ellsworth's addition to said city, the same to be known as Brandon Park, and always to be used as a public park; and I also give and bequeath to said city the sum of five hundred ($500.00) dollars to be used to improve the same under the direction of the city council of said city of Tecumseh and request that donations of work, etc, be made by the citizens to assist in improving same."

Plaintiffs also alleged that the city had taken possession of the lots and the money under the will on April 5, 1909, but that "said city has ever since said date failed, neglected and refused to use said lots as a public park, and has failed, neglected and refused to improve the same for use as a public park, and has failed, neglected and refused to use said $500, or any part of said sum of money, in improving said lots as and for a public park, as directed and required by the terms and conditions of said provisions of said will; but plaintiffs aver that said defendant has used said $500 for other purposes, and has expended the same for other purposes than in the improvement of said lots for a public park. Plaintiffs further allege that said city council, in plain violation of the terms and conditions of said provisions of said will, by an order duly entered and passed by said city council on or about the—day of March, 1917, called upon the legal voters of said city to cast their votes for or against the proposition to sell said lots and devote the proceeds of such sale for the purchase of other property for use as a public park; and on the 2d day of April, 1917, at the annual election held in said city, the electors of said city did vote upon the said proposition, in pursuance of said order of said city council, and at said election said electors by a large majority voted in favor of so selling said lots and devoting the proceeds of such sale to the purchase of other property; and the use by said city of said $500 for other purposes than in the improvement of said lots for a public park has been ratified by the people of said city. Plaintiffs further allege

that, by reason of the facts, and the acts of said defendant city, above set forth, the title, ownership and right to the possession of said lots and the said $500 has reverted to these plaintiffs as the sole heirs at law of said Sarah B. Brandon, and these plaintiffs have become and are the absolute owners of said lots and the said $500, together with interest upon said $500 from April 5, 1909."

Section 6195, Rev. St. 1913, reads: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

The rule that guides this court in the construction of a will is plainly outlined in the section of the statute just quoted. It is elementary that it is the duty of the court in ascertaining the intent of a testator to place itself in his position and to carry out his expressed desire without regard to the use of conventional forms or of technical words. *Albin v. Parmele*, 70 Neb. 740.

Respecting the gift the will reads: "The same to be known as Brandon Park, and always to be used as a public park." From this language it is plain that the intent of the testatrix was that the identical lots described in her will, and not some other property that might be purchased from the proceeds of a sale thereof, should "be known as Brandon Park." The identical property so described, not some other tract, was "always to be used as a public park." It was her express intent that the $500 gift was "to be used to improve the same," namely, the identical lots described in the will. Her "request that donations of work, etc., be made by the citizens to assist in improving the same," plainly relates to the lots in suit. To hold that the city was not bound within a reasonable time to use the lots and the money for the purpose expressed in her will would defeat the

object that prompted her to make the gift. If she had intended to have her lots sold and a park established elsewhere with the proceeds of the sale, she would have so expressed her intention. We must take the will as made, and not make a will for her. *Watson v. Riley*, 101 Neb. 511.

There are some jurisdictions that seem to hold that, when a will purports to pass the fee, an expression of a purpose respecting the particular use to which the property is to be appropriated will not of itself make the estate conditional. In view of the facts surrounding the present case and of the statute and the established rule of construction of this court, we hold that the devise in question clearly shows the intention of the testatrix that an estate be given to the municipality upon a condition subsequent, namely, that the lots and money be used for the purpose expressed in the will. Upon failure by the city to comply with the condition attached to the gift within a reasonable time, the heirs could properly maintain an action to recover the property. What is a reasonable time would, of course, depend upon the facts surrounding the immediate case.

The city contends that, the will having been probated in 1906, the action as shown by the petition is barred by the statute of limitations. We do not think so. Where a time for the performance of a condition subsequent is not fixed, the performance must be within a reasonable time. 40 Cyc. 1723. The statute does not run against the heirs until the expiration of such reasonable time. The city having come into possession of the property in 1909, and less than ten years having elapsed before suit was begun by the heirs, the statute has not barred the action.

The judgment is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED.

LETTON, J., not sitting.

EDNA M. BARKLEY ET AL., APPELLEES, V. CHARLES W. POOL, SECRETARY OF STATE, APPELLEE: L. D. RICHARDS ET AL., INTERVENERS, APPELLANTS.

FILED JUNE 28, 1919. No. 20946.

1. **Statutes: INITIATIVE AND REFERENDUM: INJUNCTION.** Under section 2339, Rev. St. 1913, being a part of the initiative and referendum act, any citizen may invoke the remedy by injunction therein provided to enjoin the secretary of state from certifying or printing on the official ballot for the ensuing election the ballot title and number of an act sought to be referred.

2. ———: ———: **PETITION: CERTIFICATE: IMPEACHMENT: EFFECT.** When the certificate of a circulator of a referendum petition under the initiative and referendum act is impeached on the ground of fraud, the probative value of such certificate is destroyed, and none of the names appearing on such petition will be counted unless affirmatively proved to be genuine.

APPEAL from the district court for Lancaster county: LEONARD A. FLANSBURG, JUDGE. *Affirmed.*

Jacob Fawcett, John L. Webster, L. F. Crofoot and *Byron G. Burbank,* for appellants.

Francis A. Brogan, T. J. Doyle, John M. Stewart, Elmer E. Thomas, C. A. Sorensen and *H. H. Wilson, contra.*

DEAN, J.

The legislature passed an act, House Roll 222, chapter 30, Laws 1917, that amended section 1940, Rev. St. 1913, so that, as amended, the act conferred upon women the right to vote at the regular state election for officers and upon submitted questions, except such officers as are "specified and designated in the constitution," and except upon questions "the manner of the submission of which is specified and designated in the Constitution of Nebraska." A referendum petition, numerously signed, and apparently having more than the required number of names necessary to invoke the operation of

the referendum statute, was filed in the office of the then secretary of state, on July 23, 1917, to refer the suffrage act to the people for their approval or rejection at the regular state election on November 5, 1918.

Plaintiffs began this action under section 2339, Rev. St. 1913, to enjoin the secretary of state from referring the suffrage act pursuant to the prayer of the referendum petition. When the secretary filed his answer, certain electors intervened and by leave of court were joined as party defendants. As soon as the taking of testimony was closed, the interveners interposed a demurrer to plaintiffs' evidence, which was overruled. Interveners, electing to stand thereon, introduced no further testimony. Whereupon the court found "generally in favor of the plaintiffs and against the interveners, and defendants." The interveners alone appealed.

This case was appealed before and was dismissed by us on the ground that the ruling appealed from was not a final order. It may be added that on the former appeal none of the testimony was before us. *Barkley v. Pool,* 102 Neb. 799.

All of the plaintiffs are women. They sue on behalf of themselves and all others similarly situated. Hence interveners contend that plaintiffs cannot maintain this suit. They submit this argument: "The court should have ruled that the questions involved in this suit do not relate to either property or civil rights, but to political rights, which belong to the electors of the state and attach to the sovereignty of the state, and that a suit in equity of this sort could only be prosecuted in the name of the state, by and through the state legal department."

We do not think the court erred in ruling that plaintiffs could maintain the action. While plaintiffs are not electors, they are of course citizens. Section 2339, Rev. St. 1913, expressly provides that "any citizen" may apply to the district court for a writ of mandamus

to compel the secretary of state to file either an initiative or a referendum petition. The same section provides: "On a showing that any petition filed is not legally sufficient, the court may enjoin the secretary of state and all other officers from certifying or printing on the official ballot for the ensuing election the ballot title and numbers of such measure." The act provides a remedy that may be invoked when the secretary of state wrongfully refuses to file a petition, and a remedy is also provided against certifying and printing the title of the act on the official ballot when the petition is not legally sufficient. "Any citizen" may apply to the district court to compel a filing when the refusal is wrongful, and, if the showing is that the petition is not legally sufficient, the court must enjoin the secretary of state from certifying and printing the title of the act on the official ballot. It is not necessary to repeat the words "any citizen." Those words are implied and the statute must be so construed. If the legislature intended that either remedy created by the act could be invoked only by the attorney general or by a person belonging to some specially designated class, as distinguished from "any citizen," it could very easily have said so. It is significant that the lawmakers did not say so either in express terms or even by implication.

Ordinarily the powers of a court of equity cannot be invoked to enforce political rights. But section 2339, Rev. St. 1913, expressly provides that injunction will lie to prevent the secretary of state from submitting a referendum petition that is legally insufficient. The question then is: By whom may the action be brought? The act sought to be referred is a grant of certain rights by the legislature to all persons of a certain class, namely, the women of the state. When such grant is assailed, must the class upon whom the rights are so conferred remain passively silent and be denied opportunity to make the defense pointed out by statute? In view of

the act, or on principle, can it be said that any citizen so clothed with statutory rights is remediless? We do not think so.

Interveners cite *Friendly v. Olcott,* 61 Or. 580, which holds that the remedy by injunction, under a statute similar to ours, can only be invoked by the state "through its proper law officer," and argue that, having adopted the Oregon statute, we adopted the construction placed thereon by the Oregon court. This court is not irrevocably committed to that rule. In *Burnham-Munger Root Dry Goods Co. v. Strahl,* 102 Neb. 142, in discussing this point, it is said: "This is not a uniform rule and has been departed from for good reasons by this court on several occasions." As pointed out in oral argument and in briefs of counsel, the construction of the Oregon statute was based on the former practice in that state, and was not, strictly speaking, an independent construction of the statutory language. On principle and in view of our former holding, we decline to adopt the Oregon construction. It may be added that Oregon has preserved the distinctions between actions at law and suits in equity, while in this state such distinctions are expressly abolished by statute. We conclude that under the act any citizen may make a "showing that any petition filed is not legally sufficient" and may invoke the remedy by injunction.

Sections 2337 and 2338, Rev. St. 1913, provide generally for the duties of the circulators of initiative and referendum petitions. Section 2337 provides: "Not more than twenty signatures on one sheet shall be counted." Section 2338 provides that every sheet on such petition shall be verified on the back thereof by the circulator, who shall certify that each signature was signed in his presence, that he believes that the names and addresses are correctly given, and that he believes each signer is a legal voter.

The petitions may contain the signatures of good-faith signers, but plaintiffs proved that the names of

many persons were fraudulently written thereon by three of the circulators, namely, Barclay, Norton, and McCabe. Among other things, the district court found: "That 29,147 legal signatures were necessary, * * * and that there appear on said petition names numbering 3,840 in excess of that number; * * * that considerably more than 3,840 names on said petition * * * are invalidated, and cannot be counted by reason of fraud, forgery, false and defective certificates, signatures of minors or persons who were not electors, signatures procured through false representation of the circulator, and signatures connected with incorrect or fictitious addresses. The court further finds that as to circulator Barclay, 28 of his petitions appeared to be each in the same handwriting; 105 witnesses denied the signatures * * * and most of said 105 signatures are proven to be forgeries." Three purported signatures thereon were names of persons who had previously died. The petitions circulated and certified by Barclay contained in all 2,275 names. "As to the circulator Norton, 172 witnesses deny the genuineness of the signatures purporting to be theirs, on his petitions. The court finds that most of these 172 names are proven to be forgeries;" that he wrote signatures thereon and falsely certified that they were genuine; "that there are 1,306 names on the petitions circulated by Norton." That as to circulator McCabe's petitions, 24 witnesses deny the signatures thereon; that at least 20 are forgeries; "several petitions certified by him appear to be in the same handwriting and, on 32 different petitions, 173 names appear in the handwriting of Mr. McCabe, * * * that upon Mr. Cabe's petitions there are 1,075 signatures." That the oaths and the certificates of these three circulators are impeached for fraud; that numerous certificates by them "were knowingly and intentionally false; and the court has counted out each one of the petitions procured by these circulators in its entirety whenever a false and fraudulent signature has

been proven. The court also finds that as to all petitions of each of these three circulators, where the particular certificate has not been proven false or fraudulent by direct attack upon the signatures covered by the certificates, that nevertheless the certificate, being made by a circulator whose oath has been impeached in this transaction, lacks evidentiary value, and that in order that said petition be counted, if valid, it is necessary to furnish testimonial proof of the genuineness of the signatures and the truthfulness of these certificates, and the burden of making such proof would fall upon the defendants and the interveners herein, and they have failed to offer such proof. The court further finds that, had all false certificates of these circulators been disregarded as being unnecessary to the validity of the petitions, and had all the names on the petitions of these three circulators been assumed by the court, in the absence of proof to the contrary, to be genuine, and had been counted, except only those individual signatures which have been directly proven fictitious or not genuine, that the increase of names thus added to the referendum petition would have brought the number of valid signatures up to the required ten per cent. of the electors of the state, and the referendum petition in that event would necessarily have been sustained."

The interveners in support of their demurrer to the evidence submit this argument: "The plaintiffs, from the nature of the action, assume the burden of proving that there are not a sufficient number of genuine signatures of legal voters on the petition to comply with the requirements of the Constitution. This burden of proof is not satisfied by evidence that a circulator was guilty of a particular fraud, or that one or more names on a petition are fictitious. Every genuine signature on the petitions must be counted, irrespective of the certificates of the circulators, and whereas every signer of the petition has signed under a declaration that he is a legal voter and that the signature is his genuine

signature, etc., such signatures must be presumed genuine and counted, except in cases where the plaintiffs have affirmatively shown that the particular signature is false or fraudulent or that the person is not a legal voter within the meaning of the Constitution."

The findings of fact are not controverted.

In view of the proof of fraud, of forgery, and of perjury that was perpetrated by circulators Barclay, Norton and McCabe, and that is in effect admitted by interveners' demurrer to the evidence, their argument cannot prevail. The trial court did not err in finding from the evidence that all certificates of the three circulators were impeached and unworthy of credence. Nor did the court err in refusing, in the absence of proof of the genuineness of any of the purported signatures appearing on such petitions, to count any names thereon for the referendum. The rule is elementary that, when the testimony of a witness on a material point is impeached, all of his testimony may be rejected unless corroborated. Error cannot be shown in the findings by pointing out that the discredited petitions may have contained the genuine signatures of some persons who, by signing, voiced an honest protest against the referred act and whose names were not counted for the petition. No doubt some good-faith signatures were on the rejected petitions; but even so, in view of the record before us, error cannot be predicated on their rejection, because the burden of proof was on the interveners to establish that fact, if it was a fact, when the probative value of the certificates of the three circulators was destroyed. This the interveners did not even attempt to prove. It need scarcely be said that as to the interveners and the secretary of state no blame can possibly attach in the premises, nor was any charged.

We believe the rule is well stated in *State v. Olcott*, 62 Or. 277, in a similar case: "As the circulator of a petition is the agent of the signer, and his oath is the only evidence of the genuineness of the signature, it

follows as a matter of course that, where he is shown to have acted fraudulently, the value of his verification is destroyed, and the petition must fall, unless the genuine signatures are affirmatively shown. But, in the absence of evidence of intentional fraud or guilty knowledge on the part of the circulator, it would be an unjust rule to deprive the honest signer of his right to have his signature counted, merely because some disqualified person signed, or because some person, without the knowledge of the circulator, affixed a fictitious name, or gave a fictitious address."

Interveners again contend that under the Constitution it is mandatory that a referred act must be voted on at the next regular state election held not less than 30 days after the filing of the referendum petition or it never can be voted on. This question was decided adversely to their contention in the former appeal of this case. Although the court was not unanimous, the former decision is, of course, decisive of that point in the present case.

In this as in the former hearing, we are indebted to counsel for both parties for briefs of marked ability and oral argument of a high order.

We believe that our conclusion conforms to the intent of the legislature as expressed by the act in question. Finding no reversible error, the judgment of the district court is

AFFIRMED.

W. L. STICKEL LUMBER COMPANY, APPELLEE, V. CITY OF KEARNEY ET AL., APPELLANTS.

FILED JULY 2, 1919. NO. 20424.

Municipal Corporations: CONTRACTS: IRREGULARITIES. Where a city has the power to enter into a contract, but the manner of the exercise of the power is irregular or defective, and the city purchases, uses and still retains property purchased under such irregular proceedings, no element of fraud or lack of consideration

being shown, the allowance of the claim by the city council will not be set aside at the suit of a taxpayer.

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

H. M. Sinclair and *Fred A. Nye,* for appellants.

Warren Pratt, contra.

LETTON, J.

Judgment for $1,248.47 was rendered against the city of Kearney for the value of certain iron pipe purchased from plaintiff and used in the streets. An intervening taxpayer appeals.

A petition was presented to the city council asking that storm sewers be constructed on certain streets. The petition was granted, and plans and specifications were adopted by the council for the sewer system. A special election was called for the submission to the electors of a proposition to vote $50,000 bonds, the proceeds of which were to be used to pay the cost of the same.

Prior to the time that the election was held it was desired to pave a portion of the streets in which the proposed storm sewers were to be placed. In anticipation of a favorable result of the election, and in order to avoid the cost of removing and replacing the pavement, the city engineer purchased the pipe, and procured the same to be laid under three intersections of streets to be crossed by the sewer. The pipes were laid as part of the proposed storm sewer system and intakes were placed in the gutters to connect with them.

At the election the proposition to vote bonds was defeated. No further steps were taken to construct the system. The ends of the pipes were closed with bulkheads of lumber, and the intakes were left open, forming an inverted syphon, so that water flowing in the gutters in the usual course entered on one side of the street, passed through the pipe, and flowed out through the other intake into the gutter on the lower side, thus avoiding the use of surface gutters across the intersec-

tions. The statutes requiring estimates and competitive bids before such a purchase were not complied with. A bill was allowed by the city council for the pipe, and a warrant ordered to be drawn, when an appeal was taken to the district court by an intervening taxpayer.

It seems to be established by the evidence that, when material was needed for ordinary street improvements, the city engineer was authorized by the council to purchase the same. For the defense, several witnesses testified that after rains the water would stand in the pipes and would give off offensive odors; that the result of the paving and the installing of the pipes is that the drainage is worse than before, and the city health officer testified that it was dangerous to the public health to leave the pipes in their present condition.

The council of a city of the second class having over 5,000 inhabitants cannot lawfully incur expenses or enter into a contract therefor of this nature and extent unless money has been previously appropriated for that purpose, or the expenditures previously sanctioned by a majority of the electors of the city. *City of Kearney v. Downing*, 59 Neb. 549; *Fulton v. City of Lincoln*, 9 Neb. 358; *City of Blair v. Lantry*, 21 Neb. 247; *City of Plattsmouth v. Murphy*, 74 Neb. 749.

But even though the statutory requirements as to the making of a contract have not been carried out, if the city authorities are vested with general authority to do the act for the performance of which the materials are supplied, and there are no elements of other than fair dealing shown, and the city elects to keep the property, there may still be a recovery for the reasonable value of the same.

The crucial question is: Did the city have power to purchase the pipe for the purpose for which it was used: "If it had the power, but the manner of its exercise was irregular or defective, and the city accepts, makes no offer to return, and still retains property obtained by virtue of the irregular proceedings, it is bound, both

morally and legally, to pay the reasonable value thereof, not under the void contract, but by way of compensation." *Nebraska Telephone Co. v. City of Red Cloud,* 94 Neb. 6.

The city, under section 4951, Rev. St. 1913, had power to install a sewer and drainage system, and therefore had power to purchase material for the purpose. Though the statute required a petition to be signed by abutting property owners, and the cost to be eventually paid by them, this did not make the purchase *ultra vires.*

"Properly speaking, *ultra vires* contracts of a municipal corporation are such as the corporation has no power to make under any circumstances or for any purpose. A contract of a municipal corporation is *ultra vires* in its proper sense when it has no power under the existing legislation under any circumstances to enter into such contract. Such a contract, of course, is wholly void and gives rise to no rights. The objection to such a contract is not merely that the corporation should not have made it, but that it had no power to make it. But, in the case at bar, by the statute then existing the mayor and council were given the power to change the grade of the street and to award contracts for perfecting such change. Where the municipal corporation has the power to make the contract, but fails to follow the procedure laid down by the law for making of the contract, it cannot properly be said to be *ultra vires* and void, but is merely irregular." *Rogers v. City of Omaha,* 80 Neb. 591.

In the case at bar the mayor and council had power to provide a sewer system, and also have power to gutter and otherwise improve the streets. The pipes were not a success as gutters, but this was not the fault of the plaintiff. The city, through its officers, purchased the pipe, it is still using it, and may use it to a greater degree in the future if the sewer system approved by the council is ever installed. The case falls within the principle of *Grand Island Gas Co. v. West,* 28 Neb. 852; *Lin-*

coln Land Co. v. Village of Grant, 57 Neb. 70; *Rogers v. City of Omaha*, 76 Neb. 187, 80 Neb. 591; *Nebraska Bitulithic Co. v. City of Omaha*, 84 Neb. 575, and *Nebraska Telephone Co. v. City of Red Cloud*, 94 Neb. 6.

AFFIRMED.

ROSE, J., dissents.

CORNISH and ALDRICH, JJ., not sitting.

The following opinion on motion for rehearing was filed September 27, 1919. *Rehearing denied.*

PER CURIAM.

A motion for rehearing has been filed, pointing out that under section 4951, Rev. St. 1913, the sewer system provided for therein could only be constructed "without cost to the city." The reference to this section in the opinion is erroneous. But the power to gutter and otherwise improve the streets is given by sections 4816, 4908, and power to construct a system of sewerage and to borrow money for that purpose, pledging the credit of the city, is conferred by section 4956. It was under the latter section that the proceedings of the city of Kearney were conducted.

The motion for rehearing is

OVERRULED.

P. H. L. MEYER, ADMINISTRATOR, APPELLEE, V. CENTRAL STATES LIFE INSURANCE COMPANY, APPELLANT.

FILED JULY 2, 1919. No. 20531.

Insurance: ACTION FOR DELAY. In an action against an insurance company for negligence in delaying action on an application for life insurance, in failing to notify the applicant of the delay or of the occasion for it, and in failing to deliver a policy during his lifetime, the evidence summarized in the opinion *held* insufficient to sustain a judgment in favor of plaintiff.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Reversed and dismissed.*

A. M. Post and *E. M. Grossman,* for appellant.

John J. Sullivan and *Reeder & Lightner, contra.*

ROSE, J.

This is an action to recover $2,000 in damages for alleged negligence of the Central States Life Insurance Company, defendant, in delaying action on an application for life insurance, in failing to notify the applicant of such delay, or of the occasion for it, and in failing to deliver a policy during his lifetime; the application having been made March 8, 1916, and the applicant having been thrown from a horse and killed April 3, 1916. In the application the estate of the applicant is designated as beneficiary. Plaintiff is the father of the decedent and is the administrator of his estate. Defendant denied negligence and pleaded that the applicant died pending a proper, but an unfinished, inquiry into his insurability. A jury was waived, and the trial court rendered a judgment in favor of plaintiff for the full amount of his claim. Defendant has appealed.

As a ground of reversal it is urged that the record contains no evidence of actionable negligence. Plaintiff relies on the following facts and conclusions: When the application was made, March 8, 1916, defendant's soliciting agent told the applicant that the insurance would be in force upon his passing a successful physical examination. The local physician employed by defendant made an examination on that date and assured the applicant that he had successfully passed it. The first year's premium was then adjusted by the giving of a note for $32.86. The application and the report of the physical examination were received by defendant at the home office in St. Louis, March 13, 1916. The report, owing to a defective instrument used by the examining physician, erroneously indicated an excessive blood pressure. March

15, 1916, defendant, without avail, wrote to the examining physician for a re-examination of blood pressure and repeated the request March 27, 1916. The soliciting agent was advised of the delay March 28, 1916, but notice of the facts mentioned was not given to the applicant. In the ordinary course of business the policy would have been delivered by March 22, 1916. It was in fact issued March 17, 1916, and registered by the insurance department of Missouri at Jefferson City, March 18, 1916, notwithstanding the requests for a re-examination. The applicant was in good health when examined and his blood pressure was normal. He was a young man of good character, and, from the standpoint of underwriting, he was a good financial and moral risk. Except for his death the policy issued March 17, 1916, would eventually have been delivered and the premiums would have matured annually from that date. He never received his policy. The use of the defective instrument in testing the blood pressure, the delay in passing on the application and the want of notice resulted in the applicant's failure to procure insurance. The foregoing is a brief summary of plaintiff's case. Is the evidence sufficient to sustain the judgment in favor of plaintiff?

Life insurance is a contract. The meeting of the minds of the parties is essential to the execution of a policy. Honest, trustworthy underwriting requires serious inquiry into the moral character, habits, family history, financial standing and physical condition of an applicant for life insurance. Scientific knowledge and professional skill are necessary to an intelligent inquiry. The insurer in soliciting a risk and the applicant in seeking indemnity contemplate an investigation commensurate with the hazard involved. For this purpose a reasonable time is necessary. Difference in conditions may vary the time required for examination and investigation. In construing the conduct of the parties in relation to time, courts are not at liberty to fix an arbitrary period. For the purpose of considering an application the insurer

by contract may protect itself against accident, misinformation and unforeseen incidents causing temporary delays. In the present case defendant's receipt for the premium note permitted delivery of a policy within 60 days. To this applicant acceded and he was killed before expiration of that period. The investigation of the applicant's insurability was pursued by defendant in good faith. Two days after the report of the examining physician had been received at the home office of defendant in St. Louis he was requested to re-examine the applicant's blood pressure and was cautioned in relation to the instrument used in making the test. The request was renewed 10 days later, and the soliciting agent was notified of the delay with a view to promptness in passing on the application. The defective instrument did not belong to defendant, but was the individual property of the examining physician, whose authority did not extend beyond his duties in that capacity. The competency or fitness of the examining physician is not questioned. There is nothing to indicate that he did not act honestly and in good faith. On the part of defendant there was no negligence in selecting him. In performing his duties the examining physician used his own instruments and exercised his own professional skill and independant judgment. Notice to applicant that the report of the physical examination indicated excessive blood pressure and that as a consequence there would be a delay in considering the risk could only have been given between March 13, 1916, after the report was received by defendant at St. Louis, and April 23, 1916, the date of applicant's death. During that time defendant proceeded with reasonable diligence under the circumstances. Failure to give notice of the report of excessive blood pressure is not evidence of negligence. The stipulated period of 60 days for investigation had not yet expired. Neither the examining physician nor the soliciting agent had power to make the insurance effective upon the applicant's passing a suc-

cessful examination. Both were likewise without authority to bind defendant by assurance that liability for a loss would precede the approval of the application which on its face provided otherwise. The premium note was given on the express condition that its delivery to defendant depended upon the applicant's receipt of a policy. Defendant never demanded or received the premium note or the proceeds thereof. The issuance and the registration of the policy to hasten delivery upon a subsequent approval of the application do not tend to prove negligence. Such issuance and registration, according to the application itself, are not to be construed as an acceptance of the risk. On the undisputed facts the action should have been dismissed. Without regard to the insufficiency of the evidence to sustain the judgment, it is the opinion of the writer that no cause of action exists in favor of plaintiff and against defendant.

REVERSED AND DISMISSED.

LETTON, J., not sitting.

CORNISH, J., concurring.

I agree that no negligence was shown, but I am of the opinion that that part of the opinion dealing with the question of negligence should be eliminated.

In the absence of contract, the defendant owed the deceased no duty to furnish him insurance, and failure to furnish him insurance would not be the basis for an action in tort. It is possible that a case might arise, where one or more persons had conspired to defeat a person of his legal right to procure insurance, that would amount to actionable tort. When, as here, the parties to a contract in terms agree upon the time within which the application or proposition of one may be rejected or accepted by the other, the other has to the last hour of the last day for acceptance or rejection of the proposition. By the terms of the contract itself he is under no obligation to make his investigation except to suit his own convenience within the time. If the

maker of the proposition desires an early or more speedy investigation, it should be provided for in the agreement. A contrary rule would never be followed by those not learned in the law, because a layman would always think that, if the agreement gave him 60 days in which to answer, he would be entitled to the 60 days. An action in tort does not lie for refusal to enter into a contract.

FRANK STARR ET AL., APPELLEES, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED JULY 2, 1919. No. 20510.

1. **Carriers: INJURY TO LIVE STOCK: ACTION FOR DAMAGES: BURDEN OF PROOF.** "In an action to recover damages from a carrier for injury sustained by live stock in transit, which are accompanied by the owner or his agents, the burden is on the owner to show that the loss complained of was occasioned by the carrier's negligence." *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166.

2. ———: ———: **INTERSTATE SHIPMENTS.** The act of the federal congress, known as the "Carmack Amendment" (8 U. S. Comp. St. 1916, sec. 8604a, p. 9289), does not enlarge or change the common-law liability of carriers for injuries to live stock in interstate shipments.

3. ———: **LIVE STOCK: DUTY TO FEED AND WATER.** When the owner, or his agent, accompanies the shipment of stock, the duty of feeding and watering the stock when placed in the carrier's yards is primarily upon the owner. If he fails to do so, then the duty is upon the carrier. The duty is also upon the carrier to furnish the proper facilities for the feeding and watering of the stock.

4. ———: **FEEDING LIVE STOCK: LIABILITY.** Where the carrier fed and watered the stock, the owner being present, and it appears that some of the stock was injured by reason of poison being contained in the hay fed to them, the hay being furnished by the carrier, *held*, that in such case the carrier is not an insurer of the stock against loss by reason of the poisoned hay, but would be liable only for negligence.

APPEAL from the district court for Webster county: WILLIAM C. DORSEY, JUDGE. *Reversed.*

E. E. Whitted, J. L. Rice and *L. H. Blackledge,* for appellant.

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

CORNISH, J.

Plaintiffs' carload of horses being shipped from Billings, Montana, to Grand Island, Nebraska, was unloaded for feeding at Edgemont, South Dakota. It appears that poison in the hay fed to the horses damaged some and killed others. From a judgment for plaintiffs for damages sustained, the defendant appeals.

Plaintiff Frank Starr, as caretaker provided for in the shipping contract, was present at the time of the feeding, but the hay and water given to the horses were furnished and fed by the defendant at plaintiffs' expense. That poison was in the hay was not known until later, and how it got there is still unknown. One Petro, who harvested and sold the hay, testified that no poison was in it when delivered. The defendant kept it locked in a barn until used. The federal law makes it primarily the duty of the caretaker to buy and feed the hay, and the carrier's duty if he does not. 8 U. S. Comp. St. 1916, sec. 8652, p. 9381; *Chicago, St. P., M. & O. R. Co. v. Schuldt,* 66 Neb. 43; *Webster v. Union P. R. Co.,* 200 Fed. 597; 4 R. C. L. 985, sec. 451. The evidence does not show that either defendant or plaintiffs were negligent in feeding the hay.

If the action turned on negligence—on the fact that the carrier either knew, or in the exercise of ordinary care should have known that the hay contained poison—it must fail for want of evidence. But it is the plaintiffs' contention that, independent of the question of negligence, defendant must be held liable under its common-law liability as a common carrier, which liability cannot be limited by contract. The parties agree that such was the view taken by the trial judge, and it is the ground for the defendant's principal assignment of error. So the first inquiry is: What is the carrier's common-law

liability, in a shipment of stock, for injury thereto after stock was unloaded and while being fed in its yards, where, by agreement of parties, a caretaker is in attendance?

The common-law rule, making the carrier an insurer of goods in its hands for transportation, arose from the practical impossibility of shippers proving how the goods were lost. Frauds and collusions were easily practiced but hard to prove. The shipper parted entirely with his possession and control, and the carrier could pretend a robbery or accident which had not happened. In course of time the original rule was modified in certain particulars. Not only were losses occasioned by the act of God or public enemy excepted, but certain losses due to the natural propensities of the animal being shipped were also excepted.

When, by agreement of the parties, the animals shipped were attended by a caretaker, this furnished another ground for an exception to the original rule, because in such case it might be more the duty of the caretaker to anticipate and prevent the particular injury than it would be the duty of the carrier. Accordingly, the common-law rule, as applied to such a case, appears to be as announced by this court in *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166, as follows: "In an action to recover damages from a carrier for injury sustained by live stock in transit, which are accompanied by the owner or his agents, the burden is on the owner to show that the loss complained of was occasioned by the carrier's negligence." In 4 R. C. L., at page 995, sec. 462, the writer adopts the language of this opinion as being the prevailing rule everywhere. In fact, while the plaintiffs in their brief argue to the contrary and cite cases, we know of no decision holding to the contrary. The rule is that when the owner, or his agent, attends the stock as caretaker, and, as in this case, the stock is being fed in the carrier's yards, the carrier, while bound to furnish facilities for feeding, is not liable as an insurer against

injury, but is only liable for negligence. The test in the instant case would be: Did the carrier know that the hay fed contained poison; or, in the exercise of ordinary care, should it have known? *Chicago, St. P., M. & O. R. Co. v. Schuldt, supra; Chicago B. & Q. R. Co. v. Powers,* 73 Neb. 816; *Zimmerman v. Northern P. R. Co.,* 140 Minn. 212; *Bigelow v. Maine C. R. Co.,* 110 Me. 105; *Lukens v. Freiund,* 27 Kan. 664.

The agreement that the shipper shall accompany the stock and shall be responsible for its care is, when proper facilities are supplied, not a limitation of the carrier's liability. *Chicago, St. P., M. & O. R. Co. v. Schuldt, supra.*

Plaintiffs in their brief cite cases from Texas as holding to the contrary. In *Pecos & N. T. R. Co. v. Meyer,* 155 S. W. (Tex. Civ. App.) 309, and in *Chicago, R. I. & G. R. Co. v. Crenshaw,* 59 Tex. Civ. App. 238, the carrier's liability is made to depend upon its exercise of ordinary care, according to the circumstances. The holding in *Chicago, R. I. & G. R. Co. v. Linger,* 156 S. W. (Tex. Civ. App.) 298, is only to the effect that a provision in the contract that the shipper should assume all risks (which would include those arising from the carrier's negligence) was void under the Carmack amendment. 8 U. S. Comp. St. 1916, sec. 8604a, p. 9289.

It is further urged that the Carmack amendment changes the rule, in that it provides that contracts between the carrier and shipper attempting to limit the common-law liability are void, and also provides that the carrier shall be liable for all injuries "caused by it." Inasmuch as the statute places the primary duty of feeding the stock upon the caretaker, permitting him to do his own buying and feeding, it would be strange if such were the meaning of the law. This question, however, is foreclosed by the decisions of the federal court, holding that it is permissible for the parties to agree upon the presence of a caretaker, and that the words above quoted were not intended to change the

Common-law liability. *Adams Express Co. v. Croninger*, 226 U. S. 491, 44 L. R. A. n. s. 257; *Missouri K. & T. R. Co. v. Harriman*, 227 U. S. 657; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319; *Missouri, K. & T. R. Co. v. Byrne* 100 Fed. 359.

It is complained that in the argument to the jury statements were made by counsel for plaintiffs inflammatory in their character and not based upon the evidence. It is answered that counsel for defendant also was at fault. Courts fail in their function when their judgments are not in accord with the merits of the controversy. Trial judges cannot preserve the dignity and gravity of the court without the aid of the bar. The lawyer owes it to the litigant, as well as to the state, to prevent a diversion of the juror's mind from the question he has sworn to try. As we have heretofore said, when misconduct of counsel is such that no admonition or rebuke can entirely destroy its sinister influence, a new trial will be awarded, regardless of want of objection and exception.

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

REVERSED.

SEDGWICK, J., not sitting.

LETTON, J. dissenting.

The common-law rule which makes common carriers insurers of the safe delivery of property transported, with certain well-recognized exceptions, is a salutary doctrine and tends to the exercise of vigilance and care by the carriers. It should not be lightly interfered with, nor whittled down by exceptions, even though it may work an injustice in isolated cases.

The common-law rule is stated as follows in *Church v. Chicago, B. & Q. R. Co.*, 81 Neb. 615: "It is the general rule that a common carrier of live stock for hire is an insurer of its safe delivery to the consignee, except

where the injury or loss is due to the act of God, the public enemy, or to the inherent nature or propensities of the animals; and the delivery of the animals to the carrier in good condition and the failure of the carrier to deliver them at the place of destination makes a *prima facie* case against the carrier."

This was an interstate shipment of horses. They were fed and watered in transit by the carrier. The hay fed them was poisoned, and a number of the horses died. A caretaker accompanied the shipment, but did not procure the hay or feed the horses. Being an interstate shipment the laws of the United States, as construed by the federal courts, control. *Cincinnati, N. O. & T. P. R. Co. v. Rankin,* 241 U. S. 319. In this case it is also held that the common-law liability of a carrier as an insurer was not changed with respect to a loss occurring on its own line by the provisions of the Carmack amendment, and it is said, speaking of the construction of the Carmack amendment in *Adams Express Co. v. Croninger,* 226 U. S. 491, "properly understood neither this nor any other of our opinions holds that this amendment has changed the common-law doctrine theretofore approved by us in respect of a carrier's liability for loss occurring on its own line."

Under the interstate commerce act the term "transportation" includes all services in connection with the receipt, delivery, elevation, ventilation, refrigeration or icing, transfer in transit, storage and handling of property transported. 8 Comp. St. U. S. 1916; sec. 8563, p. 9061.

It seems evident that the furnishing of hay at its feed-yards for the feeding of live stock which the road is compelled to perform under the 28-hour statute falls within this definition of "transportation." *Southern R. Co. v. Prescott,* 240 U. S. 632. This case was decided before the Cummins amendment. Under that amendment every common carrier "receiving property for transportation shall be liable to the lawful holder of the bill of lading 'for any loss, damage, or injury to such proper-

ty caused by it,' or by any common carrier, railway or transportation company to whom such property may be delivered," etc.

In *New York, P. & N. R. Co. v. Peninsula Produce Exchange*, 240 U. S. 34, it is said: "The words 'any loss, damage, or injury to such property,' caused by the initial carrier or by any connecting carrier are comprehensive enough to embrace all damages from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination."

In the report of the senate committee on interstate commerce accompanying the second Cummins amendment, speaking of the amendment, it is said "Its purpose is to restore the law of full liability as it existed prior to the Carmack amendment of 1906, so that when property is lost or damaged in the course of transportation, under such circumstances as to make the carrier liable, recovery is had for full value or on the basis of full value."

Under the facts, I am of the opinion that the carrier is liable, under the common law, as an insurer.

MORRISSEY, C. J., concurs in this dissent.

DEWITT Y. DORWART ET AL., APPELLANTS, V. SAMUEL W. HOCKETT, APPELLEE.

FILED JULY 2, 1919. No. 20495.

1. **Brokers:** ACTION FOR COMMISSION. Error cannot be predicated on the dismissal of a suit brought by the agent of the owner of land against the drawer of a check given to such agent for the purchase price thereof, less an incumbrance, where the deed of conveyance was changed in a material matter by such agent without the knowledge of either the owner or the proposed buyer, and the sale for that reason was not consummated.
2. **Bills and Notes:** WANT OF CONSIDERATION. In such case the consideration for the check wholly failed, and suit cannot be maintained for any part thereof, even though the buyer subsequently purchased the land directly from the owner.
3. **Evidence** examined, and, though conflicting, *held* sufficient to sustain the judgment.

APPEAL from the district court for Red Willow county: ERNEST B. PERRY, JUDGE. *Affirmed.*

J. L. Rice, for appellants.

Eldred, Cordeal & McCarl and *J. E. Kelley, contra.*

DEAN, J.

Plaintiffs are real estate agents, who sued to recover on a bank check for $233.35 drawn by defendant in a land transaction. Defendant pleaded failure of consideration. A jury was waived, and on submission of the testimony of the parties the suit was dismissed, and plaintiffs appealed.

Laura M. Beem, who is not a party to this suit, owned a 160-acre farm in South Dakota mortgaged for $850. Some interest and taxes were unpaid which she was unable to pay. It is not denied that her husband, J. S. Beem, who acted with her authority throughout, agreed with plaintiffs that they might sell the land if they would give the Beems $25 net from the proceeds. Thereafter plaintiffs began to negotiate with defendant, Hockett, for the sale of the Beem tract to him.

There is evidence tending to establish these facts: At their first meeting defendant was told by plaintiffs that the land was mortgaged for $800; that the owner wanted $100 net to him; that $80 or $85 taxes were unpaid; that plaintiffs wanted a $100 commission; that the transaction was not closed at the time because defendant wanted to put in some personal property instead of paying all cash; that defendant said that if he had to pay all cash he would pay $300 and assume the $800 mortgage, making the purchase price $1,100; that a few days later plaintiffs went out to defendant's farm, taking with them a deed to the land, which provided that defendant should assume a mortgage for $850; at the same time they requested a check for $350; defendant refused to accept the deed or give the check; that plaintiffs then said they would accept a check for $300, which he refused to give. Finally, plaintiffs induced defendant to give them his

check for $250, which was post-dated 10 days, to the end that defendant might have time to obtain a report respecting the land. A few days later defendant went to plaintiffs' office to close the transaction. He testified that plaintiffs at that time told him a mistake had been made, and that a check for $233.35, namely, the check sued on, was all that would be required; that he did not know what the mistake was, but relied on plaintiffs, signed the check and took the deed; that immediately after leaving the office he went to a bank to make a deposit to cover the amount of the check; that the bank was closed, and upon examining the deed he discovered a provision requiring him to pay certain back interest and taxes; that he at once returned to the office and told plaintiffs there was a mistake, and that if he had to pay back interest and taxes the check was written for too great an amount, and asked plaintiffs to correct the mistake, and demanded that the deed be made to conform to the agreement; that his demands were refused; that he thereupon offered to return the deed, and demanded a return of his check; both the offer and the demand being refused, he then notified the bank not to pay the check.

Respecting the interest and tax clause, defendant testified it was not in the deed when he first saw it, and on this point he is corroborated by Mr. Beem, who testified that it was not in the deed when signed by him and his wife and forwarded to plaintiffs. It is clear that there is sufficient testimony to establish the fact that the deed that was finally delivered to defendant by plaintiffs was not the deed that was contemplated by the agreement, and that under the evidence the defendant was justified in returning the deed and in stopping payment on the check.

It seems that defendant, being unable to close the transaction with plaintiffs, afterwards bought the land directly from the Beems. Plaintiffs now contend that they are entitled to the amount of the check, less the

back interest and taxes, on the theory that there was only a partial failure of consideration. We do not think so. The suit was brought to recover on a check given for the full amount of cash required on a land sale in excess of the incumbrance thereon. The transaction was not consummated at the time the suit was begun. It was through no fault of the defendant that the sale was not consummated and that the transaction was never closed with plaintiffs. It seems clear that there was a total failure of consideration. The testimony conflicts, but is amply sufficient to sustain the judgment of the trial court.

The judgment is

AFFIRMED.

MARSH & MARSH, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JULY 2, 1919. No. 20472.

1. **Carriers: INTERSTATE SHIPMENTS: DELAY: LIABILITY.** When a railroad company contracts to deliver goods at a certain place of business in another state, and is compelled to transfer them to another railroad for delivery, it is liable for damages for delay in delivery the same as if the delay had occurred on its own line.
2. **———: CLAIMS: ATTORNEY'S FEES.** The attorney fees provided for in section 6063, Rev. St. 1913, are in the nature of costs, and may be allowed in all cases provided for in that section.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

Wymer Dressler and *C. H. Gorman,* for appellant.

John H. Grossmann and *Baker & Ready, contra.*

ALDRICH, J.

This is an action at law brought by plaintiff, a produce dealer of Omaha, to recover $147.61 as damages to a carload of cheese shipped from Plymouth, Wisconsin, Davis Brothers Cream Company, on June 13, 1914, and consigned to the plaintiff at Omaha.

The plaintiff's place of business at Omaha is at the corner of Twelfth and Jones streets, where it uses the warehouse and cold storage plant of the Fairmont Creamery Company. The defendant railroad company entered into a contract with plaintiff to deliver these goods. The car arrived over the defendant's lines on the morning of June 17, at 2:30 A. M., and the record discloses that it was examined and found in good condition.

The defendant company recognized this car was to be delivered at the warehouse, and finally caused it to be switched over there. The Union Pacific Railroad tracks alone accommodated the Fairmont Creamery warehouse, but there was a delay in getting this car over to the warehouse, and it was during this delay that the damage complained of was caused. The weather at the time of this shipment was very hot, and the ice getting out of the car left the cheese subject to the hot weather without ice during the three or four days that it lay in the Omaha yards, thus causing the damage complained of. The defendant claims that, when it delivered the car to the Union Pacific, its liability ceased, and that whatever damage resulted it was not responsible for. The plaintiff insists that the defendant contracted to deliver the car to plaintiff's warehouse, and that it procured the services of the Union Pacific Railroad Company to so place the car there, and paid for its services. It is claimed that the defendant delivered the car to the Union Pacific Railroad Company according to the usual method and custom employed in delivering shipments to connecting carriers, and the record shows that upon arrival the car was ordered delivered to the Fairmount Creamery Company, and it is also a matter of record that the car was transferred to the Union Pacific. These in the main are the facts at issue in this case. The plaintiff alleges two grounds for recovery in the issues hereby tendered: "(1) Negligence of the defendant company in its transportation of the car with knowledge of its perishable contents, and before final delivery of the car to the plain-

tiff. (2) Its acknowledgement of liability upon an inspection of the car, and its agreement to pay the loss when ascertained."

The defendant admitted the receipt on June 13, 1914, of the car at Plymouth, Wisconsin, consigned to the plaintiff, and denied all its charges of negligence, and alleged the defendant transported the shipment to Omaha strictly in accordance with its instructions, and claimed further that the car arrived in Omaha on the 17th of June, 1914, at 2:30 A. M., and that the plaintiff was duly notified of the arrival of the car, and that at plaintiff's special instance and request the defendant delivered the car to the Union Pacific Railroad Company, and had it switched to the warehouse of the Fairmont Creamery Company by the Union Pacific Railroad Company, that the former should notify the latter of all cars to be switched to it for unloading, and that the Union Pacific Railroad Company did switch this car to the Fairmont Creamery Company, which plaintiff used for unloading, promptly upon receipt of notice to do so. The case was tried on these issues, and the jury rendered a verdict in favor of the plaintiff for the sum of $181.62.

The plaintiff also requested allowance of an attorney's fee, and the record discloses that there was allowed the sum of $75 for this purpose. From this situation, or state of facts, the defendant appeals. There are two issues to be determined: (1) Was the defendant negligent or responsible for the delay caused in the delivery, under the Nebraska statute, of these goods to the plaintiff herein? and (2) is defendant liable for an attorney's fee?

This was an interstate shipment under the following described bill of lading: "Received * * * at Plymouth, Wisconsin, June 13, 1914, from the Davis Brothers Cheese Company, the property described below in apparent good order, except as noted (contents and condition of contents of packages unknown) * * * which said company agrees to carry to its usual place of delivery at said destination consigned to Marsh & Marsh, destination Omaha, State of Nebraska."

It will be noted from the above that the plaintiff and defendant entered into a contract whereby the defendant was to deliver this car to the usual place of delivery at its destination to Marsh & Marsh. It is admitted that the defendant had made many shipments over its lines of railway, and that it was familiar with plaintiff's warehouse in Omaha, and that this was the place of delivery and the destination of the car; and it also knew that the only way for the car to reach its destination was, upon its arrival over its tracks, to employ a Union Pacific engine to deliver it to Marsh & Marsh's warehouse. On June 16, 1914, at 5:45 P. M., the record shows that plaintiff gave to defendant's freight house at Omaha an order as follows: "On arrival of D. L. & W. 6249, cheese consigned to Marsh & Marsh, set to Union Pacific for Fairmont Creamery." Thus it is plain the defendant recognized its obligation and responsibility to deliver the car of cheese to the plaintiff's place of business, and that the damage that occurred to the cheese occurred after its arrival in the Omaha railway yards; and, as the defendant was under contract to deliver this merchandise to the plaintiff at its place of business, then it must follow that whatever damage occurred to the merchandise resulted through the negligence of the defendant. When the defendant entered into a contract to deliver this car and its contents to Marsh & Marsh at the usual place of business in Omaha, it also contracted to deliver it at the place where it usually has its merchandise delivered, and the defendant was cognizant of it, and it appears undisputed in the record that they were familiar with the defendant's location, and to carry out the terms and conditions of their contract they employed the Union Pacific Railroad Company to deliver the alleged damaged cheese to plaintiff's warehouse, and paid them for the service so rendered. It is undisputed also that the defendant was the initial carrier from a point in Wisconsin to a point at plaintiff's warehouse in Omaha, on the Union Pacific tracks, and procured the services of the Union

Pacific company to deliver the car at the Fairmont Creamery Company's warehouse. It was carrying out in detail its written contract already entered into with plaintiff. Then if upon the arrival of the car the cheese therein was in good condition, and upon its receipt at the warehouse, a few days later, it was damaged, and in an unsalable condition, it must follow that whatever damage resulted after the car's arrival in Omaha the defendant is liable for.

It also appears the defendant examined the condition of this car and agreed to settle for all damages. We have examined the instructions, and it would seem that the defendant has no cause of complaint as to any of them, because they were favorable to the issues of the defendant.

Complaint is also made that the allowance by the court of an attorney's fee of $75 is wrong, and should not be permitted to stand. The record shows that this was an interstate shipment; that the shipment began in Wisconsin and ended in Omaha. We suppose this claim was allowed under section 6063, Rev. St. 1913. The provision of this statute, so far as it applies here, is as follows: "In the event such claim, which shall have been filed as above provided within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at 7 per cent. per annum from the date of filing of such claim, and shall also be liable for a reasonable attorney's fee to be fixed by the court." Seven per cent. is the legal rate of interest in this state in the absence of contract. The court named $75 as an attorney's fee. The amount is not exorbitant or unreasonable, but the serious question is: Can this statute above quoted be made applicable to an interstate shipment?

The statute under consideration provides for the allowance of attorney's fees in all cases where claims for loss or damage for which a common carrier may be

liable shall not be adjusted and paid within a fixed period. By this statute no attempt is made to regulate interstate commerce. Neither is the imposition of attorney's fees to be considered as a penalty; rather it is to be considered as a part of the costs incurred in the action, although not so denominated in the statute. The allowance is clearly in the nature of costs. It is not a fixed sum to be recovered as a part of the judgment, but its amount is to be fixed by the court. *Smith v. Chicago, St. P., M. & O. R. Co.*, 99 Neb. 719. As was said by Mr. Justice Pitney in *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642: "Manifestly, the purpose is merely to require the defendant to reimburse the plaintiff for a part of his expenses not otherwise recoverable as 'costs of suit.' So far as it goes, it imposes only compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand. The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle." Taking this view of the matter, the case of *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, cited by appellant, is not applicable.

The judgment of the district court must be

AFFIRMED.

MORRISSEY, C. J., not sitting.

SEDGWICK, J., concurring.

The defendant received this property for shipment from a point in Wisconsin to Omaha. When it arrived in Omaha, it remained at defendant's station and yards several days, which delay in delivery caused the damage complained of.

1. The first question presented is whether the defendant had undertaken to deliver the goods to the con-

signee at its place of business in Omaha, and so was liable for damage caused by the failure of prompt delivery. It appears that similar shipments had been made to this plaintiff and had been delivered at the plaintiff's place of business, which was done by transfer over the lines of a connecting carrier, and such shipments were delivered by the defendant to the connecting carrier for that purpose. It also appears that the charges of the connecting carrier for this transfer were paid by the consignor to the defendant. The bill of lading recited that the defendant "agrees to carry to its usual place of delivery at said destination consigned to Marsh & Marsh, destination Omaha." The defendant having received compensation for this transfer when it accepted the goods for shipment, it follows that it undertook to cause this transfer to be made and the goods to be delivered at the place of business of the plaintiff. Under those circumstances, by the Carmack amendment, it is liable for any default of the connecting carrier.

2. The second question presented is as to the defendant's libility for an attorney's fee. Section 6063, Rev. St. 1913, provides: "In the event such claim, which shall have been filed as above provided within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at 7 per cent. per annum from the date of the filing of such claim, and shall also be liable for a reasonable attorney's fee to be fixed by the court." The trial court fixed an attorney's fee of $75. As this was an interstate shipment, and congress by the act of 1906 has provided the liability for loss or damage in interstate shipments, the states cannot add any liability for damage; and the question is whether this is an attempt to do so. If the attorney's fee is an additional burden upon interstate commerce, it cannot be allowed by the state. If it is merely a provision in regard to the local costs of the litigation, which was made

necessary by the delay of the defendant in adjusting the matter, it cannot be said to be a burden upon interstate commerce. The language of Mr. Justice Pitney in *Missouri, K. & T. R. Co. v. Cade,* 233 U. S. 642, which appears to be the unanimous opinion of that court, seems to justify the conclusion that under such circumstances an attorney's fee is properly taxable as a part of the costs of the case. That opinion says: "Manifestly, the purpose is merely to require the defendant to reimburse the plaintiff for a part of his expenses not otherwise recoverable as 'costs of suit.' * * * The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle." Although interstate commerce was not involved in that case, and the court was discussing other questions, the language used is so pertinent to the point involved here that, with some hesitation, I concur with the majority in holding that an attorney's fee was properly taxable by the court as a part of the costs in this case. In view of the fact that we have had various statutes in this state providing for attorney's fees, and that such statutes have universally been construed as dealing entirely with costs that may properly be taxed, it seems reasonable that this statute should also be so construed.

The decision of the supreme court of the United States in *Charleston & W. C. R. Co. v. Varnville Furniture Co.,* 237 U. S. 597, is not in conflict with this view. In that case, the statute of South Carolina made the liability of the last carrier extend "to losses on other roads in other jurisdictions and increases it by a fine difficult to escape;" whereas the Carmack amendment "requires the initial carrier to issue a through bill of lading and makes it liable for all damage anywhere on the route." This, the court say, "cannot be sustained as a help to the

federal statute because it goes farther than congress has seen fit to go;" and the court refers to *Boston & Maine R. Co. v. Hooker,* 233 U. S. 97, and say: "It is true that in that case the inclusion of the attorney's fee not exceeding $20 in the costs upon judgments for certain small claims was upheld, although incidentally including some claims arising out of interstate commerce. But apart from the effect being only incidental, the ground relied upon was that the statute did not 'in anywise enlarge the responsibility of the carrier' for loss or 'at all affect the ground of recovery, or the measure of recovery.'" This seems to reaffirm the doctrine of the *Boston & Maine* case that the effect of taxing an attorney's fee as part of the costs is only incidental, and does not in anywise enlarge the responsibility of the carrier for loss, or at all affect the ground of recovery, or the measure of recovery. This is in harmony with the language above quoted from *Missouri, K. & T. R. Co. v. Cade,* 233 U. S. 642.

I, therefore, concur in the conclusion reached by the majority upon this point.

CORNISH, J., dissenting.

A law which requires a litigant to pay the attorney's fees of the opposing party if he is defeated, and which does not require the opposing party to pay his attorney's fees if he wins is in the nature of a law imposing a penalty. No other conclusion is reasonable. It would amount to a denial of the equal protection of the laws, unless enacted as a police regulation to prevent a common wrong in the refusal by carriers to entertain and pay just claims. I seriously doubt the existence of such customary wrong at the present time.

To me it is equally apparent that such a law must be a burden upon commerce. As a matter of business prudence, the common carrier will pay doubtful claims, small in amount, rather than run the risk of having finally to pay not only the claim, but, in addition thereto, an attorney's fee that may amount to more than the claim.

The result must be that in states having the law the emoluments going to the carrier for its service must be less than in those states not having the law.

It cannot be assumed that resistance of a claim is wrong, although it is finally upheld in court. Such presumption arises only by relation.

The law does not denominate the attorney's fees as costs. If it did, and the amount was limited and the right restricted, a different question might arise. This fact, it appears to me, distinguishes the case in hand from the federal cases cited. The statute uses the words, "reasonable fee." The word "reasonable," under the previous decisions of this court, is hardly restrictive. If $100 worth of service is performed by the attorney in prosecuting a $10 or $25 claim, his reasonable fee is $100.

DANIEL W. DONOVAN, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES.*

FILED JULY 2, 1919. No. 20959.

Highways: SUIT TO ESTABLISH: LIMITATIONS. Evidence examined, and *held*, that the road was abandoned for a period of more than ten years before plaintiff began his action, and that his action is barred by the statute of limitations.

APPEAL from the district court for Merrick county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

W. T. Thompson and *Reese & Stout*, for appellant.

W. H. Thompson, Lloyd G. Thompson, John C. Martin, Thomas W. Bockes, Edson Rich and *C. A. Magaw, contra.*

ALDRICH, J.

This action in equity was commenced on the 16th day of December, 1914. Plaintiff filed his amended petition in the district court for Merrick county, in which he alleges that he was a citizen and resident of Merrick county, residing within five miles of the public road in

*Reversed on rehearing. See 104 Neb., p. ——.

question; that the road was legally established; that there were legal proceedings instituted to establish the road prior to April 24, 1895, and that this wagon road followed the general line of the Union Pacific main track through Merrick county to the Hall county line.

As the defendants admit that the statement of fact and issues in the appellant's brief are correct and accurate, we copy therefrom, as summarized, sections 3, 4, 5, 6, and 7 of plaintiff's petition:

"That the defendants, without legal right to do so, have closed the road to public travel, and have obstructed the same, and have and are threatening to prevent plaintiff, and the general public, from traveling over and upon said highway, and have plowed and planted it to crops and rendered it unfit for travel, and claim the right to so use the same, either as owners or lessees, and have denied and are denying the right of plaintiff and the public to the use of such highway.

"That on the 24th day of April, 1895, in an action then pending in the circuit court of the United States, in the district of Nebraska, to which the receivers of the Union Pacific Railway Company, the county of Merrick, the board of supervisors of said county, and the Union Pacific Railway Company were parties, it was decreed that the highway in question should be located so that the north line of said highway is and shall be 63 feet south from and parallel to the center line of the main track of said railroad as then constructed through Merrick county, etc., that the railway company should have the right to put in culverts and ditches as needed, etc.

"That said decree was rendered on stipulated facts, to which stipulation the Union Pacific Railway Company, the receivers, Merrick county, and the board of supervisors of Merrick county were parties. That said decree was final, and permanently fixed the right of the public to maintain and use said highway.

"That said public road has never been vacated, and was used for many years until fenced and plowed and obstructed by defendants.

"That plaintiff prosecutes this action in his own behalf and on behalf of others similarly situated; that by closing said road plaintiff, and others, will be damaged and will suffer loss and inconvenience; that said highway is the shortest, best and most convenient road from plaintiff's premises to Grand Island, and plaintiff is without adequate remedy at law."

Plaintiff is a private citizen of Merrick county, and it is admitted that he resides within five miles of the road in issue, and that he has the right to maintain this action. The statute of limitations, which we are met with at the threshold of this inquiry, is found in section 7564, Rev. St. 1913, and provides: "An action for the recovery of the title or possession of lands, tenements or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of action shall have accrued: Provided, no limitations shall apply to the time within which any county, city, town or village or other municipal corporation may begin an action for the recovery of the title or possession of any public road, street, alley or other public grounds or city or town lots."

The issue here tendered by the pleadings would seem to be: Has this highway at any time since its organization been unused or abandoned, or has it been a regularly recognized and traveled highway? The legal questions are fairly well settled in this issue. The question is largely one of fact and the section of the statute just quoted applies to the issues herein. It is in evidence that this highway was established west of the town of Chapman across Merrick county in the year 1874. While it is true that the statute was not in every detail complied with, and many things were left undone which the statute requires to have been done, nevertheless it was for years recognized as a regular and correct proceeding, and that the public had the right to travel over this highway attempted to be established at this time: Thus did matters proceed until 1895, when proceedings were instituted in

the federal court for the purpose of establishing finally the highway, which was an issue before the county board of Merrick county in 1874, thus recognizing whatever rights the public had obtained during the year of 1874 had been abandoned, and that it was necessary for the public to maintain further proceedings to establish the rights which had been lost or thrown away after 1874. In the proceedings which took place in the federal court in and for the district of Nebraska in 1895, there was a stipulation or agreement entered into between the defendant, the Union Pacific Railway Company, and the county board of Merrick county. This agreement was adopted and made the decree of the court, and thus by decree of the court a road was established parallel to the right of way of the Union Pacific Railway Company.

From 1894 most of the country on the south side of the Union Pacific road track was open and unfenced, and there was some travel on a wandering and deviating line along the right of way of the Union Pacific west of Chapman. This trail was not a stright line and did not proceed as a road surveyed and marked out and worked, but was simply in the nature of a trail wandering and deviating in its character. There is no evidence that it was ever worked nor a dollar expended upon its improvement. It also is undisputed evidence that there were groves and trees and other incumbrances along this alleged highway, and that the travel did not interfere with groves and trees growing upon the alleged right of way surveyed and platted by the engineer of the county of Merrick. Thus there are evidences on every hand that this road as alleged to have been established in 1874 was simply a paper road and had never proceeded beyond that stage. There is no evidence in the record that the officials, or any of them, whose duty it is to see to roads and keep them in repair, ever did an hour's work, or expended a dollar in money, in keeping up this road and causing it to have the appearance of a public highway. There is in the record no evidence whatever that the

board of supervisors of Merrick county ever exercised any dominion over this road from the Hall county line eastward across Merrick county from the Hall county line to Chapman. Extensive groves have been allowed to grow up; land has been fenced off for many years by farmers and ranchmen; and the entire country, so far as ever having been laid out and marked for this road, has been used and occupied exclusively for farming and stock purposes, and whatever easement, if any, the public acquired by the several legal proceedings of record, they never proceeded any further than making a paper record. Actually neither Merrick county, nor any of its proper officials, ever exercised any authority, or attempted any control, or expended any labor, or cash, for the betterment of the road in question.

The record discloses this was an official report made by a committee, which we will call viewers of the land, to the county board of supervisors. This was done sometime (if we quote the record correctly) in April, 1894. This condition such as we have described is a condition which could not have occured in a day or a night; there are groves and trees which could not have grown up over night, or have been in the condition that they were at the time proceedings were started in federal court in 1895. While we admit that it is true that this situation proves nonuser to a certainty, and for a period of more than 20 years, yet we do not claim that nonuser is at all sufficient to maintain title. If there had been any actual occupancy, tangible and real, beyond paper, this nonuser would be of no force and effect only in so far as it expresses an intention on the part of the public as to what it was going to do with this road for travel purposes, and nonuser is met further in a question like this in so far as it indicates an intention of abandonment, and abandonment for a term of ten years or more in this state is sufficient to deprive the public of the road which has been so treated; but we do not claim that nonuser may create abandonment, but it does clearly declare, and

correctly, we believe, the intention of the parties involved, and that intention may become proof of the purpose or relation that the parties intend to assume toward the road in controversy. Then if this intention is followed up by actual abandonment, and the public fails to recognize its duties and obligations toward this road in the way of labor and repair, it is evident and indisputable, as shown in the record, that the public never intended to occupy and use this alleged road for a public highway. The record does not disclose that the county board of supervisors of Merrick county ever surveyed and laid out the road in issue. Then if it has never taken any of these statutory steps, but allowed the road to grow up to groves and trees, and to be fenced off for farming and stock purposes for a period of over ten years, as this record shows, what statutory law is there in Nebraska that gives it the right of occupancy of the strip of land in question, similar to the Union Pacific, for road purposes? The public, as well as this plaintiff, has abandoned in every particular whatever easement or right that it had ever acquired, or pretended to acquire, in relation to this road. It never by any act dedicated this road to public service. *Postal v. Martin*, 4 Neb. (Unof.) 534.

It cannot be said that abandonment of this road gives any great inconvenience, or causes any great hardship, because, if it had, why would it have been abandoned? If it was so necessary to the welfare and prosperity and convenience of any given set of men, or community, why would they suffer all this inconvenience and annoyance when they could have prevented it by using it if it was so necessary? The record seems to disclose that the road laid out from Chapman south within a mile or two of the Oregon trail is the one used by the public generally, and has been for many years last past in traveling from Chapman to Grand Island; in other words, the record does not disclose that there is any necessity or convenience to be obtained in establishing this road. The report of the viewers appointed by the county com-

missioners in 1894, it occurs to us, is dependable in all respects, and is an impartial statement of the facts, and, as a matter of fact, is corroborative of witnesses, and portrays a true condition of the treatment of this strip of land for highway purposes. There is no question whatever about the intention of the parties to this transaction, and, that being plain, it is proof, in our judgment, of actual abandonment for a period of more than ten years. *Wiggins v. McCleary,* 49 N. Y. 346; *Moore v. United Elkhorn Mines,* 64 Or. 342; *O'Dea v. State,* 16 Neb. 241.

The Union Pacific Railway Company acquired by act of congress in 1864 an easement for the operation of the railroad through and upon this strip of ground involved in the issues of this road case, and as a matter of law it is axiomatic that whatever the public has done with reference to obtaining a roadway over and upon the railroad land in question, and having once obtained it, if it afterward abandoned this right or easement, then it must of necessity revert back to the defendant railway company, and it is a recognized doctrine that after acquiring land for a specific purpose, and afterward it is abandoned, then the easement is forfeited. *Perry v. Staple,* 77 Neb. 656; *Baldwin v. Trimble,* 85 Md. 396, 36 L. R. A. 489. This principle of abandonment as applied to the use of roads and the effect of it is recognized by the Ohio supreme court in *Nail & Iron Co. v. Furnace Co.,* 46 Ohio St. 544, 5 L. R. A. 652. The only reason that the court did not hold that this road had been forfeited by reason of abandonment was that the abandonment did not continue over the statutory period of 21 years; but in Nebraska the statutory period is only 10 years. It appears of record that by reason of the allowing of groves to grow up into large trees, and fences to be used to inclose the ground in issue, over the alleged road right of way, and from the farming business that went on, it was clearly the intention of the public, as well as that of the plaintiff, to pay no attention or to make no

further claims to their easement in and to the premises in question. The following report, then, or rather the digest of it, is given by the committee who made the report for and in behalf of the county supervisors, and we unhesitatingly say that it is corroborative of the position we have taken in the foregoing discussion.

The record discloses that the county board of Merrick county appointed a committee for the purpose of viewing and examining the public road in question. An examination of this report will show that the committee made a careful painstaking investigation, and nowhere in the record does it show that Merrick county ever expended any labor or funds in repairing or building this road, but it met no obligation and showed no interest whatever. The report also shows that on section 32, township 12, range 8, there is a grove of cottonwood trees 56 feet from the south rail and 40 rods long, also a wire fence 40 rods long and 74 feet from the south rail at west end and 60 feet from rail at east end. On section 33, township 12, range 9, at Lockwood there is a wire fence 4 rods long, 66 feet from rail, and stockyards commencing 65 feet from rail and extending back 128 feet. On section 14, township 12, range 8, there is a fence 104 rods long 45 feet from rail, and a grove of box-elder and cottonwood trees 108 feet from rail on west end, and on section 18, township 12, range 8, there is a row of cottonwood trees 62 feet from rail. Also on section 7, township 12, range 7, Chapman town site, there is 40 rods of fence 97 feet from rail, and in section 8, township 12, range 7, there is 115 feet of grading 1 x 16, 55 feet from rail to north ditch, also 416 feet from grading 1 x 16, 60 feet from rail to ditch and 13 box-elder trees 69 feet from rail. In section 4, township 12, range 9, cottonwood trees 60 feet from rail, and on the northeast quarter of this section there is a grove running parallel to road 116 feet from rail. So this report continues detailing the groves, the fences, and the occupation and use of this alleged road by farmers, running all

the way from somewhere near Central City to the Hall county line. It is absolute and convincing proof of the nonuser of this alleged road for traveling purposes. We suppose that in pioneer days there was possibly a path or track made along the Union Pacific right of way to accommodate itinerant travelers; but the record and the physical condition of the road show that it was not regularly traveled and never had been. This condition prevailed until 1899, when the defendant railway company exercised its right of domain over the strip of ground sought to be used now and then by the public for road purposes.

Neither the public, nor a private individual, has any right to sleep upon his rights so long that witnesses are dead or have departed from the territory in question. It is the law of Michigan that a highway can be partially discontinued by nonuser. *Gregory v. Knight,* 50 Mich. 61. It is the recognized law of this country that "every right or interest in, title to, or ownership of property may be lost by abandonment." 1 C. J. 9, sec. 12. In this case there is evidence of nonuser, which being applied to the question of abandonment of the easement that the plaintiff asserts in the roadway in controversy is evidence of intention. Whether or not he has abandoned his easement depends upon circumstances, and is a question of intention always. Then again in the decree or stipulation entered into when this action was before the federal court in 1895, it is noticeable that neither the county of Merrick nor any one acting for it has ever performed a single agreement entered into at that time or place. The fact is that neither the Merrick county officials nor this plaintiff, nor any one similarly situated as they, have ever exercised any dominion over or performed a single act in recognition of this road, and the record discloses that possibly whatever travel there may have been from Chapman to Grand Island goes a mile or two south of Chapman, and this was on the Oregon trail to Grand Island, and all the travel upon this road has been fitful

and never at any time discloses a well-established recognition of this road, but rather shows no intention on the part of any one either directly or indirectly to use it as a public highway. The record discloses that this Oregon trail is about 1 1/2 miles south of the track near Chapman, and parellel to the Union Pacific Railroad Company, and is more convenient and more easily accessible in going from Chapman to Grand Island than the path used along the Union Pacific right of way. The Union Pacific in fencing up this easement from Chapman to the Hall county line and leasing the railway right of way to farmers and stockmen was simply reoccupying territory or a strip of land that had been abandoned by the public and the plaintiff herein and those similarly situated.

In *Railroad v. French,* 100 Tenn. 209, 66 Am. St. Rep. 752, is was held by the Tennessee supreme court that a user by an adjacent landowner of the right of way up to the line of road for an indefinite time is not adverse to the road easement. To the same effect is *Southern P. R. Co. v. Hyatt,* 132 Cal. 240.

In concluding this discussion, permit us to say that this court has held: "Proceedings had under a statute to create a highway should be so definite and certain that a competent surveyor could, with the record before him, point out this location." *Warren v. Brown,* 31 Neb. 8. Applying this holding to the question at issue, the appellant's contention wholly fails, because it is a matter of record that there are no landmarks, no corners and none of the usual methods of recognition have ever been established or pointed out. The record does not disclose any evidence of a road there, or any travel, only a wandering and deviating path along the railway right of way.

So, from every standpoint, we must conclude that the judgment and finding of the trial court should be, and it is

AFFIRMED.

SEDGWICK, J., not sitting.

GLOBE INDEMNITY COMPANY, APPELLANT, V. GUST LARSON, APPELLEE.

FILED JULY 8, 1919. No. 21026.

Master and Servant: WORKMEN'S COMPENSATION ACT: APPEAL. On appeal by either party from an award of the compensation commissioner in a cause arising under the employers' liability act, the district court of the county, where the employee could sue the employer at the time of the injury, is the proper court to which the cause should be submitted on appeal.

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

Courtright, Sidner & Lee, for appellant.

J. H. Barry, contra.

CORNISH, J.

When either party to an action, arising under the employers' liability act, refuses to accept the award made by the compensation commissioner, to what district court may he cause the matter to be submitted so that the court may have jurisdiction to hear and determine the cause as provided by statute?

The injury for which the employee (named as defendant herein) asks compensation occurred in Saunders county, in which county the employee resided. The employer resided and had his place of business just across the line in Fremont, Dodge county. The parties not agreeing on the amount of compensation, the employee caused the matter to be submitted to the compensation commissioner, at Lincoln, who took testimony in both Saunders and Dodge counties; summons being served on the plaintiff insurance company in Dodge county. At the hearing before the commissioner, the claim of the employee was resisted by the plaintiff (appellant) in the place of the employer. The plaintiff, refusing to accept the award, filed its petition, provided by statute, in

the district court for Dodge county. A special appearance made by the defendant (appellee) was sustained, and the cause appealed to this court.

The question turns largely upon the interpretation of the language used in the employers' liability act, as amended in 1917 (Laws 1917, ch. 85). Section 3674 of the act, as amended, provides for service of notice of the injury by the employee upon "the employer as soon as practicable after the happening thereof." Section 3677 provides that the interested parties shall have the right to settle all matters of compensation between themselves in accordance with the provisions of the article. Section 3678 provides that disputed claims shall "be submitted to the compensation commissioner for an award." Then follows: "If either party at interest is dissatisfied with the award of the compensation commissioner, then the matter may be submitted to the district court of the county which would have jurisdiction of a civil action between the parties," or, as stated in section 3693, "the district court which would have jurisdiction in an ordinary civil case involving a claim for the injuries or death in question."

Section 3680 provides the procedure which "either party" may take in case a dispute arises.

It seems clear that the submission of the cause to the district court provided for is in the nature of an appeal from an award. This is shown also by the language used in subdivision g, sec. 29, ch. 85, Laws 1917, in which the proceeding is demoninated an "appeal." Neither the employer nor the insurance company has a right of action against the employee.

While the language used is indefinite and unsatisfactory, we think that, as affecting the question of jurisdiction, the words "either party" (which mean one of two) refer to employer and employee, and the "district court" to whom the cause should be submitted is the one to which the employee would be compelled to resort in a suit for damages for injuries received. In other

words, the legislative intent was to leave the forum for an action between the parties the same as it was before the enactment of the compensation law. This would be the county in which the employer resides or in which service could be had upon him—Dodge county. This would be the county where, in nearly all cases, both parties would reside, where the witnesses would reside and the cause be prosecuted with the least expense.

This conclusion, of course, will not permit the one appealing to select the forum. If, however, we were to hold that, where the statute uses the words "either party," the insurance company may be one of the two parties in mind (depending upon who is resisting the claim), then it might follow that the insurance company, as appellant, could have the cause submitted in any one of a large number of jurisdictions, for the reason that the insurance company might be sued by the appellee in any one of a large number of jurisdictions.

The jurisdiction should be determined as of the time the cause of action arose.

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

REVERSED.

J. WARREN KEIFER, JR., APPELLANT, V. H. R. SMITH, ET AL, APPELLEES.

FILED JULY 16, 1919. No. 20417.

Officers: LIABILITY: DISCRETION. In the absence of malice, oppression in office, or wilful misconduct, public officers cannot ordinarily be held liable for mistaken exercise of discretion, or error in judgment, in the performance of official duties.

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

Stocker & Foster, for appellant.

Charles A. Chappell, Burkett, Wilson & Brown, George W. Ayres and *Nye F. Morehouse, contra.*

MORRISSEY, C. J.

The legislature of 1911 created a stallion registration board, whose duty it was to pass upon pedigrees, and to license stallions for breeding purposes either as pure breds or grades. The members of the board were the secretary of the state board of agriculture, the professor of animal husbandry of the state university, and the deputy state veterinarian. In 1912 the board examined a purported pedigree of a stallion known as "Marquis De Wierre" and certified him as a pure bred Percheron. The horse was not a pure bred, but a grade, and upon a re-examination, two years later, the papers theretofore examined were found to be not genuine, and a renewal of the license was refused.

Plaintiff sued the members of the board for damages resulting from their alleged incompetence, or negligence, in failing to detect the invalidity of the pedigree at the time of its original examination. The petition alleges that the papers were submitted to defendants under a contract obligating plaintiff to purchase the horse, provided he passed the board as a pure bred; that, relying upon the certificate issued by defendants, plaintiff did so purchase him, paid the price of a pure bred for him, and stood him to public breeding as a pure bred; that as a result of defendants' negligence plaintiff suffered damages in the sum of $3,000. The trial court sustained demurrers on the part of each of the defendants to the amended petition, and plaintiff appeals.

The statute made provision for resort to certain specified books in ascertaining whether a pedigree was signed by the proper officers of recognized stud associations, and whether such signatures were genuine. These acts necessarily involved the examination of evidence and the exercise of judgment. The allegations of the petition that "the numbers on said papers purporting to be a good pedigree should have shown * * * that the said paper was void and of no effect," and that "the signature on said purported pedigree should have in-

stantly put the defendants * * * on guard as to its validity," sufficiently indicate that defendants' duties were more than ministerial in character. The rule is well established that in the absence of malice, oppression in office, or wilful misconduct, public officers cannot be held liable for mistaken exercise of discretion, or error in judgment, in the performance of duties of a quasi-judicial nature. 22 R. C. L. p. 485, sec. 163; *State v. Hastings,* 37 Neb. 96. The duties of the board in determining the genuiness and validity of the pedigree papers fell within this rule. There can be no liability for mere error or mistake in judgment in the performance of these duties, and the demurrer to the petition was properly sustained.

Several other propositions have been urged by defendants in support of the judgment of the district court. Among these is the claim that defendants could in no event be liable as public officers because they never occupied a *de jure* office. This claim is based on the fact that chapter 1, Laws 1911, which created the stallion registration board, was subsequently declared unconstitutional as an attempt on the part of the legislature to create state officers. *Iams v. Mellor,* 93 Neb. 438. Whether defendants might be *de facto* officers, even though no *de jure* office existed, it is unnecessary to decide.

The judgment of the district court is

AFFIRMED.

ROSE, J., dissents.

HARRY W. HARRINGTON ET AL., APPELLEES, V. MARION VOGLE, DEFENDANT: MASSACHUSETTS BONDING & INSURANCE COMPANY, APPELLANT.

FILED JULY 16, 1919. No. 20534.

1. **Notaries: NEGLIGENCE. Proof that a notary public signed a certificate of acknowledgment to a forged deed, and that no other persons of the name of the purported grantors could be located**

who might reasonably have made the acknowledgement in question, or have led the notary to believe that they were the owners of the land, is sufficient to establish a *prima facie* case of negligence or misconduct against the notary in failing to have satisfactory evidence of the identity of the persons making the acknowledgment.

2. **Petition** examined and *held* to state a cause of action.

3. **Evidence:** COMPARISON OF HANDWRITING. In an action on the bond of a notary public for making a false certificate of acknowledgment to a deed, the official signature on her bond filed with the county clerk may be received in evidence for the purpose of comparison of handwriting.

4. **Deeds:** INSERTION OF NAME OF GRANTEE. Unless a contrary intention appears, the regular execution and delivery of a deed vests in the person to whom it is delivered implied authority to complete it by inserting the name of the intended grantee where this has been left blank.

5. ———: ———. Where a deed appears to be regularly executed, acknowledged and delivered, it is *prima facie* evidence, as to innocent third parties, of the authority of the person holding the deed to insert her name as grantee.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

Strode & Beghtol and *Kennedy, Holland, DeLacy & Horan,* for appellant.

F. B. Baylor and *B. N. Robertson, contra.*

MORRISSEY, C. J.

This is an action on the official bond of a notary public for damages arising from a false certificate of acknowledgement to a deed. The notary made no appearance, and the case was tried against her surety, the Massachusetts Bonding & Insurance Company, without a jury. Plaintiffs recovered judgment for $2,000, the amount stipulated in the bond.

One Eleanor Sauers gave plaintiffs her deed to certain land in Banner county in exchange for a stock of merchandise. In the course of the negotiations she exhibited to plaintiffs a deed purporting to have been executed by Jennie Thornburn and Hannah Thornburn,

record owners of the land, with the acknowledgment duly certified by defendant Vogle, as notary public. The deed was a forgery. The title of Eleanor Sauers rested on the forged deed. Plaintiffs sued Eleanor Sauers for the fraud perpetrated upon them, and recovered a judgment, upon which they were unable to realize any amount. They thereupon brought this action against the notary and her surety.

The bonding company seeks a reversal of the judgment entered against it on the ground, among others, that the petition does not state a cause of action, and that the trial court erred in overruling its objection to the introduction of any evidence. The alleged defect in the petition is that the petition does not aver that the notary took the acknowledgment without knowing or having satisfactory evidence that the persons purporting to make it were the persons described in and who executed the instrument.

The petition alleges that it is the duty of a notary public in taking an acknowledgment to a deed to know, or to have satisfactory evidence, that the person making the acknowledgment is the person described as grantor; that defendant Vogle did not faithfully perform the duties required of her as notary public; that she took the acknowledgement to a deed which was a forgery; and that her certificate thereto is false and untrue. Defendant did not attack the petition by motion. As against an objection to the introduction of any evidence, the petition sufficiently alleged such breach of duty on the part of the notary as to entitle plaintiffs to maintain the action.

Defendant further contends that judgment is not sustained for the reasons: (1) That there is no evidence that the notary took the acknowledgment in question; (2) that there is no evidence that the notary did not know or have satisfactory evidence that the persons making the acknowledgment were the persons described in and who executed the instrument; (3) that plaintiffs' damage did not result from the act of the notary, since the

deed in question was incomplete and would not have passed title, even if the certificate had been true and the deed had actually been signed by the owners of the land.

Plaintiffs introduced in evidence the bond and official signature of defendant Vogle. They were regularly produced as part of the public record. Their genuineness and validity were beyond question, and, in the absence of any other proof on this point, they furnished a sufficient basis for a comparison with the signature on the deed, and a finding that the acknowledgment had been made by defendant Vogle. Rev. St. 1913, sec. 7912.

As to the contention that the judgment cannot be sustained because plaintiffs did not prove that the notary did not know or have satisfactory evidence of the identity of the persons making the acknowledgment, it is sufficient to say that plaintiffs showed that the deed was a forgery, and that no other persons of the name of Thornburn could be located who might reasonably have made the acknowledgment in question or have led the notary to believe that they were the owners of the land. This was sufficient to sustain the burden placed on plaintiffs and to establish a *prima facie* case of negligence or misconduct. 20 R. C. L. 335 sec. 17.

Defendant's final argument is that plaintiffs' damage did not arise from the notary's act. The evidence shows that the deed was blank as to the name of the grantee, and that Eleanor Sauers filled in her name after she had shown the deed to plaintiffs and attempted to get them to accept it as direct grantees. It is urged that, since this deed was incomplete, to plaintiffs' knowledge, it was ineffectual to pass title, even if the notary's certificate had been true, and hence plaintiffs' loss would have occurred without regard to the negligence or misconduct of the notary.

Unless a contrary intention appears, the regular execution and delivery of a deed vests in the person to whom it is delivered implied authority to complete it by insert-

ing the name of the intended grantee where this has been left blank. *Montgomery v. Dresser,* 90 Neb. 632, 38 L. R. A. n. s. 423. And where a deed appears to be regularly executed, acknowledged and deliverd, it is *prima facie* evidence, as to innocent third parties, of the authority of the person holding the deed to insert her name as grantee. We are not called upon to hold, as between the grantor and a person claiming to have relied upon such deed as subsequent innocent purchaser, that the authority of the holder of the deed may not be rebutted; but, in an action on the bond of a notary public for making a false certificate of acknowledgment to a deed, it cannot be successfully urged that the loss would have arisen without regard to the notary's act because the deed did not contain the name of a grantee. In such case a third party relying upon the certificate of the notary and the apparently regular execution, acknowledgment and delivery of the deed may assume the authority of the holder of the deed to insert her name as grantee.

The record contains no fact sufficient to excuse the notary's negligence or misconduct, and the judgment is

AFFIRMED.

UNITED STATES FIDELITY & GUARANTY COMPANY ET AL., APPELLANTS, V. EMMA WICKLINE, APPELLEE.

FILED JULY 16, 1919. No. 21010

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: LIABILITY. When a woman employee who has suffered an injury to one of her kidneys offers to permit an X-ray photograph of the kidney to be made, but refuses to permit the injection of coloregol into the kidney for the purpose of rendering it opaque, she does not necessarily by such refusal forfeit her right to compensation under the employers' liability act.

2. **Appeal:** LAW OF THE CASE. Where on an appeal under the employers' liability act it is held that an attorney fee cannot be taxed as part of the costs, that holding becomes the law of the case, and the question is not open for consideration on a second appeal.

3. **Master and Servant: WORKMEN'S COMPENSATION ACT: APPEAL: TRIAL.** In an appeal under the employers' liability act from an award of the compensation commissioner, the district court has authority to hear the cause as a suit in equity and to enter final judgment therein. Rev. St. 1913, sec. 3678.

4. ———: ———: ———: **AWARD.** Where an appeal is taken from an award of the compensation commissioner under the employers' liability act, the district court, on proper application, should allow such additional compensation and "waiting time" as the evidence shows the employee entitled to by reason of continuing disability subsequent to the award of the commissioner.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed as modified.*

Strode & Beghtol, for appellants.

R. J. Greene, contra.

MORRISSEY, C. J.

This cause is here for the second time. It is first reported in *United States Fidelity & Guaranty Co. v. Wickline, ante,* p. 21. A second trial has been had, and from the judgment entered both parties appeal.

It is said in the brief of plaintiff: "The sole issue in the case is whether or not Mrs. Wickline, by refusing to submit to a medical examination, including the taking of an X-ray picture, brought herself within the provisions of section 3675, Rev. St. 1913, which provides that refusal to submit to a medical examination shall bar the right to compensation." We shall dispose of this question before taking up the questions raised in the cross-appeal.

Defendant's physician testified that she "thought an X-ray picture was a reasonable and a necessary thing," and that she had so advised defendant. A physician skilled in the art of making and reading X-ray photographs testified that, in order to properly determine the extent and character of defendant's injury, an X-ray photograph of the kidney ought to be made. He stated that in order to make a proper photograph it might be necessary to inject into the kidney an opaque solution called

"colorogol," and described in detail the method of making this injection, stating: "In the hands of an expert there is no danger whatever." He further testified: "That is a procedure that is not used so extensively as formerly because we are now able to X-ray the kidney without difficulty without injecting it." He explained that he found it necessary to use this solution in a few cases. Defendant testified that, if the court called upon her to have an X-ray picture taken, she would permit that to be done, but she would refuse to have colorogol injected into her kidney.

The district court found that the demand upon her was not reasonable, and that her refusal ought not to bar her from a recovery. It further found that there was due defendant from plaintiff $81 for compensation and waiting time from the time plaintiff ceased its payments to the date of the award made by the compensation commissioner, with interest and costs.

In our former opinion it is said: "In the present advanced state of the science of X-ray examinations and X-ray photographs of the person, there appears to be no reason why such examination or photograph should not be permitted by a claimant for compensation under the employers' liability act, upon request by the employer or insurer, unless the request is shown to be unreasonable." The district court was therefore required to determine whether under the circumstances the request in this case was reasonable. It will be seen from the testimony of the expert produced by plaintiff that it is only in rare instances that it is necessary to inject this substance into the kidney, and it would seem that plaintiff ought to have availed itself of defendant's offer to submit to an X-ray examination without this injection. It may be that an injection was not necessary. We are constrained to hold, with the trial court, that the demand upon Mrs. Wickline was not reasonable.

By cross-appeal, counsel for defendant again asks us to tax an attorney fee against plaintiff. In the former

opinion it was properly held that an attorney fee could not be taxed as part of the costs, and that holding is the law of the case. The statute was amended by the legislature of 1919 (Laws 1919, ch. 103), but the amendment is not applicable to this case.

It is urged that the judgment ought to be for compensation and waiting time down to the date of the judgment in the district court, rather than to the date of entering the order by the compensation commissioner. Section 3678, Rev. St. 1913, as amended by section 13, ch. 85, Laws 1917, provides that "all disputed claims for compensation * * * must be submitted to the compensation commissioner for an award," but, "if either party at interest is dissatisfied with the award of the compensation commissioner, then the matter may be submitted to the district court, * * * which court shall have authority to hear and determine the cause as a suit in equity and enter final judgment therein." Under this provision of the statute and the evidence adduced, the district court ought to have made a determination of the rights and claims of the parties down to the date of trial. Mrs. Wickline's undisputed testimony, as well as that of her husband, shows she was still disabled, as a result of the injury, at the time of the hearing in district court. She was entitled to 40 weeks' compensation at $6 a week and waiting time in addition to that awarded her.

The judgment of the district court is modified by adding to it the amount of $360, compensation and waiting time to the date of trial in that court, and, as thus modified, is affirmed.

AFFIRMED AS MODIFIED.

ANNA ZANTOW, APPELLEE, V. OLD LINE ACCIDENT INSURANCE COMPANY, APPELLANT.

FILED JULY 16, 1919. No. 20513.

Insurance: POLICY: CONSTRUCTION. Special provisions in a policy of life insurance will not be so construed as to defeat or limit the benefits of the policy unless they are so clear and definite as to require such construction, and are not inconsistent with other provisions of the policy.

APPEAL from the district court for Perkins county: ERNEST B. PERRY, JUDGE. *Affirmed.*

Thomas W. Blackburn, for appellant.

G. B. Hastings and *B. F. Hastings, contra.*

SEDGWICK, J.

W. F. Zantow had a policy of insurance in the defendant company and was killed in a railway accident. This plaintiff, who is his widow, and was the beneficiary under the policy, brought this action to recover thereon. The policy provided that, in case of death of the insured by accident, the company would pay the beneficiary $1,000. It also contained a provision: "If the insured sustains injury, fatal or otherwise, or contracts illness, after having changed his occupation to one classed by the company as more hazardous than that herein stated, or while doing any act or thing pertaining to any occupation so classed, then this insurance shall not be forfeited, but the liability of the company shall be only for such proportion of the principal sum or other indemnity as the premium paid by the insured will purchase at the rates fixed by the company for such more hazardous occupation." It also contained a special provision for insurance while traveling. The trial court found that the assured had not changed his occupation within the meaning of the policy, and rendered judgment for $1,000, and also found that the plaintiff was not entitled to re-

cover the special insurance against accident while traveling. From the finding in favor of the plaintiff, the defendant has appealed; and the plaintiff has taken a cross-appeal.

Two questions are discussed in the briefs: Had the assured changed his occupation to a more dangerous one? And was the assured at the time of the accident "riding as a passenger in the inclosed part of a railway passenger car" within the meaning of the policy? At the conclusion of the evidence, each party moved the court for an instructed verdict. The court thereupon discharged the jury and decided the case as submitted to the court upon the evidence. Under such circumstances, the findings of fact by the trial court are not to be disturbed upon appeal, unless under all the circumstances they are clearly wrong.

The definition of "traveling" in the policy is: "While riding as a passenger in the inclosed part of a railway passenger car or street car, or licensed steamboat, or licensed passenger elevator provided for the exclusive use of passengers, and due directly to the wrecking of such conveyance." The words "for the exclusive use of passengers" must be considered as applying only to "licensed passenger elevator;" and the fact that officers or agents of the railroad company may also have ridden in this car is immaterial.

"A person traveling on a freight train on a stock shipper's pass or contract, for the purpose of attending to and caring for the live stock being shipped on such train, sustains the relation to the carrier of passenger, but in a restricted and modified sense." *Chicago, B. & Q. R. Co. v. Troyer*, 70 Neb. 293. *Otto v. Chicago, B. & Q. R. Co.*, 87 Neb. 503.

The plaintiff called as a witness the station agent at the station where the deceased took the train, and he testified that the train was a regularly scheduled train, and that it carried passengers; that he sold passenger tickets for that train continually. On cross-examination

he was asked if the rules of the company provided for selling passenger tickets for that train, and answered that they did. He was asked if he had a copy of those rules with him, and answered that he had not.

The defendant called as a witness the chief clerk in the office of the general solicitor of the company. It appears that several people lost their lives in this accident, and this clerk was sent immediately to the scene of the accident to make investigations. He was asked whether the rules of the company authorized selling passenger tickets for that train, and answered that they did not, and also testified that it was not a passenger train. This evidence was taken by deposition, and although no objection to the evidence was entered in the deposition, the plaintiff's attorney, upon the filing of the deposition, filed objections on the ground that the witness had not shown himself to be competent, and that his evidence was not the best evidence, and that the evidence itself was incompetent and immaterial.

Other witnesses were examined by the plaintiff, who were on this train at the time of the accident, and who testified that there were several passengers in this car at the time, including several women who had paid regular fares as passengers. The court is not concerned with the question whether the railroad company makes rules not intended to be enforced. The question is whether as a matter of fact this car was at the time engaged in passenger service.

The evidence shows conclusively that this car, in which the insured was at the time of the accident, was a passenger car, as defined in our former decisions and the decisions of other courts. In *Funke Estate v. Law Union & Crown Ins. Co.*, 97 Neb. 412, it is held: "Where an insurance policy contains inconsistent provisions, the courts, in case of loss, will adopt the provision which is most favorable to the assured and offers the protection which a fair interpretation of the policy will give him." And this court has several times defined the position

of one who accompanies his stock as caretaker. *Chicago, B. & Q. R. Co. v. Troyer*, 70 Neb. 287, 293; *Otto v. Chicago, B. & Q. R. Co.*, 87 Neb. 503.

The policy is unsual and peculiar; its terms cover several sheets of closely printed matter. The provisions in regard to the special traveling insurance are sufficiently plain as to what shall constitute "traveling," but are indefinite as to the protection given to the insured. This was a valuable part of the insurance, and the defendant received in the premium the consideration for this special contract. It would seem inconsistent to hold that the insured was a passenger in "a railway passenger car" with the rights of a traveler under his policy, and at the same time was engaged in a more hazardous occupation than that contemplated in the insurance of travelers. The policy is so complicated on some points and so indefinite on others that it is difficult to find the real intention. The familiar rule is that under such circumstances the construction must be against the insurer, who should have made the exception that would defeat the policy clear and certain.

The trial court evidently considered that neither of these special variations from the principal feature of the policy could be enforced under conditions disclosed by the evidence. We cannot say that in applying and construing this evidence the court was so clearly wrong as to require a reversal.

AFFIRMED.

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

HENRY C. DIEDERICH ET AL., APPELLANTS, V. CITY OF RED CLOUD ET AL., APPELLEES.

FILED JULY 16, 1919. No. 20582.

1. **Municipal Corporations: STREET IMPROVEMENTS: ASSESSMENT OF BENEFITS: INJUNCTION.** A city of the second class having more than 1,000 and less than 5,000 inhabitants cannot make a valid contract for extensive street paving without an estimate, as re-

quired by section 5011, Rev. St. 1913. If the city engineer is not competent to make such estimate, and a proper estimate is made by competent engineers employed by the city for that purpose, owners of adjoining property cannot, after such paving is completed, enjoin an assessment of benefits against their property on the ground that the estimate was not made by the city engineer.

2. ———: ———: ———: ———. Such levy of assessment cannot be enjoined because a street railway was allowed to remove its rails from the street to be paved, instead of paving the space formerly occupied thereby, as required by section 5110, Rev. St. 1913, nor because the contractor guaranteed the quality of the work and agreed to make good any defect that appeared within five years, nor because no formal personal notice of the formation of the paving district and subsequent actions of the council was given them.

APPEAL from the district court for Webster county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

F. J. Munday and *L. H. Blackledge,* for appellants.

Bernard McNeny, J. S. Gilham and *Strode & Beghtol, contra.*

SEDGWICK, J.

The city of Red Cloud, a city of the second class having less than 5,000 inhabitants, by ordinance created paving district No. 1 of that city, and afterwards let a contract for paving a street in the district; and the city council was about to levy assessment upon the property owners of the district to pay for the paving, when this action was begun by some of the property owners to enjoin the city and the officers thereof for making such levy. From a judgment in favor of the city, the plaintiffs have appealed.

1. The first objection is that no estimate was made by the city engineer as provided by section 5011, Rev. St. 1913. The city council employed engineers to make this estimate, which was duly made. The objection is that it was not made by the city engineer, and it is contended that no other estimate can be acted upon by the city council under section 5011, Rev. St. 1913. Our statute pro-

vides for the election of city officers, and prescribes their powers and duties. The purpose of this section is to prescribe the powers and duties of the city engineer. The plaintiffs cite *Moss v. City of Fairbury*, 66 Neb. 671, and several other decisions of this court, in which it was held that the public authorities had no jurisdiction to proceed without an estimate of the cost of the work; but none of these cases, so far as we have observed, considers the question whether such estimate may under any circumstances be made by any other than the city engineer. The evidence shows that in this case, as in other towns of this class, the city engineer is chosen without reference to his qualifications to make a proper estimate of the items of cost of extensive street paving. The city engineer was a witness upon the trial, and his evidence shows that he was not qualified, and did not consider himself qualified, to make an estimate of such extensive street paving, and that the city council, with his knowledge and consent, employed competent engineers who did make the estimate. It does not appear that any objection was made to the estimate on the ground that it was not made by the city engineer until after the paving was done. While the letter of the statute is that the city engineer shall make estimates, the preceding direct statement of the improvements for which the city engineer shall make estimates might indicate that the legislature did not have extensive paving in towns of this class in view, for which it would be necessary to employ more competent engineers. When the statute was enacted in 1879, neither the legislature nor any one else contemplated that towns of this class would do extensive paving. If the present situation had been contemplated by the legislature, we may well suppose, in view of the provisions of this comprehensive act, that the language of this section would have been more explicit. Under all of the circumstances, we cannot conclude that it was the intention of the legislature to prevent the city council from securing the necessary services of competent engineers under such conditions as these.

The plaintiffs cite *Board of County Commissioners v. Davis,* 92 Kan. 672. Their statute provided expressly under what circumstances the county board might employ assistance for the county surveyor, and as such circumstances did not exist, the court concluded that the board could not employ such assistance. The case is not in point under our statute.

2. Complaint is made that the amount paid the engineer, and included in the cost of the paving, was excessive, but the evidence will not support the contention.

3. The property owners cannot complain that the street railway company was permitted to remove its rails from the street to be paved, instead of paving the portion of the street which had been occupied by its tracks, as required by section 5110, Rev. St. 1913. There is no evidence, and it does not appear, that it is contended that the benefits to the property of plaintiffs are less than the cost of the paving.

4. The contractor guaranteed: "That said curb shall be of such perfect material and workmanship as to endure for a period of five (5) years after the completion and acceptance of said work without showing settlement, cracks, or other defects; and said contractor shall during the time of said guaranty remove such pieces of stone as may show any defects; and said contractor shall substitute new work therefor when called upon by the city to do so, and shall complete such work of replacing defective stones within thirty (30) days after issue of written notice so to do, and such new work shall, in every respect, conform to the specifications." Such guaranties of the quality of the work will not render the contract void, nor prejudice the property owners.

5. There is no merit in the contention that the property owners should have formal personal notice of the formation of the paving district, and subsequent actions of the council.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

DAWSON COUNTY IRRIGATION COMPANY, APPELLANT, V. DAWSON COUNTY, APPELLEE.

FILED JULY 16, 1919. No. 20507.

1. **Trial: INSTRUCTIONS: BURDEN OF PROOF.** Plaintiff's petition asked damages from the defendant county for the wrongful removal of certain specified bridges, 19 in number. The answer contained a general denial, and alleged that on account of the bridges being out of repair and dangerous to public travel, and the plaintiff having consented thereto, it "became necessary for the defendant and its county commissioners to remove certain of said bridges." *Held*, error to instruct the jury that the burden was upon plaintiff to show removal by the defendant.

2. ———: **STATEMENT OF ISSUES.** The trial judge's statement of the issues to the jury should state the issues as the case is being finally presented to the jury on the pleadings and the evidence adduced.

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

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

N. M. York, D. H. Moulds and *H. D. Rhea, contra.*

CORNISH, J.

The plaintiff, an irrigation company, with bridges and ditches on and across the public highway, defeated in its action against the county for wrongfully removing and carrying away its bridges and filling up its ditches, and laying its defeat to the error of the court, appeals.

Defendant's answer contained a general denial, and alleged, by way of defense, that the bridges were old, rotten, out of repair, dangerous, and abandoned, and that, in order to make the highways safe for travel, plaintiff having failed, after notice and request, to repair them, and having consented to their removal, "it thereby became necessary for the defendant and its

county commissioners to remove certain of said bridges * * * and to fill said ditches where said bridges had been."

In the trial court's instructions the plaintiff was given the burden of proving that the county removed the bridges, and no burden was placed upon defendant to prove the allegations of its answer, denied by plaintiff, although the evidence was conflicting. This is complained of as error, and we think it was. The defendant's answer, as quoted above, fairly interpreted, amounts to an admission that it removed the bridges and filled the ditches, especially so when the record shows no attempt by the defendant to specify the bridges removed or not removed by it. The jury should also have been instructed that the burden of proof was upon the defendant to prove its affirmative defenses alleged.

The plaintiff in its petition alleged its damages to be $4,081.48, the amount it cost the company to put in new bridges and remove the dirt from the ditches. When it offered proof, the court sustained objection to the evidence as not showing the right measure of damages, holding, we think rightly, that the true measure is the value of the bridges at the time of removal, together with the reasonable cost of removing the dirt. In other words, it would be the reduced value of the irrigation system, as it stood, by reason of the wrongful act. The plaintiff then offered evidence in accordance with the court's ruling. The court, however, in its statement of issues to the jury, erroneously included the 4 1/2 pages of plaintiff's petition giving the items of cost of new bridges, no evidence of which was before the jury. The error in this respect was in part corrected by instruction No. 8, on measure of damages.

The court instructed the jury that it was the duty of plaintiff to build its bridges "in accordance with the plans and specifications of the county board." The instruction refers to a statute passed after the construction of the bridges in controversy and was inapplicable to the issues.

The plaintiff's petition alleged that Breymann, administrator, who owned the property when the cause of action arose, assigned his cause of action to the plaintiff. In the statement of the issues to the jury this allegation should have been, but was not included as one of the facts to be shown by the plaintiff.

If the owners of an irrigation system should finally abandon it for irrigation purposes, it would be their duty to remove their bridges and restore the highway to its former condition. Failure to do so within a reasonable time would constitute their bridges an obstruction upon the public highway, in which case the public authorities could remove the obstruction, being liable to the owners for only the value of the material, less the expenses of removal and the filling in of the ditches. Mere delay, however, in repairing, while endeavoring to find a purchaser for the property, would not ordinarily constitute such an abandonment, unless the circumstances were such as would lead reasonable men to believe that the property had been finally abandoned for irrigation purposes.

As the law was when these bridges were constructed, the duty was upon the irrigation system to keep the bridges in repair and safe for travel. If the bridges, not having been abandoned by the owners, were permitted by them to become out of repair and dangerous for public use, then the county could do whatever would be reasonably necessary to protect the public from danger. In such case it may repair at once if an emergency exists; otherwise, it should give the owner reasonable notice to repair the bridges, and, on the owner's failure to repair them, take such action as is necessary, doing the owner as little damage as need be. If the bridges had become so old and rotten that attempts at repair would be useless, or if the irrigation company persisted in maintaining its bridges in an unrepaired and dangerous condition, then the rights of the county and the public could be protected by a mandamus action requiring the

owner to repair the bridges on penalty, if it did not do so, of having them removed and the highway made in safe condition at the owner's expense. If the county, in such case, should remove the bridges without notice or legal action, it would be a wrongful act.

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

REVERSED.

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

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION ET AL., APPELLEES.

FILED JULY 16, 1919. No. 20913.

1. **Carriers: RATES.** The fundamental inquiry in fixing the rates of a public service utility always is: What rate is necessary in order to yield a reasonable average return on a fair valuation of the property for rate-making purposes, such a return as will not discourage, but will attract, the investment of capital in the utility?
2. **State Railway Commission: POWERS.** Under the Constitution and laws of this state, the state railway commission has a wide discretion in these matters.
3. **Carriers: RATES.** A situation, due to an unexpected rise in prices and wages, which makes it altogether probable that the past and present rate is insufficient to yield a revenue which will pay that fair average return which the law requires, although not constituting what would technically be denominated an "emergency," may, when shown, be sufficient for the allowance by the commission of a temporary rate, limited to the time required for making an investigation and finding of the facts. If it should happen that the temporary rate so fixed is too high, the condition may be rectified in the order fixing the rate after investigation.
4. ———: ———: **EARNINGS.** In fixing the rates at any particular time, former earnings and probable prospective earnings should always be considered, with a view to so adjust the rates as to prevent extortion and allow a fair average return.

5. ———: ———: POWER OF RAILWAY COMMISSION. The law contemplates that the findings and orders should be made in the first instance by the commission, which has powers of its own that the courts may not usurp. Its orders will not be reversed unless clearly wrong.

6. ———: ———: ———. The act, known as the "Railway Commission Act" (Laws 1907, ch. 90, Rev. St. 1913, sections 6104-6158), gives exclusive original jurisdiction of cases like this, involving the rates of common carriers, to the state railway commission, and is not changed by the provisions of the Omaha charter.

APPEAL from the State Railway Commission. *Reversed, with directions.*

John L. Webster, for appellant.

W. C. Lambert and *Hugh LaMaster, contra.*

CORNISH, J.

The state railway commission denied the application of the plaintiff street railway company for an increase of its fares from five to seven cents. Plaintiff appeals.

The application is denominated by the plaintiff as one for emergency or temporary rates, due to conditions brought about by the war, causing a large and unexpected increase in wages and cost of material and supplies, making it temporarily impossible for the company to continue paying its fixed charges and a return upon the reasonable value of its property.

At the hearing the commission ruled that emergency rates would not be justified, except as a condition is shown which, if not relieved from, will imperil the property of the company and its service to the public, such as might subject the company at once to proceedings in bankruptcy or receivership; that mere inability to make profits or pay dividends would not create an emergency. The plaintiff company, besides insisting that the condition shown was one which imperiled the utility, also contended that a temporary rate should be granted when it becomes clear that the revenues are not sufficient to pay dividends.

In ordinary cases the view taken by the commission, as to when an emergency rate should be allowed, is correct. The fundamental inquiry in fixing rates always is: What rate is necessary in order to yield a reasonable average return on a fair valuation of the property for rate-making purposes, such a return as will not discourage, but will attract, the investment of capital in the utility? It is desirable, if possible, before changing the rates, to know all of the facts, so that the rates may not be temporary and fluctuating.

Under the Constitution and laws of this state, the commission has a wide discretion in these matters. Even though present financial conditions, prices and wages (showing almost unprecedented changes), together with the financial condition of the plaintiff company, do not show a situation which would be technically denominated an "emergency," yet, if they do show a situation which makes it altogether probable that the past and present rate is insufficient to yield a revenue which will pay that fair average return which the law supposes, the commission is empowered, and it may be its duty, to permit a temporary rate, limited to the time required for making an investigation and finding of the value of the property. If it should happen that the temporary rate so fixed is too high, the condition can be rectified in the order fixing the rate after investigation. The purpose of the law being to allow those who voluntarily furnish the necessary capital to install and operate such public utilities a fair average return upon the value of the property so devoted to the public use, and to prevent unreasonable profits, in fixing the rate at any particular time, former earnings and probable prospective earnings should always be considered, with a view to so adjust the rate as to prevent extortion and allow such fair average return.

In the instant case, we believe it is not altogether certain that the street railway company can continue paying present wages and high prices for material, and at the

same time meet its obligations and maintain its credits, and it is altogether probable that it cannot make profits and pay dividends. If we could assume that a five-cent fare was a reasonable charge before the war, we would know that it is not a reasonable charge under present conditions, because we would take judicial knowledge of the fact that the exchange value of the dollar has lessened, at least temporarily.

We will not go into an extented discussion of the financial condition of the plaintiff company. The plaintiff's evidence would indicate that since the pre-war period, 1914, there have been increases in the wages of the company's 1200 employees, amounting to $740,000 annually; that taxes have increased $117,000; that these items, together with increased cost of coal, freight charges, material, and supplies, will increase the amount of annual expenditures for operating expenses and repairs in the year 1919, over the year 1914, in the sum of approximately $1,321,518. From this increase should be deducted the increased income to the company from passenger travel, which in the year 1918 was $426,575.13 in excess of that for 1914. For 1919 the excess will be greater, possibly from $150,000 to $200,000 greater. The income from passenger travel for the year 1918 for both Iowa and Nebraska divisions of the road was approximately $3,214,000; for 1914 it was $2,787,424. The total revenues for 1918 were $3,359,115.93, and the expenditures for that year, which included taxes $320,638.84, rent of leased roads $150,900, interest on bonded debt $480,950, and miscellaneous $6,025, amounted to $3,289,319.22. This would leave a net income for 1918 of $69,796.71. The figures are somewhat in dispute, the company putting the net income at $40,150. The operating expenses for 1918 were $2,330,805.38. For 1914 the operating expenses were $1,608,231. The increase in operating expenses for the year 1919, as above indicated, would be much in excess of those for 1918, because the increase in wages, following the order of the national war labor

board, did not go into effect until July 17, 1918. The net income, above shown, of from $40,000 to $70,000 for the year 1918 makes no allowance for dividends ($399,600), but includes other deductions.

It is contended by the plaintiff company that for the year 1919 there must be a deficit in the sum of $422,600; that the fixed charges and obligations of the company cannot be met. This is disputed by the defendants, who contend that to show such a deficit the plaintiff has estimated the operating expenses to be $2,467,000 for 1918, and $2,929,750 for 1919; that $200,000 of this increase for 1919 is in addition to the $300,000 allowed for 1918 for the depreciation account. It is contended that the actual money needed for this account, instead of being $500,000, has never been in excess of $170,000. It is further contended that the statement showing the deficit for 1919 makes no allowance for increased passenger fares, which will in all probability be over $200,000. Attention is also called to the fact that the evidence shows that the company has other operating revenues which have increased annually in about the sum of $15,000 since 1914. It is argued that, instead of a deficit, there will be a net income of $200,000 for the year 1919.

Just what the situation is, it is difficult to say. It would seem that no wrong would be done, which could not be corrected, in allowing such increase in fares as would make the company secure against insolvency for a temporary period. Insolvency might do permanent injury to the utility, for which, in the long run, the people would have to suffer. No great risk of that should be taken. Besides, any appearance of disregard of the company's rights in this respect lays the public and the authorities open to the charge of attempting to confiscate the property of the utility company. Now, we believe, without the slightest hesitation, that neither the commission nor the public, nor any community in this state, if left free to act, would, from greed or ignorance, ever desire to take the property of the utility without compensation. They

know that in the loss of these utilities the people would suffer most. The state must be careful to do nothing which may rightfully take away from it that valuable right of jurisdiction and control over its own local property and institutions.

While there was some evidence bearing upon the valuation of the utility, we agree with the commission that there was not sufficient upon which to base any permanent rate. The law contemplates that the findings and orders should be made in the first instance by the commission, which has powers of its own that the courts may not usurp. Its orders will not be reversed unless clearly wrong.

We are of opinion that the commission was right in ordering that a hearing be had for the purpose of taking evidence, with a view to fixing the valuation of the property for rate-making purposes, and that, pending such hearing, the commission should award such raise in fares as would make the company secure against possible insolvency; that such rates, so fixed, should be temporary, abiding only the investigation ordered. Apparently, a rate of 6 cents for a single ticket and 10 tickets for 55 cents would not be improper, but the exact rate is for the commission to order.

Public service corporations naturally keep in view the value of the service to the user and what charge the traffic will bear. The public (and the courts, too) inquire: What has been the cost of the service to the utility? Capital can be attracted to these enterprises only as there is confidence that fair returns, under reasonably capable management, will be allowed.

The profits of most business enterprises depend largely upon the amount of business done. This is peculiarly true of railroads and street railway companies. When the plant is ready for operation, the great cost of the service has been incurred. Additional cost, due to ever-increasing business, is insignificant compared with the increasing income. The public have always anticipated,

and may properly anticipate, decreasing rates as population and business increase. A fair wage must be paid to employees, and a fair return must be paid to those whose capital is invested.

Complaint is made by the plaintiff company of the attitude of the commissioners, or some of them, or their manner of conducting the hearing. We admit that it is a little startling to the lawyer, bred in the courts, who is submitting his controversy to a body having judicial powers, to see a member of that body conduct a cross-examination and hear him express opinion upon the merits before the case is finally submitted. Not only is impartiality the supreme virtue of courts as ministers of the law, but the courts have always recognized that their functions can be best exercised and protected under conditions which exclude any invasion of the partisan or personal element, or the appearance of it. Accordingly, they have been hedged about by forms and rules calculated to inspire the greatest respect for the position the judge occupies. That which may appear to be anomalous inheres more or less in the nature of the proceeding and the unusual powers vested in the state railway commission. The division of the powers of the state into legislative, executive, and judicial is natural. Aristotle pointed out long ago the difficulties and dangers of lodging law-making powers in the executive department of government. Courts, as such, know only adversary parties, and are unsuited to the work of commissions.

The state railway commission is clothed with certain legislative, judicial, and administrative powers, but a review of its action is reserved to the courts. In the exercise of its legislative and administrative powers, it must be that it exercise those functions, and hence conduct for itself those investigations which will enable it to legislate wisely. It must be permitted to see to it that the evidence necessary is adduced, and to take the legislator's attitude as to what the law should be. The commission,

as a co-ordinate department of the state, acts independently. In the exercise of its prerogatives, it is not subject to dictation or criticism by the courts, except as what transpires may be a proper subject of review, as bearing upon the orders or judgments of the commission. The courts, ordinarily, in reviewing the work of arbitration boards and commissions, give ready attention to any complaint on the part of either of the parties that the body hearing the matter was actuated by any feeling of bias or prejudice, or other improper motive. The commission is free to adopt its own rules and course of procedure, and to do everything necessary to inspire and bring about absolute respect for it and its judgments. It may preserve decorum, and under some circumstances may punish for contempt. Being, in fact, neutral as between the parties, and conducting its hearings, not *ex parte,* nor as a partisan debate between it and either of the parties, it may avoid all appearance of bias or prejudice. Upon review of the record in this case, we find nothing to indicate that the commission has been actuated by any desire other than to do justice to the utility, on the one hand, and the public, on the other.

Defendant city of Omaha raises the issue whether jurisdiction for determining rates is not, by law, vested in the city council of Omaha. A part only of the plaintiff's lines are within the limits of the city of Omaha. The act, known as the "Railway Commission Act" (Laws 1907, ch. 90, Rev. St. 1913, sections 6104-6158), gives exclusive original jurisdiction of cases, like this, involving the rates of common carriers, to the state railway commission, and, although there is a provision in the Omaha charter which appears to be to the contrary, we are of opinion that the act is unamended and unchanged, so as to deprive the state railway commission of jurisdiction in this case.

The order of the state railway commission, denying any increase of rates, is reversed, and the cause remanded to the commission, with instructions to order an increase of

rates, the same to be temporary only and continue until such time as is necessary after an investigation and hearing before the commission to determine what rate is right and proper under the facts of the case.

REVERSED.

MORRISSEY, C. J., not sitting.

IN RE DAVIS.

FRED BRITTELL, APPELLEE, v. HARRY W. DAVIS, APPELLANT.

FILED JULY 16, 1919. No. 20548.

1. **Constitutional Law**: IMPAIRMENT OF OBLIGATION OF CONTRACT. A legislative act does not impair the obligation of a contract, entered into before the act became operative, merely because such act abrogates or holds in abeyance an existing remedy for the collection of debts, provided, another equally adequate remedy is substituted that does not lessen the value of the contract.
2. ———: ———. Chapter 164, Laws 1917, does not impair the obligation of contracts entered into before the act became operative.

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

Clifford L. Rein, for appellant.

Clark Jeary, contra.

DEAN, J.

On September 22, 1917, Harry W. Davis, the petitioner, was indebted to eleven or more creditors in the aggregate sum of $442. On that date he filed a verified petition in the county court of Lancaster county under chapter 164, Laws 1917, praying the court to fix the amount of his indebtedness and the time for payment thereof. The petition was dismissed in county court, and on appeal to the district court it was again dismissed. The petitioner has appealed.

The substance of the act applicable here provides generally that a debtor owing not less than $50 nor more

than $1,000, to not less than three creditors, may file in a municipal or county court a verified petition, containing his creditors' names and addresses, the respective amounts owing to each, and praying the court to fix the amount of and the time when payments thereon should be made, the creditors to be notified by registered mail and the time for hearing to be not less than seven nor more than ten days after filing the petition. Other details are enumerated in the act that are hereinafter noted.

At the hearing the parties stipulated that all the debts involved herein were incurred before the act became operative; "that the only point in issue in this hearing is to determine the question as to whether this statute impairs the obligation of the contracts."

Fred Brittell is the only creditor who contested the petitioner's application. He says that the act violates section 10, article 1 of the federal Constitution, in that it impairs the obligation of contracts entered into before the act became operative.

We do not agree. The act affects the remedy, but does not relieve the debtor of his contractual obligations. It requires payment in full. The value of the contract is not lessened, nor is the remedy materially changed. The debtor does not escape payment, and he is always subject to the court's order. His property is in the hands of the court. The amount of the periodical payments and the time when they shall be made are determined by the court. The act also provides that the provisional statutory remedies, such as attachment and the like, that are pending in any court, "upon the filing of the petition and the mailing of notice as herein provided, * * * shall be held in abeyance so long as the debtor shall comply with the order of the court relative to the disposition of his property and earnings and the payment of the proceeds therefrom, to the clerk of the court for the benefit of the creditors" (section 7); that upon failure to comply with the court's order the debtor forfeits the protection of the act. It plainly appears that, upon non-

compliance by the debtor, all former rights and remedies of the creditor for the collection of debts are automatically restored.

The act further provides: "If any property not exempt from execution, which had been attached or against which execution had been levied prior to the mailing of the notice provided for herein, shall be so sold, the proceeds therefrom shall be distributed under the attachment or execution as heretofore provided by law." This provision clearly safeguards the diligent creditor who, prior to the mailing of the notice, has procured an attachment or a levy on non-exempt property, by providing that, if the property so attached or levied upon shall be sold under this act, the proceeds of the sale shall be distributed to the prior attachment or execution creditors as heretofore provided by law, so that the act does not affect the lien of prior attaching or execution creditors.

In 6 R. C. L. 359, sec. 354, it is said: "While the legislature may not withdraw all remedies, and thus in effect destroy the contract, modes of procedure in the courts of a state are so far within its control that a particular remedy existing at the time of the making of a contract may be abrogated altogether without impairing the obligation of the contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away. This is the rule even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy. However, on this phase of the rule there is some conflict, for it has been held that the alteration must not, so far as prior contracts are concerned, appear on the face of the statute to be enacted to render the remedies less efficient or more dilatory than those in force when the contract was made. It is enough if the contract is left with the same force and effect, including the substantial means of enforcement, which existed when it was made, or sufficient to enforce the contract." On page 360, section 355, it is pointed

out that "the difficulties in the way of stating a rule render it imperative that every case be determined on its own particular circumstances; and the question whether a change of remedy impairs a substantial right in the last analysis is ordinarily one as to reasonableness."

It can scarcely be shown that the act is unreasonable. The purpose of the act is to prevent the destruction of a debtor of small means, by an avalanche of creditors who are demanding either immediate payment or judgment, and to provide a reasonable remedy at small cost that will inure to the benefit of all creditors and the debtor alike. It accords with sound public policy. The public is equally interested in the welfare of both debtor and creditor. It is more in accord with reason that the former should not be sacrificed but be given reasonable opportunity to pay, and that all creditors should recover their debts, than that one, or at most only a few, should do so. We conclude that the act is not violative of the federal Constitution in the respect noted by counsel.

The court erred in dismissing the petition. The judgment is reversed and the cause remanded for further poceedings not inconsistent with the views herein expressed.

REVERSED.

LETTON, J., concurs in the conclusion.

CREIGH SONS & COMPANY, APPELLEE, V. HARRY B. JONES ET AL., APPELLANTS: ROY TOWLE ET AL., APPELLEES.

FILED JULY 24, 1919. No. 20816.

1. **Mortgages: FUTURE ADVANCES.** If the owner of real estate contracts to borrow money to erect buildings thereon, and gives a mortgage upon the real estate to secure the loan, which, by agreement, is to be advanced as the buildings progress, the lien of the mortgage begins upon the recording thereof.

2. ———: ———. Under such agreement, the advancement of the money is not optional with the mortgagee, but must be advanced as the building has progressed.

3. ———: MECHANICS' LIENS: PRIORITIES. In such case, the lien for material and labor furnished for the buildings will begin when the furnishing of the labor or material begins, and, if that is before the recording of the mortgage, such liens will be superior, but, if it is after the filing of the mortgage, the lien of the mortgage is superior.

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

Anson H. Bigelow, Joseph Rapp, Jr., and *H. G. Moorhead,* for appellants.

Gaines & Van Orsdel and *E. H. Westerfield, contra.*

SEDGWICK, J.

The defendant Jones purchased of the plaintiff, Creigh Sons & Company, the real estate involved in this action for the agreed price of $1,200, of which he paid in cash $285 and the agreement was that he should give a mortgage upon the property for the remainder of the purchase price, and that he should borrow money with which to build the three buildings on the real estate, and might give a mortgage to secure such loan, which should be the first mortgage upon the real estate, making the plaintiff's mortgage subject thereto. Pursuant to this agreement, he contracted with the defendant Occidental Building & Loan Association to furnish him $5,100, and to take a first mortgage upon the real estate as security therefor. He began the contemplated buildings, and the defendant Roy Towle furnished labor, some of which was furnished prior to the recording of the $5,100 mortgage. He was therefore allowed a first lien upon the property which is not now contested. The other parties to the litigation furnished labor and materials after the $5,100 mortgage was recorded, but before any money had actually been advanced to Jones by the loan company. These lienholders contended that the mortgage of the loan company, so far as it was not

advanced to Jones before their liens attached, was subject to their liens, and further contended that, as the agreement between the plaintiff and the loan company was that the loan company's mortgage should be first, they should be subrogated to the rights of the loan company, making their liens prior to the lien of the plaintiff's mortgage. The trial court found that the defenddant Roy Towle had the first lien; the loan company the second lien; the plaintiff, Creigh Sons & Company, the third lien; and the liens of all other parties were subject to these three liens. From this judgment, the subsequent lien holders have appealed.

The appellants contend that "the lien of a mortgage intended to secure future advances only, when the making of said advances are optional, does not attach until the moment advances are actually made, and cannot be enforced against other liens prior thereto of which mortgagee has actual notice." It seems that the loan company concedes this proposition, and contends that the making of said advances was not optional, but the consideration of the mortgage, and their contract with Jones, was to advance the money as the buildings progressed, to the full amount of the mortgage.

In *Hoagland v. Lowe,* 39 Neb. 397, the law is stated in a quotation from a former case, as follows: "'A person commencing to furnish material for, or commencing to labor on, an improvement on real estate must, at the time, take notice of the interest and title in the premises of the person with whom he contracted, as shown by the public records, as his lien for labor or material, aside from the improvement itself, attaches only to such interest.' *Henry & Coatsworth Co. v. Fisherdick,* 37 Neb. 207." In the opinion there is a quotation from Phillips, Mechanics' Liens (2d ed.) sec. 225, p. 378: "The law imposes on mechanics, like other persons, the necessity to ascertain for themselves the nature of the interest in the land to be improved of the persons with whom they contract, and all negligence in this regard

is charged to their own account. * * * The rule of *caveat emptor* therefore applies against a mechanic as well as in the case of a vendee. If a contractor proposes erecting buildings, furnishing materials, or putting labor on a lot of ground, it behooves him to examine and assure himself of the fact that the person with whom he contemplates making a contract, or for whose benefit he is about to employ his means or labor, has such an interest or title unincumbered as will enable him to avail himself of a valid or efficient lien." This statement of the law has been reaffirmed in many cases since, including *Boggs v. McEwen,* 69 Neb. 705, in which other cases are cited. The case also is cited by other courts as correctly stating the law. *Anglo-American Savings & Loan Ass'n v. Campbell,* 13 D. C. App. 581, 43 L. R. A. 622. The appellants cite, and appear to rely upon *Finlayson v. Crooks,* 47 Minn. 74, but the case is not in point. The court said; "It is not necessary to consider any of the controverted questions of priority between a first mortgage, to secure future advances, and subsequent incumbrances." In that case the mortgage was given to secure advances for improvements on real estate, but the mortgagee, instead of advancing the money for that purpose, applied it upon another prior mortgage. The court therefore distinguished it from a case where the money was actually advanced to the owner of the property in accordance with the agreement in giving the mortgage. It may be that it would be more equitable to require a mortgagee, who is to advance money to the mortgagor for improvements on real estate, to see to it that the materials and labor for such improvements are paid for out of the money so advanced. If such a rule would be an improvement upon our law, the lawmakers, and not the courts, should make the change. Until such change is made, we are required to abide by the rule that has so long been established and acted upon in this state. The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1919.

HARRY WILLIAMS v. STATE OF NEBRASKA.

FILED SEPTEMBER 27, 1919. No. 20858.

1. **Criminal Law:** REFUSAL OF INSTRUCTION. It is not error for a trial court to refuse a requested instruction, even though in proper form and supported by competent evidence, when he gives substantially the same instruction on his own motion.
2. **Homicide:** INSTRUCTIONS. On the trial of one charged with having committed the crime of murder in the first degree, it is the duty of the court to instruct the jury only on such degrees of homicide as find support in the evidence.
3. ———: DYING DECLARATION: REFUSAL TO OFFER. One convicted of the crime of murder cannot predicate error on the refusal of the trial court to require counsel for the state to offer in evidence the dying declaration of the deceased when the record fails to show that such a declaration was made.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

William N. Jamieson and *William E. Lovely,* for plaintiff in error.

Clarence A. Davis, Attorney General, George W. Ayres, J. B. Barnes and *Ralph P. Wilson, contra.*

MORRISSEY, C. J.

Defendant prosecutes error from a judgment of the district court for Douglas county, wherein he was sentenced to serve a term of twenty years in the penitentiary on a conviction of murder in the second degree. He is one of the parties mentioned in connection with

the death of a peace officer named Rooney in *Kirk v. State, ante,* p. 484.

The facts are stated in that opinion.

The instructions given on the trial of the *Kirk* case were, with the necessary changes as to names, given on the trial of defendant. Having already approved these instructions, we shall not again discuss them. The evidence adduced on behalf of the state is to the same effect as that given in the *Kirk* case, except that in the *Kirk* case the evidence did not show that defendant was armed or fired any shots at the peace officers, while in the instant case a witness for the state testifies positively that defendant was armed and shot at the officers. The evidence of defendant's guilt being stronger and more conclusive than in the *Kirk* case, where it was regarded as sufficient, need not be further reviewed.

Error is assigned because of the refusal of the court to give instruction No. 2, requested by defendant, which would direct an acquittal in case the jury entertained a reasonable doubt as to whether the shot which caused the death of deceased was fired by one of the defendants named in the information or by one of the peace officers. The court on its own motion instructed the jury that, unless they found from the evidence, beyond a reasonable doubt, that deceased "was killed by a pistol shot fired by one of the parties, jointly charged by the information in this case, you should find defendant not guilty." This instruction is, in substance, the same as that requested, and the assignment is not well taken.

The information charged defendant with murder in the first degree, thereby charging, also, murder in the second degree and manslaughter. The court instructed the jury on murder in the first degree, and murder in the second degree, but did not submit the lesser degree of manslaughter. No request was made for such instruction, but it is urged that it was the duty of the court to so instruct on its own motion, and that its failure so to do is error. It is the duty of the trial court to

submit, under suitable instructions, the various degrees of homicide, whenever there is evidence to warrant such submission. *Kraus v. State,* 102 Neb. 690. In the instant case we are not pointed to any evidence tending to support the charge of manslaughter, and without such evidence the court would not be warranted in submitting that question to the jury.

In conclusion, it is urged that the court erred in overruling defendant's motion, made at the close of the state's case in chief, to compel the state to produce the dying statement of the deceased as part of the *res gestæ.* Immediately following the making of this motion, counsel for the state announced in open court that the state had produced all evidence touching the commission of the crime, except such as might be cumulative. Counsel for defendant then asked that the record be made to show that he called the state's attorney to the witness stand—for what purpose is not clear, but presumably to show that there was a dying statement. The court stated that the record might so show. Counsel did not propound any interrogatory to the witness, nor offer to prove by the witness that there was a dying declaration, and there is no showing that deceased made a dying declaration.

The record is free from error, and the judgment is

AFFIRMED.

SAMUEL STONE V. STATE OF NEBRASKA.

FILED SEPTEMBER 27, 1919. No. 20878.

Criminal Law: JURY: EXAMINATION. A defendant in a felony case has the right to exercise the statutory number of peremptory challenges, and in order to exercise this right understandingly it is proper for him to ascertain, as nearly as practicable, the disposition of the juror toward him, and toward the subject-matter of the controversy; and any inquiry within reasonable limits which tends to bring to light any bias or prejudice entertained by the juror is proper, but the form of the interrogatories pro-

pounded on abstract questions is within the sound legal discretion of the court, and where an abuse of such discretion is not shown the ruling of the trial court will be sustained.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

William N. Jamieson and *William E. Lovely,* for plaintiff in error.

Clarence A. Davis, Attorney General, George W. Ayres, J. B. Barnes and *Ralph P. Wilson, contra.*

MORRISSEY, C. J.

Defendant is one of the parties mentioned in connection with the death of a peace officer in *Kirk v. State, ante,* p. 484, and *Williams v. State, ante,* p. 719. He prosecutes error from a judgment of the district court for Douglas county, wherein he was sentenced to a term of twenty years in the penitentiary on a conviction of murder in the second degree. The record is essentially the same as in the cases mentioned, and on the points therein presented we adhere to the rulings made.

A point not made in the other records, but presented here, is the ruling of the court on the *voir dire* examination of the jury. Counsel for defendant propounded the following question: "Now, from what you read about this case, did you form any opinion that the crime of murder had been committed because Frank Rooney had been shot?" Objection was made to the form of the question, and the court said: "I don't believe that question is in proper form. Murder is one thing in law, and another thing in popular conception, of course. I will sustain the objection to the question in that form." The question was propounded to another juror. The objection was repeated, and thereupon it was agreed that, without repeating the question to other jurors, defendant would be given the benefit of an exception to the ruling. It is urged that the ruling of the court is prejudicially erroneous, as depriving defendant of an opportunity to elicit information which

might guide him in the exercise of his peremptory challenges.

A defendant in a felony case has the right to exercise the statutory number of peremptory challenges, and in order to exercise this right understandingly it is proper for him to ascertain, as nearly as practicable, the disposition of the juror toward him, and toward the subject-matter of the controversy; and any inquiry within reasonable limits which tends to bring to light any bias or prejudice entertained by the juror is proper, but the form of the interrogatories propounded on abstract questions is within the sound legal discretion of the court, and where an abuse of such discretion is not shown the ruling of the trial court will be sustained. By questions properly framed, defendant was free to elicit information that might be necessary to guide him in the exercise of his peremptory challenges.

The judgment is

AFFIRMED.

EDITH LAIR, APPELLEE, V. ARTHUR J. CALLOWAY, APPELLANT.

FILED SEPTEMBER 27, 1919. No. 20584.

1. **Bills and Notes:** ALTERATION: INSTRUCTION. The promissory note on which the action was predicated bore date May 9, 1914, which was within the statute of limitations. Defendant pleaded that the note sued upon was a forgery, in that it was originally dated May 9, 1911, and that the date had been changed. The court instructed the jury, in substance, that if they found the note was changed as to date, as defendant asserted, without his knowledge or consent, they should find in his favor, but that if dated May 9, 1914, originally, it would not be barred by the statute of limitations. *Held*, that the instruction was not prejudicial to defendant.
2. **Evidence** examined, and *held* to sustain the verdict.
3. **Compromise and Settlement:** FINDING: EVIDENCE. Defendant answered, among other defenses, that all matters in controversy

between the parties had been settled, and produced a receipt which made such a recital on its face. Plaintiff made a general denial to the answer. At the trial undisputed testimony was received without objection that, at the time the receipt was signed, the promissory note was not mentioned or considered by either party, and that there was no consideration for the signing of the receipt. *Held*, that this warranted the special finding of the jury that no settlement was had of the debt evidenced by the note.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

Fawcett, Mockett & Walford, for appellant.

O. B. Clark, contra.

LETTON, J.

Action upon a promissory note dated May 9, 1914, due six months after date, for the sum of $3,000, with interest at 10 per cent. The note is upon a printed form, and the words, "This note given for labor," are interlined upon its face. It also bears indorsement as follows: "1914, Nov. 9, paid $120."

Five defenses are set forth in the answer: A general denial; that the note was originally given in 1911, which date was afterwards changed without the knowledge or consent of the defendant to 1914; that the words, "This note given for labor," were added without his consent after the note was given; the statute of limitation; payment by the giving of another note by the plaintiff to defendant for the same amount at the same time; and settlement. The reply is a general denial. The jury found for plaintiff, and also made special findings to the effect that the note sued upon was given on May 9, 1914, to settle an existing obligation; that the date was not altered; and that in the settlement of August 15, 1916, it was not the intention of the parties to include the note in suit as a part of the settlement. A motion for a new trial in the usual form was made, and afterwards a like motion was filed on the ground of newly discovered evidence. This was supported by affidavits. These

motions were overruled, and the case is now before us upon appeal.

It is a comforting circumstance that it is seldom that a case comes before this court in which so much of the testimony of the principals is so unreliable and palpably untrue. The evidence shows that the plaintiff, a married woman, living separate from her husband, came from Pennsylvania to act as housekeeper for the defendant in 1905. They, with their respective children, lived in the same household for a period of nine years and ten months. She not only acted as housekeeper, but helped in a hotel and another business owned by defendant. Afterwards the family lived on a small farm. Plaintiff took active part in the work upon the farm, milking cows, cultivating and doing other manual work. This much is undisputed. With respect to the making of the note, the testimony on behalf of plaintiff tends to prove that in 1914 dissensions arose; that defendant was dissatisfied with the work of some of the children; and that on returning from Syracuse May 9, 1914, he went to his room, wrote out the note in suit and handed it to plaintiff, indicating this was to end their relations. Defendant made positive denial of this, testifying that, though he signed this note, it was not at the time it was dated, but in 1912, and the note was dated May 9, 1911; that at the same time a note was executed by plaintiff in defendant's favor for the same amount, bearing the same date; that this transaction was had because he was in litigation and wanted to transfer to plaintiff $3,000 worth of stock in a garage company which he owned, in order to put it out of the reach of his creditors; and that the notes were intended to offset each other. Defendant also testified that the words, "This note given for labor," and the indorsement on the back of the note were not in his handwriting, and were placed there without his knowledge or consent after the note was given.

The evidence seems clear that the writing upon the face of the note and the indorsement thereon was made by the defendant, except perhaps as to the date 1914, and as to this there is sufficient evidence to sustain the verdict.

With respect to the plea of settlement, it appears that defendant desired to purchase an interest which plaintiff had in a tract of land in Cheyenne county, Nebraska. At the time when an agreement was reached that defendant should pay $500 for the same, plaintiff executed a deed for the land and signed a receipt for $237, "in full settlement and satisfaction for every claim or demand that I may have either at law or in equity against the said A. J. Calloway or his estate. This agreement and receipt is intended to cover every item of disagreement between myself and said A. J. Calloway of every kind or nature." The receipt was prepared by Mr. West, an attorney of Syracuse. No money was paid to plaintiff except the $500 for the land. The testimony is undisputed that the $3,000 note was not considered or discussed at the time this receipt was executed. Plaintiff testified, without objection, that not until long after that time was there any disagreement between them with respect to the note in suit and that no release, settlement, or discharge of that debt was contemplated by either of the parties.

The plea of settlement is an affirmative defense, and the burden of proof was upon the defendant.

No consideration was shown for the signing of the paper. The court left the question whether a settlement of the note had been made, to the jury, which found for plaintiff. We are of opinion that defendant failed in his proof of a valid settlement, as also in his contention that a check given to the plaintiff on June 6, 1916, for wages, upon which he had written certain words indicating that same was "in full settlement of all claims to date," constituted a settlement.

Instruction No. 5, which withdrew the defense of the statute of limitations, is complained of. This instruction told the jury that if the note, as originally delivered, bore the date of May 9, 1914, it would not be barred by the statute, but if the date of the note was changed from 1911 to 1914, as alleged, the note was void and uncollectible. This instruction stated the law correctly. The answer of the jury to the special interrogatory settled the question that the note had not been altered, and there was no error in the instruction.

The facts alleged in the affidavits for a new trial on the ground of newly discovered evidence are not sufficient in our opinion to have changed the result if they had been adduced at the trial. The affidavit of the defendant himself flatly contradicts his testimony at the trial in several material respects, and we see no reason why the court should consider that his later statements, made after plaintiff's rebuttal evidence had been produced, should be given any greater weight than that given upon the witness-stand by him. It is impossible that both of his statements can be true. He testified at the trial that he only made one note in favor of plaintiff, and the note produced by him, defendant's exhibit 1, was the note signed by plaintiff in 1912. He now makes affidavit that after the trial he searched his papers and found another note, which he now produces, and which is the note made by plaintiff. Plaintiff makes a counter affidavit denying this positively. The jury may have erred, but the evidence is sufficient to support a finding that the $3,000 note in suit was in fact given to the plaintiff in consideration for services rendered. We find no prejudicial error, and the judgment of the distict court is

AFFIRMED.

JOHN W. SIEBERT, APPELLEE, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 27, 1919. No. 20463.

Railroads: INJURY TO EMPLOYEE: NEGLIGENCE: SUFFICIENCY OF EVIDENCE. On the issue of negligence on the part of defendant in setting a brake on a railroad freight car, the evidence outlined in the opinion *held* insufficient to sustain a verdict in favor of plaintiff.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Reversed.*

Crofoot, Fraser & Connolly, for appellant.

A. H. Bigelow, contra.

ROSE, J.

This is an action by John W. Siebert, plaintiff, to recover from the Chicago, Milwaukee & St. Paul Railway Company, defendant, damages in the sum of $10,000 for alleged negligence resulting in personal injuries. Defendant denied negligence on its part, and pleaded that the injuries of which plaintiff complains were caused by his own negligence. From a judgment on a verdict in favor of plaintiff for $8,250, defendant has appealed.

Plaintiff, when injured, was a railroad conductor in the employ of the White Sulphur Springs & Yellowstone Park Railway Company, a corporation operating 23 miles of railroad in Montana between Ringling and White Sulphur Springs. Under a lease, both plaintiff's employer and defendant used the latter's railroad tracks and switch-yards at Ringling. There a line of live stock cars were standing on a side-track, where they had been switched and left by defendant. Plaintiff and his train crew in the performance of their duties undertook to switch some of these cars to another track. After the locomotive had been attached to the line for that purpose, plaintiff mounted a car near the

front end of the train, turned by hand the brake-wheel on the top of the brake-shaft, kicked the brake-dog out of the brake-ratchet on the top of the car, and thus released the brake. Walking on the tops of the cars toward the rear, he released the brakes in the manner indicated. In his petition he alleges that the brake on the rear car, when released by him, recoiled with tremendous force and threw him onto a parallel track inflicting severe injuries. The negligence imputed to defendant is the setting of the brake too tight.

The principal assignment of error is the failure of the trial court, after both sides had adduced their proofs, to sustain a motion by defendant for a peremptory instruction in its favor on the ground that the evidence is insufficient to sustain a verdict for plaintiff on the issue of negligence in setting the brake. On this point counsel for plaintiff summarizes his case thus:

"Plaintiff was thrown from the top of a car and injured by a tremendous brake-recoil. He declared that such a recoil could only have been produced by the brake being improperly set when the car was set in. Two experts support this declaration, and defendant, with all its available experts, neither made any attempt to deny it nor to show that such a recoil could have been made by any customary or proper way of setting the brake when the car was set in, nor by the way they testified they had set the car in."

Should the jury have been permitted to find that defendant negligently set the brake? Defendant's train-crew switched the string of live stock cars onto the side-track several days before plaintiff was injured. There is no evidence that any employee of defendant in the meantime touched any of those cars. Neither plaintiff nor any other witness who testified in his behalf saw the switching or the braking. The inference of negligence rests alone on the force of the brake-recoil, as described by plaintiff, and the expert opinions of himself and two other trainmen that such force was, or

could have been, caused by negligence in the setting of the brake too tight; the latter testifying in answer to hypothetical questions. The string of cars stood on a slight incline, where they could be held in place by the application of the hand-brake by a single brakeman. This was the proper method of braking at the place of the injury. The theory of plaintiff is that the brake which recoiled with violent force was set by two brakemen, or by the use of a brake-stick, or by air—all improper methods. He testified that he seized the brake-wheel with his hands and made several efforts to release the brake before he succeeded; that when finally released it recoiled violently before he could get his hands out of the way; that it threw him off the car, and that in his opinion the force of the recoil was caused by the setting of the brake in one of the negligent methods described. His testimony, however, and that of his two experts must be considered in connection with other proofs. Plaintiff was 55 years of age when injured. The weather was hot at the time. His own testimony shows that he wore greasy gloves when turning the brake-wheel; that his gloves slipped; that he was off his balance at the time of the recoil; that the amount of force used in setting the brake would, if properly applied, release it; that he in fact released the brake himself by hand. The testimony of his own experts on cross-examination tends to show that a strong man, by hand, could have set the brake tight enough to produce a brake-recoil with sufficient force to throw a man from the car, if off his balance. There was no necessity or occasion for setting the brake in any of the three improper methods mentioned by plaintiff. The use of any one of them would have required the service of another man or increased the task of a single brakeman. That course would have disregarded a custom and a rule of defendant—the employer of the trainmen who did the switching and the braking. With one exception plaintiff released the brakes by hand without

mishap. Three members of the train-crew who switched the string of stock cars onto the side-track testified at the trial. The import of their testimony is: Their attention was called to the accident shortly after it occurred, and the circumstances connected with the switching and the braking were thus impressed on their minds. A single brakeman, while the train was in motion, set the brake on the rear car by hand. The brake was not set by two men, or by the use of a brake-stick, or by the application of air. This testimony came from the brakeman who set the brake on the rear car, and from other trainmen, who said they were present when the live stock cars were switched onto the side-track. In addition, the proofs of defendant show that plaintiff, as conductor, in formally reporting the accident, gave the cause of his fall as follows:

"While switching out stock cars in west end of Ringling yards, to be sanded, was on top of car letting off hand-brakes, and while doing so his handhold slipped, throwing him off balance and causing him to fall to the ground."

In the light of all of the evidential facts which appeal to the reason and convince the judgment, plaintiff's description of the recoil and his opinion that it was caused by the work of two men in setting the brake, or by the use of a brake-stick, or by the application of air, are mere conjecture and speculation. His experts did not strengthen his case. Such testimony is not sufficient evidence of the negligence charged to support a verdict in favor of plaintiff. The contrary was implied, if not declared, by the submission of the case to a jury whose sympathies would naturally be aroused by the age of plaintiff, by his service as brakeman and conductor, and by his injury, suffering and loss. It is sometimes difficult to escape such promptings of the human heart, even where there is judicial responsibility for an impartial analysis of the evidence and for an unfaltering application of the law. Under the circumstances the verdict

for plaintiff, therefore, should occasion no surprise, though without support in the evidence. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

EBBA LOFGREN, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED SEPTEMBER 27, 1919. No. 20525.

Carriers: ACTION FOR INJURIES: DIRECTION OF VERDICT. Where the evidence is insufficient to sustain a judgment in favor of plaintiff, the trial court should direct a verdict for defendant.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

W. J. Connell, for appellant.

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

ROSE, J.

This is an action to recover damages for alleged negligence resulting in personal injuries to plaintiff in a collision with an electric passenger car on defendant's street railway in Omaha. After both sides had adduced their testimony, the trial court gave a peremptory instruction in favor of defendant for insufficiency of the proofs to sustain a verdict for plaintiff. From a dismissal of the action, plaintiff has appealed.

The only question presented is the correctness of the trial court's ruling that there is no evidence of actionable negligence on the part of defendant. The charges of negligence are that the passenger car which struck plaintiff was operated at a high and dangerous rate of speed and was not under control.

The accident occurred on Twenty-fourth street, on a line with the south curb of Mason street, where the two streets meet at right angles. Mason street extends east,

but not west, from Twenty-fourth street. There are double tracks four or five feet apart running north and south on Twenty-fourth street. The south-bound cars run on the west track and the north-bound cars run on the east track. After dark, when there was a light snow on the ground, plaintiff, a passenger, alighted at the rear exit of a south-bound car, which stopped at the south side of Mason street, went around the rear end of it, and walked eastward across the narrow space between the two tracks. As she was stepping over the west rail of the east track, she was struck by the fender of a north-bound car. She testified that, when she was facing southward in alighting, she saw a north-bound car "about a block away," approaching from the south, and knew that she had time to cross the track ahead of it, if it was running at the usual rate of speed. In addition, there is proof that a rule of defendant required the motorman, when passing a standing street car at a public crossing, to have his own car under complete control, "so that stop can be made instantly." Plaintiff argues that, since the north-bound car ran about a block while she was alighting and walking to the place of the collision, its speed was 30 miles an hour. She offered no evidence whatever of the rate at which the north-bound car passed the one on which she had been a passenger. While alighting, according to her testimony, she looked toward the south into the headlight of the approaching car "about a block away." Her estimate applies to the block south of Mason street, where there were no intersections or public crossings. The bases of computation make the result of her calculations mere conjecture. The motorman testified that his rate of speed south of Mason street did not exceed 10 miles an hour; that he applied his brake when within a block of the south-bound car; that he reduced his speed to two or three or four miles an hour while passing the south-bound car; that his car ran four feet only after he saw plaintiff, and two feet only after the fender struck

her. This testimony is in harmony with that of a disinterested eye-witness who assisted plaintiff to her home after the accident. A number of witnesses testified directly to the speed of the north-bound car as it passed the south-bound car, and the estimates range from two to five miles an hour—speeds varying from a slow to a rapid walk. This evidence is uncontradicted, and there is nothing in the record to challenge the veracity of the witnesses who thus testified.

There is also proof that plaintiff, after the accident, was found outside of the west rail of the east track near the front end of the car where the fender is attached. The rule mentioned did not require the motorman to stop at the intersection where the south-bound car had stopped for plaintiff to alight. His headlight, the noise of his moving car, and his gong gave notice of his approach. Under the circumstances he is not chargeable with negligence because he failed to act in advance on the assumption that some one behind the south-bound car would step on the track in front of his car without stopping or looking or listening. The testimony of plaintiff that she saw the approaching car about a block away and knew she could cross the track ahead of it, if running at the usual speed, and the other evidence do not prove that it was operated at a high and dangerous rate of speed while passing the south-bound car, and was not then under control, whatever effect such testimony might have on an issue of contributory negligence.

Plaintiff also testified that light from the northeast was thrown about her from an automobile, but this, in connection with the evidence as a whole, does not show negligence on the part of defendant in the respects charged in the petition. It is clear that plaintiff did not make a case calling for the verdict of a jury, and that the trial court did not err in dismissing the action.

AFFIRMED.

GERALD V. CAUGHLAN, ADMINISTRATOR, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED SEPTEMBER 27, 1919. No. 20600.

Municipal Corporations: PUBLIC BATHING PLACE: LIABILITY FOR DEATH. In absence of statute, a city, in maintaining a public park and a municipal beach therein for bathing and other aquatic recreations, performs a governmental function, as distinguished from a proprietary or business enterprise, and is not pecuniarily liable for personal injuries, resulting from the negligence of city officers to persons exercising such municipal privileges; and neither the character of the municipal function nor the exemption from liability is changed by a small incidental revenue derived from the rental of city buildings used in connection wth the public park or the municipal beach.

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

Thomas Lynch and *Byron G. Burbank,* for appellant.

Frank L. Weaver, W. C. Lambert and *H. L. Mossman, contra.*

ROSE, J.

This is an action against the city of Omaha to recover damages in the sum of $10,000 for negligence resulting in the death of Samuel H. Daniels; the administrator of his estate being plaintiff. A demurrer to the petition was sustained. From a dismissal of the case, plaintiff has appealed.

For the purpose of reviewing the ruling on the demurrer, the facts pleaded in the petition may be summarized as follows: Defendant maintains a public park having a municipal beach on Carter Lake. A public dock, with spring diving boards on each side, extends from the shore into the lake, for the use of persons resorting to the water for recreation and for other purposes. Daniels, in common with the public generally, was invited to use the municipal privileges and facili-

ties. In a bathing suit he jumped head foremost from a spring diving board on one side of the dock, struck his head on the bottom of the lake at a depth of three and one-half feet, and broke his neck. On the other side of the dock the water under the spring diving boards was eight or ten feet deep. The lake was murky, concealing the bottom and the depth of the water. Daniels had not been notified that the water under the spring diving board which he used was shallow, and had no knowledge of that fact. For $402 defendant had leased for a year buildings used in connection with the public dock. Negligence in creating and in maintaining the place of danger described, and in inviting Daniels to use the spring diving board without notice or warning that the water under it was shallow, is imputed to defendant. On these facts, properly pleaded, is the petition demurrable?

Defendant justifies the dismissal of the case on the ground that the city acted in a governmental capacity, and that, therefore, it is not pecuniarily liable for personal injuries resulting from the negligence of its officers. Plaintiff insists that the city receives a substantial revenue from the bathing beach, and that it is answerable in its private or proprietary capacity for the wrongs pleaded in the petition. On the question presented the courts of the country, like the parties hereto, seem to entertain diverse views. The nature of the functions exercised by a city in maintaining a public park has been a subject of extended judicial discussion in recent years. The weight of authority supports the fundamental proposition of law that a city in maintaining a public park performs a public or governmental duty. *Bisbing v. Asbury Park* (80 N. J. Law, 416) 33 L. R. A. n. s., note, 523. The municipal purpose is different from that of an ordinary corporation conducting a business enterprise for private gain. Health, comfort, recreation, sanitary conditions and better environments, resulting in order, happiness and increased usefulness

from a public standpoint, are governmental aims in the maintenance of a public park or a municipal beach. To extend these privileges without compensation or discrimination to the poor and the other classes alike is above the aim of private or individual enterprise generally. To attain these objects is a fundamental purpose of government. Consequently, most courts, in determining liability for negligence in cases of this kind, make a distinction between governmental functions and private enterprise. The rule generally adopted, therefore, is that, in absence of statute, a city, in maintaining a public park or a municipal beach, is not pecuniarily liable for the negligence of city officers while exercising functions relating to this feature of municipal government. *Bisbing v. Asbury Park, supra*: *Harper v. City of Topeka,* 92 Kan. 11, 51 L. R. A. n. s. 1032; *Bernstein v. City of Milwaukee,* 158 Wis. 576, L. R. A. 1915C, 435, and cases cited in note; *Nemet v. City of Kenosha,* 169 Wis. 379. Neither the character of the municipal function nor the exemption from liability is changed by a small incidental revenue derived from the rental of city buildings used in connection with the public park or the municipal beach. *Kellar v. City of Los Angeles,* 178 Pac. (Cal.) 505.

This view of the law results in an affirmance.

AFFIRMED.

SEDGWICK, J., dissenting.

It is said that, in establishing and maintaining parks, the city exercises a governmental function. The supreme court of the United States has said:

"A distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary quasi corporations known as counties, towns, school districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. * * * It is denied that a munic-

ipal corporation (as distinquished from a corporation organized for private gain) is liable for the injury to an individual arising from negligence in the construction of a work authorized by it. Some cases hold that the adoption of a plan of such a work is a judicial act; and, if injury arises from the mere execution of that plan, no liability exists. *Child v. City of Boston*, 4 Allen (Mass.) 41; *Thayer v. City of Boston*, 19 Pick. (Mass.) 511. Other cases hold that for its negligent execution of a plan good in itself, or for mere negligence in the care of its streets or other works, a municipal corporation cannot be charged. *City of Detroit v. Blackeby*, 21 Mich. 84, is of the latter class, where it was held that the city was not liable for an injury arising from its neglect to keep its sidewalks in repair. The authorities establishing the contrary doctrine, that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them."

The opinion then cites English authorities, cases from the supreme court of the United States, and from ten of the states of the Union. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440. This seems to be the well-settled rule of the common law. It is for the city to decide whether it will have parks, and when, where and in what form it will have them. In building them, and caring for them, it is not assisting the state in any way to carry out the laws of the state, but it is acting independently and for its own interests, and there seems to be no reason for holding that it is exercising a governmental function, any more than in laying out, constructing and caring for its streets.

Even if it should be held that the city is exercising a governmental function in constructing parks and improvements therein, and that, therefore, it is not liable for the negligence of its agents in connection therewith, it would still be liable in an action of this kind. As is said in the note under *Bernstein v. City of Milwaukee*,

158 Wis. 576, L. R. A. 1915C, 435: "A municipality may not maintain a public nuisance, even where it is performing a governmental duty." And in 20 R. C. L. 380: "The term nuisance, in legal parlance, extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property." That the thing complained of in this case endangered "life or health" cannot be doubted. No one could discover the danger from the appearances, and this brings it within the principle of the "Turntable cases." In those cases the liability arises from maintaining an "attractive nuisance." The cases generally involve injuries to children, who are not able to discover the danger. In the case at bar the danger was hidden. No one could discover it, and the principle, therefore, applies to such cases. It is conceded that this diving place was authorized by the city. By holding that the city, in authorizing it, was exercising a governmental function, it is now relieved from liability. I cannot concede that to authorize its construction required the exercise of any governmental function, but, even if the city can be said to have exercised a governmental function in that respect, the thing was dangerous to life and health, and was therefore a nuisance, and "a municipality may not maintain a public nuisance, even where it is performing a governmental duty."

MORRISSEY, C. J., concurs in this dissent.

ELIZABETH GRANT ET AL., APPELLANTS, V. BETTIE HOVER ET AL., APPELLEES.

FILED SEPTEMBER 27, 1919. No. 20522.

1. **Wills: CONSTRUCTION: INCONSISTENT CLAUSES.** The settled rule of law is that, if a deed or will conveys an absolute title in fee simple, an inconsistent clause in the instrument attempting merely to limit that title or convey to the same person a limited title in the same land will be disregarded.

2. ———: ———: INTENT. When, however, there are different provisions in the same will as to the disposition of specified property, they must be construed together to ascertain the intention of the testator.

3. ———: DEVISE: CONSTRUCTION. The statement in *Loosing v. Loosing*, 85 Neb. 66, "If a testator in his will devises an estate in fee simple, a subsequent clause attempting to devise over any part of that estate is void," is not approved. The devise and the attempt to devise over must be construed together to ascertain whether the testator intended to convey a life estate to one and remainder to another.

4. ———: ———: ———. The clause, "It is my will" that the land devised to his daughters "shall descend to their children or heirs at their death, and this land is willed to them with this charge," although not technically exact, must, in the light of the whole will, be construed to give his daughters a life estate, and the remainder to "their children or heirs."

5. ———: CONSTRUCTION: "CHILDREN OR HEIRS." The words, "children or heirs," are construed, in the light of the whole will and surrounding circumstances, to mean their children, if they leave any, otherwise to their natural heirs.

6. **Discussion Disregarded.** The discussion in the commissioner's opinion in *Spencer v. Scovil*, 70 Neb. 87, was rejected by the court, and should be disregarded.

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

E. S. Nickerson and *William R. Patrick*, for appellants.

Murphy & Winters, contra.

SEDGWICK, J.

Arthur M. Remer, deceased, left a will by which he attempted to dispose of his property. He left a widow and several children. By the second and sixth paragraphs, inclusive, of his will, he gave specific property to each of his five daughters. The second paragraph is:

"I give, devise and bequeath unto my beloved daughter Bettie Hover the SW 1/4 of NE 1/4 and the SE of NW 1/4 'Tax Lot 6,' all in section 21, township 14, range 13, subject to the railroad right of way."

And the others are similarly positive and direct in form. The seventh and eighth paragraphs of his will are as follows:

"7th. It is my wish and I hereby order and require that my beloved wife, Rebecca Remer, shall have the full use and benefit of all my lands herein devised, during her natural lifetime, and also the interest of the money now in the bank and that my children shall not enter into possesssion of said land until after my wife's death.

"8th. It is my will and I hereby require, that no part of the land so devised by me to my children, shall be sold by them to any one, during their natural life, and shall descend to their children or heirs at their death, and this land is willed to them with this charge, and this is a part of the consideration for willing the land to them."

The trial court construed this will to give to these daughters a life estate only in the specified lands. The appellants contend that the provisions of the seventh and eighth paragraphs are inconsistent with an absolute title in fee simple as conveyed in the prior paragraphs, and that, therefore, these inconsistent provisions are void and to be disregarded. It has been regarded by the courts that it is impossible to convey an absolute title to real estate in fee simple by deed or will, and at the same time in the same instrument convey to the same person a limited right or title in the same land. It therefore follows that when there was an attempt to do so, and no other disposition of the land was made in the will, the courts, on the theory that real estate must have an owner, rejected the attempt to convey the limited title, and treated the conveyance as of a fee simple title. This theory, so patiently developed by the English courts and subsequently by some of the American courts, has led to some peculiar reasoning in some of the later decisions. This has happened even in some jurisdictions where the law required, as our statute

provides, that wills shall be construed so as to carry out the true intent of the testator. It would seem to be manifest that under this rule of law, if there are two different provisions in the same will as to the interest in specified property conveyed to a certain person, the two provisions would be put together, and, in the light of the other provisions of the will, and the conditions and circumstances surrounding the testator at the time, the true intent of the testator should be determined. If the second and seventh and eighth paragraphs of the will, as above quoted, had been combined in one paragraph, probably no question would be raised as to the quality of the estate conveyed by the will to the daughter Bettie Hover; but the limitation that the seventh and eighth paragraphs place upon the devise in the second paragraph is as clear and emphatic as though the three paragraphs were combined in one, and if we are to ascertain the intent of the testator from the whole will and surrounding conditions, we must conclude that the trial court was right in finding that it was intended to convey to Bettie Hover a life estate in the real estate described in the second paragraph of the will, with the remainder to her children or heirs at her death, and subject to the right of the widow, Rebecca Remer, to have the possession and use of the land during her lifetime.

In *Spencer v. Scovil*, 70 Neb. 87, there is a lengthy opinion if the commissioner discussing abstruse questions of construction, and containing some expressions which have perhaps been misunderstood by some who were interested in the construction of wills. Upon motion for rehearing, the court, after investigation, concluded: "The terms of the will seem plain. We do not see the necessity of applying abstruse rules of construction." No one, therefore, should be misled by any "abstruse rules" suggested in the lengthy opinion.

Loosing v. Loosing, 85 Neb. 66, has provoked most of the discussion in later cases. In that case it is correctly

said: "We, however, have never held, nor do we believe it to be sound law, that a general restraint against alienation may be successfully attached to an estate in fee simple. Such a limitation is repugnant to the estate conveyed, against public policy, and void." It is also said: "The intent of a testator must control, and will be ascertained from the language of the will aided somewhat by a consideration of the facts and circumstances surrounding the testator as reflected from the evidence, but that intent will not be inferred in flat contradiction to, and in violation of, well-established rules of law." But this is followed by the inaccurate statement derived from *Spencer v. Scovil, supra*: "We are committed to the principle that, if a testator in his will devises an estate in fee simple, a subsequent clause attempting to devise over any part of that estate is void." The devise and the "attempt to devise over" contained in the same will must be construed together, and if together they show an intent to convey a life estate to one and remainder to another, they are not inconsistent and can be enforced. The succeeding statement in the *Loosing* opinion: "The rule does not of necessity apply merely for the reason that the first clause considered by itself might be construed as conveying a fee simple. The later clause, or clauses, may be read in connection with the first one for the purpose of advising the court whether it actually did transfer the fee, and if it does not in itself clearly and unequivocally do so, and by a comparison thereof with the remaining parts of the instrument the court is convinced that the testator did not in fact intend to vest the greater title in the first taker, the instrument will be construed accordingly"—states the rule better. And it is still more accurately stated in the quotation from *Sheets' Estate*, 52 Pa. St. 257: "Subsequent provisions will not avail to take from an estate previously given, qualities that the law regards as inseparable from it, as, for example, alienability; but they are operative to define

the estate given, and to show that what without them might be a fee, was intended to be a lesser right."

The will in the *Loosing* case said: "I bequeath to my daughter, Louise Loosing (certain lands). This daughter is not to have possession of this property until after the death of my wife. I want it distinctly understood that the property I have herein bequeathed to my two sons and one daughter that they shall not have the right to dispose or mortgage same, but it shall be handed down to their children." And the opinion says: "The subsequent clause * * * does not indicate a purpose on the part of the testator to cut down the estate first granted, but that the children of the first taker shall inherit from their parents. If the testator intended that William, Fred and Louise should only take a life estate, a remainder could not descend or 'be handed down' from them, and their children could not receive an estate, except from the testator and through his will, and he nowhere in that instrument devises anything to the children of his children. * * * He has nowhere provided that such title shall proceed from himself."

This now seems to us as a rather technical construction of the language used, when we consider the whole instrument. If he intended that they should have the title, it must be that he expected them to get it by virtue of his will, and that they would get the title that he himself had when he made the will; and so the title would go to them from himself through the terms of the will. But, however the language there used should be construed, there does not seem to be any doubt as to the language of the will we are construing. He not only wishes, but orders and requires that his wife "shall have the full use and benefit of all my lands herein devised, during her natural lifetime." Clearly the intent was to give the wife a life estate in the land. A title in fee simple includes possession, and "my children shall not enter into possession of said land until after my wife's

death." It would seem a perversion of language to hold that this will gives the entire estate in these lands to the children with immediate possession.

The next clause begins with the words "It is my will." It mentions the land devised to his children, and then says, "shall descend to their children or heirs at their death, and this land is willed to them with this charge." The language is not elegant or technically exact, but if we are only interested in finding how he intended to dispose of his land, and who he intended should have it we cannot think that he was intending to give to his children named more than a life estate therein. He meant that the mother would have the use and benefit of the land during her life, thereafter his children named would have it as long as they lived, and then their "children or heirs" would have the complete title and possession.

A question is raised as to the words, "children or heirs." When the will was made, the devisees of the life estate, or at least some of them, had no children. It was then uncertain whether they would have children at the time of his decease or afterwards. He evidently intended to give the land to the children of the devisees, if they left children, but otherwise to their natural heirs —sisters or their descendants.

This appears to be the effect of the judgment entered by the district court, and it is therefore

AFFIRMED.

STATE OF NEBRASKA, COMPLAINANT, V. ALLEN G. FISHER, RESPONDENT.

FILED SEPTEMBER 27, 1919. No. 20562.

1. **Attorneys at Law: DISBARMENT: COMPLAINT.** If reliable information is brought to this court that any member of the bar of this state has been guilty of misconduct requiring disbarment, the court will require formal charges to be filed and trial had thereon.

However, when the information is brought to this court by the sworn statement of a citizen sufficiently formulating the charges against a member of the bar, and the member so charged makes formal answer to the information, no other proceedings are necessary to present the issues for determination.

2. ———: ———: TRIAL: EVIDENCE. In trial of disbarment, the ordinary rules of evidence obtain. If the defendant objects to evidence on the ground that it is "incompetent, irrelevant and immaterial, not tending to support any issue in this case," and afterwards withdraws his objection, he cannot afterwards complain that the evidence was incompetent because of formal defects.

3. ———: ———: FORGERY. The lawyer who knowingly uses forgery of another to impose upon a court cannot justify or lessen his violation of duty as a member of the bar by showing that he did not himself commit the forgery.

4. ———: SUSPENSION: PRACTICING PROFESSION. To draw pleadings and prepare a case for trial in the district court is practicing the legal profession in that court whether he signs his own name or the name of some other attorney, and is a violation of duty by an attorney who has been suspended from practicing his profession in that court.

5. ———: DISBARMENT: DEFENSE. A prosecution for contempt is entirely distinct from a prosecution for disbarment, and they will not be tried together; but the fact that a member of the bar has made himself liable to a criminal prosecution, and has not been prosecuted, or has not been convicted, may not be a complete defense to a complaint for disbarment for the same act.

6. ———: ———: UNLAWFUL CONSPIRACY BY CLIENTS: DUTY OF ATTORNEY. If a member of the bar is aware of conspiracy of his client and others to obstruct justice and accomplish unlawful purposes in litigation in which he is employed as attorney, he should prevent such practices, if possible, and, if not, should either expose such conspiracy or, at least, withdraw from the employment.

7. ———: ———: UNLAWFUL CONSPIRACY. If the conspirators continually consult with him as to their plans and purposes, and he criticises the same only on the ground of impracticability, and tacitly approves of obtaining, if possible, the desired results by the means employed, he will, in proceedings to disbar him, be considered as one of the conspirators.

8. ———: ———: EVIDENCE. Although a specific charge of misconduct of an attorney may not be supported by sufficient evidence

to require disbarment, still, if it shows a disposition to unprofessional conduct, it should be considered in connection with the facts established upon other charges in the same complaint for disbarment.

9. ———: ———: LIMITATIONS. When the misconduct of an attorney has been practically continuous, and there is no evidence of reformation or change of conduct, disbarment will not be barred by lapse of time as to any of such misconduct.

Original proceeding by the state to disbar respondent from the practice of law. *Disbarred.*

Fawcett, Mockett & Walford and *E. D. Crites,* for complainant.

J. B. Barnes and *Strode & Beghtol, contra.*

SEDGWICK, J.

Disbarment proceedings were begun against the defendant by filing in this court a complaint with seven separate counts with specifications. The defendant answered, and the court appointed Honorable Frank A. Barton referee to take the evidence and report to the court his findings of fact and conclusions of law. The matter appears to have been very earnestly contested before the referee. A very large amount of evidence was taken by the state, and the referee has found that the first four alleged grounds for disbarment stated in the information are established by the evidence, and his conclusion is that the defendant is guilty as charged, and that he ought to be disbarred. The referee found that the three remaining charges of the information are not established by the evidence. A motion was made to confirm the report of the referee as to the first four counts and for order of disbarment thereon, and that the findings of the referee as to the fifth and sixth charges of the information be reversed, and the court find from the evidence that the defendant is guilty as therein charged. It is conceded that the seventh charge of the information is not supported by the evidence.

It was objected that the information should be dismissed, because it is presented by a private person, and

not by the authority of the court or of the state. It is the duty of any citizen who has knowledge of the fact to inform this court when any member of the bar has been guilty of such conduct as to require his disbarment. Perhaps regularly upon such information the court would order the attorney general or some member or committee of the bar to investigate the matter and formulate charges. However, when the information is brought to this court by the sworn statement of a citizen formulating the charges against a member of the bar, as in this case, and the member so charged makes formal answer to the information, no other proceedings are necessary to present the issues for determination.

The first count of the information charges that the defendant in February, 1907, was guilty of forgery in an action pending in the district court for Dawes county, in which he was employed as attorney, and that he offered the forged document in evidence, and that, to procure the admission of the document in evidence, he falsely testified in that trial that the document as offered by him was executed in his presence by the parties by whom it purported to be executed. The record, including the evidence taken in the trial of the case referred to, was offered and received in evidence before the referee. As this defendant was not a party to that action, it is objected that this record and evidence was incompetent and should not have been received. This objection would have been available as to a large part of this record, at least, if it had been made at the time it was offered and had been insisted upon. On the contrary, it was stipulated between the parties that the files offered were the original files in the case referred to, "and that said files were produced by the proper authority, foundations of proof being waived." The defendant made several objections to the evidence, as that the charge was too stale, and that the charge was not ground for disbarment, and was barred by the statute of limitations, and was false in substance. When

the pleadings, proceedings, and decree in the cause were offered, the defendant objected on the ground that it was "incompetent, irrelevant and immaterial, not tending to support any issue in this case." But afterwards the record shows: "Objection is withdrawn and said exhibits numbered 1 to 1-L are here received in evidence." The defendant, by withdrawing this objection to the evidence, made the production of oral testimony unnecessary, and cannot now be heard to object to the competency of the evidence.

It is also objected that the evidence, even if the record is considered, is not sufficient to support the finding and conclusion of the referee.

"The lawyer's life must be one of fidelity and stern integrity." *In re Sitton,* 177 Pac. (Okla.) 555.

"In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. If a deceit is practiced by an attorney in his character as such, although not in a suit pending in the court, he may be removed from his office as attorney." *State v. Burr,* 19 Neb. 593. 2 R. C. L. 1099, sec. 192; 6 C. J. 598, sec. 58.

The facts established by the uncontradicted evidence, with admissions of defendant, in this record, prove that the defendant knew, or at least as the responsible attorney in the case should have known, that the document he offered in evidence had never been agreed to by the party against whom it was offered. If defendant was not guilty of forgery himself, he sought to deceive the court by the forgery of others. One who attempts to benefit by the use of forged commercial paper is as guilty of felony as the forger himself. And so, the lawyer who knowingly uses forgery of another to impose upon a court cannot justify or lessen his violation of duty as a member of the bar by showing that he did

not himself commit the forgery. This evidence is an important part of the whole evidence showing the character of the defendant's professional conduct during a series of years.

Proceedings for disbarment of this defendant were heard before this court in 1908, and resulted in his suspension from practice as an attorney for the year commencing Feb. 1, 1909. *State v. Fisher,* 82 Neb. 361. The second count of the information that we are now considering charged that the defendant, in violation of the order of this court in the former proceedings, continued in the practice of law during the whole year in question. The order of this court was: "It is therefore considered, ordered and adjudged that the defendant Allen G. Fisher be, and he is hereby, suspended from the practice of his profession of attorney and counselor at law in this and the district courts of this state for the period of one year; but, in order to protect the interests of his clients the suspension shall not take effect until January 1, 1909." The defendant was employed as an attorney in litigation then pending, and he attempted with another member of the bar to conduct the litigation in the courts, not only in those cases then pending, but also in such new cases as might be offered to defendant. It is contended that the defendant did not at any time orally participate in the trial of cases in open court, either in the state supreme or district courts, and that the order of the court did not deprive him of the right to do any other act or thing that he was authorized to do by his membership of the bar of the state. If it should be considered that the order did not suspend all of the powers given him by his membership of the bar, he was forbidden to "practice his profession" in the courts named. What is it to practice the legal profession in the courts? In *In re Lizotte,* 32 R. I. 386, 35 L. R. A. n. s. 794, it is held: "An attorney who has been suspended from the practice of his profession is guilty of contempt of court if he retains

upon his office door and stationery the statement that he is an attorney, and consults with clients, makes collections, and does other legal work the same as before his suspension, except so far as it requires his appearance in court proceedings, although in so doing he acts upon advice of counsel." The opinion recites the acts complained of, which are substantially the same as this defendant has done. The court said: "Members of the bar who are under suspension will be required to comply with the terms of the decree suspending them in such a manner that there may be no ground for suspicion on the part of other members of the bar or of the public that the decrees of this court are not being exactly observed in their letter and their spirit."

The defendant here not only prepared and filed in the district court pleadings and other papers with the name of another attorney attached, but in some instances with his own name also attached as attorney. He maintained a law office as before his suspension, which carried a sign naming him as an attorney at law. He consulted with clients continually in regard to their actions pending in this and the district court, and was present in court when their cases were tried. In some cases he attempted in open court to make suggestions in regard to one of his cases being tried, and was rebuked by the court. These things and other matters that are proved without contradiction constitute practicing "his profession as attorney and counselor at law." To draw pleadings and prepare a case for trial in the district court is practicing his profession in that court, whether he signs his own name or the name of some other attorney. During the time he was so violating the order of the court, the court so construed that order and notified him of that fact. The evidence shows that he forwarded some papers to the clerk of this court for docketing here, and that the court, after learning the facts, instructed the clerk to inform this defendant that "a package containing records" in certain cases had

been received by the clerk with the defendant's check "in payment of filing fee in these cases," and "the judges have given this office positive instruction to file no papers in this court received from you, even though the name of some other person is attached thereto as attorney. * * * They have also requested that we return your letter of July 6, together with your check for $20. * * * It has been suggested that it would be well for you to strictly obey the order of the court, and not try to avoid same by signing other attorney's names to papers filed herein; otherwise, your action might prove disastrous both to yourself and the attorney whose name you attach to the papers." This official construction of the order and notification of the same appears to have had no effect upon the defendant. He continued in his conduct as before.

It is said that, if such conduct amounted to contempt of court, the remedy was to punish for contempt, and that disbarment cannot be coupled with prosecution for contempt. It is true that the evidence appears to establish that the defendant was by that practice guilty of contempt of court, and that he might have been prosecuted for such contempt, and also that a prosecution for contempt is entirely distinct from a prosecution for disbarment, and that the two cannot be joined, at least are not usually joined, in one complaint. But the fact that a member of the bar has made himself liable to a criminal prosecution, and has not been prosecuted and convicted, is not an answer to a complaint for disbarment for the same act. Such complaint for disbarment may be made either before or after a prosecution, whether the prosecution is successful or unsuccessful. 2 R. C. L. 1101, sec. 194.

The third count alleges that the defendant was employed by one Hood to obtain a divorce, and that Edwin D. Crites, an attorney of the same county, was employed by Mrs. Hood, and that defendant conspired with certain private detectives and with enemies of Crites to

"cause the said Edwin D. Crites and the said Mrs. Robert Hood, in said county and state, to be falsely charged with material (marital) misdemeanors, indiscretions and scandals, with each other, prejudicial to the honor and reputation of the said Edwin D. Crites, as such attorney, and the said Mrs. Robert Hood, and did so conspire, confederate, advise and agree that the said Edwin D. Crites and the said Mrs. Robert Hood should in some manner be caused to be found together in the law office of the said Edwin D. Crites, in the city of Chadron, in the nighttime, * * * and would then use such fact of the presence of said Crites and said Mrs. Hood in said office at said time as a basis for compelling, by threats of exposure for alleged marital misdemeanors, indiscretions and scandals, and by personal violence, if necessary, the said Crites and Mrs. Hood to sign written admissions and acknowledgments of marital misdemeanors and indiscretions, and would compel the said Edwin D. Crites, who was an attorney and counselor at law as aforesaid, and the county and prosecuting attorney in and for said county of Dawes, unlawfully, improperly, and forcibly, if necessary, and against his will, to dismiss certain criminal prosecutions then pending against one of the conspirators, and others, * * * and to coerce and compel the said Crites to abstain and refrain from thereafter seeking election to public office, and to coerce, and compel the said Mrs. Robert Hood to refrain from making any defense to said contemplated suit for divorce by her said husband, and to waive and abandon any claim, demand or right for alimony therein, all for the unlawful, unprofessional and wicked purpose and with the intent thereby to procure false and perjured testimony whereon to obtain a decree of divorce for the said Robert Hood, which the said Fisher well knew could not be lawfully obtained on truthful testimony."

It alleges various actions on the part of defendant and other conspirators to carry out the conspiracy. It seems

to be conceded that the conspiracy existed, and that Hood had employed the detectives for the purposes alleged, and that active and vigorous efforts were made to carry out the plan; also that this defendant was acting for Hood as his attorney, and knew all about their plans and purposes, and was continually consulting with the conspirators with reference thereto. Witnesses testified that this defendant planned and continually assisted in carrying out the conspiracy. The defendant denied that he planned or advised the action of the conspirators, and testified that he told one of the conspirators that "Mr. Crites is too wise to have any arrangement or meeting of that kind, and I said, if he did have, I said, Mr. Hood knows that his wife has a right to go and see her attorney, and I said that he wouldn't pay any attention to it; I said it is a piece of——foolishness," and similar statements. He does not testify to any active measures of his to prevent the conspiracy or its consummation. The consipiracy was largely intended in aid of the litigation in which defendant was employed as attorney for Mr. Hood, and Hood was actually prompting it. Defendant's objections, as testified to by him, were wholly on the ground that it was impracticable, and would not accomplish the desired results.

An attorney and counsellor at law is an officer of the courts, and the proper sense of the importance and honor of his high calling will prevent his connection with litigation in which such methods are practiced, and would lead him at once to prevent such attempts or withdraw from the employment. But the plans were discussed and made in the defendant's office, and he attempts the further justification by the assertion that some parts of the scheme were discussed with his law partner, and not with himself.

"It is the duty of an attorney and counsellor: First, to maintain the respect due to the courts of justice and to judicial officers; second, to counsel or maintain no other actions, proceedings or defenses, than those which

appear to him legal and just, except the defense of a person charged with a public offense; third, to employ, for the purpose of maintaining the cause confided to him, such means only as are consistent with the truth; fourth, to maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his clients; fifth, to abstain from all offensive practices, and to advise no fact prejudicial to the honor or reputation of a party or witness required by the the justice of the cause with which he is charged; sixth, not to encourage the commencement or continuance of an action or proceeding from any motive of passion or interest." Rev. St. 1913, sec. 269.

The fourth count charges that the defendant became offended against this complainant, and "proceeding from motives of passion, interest and hatred on his part against this complainant, instigated, and ever since has maintained, continuous litigation of one sort and another against this conplainant, before the general land office, the courts of this state and of the United States; that said litigation was malicious and without probable or any cause, was illegal and unjust, and was not consistent with truth." It is alleged in these proceedings that defendant committed perjury and was guilty of various acts of professional misconduct, and, among other things, it is alleged that, in contesting a filing of complainant on government land, the defendant falsely procured his minor son to represent himself as the head of a family and pretend to adopt a younger brother, while in fact both sons were living with the defendant and were supported by him; that the defendant filed affidavits before government officers to maintain these false claims, and himself committed perjury therein. Without attempting to analyze the great mass of evidence as to perjury of defendant in these matters, or his good faith in the many actions he brought against complainant, it is sufficient to consider his attempt to secure this government land in the name of his minor son.

If a minor may under some circumstances be the head of a family within the meaning of the homestead law this defendant knew that the pretended adoption of his younger brother was a farce, and that both sons were dependent upon their father for support. It is plain that he adopted the scheme to impose upon the federal officials and to obtain for his son government land illegally.

The fifth count charges that defendant and others "associated themselves together under the name of Surety Title & Trust Company, which they claimed to have incorporated;" that in fact there was no incorporation, and their main purpose and practice was to find defects in titles and obtain quitclaim deeds that would enable them to challenge the title of the owner; that pursuant to this policy they purchased fictitious claims and began litigation; that a writing was executed in the name of this company with the defendant, whereby he agreed "to perform for a period of four years, from this date, all necessary legal business of this company, and his compensation therefor is to be 20 per cent. of the capital stock now issued;" that defendant afterwards brought an action against the company upon the contract, had the summons served upon himself as secretary, and procured judgment thereon without the knowledge of any one interested; "that said purported judgment was so procured to be entered for the purpose of enabling the said Fisher to realize on a fraudulent claim, and for the purpose of enabling him to make a purported levy thereunder on lands owned by one Fred Hoyt, in trust for the Sheridan Realty Company, a corporation of Sheridan county, Nebraska, he, the said Fisher, claiming that said lands were held in trust by said Hoyt for said alleged corporation, Surety Title & Trust Company. * * * Upon the entry of said supposed judgment, the said Fisher caused an execution to issue out of the office of the clerk of said district court thereon, and caused the same to be levied upon the land so held in trust by

said Hoyt, without any notice to said Hoyt, and caused the same to be advertised for sale by the sheriff to satisfy said judgment, although said land was not then and never had been the property of said Surety Title & Trust Company, as said Fisher then and there well knew; that said Hoyt, being advised by friends of such sale, instituted his suit in injunction in said district court, as plaintiff, against said Fisher and the sheriff of said county as defendants, to restrain said Fisher and said sheriff from making sale of such lands, and such proceedings were had in said cause in said court, that the issues were joined, a hearing had, and a decree entered in favor of said Hoyt and against said Fisher and said sheriff, and that thereupon the said Fisher prosecuted an appeal to this court from such decree of said district court, and said appeal is still pending."

The sixth count is that defendant filed a large fictitious claim against the estate of a decedent, with many specifications of unprofessional and even rascally conduct of defendant in connection therewith. It is not necessary to analyze the evidence, which is voluminous, in support of these fifth and sixth counts. Even if it should be found that the evidence is not sufficient to require disbarment on either of these two counts, if considered alone, which we understand is the view of the referee, yet the nature of the charges and the evidence supporting them will require that they be considered in connection with the facts upon which the disbarment is based. If an attorney has been guilty of such misconduct as requires disbarment, and there is clear evidence of subsequent reformation, there would be no occasion for disbarment under such circumstances. Even if he had been disbarred at the time of such misconduct, clear proof of reformation might justify his reinstatement. In this case the misconduct of defendant has been practically continuous, so that each unworthy act tends to aggravate the main offenses. Each of the

first four counts is sufficiently proved. 6 C. J. 601, sec. 61.

We therefore approve and confirm the findings and conclusions of the referee, and it is ordered that the admission of the defendant, Allen G. Fisher, to the bar of this state is canceled and annulled, and his name stricken from the roll of attorneys and counselors at law.

DISBARRED.

MORRISSEY, C. J., not sitting.

PETE WOZNIAK V. STATE OF NEBRASKA.

FILED SEPTEMBER 27, 1919. No. 20945.

1. **Intoxicating Liquors:** INFORMATION. An information which charges only that the accused kept intoxicating liquors "for unlawful purposes" is too indefinite to charge a felony under section 11, ch. 187, Laws of 1917.
2. **Criminal Law:** INFORMATION, SERVICE OF COPY. In prosecutions for felony, the statute requires that a copy of the information be served upon the defendant at least one day before the trial.
3. ———: ———. When defendant objects to going to trial because no copy of the information has been given him, and the objection is overruled without any suggestion that such copy has been served, such ruling cannot be sustained unless the record affirmatively shows such service.
4. ———: ———. If the briefs do not quote nor refer to such evidence in the record, the court will not presume that such evidence exists.
5. ———: ARRAIGNMENT. A judgment of conviction for felony will not be affirmed unless the record shows that the accused was arraigned and given an opportunity to plead before the trial began. (Letton, Dean, and Aldrich, JJ., dissent.)
6. ———: INSTRUCTIONS: DEGREES OF GUILT. Under section 56, ch. 187, Laws 1917, the first and second offenses are misdemeanors with different penalties attached, and the third offense is a felony. In a prosecution for felony under the act, the defendant may be acquitted of the felony but convicted as for a first or second offense. The instructions should be given upon that theory, especially when the evidence as to former offenses is more doubtful than as to the principal offense charged.

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

Jamieson & O'Sullivan, for plaintiff in error.

Clarence A. Davis, Attorney General, George W. Ayres and *J. B. Barnes, contra.*

SEDGWICK, J.

The defendant was convicted and sentenced to the penitentiary for a term not exceeding two years, under section 56, ch. 187, Laws 1917. The original information charged the defendant with keeping intoxicating liquors "at a place other than his private dwelling house," which would be criminal under section 11 of the act. When the evidence developed that the liquor was kept at his dwelling house, the prosecution asked to amend the information by striking out those words and adding the words "for unlawful purposes." This was objected to, but the amendment was allowed. Section 11 provides that no person shall keep intoxicating liquors in his dwelling house "in an amount more than is reasonably sufficient for his personal use and needs." The violation of this provision was not charged in the information, and it is not stated in the briefs under which provision of the statute the words, "for unlawful purposes," were inserted in the information. The language of the information in this regard is not as definite as is generally used in charging a felony.

Section 9080, Rev. St. 1913, provides: "Within twenty-four hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, the defendant or his counsel a copy of the indictment, and the sheriff on receiving such copy shall serve the same upon the defendant, and no one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid."

The first objection presented is that the defendant was not served with any copy of the information. As this was a prosecution for a felony, the statute is mandatory that the defendant must be served with such copy, and that he cannot be put upon trial until one day after such service. The brief of the state says: "The record shows that defendant was served in due time with a copy of the information;" but no reference is made to the place in the record where this is found, and we have not observed it. In *Preuit v. People,* 5 Neb. 377, it is said that failure to enter the prisoner's plea on the back of the indictment is not ground for the reversal of the judgment "when the plea is contained in another part of the record." This indicates the reasonable rule that the record must show affirmatively the compliance with those provisions of the statute that are intended to secure to the defendant a fair trial. The defendant objected at the time, "for the reason that no copy of the information was served upon the defendant in this case 24 hours previous to this trial." The court overruled the objection without any suggestion from any one that the information had been properly served upon the defendant, and then the court suggested, "I suppose there should be a plea of some kind here," and the prosecuting attorney said: "I don't know whether he has been arraigned in this court." The defendant then objected to "being arraigned at this time, for the reason the jury has already been picked and sworn to try this case." The court then entered upon the record this statement: "Let the record show that the jury has been examined and sworn and the statements made, the defendant not having been arraigned, and under objection to the arraignment the court enters a plea of not guilty for him."

"A judgment of conviction of felony cannot stand where there was no arraignment of, and plea by, the accused before the trial." *Browning v. State,* 54 Neb. 263. The counsel for the prosecution seemed to have

overlooked the fact that they were trying this man for an alleged felony, and that it was necessary to observe the rules of law intended for the protection of the accused in such cases.

Under the statute, the first and second offenses are misdemeanors with different penalties attached, and the third offense is a felony. The information specified the dates on which it was alleged the defendant was convicted of the former offenses charged. The court submitted the case to the jury on the theory that they must either find him guilty of the third offense constituting the felony, or find him not guilty. This was erroneous. When the evidence is clear of the particular offense charged, but is doubtful as to prior offenses, the rights of the defendant might be prejudiced by such an instruction.

There are other errors discussed in the briefs, but they may be covered by the general observation that, in prosecutions for violations of the prohibitory statute, the constitutional rights of the defendant, and the established law for enforcing, those rights, must be observed, so far at least as not abrogated by express provisions of the statute. There is nothing in this statute to the effect that prosecutions for felony under its provisions are to be entirely without the ordinary safeguards of the rights of the accused.

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

REVERSED.

CORNISH, J., concurring.

While I have always believed that the ancient procedure, requiring the arraignment of an accused man before putting him to trial, was the only fair or legal method, yet I have also thought that there was no good reason, under modern conditions, why the accused (the law permitting it) may not waive arraignment. Our system of criminal jurisprudence, in its care to protect the rights and liberties of the citizen, had the

rule that without the plea there could be no valid trial. This state has a statute upon the subject, section 9092, Rev. St. 1913, as follows: "The accused shall be arraigned by reading to him the indictment, unless, in cases of indictments for misdemeanors, the reading shall be waived by the accused by the nature of the charge being made known to him, and he shall then be asked whether he is guilty or not guilty of the offense charged."

Under this statute, I do not see how the court, following plain rules of construction, can do otherwise than hold that it is the duty of the trial judge to see that the defendant, accused of a felony, is arraigned, whether he would waive it or not. Such in fact has been the decision of this court in three cases, where the question has been considered, the latest being *Burroughs v. State*, 94 Neb. 519. Until the rule is changed by legislative act, the law as it is must govern the courts.

An act permitting waiver, as waiver is understood in the law, would be reasonable. If, however, in order to enforce the recent amendment to the Constitution against saloons and drunkenness, the legislature should go to the extremity of providing that, even in a case like this, where, in the midst of a trial, the indictment or information is changed so as to charge a different offense from the one upon which the trial began, the prosecution should be allowed still to proceed, denying the defendant an opportunity to prepare his defense against the crime then charged for the first time, then we would have a case for the supreme court of the United States, but not similar to the one relied upon for the contention made in this case. In *Garland v. State of Washington*, 232 U. S. 642, the supreme court of that state, apparently in the absence of any statute upon the subject, had decided that, under the law of the state, defendant had waived formal arraignment upon the information. The only question before the federal supreme court was whether the due process of law amend-

ment to the Constitution had been violated. The court said: "Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution"—and refused to hold that "the want of formal arraignment deprived the accused of any substantial right or in any wise changed the course of trial to his disadvantage," since, under the circumstances of the particular case, it could not be said that the accused was deprived of a substantial right. This is very far indeed from holding that the state would not have authority by express statute to require the accused, in a prosecution for felony, to be arraigned and hear the information read before the trial. If our statute is wrong in that respect, it devolves upon the legislature to change it.

I am not to be understood as saying that it is the attitude of any of the judges that extreme legislation of the sort mentioned in paragraph 3 above would be valid, nor that the procedure, in the instant case, in the trial court was proper.

LETTON, J., dissenting.

I again dissent from the statement of law in the fifth paragraph of the syllabus. Under certain circumstances the want of arraignment may be prejudicial error, but the defendant may by his conduct waive arraignment. Since the decision of *Burroughs v. State*, 94 Neb. 519, in which my former dissent was written, the supreme court of the United States has taken a forward step and overruled its former decisions in this respect, saying: "Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses,

even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the *Crain* case, 162 U. S. 625. * * * Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the *Crain* case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed, it is necessarily overruled." *Garland v. State of Washington,* 232 U. S. 642.

I believe this court should follow the example of that distinguished tribunal, and overrule its former decisions adhering to the idea that convictions of crime should be set aside for the lack of a mere formality.

DEAN and ALDRICH, JJ., concur in this dissent.

KENESAW FREE BAPTIST CHURCH, APPELLEE, V. G. S. LATTIMER ET AL., APPELLANTS.

FILED SEPTEMBER 27, 1919. No. 20524.

1. **Religious Societies:** GOVERNMENT: CONTROL OF PROPERTY. When a church, strictly congregational or independent in its organization, is governed solely within itself, either by a majority of its membership or by such other local organism as it may have instituted for the purpose of ecclesiastical government, and holds property either by way of purchase or donation, with no other specific trust attached to it than that it is for the use of that church,

the numerical majority of the membership of the church may ordinarily control the right to the use and title of its property.

2. ———: — —: ———. Such local church may sever its ecclesiastical connection and still be entitled to control the temporalities of the church, where such change does not involve any diversion of the property from the original trust. In such case the civil courts will only inquire as to who constitute the religious society and its legitimate successors, and award to them the use of the property, and will not ordinarily, in case of a schism in the organization, inquire into the existing religious opinion of those who adhere to the original local organization.

APPEAL from the district court for Adams county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

Hugh La Master, for appellants.

C. C. Flansburg, contra.

CORNISH, J.

Appeal by defendants from a decree quieting title in the plaintiff to certain church property held by them as trustees, and enjoining them from interference therewith.

In 1883, 1884, when funds were raised and the church building erected, the Freewill Baptist denomination at Kenesaw was an independent governing body, owing no obedience to any higher authority. Quarterly meetings, composed of delegates from two or more local churches, could admonish a church when, in its opinion, it became an alien to the faith and practices of the denomination. It could determine whether the church was worthy of its fellowship or not. A local church, being independent, had the right to withdraw from the quarterly meeting and to join another evangelical denomination. This body would send delegates to the yearly meeting, which body sustained about the same relation to the quarterly meeting that the quarterly meeting did to the local church. Still higher was the general conference, a national organization, which aimed to consolidate the body, harmonize its different parts, and produce unity of

sentiment and discipline. Its powers, too, were only admonitory.

In the nine articles of the constitution of the local church it was provided that its trustees should provide for purchasing, selling, insuring, and caring for its property, and, amongst others, a provision as follows: "Other matters shall come under the rulings of general conference." In October, 1883, the general conference appropriated $200 for erecting a house of worship at Kenesaw. The remainder of the $1,503.18, required to erect the church, was pledged without condition for the building of the church by local contributions of the citizens of Kenesaw before the church was organized. At the time of the completion of the church $400 was owing, which the church assumed and paid.

At this time one Rev. A. D. Williams acted as church clerk, was its first pastor, and the active person in procuring the church fund. He was also chairman and one of the five members of the executive committee of the Nebraska Yearly Meeting, a corporation, to whom the property was deeded "in trust for the Freewill Baptist Church of Kenesaw, Nebraska." This executive committee was created "to be a board of missions and church extension, to secure, hold, use and convey funds, in money, houses or lands, for the propagation of the gospel," etc. It was named a "System of Co-operation," organized in part to hold title in trust "for the churches or purposes for which it was secured," in cases where it had afforded aid. It would seem that the fund raised was pledged before the creation of this executive committee and co-operative system, but from the time Mr. Williams became its chairman, January 21, 1884, the committee, through him, may be said to have given aid in the construction of the building. Later the congregation built and paid for a parsonage upon the church grounds.

Years afterwards, by concerted action of the national organizations of the Freewill and Missionary Baptists,

it was determined that there was no such difference in their denominations as to require their continued separation, and a basis of union was agreed upon and approved by the general conference of Freewill Baptists. Twenty-eight constituent bodies of the general conference, representing 44,481 members, approved, and five bodies, representing 1,721, disapproved of the basis of union. Among those disapproving was the Nebraska Yearly Meeting. The plaintiff church, however, approved of the action taken. Afterwards the Nebraska Yearly Meeting organized another general conference, and in 1915 refused recognition of delegates from the plaintiff church, on the grounds that it had taken itself out of the denomination. It also refused to deed the church property to the plaintiff, and would seem to claim the right, if in its judgment it seems proper, to hold the property for the uses of another congregation, conforming to the present views of the Nebraska Yearly Meeting. It should be added that the plaintiff represents every member of the present congregation at Kenesaw, so that what might be considered as the individual right of a member of the church is not involved.

The question is whether the members of the local church, as an independent body, can control the right to the use and title of the church property, in spite of the fact that the system of co-operation governing the executive committee provides that it shall be the judge whether the church has taken itself out of the denomination, or has become extinct, and when and in what way the property shall be disposed of for the purposes for which it was secured.

Disputes of this character have been classified as follows: First, cases where the property has been by the deed or will of the donor, or other instrument, by which the property is held, by the express terms of the instrument devoted to the teaching, support or spread of some specific form of religious doctrine or belief; second, cases where the property is held by a religious con-

gregation, which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and, so far as church government is concerned, owes no fealty or obligation to any higher authority; third, cases where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals, with a general and ultimate power of control, more or less complete, in some supreme judicatory over the whole membership of that general organization. It will be remembered that the trust created in the deed in controversy was "for the Freewill Baptist Church of Kenesaw, Nebraska."

No doubt individuals may dedicate their property for the propagation of a definite religious doctrine or belief, so long as it violates no law or morality, in which case the property cannot be diverted from its special purpose. When, however, as in the instant case, property is given to a church which is a strictly congregational or independent organization, governed solely within itself, with no specific trust attached other than that it is given for church purposes, the case is different. In such case the ordinary contributor to a particular church regards it as a living organism, subject to change and growth. He would not attach conditions to the contrary if he could. So long as it continues by regular succession, retaining its identity as the church to which the donation was made, he will not complain, even though there are changes of doctrine or method which do not amount to an abandonment of the original purpose. This was the attitude of the yearly meeting. It has thought itself free not to follow the action of the general conference.

The defendants contend that differences exist between the old organization and the union, touching freedom of the will, general atonement, open communion, and perseverance of the saints. We will not go into a discussion concerning the extent of these differences. We

do not believe that they are of such a character as to show an intention, on the part of the governing body of the local church, to violate its implied trust and abandon the purposes for which the church was organized. We do not believe that the local church, in following the recommendations of the general conference, have acted outside of their own rights or violated any of the rights of the executive committee. No member of the local congregation complains. The general rule appears to be that, when a majority section of the church, independent in government, voluntarily followed the action of the general conference, which resulted in severing its connection with the yearly meeting, it did not thereby lose its identity, and is entitled to control the temporalities of the church, such change not involving any diversion of the property from the original trust.

We are of opinion that the congregation of the Kenesaw Freewill Baptist Church are entitled to have their property in the hands of those who are in accord with their purposes, and who do not deny them the right to take the step which they have taken in their church affiliations.

Error is assigned that plaintiff failed to prove its corporate character, and that such failure must defeat its action. We are of opinion that under the circumstances of this case the plaintiff was not required to either plead or prove its corporate character.

For cases bearing upon questions discussed, see *Mack v. Kime*, 129 Ga. 1, 24 L. R. A. n. s. 675; *Watson v. Jones*, 80 U. S. 679; *Brown v. Clark*, 102 Tex. 323, 24 L. R. A. n. s. 670; *Schradi v. Dornfeld*, 52 Minn. 465; *Parish of the Immaculate Conception v. Murphy*, 89 Neb. 524; *Pounder v. Ashe*, 44 Neb. 672; *Smith v. Pedigo*, 145 Ind. 361, 19 L. R. A. 433; *Exchange Nat. Bank v. Capps*, 32 Neb. 242.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

PRESCOTT E. POWERS, APPELLEE, V. MABEL P. NORTON ET AL., APPELLANTS.*

FILED SEPTEMBER 27, 1919. No. 20355.

Specific Performance: PAROL CONTRACT; EVIDENCE. An action for the specific performance of an oral contract for the conveyance of land will not lie, unless the proof is clear, satisfactory and unequivocal that the contract was made and substantially performed by the party seeking its enforcement.

APPEAL from the district court for Adams county: WILLIAM C. DORSEY, JUDGE. *Reversed and dismissed.*

Ragan & Addie and *C. C. Flansburg,* for appellants.

Charles E. Bruckman and *Fred G. Johnson, contra.*

DEAN, J.

Carra Powers, unmarried, died in Adams county December 1, 1916, being then the owner of a small amount of personal property, not in controversy here, and 80 acres of land. Her mother, Mrs. Jannette Powers, and a brother and sister, namely, Prescott Powers and Mrs. Mabel Norton, survived her. Three days before her death she made a nuncupative will that purported to give, not only her personal property, but also the land to her sister on condition that she take care of her mother during her life. The nuncupative will was probated, but, being ineffective to pass the title, the land descended to her mother under the statute. Soon thereafter Mrs. Powers conveyed the title to her daughter, with whom she now makes her home.

Prescott Powers began this suit to compel specific performance of a verbal contract, alleged to have been entered into between him and his sister Carra nearly 18 years before she died, and that he says was fully performed on his part, and wherein it was provided that

*First heard before commissien and affirmed. No opinion.

her land should upon her death become his sole property, in consideration of his remaining at home and caring for her and her mother. Plaintiff also prayed that the deed of his mother to Mrs. Norton be canceled and that the title be quieted in him. The plaintiff prevailed, and defendants appealed. This case was formerly heard by the commission on appeal, and the judgment of the trial court was affirmed. The case is now before us on a motion for rehearing.

Carra was a cripple, but with her mothers's aid she did a good deal of housework. She was an accomplished seamstress and earned considerable money sewing for others. During the time material to this inquiry she attended to her own business affairs for the most part, collecting the land rent and the like, although for a part of the time she leased her land to her brother.

Plaintiff attempted but failed to show that he paid out considerable sums of money for the care and support of his sister and mother. No good purpose would be served by an extended review of the record on this point. Because of plaintiff's negligence and lack of ordinary business ability it appears that he lost, not only an 80-acre tract of land that he owned, but he was the cause of his mother losing an 80-acre tract that she owned, and on which the family lived, and it appears that he became very much displeased because Carra refused to involve her land and pledge it to the payment of his debts.

There is some testimony tending to show that plaintiff and his sister had some talk respecting the subject of this suit. But there is an entire absence of evidence to show that the minds of the parties met, and that they entered into a clearly defined agreement. The record does not disclose what Carra's intentions were, and it fails to show what services plaintiff was to perform for her. Nor is the time of performance definitely fixed. The evidence adduced by plaintiff on these points is vague, uncertain and unsatisfactory. It fails utterly to

come within the rule that is required in this class of cases, namely, that the proof relied on to establish the contract must be clear, satisfactory and unequivocal. *Damkroeger v. James,* 95 Neb. 784.

A large number of witnesses were called by plaintiff, from whose testimony it appears that he did nothing more for his sister nor about the home than would reasonably be expected from a brother who lived with a mother and a sister under like circumstances. They testified generally that he carried in water and fuel, and helped his sister into the family carriage when she would go away and to alight when she returned, and that he sometimes accompanied her to town. His mother and other witnesses testified that he was unkind to his sister. During all this time Carra and her mother lived and maintained the home on the 80-acre farm, formerly owned by Mrs. Powers, that joined the land in suit. Plaintiff, being a single man and without a home of his own, lived with them there until within two or three years before his sister died, when he married and with his wife moved to Hastings, 22 miles distant. Except for occasional visits thereafter, he left his aged mother and crippled sister alone on the farm.

It is not sufficiently proved that a definite contract was entered into. Our former judgment is therefore vacated, the judgment of the district court is reversed and the suit dismissed.

REVERSED AND DISMISSED.

STATE, EX REL. COUNTY OF BURT, APPELLANT, V. BURT-WASHINGTON DRAINAGE DISTRICT, APPELLEE.

FILED SEPTEMBER 27, 1919. No. 20563.

1. **Drains:** BRIDGES. When a county board and the governing board of a drainage district fail to agree respecting the building of bridges over drainage ditches on county roads, under section 2983, Rev. St. 1913, it becomes the duty of the drainage district

to construct such bridges under the supervision of the county board.

2. ——: ——: ESTOPPEL. When a county board is notified by a drainage district that it is desirous of constructing bridges over its ditches on county roads, or in any manner becomes aware of that fact, and fails to take steps to undertake the supervision of such construction, as provided in section 2983, Rev. St. 1913, and, without appropriate action on its part, permits the drainage district to build the bridges, such county board is thereafter estopped from complaining that such bridges were not built under its supervision. In that case it is sufficient if the drainage district construct good, substantial and serviceable bridges in accordance with the requirements of the statute.

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

Herbert Rhoades and *Brome & Ramsey,* for appellant.

W. M. Hopewell, contra.

DEAN, J.

This is a mandamus proceeding begun by plaintiff against the defendant drainage district to compel it to reconstruct certain bridges erected by it over its ditches on county roads in Burt county, on the ground of defective construction. Judgment was rendered in favor of defendant, and the suit was dismissed, but without prejudice to the bringing of a new action as to two bridges, "should later developments render the commencing of such an action necessary." The court also by its decree ordered the defendant to construct one new bridge, and to perform certain work, such as filling and the like, at certain other bridges. The plaintiff appealed.

Plaintiff argues: "The main issue involved in this appeal is the question whether or not the defendant drainage district has the right under the law to determine for itself the kind of bridges it will construct on the highway over its ditch, the length of the bridges, and the material of which they shall be constructed, and enter into a contract with a bridge company to con-

struct bridges of the material and in the manner designed by it, or whether the general plans and specifications required by law, to be furnished to the county by the state engineer and adopted by the county, must be followed, and whether or not real supervision of this work, that is, the determination of the length and width of the bridges that are to be built, and the manner in which they shall be anchored or fastened to the bank on either end, are matters to be determined in the first instance by the county board."

Twenty or more of the bridges in Burt county were complained of in the petition as being defective, but on appeal complaint is made here of only three. Roy Towl, engineer for the drainage district, testified that the bridge superstructures were built from plans and specifications obtained from the state engineer, and that the substructure plans were designed by him, because at that time the state engineer had no such plans. It seems though that Towl consulted the state engineer respecting the substructure plans.

The county board was notified by the drainage district that it intended to erect the bridges, but the board neither furnished nor offered to furnish plans or specifications. The district also, before the work began, requested the county board to supervise the construction of the bridges, but for some reason the board did not do so, whereupon the drainage district proceeded with the work.

Section 2983, Rev. St. 1913, provides: "Whenever any public drainage or irrigation district organized under any law of this state has in the past excavated, or shall in the future excavate any ditch, or any new channel of any running stream, across the then existing public highway, it shall be the duty of the governing board of said drainage or irrigation district and the governing board of the county or municipal corporation involved, to negotiate and agree for the building and maintaining of bridges and approaches thereto on such terms as shall be equitable. * * * In (if) said boards for any rea-

son fail or neglect to agree with reference to said matter, then it shall be the duty of said drainage or irrigation district to restore said highway, when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness, and it shall be the duty of the county or municipal corporation involved, as the case may be, to maintain said bridge and approaches after the same have been built by said drainage or irrigation district: Provided, however, any bridge that may be built by any drainage or irrigation district on any county road shall be constructed under the supervision of the county board and in accord with the established plans and specifications of said county board."

The governing board of the drainage district and the county board for some reason failed to reach the agreement that is contemplated by the act. As therein provided it then became the duty of the drainage district to construct the bridges. It clearly appears, too, that under the act the county board has the right to supervise the construction of bridges over drainage ditches on county roads.. But if the county board, after having been notified by the drainage district that it is desirous of constructing such bridges, does not take steps to undertake the supervision of construction that the statute contemplates and, without appropriate action on its part, permits the drainage district to proceed with such construction, such county board, after the bridges are built, is estopped from complaining that they were not built under its supervision. In such case it is sufficient if the drainage district construct good, substantial and serviceable bridges in accordance with the requirements of the statute.

One of the three bridges complained of was built by the county ,and for its condition defendant is not responsible. Respecting the remaining two bridges, and the work performed generally by defendant, we are unable to discover that the court erred in its findings.

The trial court not only heard the witnesses testify but, in company with counsel for the parties, personally examined the bridges and inspected the work generally. The court's findings are clear and explicit and fairly cover every contested feature of the case.

We do not find reversible error. The judgment is therefore

AFFIRMED.

OTTO E. LINDBURG, APPELLEE, V. ELMER J. LAMB ET AL., APPELLANTS.

FILED OCTOBER 4, 1919. No. 20585.

1. **Fraud: REPRESENTATIONS AFTER SALE.** Representations made by a seller after the consummation of a contract of sale are incompetent as independent evidence of fraud inducing the purchaser to enter into the contract.
2. ———: **EVIDENCE.** If the contract is conditioned upon the performance of certain things by the seller within a specified time, and within such time such performance is being considered by the parties, representations then made by the seller, intended to prevent suspicion of prior fraud inducing the contract and to induce the purchaser to consummate the contract, may be competent as evidence of fraud in an action by the purchaser for damages.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Peterson & Devoe, for appellants.

contra.

George A. Adams, T. F. A. Williams and *Clark Jeary,* SEDGWICK, J.

A judgment against these defendants for misrepresentation in the sale of some of the same stock was affirmed in *Redfield v. Lamb, ante,* p. 410. The evidence as to representation is substantially the same in both cases. In the case at bar but one question is presented which was not involved in the former case. It is con-

tended that the court erred in admitting evidence of representations which were made after the contract was entered into. The contract was in writing, entered into in November, 1914, and the evidence complained of related to occurrences in the succeeding month of March. As a general proposition representations made by a seller after the consummation of a contract of sale could not have been relied upon by the purchaser in entering into the contract. This contract by its terms was conditional. It provided:

"That in case the said powder company shall increase its present capital, * * * said O. E. Lindburg will take charge of this serum plant and the present business at a salary, etc. * * * O. E. Lindburg agrees to subscribe for $4,000 stock in said company $1,000 to be paid in cash when the stock is issued and $3,000 in note payable $41.66 per month, with interest at the rate of 6 per cent. payable annually. * * * If the Farmers Hog & Cattle Powder Company do not make the above mentioned arrangements within six months from date then this contract shall be null and void."

Within the six months a meeting of those interested was held to ascertain whether the "above-mentioned arrangements" had been made in accordance with the understanding of the parties. At that meeting representations were made as to the financial and other conditions of the company, and these representations were received in evidence over the objection of the defendants. Thus it appears that the contract in question in this case was not complete and enforceable against this plaintiff before this meeting was held. If he had discovered the fraud of which he now complains, he would not willingly have completed the contract, and could not have been compelled to do so. Relying upon the representations made at this meeting, as well as former statements of defendants, he paid $1,000 as first payment for the stock in question, and in other respects con-

summated the contract. The evidence complained of was properly received.

The judgment is

AFFIRMED.

CORNISH, J., concurring.

I have concurred in this opinion. I think it proper to add that the reader must not interpret the first paragraph of the syllabus as holding that representations made after a sale are never admissible as evidencing knowledge, intent or design on the part of the vendor. Of course, representations made after the sale could not have been an inducement to the purchase; but the false representation, repeated after the sale, for the purpose of lulling the purchaser into a sense of security, and to carry out and make more effectual the original plan or design, may well be evidence to show fraudulent intent on the part of the vendor in making the original false representation which induced the purchase. In fact, a repetition of the falsehood, made under circumstances where the person would be expected to tell the truth, renders it more likely that he made the false representation in the first instance. In this case our holding could well be based on the ground, not that the contract had not yet been fully executed when the false representation was repeated, but upon the ground that the repetition of the falsehood, under the circumstances when it was made, is itself evidence, making it more probable that the representation was made at the time alleged, and with fraudulent intent.

JOHN O. ANDERSON, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED OCTOBER 4, 1919. No. 20423.

1. **Evidence:** MAPS. A map or drawing shown to be reasonably accurate may be admitted in evidence as an aid to the court and jury in making intelligible the evidence respecting the location of objects that are the subject of investigation.
2. **Negligence:** EVIDENCE. "Evidence of subsequent repairs made or precautions taken after an accident or the infliction of an injury is not admissible to prove antecedent negligence." *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657.

APPEAL from the district court for Dawson county: RALPH W. HOBART, JUDGE. *Reversed.*

Edson Rich, C. A. Magaw and *Thomas F. Hamer,* for appellant.

W. A. Stewart and *Cook & Cook, contra.*

DEAN, J.

Plaintiff began this action to recover damages to growing crops said to have been caused in June, 1915, by defendant's failure to provide an outlet for the escape of surface water under its roadbed and for closing "a waterway, maintained under its roadbed about one mile west of the plaintiff's land, and thereby a great portion of said waters were cast upon the plaintiff's land." Plaintiff recovered a verdict and judgment thereon, and defendant appealed.

Defendant points out that plaintiff was permitted over its objection to prove that defendant, after the alleged injury, installed a culvert under its railroad tracks, apparently for the purpose of preventing a repetition of the injury complained of. On this point plaintiff called Dr. Rosenberg, who testified: "Q. Doctor, state if you know about a culvert or drum recently being placed under and across the defendant's right of way up near the

Strohmeyer place about a mile west of the plaintiff's land. (Objected to as incompetent, irrelevant, immaterial, and after the occasion of the alleged injury. Overruled. Exception.) A. Yes, sir; I know about that culvert—have seen it."

It will be observed that the question objected to was put to the witness substantially in the language contained in plaintiff's petition, and refers definitely to a place about one mile west of plaintiff's land. The plaintiff complains because the objection of defendant contained the words, "and after the occasion of the alleged injury," and says that, because Dr. Rosenberg's testimony was in the form of a deposition, defendant's objection should have been made in writing and filed before the trial commenced; and to support his contention cites section 7956, Rev. St. 1913. We do not think the statute applies here, because the question was clearly incompetent, and the defendant had the right, and it was his duty, to challenge the court's attention to the error and to give the reason why the objection was made.

In view of the former decisions of this court on this point, it seems that the objection should have been sustained. In *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657, it is said: "Evidence of subsequent repairs made or precautions taken after an accident or the infliction of an injury is not admissible to prove antecedent negligence." The rule there announced was adhered to in *Tankersley v. Lincoln Traction Co.*, 101 Neb. 578. These cases present many authorities, which need not be here reviewed. Merely to invite the attention of the jury to the recent construction by defendant of a culvert at the place indicated in counsel's question may have been sufficient to have induced the jury to conclude that the culvert would not have been installed, had it not been for the infliction of the damage complained of by plaintiff, and might also be taken as a confession of negligence. Nor is it improbable to believe that the

amount of the verdict would be influenced by testimony of the character objected to by defendant.

Defendant also objected to the court permitting plaintiff to prove the amount and value of the feed that he was compelled to buy for his live stock that was made necessary by the destruction of his crops as being "too remote and speculative, and if proved and permitted it permits a double recovery." It seems clear to us that this objection should have been sustained. The sole question for determination was respecting the value of the crops and property destroyed by the negligence, if any, of defendant.

Defendant says the court erred in admitting a certain map purporting to show the location of certain points in controversy. In this class of cases a map or chart that is shown to be reasonably accurate is helpful in making intelligible the testimony of the witnesses respecting the location of objects that are the subject of investigation. We have found them to be an aid in the review of cases brought here on appeal. We do not think the court erred in the admission of the map. 10 R. C. L. 1152, sec. 355.

Defendant contends that the testimony does not support the verdict. We are unable to pass intelligently on this point because of the admission of the prejudicial evidence that is hereinbefore noted. It may be that the verdict is based in part on the incompetent testimony to which exception was taken. Besides, the case is for retrial.

In the present state of the record, the judgment must be reversed and the cause remanded for a new trial.

REVERSED.

ROSE, J., not sitting.

SAMUEL G. ANDERSON, APPELLANT, V. GEORGE KIENE ET AL., APPELLEES.

FILED OCTOBER 4, 1919. No. 21062.

Appeal: CONFLICTING EVIDENCE. "Under the employers' liability act (Laws 1913, ch. 198, as amended, Laws 1917, ch. 85), where the case is heard in court before a judge of the district court upon conflicting evidence, and where there is competent evidence sufficient to sustain the finding, the judgment rendered by the district court will not be set aside on appeal unless it is clearly wrong." *Miller v. Morris & Co.*, 101 Neb. 169.

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

Switzler, Goss & Switzler, for appellant.

James C. Kinsler, contra.

DEAN, J.

Plaintiff filed an application in the compensation commissioner's office pursuant to the employers' liability act, namely, chapter 35, art. VIII, Rev. St. 1913, as amended, Laws 1917, ch. 85, to recover for personal injuries sustained while in defendant's employ. The application was denied, and upon appeal to the district court for Douglas county the finding of the compensation commissioner was affirmed and the action dismissed. Plaintiff appealed.

The only question involved is whether the judgment is sustained by the evidence. The injury occurred on July 24, 1918, that being the second day of plaintiff's employment. He was then 18 years of age. His wage was at the rate of 45 cents an hour for an 8-hour day. Beginning immediately after the accident, and for a period of 22 weeks, defendant paid plaintiff, as compensation, $264, being $12 a week, and also all hospital and medical services, which amounted to $198.50 additional.

At the time of the injury plaintiff was working on the upper part of a one-story brick building. His work consisted in taking the wheelbarrows, loaded with bricks and said to weigh about 30 pounds, from a hoist or elevator and wheeling them to the different parts of the building as needed by the workmen. Plaintiff testified that the scaffolding gave way just as he was about to remove a wheelbarrow, and that he fell with the elevator about 30 feet. Upon examination it was discovered that he received an injury to the "third lumbar vertebra." Plaintiff contends the injury is permanent.

To determine this point expert testimony was introduced by the parties. On the part of plaintiff a physican testified that his examination showed the spine to be normally flexible. He further testified: "Q. And this spine, then, is normally flexible now, or just as flexible as any spine would be that had never been injured? A. It seems to be." A doctor called by defendant on cross-examination testified: "Q. Did you find any evidence at the present time of any injury to his back? A. No. Q. And is it not a fact that you find him to be in perfect physical condition at the present time? A. As far as I could make out by my examination. * * * Q. So that, if the X-ray shows some injury at some time, it is true that he has recovered from that injury now? A. As far as I can determine by an examination." He also testified that he did not find any abnormal conditions. When the case was tried, plaintiff went through a course of bending exercises in the presence of the trial judge, so that the court seems to have been well advised. At the time of the trial plaintiff was employed by an outfitting company at Omaha as a bill collector, and his work required him to travel on the street cars from place to place about the city. For this work he was receiving $17 a week for a working day of 4 hours. It may be added that when plaintiff fell he sustained a fractured wrist, but in the oral argument and in the briefs his counsel says that, the wrist

having become normal, no claim was made for additional compensation on that account.

In view of the finding of the compensation commissioner and of the judgment of dismissal by the district court, and of the record generally, we do not think the case should be reversed. There is some conflict in the testimony as to his condition at the time of the trial, but there is sufficient to support the judgment. *Miller v. Morris & Co.*, 101 Neb. 169.

Finding no reversible error the judgment is

AFFIRMED.

ROSE, J., not sitting.

MARGARET MAUZY V. STATE OF NEBRASKA.

FILED OCTOBER 4, 1919. No. 20975.

1. **Criminal Law**: INSTRUCTIONS. Where instructions given by the trial judge correctly respond to the evidence and issues raised, they will be held to have been correctly given.
2. ———: WITNESSES: CROSS-EXAMINATION. Whenever a defendant offers himself as a witness in his own behalf, he is subject to the same rules of cross-examination as any other witness. It rests, however, with the sound discretion of the trial judge as to how far opposing counsel may be allowed to go in his cross-examination, and, unless there was an abuse of discretion, no error has been committed. *Held*, that in the instant case the trial judge acted well within the limits of his discretion.
3. **Homicide**: EVIDENCE. The evidence in the present case examined, and *held* to sustain the verdict of the jury.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

J. C. McReynolds and *Herman N. Mattley*, for plaintiff in error.

Clarence A. Davis, Attorney General, George W. Ayres and *J. B. Barnes, contra.*

ALDRICH, J.

Margaret Mauzy, whom we will hereafter refer to as the defendant, rented room 25, at the west end of the hall on the third floor of a rooming-house at 510 North Fourteenth street, Lincoln. On the 11th day of November, 1918, she telephoned to Dr. Spear at his room in the Y. M. C. A. building, representing herself as Mrs. Wells who was calling from the above-named room. In response to this call, Dr. Spear answered by calling at the rooming-house and going up, as Mrs. Mauzy alleges, to room 25 and rapping on the door. The defendant answered the call, and, after some little altercation between the two, Mrs. Mauzy drew her revolver and shot Dr. Spear four times, fatally wounding him. The cause of the altercation which resulted in the shooting was the failure, according to Mrs. Mauzy's statement, of Dr. Spear to settle with her a claim which she held against him in the sum of about $6,000; and, further, that in the course of the altercation Mrs. Mauzy claims that Dr. Spear, after inquiry as to who called him, and as to whom he would look for settlement, became enraged at Mrs. Mauzy deceiving him, and raised his medicine case up over his head as though to crush it down upon the head of defendant. When she saw him in this attitude, about to strike, she then drew the revolver and fired at him while they were in a position facing each other. She also alleges that she represented herself as Mrs. Wells to get the doctor to go there for the purpose of arranging with him to treat her mother. Mrs. Mauzy first went there in the forenoon and procured this room, and, having called Dr. Spear, lay down and took a nap until he should arrive. The defendant admits the shooting and the resulting death from the shots, but justifies the killing on the ground of self-defense.

This in the main is a statement of the material facts. The jury returned a verdict of murder in the first degree, but with a recommendation that the court impose

a sentence of life imprisonment, which the court accordingly did.

On the cross-examination the state inquired of defendant if she had gone under the name of Margaret Stabba, which she denied, and if she had gone under the name of Margaret Huffman, to which she replied she had a right to that name at one time. It is not disclosed whether she had ever been married to a man by that name or by what right she claimed the name. The state also asked if she went under the name of Carmen Calvert. She denied this, but admitted having received letters under that name. Defendant assigns this cross-examination as error, but we think that the defendant having testified in her own behalf became subject to the same rules of cross-examination as an ordinary witness. Error was not committed in the premises because the interrogations were apparently for the purpose of testing her credibility. The testimony was therefore both competent and material. *Hanoff v. State,* 37 Ohio St. 178; Underhill, Criminal Evidence (2d ed.) sec. 60; 2 Wigmore, Evidence, sec. 1006; 5 Chamberlayne, Modern Law of Evidence, sec. 3726; *Elliott v. State,* 34 Neb. 48.

The next error complained of is with reference to instruction No. 11½. The instruction follows: "It is proper for you to consider in this case that the defendant went to the room armed and awaited Dr. Spear armed when he came in answer to her call; and if you find beyond a reasonable doubt that she caused him to come into her presence, knowing or believing that he would become angry, and perhaps assault her, and meaning to shoot him if he did, then and in that case you should scrutinize her evidence as to self-defense with great care with a view of rightly determining the issues involved." The complaint is that the trial court "assumed the existence of a state of facts not admitted, and upon which no evidence was introduced." We do not think the court erred in giving the instruction.

Defendant represented herself as Mrs. Wells in calling Dr. Spear, because, as she explained, when he recognized her voice over the telephone he would pay no attention to the call. She also testified that Dr. Spear was a man of violent temper, and if he became angry he would very likely do her great bodily harm. In view of these facts, she was not justified in provoking an assault.

It may be noted that defendant admitted she went to the room with the revolver, and awaited the appearance of Dr. Spear, and removed it from her hand-bag and concealed it on her person. This is all admitted, and, after having shot him four times, she quietly and coolly fixed herself up, put the revolver back into her hand-bag, adjusted her hat and veil, and carefully prepared herself to go. The evidence shows she was the coolest and most unconcerned person of all those present; that she called the sheriff's office, or jail, and told him what had occurred, and at no time expressed any regret for what had happened.

When another person present started to call the police, she said, "This is not a police case; call the sheriff," showing deliberation. It will be noticed in this connection that the defendant came to room 25 carrying a revolver in her hand-bag, and that she removed the revolver some little time later and got it ready for action, concealing it upon her person when she went out to meet deceased. The defendent deliberately placed herself in a position, according to her testimony, necessary to insure her own safety, and then shot the deceased. This does not constitute justifiable homicide. It is in evidence, too, that defendant in substance said to Mrs. Knorr, on or about November 5, that if there was any more medicine she (Mrs. Knorr) needed she had better get it, as Dr. Spear would not be able to write prescriptions much longer, and that that time was not far distant. It is true she claims this remark was made in another relation; but in view of her conduct,

and what happened, it could only mean the shooting that followed on November 11. Immediately after the shooting, the defendant said: "I shot him with his own gun, and he knowed he had it coming." Further she remarked to another witness who was present right after the shooting and while Dr. Spear was complaining of the intense agony he was suffering from the shot through his arm: "Well, he will not break any more babies' necks with that arm." These remarks are calculated to strengthen the proposition that the defendant at the time of the shooting was deliberate and cool, and was carrying out a premeditated plan, and was satisfied that she had done a good job.

That situation did not support the theory that she was taken by surprise and was compelled to shoot to defend herself from great bodily injury. There is not a syllable in the record that would prove this was justifiable homicide. On the other hand, it was a deliberate and premeditated act by a desperate woman willing to go to any extreme to revenge herself for fancied wrongs. She was not afraid of Dr. Spear, because she said to a witness: "No; he has no arms; he would not hurt any one if he did have." The record clearly shows that the defendant way lying in wait for Dr. Spear with a revolver for the purpose of provoking a quarrel with him.

The nature of the wounds inflicted and the direction from which the impact occurred which caused the mortal wounds did not sustain the theory of the defendant that she shot deceased when face to face or but a short distance from him. Defendant testified that Dr. Spear called at her room and knocked, and that she in response thereto came to the door; that he was surprised to meet defendant; that he refused to come in; that she stepped outside and entered into conversation with him out of which grew the altercation, and she shot him four times, each shot taking effect.

It also appears of record that one A. J. Olson was rooming in close proximity to room 25 where the shooting took place, and that at the time his door was open and he could easily see everything that transpired, and in substance his evidence is that he heard no knocking at the door on the day of November 11, although the door of his room was open, and that no one else living near the room that Mrs. Mauzy occupied heard any knocking. Francis E. Kroben says that the deceased did not at any time prior to the call rap on the door of defendant, and the evidence of Dr. McKinnon as to the location of wounds shows conclusively that the shooting took place at the head of the stairway on the third floor. Defendant's evidence in respect to self-defense is not corroborated.

Francis E. Kroben says he was rooming, together with his family, in room 29, in the building where the tragedy occurred, and that he was present in his room together with his family at the time of the shooting; that he heard the doctor coming upstairs onto the third floor, and also heard the shots, five in number; that his room is something like 20 feet from the door of room 25; thought his room was also about 17 feet from the head of the stairs on the third floor; that, while sitting in his room, he heard a person in the stairway between the second and third floor, immediately before the shooting, heard the footsteps coming up the stairs, and then he heard the shots, and then the tumbling down the stairs. He went out into the hall, and, as he came out of the door upon hearing the shots, saw Mrs. Mauzy.

Dr. McKinnon performed an autopsy upon the body of Dr. Spear. According to the evidence of Dr. McKinnon, the wounds were not received by Dr. Spear when he was facing the defendant, but rather when he was retreating with his back turned toward her. This is proved absolutely by the perforations of the bullets at the side and the back.

One cannot determine by the selection of detached parts of instructions their true meaning and import, but they must be taken together as a whole and considered. The instructions complained of, to wit, 10, 11, 11½, and also 15 and 16, when taken together and viewed in the light of the facts in this case, and the law applicable thereto, are without prejudicial error. *Murphy v. State,* 15 Neb. 383; *Housh v. State,* 43 Neb. 163; *St Louis v. State,* 8 Neb. 405.

In *State v. Harris,* 1 Jones, Law (N. Car.) 190, a very carefully considered case is reported, in which it is said: "If the person charged with the homicide is to judge for himself whether this reasonable ground existed, the most atrocious murders may be committed with impunity. The prisoner says he believed his life was in danger. Who can look into his heart? If the law allows him to judge, who can contradict him? The circumstances are nothing. It is his belief that justifies him. The law is not so. It is only from circumstances accompanying the transaction that reasonable ground can be ascertained, and of their bearing and influence the jury are the sole judges."

This is the precise situation in the instant case. The jury weighed this evidence. They are the sole judges as to whether or not the defendant believed that an assault was to be made upon her that would cause great bodily harm, or injury, and the jury found against her. As said in the *Housh* case: "The principle which underlies the rule there stated is that human life should not be made to depend upon conditions so unreliable and hazardous as the bare belief of any man that he is in danger of death or bodily harm."

No prejudicial error appearing in the record, the verdict is

AFFIRMED.

SEDGWICK, J., not sitting.

ROSE, J., dissenting.

I am unable to concur in the approval of the cross-examination of defendant or in the charge to the jury.

LETTON, J., concurring in part.

The evidence of the crime is so plain and the testimony as to self-defense is so slight and unreliable that it seems to me the jury could not have reached any other conclusion than they did. But I think instruction No. 11½ should not have been given, and is erroneous, but is not prejudicial when considered in connection with all the other instructions, and with the evidence. I therefore concur in holding that the record does not require or warrant a reversal of the judgment.

RUFUS HANEY, APPELLEE, V. CHARLES J. COLLINS, APPELLANT.

FILED OCTOBER 18, 1919. No. 20302.

1. **Parol Evidence:** LOCAL CUSTOM. Where local custom or usage has given to a term a special meaning of general acceptance in a certain line of business, parol evidence is admissible, in the case of a written contract, to show such meaning. Such evidence does not vary the terms of the written instrument, but merely aids in ascertaining the intention of the parties by showing the true significance of the terms employed.

2. **Public Lands:** HOMESTEAD: EXISTING IMPROVEMENTS. As against all parties except the United States, an entryman on public lands under the homestead laws is entitled to all existing permanent improvements on the land on which he files, and where a trespasser, or a former entryman, has erected permanent improvements on public lands, which are not removed at the time of an entry thereon under the homestead laws, an agreement on the part of the entryman, who has successfully contested the original entry, to pay for such improvements is unenforceable for want of consideration.

APPEAL from the district court for Grant county: BAYARD H. PAINE, JUDGE. *Affirmed on condition.*

Daniel F. Osgood, for appellant.

Mitchell & Gantz, contra.

MORRISSEY, C. J.

Plaintiff's first cause of action is based on two promissory notes, on which the parties agreed at the trial that there was due $615, together with a small item of interest. In the second cause of action plaintiff seeks to recover $100, and interest, for a wire fence which had been owned by plaintiff prior to the time when defendant made a homestead entry on the land on which the fence stood. Defendant set up numerous counterclaims, and, on trial to a jury, there was a verdict and judgment for plaintiff for $315.70. Defendant appeals.

Two questions are presented for review. Defendant had pastured cattle for plaintiff under a written contract, which provided that plaintiff should pay the sum of 25 cents per head, per month, for any cattle defendant should pasture for him. The contract contained other provisions requiring defendant to furnish certain lands and fences, but, as there is no dispute on these items, it is not necessary to set them out.

Most of the cattle pastured by defendant were cows, many of them with sucking calves. The contract contains no mention of the calves, unless they are included in the term "head." Defendant claimed he was entitled to pay for the pasturage of the calves, whether they were running with the cows when the cattle were first delivered, or were afterwards born while the cows were in his pasture. Plaintiff denied liability for the pasturage of the calves and, over the objection of defendant, was permitted to prove the custom among live stock men in that vicinity of counting an unweaned calf with its mother, and of making no charge therefor. The ruling of the court in permitting proof of this custom is assigned as error, on the ground that it allowed the terms of a written instrument to be varied by parol.

The term "head of cattle" as used in this contract has, of course, a clear and well-defined meaning when used in a general sense. But this does not prevent it from having a special meaning of general acceptance in pasturage contracts, among stockmen in the locality where these parties did business. And where local custom or usage has given to a term a special meaning of general acceptance in a certain line of business, parol evidence is admissible, in the case of a written contract, to show such meaning. 3 Jones, Commentaries on Evidence, secs. 455-457. Such evidence does not vary the terms of the written instrument, but merely aids in ascertaining the intention of the parties by showing the true signification of the terms employed. The evidence complained of merely showed that a cow and her unweaned calf constituted but a single "head of cattle" under the special meaning accorded the term generally in pasturage contracts among stockmen, in the locality where the parties did business. There was no error in its admission.

The second question presented arises out of plaintiff's attempt to recover for a fence which, confessedly, stood upon public lands of the United States at the time defendant entered the same under the homestead laws. The fence was erected some time prior to 1907 by one Kackley, who subsequently undertook to sell it to plaintiff. One Mondell entered the land under the homestead act. The record does not show what, if any, agreement there was in relation to the fence between the entryman and Kackley, or plaintiff. Mondell's entry was successfully contested by defendant, who made a homestead entry thereon in 1907. The fence remained upon the land, apparently without question as to ownership, until this suit was filed. Plaintiff testified that in 1913 he and defendant entered into an oral agreement by which he sold the fence to defendant for $100. Defendant denied this agreement. As we view it, the conflict in the evidence on this point is immaterial.

The rule is well established that, as against all parties except the United States, an entryman on public lands under the homestead laws is entitled to all existing permanent improvements on the land on which he files. *Hiatt v. Brooks,* 17 Neb. 33; *Hill v. Pitt,* 2 Neb. (Unof.) 151. And where a trespasser, or a former entryman, has erected permanent improvements on public lands, which are not removed at the time of an entry thereon under the homestead laws, an agreement on the part of the subsequent entryman, who has successfully contested the original entry, to pay for such improvements is unenforceable for want of consideration. Defendant was already entitled to the fence, free from the claims of all persons except the government of the United States. This cause of action ought not, therefore, to have been submitted to the jury.

While it is difficult, in view of the numerous items of defendant's counterclaim, to ascertain with certainty just what the jury took into consideration in arriving at its verdict, it is clear that the judgment in part, at least, rests upon plaintiff's second cause of action. Exclusive of the claim for the fence, and certain credits plaintiff admitted to be due on the counterclaim, plaintiff's demand amounted to $280.62, while the verdict and judgment are for $315.70. If plaintiff chooses to file a remittitur within 30 days for $120.13, the amount including interest claimed for the fence, the judgment of the district court will be affirmed, otherwise it will be reversed and a new trial granted.

AFFIRMED ON CONDITION.

CORNISH and SEDGWICK, JJ., concurring.

The statement of the law contained in paragraph 1 of the syllabus is faulty, if not erroneous, and contrary to the rule as announced in *Bixby v. Bruce,* 69 Neb. 78. One prerequisite for the introduction of oral evidence always is that without it the contract would be ambiguous. Another is that where the contract is not ambigu-

ous on its face, but special meaning is sought to be given the words used, which is limited to dealings with an individual or to a locality, then it must first be shown that the parties to be bound knew of it. Neither of these prerequisites is embodied in the syllabus.

1. When in a written contract a character, mark, letter, figure, word or phrase (the instances are multitudinous) is used, having a peculiar technical or local meaning, unintelligible to persons unacquainted with the business, then parol evidence is admissible to explain the ambiguity without the foundation that the party knew it. Here the ambiguity appears from the context of the instrument. The parties have contracted with reference to a particular trade or business, and have deliberately used the word, and parol evidence is admissible to show its actual meaning.

2. When the ambiguity arises out of circumstances surrounding the contract, such as a local usage, and not out of a term of doubtful meaning shown in the context, an additional inquiry arises. The local usage can be incorporated into the contract only on the assumption that the parties contracted with reference to it. The general rule is that contracting parties may rely upon it that their words used will be given their natural and primary meaning. There is no presumption of law in such a case that a usage, even though uniform and general, if confined to a particular locality, is known to either of the parties. Not one, but *both*, of the parties must have contracted with reference to it. The party offering oral evidence must show as a foundation for it that the other party had actual knowledge of the local usage, or he must show that the usage was of such general, uniform and notorious a character that from the evidence the jury may find that he knew of it. Otherwise, in some cases great injustice would be done. It is not sufficient to show that the usage is "generally accepted" in the locality, as stated in the syllabus. A practice does not rise to the dignity of a usage in any

case until it is generally accepted. Even if generally accepted, it cannot be used to contradict the contract. The ambiguity must exist, and the usage be consistent with the words used. As Lord Lyndhurst expressed it: "Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain."

Neither of these two requisite foundations for the testimony is stated in the syllabus. In fact, the syllabus appears to have confused the two rules stated above, namely: Where the ambiguity appears upon the face of the instrument, the instrument itself not showing the meaning intended by the parties, then the court, in permitting oral testimony to explain the ambiguity without evidence of knowledge, is merely endeavoring to interpret the instrument as written. Where the ambiguity arises out of surrounding circumstance, showing merely an individual or local custom, then it must be shown that the parties knowingly contracted with reference to it. As to certain inconveniences of proof, see 17 C. J. 519, sec. 86.

Whether a written contract, whereby C. agrees to pasture *cattle* at so much a head, will necessarily include calves a few weeks or days old, running with their mothers in the pastures, or is ambiguous as to the intention of the parties, is possibly not entirely clear under the authorities. We do not consider it our duty to dissent from the opinion of the majority upon that question.

PHILLIP F. CAMPBELL, APPELLEE, v. ROBERT P. PETERSON, APPELLANT.

FILED OCTOBER 18, 1919. No. 20435.

Vendor and Purchaser: FRAUD: RELIEF. One who in response to a material inquiry gives an equivocal and misleading answer which is intended to convey, and does convey, to an intending purchaser, to

his prejudice, a false and erroneous impression, but for which he would not have entered into a contract, is guilty of such fraud as will justify a court of equity in setting aside the contract, at the suit of the injured party.

APPEAL from the district court for Custer county: BRUNO O. H STETLER JUDGE. *Affirmed.*

Henry Mencke, N. T. Gadd and *Frank Dolezal,* for appellant.

Sullivan, Squires & Johnson, contra.

LETTON, J.

This is an action to set aside a contract for the exchange of lands upon the ground of fraud.

Plaintiff was the owner of a ranch of 1,720 acres in Custer county. The defendant owned a farm in Burt county upon the banks of the Missouri river. Early in 1916 the plaintiff wrote to one Hunter, a real estate agent, requesting him to find a purchaser for his ranch, or some one who would exchange for it land in eastern Nebraska of less value, and offering to carry the difference in value as an incumbrance upon the land. Hunter went to defendant's land, examined it, and procured defendant, Peterson, to go to Custer county and look at the plaintiff's land. A few weeks afterwards plaintiff went to Blair, where he met Hunter and one Hopewell, a lawyer and real estate agent of that place. Hopewell drove them to defendant's farm. They looked over the building, started to look at the land, when Peterson left them and requested Hunter to show the place to plaintiff. Some discussion took place as to whether there was 320 acres of the land. Plaintiff stepped from a fence, which he says was pointed out to him as being a certain distance from the west line, to the river, and convinced himself that the quantity of land was as represented. He now insists that the location of the fence was misrepresented to him, and that he was therefore misled and deceived with regard to the quantity of land. He also implies that Hunter was acting in Peterson's interest in thus deluding him.

The story of plaintiff is absolutely contradicted by defendant and his witnesses with respect to most of the material points in the case. It is clear that the plaintiff had an opportunity to fully examine the farm, as he spent the greater part of the day there; that Hunter took him over the place; that at that time the Missouri river was high and some of the land along its banks was being undermined and falling into the river. This is another point as to which plaintiff insists he was deceived. He testifies that, when he asked defendant about the river cutting the land, he was told that the river had been at that place for 18 years, and that it would be there after defendant was gone. There is no question but that defendant's farm is rich and fertile, but it appears that, instead of there being 320 acres of land, as plaintiff says was represented to him, there was in fact only about 262 acres. The value of the land for the purpose of the exchange was placed at $150 an acre, but the court found, as we think correctly, that it is not worth to exceed $100. At this figure there is a difference in value on account of the loss of acreage alone of $5,800.

A number of other allegations of fraud and misrepresentations are made in the petition, most of which were not proved. The court found: "That, in order to induce the plaintiff to enter into said contract, the defendant represented to the plaintiff and knowingly led the plaintiff to believe before and at the time of the execution of said contract that there were in the tracts that the defendant "knowingly, deceitfully and wrongfully by his manner and language caused the plaintiff to believe and to understand that the Missouri river, on the banks of which said land was situated, had not of land owned by the defendant and described in said warranty deed fully 320 acres." The court also found for a long period of time washed away any substantial portion of said land, but that the margin thereof had remained substantially permanent for a long period

of time; that for the purpose of deceiving the plaintiff the defendant then said to him, 'I have been here about 18 years and the river has always been there and is not worrying me a particle:' But the court finds from the evidence that said river had washed away large quantities of said land within recent time so that many acres thereof had fallen into the river and become worthless; that said river is constantly encroaching upon said land and carrying off great quantities thereof, all of which the defendant well knew at the time said contract was entered into, but plaintiff was ignorant thereof. And the court finds that said conduct of the defendant toward the plaintiff constitutes and is a fraud upon plaintiff, and that plaintiff was deceived thereby; and the court finds that said contract as to the plaintiff is inequitable, unconscionable, fraudulent, null and void, and ought not to be specifically enforced by a court of equity."

The court made other findings with respect to misrepresentations as to title and as to the amount of incumbrance on the land, but we are of opinion such findings, standing alone, would not justify a decree for plaintiff. We are also convinced that, while opportunity was afforded the plaintiff to see the farm, sufficient misrepresentations of fact were made to him to justify the finding and decree of the district court.

A cross-petition was filed by the defendant, asking specific performance of the contract for the conveyance of plaintiff's land in Custer county. This was properly denied by the district court. Several of defendant's witnesses testified that, on the day plaintiff examined the farm, defendant told him that he could take the land at 320 acres, or measure it, or have it surveyed; but this testimony is considerably shaken by the fact that the witnesses do not agree as to the time and place of the alleged conversations. Upon the whole case we are satisfied that the district court reached the proper conclusion.

AFFIRMED.

ROSE, J., not sitting.

CORNISH, J., concurring.

I agree to the law as stated, in its application to the case in hand and to rescission cases generally. The opinion properly distinguishes the case as one in equity, asking that the parties be placed *in statu quo*, and not one where the plaintiff is seeking damages for fraudulent representations on the ground that he is entitled to the benefits of his contract as made. In the latter class of cases, the question may always arise whether, under the circumstances, the plaintiff had a right to rely upon the representation made.

ALICE E. E. MITCHELL, APPELLEE, V. BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, APPELLANT.

FILED OCTOBER 18, 1919. No. 20539.

1. **Estoppel:** CHANGE OF POSITION. Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold.
2. **Insurance:** PROOF OF DEATH: WAIVER. Where, upon proof of death being furnished to a fraternal beneficiary association, the proofs not being in strict conformity with the rules and by-laws of the order, no objection was made to the form of proof, and the claimant was informed that the association "cannot make payment until furnished with positive proof of death," and that, "upon receipt of such proof of death, payment of the claim will be immediately made," *held*, that strict conformity of the proof to the requirements of the by-laws was waived, and the only thing necessary to establish liability was "positive proof of death."
3. ———: ———. A by-law of a fraternal beneficiary association providing that the association "shall only be liable for the payment of a death claim when there is positive proof of death," the words "positive proof" must be held to mean proof as positive as the circumstances reasonably afford, and positive enough to satisfy the judgment of reasonable men. The production of the dead body of the deceased is not indispensable.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

Vinsonhaler, McGuckin & Caldwell, for appellant.

James E. Rait, contra.

LETTON, J.

The husband of the plaintiff held a life insurance certificate in the defendant association. He was a night watchman upon a railroad bridge then being constructed at Omaha across the Missouri river. In going to work it was usual for him to cross from the old bridge to the new bridge by means of a plank in place at a certain point. He was last seen about 7:30 on the night of October 30, 1916, when he told a companion he was going to an engine on the bridge to eat his lunch. His lunch was found next morning uneaten. His hat was found upon some lattice work below the old bridge near the plank, but his body was never recovered, although a thorough search was made. Mrs. Mitchell presented a claim to the defendant for the amount of the certificate, and accompanied it with a copy of the report made by a special master in an action she had brought in the United States district court, against the corporation by whom he was employed, to recover compensation. This report stated the facts very fully, and found that Mitchell was dead. In the letter acknowledging the receipt of the claim and report, defendant, by its general secretary and treasurer, quoted a portion of its laws with reference to "Disappearance of Members," and stated that it would not pay the amount due upon the certificate until it was "furnished with positive proof of death," and further stated, "upon receipt of such proof of death, payment of the claim will be immediately made." Plaintiff then began suit. The petition did not set out a copy of the certificate, nor state its date, alleging it was in the hands of defendant. Defendant answered, admitting the issuance of a certificate, and that it was in full

force and effect on the 30th day of October, 1916, and pleaded that proofs of death had not been furnished as required by the by-laws, that the policy was not payable until such proof was furnished, and denying the other allegations of the petition.

At the time of the trial the defendant filed an amended answer, denying that the policy was in full force and effect, alleging that it was void on account of certain false statements made by the deceased as to his physical condition in his application for insurance made January 5, 1910, on which the policy was issued, and setting up failure to furnish proof of death. The reply denies that deceased made application for a certificate on January 5, 1910, or made any false or fraudulent statements; alleges that he had been a member for many years prior to that time, and had paid all dues and assessments, denies that he was ever suspended or expelled, or that he ever executed an application for reinstatement. At the trial it was stipulated that deceased joined the defendant order many years prior to September, 1910.

All the facts with reference to the membership of deceased in this order and as to his payment or nonpayment of assessments prior to January 5, 1910, are neither pleaded nor proved. Plaintiff relies upon membership begun in 1905. Defendant asserts no membership before 1910.

Plaintiff was permitted by this court to file an amended reply alleging waiver and estoppel by reason of its promise, before the action was begun, to pay plaintiff's claim as soon as proofs of death were furnished.

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." *Railway Co. v. McCarthy*, 96 U. S. 258. *Ballou*

v. Sherwood, 32 Neb. 666; *Frenzer v. Dufrene,* 58 Neb. 432; *State v. County Commissioners,* 60 Neb. 566; *Hixson Map Co. v. Nebraska Post Co.,* 5 Neb. (Unof.) 388; *First State Bank v. Stephens Bros.,* 74 Neb. 616.

Defendant knew of the statements made in the application. It was also advised, before it promised to pay the loss when proofs were furnished, of the fact a witness had testified before a special master in United States district court, that decedent had received an injury in a railroad wreck on December 5, 1905, that he was operated upon, a portion of his skull removed, and a silver plate placed over the opening, and had since suffered from dizzy spells and epilepsy. This was sufficient notice of a probable defense, and if it desired to assert it, it should not have put its refusal to pay upon the other ground only. We are of the opinion that defendant is estopped to defend upon the ground first set up in the amended answer.

The finding of the jury as to the fact of death seems to be supported by the evidence. There is proof that there were piling and timbers in the river under the place where deceased's hat was found, and that it was 65 feet from the floor of the bridge to the surface of the water. It is also shown that a young woman had been drowned near the bridge a few days before, and that neither her body nor that of Mitchell were ever found, though diving, dynamiting the river, using grappling irons and other means were resorted to. It is a well-known fact in the locality that bodies of persons drowned in the Missouri river are not uncommonly never recovered. The defendant offered to pay if "positive proof" was furnished. This must be held to mean proof as positive as the circumstances reasonably afford, and positive enough to satisfy the judgment of reasonable men. Otherwise, where, as in convulsions of nature, such as floods, tornadoes and tidal waves, or in catastrophes such as conflagrations or explosions, where it is very frequently impossible to furnish abso-

lute proof of death by the production of the body, the insurer might escape a just liability.

The proof furnished was not in accordance with the rules of the society, but it was impossible to make such proof. In the letter referred to, no objection is made as to the form of the proof furnished, but only as to the fact of it not being "positive." It is the quantum of proof, and not its form, that is criticized. The plain inference is that the requirement that the proofs be executed in accordance with the laws of the defendant was waived, if it was sufficient as to the fact of death. The jury was satisfied upon this point, and there is sufficient evidence to sustain its finding, though it might almost as well have found to the contrary.

Upon the whole record we find no prejudicial error.

AFFIRMED.

BENJAMIN F. MORGAN, APPELLEE, V. CITY OF FALLS CITY, ET AL., APPELLANTS.

FILED OCTOBER 18, 1919. No. 21256.

1. **Statutes:** AMENDMENT. An amending statute was passed with an emergency clause amending section 5119, Rev. St. 1913. Afterwards at the same session another act without an emergency clause was passed and approved amending the same section. *Held*, that the first act was in force until the later act became operative three months after the adjournment of the session.
2. ———: ———. Where, by amendment and repeal, the words of a former statute or section of a statute are changed in some respects, but it is intended that the statute shall continue to operate, it is not strictly a repeal, but a continuation of the former law as amended.
3. **Municipal bonds** should be issued in conformity to the proposition adopted by the electors, and to the statute in force at the time of their issuance.
4. **Statutes:** PRESUMPTION. The legislature must be presumed to know the state of legislation, more particularly the changes in the former law made by amendments during its session, and to intend the consequences of its action.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Frank N. Prout and *Frank A. Hebenstreit,* for appellants.

John Wiltse and *James E. Leyda, contra.*

J. J. Thomas, amicus curiæ.

LETTON, J.

Action to enjoin the issuance of certain municipal bonds. The district court granted a permanent injunction. Defendant appeals. The controversy grows out of the following facts. Prior to 1919, section 5119, Rev. St. 1913, as amended (Laws 1917, ch. 103), which relates to cities of the second class from 1,000 to 5,000 inhabitants, within which class Falls City is embraced, provided that bonds might be issued to pay for the erection or extension of water works, when authorized by three-fifths of the legal voters of the city, the bonds to become due in 20 years from the date of issuance, and payable any time after 5 years.

The legislature of 1919 passed three separate acts for the purpose of amending this section, chapters 46, 48, and 52, Laws 1919. Chapter 52 was approved April 3, 1919. Chapter 46 was approved April 16, 1919. Neither of these acts contained an emergency clause, and could not become effective until three months after the adjournment of the legislature. Chapter 48 contained an emergency clause, and went into effect on the date of its approval, April 7, 1919. It was under this act that the proceedings to issue the bonds were initiated. After the bonds had been voted, but before their issuance, chapter 46, the later act, went into effect. Chapter 48 provided such bonds should become due in not to exceed 40 years from date of issuance, and payable any time after 10 years. The later act made them become due in 20 years and payable any time after 5 years. The due date specified in the proposed bonds is 20 years,

which is allowable under chapter 48, but the time in which they may become payable is fixed at "any time after 10 years," which is not permitted by the statute now in force. This is a substantial change and one affecting the rights of taxpayers.

Appellant first contends that, since section 5119 had been amended and repealed by chapter 48, it was no longer in existence, and could not be amended by chapter 46; but we have held that where by amendment and repeal the words of a former statute are changed in some respect, but it is intended that the statute shall continue to operate, it is not strictly a repeal, but a continuation of the former law as amended. *State v. Wish,* 15 Neb. 448; *State v. Bemis,* 45 Neb. 724.

Section 5119 retained its identity. Only minor changes were made in its substance. It was in full force and effect, and the title of the amending act was sufficient.

It is next contended that since the statute gives the city the right to pay at any time after five years, instead of after ten years, as specified in the proposition which was voted upon, the statute governs, and they may be issued payable at any time after five years. This argument is unsound. The propositions to make the bonds payable at any time after five years was never submitted to the voters, hence was never adopted by them. Bonds issued must conform to the proposition adopted by the electors. It is to be borne in mind that this is an action to restrain the issuance of bonds, and not an action by a *bona fide* purchaser.

The general rule is that bonds must be issued in conformity with the statute in force at the time of issuance. *People's Bank v. School District,* 3 N. Dak. 496; *Barnum v. Okolona,* 148 U. S. 393; *Barnett v. Denison,* 145 U. S. 135; *Brownell v. Town of Greenwich,* 114 N. Y. 518.

There may be exceptions to this rule on account of saving clauses in the act providing for their issuance, or by reason of a general saving clause in statutes gov-

erning the amendment or repeal of laws, but nothing is alleged which brings the case within any exception.

The legislature must be presumed to know the state of legislation on the subject matter, more particularly the changes in the former law made by its enactments at that very session, and to intend the consequences of its action. Under the law we can take no other course than to affirm the judgment of the district court holding the proposed issue of bonds unauthorized.

AFFIRMED.

DEAN, J., not sitting.

STATE, EX REL. COUNTY ATTORNEY, APPELLANT, V. FRANK F. WILLOTT, APPELLEE.

FILED OCTOBER 18, 1919. No. 21099.

1. **Officers:** APPOINTEE: RIGHT TO HOLD OVER. An appointee to fill a vacancy in a public office is generally entitled to the benefit of a statutory provision that officers shall hold over until their successors are elected and qualified.
2. ———: VACANCY. As a general rule, the appointing power has no vacancy to fill upon the expiration of a term of office, where the incumbent is entitled to hold over until his successor is elected and qualified.
3. ———: CHANGE OF TERM. Where the tenure of a public office is fixed by statute, the appointing power cannot change the term as a condition of appointment.
4. ———: APPOINTMENT: CONDITION. An appointing officer or board, as a condition of making an appointment, cannot exact of an appointee the surrender of any right, privilege or emolument appertaining to the office, and this principle cannot be evaded by estoppel.
5. ———: TERM. The time for which the right to hold over exists is as much a part of the incumbent's term of office as the fixed statutory period.
6. ———: VACANCY. Where a sheriff having the right to hold over retains his office, and to protect that right files with the county clerk a proper official bond, which is presented in due time to the county board for their approval, their arbitrary refusal to act on the bond or to approve it within the time prescribed by law does not create a vacancy for them to fill or oust him from office.

APPEAL from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

R. D. Flory and *W. J. Donahue,* for appellant.

Albert & Wagner and *F. D. Williams, contra.*

ROSE, J.

This is an action in the nature of *quo warranto* prosecuted in the name of the state on the relation of the county attorney of Boone county to oust respondent from the office of sheriff. The action was dismissed, and relator has appealed.

Otto Anderson, sheriff of Boone county, died October 29, 1918. He had been a candidate to succeed himself at the general election to be held November 5, 1918. His name remained on the official ballots after his death, and the election returns showed that he received the highest number of votes cast for that office. It thus happened that there was a vacancy in the office of sheriff October 29, 1918, for the unexpired term, and that Anderson's successor for the regular term beginning January 9, 1919, was not elected at the general election November 5, 1918. The county board, November 2, 1918, appointed respondent to fill the vacancy caused by the death of Anderson. Respondent qualified, entered upon the duties of his office, and is the present incumbent, claiming the right to hold over. The county board met January 20, 1919, and declared that respondent had no right to hold over for the following reasons: He was appointed to fill an unexpired term ending January 9, 1919, and a bond entitling him to hold over was not filed within the time prescribed by law. The county board then proceeded to fill the office of sheriff by the appointment of F. B. Waring.

Did respondent's tenure under his appointment end January 9, 1919, leaving a vacancy to be filled by the county board? An appointee to fill a vacancy in an office is protected by a general statutory provision that officers shall hold over until their successors are elected

and qualified. *State v. Metcalfe,* 80 Ohio St. 244; *Sackett v. State,* 74 Ind. 486. As a general rule the appointing power has no vacancy to fill upon the expiration of a term, where the incumbent is entitled to hold over until his successor is elected and qualified. *Re Advisory Opinion to Governor,* 65 Fla. 434, 50 L. R. A. n. s. 368, and cases cited in note. The death of Anderson did not occur 30 days before the general election, and under the statute the vacancy could not be filled thereat. Rev. St. 1913, sec. 2278. The vacancy, therefore, was properly filled by the appointment of respondent, and thereafter there was an "incumbent to continue in office until his successor is elected and qualified." Rev. St. 1913, sec. 2275. His tenure under his appointment and the statutes did not terminate January 9, 1919. Rev. St. 1913, secs. 1967, 2280. The time for which the right to hold over exists is as much a part of the incumbent's term of office as the fixed statutory period. *State v. Metcalfe,* 80 Ohio St. 244.

It is argued, however, that respondent agreed with the county board that his term of office under his appointment should expire January 9, 1919, and it is insisted that he is estopped to declare the contrary. Where the tenure of office is fixed by statute, the appointing power cannot change the term as a condition of appointment. It is a well-settled rule of law, founded on the imperative demands of public policy, that an appointing officer or board, as a condition of exercising the appointing power, cannot exact of an appointee the surrender of any right, privilege or emolument appertaining to the office. This rule is not defeated by estoppel. *Gallaher v. City of Lincoln,* 63 Neb. 339; *Abbott v. Hayes County,* 78 Neb. 729; Throop, Public Officers, sec. 456. The conclusion, therefore, is that respondent's tenure of office under his appointment did not expire January 9, 1919.

Did respondent lose his right to hold over by failing to give an official bond within the time prescribed by law? The statute provides:

"When it is ascertained that the incumbent of an office holds over by reason of the nonelection or nonappointment of a successor, or of the neglect or refusal of the successor to qualify, he shall qualify anew within ten days from the time at which his successor, if elected, should have qualified." Rev. St. 1913, sec. 5723.

Relator insists that the office of sheriff became vacant because respondent did not give a bond, with the approval of the county board indorsed thereon, by January 19, 1919. A good and sufficient bond executed by respondent in substantial compliance with the statutes was executed by respondent, filed with the county clerk December 13, 1918, and presented to the county board in the usual manner in due time for their approval. The county board, knowing that respondent claimed the right to hold over, did not approve or reject his bond or make any objection thereto until January 20, 1919, when they declared a vacancy because it had not been approved by them in time.

In exercising his right to hold over, respondent in due time complied with all statutory requirements. He was in possession of the office performing its functions under a valid appointment. The failure of the county board to approve his bond was not attributable to him, but was an arbitrary departure from their official duty, based either on a misapprehension of the law or on a preconceived purpose to prevent him from exercising his right to hold over. In either aspect the result is the same. The unauthorized conduct of the county board did not create a vacancy or oust respondent from his office or force him to resort to mandamus for the approval of his bond as a condition of holding over. Respondent was not seeking to oust a present incumbent. For the purpose of defending a writ of ouster his title is sufficient. The approving of the proper bond when presented in due time was not a favor to respondent, but a duty to the public. In law the bond was delivered. For the official acts performed under it during respon-

dent's incumbency both principal and surety are bound. The case is governed by the rules announced in *Duffy v. State,* 60 Neb. 812, where the cases upon which relator relies are distinguished. See, also, *McCracken v. Todd,* 1 Kan. 148; *Young v. State,* 7 Gill & J. (Md.) 253; Throop, Public Officers, sec. 183; Mechem, Public Officers, secs. 311-313.

The writ of ouster was properly denied and the dismissal of the action is

AFFIRMED.

DEAN, J., not sitting.

IN RE APPLICATION OF ALSON B. COLE.
ALSON B. COLE, APPELLANT, V. WILLIAM T. FENTON, WARDEN, APPELLEE.

FILED OCTOBER 18, 1919. No. 21206.

1. **Criminal Law:** INFORMATION: HOMICIDE: PLEA OF GUILTY: DETERMINATION OF DEGREE. When a defendant pleads guilty to an information charging murder in the first degree, he is not required, nor even allowed, himself, to determine the degree of the crime; under such an information he might be convicted of murder of either degree or of manslaughter. The court should determine from the evidence the degree of the crime.
2. ———: HOMICIDE: PUNISHMENT. The determination of the degree of the crime does not necessarily involve the determination of the punishment for the crime when the degree has been determined.
3. ———: JOINT INFORMATION: PLEA OF GUILTY: PROCEDURE. When one of two defendants jointly charged with murder enters a plea of guilty, even if it is entered in the progress of the trial, and there had been no request for separate trials, the practice regularly would be to proceed with the trial as to the defendant not pleading guilty separately, and not take the evidence as to the degree of the crime of the defendant pleading guilty in and as a part of the trial of the other defendant.
4. ———: ———: ———: EVIDENCE: WAIVER. In such case, if neither defendant asks for such separation, and the evidence against both is taken together, the parties so consenting to that manner of procedure cannot afterwards contend that for that reason the judgment finally rendered is absolutely void.

5. ———: PLEA OF GUILTY: ERROR AFTER PLEA: REMAND. Upon proceedings in error in a criminal case, if prejudicial errors have occurred only after the defendant's guilt has been determined, the judgment will be found to be erroneous, and will be reversed and the cause remanded for correct proceedings subsequent to the determination of the defendant's guilt.

6. **Habeas Corpus:** VALID CONVICTION: UNAUTHORIZED JUDGMENT: PROCEDURE. If upon a valid conviction of guilt the court renders a judgment unauthorized by law, and the defendant is being imprisoned under such void judgment, he may be released from such imprisonment by a writ of habeas corpus, but in such case he will not be discharged from custody if it appears that he is charged with a crime in a valid information.

7. ———: PURPOSE OF WRIT. The writ of habeas corpus is not a writ for the correction of errors, and will not be allowed to be used for that purpose.

8. ———: ERRORS: CORRECTION. If the proceedings subsequent to conviction are erroneous, such errors can be reviewed and corrected by proceedings in error in the regular course of the law, but not by the writ of habeas corpus.

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

J. M. Priest, for appellant..

Clarence A. Davis, Attorney General, and *George W. Ayres, contra.*

SEDGWICK, J.

This appellant was convicted of murder in the first degree in the district court for Howard county and sentenced to death, and afterwards brought this petition in the district court for Lancaster county for a writ of habeas corpus. The application for the writ was overruled, and he has appealed to this court.

The petitioner first entered a plea of not guilty to the information against him, and after the jury had been impaneled and the trial had begun, he withdrew his plea of not guilty and entered a plea of guilty. The information charged both himself and one Grammer with the crime of murder, the petitioner as the principal and Grammer as accessory before the fact. The

trial began as against them both jointly, and after the petitioner had changed his plea to guilty, the trial continued as against them both jointly, without objection on the part of either defendant. When the evidence was introduced as tending to show the degree of the petitioner's guilt, the court informed the jury that they must not consider such evidence as evidence against the defendant Grammer, and so the trial proceeded. The court submitted the question to the jury as to the punishment to be inflicted. The jury found that his punishment should be death, and the court entered judgment against him accordingly.

The General Statutes of 1873, p. 720, defined the crime of murder in the first degree, as follows: "If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison or causing the same to be done, kill another; or, if any person, by wilful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person; every person so offending shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death." This was amended in 1893 (Laws 1893, ch. 44, Rev. St. 1913, sec. 8581) by adding the words, "or shall be imprisoned in the penitentiary during life, in the discretion of the jury." But section 489 of the Criminal Code (Gen. St. 1873, p. 830), as follows: "That in all trials for murder, the jury, before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict, whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession, in open court, the court shall proceed by examination of witnesses, in open court, to determine the degree of the crime, and shall pronounce sentence accordingly"—was not changed, and is now section 9139, Rev. St. 1913. The words added to the section defining the crime of murder, "or shall be

imprisoned in the penitentiary during life, in the discretion of the jury," assume that, even in murder of the first degree, the circumstances may be such that the death penalty should not be inflicted, and this is the only authority in our law for substituting imprisonment for life for the death penalty. The duty of the court to determine the degree of the crime if the conviction is "by confession, in open court," has not been changed, and it is argued that the lawmakers intended that the court should also in such case determine whether the convict "shall suffer death or shall be imprisoned in the penitentiary during life," by the words, "and shall pronounce sentence accordingly," which were left unchanged when the new provision as to punishment for first degree murder was introduced into our law in 1893; that is, that the court should have determined, not only the degree of the crime, but also the penalty, instead of submitting that question to the jury, and that the judgment of conviction against the petitioner was therefore void. The provisions of the statute are not as clear as they might be in such case. When a defendant pleads guilty to an information charging murder in the first degree, he is not required, nor even allowed, himself, to determine the degree of the crime, since under such an information he might be convicted of murder of either degree or of manslaughter. The provision, then, that the court upon conviction by confession should determine from the evidence the degree of the crime was appropriate and necessary. It seems to be contended that to determine the degree of the crime involved the determination of the punishment for the crime when the degree has been determined, but this is a mistake. The two matters are entirely distinct; and, while one might expect that when upon a plea of guilty the court determines the degree of the crime, the court might also be required to determine the punishment, still the degree of the crime might be fixed by the court, and the question of the punishment, whether by death or life imprisonment, be submitted to the jury.

If the attention of the legislature is called to the inconsistencies of these statutes, undoubtedly the law will be so written as to make its application definite and plain in all cases.

When one of two defendants jointly charged with murder enters a plea of guilty, even if it is entered in the progress of the trial, and there had been no request for separate trials, the practice regularly would be to proceed with the trial as to the defendant not pleading guilty separately, and not take the evidence as to the degree of the crime of the defendant pleading guilty in and as a part of the trial of the other defendant. But if neither defendant asks for such separation, and the evidence against both is taken together, the parties so consenting to that manner of procedure cannot afterwards contend that for that reason the judgment finally rendered is absolutely void. The fact that that evidence was taken in connection with the trial of the other defendant such practice not having been objected to by either party will not render the judgment void. If it should be thought to be so irregular as to amount to prejudicial error, the error would be corrected in the ordinary proceedings in error for that purpose. If the court is without jurisdiction to render the judgment, and the defendant is being imprisoned under such void judgment, he may be released from such imprisonment by a writ of habeas corpus, but in such case if he has been "properly informed against by information or indictment charging a crime before a court of competent jurisdiction, on a habeas corpus proceeding he should be discharged from his confinement on the illegal commitment, and remanded to the custody of the court having jurisdiction of the information or indictment pending against him." *Michaelson v. Beemer*, 72 Neb. 761. The petitioner was not being punished under this conviction, he was being held only for safe keeping upon conviction of a crime not bailable. His confinement was, therefore, not illegal.

A writ of habeas corpus is not a writ for the correction of errors and will not be allowed to be used for that purpose. *Michaelson v. Beemer,* 72 Neb. 761. If for any reason the court is without jurisdiction to try and determine the guilt of defendant, a judgment of conviction will be void; but, if prejudicial errors have occurred only after the defendant's guilt has been determined, the judgment will be found to be erroneous, and will be reversed and the cause remanded for correct proceedings subsequent to the determination of the defendant's guilt. *McCormick v. State,* 66 Neb. 337, 71 Neb. 505.

In this application for the writ of habeas corpus, the proceedings prior to his conviction are not complained of, and if the proceedings subsequent to conviction were erroneous, his remedy was by petition in error, so that the whole record of his trial would be brought before the court and all errors corrected, and a proper trial awarded. He is not entitled to discharge upon the writ of habeas corpus. The decision of the district court refusing to discharge the petitioner from custody upon his application is right, and is

AFFIRMED.

The following opinion on motion for rehearing was filed November 21, 1919. *Rehearing denied.*

PER CURIAM.

The petitioner for a writ of habeas corpus had filed a very earnest brief upon his motion for a rehearing of our former decision, *ante,* p. 802. In his petition for the writ he alleged that he was tried in the district court for Howard county; that he pleaded guilty to the charge of murder in the first degree, and was sentenced thereon. His petition contains some of the records of the proceedings, from which it appears that he was tried with one Grammer. In the hearing upon this application in the district court, there was a stipulation of facts by the parties, from which it appeared that

this petitioner was tried with Allen Vincent Grammer. The stipulation recited a part, but not all, of the instructions of the court in that case; and that a "copy of the evidence offered and received on behalf of the petitioner is hereby made from the original transcript, on file in the office of the clerk of the supreme court of Nebraska." But the transcript in this case does not contain the evidence embraced in the original transcript in the case against Grammer and Cole, which evidence was referred to and partly quoted in our opinion in that case. *Grammer v. State, ante,* p. 325. When a defendant is convicted and sentenced in a court of competent jurisdiction, habeas corpus is not available for the correction of errors in the proceedings. If for some reason the court in the particular case is without jurisdiction, the petitioner must make that appear. All presumptions are in favor of the jurisdiction of the court. The petitioner now seems to argue that he can allege that the trial court lost its jurisdiction because of the manner in which it was tried and for lack of particular evidence, and so be discharged from custody without showing to the court upon his application for habeas corpus what the evidence was in the trial of Grammar and Cole. As he has identified that case as the case in which he was tried, and has quoted a part of the record in that case, which is one of the records of this court, we referred in our opinion to some of the facts contained in that record as illustrating the fact that the applicant for this writ had not offered sufficient facts from the record of his conviction to enable the court to determine whether the trial court was without jurisdiction to pronounce the judgment against him.

The motion for rehearing is

OVERRULED.

IN RE APPLICATION FOR PERMISSION TO ATTACH IN CASE OF FERSON ET AL. V. ARMOUR & COMPANY ET AL.

FILED OCTOBER 18, 1919. No. 21281.

Attachment: JURISDICTION. Neither the county judge nor the judges of this court can allow an attachment in an action pending in the district court when a judge of that court is present in the county where the action is pending, and is capable of acting.

Original application for permission to levy an attachment. *Application denied.*

John O. Yeiser, for applicant.

SEDGWICK, J.

These plaintiffs began an action in the district court for Douglas county against several residents of this state and several nonresidents. After the action had been pending for some time, the plaintiffs applied to this court for an order by the court, or some member thereof, allowing the amount in value of the property of the nonresidents that may be attached in such action and fixing the amount of bond to be given by plaintiffs under section 7732, Rev. St. 1913. The amendment of this section in 1911 (Laws 1911, ch. 168) provides: "If the demand is not founded on contract, the original petition must be presented to some judge of the supreme, district or county court, who shall make an allowance thereon of the amount in value of the property that may be attached, and the amount of bond, if any, to be given by plaintiff."

The first question presented by this application is as to the jurisdiction of the judges of this court to make such order. The application is made here, and not in the county or district where the action is pending, and it is conceded that the judges of the district court are in that county and that application has been made to them and refused.

Section 7779 Rev. St. 1913, provides that attachment under the preceding section "may be granted by the court in which the action is brought, or by a judge thereof, or by the county judge of the county," and in *Reed, Jones & Co. v. Bagley,* 24 Neb. 332, it was decided that, when the county judge granted an attachment in an action brought in the district court, "it will be presumed * * * that the judge of the district court was absent from such county."

In the opinion it is said: "It will be presumed that the judge of the district court was absent from Cedar county when the application for the attachment was made to the county judge for that county, and that the order for the attachment was duly made by the judge of Cedar county. The authority conferred upon county judges, in cases where the debt is not due, is for the purpose of preventing a failure of justice." In such case, unless the attachment is allowed when applied for when the action is begun, it may be entirely ineffective, and hence "the ends of justice" require that the application be heard at once. To meet this requirement, if the judges of the court having jurisdiction of the action cannot be reached, the county judge may act for them in this preliminary matter, but the county judge cannot act if the judges of the district court can be reached. With this construction of that statute before them, the legislature used the same language in the amendment of 1911—and must have considered that this amendment would be similarly construed. The fact that by the provision of the Constitution this court has no original jurisdiction in such an action adds great force to this conclusion. The statute in question confers the same duty and the same authority upon the county judge that it does upon the judges of this court. We then have no more jurisdiction in such a case than the county judge has. It is incredible that the legislature could intend that, when a case was pending in the district court and the judges of that court were present, the

county judge could interfere and make orders allowing attachment, fixing the amount of property that could be attached, and the amount of bond to be given. If the legislature did not intend that the county judge should have such powers, it was not intended that judges of this court should have. The provision is precisely the same in regard to both. The dictum in *Calvert v. State*, 34 Neb. 616, is disregarded.

We conclude, therefore, that neither the county judge nor the judges of this court can allow an attachment in an action pending in the district court when a judge of that court is present in the county where the action is pending, and is capable of acting.

The application is

DENIED.

BENJAMIN S. BAKER, APPELLANT, V. HARLEY G. MOORHEAD, APPELLEE.

FILED OCTOBER 18, 1919. No. 21245.

1. **Constitutional Law:** CONSTITUTIONAL CONVENTION: ELECTION OF MEMBERS. The words, "The convention shall consist of as many members as the house of representatives, *who shall be chosen in the same manner*," contained in section 2, art. XV, Constitution, providing for the election of members to a constitutional convention, refer to the manner of electing representatives provided for in the Constitution, and a statute, which provides for nomination of members to a constitutional convention by petition only, and which is in other respects unlike the general law relating to primaries and nominations by petition, is not unconstitutional as changing the manner of election.
2. ———: ———: ———. Nor does the fact that the law under consideration provides for election of members of the convention at a special election, whereas representatives are required by the Constitution to be elected at a general election, amount to a change of manner.
3. ———: ———: ———. Section 13, art. XVI, Constitution, providing that officers "by the Constitution or laws made elective by the people" shall be elected at a general election, provided for in the

Constitution, was not intended to and does not include members of a constitutional convention.

4. ———: PROVISIONS FOR CONSTITUTIONAL CONVENTION: CONSTRUCTION. The general rule that the provisions of a Constitution will be construed as mandatory, rather than directory, does not apply with the same strictness to provisions of the Constitution providing for future constitutional conventions, as it applies to other parts of the Constitution.

5. ———: PROVISIONS FOR REVISION: CONSTRUCTION. A construction of a provision of the Constitution which would make difficult or impossible any fair and just method of revising it will not be adopted by the courts.

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

Baker & Ready and *John P. Breen,* for appellant.

Abel V. Shotwell and *W. W. Slabaugh, contra.*

Anson H. Bigelow and *C. A. Sorensen, amici curiæ.*

CORNISH, J.

Action to enjoin the election commissioner in Douglas county from proceeding under chapter 196, Laws 1919, providing for the election of delegates to a constitutional convention, on the ground that the law is unconstitutional. From a judgment on sustaining the demurrer to the petition, plaintiff appeals.

Chapter 196, unlike the general law for primary elections and nominations of candidates, provides for the nomination of delegates to the convention by petition only, without party designation, on printed ballot. It requires the signatures of five per cent. of the electors in each district and verification by oath of five of them; whereas, under the general law, in its application to representatives, not more than 200 signers to a petition, nor such verification, is required.

It is contended that these changes from the general law render the law unconstitutional as violative of section 2, art. XV, Constitution, providing for the election of members to a constitutional convention, which con-

tains these words: "The convention shall consist of as many members as the house of representatives, *who shall be chosen in the same manner,*" etc. It is argued that this provision of the Constitution is mandatory, not directory, and that the law under consideration violates it in that the members are to be chosen in a manner different from that of choosing members of the house of representatives.

In construing Constitutions, the same as with other written instruments, the main inquiry is: What was the intent? In *Barkley v. Pool*, 102 Neb. 799, we said: "The general rule is that constitutional provisions are to be construed as mandatory, unless, by express provision or by necessary implication, a different intention is manifest." The main reason for this rule is that in Constitutions the sovereign power itself speaks and is laying down rules which, for the time at least, are to control alike the government and the governed. It is an instrument of a solemn and permanent character, laying down fundamental maxims, and, ordinarily, is not supposed to concern itself with mere rules of order in unessential matters. Its directions are likely to be intended as mandates, except in cases where such a construction would be so unreasonable that it becomes apparent that such was not the intent. Again, in the reasonable construction of a Constitution, it is to be observed that those provisions which have to do with the subjects and agents of the state—those provisions limiting the powers of the legislature and officials, and even those which have to do with amendments to the Constitution—stand upon a somewhat different footing from those which have to do with future attempts of the sovereign power itself to draft a new Constitution. The Constitution-makers of one generation would never really intend to prevent the people of a succeeding generation from exercising their sovereign right to alter or amend their fundamental laws. If the spirit of our free institutions and republican form of government is to be

preserved, some orderly and lawful way, avoiding tumult or revolution, must exist to make Constitutions conform to the will of the vast majority of the people. As said in *State v. Winnett,* 78 Neb. 379, 387, 10 L. R. A. n. s. 149, the courts will avoid giving to a restriction an interpretation which "might result in prohibiting any amendment, however it might be desired by the great mass of the people." In *Prohibitory-Amendment Cases,* 24 Kan. 700, Judge Brewer, in a case where a similar provision of the Constitution had not been followed, said (p. 710): "The two important, vital elements in any constitutional amendment, are, the assent of two-thirds of the legislature, and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms." We also quote from *Green v. Weller,* 32 Miss. 650, 684: "The means provided for the exercise of their sovereign right of changing their Constitution should receive such a construction as not to trammel the exercise of the right." It follows that the provisions of a Constitution, providing for the calling of a future convention for the drafting of a new Constitution, might be construed as directory or recommendatory merely, when other portions of it would not be.

With this in mind, and also the rule of construction that laws will not be construed to be unconstitutional unless plainly so, we will consider what was intended by the above-quoted words of the Constitution. We are of opinion that they refer only to the manner of election of representatives that then prevailed and as set out in the Constitution itself. At that time our later enactments, governing primary elections and nominations by petition, were unknown, and the words, "chosen in the same manner," could not have referred to these later enactments, nor have anticipated present methods of nomination. The fact is, the manner of elections and the manner of nominations are different subjects of consideration. The Constitution-makers had only the former in mind. They wished to preserve to the people the

right of choosing members by election in the manner therein provided—a free election by ballot; at an election opened and conducted under general laws. See section 22, art. I, secs. 2, 3, 5, 15, art. III; and secs. 1-6; art. VII, Constitution. It is not to be presumed from the language used that it was intended to place restriction upon future legislation of the kind under consideration. It is not asserted that chapter 196 is unwise or unfair in its provisions. It is just that sort of an enactment which a legislature might think best for bringing about any changes needed in the Constitution to make it comport more nearly with the people's will.

The enactment is to be construed as mandatory, so that a statute, allowing the governor to appoint members of the convention, or providing that they shall be chosen by the legislature itself, or in any manner other than by ballot at a free election by all qualified voters of the state, would be unconstitutional. It cannot be construed to intend to prohibit matters of mere form and machinery, that the people may deem necessary for securing a fair election of the delegates to the convention.

The law, evidently for the purpose of concentrating the choice of the people at the election, provided that, if the number of candidates equals or exceeds three times the number of delegates to be chosen, then a special primary election should be held and the number reduced to two times the number to be chosen; otherwise not. It follows that in some districts it may happen that three candidates would appear on the ballot, and in others only two. It is urged that this is special or class legislation, violative of section 15, art. III, Constitution. We think not. The law is general and restricted by its terms to no particular locality; it operates equally upon all of a group of objects; it is based on a rational difference of situation and is not a special law.

The provision requiring the oath of five signers to a petition is objected to as an impediment and hindrance to the voter's right to have freedom in the matter of

getting candidates upon the official ballot, and violative of section 22 of the Bill of Rights. We hardly think that this provision is unduly burdensome. It is intended to prevent spurious petitions. The voter is still free to vote for whom he wishes by writing the name on the ballot.

Chapter 196 also provides for the election of delegates to the constitutional convention at a special and not the general election. The question is raised whether this provision is not contrary to section 2, art. XV, Constitution, above quoted, and also to section 13, art. XVI, Constitution, which provides that all officers (except certain ones named) "by the Constitution or laws made elective by the people" shall be elected at a general election therein provided for.

We are satisfied that, while in some cases the time of doing a thing may be part of the manner of doing it, ordinarily this is not the case, and is not in this instance. *Bankers Life Ins. Co. v. Robbins,* 59 Neb 170; *Opinion of the Justices,* 76 N. H. 586.

We are also of opinion that members of the constitutional convention are not officers intended to be embraced in the provisions of section 13, *supra.* They are not constitutional officers in a strict sense; they are officers who create a Constitution, rather than officers who are created by the Constitution. Section 13, read in connection with section 14, which has to do with terms of office, would indicate that those provisions have to do only with officers elected who have fixed terms of office, and should be elected at an election called with reference to the time of the beginning of their terms. The members of the convention have no fixed term of office, and, by the Constitution itself, the convention may be called at any time within three months after the election of its members.

The drafting of a new Constitution is likely to enlist the attention of the entire people as much as or more than any proposition that would come before them.

There are good reasons why the members should be elected at an election, freed from party politics, freed from what might be the sinister influences of other candidacies, and freed from anything that might distract the attention of the voter from those qualifications needed in a member who is to perform so important a function. We do not believe that the constitution-makers intended that this provision of the Constitution should stand in the way, to prevent the legislature from doing what, to it, at the time may seem the wisest and best.

The initiative and referendum amendment, also voted after the Constitution of 1875 was adopted, has a bearing upon the question. Under this amendment, changes in the fundamental law, drafted by a faction or party, may be submitted to the people for adoption. Where the changes are radical and uncertain, it may well be better to have them formulated in a convention elected by all the people and after extended discussion.

AFFIRMED.

LIZETTA K. TANNER, APPELLEE, V. F. L. FRINK ET AL., APPELLANTS.

FILED OCTOBER 18, 1919. No. 20578.

1. **Fraudulent Conveyances:** CONVEYANCE BY PARENT TO CHILD. "A conveyance without fraudulent intent, by a solvent man, of lands to his wife or child, is presumed to have been made in consideration of his moral obligation for the support and maintenance of the grantee, and, in the absence of evidence of a contrary intent, will be held to have transferred the entire title, both legal and equitable, so that the transaction cannot be successfully assailed by subsequent creditors of the grantor." *Hill v. Schmuck*, 65 Neb. 173.
2. ———: INTENT. The question of fraudulent intent is to be considered as of the time when the conveyance is made, and with reference to the particular conveyance alleged to have been fraudulent as against creditors.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Reversed.*

M. D. Tyler and *M. B. Foster,* for appellants.

H. Halderson and *H. C. Vail, contra.*

CORNISH, J.

On October 1, 1910, the defendant F. L. Frink purchased land in Texas for a consideration of $12,210, paying $2,199.33 in cash, and giving his notes, secured by vendor's lien, for the balance. On December 16, 1913, a personal judgment for $8,680.39 was had against him in an action foreclosing the lien. This action is to subject to the payment of the judgment 80 acres of land, standing in the name of Amy B. Frink, his daughter. The consideration for this eighty was paid by him, and he caused it to be deeded to his daughter March 15, 1909, as a gift. Under this deed, recorded a few days later, she took and has retained possession. It is alleged that this deed was made to hinder, delay and defraud creditors, and judgment that Amy B. Frink holds title to said eighty in trust for creditors is prayed for.

At the time this voluntary conveyance was made by Frink to his daughter, and at the time of incurring the obligation, the basis of the judgment, October 1, 1910, it does not appear that Frink had other indebtedness, or that credit was extended on the basis of his ownership of this or any other property. It would appear that, at the time of making the voluntary conveyance to his daughter, Frink was possessed of property as follows: An equity in 80 acres of land in Platte county, worth $6,700; money in the bank, $2,000; an automobile, $500; and the land in controversy, $4,250; making a total of $13,450. Ordinarily a man owning $13,450 worth of property, with no debts, and who gives $4,250 of it to his daughter as an advancement or settlement upon her, could hardly be said to make the gift for the purpose of hindering, delaying or defrauding creditors. No doubt an exception to this rule may arise if it appears that the gift is made for the purpose of avoiding or defeating creditors in some more or less hazardous

enterprise that the person is about to undertake. That Frink owned $9,200 above his indebtedness, after deeding the property to his daughter, is not admitted by plaintiff, but in the brief it is admitted that he was at that time worth from $3,500 to $4,000 above his indebtedness.

It is strenuously insisted by plaintiff that the time of Frink's obligation should not date from the time the contract was entered into and the notes given, October 1, 1910, but should date from the time when a prior contract was entered into for the purchase of the Texas land, December 23, 1908, which contract provided for the purchase of the land in the name of Frink's wife, and upon which a payment of $500 was made. It is contended that in this prior contract Frink was the real party in interest, and there is more or less evidence to support this contention, denied by Frink. If, however, we admit this to be true, then, while it would show that Frink at the time had an indebtedness in the amount of his notes given for the Texas land, it will also increase his assets in the amount of the value of the land.

In determining whether his voluntary conveyance to his daughter was made to hinder, delay or defraud creditors, we must look at the situation as it existed at the time. The presumption must be that he thought the land, which he was buying and making payments of $2,199.33 upon, was worth what he was paying for it. He would hardly anticipate at that time that the land would be worth less, or anticipate this judgment of $8,680.39. The gift would not necessarily or presumptively make difficult or impossible the payment of any indebtedness that he would then know about, and we can hardly find fraud intended or effected by it. In *Hill* v. *Schmuck*, 65 Neb. 173, we held that a solvent man is free, if done without fraudulent intent, to make conveyances of his property to wife or children.

We reach this conclusion with some hesitation after consideration of evidence. Assuming that the learned

trial judge, who heard this case, would be right in finding that Frink's conduct and method of doing business showed a disposition upon his part to cover up and hide his property, so that it would not be accessible for application in payment of his debts, still it is difficult to say that such disposition would play any part in the transaction deeding the property in controversy to his daughter. There would seem to have been no necessity or motive for it at that time. Neither he nor his vendor would anticipate the present situation—that he would lose the land and still owe the major portion of the consideration promised.

For other cases bearing upon this question, see *Seeley v. Ritchey*, 76 Neb. 433; *Johnson v. Johnson*, 36 Neb. 700; *Adler & Sons Clothing Co. v. Hellman*, 55 Neb. 266; *McIntyre v. Malone*, 3 Neb. (Unof.) 159; Bump Fraudulent Conveyances (4th ed.) secs. 248, 251, 255; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732.

The judgment of the district court is

REVERSED.

SEDGWICK, J., not sitting.

OMAHA GRAIN EXCHANGE, APPELLEE, V. NATIONAL SURETY COMPANY, APPELLANT: CORN EXCHANGE NATIONAL BANK ET AL., APPELLEES.

FILED OCTOBER 18, 1919. NO. 20505.

1. **Carriers:** BILLS OF LADING: RIGHTS OF BONA FIDE PURCHASER. Where the owner of goods has clothed another with apparent ownership through the possession of an indorsed bill of lading, or one made out to bearer, a *bona fide* purchaser or pledgee for value to whom such bill of lading is transferred, or to whom a receipt is transferred that has been obtained by means of the possession of the bill of lading that shows title to such bill of lading in the person transferring the receipt, is protected, because the real owner is estopped from asserting ownership when he voluntarily places the means within the hands of another with which to mislead persons who without notice advance value thereon.

2. **Subrogation:** RIGHTS OF SURETY. The right of a surety to be subrogated to the rights of a creditor is not prejudiced by a stipulation between creditors and the principal that certain perishable property shall be sold and the proceeds delivered to a trustee to be held to await the decision in a suit to be brought against the surety, where, the suit having been commenced, the trustee is made a party and the fund held by him is subject to the court's order.

3. **Principal and Surety:** SUBROGATION. The dismissal by a creditor of a replevin suit against a defendant, who is the principal on a surety bond, where the sheriff's return shows "no property found," does not affect the surety's right of subrogation, and he is not thereby discharged.

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

Alvin F. Johnson, for appellant.

Smith, Schall & Howell, contra.

DEAN, J.

This suit was brought by the Omaha Grain Exchange on a surety bond to recover a balance of $2,993.05, the purchase price of five cars of grain separately sold by the Holmquist Elevator Company, the Vincent Grain Company, and the Beal-Vincent Grain Company, the latter two being practically the same company, to William B. Weekes, doing business as the Weekes Grain Company. These parties will be hereinafter referred to as Holmquist, Vincent, and Weekes, respectively. Weekes and the three sellers were all members of the Omaha Grain Exchange, and to the exchange the several claims for the unpaid purchase price were assigned for collection.

The exchange, to secure to the sellers payment for all grain purchased by Weekes on its trading floor, had, pursuant to its rules, exacted of him a bond in the penal sum of $10,000. The bond sued on was executed by the National Surety Company. Weekes became insolvent and was unable to pay the claims in controversy. Neither Weekes nor the Weekes Grain Company made any appearance in the case and as to them a default was

entered. When the taking of testimony was concluded, both parties moved for a directed verdict, whereupon the court, by consent of the parties, discharged the jury and retained the case for determination. It appearing from the evidence that the Corn Exchange National Bank and H. S. Clarke, Jr., its vice president, were necessary parties, they were by the court's order joined as defendants, and filed pleadings disclosing their interests in the proceeds of the grain.

Judgment was rendered in favor of plaintiff and against Weekes and his surety for $2,993.05, with interest from August 10, 1916. Defendant Clarke, having at the time in his possession the proceeds of the sale of grain in question, under a stipulation or agreement entered into by certain of the parties in interest that will presently be noted, was ordered by the judgment of the court to deliver to the Corn Exchange National Bank such proceeds as he held in his hands. The surety alone appealed.

The three sellers at the time the sale was made delivered the five bills of lading to Weekes, and, pursuant to a custom of the exchange, Weekes gave to the respective sellers a separate receipt for each of the five bills of lading covering the grain purchased. Within a day or two Weekes sold four of the cars of grain to the Van Wickle Grain & Lumber Company, to whom he delivered the four bills of lading, and from whom he accepted four of the same kind of receipts for the bills of lading that he had given to the sellers. The receipts are all the same in form. A copy follows:

"Omaha, Neb., June 21, 1916.

"No. —. Received of the Weekes Grain Company, of Omaha, Nebraska, bill of lading executed by the C. & N. W. R. Co., and dated at Verdell, Neb., covering a car of wheat, for which the undersigned agrees to pay to the Weekes Grain Company, the sum of 91 cents per bushel within seven days from date hereof, or, if not unloaded, will advance 75 per cent. of the value upon

surrender of this receipt. Said bill of lading describes said car as No. 139036. Initials C. N. W., capacity 49,630 pounds. It is agreed by us that the title to said bill of lading and contents of said car shall remain in the Weekes Grain Company, or their assigns, until the undersigned has paid the Weekes Grain Company, or their order, the entire purchase price of said grain at said rate. Upon full payment to the Weekes Grain Company, or order, of said purchase price as aforesaid, and the surrender of this receipt, the title to said bill of lading and contents of said car shall pass to the undersigned.

"Van Wickle Gr. & Lbr. Co.
"By E. Thompson."

Shortly thereafter Weekes procured loans from the Corn Exchange National Bank, giving his notes therefor, upon which $3,698.27 remains unpaid. At the time the loans were made and as collateral security therefor, he gave to the bank the four Van Wickle receipts and the bill of lading covering the remaining car of grain.

Soon afterwards Weekes became insolvent. The sellers, not having been paid, then began separate replevin suits in the district court at Council Bluffs, Iowa, to recover possession of the grain. While these suits were pending, Van Wickle, not having paid for the grain, because some of the parties hereto were making claim to the grain or the proceeds thereof, began a suit in the district court for Douglas county, that is referred to in the record as an action of interpleader, making the sellers and the Corn Exchange National Bank and Weekes parties defendant and praying for a disclosure of their respective rights to the grain, if any, then in the possession of Van Wickle.

While the interpleader suit at Omaha and the replevin suits at Council Bluffs were yet pending and undetermined, the parties to the former suit entered into a written agreement which provided generally that the Van Wickle Company, herein referred to as Van Wickle,

should sell the grain and from the proceeds deliver to Clarke $3,698.27, the amount remaining due the bank on Weekes' notes and pay the remainder to the sellers; that Clarke was to hold the money so delivered to him to await the decision in a suit to be brought against the surety on the bond given to the grain exchange, namely, the present suit. In case the surety company prevailed, it was provided that Clarke should deliver the money to the sellers as their respective interests should appear. This provision also appears:

"But in the event that it is not so decided, or that said Holmquist Elevator Company, Vincent Grain Company, and Beal-Vincent Grain Company receive from said surety company, either before or after the said action has been commenced, all money coming to them because of or on account of any claim against, or right in, said grain or said $3,698.27, then all rights of the Holmquist Elevator Company, Vincent Grain Company, and Beal-Vincent Grain Company against said grain or said $3,698.27, placed in the hands of the said Clarke as aforesaid, shall be deemed satisfied and fully discharged," etc.

Under the stipulation, the grain having been sold by Van Wickle and the proceeds having been distributed pursuant to its terms, and the sheriff having returned the replevin writs "no property found," the replevin suits were dismissed. The interpleader suit is still pending and awaiting the result of this action.

The surety company argues: "Appellant therefore contended in the trial below that plaintiff's assignors had, by their own acts, abandoned, released, and impaired their rights in and to the grain in question, in such a manner to defeat appellant's right as surety to be subrogated thereto, upon performing its obligation as surety and paying for the grain, and therefore appellant (the surety) was released from its liability *pro tanto*."

One of the acts complained of relates to the replevin suits begun and later dismissed by the sellers, without

the surety's knowledge. In view of the evidence on this point and of the sheriff's return, "no property found," we are unable to discover wherein defendant was prejudiced. No lien was obtained, and consequently none was abandoned. *Eickhoff v. Eikenbary*, 52 Neb. 332; 21 R. C. L. 1044, sec. 88.

In effect, too, the surety charges that the stipulation referred to herein defeated its right of subrogation to whatever title or interest plaintiff's assignors, the sellers, had in the grain after it reimbursed them for the losses sustained by Weekes' default. We do not think so. The surety was not a party to the stipulation and of course is not bound by it. The proceeds of the sale are properly safeguarded. Demurrage, storage, and insurance charges, and loss from waste, and the like have been avoided. All interested parties are in court, and the fund in dispute is in the hands of a party to the suit by whom it is held subject to the court's order. We are unable from the record to discover wherein the surety has been prejudiced in the respects noted. The right of the surety to be subrogated to such rights as plaintiff's assignors may have to the fund, on payment of the losses incurred by them, is of course, conceded, and unless such rights are inferior to those of the bank, then the surety as against the bank must prevail.

The question then is: Who has the superior right to the funds now in the hands of Clarke? Is it the surety company, standing as it does in the place of plaintiff's assignors or the bank that made the loan to Weekes?

The receipts on which Weekes obtained the money from the bank on the face are regular. The presumption would be that they spoke the truth. A person to whom they would be presented for negotiation would, from the recitals thereon, naturally presume that they would not have been issued unless the holder was the owner of the bills of lading. The receipts were apparently

issued pursuant to section 9, art. 6 of the by-laws of the exchange. So much of the rule as is here applicable follows:

"Where a bill of lading is transferred and the party receiving the same issues and delivers to the person surrendering the bill of lading a receipt therefor, stating that the title to the grain covered by said bill of lading shall remain in the party holding said receipt, until the same is fully paid for, the person issuing such receipt is hereby prohibited from accepting or receiving advances on such bill of lading, or negotiating the same, so long as the receipt therefor is outstanding."

While there is no evidence that any of the bank officers knew of the existence of the rule, nevertheless, under the circumstances, even if the rule had been known to the bank, it would have justified the bank's course of dealing with Weekes in the premises. It has not been made to appear that the bank officer who dealt with Weekes, nor any person connected with the bank, had notice of any facts connected with the transaction that would put a reasonably prudent man on inquiry respecting the *bona fides* of the receipts that were presented by Weekes.

Where the owner of goods has clothed another with apparent ownership through the possession of an indorsed bill of lading, or one made out to bearer, a *bona fide* purchaser or pledgee for value to whom such bill of lading is transferred, showing title to such bill of lading, is protected, because the real owner is estopped from asserting ownership when he voluntarily places the means within the hands of another with which to mislead persons who without notice advance value thereon. It is obvious that a receipt, obtained by means of a bill of lading, showing title to such bill of lading in the holder of the receipt, would be as effective a means of misleading *bona fide* purchasers or pledgees for value as the bill of lading itself. *Pollard v. Reardon*, 65 Fed. 848; *Munroe v. Philadelphia Warehouse Co.*, 75 Fed.

545; *Commercial Bank v. Armsby Co.*, 120 Ga. 74; *Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co.*, 239 U. S. 520; Mechem, Sales, sec. 166; Williston, Sales, sec. 425; 10 C. J. 207, sec. 276. In the *Pollard* case it is said: "There is every reason found in the law of equitable estoppel and in sound public policy for holding, and no injustice is involved in holding, that, if one of two must suffer, it should be he who voluntarily puts out of his hands an assignable bill of lading, rather than he who innocently advances value thereon." On this point the *Pollard* case is cited with approval by Mr. Justice Hughes in the *Commercial Nat. Bank* case.

We conclude that the district court did not err in holding that the bank was a *bona fide* pledgee, without notice, of the collateral given to it by Weekes, and that plaintiff's assignors, having surrendered to Weekes the bills of lading, were therefore estopped from asserting title under the terms of the conditional sales to Weekes as against the bank. That the rights of the surety are no greater than those of plaintiff's assignors is obvious. Both parties moved for a directed verdict, and, as herein noted, the court discharged the jury and retained the case for determination. Under the rule, the findings of the court take the place of a verdict on disputed questions of fact, and they are so treated by this court on appeal.

There is sufficient evidence to support the findings and judgment. We do not find reversible error, and the judgment is therefore

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

MORRISSEY, C. J., not sitting.

MARTIN I. BROWER, ADMINISTRATOR, APPELLEE, V. MARY E. UMSTEAD ET AL., APPELLANTS.

FILED OCTOBER 18, 1919. No. 20450.

Executors and Administrators: SUIT TO RECOVER PROPERTY. Equity will not entertain a suit on the part of an administrator to recover, on the ground of mental incompetency, property conveyed to some of the children of the intestate, where there are no creditors, and the only persons who would be benefited by such suit are the other children of the intestate, who during the same period of alleged incompetency also received property from the intestate which they still retain.

APPEAL from the district court for Nance county: GEORGE H. THOMAS, JUDGE. *Reversed and dismissed.*

Albert & Wagner, J. R. Shields, and *W. L. Rose,* for appellants.

Reeder & Lightner, contra.

ALDRICH, J.

This is an action in equity, instituted by the plaintiff, who is the administrator of the estate of Margaret Lamb, against certain heirs of the estate, to wit, Mary Umstead, J. H. Umstead, and Charles B. Lamb. Margaret Lamb, for whom a guardian was appointed, was a feeble old lady possessing considerable property. Being in poor health, she was desirous of relieving herself of responsibility in the care and management of certain real estate, and submitted to an appointment of a guardian for her own personal convenience.

After the guardian was appointed, as the record discloses, and after he had acted for a time, she became desirous of discharging him, and whatever little business she might have left, to manage the same for herself. She procured his discharge in the county court of Nance county without notice to some of the children, John E. Lamb, Mike Lamb, Jennie Glen, and Margaret Randolph. The discharge was effected in May, 1914. Some of the children refused to recognize the validity

of this discharge, and appealed to the district court to have the guardian reinstated. After the death of Mrs. Lamb, the children who had appealed procured the appointment of an administrator, and he brought this action to set aside certain transfers of property made by Mary Lamb, after her discharge from guardianship, to these defendants.

The record shows that each child who is not a defendant, and in whose interests it is argued the administrator really appears, received from Margaret Lamb, after her discharge from guardianship, property of considerable value. Although the suit is brought in the name of the administrator, the only parties in interest are the ones who, during Margaret Lamb's lifetime, and after the discharge of the guardian, recognized her capacity to transact business and induced her to convey valuable property to them. There are no creditors of the estate, and the only ones who can possibly have any interest in this suit are the children who are not defendants. But they have recognized the validity of the discharge from guardianship and their mother's ability to transact business by receiving property from her which they still retain. In view of these circumstances, a court of equity ought not to lend its aid to recover for their benefit the property similarly received by the defendants. 10 R. C. L. 694, sec. 22.

The plaintiffs are estopped in a court of equity from seeking to enforce such a position. Such a relation is unconscionable, and they are estopped from assuming it. It seems quite evident from the record that these complainants waived every claim, and any right that they might have against the defendants, by obtaining the same relief that they sought to obtain from the defendants, Mary Umstead et al.

For these reasons, then, it becomes our duty to reverse and dismiss these proceedings.

REVERSED AND DISMISSED.

ROSE and SEDGWICK, JJ., not sitting.

JOHN ROLLINS, APPELLANT, V. EDWIN HOPKINS ET AL., APPELLEES.

FILED OCTOBER 18, 1919. No. 20475.

Mortgages: FORECLOSURE: COUNTERCLAIM. In giving the warranty deed in question, without any reservation, the plaintiff created a charge, or duty, on himself by his own contract which he is bound to make good in a court of equity.

APPEAL from the district court for Knox county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

W. A. Meserve and *T. N. Treat*, for appellant.

F. M. Scoblic and *E. A. Houston, contra.*

ALDRICH, J.

This is an action in equity in the district court for Knox county to foreclose a mortgage of $475. The appellee herein appears as defendant in the foreclosure, and it is admitted that the owner of the fee bought the same free of incumbrance. The appellee admitted his liability on the note and mortgage sued upon. Plaintiff represented to the defendant that no public road existed over the land in controversy, of any character, and defendant claimed that the land at that time was charged with a public highway running diagonally from a northeasterly to southwesterly direction and that it was generally used by the public. Plaintiff afterward denied that such a road was ever formed or was running in the direction claimed by the defendant.

The record discloses that this road was abandoned, or vacated, some time in the year 1900; but again in 1909 a petition was filed for the re-establishing or reopening of this road in controversy across the premises, and while it is true that some irregularities existed, as appears of record, yet the road was re-established, and the petition granted, and it has been used

ever since by the public as a public road running diagonally across the quarter section involved. The mortgage of $475 was given as a part of the purchase price of the land.

The plaintiff gave a warranty deed at the time the mortgage was given, but did not in any way make the warranty subject to any incumbrance whatever; it being a straight warranty deed with no reservations whatever. The defendant claims as damages the sum of $475 by reason of the road running across the premises, and the trial judge awarded $310.20 on this counterclaim as damages to defendant. It is from this finding that plaintiff appeals. The issue presented for decision is: Was it proper, just, and legal to allow this counterclaim in the sum of $310.20?

It appears of record that on April 18, 1913, plaintiff and defendant entered into a contract whereby, in consideration of the purchase, the plaintiff guaranteed and expressly provided in the contract that the road was to be along the "east and south line of said described quarter section." Then it was the intention of the parties, at the time of the contract, sale and conveyance of the land, that there was no road running along from a northeasterly to a southwesterly direction diagonally across the quarter section involved, and it also appears of record that after the transfer had been made, and the mortgage given, and the deed turned over to the defendant, there was a regularly traveled and established highway running in the direction as mentioned. Then it was that defendant made his complaint to the plaintiff, who requested the defendant to pass a petition around for the purpose of causing the road to be vacated and changed along the section lines. This the defendant tried to do, but failed. The record shows that on April 12, 1909, the petition before the supervisors to re-establish and allow this road was filed, and the road was established from northeast to southwest, the same as it had been in 1900, and had been used at all times for

many years. Plaintiff claims that, because no damages were paid, the road is not a public highway, but the right, if any, to recover for the actual taking by the public before it was sold to defendant belongs to plaintiff. Besides, in equity, he is not entitled to treat his guaranty as a nullity, and defendant is entitled to counterclaim upon it.

The record and evidence show conclusively that the road was not where it was guaranteed to be. The defendant declared in the beginning of the negotiations that, if the road ran diagonally he did not want the land. The guaranty and other inducements of plaintiff satisfied defendant; now he is called upon to make his representations and guaranty good.

The trial court in allowing a foreclosure of the mortgage involved, and in allowing the counterclaim of $310.20, had ample evidence to sustain his position, and the same is just and equitable, and therefore

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

DEAN, J., not sitting.

WILLIAM BECK ET AL., APPELLEES, V. KATHERINE TRAPP ET AL., APPELLANTS.

FILED NOVEMBER 1, 1919. No. 20568.

1. **Appeal:** TIME: PARTITION. Where there is a conflict as to title in partition proceedings, and issues are framed, a trial had, and a final decree quieting the title rendered, parties desiring to appeal from the decision on this question must do so within the statutory time after such decree is rendered. *Peterson v. Damoude*, 95 Neb. 469.

2. ———: ———: ORDER OF CONFIRMATION. In such case an appeal from an order of confirmation of sale, taken more than a year after the decree quieting title, does not bring up the issues as to title.

3. ———: ———: TITLE. And where the only controversy in such an appeal is upon the title, and not upon the partition proceedings, an appeal from the order of confirmation will be dismissed.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Appeal dismissed.*

Harry A. Reese and *Reed & Gill,* for appellants.

M. B. Foster and *Dowling, Warner & Moyer, contra.*

LETTON, J.

This action was begun for the purpose of procuring a partition of certain real estate. The title of plaintiffs to any interest in the land was denied by defendants. The district court therefore ordered that hearing on the petition for partition be held in abeyance until the title was determined, and that pleadings upon that issue be filed. This was done by the filing of an amended and supplemental petition, and of separate answers and replies.

Trial was had upon the issue of title. The court found that plaintiffs were the owners of an interest in the lands, as they alleged in the petition, quieted their title to the same, caused an accounting to be had of the rents and profits due them, and rendered judgment for the amount found due. It also ascertained and decreed the respective interests of defendants in the premises, and directed that the lands be partitioned. This decree was rendered on February 8, 1916. A commission was issued to a referee to make partition in accordance with the decree. He reported that partition could not be made without prejudice to the owners, and on May 16, 1916, the land was ordered sold. On June 29, 1916, an appeal bond was filed, which recited the rendition of the decree; that upon a report of the referee that the lands could not be partitioned without damage to the estate, the court ordered them sold; and that defendants intend to appeal the case. The bond was conditioned to pay the condemnation money and costs, and against waste.

On account of the threatened appeal, the referee took no action, and on September 26, 1916, plaintiffs

moved the court to direct the referee to sell the land, and the court so directed. This was done, and the sale was confirmed on December 12, 1917. This appeal is from that decree.

Defendants contend that this appeal, taken after the order of confirmation, is sufficient to warrant a review of the entire case, including the proceedings to determine the title, while plaintiffs maintain that the appeal upon the question of title should not be entertained, because not taken within the time limited by the statute.

The real controversy in this action is upon the question of title. The partition prayed for is only incidental. If the plaintiffs did not succeed in establishing their title, they would have no right to partition. Prior to 1914, the proper practice as to appeals in such cases was not clear. In *Peterson v. Damoude*, 95 Neb. 469, the method of procedure to be followed in the case of appeals in partition suits involving issues of title was considered, the former decisions of the court were reviewed and distinguished, and the proper rule laid down. In that case, as in this, the real controversy was upon the question of title, which depended upon the construction of a will, and partition was only incidental. An appeal was taken when the question of title was determined by decree and before partition. It is said in the opinion, after pointing out that in such proceedings there are three classes of cases: "The third class is where everything depends upon the title and the nature of the title, and where, when that question is determined, the whole thing is determined. In such case there can be no doubt under the *per curiam* in the *Sewall* case that, when that question is determined, such determination is a final order, within the meaning of the statute, and is appealable." After stating the proceedings and issues in that case, the opinion proceeds: "The sole matter contested was the construction and effect of the will; there being no contest as to the partition if the will is construed as the plain-

tiffs contend. This brings the case within the third class above indicated as the law is announced in *Sewall v. Whiton,* 85 Neb. 478. The order construing the will determined the whole controversy. It follows that the order complained of is final, within the meaning of the statute, and the motion to dismiss the appeal is overruled."

The decree settling the question of title in the case at bar "determined the whole controversy," and the appeal should have been taken within the proper time from the rendition of that decree. To hold otherwise would result, in many cases, in unjustifiable delay. In this case the final determination was postponed by the interval of time elapsing between February 8, 1916, and December 12, 1917, a period of nearly two years. It is to the interest of the public as well as of the parties immediately concerned that such controversies be ended as speedily as the law will allow. We adhere to the rule laid down in the *Peterson* case.

A motion for a new trial was filed on February 10, 1916, and, so far as the record shows, was never ruled upon. No attempt seems to have been made to call this motion up and have it passed upon, and no objection was made on the part of the defendants to the order appointing the referee, or to the sale or confirmation on the ground that this motion was still pending. Under these circumstances, we think defendants waived any objection to the proceedings based upon the failure to rule upon this motion. The appeal, not having been taken in time, is dismissed.

APPEAL DISMISSED.

SEDGWICK, J., not sitting.

ROBERT D. O'BRIEN, APPELLEE, V. OMAR A. COON, APPELLANT.

FILED NOVEMBER 1, 1919. No. 20955.

1. **Trial:** INSTRUCTIONS. The court properly refused an instruction which stated that the matters recited therein, which related to only a part of plaintiff's cause of action, would, if believed by the jury, be a complete defense.
2. **Appeal:** DAMAGES: EVIDENCE. A statement of the witness' estimate in giving the amount of his damages is not alone sufficient to support a verdict; but allowing such statement after evidence of the witness of various items of damages is not necessarily prejudicially erroneous, when the record shows conclusively that the verdict must have been based upon the items of damages so proved, and not of the incompetent estimate of the witness.
3. **Payment:** EVIDENCE. If money has been placed in the hands of a third person with which to satisfy plaintiff's claim, the fact that plaintiff relied upon such deposit will not amount to a satisfaction, unless it appears that the plaintiff agreed to accept such arrangement and released defendant.
4. **Evidence:** OFFER OF WRITING. Merely offering a writing in evidence, not signed by the party to be charged, is not proof of its contents.
5. **Payment:** EVIDENCE. If plaintiff had received the money deposited, it would have satisfied his claim. Evidence that he had not received the money was therefore competent.
6. **Appeal:** PAYMENT: EVIDENCE. It was not prejudicial error to allow evidence tending to show that there was in fact no money deposited for plaintiff's claim, since no money was paid him, and there was no competent evidence that he had agreed to accept the depositing of the money as satisfaction of his claim.
7. **Depositions:** INCOMPETENCY: WAIVER. If no objection is made to a deposition, and both parties read therefrom as evidence, neither party can thereafter object that the deposition was incompetent.
8. **Fraud:** EVIDENCE: SUFFICIENCY. The evidence referred to in the opinion is found to support the verdict.

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

Charles A. Robbins and *C. E. Tefft,* for appellant.

D. O. Dwyer and *A. L. Tidd, contra.*

SEDGWICK, J.

This defendant, as agent for the Tri-State Investment Company, contracted to sell to the plaintiff a section of land in Minnesota for $32,655. The plaintiff paid on the contract $2,000 at one time, and at another $1,000, and could not get title to the land under the contract. He brought this action against the defendant for damages, alleging that the defendant procured him to enter into the contract by false and fraudulent statements and representations. He asked to recover the $3,000 he had paid on the contract, with interest, and alleged that, relying upon the contract, he incurred other damages, for which he sought also to recover. The defendant answered alleging a general denial of fraud on the part of the defendant; and that the plaintiff had a valid contract with the investment company described in the petition, and "had a just claim and cause of action against" a certain other agent of the company and against the company itself; and that there had been a "full compromise and settlement" of his cause of action through certain transactions with the investment company and others. There was a verdict and judgment in favor of the plaintiff for $5,198.57, and the defendant has appealed.

The land was owned by a woman in the East, and the investment company had no salable title in the land. The evidence was conflicting as to the statements and representations made by the defendant in procuring the contract. The plaintiff and his wife and daughter testified positively to the alleged representations of the defendant. This evidence was denied by the defendant, and possibly some discredit was thrown upon the testimony of plaintiff by another agent of the company and perhaps some other witnesses. But as the plaintiff dealt with the defendant and relied upon him so far that he advanced this money before receiving any title or any satisfactory evidence of title, and in view of other circumstances in the case, it cannot be said that

this finding was without sufficient support in the testimony.

The defendant complains of the refusal of the court to give the jury an offered instruction in which it was said that the defendant would not be liable to the plaintiff if they found "that plaintiff was informed while on the land in controversy that it was owned by a lady in the East." The $2,000 had been paid by the plaintiff relying upon these representations before he was "on the land," and therefore the instruction would have been erroneous, if given.

The defendant requested instructions to the effect that he would not be liable for expressions of opinion or belief as to what the company would do in completing the contract; but this point, so far as it is applicable in this case, appears to have been covered by the instructions given by the court.

As an element of damage, the plaintiff alleged and testified that, relying upon the purchase of the land in question, he disposed of his farming interests in Nebraska, and was prevented from farming the coming season, and was damaged in at least the sum of $2,000. The defendant requested the court to instruct the jury that the evidence was not sufficient to entitle the plaintiff to recover damages. The plaintiff was asked the question: "You may state, Mr. O'Brien, from your knowledge of what you had been doing upon the farm the years before and at this time, what your damages were for the season of 1912, from being without a farm to cultivate." This was objected to as incompetent, irrelevant, and immaterial; no proper foundation laid. The objection was overruled, and he answered: "Why, to the best of my knowledge I was damaged about $2,000." It is objected that "what one 'estimates' or 'calculates' or 'thinks' is not proper evidence of damages." It may be conceded that this answer of the witness alone would not be a sufficient basis for estimating damages. The defendant's cross-examination of

the witness was not extensive. It appears to have been carefully calculated to avoid showing actionable elements of damage; but it does appear from the cross-examination that the plaintiff, relying upon this contract of purchase, went to Minnesota, taking ten horses with him and other property; that the defendant paid at least a part of the plaintiff's expenses while there. When this question was first asked, the court sustained the objection. The plaintiff then testified that he had been farming all his life; that he had four boys at home to help him; that he knew from experience what it was worth to have a farm to cultivate during the season; that he had farmed 240 acres during the past season, and since 1912. It appears that the jury did not rely upon the plaintiff's estimate that these damages amounted to $2,000. The record shows that they did not allow more than $700 or $800 for these damages. The jury must have estimated that the expense of removing to Minnesota and remaining there for some time, and the loss of time of the plaintiff and his help, could not have been less than $700, and we cannot say from what we have seen in this record that the evidence under the circumstances will not support such a conclusion.

After the plaintiff had paid the $2,000 he obtained an abstract of title to the land, which showed that the investment company had no title, and as he made the further payment of $1,000 afterwards, it is insisted that he could not have relied upon the representation that the company owned the land. The plaintiff testified that he called the defendant's attention to the fact that the abstract showed that the company had no title, and that the defendant assured him that the company had a deed from the owner of the land which would complete the title. This the defendant denies, and the fact that upon a former trial of this case the plaintiff upon cross-examination stated certain representations that the defendant made to him after he had seen the abstract, and did not testify that the defendant

stated then that the company had a deed for the land, and the fact that the case upon a former hearing in this court had been reversed for a failure of evidence upon that point, it is contended so far discredits this testimony of the plaintiff that it should not have been believed by the jury. The defendant concedes that the abstract failed to show a title in the company, and that his attention was called to it, and that nevertheless he succeeded in obtaining another thousand dollars payment upon the contract. The cross-examination upon the former trial was not apparently intended to assist the plaintiff in bringing out the truth as to the matter, but rather was aimed at confusing the witness. There was in that cross-examination no direct statement of the witness that the defendant did not make such a representation. The cross-examination avoided challenging the witness' attention to that particular fact. The plaintiff relied upon getting the land and paid this $1,000 upon that reliance. It was plainly the defendant's conduct and general representations that caused this reliance of the plaintiff, and we cannot say from all this evidence that the jury was clearly wrong in believing the plaintiff's evidence that this statement was made by the defendant.

There was evidence that an agent of this company had left with one Matters money and property with which to satisfy the plaintiff's claim against the company, and that Matters had agreed to pay the money and property to the plaintiff. The defendant made a claim against the investment company, and in an action against the company attempted to garnish this money and property in the hands of Matters. It appears that Matters answered that he held it for this plaintiff. It is now claimed that if Matters held the money and property in trust for the payment of the plaintiff's claim, and the plaintiff had relied upon the arrangement, the money and property belonged to the plaintiff, which would discharge his claim except as

against Matters; but this would not necessarily be true. The plaintiff might rely upon the arrangement placing money in the hands of Matters for his claim, and, unless he agreed with the defendant or the company to release them and hold Matters, the fact that he expected that Matters would pay his claim would not discharge his claim against the defendant and the company. Matters might defend against the garnishment by showing that he ought to pay the money to this plaintiff, that it was deposited with him for that purpose, and yet that of itself would not satisfy the plaintiff's claim. The transaction might amount to an equitable assignment of the money as security for plaintiff's claim, and it appears to have been so regarded. It is contended that the plaintiff expressed satisfaction with the arrangement depositing the money with Matters, and requested the defendant to release his garnishment proceedings; but this would merely amount to saying that he expected Matters to pay his claim, and that he believed that the release of the garnishment would hasten the payment of his claim.

It is further contended that the plaintiff agreed with the defendant that, if he would release his proceeding against Matters, he (the plaintiff) would look to Matters only for the payment of his claim, and that the defendant did release his claim upon that understanding. This would amount to the satisfaction of the plaintiff's claim so far as the defendant was concerned. A typewritten letter addressed to the investment company with the plaintiff's name attached in typewriting, but without the plaintiff's signature, was offered in evidence by the defendant. The letter, after speaking of the defendant and others dismissing their attachment against the money supposed to be in the hands of Matters, contains the statement: "If they dismiss their suits, I will never bother you any more about it. I will make my own settlement with Mr. Matters." The defendant in the brief says that

the plaintiff "expressly agreed that, if Coon would release Matters, he would look to Matters only, 'and never bother you any more about it,'" and refers to this typewritten letter. The letter as contained in the record shows that it was on Matters' letter paper, and of course, as it turns out that Matters never paid this money to anybody, he was interested in having the garnishment proceeding dismissed. Under such circumstances the defendant is hardly justified in making these statements in a brief, without showing that the letter was authorized by the plaintiff, and even without showing that it was ever received in evidence. There is no reference in the brief to any part of the record that shows that this letter was received in evidence by the court, or that it ought to have been received.

The defendant complains that plaintiff was permitted to testify that he had not received from Matters the money and property which Matters had promised to pay him. Of course, on the theory that he had not released the defendant from liability to him, it was incumbent upon the plaintiff to show that he had not received the money from Matters, or any other source, and this evidence would be competent. The contention that the defendant was prejudiced by admitting Matters' testimony that he had been defrauded by Towne, and therefore that he did not owe the money, and other similar testimony, is not well taken, because it is wholly immaterial whether Matters had the money or not, since Matters did not pay the money, and there was no evidence that the plaintiff had agreed to accept Matters in lieu of the defendant and the investment company as his debtor.

The defendant attempted to impeach Matters by showing that he had been convicted of a felony after his deposition had been taken which contained his testimony. In the plaintiff's brief it is stated that the defendant made no objection to this deposition when it was offered, and that the defendant himself offered

and read parts of the deposition to the jury. We have not found anything in the record, nor any suggestions in the defendant's brief, refuting these statements.

On the former appeal to this court the judgment was reversed because of insufficiency of evidence in regard to the second payment of the thousand dollars. Upon the second trial this evidence was supplied, and we do not find that the alleged errors pointed out and discussed in the briefs are of such a character as to require a reversal.

The judgment of the district court is

AFFIRMED.

ALDRICH, J., concurs in the conclusion.

CORNISH, J., dissents.

ROSE, J., not sitting.

JOHN M. BENNETT, APPELLEE, V. ASEPH W. WINEGAR, APPELLANT.

FILED NOVEMBER 1, 1919. No. 20480.

1. **Mortgages:** APPLICATION FOR DEFICIENCY JUDGMENT. An application for a deficiency judgment that is treated as a continuation of the original mortgage foreclosure action does not come within the meaning of section 8257, Rev. St. 1913, which provides that such proceeding must first be authorized by the court.
2. **Names.** Under the rule of *idem sonans*, the name "Asa W. Winegar," when used in a notice of service by publication in a foreclosure action, is sufficient to confer jurisdiction upon the court to determine the rights of one whose real name is "Aseph W. Winegar."

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

E. J. Clements and *A. L. Chase,* for appellant.

Fawcett, Mockett & Walford and *W. T. Thompson, contra.*

DEAN, J.

This is an application to recover a deficiency judgment in a foreclosure case on a second mortgage, owned by plaintiff; the first mortgage and costs only having been paid from the proceeds of the sale under execution of the mortgaged real estate. In this proceeding plaintiff recovered "$1,821.74 as a deficiency judgment." Defendant Winegar appealed.

These are the facts in brief: In July, 1913, Edward P. Bennett was the owner of the real estate in suit, on which the Security Investment Company, hereinafter called the company, held a first mortgage of $3,000, and John M. Bennett held a second mortgage of $1,500. In the same month A. W. Winegar bought the real estate from Edward P. Bennett, and as a part of the purchase price Winegar assumed and agreed to pay both mortgages, but failed to do so. Soon thereafter Winegar left the state and became a resident of Colorado. In May, 1914, John M. Bennett began a suit to foreclose his second mortgage, but did not make the company a party. Service in that case was had on Winegar by publication. In September following the company began a separate action to foreclose its first mortgage. Later the actions were consolidated, tried together, and, the priority of liens being established, the mortgaged property was sold by the sheriff under execution, and, as noted, the first mortgage lien and costs only were satisfied. Subsequently John M. Bennett, having recovered no part of his mortgage debt, began an independent action against Winegar to recover a deficiency judgment; personal service being obtained on him in Lancaster county. Winegar moved to have the suit transferred from the equity to the law docket. His motion was overruled, the court properly treating the proceeding as a continuation of the original foreclosure case.

Defendant Winegar contends that in view of section 8257, Rev. St. 1913, Bennett could not maintain an in-

dependent action for the recovery of a deficiency judgment without leave of court; but the court having treated the proceeding as a continuation of the original foreclosure case, we think his objection is without merit.

Defendant also argues that the notice of the foreclosure suit by John M. Bennett was defective, in that the published notice named "Asa W. Winegar" as a defendant. He maintains that his name is not "Asa," but "Aseph," and that the court did not therefore acquire jurisdiction to foreclose him of his rights. Considerable testimony was taken on this point, but it seems to be clearly established that in his boyhood days and young manhood Winegar was known as "Asa." It was disclosed that his name appeared in the city directory for 1915 as "Asa." In his answer, in the present proceeding, in which he appeared generally, and in a motion filed by him, his name appears in the caption as "Asa." The answer refers to him repeatedly by that name. While the court found specifically that his real name was "Aseph," we do not count this a matter of importance, because the difference in the pronunciation of "Asa" and "Aseph" is so slight that one can scarcely tell from the pronunciation which name the speaker is using. We see no reason why the rule of *idem sonans* should not apply to a case involving service by publication. *Kuhn v. Kilmer,* 16 Neb. 699; *Clifford v. Thun,* 74 Neb. 831, citing *Lane v. Innes,* 43 Minn. 137; 19 R. C. L. pp. 1334, 1335, secs. 12. 13. In *Puckett v. Hetzer,* 82 Kan. 726, it is said: "Perfect identity of sound is not required." Under the circumstances of the present case, we do not think the variation is sufficient to void the service.

Finding no reversible error, the judgment is

AFFIRMED.

STATE, EX REL. EARL J. HADSELL, APPELLANT, V. FREDERICK A. PUTNAM ET AL., APPELLEES.

FILED NOVEMBER 1, 1919. No. 21033.

Mandamus: SCHOOLS: JUDGMENT FOR DAMAGES. Current wages earned by a school-teacher should be paid by warrant on the teachers' fund. But a judgment for damages for breach of contract preventing the plaintiff from earning wages in the former year must be collected by special levy. Mandamus will not lie to compel the issuance of a warrant upon the current funds of a school district to pay such judgment.

APPEAL from the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Burkett, Wilson & Brown, for appellant.

F. A. Putnam, C. M. Ball, Jr., and *J. N. Fuller, contra.*

ALDRICH, J.

Plaintiff was employed by the defendant school district as superintendent of its schools. The district having refused to pay him, he began an action against the district and recovered a judgment, and he is now a regular judgment creditor of the district. This action in mandamus was commenced by him to compel the board of education of defendant district to issue a warrant on the general fund of the district in satisfaction of his judgment. Defendant demurred to his petition and it was sustained, and plaintiff appealed.

The law of this state is that a teachers' fund constitutes what is known as a "continuing fund," and teachers' wages become a charge upon this fund, whether there is any money in the treasury or not. *State v. Gardner,* 79 Neb. 101. But section 6464, Rev. St. 1913, provides:

"Whenever any judgment shall be obtained in any court of competent jurisdiction in this state for the payment of a sum of money against any county, town-

ship, school district, road district, town or city board of education, or against any municipal corporation, or when any such judgment has been recovered and now remains unpaid, it shall be the duty of the county board, school district board of education, city council or other corporate officers, as the case may require, to make provisions for the prompt payment of the same."

Section 6465 provides: "If the amount of revenue derived from taxes levied and collected for ordinary purposes shall be insufficient to meet and pay the current expenses for the year in which the levy is made, and also to pay the judgment remaining unpaid, it shall be the duty of the proper officers of the corporation, against which any such judgments shall have been obtained and remain unsatisfied, to at once proceed and levy and collect a sufficient amount of money to pay off and discharge such judgments."

The tax is to be levied and collected "in the same manner and at the same time provided by law for the collection of other taxes." Section 6466. The statute distinguishes between "current expenses" and "the special tax herein provided for, for the payment of judgments."

Section 6468 provides for mandamus to compel the officers "to so levy and collect the tax necessary to pay off such judgment * * * after request made by the owner or any person having an interest therein, * * * he or they having such interest may apply to the district court of the county in which the judgment is obtained, or to the judge thereof in vacation, for a writ of mandamus to compel the proper officers to proceed to collect the necessary amount of money to pay off such indebtedness, as provided in this article, * * * and the proceedings to be had in the premises shall conform to the rules and practice of the court, and the laws in such cases made and provided."

These statutory provisions make it plain as to how judgments against a school district may be collected; especially is this true when such judgment is for damages for refusing to allow the plaintiff to earn wages as a school-teacher, as in this case.

Current wages earned by a school-teacher should be paid by warrant on the teachers' fund, as was held in *State v. Gardner*, 79 Neb. 101. But a judgment for damages for breach of contract preventing the plaintiff from earning wages in a former year, must be collected by special levy, as is clearly provided in the statutes above quoted. The district court was right in refusing to compel the payment of this judgment by warrant on the current teachers' fund.

AFFIRMED.

FRED C. RURUP, APPELLEE, V. JOHN N. KILZER, APPELLANT.

FILED NOVEMBER 15, 1919. No. 20181.

Highways: DESTRUCTION OF HEDGE: INJUNCTION: EVIDENCE. Suit to enjoin a road overseer from cutting down and removing a hedge, claimed by the overseer to be an encroachment upon the public highway. Evidence examined, and *held* to support the decree of the trial court.

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

Thomas, Vail & Stoner, for appellant.

R. R. Schick and *McKillip & Barth, contra.*

MORRISSEY, C. J.

Defendant appeals from a decree of the district court for Seward county, enjoining him as road overseer from cutting down and removing a hedge on or near the north boundary line of a quarter section of land owned by plaintiff. The controlling question is

whether this hedge is an encroachment upon the public highway.

Many questions of law, based upon the record of the proceedings had in the opening of the road, are presented in the briefs; but, having reached the conclusion that the decree of the district court must be affirmed regardless of these questions, it is unnecessary to discuss or determine the questions of law presented. Plaintiff alleges that the hedge is along the line separating his land from the public highway, and that defendant threatens to cut it down and remove it. Defendant denies that the hedge is on the line, alleges that it is an encroachment on the public highway, and claims the right to remove it.

Proceedings to open the road were had in 1872, and from that time down to the present the public has continuously occupied and used a strip of ground along the north side of plaintiff's land as a highway. There is some dispute as to the time when the hedge was planted. The trial court found that it was planted in 1884 or 1885, while plaintiff appears to claim that there was a hedge planted at an earlier date. However that may be, the evidence supports the finding as to the planting of the hedge in question, and it fails to show that the public ever actually used the land on which the hedge stands. In this state of the record, the burden was on defendant to show that the hedge encroached upon the highway.

A survey was made at the instance of the road district by a young man who had taken some work in civil engineering at the University of Nebraska, but who had not completed the requirements for a degree. Prior to doing this work, he had had little, if any, experience as a practical engineer or surveyor. It would serve no useful purpose to set out his testimony at length. It has been reviewed by the court, and wholly fails to show the definite location of the true section line. It shows that he was unable to find the original

government monument at the northeast corner of plaintiff's land, but by means of the original field notes, and by a monument found approximately a mile to the south and another found approximately a mile to the north, he undertook to relocate the corners at plaintiff's land. If this location could be accepted as correct, perhaps we might say that plaintiff's hedge is an encroachment upon the highway; but in the course of his testimony the surveyor says that he is quite certain that the road was not originally laid along the line where by his survey he undertook to locate it, and that it is quite possible "that the original stone was north of the stone we located."

It is said in the brief of defendant that this indefinite statement does not show whether the variance is "a matter of inches or yards," and it is argued that, where the original monument cannot be found, it is rare that a surveyor can definitely and accurately locate the spot where it was placed by the original surveyor. This is undoubtedly true; but it is also true that the original location must be determined with a reasonable degree of certainty, especially in cases like this where a hedge has been planted and permitted to remain for more than thirty years, all parties appearing to regard it as standing upon the line of the highway.

The evidence fully supports the decree entered, and the judgment is

AFFIRMED.

ROSE, J., not sitting.

EMMA C. BARRETT, APPELLANT, V. SELDEN-BRECK CONSTRUCTION COMPANY, APPELLEE.

FILED NOVEMBER 15, 1919. No. 21061.

1. **Master and Servant:** INDEPENDENT CONTRACTOR. The right to supervise, control, and direct the work is one of the tests for determining whether a person is an independent contractor or an employee, but it is not the sole and only test.

2. ———: ———: WORKMEN'S COMPENSATION ACT. One who takes contracts for cleaning and pointing the walls of brick buildings, agreeing to furnish his own tools, scaffolding, and material, to employ his own help, keep his own time, to furnish workmen's compensation insurance for the workers whom he employs, who is under no obligation to do the work in person, who is paid on weekly estimate 50 per cent. of the value of the work done, the balance being reserved until the completion or acceptance of the work, is an independent contractor, and not an employee, under the workmen's compensation act.

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

John M. Berger and *J. C. Kinsler*, for appellant.

Smith, Schall & Howell, contra.

LETTON, J.

This is an appeal from a judgment of the district court dismissing an award made by the compensation commissioner to plaintiff on account of the death of her husband. The district court found: "That at the time of receiving the injuries resulting in his death, the said Albert J. Barrett was a subcontractor under the Selden-Breck Construction Company, appellant herein, and was an independent contractor with the said Selden-Breck Construction Company * * * in the construction of the building upon which the said Albert J. Barrett was working at the time the injuries were received by him which resulted in his death."

Selden-Breck Construction Company was engaged in constructing a large brick building in Omaha, known as the Conant Hotel, or Wolf-Hiller building.

At the time the accident occurred, Barrett was washing down the building and pointing up the joints. He was assisted by a workman whom he employed. The men were standing upon a scaffold which was attached to the building by ropes and pulleys. The scaffold was about 16 feet long, and the manner of doing the work was to start upon the top of the building and wash down a section the width of the scaffold, or about 16

and fell to the street. The vice-president and general manager of the company testified that, prior to the construction of this building, Mr. Barrett had the contract for the washing down and pointing of the outside brick walls of the building when it was practically completed, and produced the following letter:

"March 29th, 1918.

"Re Wolf-Hiller Building.

"Mr. A. J. Barrett, 649 Franklin Avenue, Council Bluffs, Iowa.

"Dear Sir: We hereby accept your verbal proposition to clean down all the brickwork and clean and point all the stone and terra cotta work in the Conant Hotel building, 16th & Harney streets, Omaha, Nebraska, for the sum of four hundred and no/100 ($400) dollars. Work to be started at once and to be carried forward as rapidly as conditions will permit. Payment to be made each week covering 50 per cent. of the value of the work completed that week.

"You hereby agree during the continuance of the work done by you under this contract, also extra work in connection therewith, to maintain liability and workmen's compensation insurance in a sufficient amount to protect you and us from any liability or damage on account of injuries suffered by any of your employees, including any liability or damage which may arise by virtue of any statute now in force or which may hereafter be enacted.

"This letter with your signature attached below shall constitute a contract between us, it being understood that you will not sublet or assign any portion of the work without our written consent.

"Yours very truly,

"SELDEN-BRECK CONSTRUCTION CO.,

"By C. R. VAUGHN.

"Accepted by A. J. BARRETT."

Barrett furnished the scaffolding, ropes, pulleys, tools, and material, such as mortar, acid and water for the

work. When help was necessary, he employed and paid for it himself. The words "extra work" used in the contract meant cleaning and pointing a larger portion of the walls of the building than described in the specifications, and if it was necessary to remove or replace a part of the cornice, or broken brick or stonework, this was also "extra work."

The superintendent of the brickwork upon the building testified that it was his duty to oversee the work, including cleaning and pointing of the walls. The witness testified that, if he saw that Barrett was doing a "streaky job," he would call his attention to it, that he had no authority to make him do it over, it would be left to the architect, but it would have to be satisfactory before the work would be accepted. He also testified that if Barrett had replaced brick, or done other extra work of that nature, the superintendent would inspect it, and either accept it or report to the office.

Plaintiff insists that the test for determining whether one person is the employee of another, or is an independent contractor, is whether the employer possessed the power to control the workmen in the transaction out of which the injury arose, and that the evidence in this case shows that the construction company had full power at all times to inspect, supervise, and control the workmen, and the manner of its performance.

He argues that because the contract provided for "extra work," and it was shown that the extra work might consist of removing defective brick, or stone, or terra cotta, and replacing the same to the satisfaction of the principal contractor, or the architect, and since with regard to such work, if it should be required, Barret would be under the direction of the superintendent of the building, the contractor, or the architect, he was a workman doing piecework. It was shown that there was no "extra work" of this nature on this building. Moreover, the proof was that, if such extra work had

been performed, it would have been paid for on what is termed a cost plus basis; that is, the cost of the material and labor with a percentage added for the contractor's profit. This is not an unusual method of contracting even for large undertakings. It is a matter of public knowledge that the government in recent years adopted this method of paying contractors in many instances, and the criticism was freely made that such contracts were much to the benefit of the contractors. The work which Barrett agreed to do was provided for in the specifications for the building. The principal contractor, or the architect, was to decide whether the work conformed to the specifications, and had the right to criticise defective work and suggest that it be remedied. Plaintiff showed that the superintendent of the building often looked at the work which was being done to see that the work was all right; but it was also shown that, if the work was not according to the specifications, the superintendent would call it to the attention of the contractor, who would take the matter up with Barrett and see that the work was performed according to the contract. It was also shown that the contractor did not keep the time of a man employed by Barrett on the job; that Barrett began and quit work at such times as suited his own convenience; that Barrett was paid upon estimates at the end of each week only 50 per cent. of the estimated price for the work performed until the job was finished and accepted, and it was his duty to insure his employees under the compensation act.

The right to supervise, control, and direct the work is one of the tests for determining the nature of the relation which exists, but it is not, as plaintiff seems to contend, the sole test. The owner or principal contractor has the right to see that the contract is being carried out in conformity with the specifications, and seasonably to call defects to the attention of the subcontractor. 14 R. C. L. 68, sec. 4.

It is quite often difficult to distinguish between the relation of employee and independent contractor. There is no one criterion known to the law, but several elements may enter into the determination. A test is whether the contract requires the work to be done by the particular person contracting, or whether his personal services are not required, and any person whom he may employ may, under the agreement, do the job. In *Rheinwald v. Builders Brick & Supply Co.*, 168 App. Div. (N. Y.) 425, a sign painter who agreed to paint signs for a specific sum, furnishing his own material and doing the work himself, and guaranteeing the work for four years, was held by the compensation commission to be an independent contractor; but on appeal he was held, by a divided court, to be an employee. The case is interesting as pointing out distinctions. In the opinion of the court it is shown that it was contemplated by both Rheinwald and his employer that he would do all the work personally, and he had no assistants, on whose labor he made a profit. He personally performed every detail of work for which he was paid, and the record indicates that both understood that full rights of control and direction were reserved to and ordinarily exercised by the employer. "Rheinwald really was a worker; the sum he received for his painting was in an economic sense wages, and not profits; he had no helpers, on whose work he made a profit; he was not an employer, with employees whom it was his duty to insure under the act; he personally performed all the work; it was contemplated by the employer that he would; and the employer had at least potential control, direction, and supervision of all the work Rheinwald did at his trade for the respondent."

That case seems to be the converse of this. The contract is silent as to requirement that the work shall be performed by Barrett personally. The evidence shows that he did not do such work for Selden-Breck Company alone, but that he had cleaned and pointed

buildings for other contractors. The fact that after Barrett's death his workman was paid his earned wages by the contractor is not of much moment, since it is shown it was done because, otherwise, the man had a right to file a lien on the building, and he had requested the payment before it was made. Under the facts Barret was not a workman doing piecework, as plaintiff contends.

We have examined many decisions of courts and compensation commissions, and are satisfied that no one fact can be relied upon as a test or criterion, but the nature of the relation must be determined from all the evidence. The finding and judgment of the district court are supported by the evidence.

AFFIRMED.

SEDGWICK and ALDRICH, JJ., not sitting.

ELIAS F. DANCER, APPELLEE, V. EDWARD P. MEYERS, APPELLANT.

CHARLES J. COLLINS, APPELLANT, V. RUFUS HANEY ET AL., APPELLEES.

MEYERS LAND & CATTLE COMPANY, APPELLEE, V. ROY F. DANCER, APPELLANT.

MEYERS LAND & CATTLE COMPANY, APPELLANT, V. ERNEST E. HAUPT, APPELLEE.

FILED NOVEMBER 15, 1919. No. 20382.

Boundaries: ORIGINAL CORNERS: EVIDENCE. A government resurvey authorized by act of congress for the purpose of relocating and restoring lost or obliterated corners is evidence that the original corners are at the places relocated, but such evidence may be overturned by more convincing evidence that the original corners were in fact elsewhere.

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

Mitchell & Gantz, for *Edward P. Meyers et al.*

Daniel F. Osgood, for *Elias F. Dancer et al.*

ROSE, J.

Four cases were consolidated below for the purpose of trial, and there is an appeal in each case. In the first case Elias F. Dancer is plaintiff and Edward P. Meyers is defendant. They own adjoining lands in sections 14 and 23, township 20, range 38, in Arthur county, and are disputing about the boundary between their possessions. Each claims the same strip of land and seeks by his pleadings and proofs to have the title thereto quieted in himself and to have his rights, when thus established, protected by an injunction against the other. The trial court found generally in favor of plaintiff and entered a decree against defendant, who has appealed.

In the second case Charles J. Collins is plaintiff and Rufus Haney is defendant. They own adjoining lands in sections 7 and 8, township 20, range 37, in Arthur county, and are disputing about the boundary between their possessions. Each claims the same strip of land and seeks by his pleadings and proofs to have his title thereto quieted in himself and to have his rights, when thus established, protected by an injunction against the other. The trial court found generally in favor of defendant and entered a decree against plaintiff, who has appealed.

In the third case the Meyers Land & Cattle Company is plaintiff and Roy F. Dancer is defendant. They own adjoining lands in Arthur county. The action is ejectment for lands in sections 13 and 24, township 20, range 38, and in section 19, township 20, range 37. The answer was a general denial. The parties waived a trial by jury. The findings and judgment were in favor of plaintiff, and defendant has appealed.

In the fourth case the Meyers Land & Cattle Company is plaintiff and Ernest E. Haupt is defendant. They own adjoining lands in Arthur county. The action is ejectment for lands in section 34, township 20, range 37. The answer was a general denial. The

parties waived a trial by jury. The findings and judgment were in favor of defendant, and plaintiff has appealed.

The principal issues of fact presented and tried involved the location of government corners according to the original survey of the townships in 1876. These corners are necessary to the defining of the sections and the quarter sections owned by the parties. The corners in controversy were subjects of disagreement among the early settlers, and the controversy extends to present landowners. Under an act of congress approved March 3, 1909 (35 U. S. St. at Large, p. 845, ch. 271) and amended June 25, 1910 (36 U. S. St. at Large, resolution 40, p. 884), a resurvey or retracement of the original survey was made by government surveyors in 1912 and 1913 for the purpose of relocating and restoring lost or obliterated corners. One set of litigants contends that the government surveyors who retraced the original government survey of township 20, range 37, and township 20, range 38, Arthur county, found and restored the original government corner at the southwest corner of section 16, township 20, range 37, and at the southwest corner of section 36, township 20, range 38. This is controverted by another set of litigants. The evidence relating to the location of these original corners is conflicting and too voluminous for detailed narration in an opinion. The trial court found that the original government corner at the southwest corner of section 36, township 20, range 38, Arthur county, was in fact at the place designated by the resurvey or retracement. This finding is challenged as contrary to the evidence. Upon a consideration of all of the proofs, however, the finding seems to be correct. It is supported by the result of the resurvey itself which, having been made by competent officers under authority conferred by an act of congress, is evidence of the proper relocation. There is also competent oral testimony of government surveyors who assisted in restoring the corner, tending to show that they had

found at that place physical evidence of the original location, corresponding to the topographical features described in the original government field notes. In addition, there is testimony tending to show that the corner as restored had been observed before the surface indications of the original pits and mound had been obliterated. The findings as to this corner are adopted on appeal as being supported by a preponderance of the evidence.

The trial court, however, took a different view of the testimony relating to the place designated in the retracement as the southwest corner of section 16, township 20, range 37, and held that the original government corner was about 80 rods farther east. This finding is also challenged. While the resurvey is evidence tending to prove that the corner as relocated is an original government corner, the contrary may be shown by conflicting evidence of a more convincing nature. Many witnesses, including early settlers and local surveyors, testified in substance that they had seen the original government corner while it could be indentified by the original pits and mound made by the original government surveyors, and that it was not at the place indicated by the resurvey. The original location described by these witnesses was found by the trial court to be the original government corner. The evidence shows further that it had been selected by many of the early settlers as a starting place in surveying their homesteads, and that it has been generally recognized since as a government corner. The competent evidence of this character seems to overturn the evidence of a different import. The findings of the trial court in each of the four cases consolidated are found to be the proper deductions from the evidence and are adopted as correct. The government corners in dispute are definitely described in the decrees and accompanying plats in the district court, and as thus established there is an affirmance in each case.

AFFIRMED.

The following opinion on motion for rehearing was filed January 31, 1920. *Rehearing denied.*

PER CURIAM.

Motions for rehearing overruled and affirmance of the judgment in each case adhered to, but permission is granted to any party to a judgment to apply to the district court to correct in such judgment clerical errors in descriptions of land, if any such error there be.

REHEARING DENIED.

ELIZABETH HAMMOND, APPELLEE, V. WILLIAM V. HAMMOND, APPELLANT.

FILED NOVEMBER 15, 1919. No. 21170.

1. **Divorce:** DECREE: MODIFICATION: CUSTODY OF CHILD. In a decree of divorce, a provision for the temporary custody of a child until the further order of the court may be modified on motion.
2. **Appeal:** FAILURE TO PLEAD FACTS. In a suit in equity, a decree, responding to issues fairly raised, fully tried and properly decided under allegations of a petition filed by defendant, will not be reversed on appeal merely because plaintiff in the first instance failed to plead facts, the denial of which would raise such issues.
3. **Divorce:** CUSTODY OF CHILD. In determining the custody of an infant child, the best interest of the child is the controlling consideration.

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

M. O. Cunningham, for appellant.

Sutton, McKenzie, Cox & Harris, contra.

ROSE, J.

This is a controversy over the custody of a child named William W. Hammond, who was born in Omaha, June

26, 1918. Plaintiff is the mother and defendant the father of the child. The action is one for divorce on the ground of extreme cruelty. A decree in favor of plaintiff was rendered January 14, 1919, and the custody of the child was committed to defendant's mother, Katherine Hammond, until the further order of the court. On motion filed by plaintiff May 20, 1919, the trial court modified the original decree July 12, 1919, and committed the care and custody of the child to plaintiff, the modification being in the following form:

"This cause came on to be heard on motion of plaintiff to modify the decree as to the possession of William W. Hammond; and the court, having heard the evidence, and being fully advised, finds the plaintiff is entitled to the custody and possession of said child, subject only to the right of the defendant to visit said child at all reasonable times and places; and said defendant be and he is hereby ordered to deliver the custody and possession of said child to the plaintiff."

Defendant petitioned the trial court July 14, 1919, to set aside this order, alleging that it was entered without petition or notice, and that plaintiff was not a proper person to have the care and custody of the child. Upon a trial of the issues raised by the petition and a denial of the allegations thereof, the modification was allowed to stand and the petition of defendant was dismissed. From that judgment he has appealed.

Defendant argues that the trial court, on a mere motion by plaintiff, without notice, did not have jurisdiction to modify the decree by changing the custody of the child. In the action for divorce the record shows:

"The court finds ever since said marriage the said plaintiff has conducted herself toward the defendant as a faithful, chaste and obedient wife.

"The court further finds the defendant, without any excuse or provocation therefor, has been guilty of extreme cruelty toward plaintiff.

"The court further finds the plaintiff has not fully recovered from her sickness growing out of the birth of said child, and for the present, and until the further order of the court, the said Katherine Hammond is to continue to have the care and custody of said child."

For the purpose of a "further order" on the question of custody, the case was pending when the district court modified the decree. The record shows on its face that the child had been left with his grandmother temporarily, while plaintiff was ill, and that the provision in respect to custody was subject to modification at any time. The grandmother kept the child on those conditions. Defendant had appeared in the case, and knew that jurisdiction to modify the decree as to custody had been conferred upon and retained by the district court. Rev. St. 1913, sec. 1606; *Everson v. Everson,* 101 Neb. 705. Defendant had notice of the motion through his attorney of record. In a suit in equity like this, pending for the purpose of determining what is for the best interests of the child and of protecting the rights of the mother, if she should recover her health, the notice was sufficient.

The sufficiency of the motion itself to sustain the modification is also challenged, and in this connection it is insisted that the statutory procedure requires a petition, as distinguished from a motion. The relief sought by plaintiff was specifically pointed out in her motion, which reads thus:

"Comes now the plaintiff in the above-entitled cause and moves the court to modify the decree signed and journalized on January 14, 1919, by setting aside paragraph 5 of said decree, and substituting therefor, 'That the plaintiff shall have the care and custody of said child.' "

The custody of the child, in the event of his mother's recovery, was an undetermined issue raised by the original pleadings in a case still pending. For the purpose of determing that issue, those pleadings were suffi-

cient; but, if a contrary view were conceded as a requirement of technical rules of pleading, defendant would not be entitled to a reversal on the ground that the modification was sought by motion, instead of petition. Defendant himself filed in this case a petition, in which he pleaded that plaintiff was an unfit person to have the custody of her child, and that the latter should remain with his grandmother. The issues raised by a denial of these allegations were fully tried, and therefore defendant has not been deprived of any right by plaintiff's failure to file a new petition which would have raised the same issues.

On the merits of the case, who should have the custody of the child? In contemplation of accouchement, plaintiff went to a hospital, and there remained in distressing helplessness for nearly six months after the child was born. Defendant had abandoned his home with his wife, and she was taken from the hospital to the home of his father and mother, where plaintiff and a brother of defendant also lived. There plaintiff was confined to her bed for three weeks, when she so far recovered as to walk with crutches. These she used for about two months. Afterwards she used a cane, until she could eventually walk without it, though still a cripple. It is established by unchallenged findings of the trial court that "plaintiff has conducted herself toward the defendant as a faithful, chaste and obedient wife," and that "defendant, without any excuse or provocation therefor, has been guilty of extreme cruelty toward plaintiff." Plaintiff left the home of her husband's parents and went to the home of her father, where the family consisted of her father, her sister, her brother and herself. The parents of the child are legally and properly separated. In this unhappy situation, the solemn duty of choosing between the grandmother and the mother is imposed upon the court. In performing this duty, the court exercises the power of the state to act in the interests of the child—an infant ward.

Society is interested in his becoming an honest, useful citizen. To this end, in determining the question of custody, courts look to the interests of the child himself. Prompted by love and a high sense of duty, the grandmother procured the child when he was a few days old, took him to her home, and made him the object of her solicitude and care. That was a proper place for him under the circumstances, and she was worthy of the obligations voluntarily assumed. She treated him as if he were her own child. Strong attachments grew up between them. Separation would naturally shock the child and make his grandmother's heart ache. The consequence of severing such ties, and of depriving the child of the comfort and attention of one who took the place of a mother, and thus created attachments born of love and kindness, is carefully considered. On the other hand, the love of a good mother is recognized as an assurance that in her care the best interests of her child will be subserved. She has a natural claim upon him. To bring him into the world she lingered in "the valley of the shadow of death." She did not forfeit her rights by suffering and misfortune, nor were the yearnings of maternity thus suppressed. She is now able to care for him. If given his custody, he will have as suitable a home as the one he leaves. His new surroundings and prospects will be equally as good. At his age the shock of leaving his grandmother will be temporary. If the ties which bind him to her are loosened, he will form new ones with his mother, which in the order of nature will last a generation longer. Plaintiff seems to have the better claim. Entertaining these views, no error is found in the decree committing to the mother the custody of her child.

AFFIRMED.

SEDGWICK and ALDRICH, JJ., not sitting.

WILLIAM JANIKE, APPELLANT, V. BUTLER COUNTY, APPELLEE.

FILED NOVEMBER 15, 1919. No. 20986.

1. **Taxation:** ILLEGAL ASSESSMENT: REMEDY. "The remedy provided for the taxpayer by the first subdivision of section 162 (Rev. St. 1913, sec. 6491) is available only when the property was wrongfully assessed, either because exempt from taxation or because the tax levied had already been assessed thereon and paid." *Darr v. Dawson County*, 93 Neb. 93.

2. ———: EXCESSIVE VALUATION: REMEDY. The remedy given by the first subdivision is not available to correct overvaluation of the owner's land, caused by the failure of the taxing authorities to assess separately a mortgage interest in the land, and to deduct the amount thereof from the total assessed value of the land. In such case the remedy of the taxpayer, where the law provides for such deduction, is to make his complaint before the board of equalization.

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

R. C. Roper and *M. A. Shaw*, for appellant.

A. V. Thomas, contra.

CORNISH, J.

Plaintiff, objecting to the tax assessed against his land, paid the tax under protest, made his claim before the county board, and from the judgment of that body against him, afterwards affirmed in the district court, appeals to this court.

The grounds of his written protest are: (1) "The property upon which it (the tax) was levied was not liable to taxation;" (2) the land had been "twice assessed in the same year and taxes twice paid thereon;" (3) there is a mortgage on the property in the sum of $3,000, to the Federal Land Bank of Omaha, which is "exempt from federal, state, municipal and local taxation."

Conceding, argumentatively, that the Federal Land Bank's mortgage is exempt from taxation, as against the

bank, and that under our assessment laws a mortgage on real estate is declared to be an interest in real estate for purposes of assessment and taxation, to be assessed in the first instance to the mortgagee, the question arises whether the plaintiff, having paid the tax under protest in accordance with section 6491, Rev. St. 1913, is entitled to a judgment against the county for the amount of the taxes so paid. We think not. The tax protested against was a tax upon land owned by the plaintiff. The point urged is that the amount of the mortgage on the land was not assessed separately, and that its amount was not deducted from the valuation of the land, so that the plaintiff would only be called upon to pay the tax upon the surplus value over and above the amount of the mortgage.

The first subdivision of section 6491, upon which plaintiff bases his right to recover, provides for payment and recovery of taxes paid under protest only in cases where the property is "not liable to taxation," or "has been twice assessed in the same year and taxes paid thereon." In the instant case, the tax is on the land and is assessed to the owner. Certainly the land was "liable to taxation," even though the mortgage interest, owned by another party, was not. The assessment does not, on its face, purport to assess the mortgage interest to the plaintiff. If, as a matter of fact, the taxing authorities have assessed the plaintiff's property which is liable to taxation at too high a valuation, or even though the valuation is made too high by reason of the failure of the taxing authorities to make a deduction on account of the mortgage, in either case, it would seem that the remedy by suit to recover a tax paid under protest would not be applicable. So long as the property assessed is liable to taxation, or is liable to taxation in part, plaintiff's remedy is to go before the board of equalization, where that portion constituting the overvaluation, however it may occur, may be abated. Primarily, the plaintiff is not interested in the taxation of another person's

property, and whether it is exempt from taxation or not. It is only when the other person's property, or interest in it, is assessed to him that he is interested. Subdivision 1 of section 6491, *supra,* in exempting property not "liable to taxation," contemplates only property of the owner which is exempt. The mortgage interest in land, held by the Federal Land Bank, whether exempt or not as to the bank, is not within the class.

In subdivision 2, sec. 6437, Rev. St. 1913, it is provided that, where lands have been assessed as entities, and where after assessment (as here) a part of such entities has been transferred, it is the duty of the board of equalization to make the proper adjustment. Under this section, and where part of the tax in question is assessable to the complaining party, he should make his complaint to the board of equalization. Even though a part of the tax may be void for other reasons, the remedy in question is not available.

No contention is made in the instant case that the property was twice assessed.

For cases bearing upon the questions considered, see *Darr v. Dawson County,* 93 Neb. 93; *Davis v. Otoe County,* 55 Neb. 677, 681; *Hicks v. Inhabitants of Westport,* 130 Mass. 478; 37 Cyc. 1184.

For the reasons above given, the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

CHARLES W. SANFORD, APPELLEE, V. SAMUEL C. HAWTHORNE ET AL., APPELLANTS.

FILED NOVEMBER 15, 1919. No. 20590.

Usury. The sale and purchase of property of any kind at a price clearly beyond its value as a condition for making a loan and for the purpose of enabling the lender to obtain more than the lawful rate of interest taints the transaction with usury.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed, with directions.*

T. J. Doyle and *Strode & Beghtol,* for appellants.

Reese & Stout, contra.

DEAN, J.

Plaintiff recovered a judgment for $9,033.32 against defendants Samuel C. Hawthorne, R. R. Langley and John Wall on a negotiable promissory note made by them and payable to plaintiff's order. The note was dated October 1, 1908, and became due in one year. It drew 10 per cent. interest from maturity until paid, the first year's interest having been deducted when the loan was made. Aside from this no interest has ever been paid. The defense was usury. Defendants appealed.

Following are the principal facts: Upon the application of Hawthorne and Langley, plaintiff agreed to loan them $5,000 on substantially these conditions: First, that they would get John Wall to sign the note with them; second, that they would pay the interest at 10 per cent. for one year in advance; and, third, that defendants would take as a part of the loan an assignment of a judgment owned by plaintiff against a man named James Craig, Sr., for $125.65 that was obtained on October 4, 1898, in a justice of the peace court in Wahoo, Saunders county, and drawing 10 per cent. interest from date of its recovery. The judgment was assigned at a valuation of $200 as a part of the loan. The testimony is not clear as to whether the $5,000 note was signed on October 1, 1908, the day of its date, or on October 14, 1908, the day when the transaction was closed. In view of the record we do not think this point is material. On October 14, 1908, plaintiff gave defendants $4,300 in cash and a credit of $500 on the note for one year's interest in advance and an assignment of the Craig judgment, all as consideration for the note in question.

Defendants contend that the Craig judgment was of no value, and that it was used merely as a subterfuge to conceal a charge, in advance, of $700 for the use of $4,300 for one year. Respecting this judgment and on the question of value, plaintiff on the cross-examination frankly testified: "Q. You did your best to collect it? A. Yes, sir; at various times. Q. You never collected anything on it? No; I never collected anything on it, although I felt satisfied that it would be paid, because the man was a good worker and a skilful artisan and was making good wages. Q. Will you swear that there was ever an execution issued on that judgment, and that it went into the sheriff's hands? A. Yes, sir. Q. Do you know when? A. October 2, 1903, was the issuance, and October 10, 1903, was the return of the execution. It had been placed in the hands of J. R. Webster, sheriff, and returned October 10, 1903. Q. And returned 'no property found?' A. Yes, sir. Q. That is the only execution that was ever issued on it, was it? A. I am not positive whether there was one— Q. That is all you know about? A. I cannot recall whether one was executed within the succeeding five years; I do not recall. * * * Q. Now, Mr. Sanford, when these parties came to you to borrow this money, you knew that it was money they wanted, didn't you? A. Yes, sir; I knew they wanted to borrow money. Q. You knew they didn't want to buy any judgment, didn't you? you knew that? A. Well, I knew—no, they hadn't applied to me for the purchase of any judgment. * * * Q. And (you) told them about having a memoranda of a judgment in favor of your father, and that you claimed to own against a man named James Craig for $125 up in the justice court in Saunders county you say they got from you; now, that is all you gave them for the $5,000 note, wasn't it? A. No sir—oh, they had been told that, and they had agreed to take that judgment on October 1st. Q. Well, whatever that was, that was all you gave them for the $5,000 note, wasn't it? A. Yes sir; the

$4,300 in checks and an assignment of a two hundred and fifty odd dollar judgment. * * * Q. Then you charged interest for the judgment the same as you did for the $4,300 cash, didn't you? A. Yes, sir. Q. Ten per cent. a year? A. Yes, sir; they took a judgment that was bearing 10 per cent. they took that at $200; it was a judgment for $250, and it was bearing 10 per cent. * * * Q. After all the efforts you could put forth prior to this transaction with Langley and Hawthorne you were never able to collect any of this money from Craig? A. I never went after him very hard. One reason was because my time and efforts were pretty well occupied, and another thing I regarded him as ultimately good, for he had a good business and was a man of temperate habits, was not an old man, and was very industrious. I didn't regard * * * Q. Did you ever get from him the court costs you paid out in getting this judgment? A. No, sir. That goes with the collection of the judgment. * * * Q. Did you have any knowledge as to why it was that Craig wouldn't pay this judgment during the ten years that you had it? A. Well, no, except for the fact that he was using money for his—for the prosecution of his business. * * * Q. Didn't you follow him up at different times where he did work for farmers and try to get something from him? A. No, sir. * * * Q. Was he a married man? A. Yes, sir. * * * Q. Did you ever file a transcript of this judgment in the district court up there? A. I do not recall; I don't know how that is. Q. You never did yourself? A. I do not recall; it is too long ago; I don't recall that. I generally made it my custom to file transcripts. Q. And didn't you also make it your custom, Mr. Sanford, with these parties in making them a loan to always have some note of some amount in addition to 10 per cent. interest that you took out in advance that you required them to take as a part of the loan? A. No; that was not my custom. It had occurred, but it wasn't a general custom."

Defendants complain because the court of its own motion gave this instruction numbered 4: "The court instructs you that there is no sufficient evidence upon which you can find that the Craig judgment was of no value, and that its assignment was a mere disguise for the taking of usury. You will therefore disregard this defense and exclude from your consideration all evidence in that connection." Defendants also complain because this instruction numbered 2 requested by them was refused: "The jury is instructed in the matter of assignment of a judgment against one James Craig, by plaintiff to the defendants, at the time of the loan, if it finds from the evidence that this was not a *bona fide* purchase of the judgment, but, on the contrary, was a mere subterfuge to obtain a rate of interest in excess of 10 per cent. for the loan of the money, in such event this would be usury, and if the jury so finds, its verdict would be for the plaintiff, for $4,300."

We think the court erred in giving instruction numbered 4 and in refusing to give defendant's requested instruction numbered 2. From plaintiff's testimony alone it is incredible that the Craig judgment was of any value. It was obtained ten years before the loan was made, and five years from its date an execution was returned "no property found." It does not appear that, aside from the issuance of an execution, plaintiff ever tried to collect the judgment. Nor does it appear that he counted it of sufficient value, nor Craig's financial prospects of sufficient promise, to file a transcript in the office of the clerk of the district court at Wahoo. It sufficiently appears that defendants did not make an application to plaintiff to buy a judgment, but to obtain a loan. The transaction appears to us to be a device by the parties to evade the usury law. Rev. St. 1913, sec. 3350. The sale of property of any kind at a price beyond its value as a part of a loan as a pretext for obtaining more than the lawful rate of interest taints the transaction with usury, and in an action to

recover on such loan neither interest nor costs can be recovered. *Grosvenor v. Flax & Hemp Mfg. Co.*, 1 Green's Ch. Rep. (N. J.) 453; *Quackenbos v. Sayer*, 62 N. Y. 344; *Mosier v. Norton*, 83 Ill. 519; *Barry v. Paranto*, 97 Minn. 265.

The evidence does not support the judgment. It appears from plaintiff's evidence that he could not lawfully recover more than $4,300 if the case were to be tried again. The judgment is therefore reversed and the cause remanded, with directions that judgment be rendered in favor of plaintiff for $4,300, and that defendants recover their costs in the district court and in this court.

REVERSED.

LETTON and ALDRICH, JJ., not sitting.

UPDIKE GRAIN COMPANY, APPELLEE, V. ALBERT SWANSON, APPELLANT.

FILED NOVEMBER 15, 1919. No. 21191.

1. **Master and Servant:** WORKMEN'S COMPENSATION: INJURY: CONDITION AT TIME OF TRIAL. Under the employers' liability act, section 3662, Rev. St. 1913, as amended, Laws 1917, ch. 85, the inquiry respecting the extent of an injury to an employee should be directed to his condition at the time of the examination or trial.

2. ———: ———: AWARD: MODIFICATION. When an award of compensation has been made, under the employers' liability act, in favor of an injured employee, an application may be made to the court by either party, any time after six months from the date of the agreement or award, for a modification of the amount of the award on the ground of increase or decrease of incapacity due solely to the injury. Rev. St. 1913, sec. 3683, as amended, Laws 1917, ch. 85, sec. 18.

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

Myers & Mecham, for appellant.

Gurley, Fitch, West & Hickman, contra.

DEAN, J.

Albert Swanson, defendant, while in the employ of the Updike Grain Company, plaintiff, sustained a personal injury on July 12, 1918, by "a plank sized 2 x 12" falling on his left hand, "cutting and crushing it" as alleged. He is a millwright and carpenter, and when injured was earning $42 a week. As a result of the accident he is now totally disabled from working at his trade. Under the employers' liability act the company paid him $12 a week for 17 weeks and his doctor's bill. Subsequently, upon application made by the company to the compensation commissioner, an award was made of $12 a week for 13 additional weeks, or a total of 30 weeks. Swanson, being dissatisfied, appealed to the district court, where the award of the commissioner was affirmed. He has again appealed.

The court found that Swanson sustained "injuries to his third, fourth and fifth fingers of the left hand." The hand was shown to have been severely injured, and it seems clear to us that the injury was not confined alone to the fingers. The physicians for both parties testified in substance that "about 50 per cent." would represent "a fair percentage of loss" of the use of the hand in its present condition.

We think the court erred in holding that the injuries were confined to the fingers alone. The evidence discloses that in its present condition Swanson's hand presents a case "involving permanent partial loss of the use or function" of that member, and comes clearly within the provisions of section 3662, Rev. St. 1913, as amended, Laws 1917, ch. 85, sec. 7, which, so far as applicable provides: "(3) For all disability resulting from permanent injury of the following classes, the compensation shall be exclusively as follows: * * * For the loss of a hand, sixty-six and two-thirds per centum of daily wages during one hundred and fifty weeks. * * * In all cases involving a permanent partial loss of the use or function of any of the members

mentioned in subdivision 3 of section 3662, the compensation shall bear such relation to the amounts named in said subdivision 3 of section 3662 as the disabilities bear to those produced by the injuries named therein. * * * Compensation under this subdivision shall not be more than twelve dollars per week, nor less than six dollars per week."

Respecting the present condition of Swanson's hand, and that is the time to which the inquiry should be directed, the evidence is clear and seems to show that, under the act, on the ground of "permanent partial loss" at the present time he is entitled to $12 a week for 75 weeks from the date of the injury. It may be noted, however, that under section 3683, Rev. St. 1913, as amended, Laws 1917, ch. 85, sec. 18, neither party is remediless in case of a change or an "increase or decrease of incapacity" in the condition of an injured employee, this section providing: "The amount of any agreement or award payable periodically for more than six months may be modified as follows: * * * (b) If the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made to the court by either party on the ground of increase or decrease of incapacity due solely to the injury."

The judgment is reversed for further proceedings consistent with the views expressed in this opinion.

REVERSED.

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18. In a suit in equity, a decree responding to issues raised in a petition filed by defendant will not be reversed on appeal merely because plaintiff failed to plead facts, the denial of which would raise such issues. *Hammond v. Hammond* 860

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7. In determining sufficiency of present rates of carrier, it is proper to consider recent dividends declared under ordinary conditions, but distribution of such dividends among stockholders throws no light on earning power of the property. *In re Lincoln Traction Co.* 229

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12. It is the duty of a carrier to keep accounts as required by the state railway commission and to render all possible assistance to enable the commission to ascertain true values, and, if it fails to do so, it cannot complain of reasonable findings of the commission as to value. *In re Lincoln Traction Co.* 229

13. If, owing to changed conditions, the net earnings of a carrier, properly managed, are not a fair return on the value of its property, the rates should be increased without imposing unnecessary conditions. *In re Lincoln Traction Co.* 229

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16. The supreme court on appeal cannot disturb findings of the state railway commission, unless it appears that some requirements of law have been disregarded, or that the result reached cannot reasonably be derived from the facts proved. *In re Lincoln Traction Co.* 229

17. The supreme court will not reverse an order of the state railway commission, unless it is clearly unreasonable. *Lincoln Commercial Club v. Missouri P. R. Co.* 504

18. Where unjust discrimination arises as between individuals or localities, because of absorbing of switching charges in certain instances and not in others under like circumstances, the carrier may be required to remove the discrimination by a change in tariff schedule eliminating the charge. *Lincoln Commercial Club v. Missouri P. R. Co.* 504

19. In an action for injury to live stock accompanied by the owner, the burden is on the owner to show that the loss was due to carrier's negligence. *Starr v. Chicago, B & Q. R. Co.*.. 645

20. Sec. 8604*a*, 8 U. S. Comp. St., does not change the common-law liability of carriers for injuries to live stock in interstate shipments. *Starr v. Chicago, B. & Q. R. Co.* 645

21. Where the owner accompanies shipment of live stock, the duty of feeding and watering the stock when placed in carrier's yards is primarily upon the owner; but, if he fails to do so, then the duty is upon the carrier, which must also furnish proper facilities. *Starr v. Chicago, B. & Q. R. Co.* .. 645

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26. The "Railway Commission Act" gives exclusive original jurisdiction over rates of common carriers to the commission, unaffected by city charter provision. *Omaha & C. B. Street R. Co. v. Nebraska State Railway Commission* .. 695

27. A situation, not constituting an "emergency," may justify the granting of a temporary rate to a public utility. *Omaha & C. B. Street R. Co. v. Nebraska State Railway Commission* 695

28. In fixing rates for a street railway, former earnings and probable prospective earnings should be considered, with a view to adjust rates so as to prevent extortion and allow a fair return. *Omaha & C. B. Street R. Co. v. Nebraska State Railway Commission* 695

29. The fundamental inquiry in fixing rates for a public service utility is what rate is necessary to yield a reasonable average return on a fair valuation of the property. *Omaha & C. B. Street R. Co. v. Nebraska State Railway Commission* 695

30. Under the Constitution and laws of Nebraska, the state railway commission has a wide discretion in fixing rates for public utilities. *Omaha & C. B. Street R. Co. v. Nebraska State Railway Commission* 695

31. Evidence in action for personal injuries *held* to require directed verdict for defendant. *Lofgren v. Omaha & C. B. Street R. Co.* 723

32. A bill of lading is a badge of ownership and protects a *bona fide* purchaser or pledgee to whom it is transferred. *Omaha Grain Exchange v. National Surety Co.* 820

Chattel Mortgages.

Sec. 534, Rev. St. 1913, making it a felony for the mortgagor of personalty to sell it to any "person or body corporate," without consent of the mortgagee, *held* to apply to a sale to a partnership. *State v. Stapel* 135

Commerce.

1. A municipal occupation tax on a telegraph company doing both an intrastate and an interstate business is a charge on its intrastate business, and not its interstate business. *City of Fremont v. Postal Telegraph-Cable Co.* 476

2. Occupation tax imposed on telegraph company *held* not to be a charge on interstate commerce. *City of Fremont v. Postal Telegraph-Cable Co.* 476

Compromise and Settlement.

In an action on a note, where defendant pleaded a settlement, evidence *held* to warrant finding that no settlement was had. *Lair v. Calloway* 714

Constitutional Law. See MASTER AND SERVANT, 2. WAREHOUSEMEN, 2.

1. Ch. 7, Laws 1918, authorizing permits to prospect for and develop minerals in public lands, does not violate secs. 11, 13, or 15, art. III, Neb. Const., nor the Fourteenth amendment, U. S. Const. *Briggs v. Neville* 1
2. Sec. 134, Rev. St. 1913, relating to control of carriers by state railway commission, *held* to apply to public stock-yards, and not to deny to appellant stock-yards company the equal protection of the law under the Fourteenth amendment, U. S. Const. *Union Stock Yards Co. v. Nebraska State Railway Commission* 224
3. The amendment creating the state railway commission is an independent part of the Constitution, and not an amendment to the executive, legislative or judicial articles thereof. *In re Lincoln Traction Co.* 229
4. A legislative act does not impair the obligation of a contract, entered into before the act became operative, merely because it abrogates or holds in abeyance an existing remedy, provided another equally adequate remedy is substituted. *In re Davis* 703
5. Ch. 164, Laws 1917, relating to debtors, does not impair the obligation of contracts entered into before the act became operative. *In re Davis* 703
6. Where a proper basis for classification exists, a tax imposed on all persons or companies engaged in a certain occupation does not deny equal protection of the law. *City of Fremont v. Postal Telegraph-Cable Co.* 476
7. Ch. 196, Laws 1919, providing for the nomination of members to a constitutional convention, *held* not unconstitutional. *Baker v. Moorhead* 811
8. The fact that ch. 196, Laws 1919, provides for election of members of a constitutional convention at a special election, whereas representatives to the legislature are required to be elected at a general election, does not amount to a change of manner of their election. *Baker v. Moorhead* 811
9. Sec. 13, art. XVI, Const., providing that officers "by the Constitution or laws made elective by the people" shall be elected at a general election, provided for in the Constitu-

Constitutional Law—*Concluded.*

tion, does not include members of a constitutional convention. *Baker v. Moorhead* 811

10. The general rule that constitutional provisions will be construed as mandatory, rather than directory, does not apply with the same strictness to constitutional provisions providing for future constitutional conventions, as to other parts of the Constitution. *Baker v. Moorhead* 811

11. A construction of a provision of the Constitution which would make difficult or impossible any fair and just method of revising it will not be adopted by the courts. *Baker v. Moorhead* 811

Contracts. See ASSIGNMENTS. COUNTIES AND COUNTY OFFICERS, 4, 5. EVIDENCE, 10. LIBEL. PRINCIPAL AND SURETY, 1, 2. SALES. STATUTE OF FRAUDS.

1. Forbearance to sue where no cause of action exists is not a consideration to support a promise. *Wehnes v. Marsh* .. 120

2. Where the law implies a contract, a promise to do something different from or in addition to that which the law implies is *nudum pactum*. *Wehnes v. Marsh* 120

3. The contract between the owner and the builder and his sureties for building is dual, the agreement to pay laborers and materialmen being distinct from the contract to erect the building. *Forburger Stone Co. v. Lion Bonding & Surety Co.* 202

4. A county wrongfully forfeiting a building contract partially performed by a contractor not in default cannot justify its failure to pay the amount justly due under the contract by showing that payments to the contractor and cost of completing building exceeded the contract price. *Howard County v. Pesha* 296

5. A building contractor is not bound by the architect's arbitrary and unreasonable refusal of estimates justly due. *Howard County v. Pesha* 296

6. Generally the right to rescind a contract exists only in favor of the party not in default. *Howard County v. Pesha* 296

7. Under a building contract requiring payments to contractor as work progresses, the owner's failure, upon demand, to make a payment justly due may justify the contractor, not in default, in refusing to proceed with the work. *Howard County v. Pesha* 296

8. Under a building contract designating the architect as sole and final arbitrator of estimates for labor and materials,

Contracts—*Concluded.*

he cannot arbitrarily defeat proper estimates justly due. *Howard County v. Pesha* 296

9. Unchallenged estimates of architect for labor and materials are conclusive in absence of fraud or mistake, under a building contract making his decision final. *Howard County v. Pesha* 296

10. In an action by building contractor for labor and materials for which architect arbitrarily refused estimates, evidence that the architect did not deny that an estimate was due, and that he arbitrarily refused to make it, *held* admissible on issue of fraud. *Howard County v. Pesha* 296

11. A loan to a building contractor to pay for labor and materials is not secured by a bond given by him for protection of persons furnishing labor and materials. *Howard County v. Pesha* 296

12. Where the owner of a partially constructed building wrongfully cancels a building contract requiring him to pay 85 per cent. of the estimates, and permitting him to retain 15 per cent. until completion of contract, the contractor may recover both percentages for work done. *Howard County v. Pesha* 296

13. Equity has jurisdiction to reform a written contract for fraud or mistake. *Shurtleff v. Pick & Co.* 414

14. A party is not chargeable with negligence in signing a contract written by the other party, containing a fraudulent misstatement of a material fact which an ordinarily prudent man would not discover. *Shurtleff v. Pick & Co.* .. 414

Corporations. See NEGLIGENCE, 2.

1. Under an executory contract to sell stock, dividends declared while the contract is executory belong to the purchaser. *Bank of Waverly v. Daily* 7

2. Articles of incorporation and statutes relating thereto are a part of the contract of one purchasing stock of the corporation. *Allen v. White* 256

3. Majority of stockholders of a corporation cannot, by amending the articles of incorporation, deprive the minority of their contractual rights to dividends under the original articles. *Allen v. White* 256

4. When a legislature provides for a state officer to administer the affairs of an insolvent corporation, such provision is a charter right which follows a corporation wherever it goes. *Kinsler v. Casualty Co. of America* 382

Corporations—*Concluded.*

5. The liability for failure of corporation to publish notice of indebtedness required by sec. 577, Rev. St. 1913, is in the nature of a penalty, and one stockholder equally at fault with others cannot maintain action as creditor of the corporation against the others for such omission. *Singhaus v. Piper* 493

6. There is no default for failure of corporation to publish notice of indebtedness required by sec. 577, Rev. St. 1913, until one year after organization of corporation. *Singhaus v. Piper* 493

7. A corporation may exchange property in purchase of its outstanding shares, but the transaction must be in entire good faith, and in no manner injure rights of creditors or stockholders. *Singhaus v. Piper* 493

8. The relation between stockholders is confidential, and, if they are creditors of the corporation, their right to object to a transfer of its property for shares of the stock is analogous to the right of creditors to object to transfers of property by their debtors. *Singhaus v. Piper* 493

9. If transfer of corporation's property for outstanding stock is made to secure stockholders against loss on account of existing indebtedness, the transfer may be held invalid as against creditors; but, if at the time of such transfer the remaining corporate property amply secures its debts, and its business continues for several years, the fact that unprofitable business and new debts have made it insolvent is not conclusive that the transfer was made with intent to defraud creditors. *Singhaus v. Piper* 493

10. A creditor and stockholder at the time of and with knowledge of a transfer of corporation's property and of its business and assets cannot complain of the transfer because after several years the corporation has become insolvent. *Singhaus v. Piper* 493

11. It is within apparent scope of authority of an officer of a trading corporation to indorse a negotiable instrument, payable to the order of the corporation, only in furtherance of its business. *Bank of Benson v. Gordon* 508

12. Where a note is payable to a corporation and is indorsed by an officer in the corporate name and given as collateral for a loan to himself or to another corporation in which he is interested, the facts are sufficient to put the lender on inquiry as to the official's authority to transfer the note. *Bank of Benson v. Gordon* 508

Costs.

When a brief fails to conform to rule 12, the supreme court may on its own motion refuse to allow a fee to be taxed therefor. *McWilliams v. Anderson* 187

Counties and County Officers. See CONTRACTS, 4-12. OFFICERS. RAILROADS, 1.

1. Where a man was employed as jailer by the county board, *held* that the sheriff was not entitled to the statutory jailer fee. *Dorcey v. Thurston County* 43
2. Under ch. 18, Laws 1915, giving the county board power to levy funds for a courthouse on petition signed by 55 per cent. of the legal voters, a petition is invalidated by a condition designating the site; the power to select the location being vested in the board. *Mylet v. Platte County* 105
3. The boundary between Grant county and Garden county *held* to be the section line three miles west of the range line between ranges 40 and 41, in townships 21, 22, and 23. *State v. Garden County* 142
4. An architect employed to superintend construction of a courthouse under a contract calling for estimates as the work progresses is a fiduciary of the county, and, if he knows any reason why estimates should not be made, he should state the facts to the county board, without its request. *Howard County v. Pesha* 296
5. Where a county enters into a valid contract for construction of a courthouse, it cannot, by pleading want of power, escape the payment of just claims for labor and materials accepted and used under terms of the contract. *Howard County v. Pesha* 296
6. Where a sheriff having the right to hold over retains his office and files a proper bond, failure of the county board to approve the bond does not create a vacancy. *State v. Willott* 798

Courts. See WILLS, 2.

The district court may try a cause on appeal upon the transcript of the proceedings in the probate court. *Keeler v. Estate of Hiles* 465

Criminal Law. See ADULTERY. FORGERY. HOMICIDE. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS, 1, 12. JURY. LARCENY. RECEIVING STOLEN GOODS. STATUTES, 1, 2.

1. In a criminal prosecution, where a negative is an essential element of the crime, and is "peculiarly within the knowledge of the defendant," it devolves upon him to produce the

Criminal Law—*Continued.*

evidence, and, on his failure to do so, the jury may infer that it cannot be produced. *State v. Krasne* 11

2. In a prosecution under sec. 8896, Rev. St. 1913, for fraudulent advertisement of merchandise, demurrer to evidence *held* improperly sustained. *State v. Krasne* 11

3. A voluntary confession, standing alone, is insufficient to prove the commission of a crime, but such confession may, with slight corroborative circumstances, be sufficient to warrant a conviction. *State v. Krasne* 11

4. Under the indeterminate sentence act, a district judge is only a ministerial officer whose authority is limited to pronouncing a minimum and maximum sentence. *Lee v. State* 87

5. Under the indeterminate sentence act, the prison board determines the term the prisoner shall serve. *Lee v. State* .. 87

6. To make evidence of other acts available, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, of itself evidence bearing upon the particular act charged. *St. Clair v. State* 125

7. An alibi is a defense in a prosecution for the sale of whiskey. *Milligen v. State* 131

8. Where name of state's witness was Hughes William Hughes, though he signed the complaint as William Hughes, and the county attorney indorsed William Hughes on the information, *held* not error to permit him to testify as a witness in chief for the state. *Brown v. State* 271

9. The district court cannot fix the minimum of a sentence for larceny at a greater period than that fixed by statute. *Brown v. State* 271

10. Failure to specifically instruct to disregard opinions expressed by rejected talesmen on their *voir dire* examination will not require a reversal, where the instructions direct the jury to base their verdict alone on evidence adduced at the trial. *Grammer v. State* 325

11. Under an information charging two with murder in the first degree, one as principal and the other as accessory before the fact, failure of the trial judge, on his own motion, to require separate trials *held* not error. *Grammer v. State* .. 325

12. Testimony that a confession was voluntary, or that there were no promises, threats, or inducements to influence accused to make it, is not objectionable as being an opinion or a

Criminal Law—*Continued.*

conclusion, where the circumstances under which the confession was made are in evidence. *Grammer v. State* 325

13. A foundation for admitting in evidence a confession of guilt may be established by testimony of a witness that it was made to him and that neither he nor any one in his presence or hearing made any promises or threats. *Grammer v. State* 325

14. Where two are charged with murder in the first degree, one as principal and the other as accessory before the fact, a confession by the principal, if admitted by the accessory to be true, may be admitted in evidence against the latter. *Grammer v. State* 325

15. Laughter and applause by the audience during trial in a felony case, *held* not ground for setting aside the verdict, where the presiding judge vigorously rebuked the misconduct and directed the jury to disregard it; prejudice not being shown. *Grammer v. State* 325

16. An oral statement directing the jury that testimony of witness under examination applies alone to one of two joint defendants is not an instruction within the statutes requiring instructions to be in writing, and forbidding oral modification. *Grammer v. State* 325

17. Instructions must be taken as a whole, and a phrase, clause or sentence may not be segregated from the context in order to give it a different meaning from that intended. *Kirk v. State* 484

18. When it is shown affirmatively that attendance of a witness cannot be procured, his evidence given on a former trial may be used on a second trial; its admission being within the sound discretion of the trial court. *Koenigstein v. State* 580

19. In a criminal trial, it is error to instruct the jury to consider "all the circumstances established beyond a reasonable doubt' by the evidence, bearing on the respective questions and facts testified to." *Koenigstein v. State* 580

20. The ultimate facts necessary to a conviction must be established beyond a reasonable doubt, but minor circumstances need not be so proved. *Koenigstein v. State* 580

21. If a witness in rebuttal is erroneously allowed to repeat his testimony on direct examination, the error will not require a reversal, unless it affirmatively appears that accused may have been prejudiced thereby. *Koenigstein v. State* .. 580

22. It is not reversible error to reject proof of matters that are conceded by all parties. *Koenigstein v. State* 580

Criminal Law—*Continued.*

23. A motion to direct an acquittal should not be sustained if the evidence is such that reasonable minds might differ as to guilt of accused under the evidence and instructions. *Koenigstein v. State* 580

24. A conviction under sec. 8767, Rev. St. 1913, defining adultery, will not be set aside because the charge was that accused was an unmarried man, when the evidence showed that he was a married man. *Miller v. State* 591

25. In prosecution for adultery, introduction of defendant's alleged child in evidence, defendant being colored and the woman and her husband white, *held* proper, as bearing on defendant's improper relations with the prosecutrix. *Miller v. State* 591

26. It is not error to refuse a requested instruction substantially the same as one given. *Williams v. State* 710

27. Where an abuse of the court's discretion as to questions propounded to jurors is not shown, its rulings will be sustained. *Stone v. State* 712

28. In a prosecution for felony, the information must be served upon the defendant at least one day before trial. *Wozniak v. State* 749

29. Where defendant's objection to go to trial because no copy of the information has been given him is overruled, the ruling cannot be sustained unless the record affirmatively shows such service. *Wozniak v. State* 749

30. Where the state's brief does not quote nor refer to record where it is shown that defendant was served with copy of information, the court will not presume that such evidence exists. *Wozniak v. State* 749

31. A conviction for felony will not be affirmed unless the record shows that accused was arraigned and given opportunity to plead before the trial began. *Wozniak v. State* 749

32. In a prosecution for felony under sec. 56, ch. 187, Laws 1917, which also defines first and second offenses as misdemeanors with different penalties attached, accused may be acquitted of felony but convicted for a first or second offense, and instructions should be given thereon. *Wozniak v. State* .. 749

33. Where instructions respond to the evidence and issues, they will be held proper. *Mauzy v. State* 775

Where accused is a witness in his own behalf, it is discretionary with the court as to how far opposing counsel may

Criminal Law—*Concluded.*

go in his cross-examination, and, unless there is an abuse of discretion, no error is committed. *Mauzy v. State* 775

35. Where one of two jointly charged with murder enters a plea of guilty, and neither requests separate trial, and the evidence against both is taken together, they cannot thereafter contend that for that reason the judgment finally rendered is absolutely void. *In re Application of Cole* 802

36. When accused pleads guilty to a charge of murder in the first degree, he cannot determine the degree of the crime, but may be convicted of murder of either degree or manslaughter, and the court should determine the degree from the evidence. *In re Application of Cole* 802

37. The determination of the degree of the crime on plea of guilty does not necessarily involve the determination of the punishment therefor. *In re Application of Cole* 802

38. Where one of two jointly charged with murder enters a plea of guilty during the trial, and neither had requested separate trial, the regular practice is to proceed separately against the one not pleading guilty, and not to take evidence as to degree of crime of the one pleading guilty as a part of such trial. *In re Application of Cole* 802

39. If prejudicial error occurs only after the defendant's guilt has been determined, the judgment will be reversed and the cause remanded for correct proceedings subsequent to determination of defendant's guilt. *In re Application of Cole* 802

Crops. See TRIAL, 3.

Damages. See SALES, 3.

1. Verdict for $2,000 for personal injuries *held* not excessive. *Ford v. Bush* 317

2. Verdict for $25,000 damages *held* not excessive. *Thomas v. Otis Elevator Co.* 401

3. Where goods of the quality ordered are not delivered, the purchaser is not required to purchase other goods on the open market in mitigation of damages, while negotiations for a settlement are pending. *Shurtleff v. Pick & Co.* 414

Death.

An action for wrongful death under sec. 1429, Rev. St. 1913 (Lord Campbell's Act) must be brought within two years after the cause of action accrues. *Gengo v. Mardis* 164

Deeds. See APPEAL AND ERROR, 22. EVIDENCE, 1. MORTGAGES, 4. WILLS, 10.

1. In a suit to cancel a deed for fraud, evidence *held* insufficient to sustain the allegations of the petition. *McWilliams v. Anderson* 187
2. Where an aged parent upon practically no consideration conveys most of his property to one son, the transaction will be closely scrutinized, and the presumption is against its validity. *Chamberlain v. Frank* 442
3. Evidence *held* insufficient to uphold conveyance by aged parent to son. *Chamberlain v. Frank* 442
4. Where an invalid conveyance was made about six years before grantor's death, and suit to annul was brought a few months after his death, there was no laches. *Chamberlain v. Frank* 442
5. Equity will cancel a conveyance, where the consideration is nominal and there are indications of fraud or concealment. *Krause v. Stevens* 463
6. Where a deed in blank as to grantee appears to be regularly executed, acknowledged and delivered, it is, as to third persons, *prima facie* evidence of the authority of the person holding the deed to insert her name as grantee. *Harrington v. Vogle* 677
7. Unless a contrary intention appears, execution and delivery of a deed gives the recipient implied authority to insert the name of the intended grantee, where this is left blank. *Harrington v. Vogle* 677

Depositions.

If no objection is made to a deposition, and both parties read therefrom, neither party can object that the deposition was incompetent. *O'Brien v. Coon* 836

Divorce.

1. The conduct of a husband toward his wife, though insufficient to sustain a decree of divorce for cruelty, may be sufficient to avoid condonation of the cruelty. *James v. James* 278
2. Evidence *held* to sustain decree of divorce and alimony. *James v. James* 278
3. A provision in a decree of divorce for temporary custody of a child until further order of court may be modified on motion. *Hammond v. Hammond* 860

Divorce—*Concluded.*

4. In determining custody of an infant, the best interest of the child is the controlling consideration. *Hammond v. Hammond* 860

Drains.

1. Courts will not ordinarily by mandatory injunction direct a different method of drainage from that adopted in good faith by the district board. *Moeller v. Logan Drainage District* 439
2. The dissolution of a drainage district according to law will not be interfered with at the suit of property owners who did not begin their suit until notice of an election to dissolve the district was being given. *Moeller v. Logan Drainage District* 439
3. When the county board and the governing board of a drainage district fail to agree on building bridges over drainage ditches on county roads, under sec. 2983, Rev. St. 1913, it is the duty of the district to construct such bridges under supervision of the county board. *State v. Burt-Washington Drainage District* 763
4. When a county board has knowledge that a drainage district desires to construct bridges over its ditches on county roads, and fails to supervise such construction under sec. 2983, Rev. St. 1913, and the district builds the bridges, the county board is estopped from complaining that they were not built under its supervision. *State v. Burt-Washington Drainage District* 763

Ejectment. See EXECUTORS AND ADMINISTRATORS, 2.

Elections.

Under the nonpartisan judiciary act, the voter may write upon the primary election ballot the name of any person as his choice for nominee for office. *State v. Hogeboom* 603

Eminent Domain.

1. Claim for damages for establishment of a highway across a railroad right of way cannot be considered in mandamus to compel construction of an overhead crossing. *State v. Omaha & S. I. R. Co.* 40
2. Objections to the establishment of a highway across a railroad right of way will not be considered in mandamus to compel construction of an overhead crossing. *State v. Omaha & S. I. R. Co.* 40

Eminent Domain—*Concluded.*

3. A petition to condemn land for use of a railroad is the basis of the proceeding and must accurately describe the land. *Dailey v. Missouri P. R. Co.* 219

4. A petition containing inaccurate statements material to dimensions of the land will render void condemnation proceedings thereunder. *Dailey v. Missouri P. R. Co.* 219

Equity. See DEEDS, 2-5. JUDGMENT, 5. PARTIES, 2-4.

Escheat. See ALIENS. MANDAMUS, 1.

When lands of a decedent, from whom nonresidents aliens would inherit if residents of the state, are forfeited to the state, they are entitled to their value; such value to be ascertained as provided by statute. *State v. Thomas* 147

Estoppel. See DRAINS, 4. OFFICERS, 7.

Where a party gives a reason for his conduct and decision in a controversy, he cannot, after litigation begun, change his ground. *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen* 791

Evidence. See APPEAL AND ERROR, 19-31. BILLS AND NOTES, 5, 6. CONTRACTS, 10. CRIMINAL LAW. DEPOSITIONS. LANDLORD AND TENANT, 1. NEGLIGENCE. TRUSTS, 2. WATERS, 3.

1. Where a deed reserving a life estate in a farm does not contain the entire contract resulting in the conveyance, grantee may show by parol that he accepted title on condition that he should occupy the farm for an annual rental during grantor's lifetime, where the latter had made an oral promise to give grantee a farm for services, which he subsequently performed. *Luther v. Luther* 46

2. In an action by a wife against saloon-keepers for loss of support occasioned by the death of her husband caused by intoxicants, the Carlisle mortality table is competent evidence of his life expectancy. *Wiley v. National Surety Co.* 68

3. A farmer is competent to testify to the value of farm crops. *Watkins v. Union P. R. Co.* 75

4. Though proof of ill health or hazardous employment may impair the effect of mortality tables as evidence, it does not make them inadmissible. *Mentz v. Omaha & C. B. Street R. Co.* 216

5. Where the entire testimony of a witness shows that he is qualified to testify to rental values of land, his testimony

Evidence—*Concluded.*

should not be excluded because some of his answers tend to indicate a lack of necessary knowledge. *Unzicker v. Unzicker* 314

6. Secondary evidence of contents of lost instrument *held* admissible. *Metcalf v. Chicago, R. I. & P. R. Co.* 431

7. Testimony of witnesses, who were near the place of an accident, that they did not hear a signal bell is not sufficient to overcome positive evidence that the bell was ringing. *Nanfito v. Chicago, B. & Q. R. Co.* 577

8. In an action on a notary's bond for false acknowledgement to a deed, the official signature on the notary's bond filed with the county clerk may be received in evidence for comparison of handwriting. *Harrington v. Vogle* 677

9. A reasonably accurate map may be admitted in evidence as an aid in making intelligible evidence respecting location of objects under investigation. *Anderson v. Union P. R. Co.* 770

10. Where local custom has given a term a special meaning of general acceptance in a business, parol evidence is admissible to explain it in a written contract. *Haney v. Collins* .. 782

11. Merely offering a writing in evidence, not signed by party to be charged, is not proof of its contents. *O'Brien v. Coon* .. 836

Executors and Administrators.

1. Upon the death of a husband, the homestead vests in his widow and heirs, and the administrator cannot take it into account in administering the estate. *Dillon v. Dillon* 322

2. An administrator who takes possession of a decedent's unincumbered homestead, excluding the widow, acts unlawfully, and a demand for possession is not a condition of her right to maintain ejectment against him. *Dillon v. Dillon* 322

3. Evidence *held* to sustain findings allowing claim against an estate based on check payable after death of decedent. *Keeler v. Estate of Hiles* 465

4. Equity will not entertain an administrator's suit to recover, on the ground of mental incompetency, property conveyed to some of intestate's children, where there are no creditors, and the only persons to be benefitted are other children of the intestate, who during her alleged incompetency received property from her which they still retain. *Brower v. Umstead* 823

Extradition.

1. In a requisition, the copy of the complaint and the authenticating certificate required by the federal law may be written on different papers. *Chandler v. Sipes* 111
2. Where the complaint in a requisition charges all the elements of a crime under the laws of the demanding state, its sufficiency is a question for the courts of that state. *Chandler v. Sipes* 111

Forcible Entry and Detainer.

In forcible entry and detainer, where plaintiff shows neither title nor right to possession, it is not error to direct a verdict for defendant. *Lierman v. Vidra* 613

Forgery.

1. In a prosecution for forgery on two counts, evidence *held* to warrant an instruction that accused might be found guilty on both counts, or on one, or not guilty. *Whitney v. State*.. 94
2. An instruction defining the essential elements of the crime of uttering a forged instrument given in substantially the language of the statute is sufficient. *Whitney v. State* 94

Fraud. See CONTRACTS, 13, 14. CRIMINAL LAW, 1-3. DEEDS, 1. MASTER AND SERVANT, 4. QUIETING TITLE. VENDOR AND PURCHASER, 3, 6.

1. In an action for fraud, instruction as to measure of damages *held* not erroneous. *Ellwanger v. Goss* 132
2. One who knowingly participates in the commission of a fraud is chargeable with guilty knowledge. *Raasch v. Lund Land Co.* 157
3. A director or officer of a corporation who approves an untrue and misleading report as to the value of its stock may become personally liable to a purchaser of the stock who is defrauded thereby. *Redfield v. Lamb* 410
4. If false representations are made by a vendor of material facts as to the value of realty requiring an independent investigation to ascertain the truth, the vendee may recover damages suffered. *McCandless v. Greusel* 472
5. If a contract is conditioned on seller's performance of certain things within a specified time, within which performance is being considered by the parties, representations then made by the seller, intended to prevent suspicion of prior fraud inducing the contract and to induce the buyer to consummate it, are competent as evidence of fraud in buyer's action for damages. *Lindburg v. Lamb* 767

Fraud—*Concluded.*

6. Representations made by a seller after consummation of a contract of sale are incompetent as independent evidence of fraud inducing the buyer to enter into the contract. *Lindburg v. Lamb* 767
7. Evidence in an action for fraud *held* to sustain judgment for plaintiff. *O'Brien v. Coon* 836

Frauds, Statute of. See STATUTE OF FRAUDS.

Fraudulent Conveyances.

1. There must be an enforceable claim as a basis for recovery by a creditor for an alleged violation of the bulk sales law. *Fisher v. Woodard* 253
2. A solvent man's conveyance of land to his child without fraudulent intent is presumed to be in consideration of his moral obligation to support her, and, in absence of evidence of contrary intent, will convey the fee, to the exclusion of subsequent creditors of the grantor. *Tanner v. Frink* .. 817
3. The question of fraudulent intent is to be considered as of the time when the conveyance is made, and with reference to the particular alleged fraudulent conveyance. *Tanner v. Frink* 817

Guaranty.

Verdict for defendant *held* sustained by proof that he refused to become guarantor when sober, but signed the guaranty when drunk, and that he rescinded it within a reasonable time. *Schultz v. Rogers* 318

Habeas Corpus.

1. In habeas corpus to release a prisoner detained under a warrant of extradition, the fact that a complaint was filed against him in the demanding state is *prima facie* evidence that he was there charged with a crime. *Chandler v. Sipes* 111
2. Where a prisoner detained under a warrant of extradition alleges that the complaint against him does not charge a crime under the statute of the demanding state, the burden is on him to produce the statute. *Chandler v. Sipes* 111
3. In habeas corpus, where there is a substantial conflict in the evidence as to petitioner's presence in or absence from the demanding state, at the time the offense was committed, petitioner is not entitled to his freedom on that issue. *Chandler v. Sipes* 111

Habeas Corpus—*Concluded.*

4. The issuance of a warrant of extradition creates a presumption that the prisoner detained under it is a fugitive. *Chandler v. Sipes* 111
5. The burden of proving that a complaint in a requisition is not certified according to federal law is on a prisoner, where he is detained under a warrant regular on its face. *Chandler v. Sipes* 111
6. In habeas corpus to determine right to possession of a child as between its father and grandparents, where the evidence is conflicting as to their fitness and as to the agreement whereby possession was committed to the grandparents, the child's welfare is the controlling consideration. *State v. Highberger* 258
7. One who under secs. 4082, 4094, Rev. St. 1913, is "found to be infected with communicable venereal virus" is not entitled to a writ of habeas corpus for release from detention. *Brown v. Manning* 540
8. If on a valid conviction the court renders an unauthorized judgment, and defendant is imprisoned under such void judgment, he may be released by habeas corpus, but he will not be discharged from custody if he is charged with a crime in a valid information. *In re Application of Cole* .. 802
9. The writ of habeas corpus is not a writ for the correction of errors, and will not be allowed to be used for that purpose. *In re Application of Cole* 802
10. If the proceedings subsequent to conviction are erroneous, the errors can be corrected by proceedings in error, but not by habeas corpus. *In re Application of Cole* 802

Health.

Under secs. 4082, 4094, Rev. St. 1913, the city of Omaha is authorized to provide for detention in detention home of persons "found to be infected with communicable venereal virus." *Brown v. Manning* 540

Highways.

1. Evidence, in suit to establish right to use an alleged public road, *held* to show its abandonment for more than ten years before suit was begun; the suit thus being barred by limitations. *Donovan v. Union P. R. Co.* 663
2. Evidence in a suit to enjoin a road overseer from removing a hedge, claimed to be an encroachment upon the public highway, *held* to sustain decree for plaintiff. *Rurup v. Kilzer* 848

Homestead. See EXECUTORS AND ADMINISTRATORS, 1, 2. VENDOR AND PURCHASER, 2.

1. A writing by a widow, not the head of the family, creating an equitable mortgage on realty in which she held a homestead life estate under the statute and the fee under her husband's will, *held* not void for want of acknowledgment. *Miles v. Martin* 261

2. A wife by living apart from her husband without fault does not thereby divest herself of her homestead rights in his property at his death. *Dillon v. Dillon* 322

3. Where a married man informed a money lender that he intended to use the money borrowed to pay for a homestead previously purchased, such fact did not entitle the lender to a lien for the purchase price. *Engaard v. Schmidt* 369

Homicide. See CRIMINAL LAW, 11, 35-39. INDICTMENT AND INFORMATION.

1. Under an information charging two with murder in the first degree, one as principal and the other as accessory before the fact, the duty of fixing the punishment of each at death or life imprisonment, if both are convicted, is imposed on the jury by the Criminal Code. *Grammer v. State* 325

2. On trial for killing an officer, instruction allowing conviction if jury find from the evidence beyond a reasonable doubt that accused with others with whom he stood charged, prior to the killing, had formed a common purpose to resist arrest, and that the fatal shot was fired by one of the parties in pursuance thereof, is proper, when other necessary elements of murder are properly defined. *Kirk v. State* 484

3. When several persons are jointly engaged in resisting officers attempting to arrest them, and in such resistance use deadly weapons, each who assists in their employment is *held* to have intended the natural and probable consequences of their use. *Kirk v. State* 484

4. When evidence shows that accused may have participated in killing of deceased, but, if so, without premeditation and deliberation, it is not error to instruct on murder in the second degree, and permit consideration of that crime. *Kirk v. State* 484

5. On a trial for murder in the first degree, it is the court's duty to instruct only on the degrees of homicide supported by evidence. *Williams v. State* 710

Homicide—*Concluded.*

6. It was not error to refuse to require state's counsel to offer in evidence a dying declaration, when the record fails to show that such a declaration was made. *Williams v. State* 710

7. Evidence *held* to sustain conviction. *Mauzy v. State* 775

Husband and Wife. See HOMESTEAD, 2.

1. When a married woman signs a note there is no presumption that she intended thereby to bind her separate estate. *Dodge v. Healey* 180

2. In foreclosure of mortgage given to secure notes signed by husband and wife, judgment for deficiency cannot be rendered against the wife, where the pleadings show marriage when she signed the notes, unless the issue as to such liability is raised by proper plea. *Dodge v. Healey* 180

3. In absence of divorce, a separation contract between husband and wife is abrogated by renewal of marital relations. *Dillon v. Dillon* 322

4. A contract between husband and wife, providing for payments for support of wife and child, and that criminal proceedings for abandonment should be "indefinitely suspended" until default of a payment, is not void as against public policy. *Weichel v. Weichel* 542

5. A bond for $1,000, "and more if required," to secure payments stipulated in contract by husband to support wife and child, is not void because exceeding amount prescribed by sec. 8615, Rev. St. 1913, providing for such bond and limiting it to $1,000. *Weichel v. Weichel* 542

Indictment and Information. See INTOXICATING LIQUORS, 12.

An information charging murder in the first degree charges also murder in the second degree. *Kirk v. State* 484

Injunction. See DRAINS, 1, 2. HIGHWAYS, 2. MUNICIPAL CORPORATIONS, 6. OFFICERS, 1.

Where the nature and frequency of trespasses prevent or threaten rights of possession and property in land, an injunction will be granted. *Meyers v. Schmidt* 475

Insurance.

1. In determining whether statements in a written application for insurance are warranties or mere representations, the court will consider the situation of the parties, the subject-matter, and the language employed, and where the parties clearly intend statements to be warranties, the contract will be so construed. *Swanback v. Sovereign Camp, W. O. W.* 34

Insurance—*Continued.*

2. To make warranties a defense to an action on an insurance policy, the insurer must plead and prove that answers were made substantially as written in the application, that they were materially false, and that the insurer relied on and acted upon them. *Swanback v. Sovereign Camp, W. O. W.* 34
3. Where a foreign beneficiary society fails to show that it has complied with its own laws as to the right to do business in this state, it is not entitled to admission. *Grand Lodge, A. O. U. W. v. Insurance Board* 99
4. An administrative board may exercise only those discretionary powers given it by statute, and it is its duty to act when the statutory requirements have been complied with. *Grand Lodge, A. O. U. W. v. Insurance Board* 99
5. Exclusion of evidence of examining physician *held* to have been erroneous. *Fox v. Scandinavian Mutual Aid Ass'n.* .. 117
6. Employers' liability policy *held* to obligate the insurer, on appeal from a judgment recovered by the employee, to furnish a supersedeas bond. *Johnson v. Maryland Casualty Co.* 371
7. Where the insurer appeals from a judgment recovered by an employee and does not furnish a supersedeas bond, the insured may pay the judgment and sue the insurer. *Johnson v. Maryland Casualty Co.* 371
8. Under the statutes of New York, it is the duty of its insurance commissioner to administer all property and credits of an insolvent corporation of that state located in Nebraska. *Kinsler v. Casualty Co. of America* 382
9. Where the holder of a fraternal beneficiary certificate has done all within his power and knowledge to procure a change of beneficiary to be made by the insurer, a court of equity, as between conflicting claimants, will treat the change as having been made. *Adams v. Police & Firemen's Ins. Ass'n* 552
10. Where officers of a mutual accident insurance company, authorized to enact by-laws, fail to formally adopt any by-laws, but act upon and publish by-laws adopted at a meeting of its members, such by-laws cannot be assailed for want of formal adoption, by a member who accepted his certificate thereunder, or by his beneficiaries. *Dunn v. Physicians Casualty Ass'n* 557
11. A by-law of a mutual accident association construed to relieve the association from liability for fatal injuries intentionally inflicted upon the insured by a third person. *Dunn v. Physicians Casualty Ass'n* 557

Insurance—*Concluded.*

12. A provision in a contract for term insurance that it shall not be payable unless death occurs within a year for which premium has been paid is binding upon the parties. *Bogue v. New York Life Ins. Co.* 568

13. Provision in life policy that any indebtedness or unpaid portion of premium for the current policy year should be deducted from death loss, *held* not inconsistent with provision that payment of premium should not keep policy in force beyond date when next premium was payable. *Bogue v. New York Life Ins. Co.* 568

14. Provision in policy that after it takes effect it shall constitute the entire contract will not prevent a subsequent agreement modifying the contract. *Bogue v. New York Life Ins. Co.* 568

15. Where premium was extended and payment was not made as agreed, the policy lapsed. *Bogue v. New York Life Ins. Co.* 568

16. An insurance agent whose authority was set out in the application and expressly called to the applicant's attention could not vary the terms of the policy by an estimate of results of the policy attached by him thereto. *Baird v. Union Mutual Life Ins. Co.* 609

17. An offer to pay the amount due under its contract *held* a sufficient tender to relieve insurer from liability for interest and attorney's fees. *Baird v. Union Mutual Life Ins. Co.* .. 609

18. Evidence in an action for negligence in delaying action on an application for life insurance *held* insufficient to sustain judgment for plaintiff. *Meyer v. Central States Life Ins. Co.* 640

19. Special provisions in a life policy will not be construed to defeat or limit its benefits, unless they clearly require such construction. *Zantow v. Old Line Accident Ins. Co.* .. 685

20. Where proof of death furnished a beneficiary association did not strictly conform to its by-laws, and the claimant was informed that payment would be made on "positive proof of death," *held* that strict conformity of proof to the by-laws was waived, and only "positive proof of death" was necessary. *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen* 791

21. "Positive proof" of death in a by-law of a beneficiary association *held* to mean proof as positive as the circumstances reasonably afford, and positive enough to satisfy the judgment of reasonable men. *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen* 791

Intoxicating Liquors. See CRIMINAL LAW, 7. EVIDENCE, 2.

1. Evidence, though circumstantial, *held* to sustain conviction for unlawful possession of intoxicating liquor. *Bilz v. State* 15
2. Petition in action for death *held* to charge the shooting of plaintiff's intestate to have been done by one of his companions, by himself, or by an unknown party, and to sustain the verdict. *Rapp v. Moscrey* 30
3. Verdict for $6,000 *held* not excessive. *Wiley v. National Surety Co.* 68
4. In an action against saloon-keepers by a wife for loss of husband's support caused by intoxicants, the granting of a divorce and alimony to the wife, *held* not to mitigate the damage. *Wiley v. National Surety Co.* 68
5. Where, in an action against saloon-keepers and their sureties, the verdict is in excess of the bond, the court may render judgment against the principals for the amount of the verdict, and against the sureties for the sum stipulated in the bond. *Wiley v. National Surety Co.* 68
6. Saloon-keepers who contribute by the sale of even a small quantity of intoxicants to a person while he is forming the drink habit, and their sureties, are liable to the persons named in the statute for loss of support. *Wiley v. National Surety Co.* 68
7. The purpose of ch. 187, Laws 1917, is by sec. 58 declared to be "for the immediate preservation of the public peace, health and safety," and must be liberally construed. *State v. Jones-Hansen Cadillac Co.* 353
8. In ascertaining legislative intent, it will be considered that forfeitures are not favored in the law. *State v. Jones-Hansen Cadillac Co.* 353
9. Ch. 187, Laws 1917, prohibiting manufacture and sale of intoxicating liquors, and providing for confiscation of property used in the traffic, will not be construed to forfeit property of innocent citizens, unless a legislative intent is manifest that such forfeiture is necessary for the preservation of public health and safety. *State v. Jones-Hansen Cadillac Co.* 353
10. An automobile used in unlawful transportation of intoxicating liquors is by sec. 42, ch. 187, Laws 1917, a common nuisance, which may be abated. *State v. Jones-Hansen Cadillac Co.* 353
11. Under ch. 187, Laws 1917, if an automobile used in transporting intoxicating liquor is declared a nuisance, the in-

Intoxicating Liquors—*Concluded.*

terest of the owner or mortgagee with notice must be sold and the proceeds applied as provided by sec. 33. *State v. Jones-Hansen Cadillac Co.* 353

12. An information which charges only that the accused kept intoxicating liquors "for unlawful purposes" is too indefinite to charge a felony under sec. 11, ch. 187, Laws 1917. *Wozniak v. State* 749

Judgment. See LIMITATION OF ACTIONS, 2. WILLS, 2-4.

1. A motion to vacate a judgment because a defendant was a resident of another county, and because there was no joint liability between the defendants, *held* properly overruled after trial and judgment. *McArdle v. Omaha & C. B. Street R. Co.* 82
2. In proceedings to obtain supplemental decree, the parties cannot relitigate matters adjudicated in the original decree. *Overlander v. Ware* 375
3. The trial court may in its discretion vacate or modify a judgment during the term, but this cannot be demanded as a legal right. *Young v. Estate of Young* 418
4. After a judgment has been paid and the cause dismissed, a motion to set aside presents no issue. *Durland Trust Co. v. Uttley* 461
5. Equity will not enjoin collection of a judgment, where defendant was served by legal process, unless it clearly and conclusively appears that his default was without his fault or negligence, and that he has a valid defense to the law action. *Campbell v. Harvard State Bank* 562

Jury.

An opinion of a juror on the merits of a criminal charge, if based solely on rumor or report, does not of itself disqualify him, where his *voir dire* examination shows that he can return a fair and impartial verdict on the evidence and the instructions. *Grammer v. State* 325

Landlord and Tenant. See EVIDENCE, 5.

1. Where existence of the relation of landlord and tenant is an issue in an action to recover for a year's use and occupancy of a farm, a judicial record showing that plaintiff had collected rent for the preceding year may be admitted in evidence. *Unzicker v. Unzicker* 314
2. In an action for rent, evidence as to surrender of premises and an agreement by plaintiff's agent to release defendant

Landlord and Tenant—*Concluded.*

held sufficient to raise a question for the jury. *Union P. R. Co. v. Gregory Coal Co.* 421

3. One who executes a lease of realty, and thereafter conveys it to another with covenants of title, is a proper party to an action to cancel the lease for fraud and concealment, and may contest it on those grounds. *Krause v. Stevens* 463

Larceny.

1. Under the Criminal Code (Rev. St. 1913, sec. 9129) it is mandatory that a jury, on conviction, shall declare in the verdict the value of the property stolen, and the court has no jurisdiction to pass sentence without such finding. *Lee v. State* 87
2. The generic term "hog" is a sufficient description under sec. 8640, Rev. St. 1913, providing punishment for stealing a "sow, barrow, boar or pig." *Brown v. State* 271
3. When property belonging to several owners is stolen, the information is sufficient if it alleges that the property belongs to any one or more of them. *Brown v. State* 271
4. Where recently stolen property is found on premises of accused, and it is not shown that any other person had access thereto, an instruction allowing the jury to assume possession in accused is not erroneous. *Brown v. State* 271

Libel.

Under the common law and the public policy of Nebraska, two rival candidates for public office cannot lawfully contract that one shall withdraw his candidacy in favor of the other, who, if elected, will appoint him to a public office; and a newspaper article naming a candidate and charging him with being a party to such conduct is of itself libelous. *Hand v. Bailey Co.* 459

Licenses. See COMMERCE.

1. The reasonableness of a tax depends upon its general operation in the class to which it applies. *City of Fremont v. Postal Telegraph-Cable Co.* 476
2. In imposing an occupation tax for revenue upon a telegraph company doing an intrastate business, extent of tax is within the discretion of the municipal government, except only that it must not be prohibitory. *City of Fremont v. Postal Telegraph-Cable Co.* 476

Licenses—*Concluded.*

3. Mere proof of operating loss of a telegraph company for two years without showing what volume of business is available, or the amount of its business or its facilities, is insufficient to show that an annual occupation tax of $60 in a city of 8,000 inhabitants is unreasonable. *City of Fremont v. Postal Telegraph-Cable Co.* 476

Liens. See HOMESTEAD, 3.

In a suit to enforce a specific lien on realty, it is not necessary to allege or prove that plaintiff's claim has been reduced to judgment and execution issued and returned unsatisfied. *Miles v. Martin* 261

Life Estates.

1. Limitations do not run in favor of a life tenant claiming the entire estate as against the remainderman until such claim is clearly brought home to the remainderman. *Anderson v. Miller* 549
2. Remaindermen may act on the legal presumption that possession of a life tenant is lawful and not adverse. *Anderson v. Miller* 549

Limitation of Actions. See DEATH. HIGHWAYS, 1. LIFE ESTATES, 1. REMAINDERS.

1. The limitation in sec. 1429, Rev. St. 1913, is independent of sec. 7577, Rev. St. 1913, suspending limitation while defendant is absent from the state, absconds or conceals himself. *Gengo v. Mardis* 164
2. A domestic judgment is a specialty within sec. 7567, Rev. St. 1913, and an action thereon is barred after five years. *Fisher v. Woodard* 253
3. A promissory note showing on its face that it is outlawed does not render demurrable a petition pleading it, where plaintiff alleges that failure to sue was due to absconding of defendant. *Cummings v. Keating & Co.* 453
4. The sufficiency of evidence to sustain finding that a debtor absconded must be tested by the circumstances of each case. *Cummings v. Keating & Co.* 453
5. In an action on notes, evidence *held* to sustain finding that defendant absconded, and so arrested the statute of limitations. *Cummings v. Keating & Co.* 453

Lis Pendens.

Under sec. 7651, Rev. St. 1913, purchaser of realty from one who procured it by fraud, who fails to record his deed until after filing of *lis pendens* in a suit to set aside the deed of his grantor, is a subsequent purchaser and bound by the proceedings. *Justice v. Shaw* 423

Mandamus. See EMINENT DOMAIN, 1, 2.

1. It is the duty of the attorney of the county in which land lies, which nonresident alien heirs cannot inherit, to proceed to forfeit the land to the state, and, if he refuses or neglects to do so, such alien heirs may enforce such action by mandamus. *State v. Thomas* 147
2. Mandamus will not lie to compel issuance of a warrant on current funds of a school district to pay a judgment for damages for breach of a teacher's contract in a former year. *State v. Putnam* 846

Master and Servant. See APPEAL AND ERROR, 30.

1. Compensation under the employers' liability act pursuant to sec. 3675, Rev. St. 1913, cannot be denied because of claimant's refusal to submit to an X-ray examination or photograph, where the uncontradicted evidence shows that neither is necessary. *United States Fidelity & Guaranty Co. v. Wickline* 21
2. Allowance of 50 per cent. penalty for delinquent payments under sec. 3666, Rev. St. 1913, as amended, Laws 1917, ch. 85, sec. 9½, *held* not unconstitutional. *United State Fidelity & Guaranty Co. v. Wickline* 21
3. The workmen's compensation act is remedial in its nature, and will be liberally construed. *United States Fidelity & Guaranty Co. v. Wickline* 21
4. Where plaintiff in a suit under the employers' liability act has released claims for compensation for a consideration, and seeks to avoid the release because of fraud, the burden is on her to establish fraud. *Swan v. Lincoln Terminal Co.* .. 36
5. Where a trifling amount is paid for release of claims under the employers' liability act, that fact may be considered, with other evidence, as tending to show fraud. *Swan v. Lincoln Terminal Co.* 36
6. Under sec. 3661, Rev. St. 1913, as amended by sec. 6, ch. 85, Laws 1917, an employer who offered to furnish to an injured employee services of a competent physician and medicines,

Master and Servant—*Continued.*

held not liable for such services, where the employee refused the offer and obtained services elsewhere. *Radil v. Morris & Co.* 84

7. The word "provided," as used in sec. 3661, Rev. St. 1913, as amended by sec. 6, ch. 85, Laws 1917, relating to liability of employer for medical services to injured employee, has the same meaning as "and" or "but." *Radil v. Morris & Co.* ... 84

8. An employee assumes the ordinary risks incident to his employment. *Dieter v. Doolittle Produce Co.* 152

9. Where an employee is induced to use defective machinery on the employer's promise to remedy the defect, he does not thereby assume the risk of injury from such defect. *Dieter v. Doolittle Produce Co.* 152

10. Under sec. 3659, Rev. St. 1913, an employee may sue a third party for damages, though his employer has settled with the employee in accordance with the workmen's compensation act, if he makes his employer a party to the action. *Muncaster v. Graham Ice Cream Co.* 379

11. Sec. 3659, Rev. St. 1913, being for the benefit of an employer who is liable to a workman injured by a third party's negligence, the workman may sue in his own name on an assignment from his employer. *Thomas v. Otis Elevator Co.* 401

12. Under the workmen's compensation act, commutation and payment in a lump sum by order of court are authorized only in the exercise of sound discretion upon an agreement or settlement by the parties. *Myers v. Armour & Co.* 407

13. In an action under the federal employers' liability act, where contents of a lost order were material to the issue, *held* not error to permit other similar orders to be introduced in rebuttal. *Metcalf v. Chicago, R. I. & P. R. Co.* 431

14. Injury to minor *held* to be one "arising out of and in the course of his employment." *Morris & Co. v. Cushing* 481

15. In an action under the federal employers' liability act, some specific act of negligence on the part of the employer must be alleged and proved. *Nanfito v. Chicago, B. & Q. R. Co.* .. 577

16. That an engine was moving four or five miles an hour in switching yards is not in itself evidence of negligence. *Nanfito v. Chicago, B. & Q. R. Co.* 577

17. On appeal by either party from award of compensation commissioner under employers' liability act, the district court of county where employee could sue employer at time of in-

Master and Servant—*Concluded.*

jury is the proper court to which to appeal. *Globe Indemnity Co. v. Larson* 673

18. On appeal from an award of the compensation commissioner, the district court has authority to hear the cause as a suit in equity and to enter final judgment. *United States Fidelity & Guaranty Co. v. Wickline* 681

19. On appeal from an award of the compensation commissioner, the district court, on proper application, may allow additional compensation and "waiting time" subsequent to the commissioner's award. *United States Fidelity & Guaranty Co. v. Wickline* 681

20. Where a claimant was willing to permit an X-ray photograph, but refused to allow injection of colorogol, such refusal did not forfeit her right to compensation under the employers' liability act. *United States Fidelity & Guaranty Co. v. Wickline* 681

21. The right to supervise, control, and direct the work is one of the tests for determining whether a person is an independent contractor or an employee, but not the sole test. *Barrett v. Selden-Breck Construction Co.* 850

22. Plaintiff *held* to be an independent contractor, and not an employee, under the workmen's compensation act. *Barrett v. Selden-Breck Construction Co.* 850

23. Under the employers' liability act, the inquiry respecting the extent of an employee's injury should be directed to his condition at the time of the examination or trial. *Updike Grain Co. v. Swanson* 872

24. Where an award has been made under the employers' liability act, an application may be made to the court by either party after six months for a modification of the award on the ground of increase or decrease of incapacity due to the injury. *Updike Grain Co. v. Swanson* 872

Mechanics' Liens.

1. A bond to secure execution of a building contract *held* to be an independent agreement as to payment of liens, not affected by a provision in the building contract requiring the owner to procure architect's certificates before making payments to contractor. *Karel v. Basta* 191

2. Under the provisions of a building contract, the owner who paid liens *held* subrogated to the right of materialmen to recover on the contractor's bond. *Karel v. Basta* 191

Mines and Minerals. See PUBLIC LANDS, 1.

1. Under ch. 7, Laws 1918, all leases of mineral lands must be made to the highest bidder in open competition and upon due notice. *Briggs v. Neville* 1
2. The lessee of mineral rights in public lands cannot interfere with the rights of an agricultural lessee to his damage, without satisfying such damage, and, if it cannot be otherwise adjusted, a court of equity will take jurisdiction. *Briggs v. Neville* 1

Mortgages. See HOMESTEAD, 1. HUSBAND AND WIFE, 2. NAMES. VENUE.

1. Where money to erect a building is to be advanced as the building progresses, the lien of the mortgage to secure same attaches when it is recorded. *Creigh Sons & Co. v. Jones* .. 706
2. Where a mortgage is given to secure money to be advanced as a building progresses, the advancement is not optional, but must be made as the building has progressed. *Creigh Sons & Co. v. Jones* 706
3. Lien of mortgage for money to be advanced as a building progresses dates from the recording of the mortgage, and is superior to liens for labor and materials furnished after the mortgage was recorded. *Creigh Sons & Co. v. Jones*..... 706
4. Grantor giving warranty deed *held* liable for damages from public road across the land conveyed. *Rollins v. Hopkins* .. 830
5. An application for a deficiency judgment that is a continuation of the original foreclosure suit is not within sec. 8257, Rev. St. 1913, providing that such proceeding must first be authorized by the court. *Bennett v. Winegar* 843

Municipal Corporations.

1. In suit to enjoin city from making paving contract, petition *held* not to state a cause of action. *Carr v. City of Lexington* 293
2. "Intersections," as used in sec. 4524, Rev. St. 1913, defined. *Price v. City of Lincoln* 366
3. When a petition to pave a certain street by its terms refers to the number of a paving district created by ordinance, such petition will be held to relate to the paving district as created. *Price v. City of Lincoln* 366
4. A notice of the sitting of the city council as a board of equalization to consider a proposed special assessment is sufficient if it comply substantially with the statute. *Price v. City of Lincoln* 366

Municipal Corporations—*Concluded.*

5. Where a city having power to contract exercised such power irregularly in the purchase of sewer pipe and used same, the allowance of the claim by the city council would not be set aside at the suit of a taxpayer. *Stickel Lumber Co. v. City of Kearney* 636
6. Property owners in a city of the second class *held* not entitled to enjoin assessment of benefits from paving on the ground that the estimate of cost was not made by the city engineer. *Diederich v. City of Red Cloud* 688
7. An assessment for paving cannot be enjoined because a street railway was allowed to remove its rails from the street to be paved, instead of paving the space formerly occupied thereby. *Diederich v. City of Red Cloud* 688
8. An assessment for paving cannot be enjoined because the contractor guaranteed the work for five years, nor because no formal personal notice of the formation of the district was given. *Diederich v. City of Red Cloud* 688
9. In absence of statute, a city, in maintaining a public park and a municipal beach for bathing, performs a governmental function, and is not liable for personal injuries to one while bathing, resulting from negligence of city officers. *Caughlan v. City of Omaha* 726
10. Municipal bonds should be issued in conformity to the proposition adopted by the electors, and to the statute in force at the time of their issuance. *Morgan v. City of Falls City* 795

Names.

"Asa W. Winegar," in a notice of service by publication in a foreclosure suit, is sufficient to confer jurisdiction to determine rights of one whose name is "Aseph W. Winegar." *Bennett v. Winegar* 843

Negligence. See MASTER AND SERVANT, 15, 16. RAILROADS, 2. STREET RAILWAYS. TRIAL, 9.

1. Where a petition charges several grounds of negligence, it is not error to submit any of the allegations of negligence which there is evidence to support. *Thomas v. Otis Elevator Co.* 401
2. In an action for damages from negligence of manager of a corporation, a verdict against the corporation is inconsistent with a finding that the manager was not negligent, but the verdict may be sustained if there is evidence of negligence of other agents of the corporation which caused the damages. *Nielsen v. Nebraska Gas & Electric Co.* 488

Negligence—*Concluded.*

3. Evidence of repairs made or precautions taken after an injury is not admissible to prove antecedent negligence. *Anderson v. Union P. R. Co.* 770

New Trial. See APPEAL AND ERROR, 6.

1. Where trial in action on note was had as if a reply had been filed alleging purchase of note before maturity, *held* not error to refuse a new trial on ground that reply was filed without leave. *Albany County Nat. Bank v. Gould* 275
2. The granting of a new trial for newly discovered evidence is within the sound judicial discretion of the trial court. *Peterson v. Kouty* 321
3. Motion for new trial on the ground of newly discovered evidence *held* properly overruled. *Metcalf v. Chicago, R. I. & P. R. Co.* 431

Notaries.

1. Evidence *held* to establish a *prima facie* case of negligence or misconduct on the part of a notary in acknowledgment of a deed. *Harrington v. Vogle* 677
2. Petition *held* to state a cause of action for damages for false acknowledgment of deed. *Harrington v. Vogle* 677

Nuisance. See INTOXICATING LIQUORS, 10.

Officers. See LIBEL.

1. A *de facto* officer may enjoin interference while in the possession of his office, and the suit does not prevent adverse claimants from trying the right of title to the office. *Kucera v. Allen* 221
2. Public offices are not subjects of lawful barter and sale. *Hand v. Bailey Co.* 450
3. In absence of malice, oppression in office, or wilful misconduct, public officers cannot ordinarily be held liable for mistaken exercise of discretion, or error in judgment, in performance of official duties. *Keifer v. Smith* 675
4. An appointee to fill a vacancy in a public office is generally entitled to the benefit of a statutory provision that officers shall hold over until their successors are elected and qualified. *State v. Willott* 798
5. The appointing power has no vacancy to fill upon the expiration of a term of office, where the incumbent is entitled to hold over until his successor is elected and qualified. *State v. Willott* 798

Officers—*Concluded.*

6. Where the tenure of a public office is fixed by statute, the appointing power cannot change the term as a condition of appointment. *State v. Willott* 798
7. An appointing board cannot exact of an appointee as a condition of making the appointment the surrender of any right, privilege, or emolument appertaining to the office, and this principle cannot be evaded by estoppel. *State v. Willott* .. 798
8. The time for which the right to hold over exists is as much a part of the incumbent's term of office as the fixed statutory period. *State v. Willott* 798

Parties.

1. Under sec. 7609, Rev. St. 1913, petition of intervention must be filed before trial, and intervention is a matter of right. *State v. Farmers State Bank* 194
2. In a proper case, equity may grant intervention any time before judgment. *State v. Farmers State Bank* 194
3. Petition *held* to be a petition in equity for leave to intervene, and not a petition of intervention under sec. 7609, Rev. St. 1913. *State v. Farmers State Bank* 194
4. When public officers are protecting public rights in litigation, a private person cannot intervene; but, when the contrary appears, any person interested in the proper administration of a public fund under control of a court of equity may intervene. *State v. Farmers State Bank* 194
5. Contract for sale of land *held* to be joint, and defendants properly joined in an action for failure to perform same. *Raddatz v. Christner* 621

Partition. See APPEAL AND ERROR, 16, 17.

In a partition suit, the district court has jurisdiction to construe a will determining the rights of the parties. *Mohr v. Harder* 545

Partnership.

1. The liability of partners for a tort growing out of the partnership business is joint and several, and they may be sued in the county where one partner resides, and summons may be issued to other counties for any person participating in the tort. *Wiley v. National Surety Co.* 68
2. In a suit for an accounting after dissolution of partnership, evidence *held* to sustain decree for plaintiff. *Gaunt v. Smith* 506

Paupers.

1. Averment in a petition of circumstances showing destitution and inability to procure assistance is a sufficient allegation of dependence, under sec. 5797, Rev. St. 1913, as against a demurrer. *Custer Township v. Board of Supervisors* 128
2. In counties under township organization having no established poorhouse, the support of the poor devolves upon the respective townships. *Custer Township v. Board of Supervisors* 128

Payment. See BILLS AND NOTES, 1-3.

1. Money deposited with a third person to satisfy a claim is not a satisfaction, unless the payee accepted such arrangement and released the debtor. *O'Brien v. Coon* 836
2. Admission of evidence, to overcome defense of payment by deposit with third person, that there was no money deposited, *held* not prejudicial, where no money was paid the payee, and there was no competent evidence that he had agreed to accept the deposit as satisfaction of his claim. *O'Brien v. Coon* 836

Pleading. See APPEAL AND ERROR, 18. APPEARANCE, 1. BILLS AND NOTES, 10. EMINENT DOMAIN, 3, 4. PARTIES. PAUPERS, 1.

1. Where a plea in the answer is tried and submitted as though traversed by the reply, which, before judgment, is amended to raise the issue in fact tried, the defect in the original reply is not ground of reversal. *Larsen v. Savidge* 79
2. The court may, on proper terms, allow supplemental pleadings to be filed while a cause is pending. *Miles v. Martin* .. 261
3. A pleading, though technically defective, will be regarded sufficient after judgment. *Durland Trust Co. v. Uttley* 461

Principal and Agent. See INSURANCE, 16.

1. An act of an agent, without actual authority, may be with such apparent authority as to bind the principal. *Union P. R. Co. v. Gregory Coal Co.* 421
2. If one repudiates an unauthorized contract of his agent, he must reject it as a whole. *State Bank v. Strickler* 490

Principal and Surety. See CONTRACTS, 3. INTOXICATING LIQUORS, 5, 6. SCHOOLS AND SCHOOL DISTRICTS, 1-6.

1. One furnishing labor or material used in construction of a building can sue the contractor and his sureties who have contracted with the owner to pay for same. *Forburger Stone Co. v. Lion Bonding & Surety Co.* 202

Principal and Surety—*Concluded.*

2. Where rights of laborers or materialmen have become fixed by furnishing labor or material used in building, no act or neglect of the contractor or owner will defeat such rights. *Forburger Stone Co. v. Lion Bonding & Surety Co.* 202

3. The dismissal by a creditor of a replevin suit against a defendant, who is the principal on a surety bond, where the sheriff's return shows "no property found," does not affect the surety's right of subrogation, and he is not thereby discharged. *Omaha Grain Exchange v. National Surety Co.* .. 820

4. A surety's right to subrogation to a creditor's rights stated. *Omaha Grain Exchange v. National Surety Co.* 820

Process. See PARTNERSHIP, 1.

Where the sheriff's return recites service of summons, there is a presumption of service, and the burden is on one seeking to impeach the return to establish its falsity by clear and convincing proof. *Campbell v. Harvard State Bank* 562

Public Lands. See CONSTITUTIONAL LAW, 1. MINES AND MINERALS.

1. The holder of an agricultural lease of school land has no right to potash and other minerals in the land, and the state can remove them from the land on making due compensation to the lessee for any injury, there being an implied reservation of the right of entry for that purpose. *Briggs v. Neville* 1

2. As against all parties except the United States, an entryman on public lands under the homestead laws is entitled to permanent improvements thereon. *Haney v. Collins* 782

3. An agreement by an entryman under the homestead laws to pay for improvements on the land is unenforceable for want of consideration. *Haney v. Collins* 782

Quieting Title.

In a suit to quiet title to land obtained by fraud, evidence *held* to sustain decree for plaintiff. *Raasch v. Lund Land Co.* 157

Railroads. See CARRIERS.

1. The state railway commission may prescribe the method in which the crossing shall be made, but the right to determine whether a highway shall extend across a railroad right of way is vested in the county board. *State v. Omaha & S. I. R. Co.* 40

Railroads—*Concluded.*

2. Evidence on issue of negligence in setting a car brake *held* insufficient to sustain a verdict for plaintiff. *Siebert v. Chicago, M. & St. P. R. Co.* 719

Receiving Stolen Goods.

The element of guilty knowledge necessary to constitute the crime of receiving stolen property is contained in sec. 8630, Rev. St. 1913, providing that the property must have been received "with intent to defraud the owner." *St. Clair v. State* 125

Referendum. See STATUTES, 4, 5.

Religious Societies.

1. When a church, governed solely within itself, holds property by purchase or donation for its use, the numerical majority of its membership may ordinarily control the right to the use and title of its property. *Kenesaw Free Baptist Church v. Lattimer* 755
2. A church, strictly congregational, may sever its ecclesiastical connection and still control its temporalities, where such change does not divert the property from the original trust, and civil courts will only inquire as to who constitutes the religious society and its legitimate successors, and award them the use of the property, and in case of a schism will not ordinarily inquire into the existing religious opinion of those who adhere to the original local organization. *Kenesaw Free Baptist Church v. Lattimer* 755

Remainders.

Limitations do not run against a remainderman until knowledge is clearly brought home to him that another is claiming title adversely. *Mohr v. Harder* 545

Replevin.

In replevin for possession of a threshing outfit mortgaged to secure notes, wherein plaintiff assumed burden of proving payment, evidence *held* to sustain verdict for plaintiff. *Wood v. Advance Rumley Thresher Co.* 377

Sales. See FRAUDULENT CONVEYANCES, 1.

1. A rule of a grain exchange that contracts for sale and delivery of grain do not expire until canceled by a party to the contract cannot bind a seller, without knowledge of the rule, who has only occasional dealings. *Vincent Grain Co. v. English* 531

Sales—*Concluded.*

2. Evidence in an action for damages for failure to deliver grain *held* to sustain verdict for plaintiff. *Vincent Grain Co. v. English* 531
3. The measure of damages for breach of contract of sale of grain is the difference between price agreed upon and price at time of breach. *Fahey v. Updike Elevator Co.* 245
4. Breach of contract of sale of grain *held* to have occurred when defendant declared a forfeiture. *Fahey v. Updike Elevator Co.* 245

Schools and School Districts.

1. Sec. 3840, Rev. St. 1913, requiring public officials to take bond from a contractor to pay for labor and materials used in a public building, is absolute, and the contract and bond will be construed to protect such laborers and materialmen if their terms are ambiguous, or if they admit of such construction. *Nye-Schneider-Fowler Co. v. Roeser* 614
2. If a contract for a school building provides that a bond shall be given, without stating the conditions, it will be presumed that the parties intended that the statutory bond should be given. *Nye-Schneider-Fowler Co. v. Roeser* 614
3. Where a contractor's bond for a school building contains conditions usual in a bond for a private building, with a proviso implying that it is for protection of laborers and materialmen, the contract and bond will be so construed. *Nye-Schneider-Fowler Co. v. Roeser* 614
4. Contract and bond for erection of school building *held* to require payment by contractor for labor and materials. *Nye-Schneider-Fowler Co. v. Roeser* 614
5. Though sec. 3840, Rev. St. 1913, requires two sureties on a contractor's bond for a school building, yet, if one signs as sole surety, he waives the defect. *Nye-Schneider-Fowler Co. v. Roeser* 614
6. Where a contractor's bond is accepted and acted upon by the school board, it amounts to approval, and the bond is not void because the contract provides for acceptance by the cashier of a bank, nor because it runs to the school district instead of the board. *Nye-Schneider-Fowler Co. v. Roeser.* 614
7. Current wages of a school teacher should be paid by warrant on the teacher's fund. *State v. Putnam* 846
8. A judgment for damages for breach of contract preventing a teacher from earning wages in a former year must be collected by special levy. *State v. Putnam* 846

Set-Off.

1. The provisions of the Code with respect to set-off are not exclusive. *Clark Implement Co. v. Wallace* 26
2. Insolvency of a party may be sufficient ground for a court of equity to allow a set-off not provided for by statute. *Clark Implement Co. v. Wallace* 26
3. The price paid for a note or claim, sought to be offset in equity, is immaterial. *Clark Implement Co. v. Wallace* 26

Specific Performance.

1. Ordinarily insolvency is not ground for specific performance of a contract for the sale of personalty. *Union Co-operative Co. v. Adolfson* 394
2. In a suit for specific performance of a contract for delivery of corn, evidence *held* insufficient to sustain allegations of petition. *Union Co-operative Co. v. Adolfson* 394
3. A suit for specific performance of an oral contract to convey land will not lie, unless the proof is clear, satisfactory and unequivocal that the contract was made and substantially performed by the party seeking its enforcement. *Powers v. Norton,* 761

State Railway Commission.

A state railway commissioner is not required to give an official bond. *State v. Hall* 17

Statute of Frauds.

1. Performance of services of such a character that their value cannot be estimated by a pecuniary standard is sufficient to take an agreement out of the statute of frauds. *Wehnes v. Marsh* 120
2. Past services not rendered in pursuance of an agreement made will not take the agreement out of the statute of frauds. *Wehnes v. Marsh* 120
3. Clear proof of a definite oral contract for a share of an estate and its substantial performance has the same force as a written contract. *Parks v. Burney* 572

Statutes. See TAXATION, 1-3.

1. Criminal statutes must be strictly construed, but courts will not give them a strained or unnatural construction. *State v. Stapel* 135

Statutes—*Concluded.*

2. Where the language of a criminal statute is ambiguous, that sense will be adopted that best harmonizes with the context and with the apparent policy and object of the legislature. *State v. Stapel* 135
3. When a statute is susceptible of two constructions, one making it valid, the other making its validity doubtful, the construction making it valid will ordinarily be given. *Union Stock Yards Co. v. Nebraska State Railway Commission* 224
4. Under sec. 2339, Rev. St. 1913, of the initiative and referendum act, any citizen may sue to enjoin the secretary of state from certifying or printing on the official ballot an act sought to be referred. *Barkley v. Pool* 623
5. When the certificate of a circulator of a referendum petition is impeached for fraud, the probative value of the certificate is destroyed, and none of the names appearing on the petition will be counted unless affirmatively proved to be genuine. *Barkley v. Pool* 629
6. Where, by amendment and repeal, the words of a former statute are changed, but it is intended that the statute shall continue to operate, it is not a repeal of the former law as amended. *Morgan v. City of Falls City* 795
7. Where an amending statute was passed with an emergency clause amending sec. 5119, Rev. St. 1913, and thereafter at the same session another act without an emergency clause was passed amending the same section, the first act was in force until the later act became operative three months after adjournment of the session. *Morgan v. City of Falls City* .. 795
8. The legislature must be presumed to know the changes in the former law made by amendments during its session, and to intend the consequences of its action. *Morgan v. City of Falls City* 795

Stock-Yards. See CONSTITUTIONAL LAW, 2. WAREHOUSEMEN.

Street Railways. See CARRIERS. TRIAL, 6.

1. It is the duty of the motorman of an interurban car to slow down his car as he approaches a frightened team, and his failure to do so is actionable negligence. *Novak v. Omaha & L. R. & L. Co.* 176
2. Where the state railway commission could not directly order cancelation of common stock of a carrier, it could not cancel it by indirection. *In re Lincoln Traction Co.* 229

Street Railways—*Concluded.*

3. The state railway commission, in authorizing a carrier to issue stocks or bonds, may determine the price and conditions of their sale, but cannot indirectly prevent such issue by imposing impossible or unnecessary conditions. *In re Lincoln Traction Co.* 229

4. In an action for injury to a child, evidence adduced *held* not proof of negligence under the doctrine of the last clear chance. *Spieler v. Lincoln Traction Co.* 339

5. Evidence *held* insufficient to prove charge of negligence in operating a car. *Spieler v. Lincoln Traction Co.* 339

Subrogation. See BANKS AND BANKING, 2. MECHANICS' LIENS, 2. PRINCIPAL AND SURETY, 3, 4.

Taxation.

1. In assessing total value of shares of stock for taxation under sec. 6343, Rev. St. 1913, as amended, ch. 108, Laws 1915, the assessor should include all the bank's property and assets at their true value, and mortgage securities on which the mortgagor has agreed to pay the tax should not be excluded. *Nemaha County Bank v. County Board* 53

2. Under secs. 6436-6443, Rev. St. 1913, a county board of equalization cannot increase the assessment valuation of all real estate in a precinct without a finding that the valuation does not bear a just relation to the valuation in other precincts in the county. *Peterson v. Brunzell* 250

3. Statutes in regard to powers and duties of boards of equalization are strictly construed, and in the exercise of their powers and duties the procedure prescribed must be followed. *Peterson v. Brunzell* 250

4. The laws of the United States permit the taxation of shares of national banks in the hands of shareholders. *State v. First Nat. Bank* 280

5. Taxation of capital stock of national banks or other property of such corporation to the banks is not permitted, except in case of real estate. *State v. First Nat. Bank* 280

6. If a tax is laid on property of a banking corporation, in assessing value of capital stock, a deduction may be made of value of tax free secureties. *State v. First Nat. Bank* 280

7. If a tax is laid on shares of bank stock in the hands of stockholders, no deduction of value of tax free securities of bank is required to be made by the laws of this state, or of the United States. *State v. First Nat. Bank* 280

Taxation—*Concluded.*

8. Under U. S. supreme court decisions, the subject of taxation determines whether a tax law interferes with the right of the United States to borrow money. *State v. First Nat. Bank* 280

9. A tax on property of a banking corporation consisting of obligations of the United States is not permitted. *State v. First Nat. Bank* 280

10. A tax on the value of national bank shares in the hands of stockholders is not a tax on the bank, and may be laid, and the fact that the value of the United States obligations are considered in ascertaining value of shares does not render the tax unlawful. *State v. First Nat. Bank* 280

11. The tax contemplated by sec. 6343, Rev. St. 1913, as amended, Laws 1915, ch. 108, relating to taxation of banking corporations, is a tax on shares of stock in the hands of stockholders, and is not a tax on property of the corporation. *State v. First Nat. Bank* 280

12. The words "capital stock," as used in sec. 6343, Rev. St. 1913, does not mean capital stock in the aggregate, but shares of capital stock in the hands of stockholders which are subject to taxation. *State v. First Nat. Bank* 280

13. When it appears to the county board of equalization that there has been apparent gross injustice in undervaluation, the valuation should be raised, and no complaint is required. *Welch v. Douglas County* 469

14. When action of the board of equalization in raising or lowering an assessment is attacked, the burden is on the person attacking it to show that it is wrong. *Welch v. Douglas County* 469

15. The remedy provided a taxpayer by subd. 1, sec. 6491, Rev. St. 1913, is available only when property has been wrongfully assessed, either because exempt or because the tax had already been levied and paid. *Janike v. Butler County* 865

16. The remedy given a taxpayer by subd. 1, sec. 6491, Rev. St. 1913, is not available to correct overvaluation from failure to separately assess a mortgage interest in land and to deduct the amount from the total assessed value of the land, but by complaint before the board of equalization. *Janike v. Butler County* 865

Tender. - See INSURANCE, 17.

Trial. See APPEAL AND ERROR. CRIMINAL LAW.

1. Where the evidence is not conflicting, *held* proper to direct a verdict in accordance therewith. *Swanback v. Sovereign Camp, W. O. W.* 34
2. Proffered instructions should be in writing. *Luther v. Luther* 46
3. In an action for value of crops, instruction as to their value as shown by undisputed testimony, leaving the jury to determine whether defendant was liable, *held* proper. *Watkins v. Union P. R. Co.* 75
4. A party desiring a more explicit instruction than that given should offer such an instruction. *Larsen v. Savidge* 79
5. A substantial conflict in evidence on an issue of fact presents a question for the jury. *Larsen v. Savidge* 79
6. In an action against a street railway company and the driver of an automobile, an instruction that the company's negligence could not be predicated upon its failure to sound gong would not take from jury evidence upon that issue as it might bear on the driver's negligence. *McArdle v. Omaha & C. B. Street R. Co.* 82
7. Where the evidence is substantially conflicting, the cause must be submitted to the jury. *Fox v. Scandinavian Mutual Aid Ass'n* 117
8. A party objecting to an instruction as indefinite should tender a suitable instruction. *Ellwanger v. Goss* 132
9. It may be reversible error to submit to the jury, as grounds for recovery, alleged acts of negligence which are wholly unsupported by evidence. *Spieler v. Lincoln Traction Co.* .. 339
10. It is generally not commendable practice, in stating issues to the jury, to quote at large from the pleadings, as it may mislead or prejudice the jury. *Spieler v. Lincoln Traction Co.* 339
11. Where undisputed evidence is sufficient as to the existence or nonexistence of a fact, it is not error to so state to the jury. *Thomas v. Otis Elevator Co.* 401
12. A motion to strike an entire answer is properly overruled, if part of the answer is admissible. *Metcalf v. Chicago, R. I. & P. R. Co.* 431
13. In an action on a note, when both parties move for a directed verdict, judgment for defendant has the effect of a verdict. *Bank of Benson v. Gordon* 508
14. The trial judge's statement of the issues should state them as the case is finally presented on the pleadings and evidence. *Dawson County Irrigation Co. v. Dawson County* ... 692

Trial—*Concluded.*

15. In an action by an irrigation company against a county for the wrongful removal of bridges, where defendant alleged that the bridges were out of repair and plaintiff consented to their removal, it was error to instruct that the burden was on plaintiff to show removal by defendant. *Dawson County Irrigation Co. v. Dawson County* 692
16. It is proper to refuse an instruction stating that the matters recited therein, relating to only a part of plaintiff's cause of action, would, if believed by the jury, be a complete defense. *O'Brien v. Coon* 836

Trusts. See ATTACHMENT, 1.

1. When title to land is obtained by fraud of a grantee, he becomes a trustee for the grantor. *Raasch v. Lund Land Co.* .. 157
2. A constructive trust is excepted from the operation of the statute of frauds, and parol testimony is admissible to prove the circumstances under which an alleged fraudulent conveyance of land was made. *Raasch v. Lund Land Co.* 157

Usury.

Transaction *held* to be usurious. *Sanford v. Hawthorne* 867

Vendor and Purchaser. See PARTIES, 5.

1. Where, with knowledge of all the facts on which a rescission of a contract for the sale of land may be based, the vendee does some act which prevents him from placing the vendor *in statu quo*, he cannot claim a rescission. *Stewart v. Tate* 28
2. An executory contract for sale of lands which includes the homestead, not signed by the wife, is obligatory upon the husband, except as to the homestead. *Davis v. Merson* 397
3. The burden of proof is upon one who claims to be an innocent purchaser of property procured by fraud, to establish that he bought without knowledge or notice of the fraud. *Justice v. Shaw* 423
4. Agreement to "give a good and sufficient warranty deed and abstract" contemplates a merchantable title. *Raddatz v. Christner* 621
5. Contract *held* joint. *Raddatz v. Christner* 621
6. An equivocal answer intended to convey to an intending purchaser of land a false impression, but for which he would not have contracted, *held* to justify setting aside the contract. *Campbell v. Peterson* 787

Venue. See PARTNERSHIP, 1.

A suit to establish an equitable mortgage on realty is properly brought in the county where the realty is situated, and summons may issue to any county where a defendant may be found. *Miles v. Martin* 261

Warehousemen.

1. Under its general police power, the state may regulate charges at public stock-yards. *Union Stock Yards Co. v. Nebraska State Railway Commission* 224
2. The legislature may delegate to the state railway commission power to fix and regulate charges at public stock-yards. *Union Stock Yards Co. v. Nebraska State Railway Commission* 224
3. An order of the state railway commission fixing a charge to be made for corn furnished by a public stock-yards company to its patrons, allowing nothing for the use of the property engaged in the service, *held* erroneous. *Union Stock Yards Co. v. Nebraska State Railway Commission* 224

Waters. See TRIAL, 15.

1. A dam built across a creek to impound water is within the exception in sec. 3444, Rev. St. 1913, providing that a reservoir holding water back and raising it for application to lands of a higher level or to give a greater head for power shall not be considered a "storage reservoir." *Barnum v. Handschiegel* 594
2. An upper riparian owner who constructs a dam across a creek channel is not liable for damages arising from the breaking of the dam, unless it has been negligently constructed or maintained. *Barnum v. Handschiegel* 594
3. In an action for damages from breaking of a dam across a creek, the burden of proof is on plaintiff; but, when he has established the breaking and resulting injury, he makes a *prima facie* case, and defendant must then show that the dam was not negligently constructed or maintained. *Barnum v. Handschiegel* 594
4. Rights and duties of owners of an irrigation system, with reference to bridges over public highway, stated. *Dawson County Irrigation Co. v. Dawson County* 692

Wills. See PARTITION.

1. Notice of probate of a will as provided in sec. 1303, Rev. St. 1913, *held* sufficient to confer jurisdiction. *In re Estate of Kelly* 513

Wills—*Concluded.*

2. The county court has power to vacate judgment of probate procured by fraud and to permit a contest of the will. *In re Estate of Kelly* 524

3. A judgment of probate on a proper petition after legal notice, and not challenged for a year and a half, should not be vacated on doubtful or equivocal proofs on the issue of testator's incompetency or of undue influence. *In re Estate of Kelly* 524

4. Evidence on issues of incompetency and of undue influence *held* insufficient to sustain findings for plaintiff on his petition to vacate judgment of probate and to contest the will. *In re Estate of Kelly* 524

5. Devise construed to convey a life estate, with remainder over. *Kluge v. Kluge* 534

6. Where the name of a deceased child was inadvertently inserted in a will instead of that of a living child, the district court has power to correct the mistake. *Mohr v. Harder* 545

7. A contract to take a boy "as a son" and give him "a child's share of my property" is sufficiently definite as to what the boy is to receive, notwithstanding the fact that a child may be disinherited by will, or that it is uncertain how many heirs there will be. *Parks v. Burney* 572

8. Devise *held* to create an estate upon a condition subsequent. *Marble v. City of Tecumseh* 625

9. Where a city fails to comply with a condition attached to a devise of land for a public park within a reasonable time, heirs of testatrix may sue to recover the property. *Marble v. City of Tecumseh* 625

10. If a deed or will conveys an absolute title, an inconsistent clause limiting the title will be disregarded. *Grant v. Hover* 730

11. When there are different provisions in a will as to the disposition of specified property, they must be construed together, to ascertain the testator's intention. *Grant v. Hover* 730

12. A devise in fee simple and an attempt to devise over must be construed together, to ascertain whether the testator intended to convey a life estate to one and remainder to another. *Grant v. Hover* 730

13. Will construed, and *held* to give daughters a life estate, with remainder to "their children or heirs." *Grant v. Hover* 730

14. "Children or heirs" construed to be children of devisees, if they left any; otherwise, their natural heirs. *Grant v. Hover* 730