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M. O. CUNNINGHAM, APPELLANT, v. DOUGLAS COUNTY ET AL., APPELLEES.

FILED APRIL 17, 1920. No. 21422.

1. **Counties:** TAXATION: CONSTITUTIONAL LAW. Section 1, S. F. No. 1, passed by the special session (Thirty-Ninth) of the legislature, which provides that the county shall "have power to levy a tax not exceeding, together with all other tax levies, fifteen (15) mills on the dollar upon the actual or full market valuation of the property in the county," to create a fund for the payment of certain bonds and interest thereon, is not unconstitutional as violative of section 5, art. IX of the Constitution, limiting taxes to $1.50 per $100 valuation.

2. **Constitutional Law:** TAXATION: CLASSIFICATION. "The power of classification rests with the legislature, and this power cannot be interfered with by the courts, unless it is clearly apparent that the legislature has by an artificial and baseless classification attempted to avoid and violate the provisions of the Constitution prohibiting local and special legislation." *Allan v. Kennard*, 81 Neb. 289.

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

*M. O. Cunningham, pro se.*

*Abel V. Shotwell, contra.*

*Jesse L. Root, Byron Clark, Edson Rich, C. A. Magaw, J. A. C. Kennedy, Wymer Dressler, E. P. Holmes, B. F. Good* and *Paul F. Good, amici curiæ.*

CORNISH, J.

Action to enjoin the issuance of certain bonds by the defendant county, and the levying of taxes to provide a fund for the payment of principal and interest accruing on the bonds. Plaintiff appeals from a judgment dismissing his action.

Section 1 of S. F. No. 1, passed by the special session (Thirty-Ninth) of the legislature, authorizes an issuance

of such bonds, and provides that the county shall "have power to levy a tax not exceeding, together with all other tax levies, fifteen (15) mills on the dollar upon the actual or full market valuation of the property in the county," to create a fund for their payment.

It is contended that this enactment is in contravention of section 5, art. IX of the Constitution, as follows: "County authorities shall never assess taxes the aggregate of which shall exceed one and a half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this Constitution, unless authorized by a vote of the people of the county."

Section 1, art. IX of the Constitution, is as follows: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct," etc.

The contention is that, inasmuch as S. F. No. 1 authorizes the tax and bond issue without a vote of the people, the law is unconstitutional, if the tax proposed exceeds the limit provided in section 5, art. IX of the Constitution, that the valuation meant in section 5 is the same as that meant in section 1 and is a "value to be ascertained" by legislative method, and not actual or market value as provided in S. F. No. 1; that in pursuance of section 1, *supra,* the legislature has fixed valuation for assessment and taxation purposes at 20 per cent. of actual value, and has forbidden a levy of taxes in excess of $1.50 on assessed valuation (Rev. St. 1913, secs. 954, 6309); that S. F. No. 1 does permit a tax in excess of $1.50 on assessed or taxable value so ascertained, and hence is unconstitutional.

We are of opinion that the question whether the constitutional limitation is to be determined by taking

property at its actual or market value, on the one hand, or by taking it at its assessed valuation, or valuation ascertained in a manner prescribed by the legislature, on the other, is not involved in considering the validity of S. F. No. 1. Conceding that the valuation meant in section 5, art. IX of the Constitution, is not actual or market value, but the valuation ascertained in a manner prescribed by legislative enactment, S. F. No. 1 cannot be said to violate the constitutional provision. It does prescribe the manner in which the valuation of the property, subject to the tax, is to be ascertained. It is to be valued at its actual or market value for the purpose of making a levy to raise the tax provided for. Such is its taxable value. It is true that, for the purposes of the particular tax, the property being taxed is taken from under the provisions of section 6300, Rev. St. 1913, and to that extent may be said to amount to a repeal of the provisions of section 6300, as applied to the particular tax and property; but it is also true that the valuation is as much one ascertained by legislative method as if, by law, it were assessed in accordance with section 6300. The tax, combined with others, not being in excess of $1.50 for $100 valuation. and the valuation not being greater than the actual or market value, S. F. No. 1 can hardly be said to be contrary to the constitutional provision.

It is also contended that S. F. No. 1 is unconstitutional as in contravention of section 15, art. III of the Constitution, prohibiting certain special legislation, and containing, among others, this provision: "Where a general law can be made applicable, no special law shall be enacted."

The act provides that, when any county of 150,000 or more population, by reason of fire, riot or other casualties, suffers a partial destruction of its courthouse or other public building, or destruction of records, the county board may, for the purpose of repairing the building or restoring records and other property named, with-

out a vote of the people, issue and sell bonds and levy taxes, as above described.

Whether such a classification, based on population and the kind of emergency described, is permissible is a difficult question. It is, in the first instance, a question of legislative discretion. The courts will not interfere with the discretion lodged in the legislature unless it is apparent that the classification is artificial and baseless, showing an attempt upon the part of the legislature to violate the provision of the Constitution prohibiting local and special legislation. With much doubt and hesitation, we have concluded that we ought not to hold the enactment void for this reason. *Allan v. Kennard*, 81 Neb. 289; *Weston v. Ryan*, 70 Neb. 211; *State v. Hunter*, 99 Neb. 520.

AFFIRMED.

ROSE, J., not sitting.

LETTON, J., dissenting.

In 1919, the authorities of Douglas county were confronted with a serious situation, fraught with possibility of grave danger to the public welfare. In this emergency the governor was prevailed upon to call a special session of the legislature, the county authorities evidently believing that by the passage of an act of the legislature more speedy relief might be afforded than available by the usual, ordinary and legal method of submission of the question of raising money by the issuance of bonds to a vote of the people of the county.

By the act in question, in counties of 150,000 or more population, in which the courthouse, jail or other county public buildings have been injured by fire, riot, mob, storm, or other casualty, the county board is given power to issue bonds and levy a tax to pay the same, "not exceeding, together with all other tax levies, fifteen (15) mills on the dollar upon the actual or full market valuation of the property in the county." Did the legislature mean to allow the county authorities of such a county

to raise five times as much money for general county purposes as they had formerly been empowered to levy? If so, and the language seems susceptible of no other interpretation, the result of the act is that in the counties affected the taxes may be fivefold as much in proportion as in all other counties of the state.

To allow the county authorities of such counties to impose at their discretion a fivefold greater burden of taxation for county purposes without a vote of the people makes an arbitrary distinction between counties without any reasonable basis of classification. In any county in the state the public buildings are liable to be injured by fire, riot, mob, storm, or other casualty. It is a matter of public knowledge that courthouses, jails, and other public buildings have been destroyed by such forces in quite a number of counties in this state. What reasonable basis is there for making this distinction? It is true a classification by population so as to provide for local administration has usually been upheld, but there is a clear distinction between such legislation and the act we are considering. I realize the conditions in Douglas county, but I believe the majority opinion clearly exemplifies the old adage that "hard cases make poor law." In my judgment the act is a special law, and violates section 15, art. III of the Constitution, providing that "In all other cases where a general law can be made applicable, no special law shall be enacted."

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J. W. GRAY, APPELLANT, v. RAYMOND J. MIDDAUGH, APPELLEE.

FILED APRIL 17, 1920. No. 20700.

Depositions: SUPPRESSION. "In the absence of a statute or standing court rule forbidding the taking of depositions during a term time of the court in which the cause is pending, the fact that they are so taken is not ground for suppressing them." *Donovan v. Hibbler*, 3 Neb. (Unof.) 652.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Former judgment of affirmance by commission (no opinion) vacated, and judgment of district court reversed.*

*Joseph E. Daly* and *Frederick L. Spear,* for appellant.

*J. C. Cook, contra.*

DEAN, J.

Plaintiff sold a farm tractor to defendant for $1,350, for which he gave two promissory notes, one for $600 and one for $750. The $600 note was paid. On defendant's refusal to pay the $750 note, for alleged failure of consideration, and a repair and freight bill for $76.73, this action was begun and tried to a jury. Defendant recovered judgment for $400 on his answer and cross-petition. Plaintiff appealed, and the case being submitted to the supreme court commission the judgment was affirmed. On plaintiff's application we granted a rehearing and the case was reargued to the court.

For reversal plaintiff relies in part on the suppression of plaintiff Gray's deposition on the ground, as appears from the court's findings, that notice was served and the deposition taken while the term of court was in session, in which the case was pending and subsequently tried, and while defendant's attorney was engaged in trial work in the same court. Service of notice to take the deposition was accepted by defendant's counsel without objection.

It does not appear that there is a standing court rule forbidding the taking of depositions during term time of the court. The suppression of the deposition is not based on that ground, as it doubtless would have been had there been such a rule. Defendant does not controvert plaintiff's statement in his brief that there is no such rule in that court. In the motion to suppress it appears that defendant's counsel was county attorney and that the preparation for and the trial of a criminal

case then pending at that term engaged his official attention, and that his attendance at the taking of the deposition was thereby prevented.

A public prosecutor cannot, of course, neglect a public duty to attend to the case of a private litigant. No more should the right of a private litigant to have his deposition taken and submitted, in short his right to be heard in his own behalf, be denied merely because counsel for the opposite party is engaged in the prosecution of public business. It does not appear that defendant was unable to procure other competent counsel to attend at the taking of the deposition.

While we do not commend the practice of taking depositions in term time if it can reasonably be avoided, we cannot, in the absence of a statute or standing court rule forbidding the practice, deny the right of a party to do so. *Donovan v. Hibbler,* 3 Neb. (Unof.) 652. At times it might be that imperative necessity would so demand. We do not pass on any question in respect of the merits of the deposition other than to say that it seems to be material, and that, subject to the rules of practice for the submission of evidence, it should have been submitted to the jury.

Ordinarily when, under the rule announced in the *Donovan* case, a deposition is suppressed that contains material evidence, the case should be continued, and in some instances on such terms as to the court may seem just. We think the court erred in suppressing the deposition.

There is some controversy over an instruction on the question of warranty, which reads: "The jury is instructed that there is an implied warranty in the sale of any article of machinery that the same is reasonably fit for the purpose for which it is sold." Plaintiff argues that, an express warranty having been pleaded by defendant, the instruction is erroneous, and cites these authorities in support of his position. *Smith v. Evans,* 13 Neb. 314; *Detroit Trust Co. v. Engel,* 192 Mich. 62.

While error might be predicated on the instruction if given, the record does not indicate that it was given, and we do not therefore decide the question.

Our former decision is vacated. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

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## IN RE ESTATE OF EVA WIELAND.
## BARBARA WIELAND, APPELLANT, V. ESTATE OF EVA WIELAND, APPELLEE.

FILED APRIL 17, 1920. No. 20840.

1. **Work and Labor:** SERVICES OF CHILD. When a child renders services for a parent after attaining majority, and while the family relation continues, the presumption is that such services were rendered gratuitously.

2. ———: ———. To overcome the presumption that services rendered by a child for a parent, after attaining majority and during the continuance of the family relation, were not rendered gratuitously, it must clearly and satisfactorily appear that the parent promised or agreed to pay therefor.

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

*Ambrose C. Epperson* and *Tibbets, Morey, Fuller & Tibbets,* for appellant.

*John B. Scott, J. E. Ray, Charles H. Sloan, F. W. Sloan* and *J. J. Burke, contra.*

DEAN, J.

Plaintiff sought to recover on two claims filed against her deceased mother's estate. One claim, over which there was no controversy, was based on a promissory note executed by her mother, on which plaintiff recovered $1,621.57. The claim in dispute was for personal

services alleged to have been performed for her mother during a period of years immediately preceding her death. The trial was to the court. At the close of plaintiff's testimony, on motion of the administrator, the claim for services was disallowed on the ground that it was not supported by the evidence. Plaintiff appealed.

Aside from a few interruptions, plaintiff, who never married, was a member of her mother's family from childhood, and for many years after her majority, and as such she shared with her parent the privileges and the burdens that are incident to family life. To meet her personal expenses she had access to the common family fund, of which no account was kept. The note in question was renewed on two or more occasions, the last renewal being shortly before her mother's death. The interest as it matured was paid to plaintiff by her mother from time to time. Aside from the note and interest, it does not appear that her mother was at all indebted to her daughter; neither can it be implied from the evidence that there was a promise or agreement on the part of her mother that contemplated payment for services. If she ever entertained an intention to pay, or made a promise from which such intention could be inferred, it does not appear in the record. Had she intended that payment should be made out of her estate, it seems that she would have made this important fact known in some way to some of her friends or acquaintances. But nothing of the sort appears.

Plaintiff cites *Bell v. Rice,* 50 Neb. 547; but we do not think the citation is in point. In that case a claim was allowed against a decedent's estate for services rendered and expenses incurred by a stepdaughter in the care of a demented stepfather. Briefly the facts are these: Rice was a resident of Illinois, who became an imbecile about two years before he died. Certain persons in that state having his property and business in charge, a conservator never having been appointed, placed him in charge of the stepdaughter, who was married, and who

was a resident of this state. Pursuant to and solely upon their request he was brought to Nebraska by her and installed in her home, where he remained until his death, about three months thereafter. Until he died she furnished him with board, lodging, medicine, and medical attendance, and the care that a demented person requires. It plainly appears that the stepdaughter was in no sense a member of Rice's family, she having long since married and left the parental roof, nor was Rice a visitor at her home by her invitation. In that case the claimant prevailed on the ground that the services were rendered and the necessaries furnished under such circumstances as to overcome the presumption that they were gratuitously furnished, a presumption that ordinarily prevails where the relationship of the parties is clearly that of parent and child.

We do not think the facts before us come within the meaning of the *Bell* case. To overcome the presumption that services rendered by a child for a parent, during the continuance of the family relation, were not rendered gratuitously, it must clearly and satisfactorily appear that the parent promised or agreed to pay therefor. The judgment is right, and must be

AFFIRMED.

LETTON, J., not sitting.

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G. H. WATKINS, APPELLEE, V. MICHAEL H. HAGERTY ET AL., APPELLANTS.

FILED APRIL 17, 1920. No. 20926.

1. **Principal and Agent:** POWER OF ATTORNEY: CONSTRUCTION. A power of attorney will be construed with respect to the natural import of the language used, keeping in view the purpose and intent of the grantor.

2. ———: ———: REVOCATION. Where a power of attorney was executed by husband and wife with reference to real estate owned

by the husband, in which the wife had no interest save and except by virtue of the marital relation, her death will not revoke the power of attorney.

3. ———: ———: INCOMPETENCY OF GRANTOR. Parties dealing in good faith with an agent acting under a power of attorney which is apparently regular and in full force will not be defeated in their rights by a subsequent adjudication that the grantor of the power is mentally incompetent.

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

*Halligan, Beatty & Halligan,* for appellants.

*Hainer, Craft & Lane, C. D. Ritchie* and *F. E. Williams, contra.*

ALDRICH, J.

This action in equity was commenced in the district court for Morrill county, Nebraska, by G. H. Watkins, to foreclose a certain mortgage executed by John D. Hagerty, as attorney in fact for John Hagerty, for the sum of $8,000, dated April 28, 1916. John Hagerty, Charles J. Bills, Andrew D. Seybolt, L. A. Engelhaupt and Michael H. Hagerty were defendants. While this case was pending John Hagerty died, the case was revived in the name of the administrator, Michael H. Hagerty, and in the name of the heirs of the estate. The defendants Charles J. Bills and Andrew D. Seybolt filed disclaimers and the action has been dismissed as to them. Anna H. Weir filed a petition of intervention seeking the foreclosure of a mortgage executed by John D. Hagerty to Charles J. Bills on April 1, 1909, in the principal sum of $3,000, which mortgage was later assigned to the intervener, Anna H. Weir. The defendant L. A. Engelhaupt filed a cross-petition to foreclose a mortgage also executed by John D. Hagerty, as attorney in fact of John Hagerty, to Andrew D. Seybolt in the principal sum of $3,500. This was executed September 11, 1912, and afterwards duly assigned to the cross-petitioner, L. A. Engelhaupt. The answer to plaintiff's petition, also

to petition of intervener, and the answer to pleadings filed by cross-petitioner, set up as defense that John D. Hagerty, attorney in fact for John Hagerty, did not have authority to execute the mortgages being foreclosed by plaintiff and cross-petitioner, for the reason that power of attorney executed by John Hagerty to John D. Hagerty was exhausted and *functus officio* from and after April 2, 1909, at which time John D. Hagerty had procured a loan under the power of attorney from one Charles J. Bills; that this power of attorney did not authorize John D. Hagerty to execute more than one mortgage upon the land therein described; set up the further defense that this power of attorney was a joint power executed by John Hagerty and Ann Hagerty, his wife; that the death of Ann Hagerty on July 18, 1910, revoked the power of attorney. Further defense is made that John Hagerty had become *non compos mentis* in May, 1910; and being in this condition the power of attorney was revoked by operation of law.

Power of attorney executed by John Hagerty and his wife, Ann Hagerty, is as follows: "Power of Attorney. Know all men by these presents, that we, the undersigned, John Hagerty and Ann Hagerty, husband and wife, both of the city of Denver, state of Colorado, have this day made, constituted and appointed by these presents to make, constitute and appoint John D. Hagerty, also of the city of Denver, state of Colorado, our true and lawful attorney for us and in our names, place and stead to borrow whatever sum of money he may deem proper from any person willing to advance the same, and for him, our said attorney, to give as security for the payment thereof our ranch known as the north half of the southeast quarter and lots numbered six (6) and eight (8) of section one (1) in township nineteen (19) north of range fifty (50) west; and the south half of the northeast quarter and the south half of the northwest quarter of section one (1), township nineteen (19) north of range fifty (50) west, and the government lots num-

bered one (1), two (2), three (3) and four (4), of section one (1), township nineteen (19) north of range fifty (50) west, and the northeast quarter of section twenty-two (22), in township twenty (20) north of range forty-nine (49) west, all said premises being situated in the state of Nebraska; hereby authorizing said attorney in fact to sign our names to whatever papers that may be necessary; to sign, execute and deliver any mortgage and note or notes that may be required and to deliver the same to the party advancing the money therefor and to collect and receive the money; herewith giving and granting unto the said John D. Hagerty, our attorney in fact, full power to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as we might or could do if personally present, hereby ratifying and confirming all that said attorney shall lawfully do or cause to be done by virtue hereof.

"In witness thereof we have hereunto set our hands and seals this the 15th day of March, A. D. 1909.

"John Hagerty. Ann her x mark Hagerty."

The district court decreed foreclosure of the mortgages, and the case is brought to this court on appeal.

The issues presented by the briefs may be summarized in these propositions: First, did the power of attorney itself by its express terms authorize John D. Hagerty as attorney in fact to execute but one loan? second, the power of attorney having been executed by John Hagerty and wife, Ann Hagerty, did the death of the wife soon after the execution of the first mortgage revoke the power of attorney? third, did the fact that John Hagerty was *non compos mentis* from and after May 1, 1910, revoke said power of attorney?

Section 6195, Rev. St. 1913, provides: "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 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."

One of the purposes the principal had in granting this power of attorney to his son was to borrow money to improve and carry on the ranch herein described. He was authorized to do everything necessary to be done in and about the above-mentioned premises, as fully to all intents and purposes as he himself might or could do when in health.

The principal also authorized his agent to sign and execute any mortgage necessary to secure payment of any note or notes that may be required by the party advancing money therefor. Then it is plain that the principals intended to secure by mortgage or mortgages whatever money was borrowed on a note or notes. It is proper to say that, since a mortgage is simply collateral security to a note, when the principal authorized the agent to sign and execute a note or notes that may be required by the party advancing the money, he also intended him, if necessary, to execute a mortgage or mortgages as security for each note signed and delivered.

In an instrument of the character of the one in question it is incumbent upon us to constantly keep in view the nature and purpose of the instrument to be construed, and also the grantor's intention. The grantors intended to extend authority to execute as many notes as were necessary to get sufficient money, and that power carries with it the authority to execute as many mortgages as were necessary to secure any note or notes executed and delivered. There was granted also to this agent by the principal plenary power to effect this disposition; then, the power given to an agent conveys as much interest as may be necessary to secure the money, and to give a note or notes and further a mortgage or mortgages which secure the note or notes. This carries

out the expressed intent of the principal as manifest in the power of attorney. There is in this power of attorney absolute authority granted to dispose of this property by mortgage or mortgages. The principal intended the agent should borrow as much money from whomsoever he could get it as he needed to carry on the ranch, and also to secure payment of the note or notes by giving as security therefor a mortgage on the ranch. This the agent did, and he executed the intent for which the authority was granted him. 31 Cyc. 1058. The intention of the principal is to be gathered from the whole instrument. It may be deemed by some that the authority granted was ambiguous. If so, following the rule laid down by the court in *Osborne & Co. v. Ringland,* 122 Ia. 329, we say that, where a written appointment as agent admits of two constructions relative to the authority conferred, it should be construed most favorably to a third person dealing with the agent. As a matter of law we hold that, in a power of attorney issue between a third person and the principal as to the agent's authority as evidenced by a written instrument, the principal is bound by the apparent interpretation which he himself has put upon the appointment. It is a matter of record that he conveyed to the agent every authority to do the things which he himself would approve of, were he present.

In construing the instrument in question we should keep within view the intention of the grantor. The mortgages foreclosed herein are valid and subsisting liens. Under the power given, the agent was not limited to one mortgage.

Another issue presented for consideration is: Would the death of Ann Hagerty, wife of John Hagerty, revoke the power of attorney? We hold that the death of the wife would not revoke the power of attorney because Ann Hagerty had no title or interest in and to the property save and except the interest that a wife has in her husband's property. It is stipulated that none of the

property mortgaged was used as a homestead. Then, the only interest possessed by Ann Hagerty was contingent, remote and depended upon the happening of a certain event in the future before her interest from the nature of things would attach. And as she died before her husband, her contingent interest passed with her. The power of attorney, so far as its continuation was concerned, could have no possible relation, and it would continue in the same way as it would have continued if her husband had died and she had owned the real estate. The death of her husband does not revoke the power of attorney given with reference to her separate estate. *Skirvin v. O'Brien,* 43 Tex. Civ. App. 1. The wife's separate estate is not here for consideration, hence her death prior to that of her husband does not revoke the power of attorney granted by husband and wife. The rule applies with equal force to the husband as well as the wife.

The next question is: Was John Hagerty *non compos mentis* at the time these mortgages were executed, and did the mortgagees know of this mental condition? This issue presents a question of more or less speculation and theory that is not easy to satisfactorily answer. We are convinced that in determining the last issue in this case the son, John D. Hagerty, acted in good faith and within the scope of his authority in administering the power of attorney granted him by his parents in their lifetime. At any rate these brothers and sisters had arrived at the period of manhood and womanhood, were in full possession of their faculties, they knew what their brother, acting under the power of attorney, was doing, and we are satisfied that if he was borrowing money and using it for his benefit and against their interest they would have invoked the aid of the courts in revoking the authority and preventing the possibility of his squandering the estate. They made no complaint, took no steps for their own protection, and allowed innocent

parties to loan their brother money in good faith, and they cannot be heard at this time to obtain the benefit of what might be termed a fraud when they could have prevented it. The mortgagees not knowing of the mental condition of John Hagerty, and the power of attorney held by John D. Hagerty being regular on its face and duly recorded and recognized in all its force by all the heirs, they are estopped from denying at this time its validity.

We might discuss the question of the mental incompetency of John Hagerty, and would do so if the record disclosed that the mortgagees acted with full knowledge of his mental condition. We are convinced that they acted in good faith.

Judgment is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

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UNION PACIFIC RAILROAD COMPANY, APPELLEE, v. CHARLES WOOSTER ET AL., APPELLANTS.

FILED APRIL 17, 1920. No. 20967.

1. **Adverse Possession:** RAILROAD RIGHT OF WAY. The Norris act will not be given retrospective operation to aid an abutting landowner in acquiring title to part of a railroad right of way by adverse possession.
2. **Railroads:** RIGHT OF WAY: ABANDONMENT. To constitute an abandonment by a railroad company of a part of its right of way, there must be a clear intention to abandon. Evidence examined; *held*, there was no intention to abandon that portion of the right of way in suit.
3. ———: ———: ———. Whenever a railroad company operates trains daily over its right of way, it is a constant assertion of its intention to use and occupy the full width of same for railroad purposes.
4. ———: ———: ———. Mere nonuser by a railroad company of a part of its right of way does not constitute an abandonment of such unused portion.

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

*W. H. Thompson* and *Lloyd G. Thompson,* for appellants.

*N. H. Loomis, Edson Rich* and *John C. Martin, contra.*

ALDRICH, J.

The Union Pacific Railroad Company commenced this action in the district court for Merrick county to recover certain parts of its railroad right of way. The land in controversy constitutes portions of the outer margin of the right of way on the north and south sides of the track where the right of way crosses defendants' quarter section of land. The court below rendered judgment in favor of plaintiff and defendants appeal.

Defendants claim title by virtue of adverse possession and abandonment as provided in the Norris act of June 24, 1912, 37 U. S. St. at Large, ch. 181, p. 138.

The land in question is part of a 400-foot right of way granted to a predecessor of plaintiff company by congressional act of 1862, which grant included each alternate numbered section along the line of railroad, being the odd-numbered sections. The Union Pacific Railroad company acquired its title to the right of way by purchase at foreclosure sale in the year 1898, when certain mortgages and a lien held by the United States government were foreclosed.

Defendants contend that section 2 of the Norris act, "That any part of the right of way heretofore mentioned which has been, under the law applicable to that subject, abandoned as a right of way is hereby granted to the owner of the land abutting thereon," effects title in their favor. Then it would indicate this act might affect antecedent rights, and, if it does, then it contravenes the federal Constitution. A statute will not be permitted to invade vested rights, nor to take property without due process of law. This act of June

24, 1912, cannot be heard to affect the question of adverse possession before the year 1912. That question is not in this case. This law was before the United States supreme court in the case of *Union P. R. Co. v. Laramie Stock Yards Co.*, 34 Sup. Ct. Rep. 101 (231 U. S. 190) and there it was expressly said: "A retrospective operation will not be given to the provision of the act of June 24, 1912," etc. This rule is just and meets the issue herein with respect to adverse possession accurately.

Then it is plain that, if the question of adverse possession has already been foreclosed in the *Laramie Stock Yards* case, *supra,* the remaining question is: Have the defendants acquired the property through abandonment and nonuser?

It must be conceded that prior to the Norris act the plaintiff company had acquired a certain public easement in its right of way which could not be disturbed so long as the act of 1862 was in operation, and also it is true that a purchaser at a valid foreclosure sale acquires all the title, rights and interest of the mortgagor in and to the mortgaged property as the same existed at the date of the sale. 27 Cyc. 1723. It is true that plaintiff company acquired whatever easement had been granted by the government to its predecessors, and that was the right of way consisting of a strip of land 400 feet wide from the city of Council Bluffs to the Pacific ocean. Then there would be no abandonment of this right of way or any portion of it since the acquisition of title at the foreclosure proceedings in 1898. Since, as we have pointed out, the United States supreme court has interpreted the Norris act as not being in any sense retroactive with respect to affecting antecedent rights, then it follows fundamentally that the plaintiff could not have done anything to be of any benefit to defendants in the acquisition of title. To give this portion of the act the effect claimed by the defendants would give

it a retroactive operation, which cannot be done to divest the railroad company of antecedent rights.

What are the facts with reference to abandonment? Is there any evidence of actual discontinuance of the use of this right of way for railroad purposes? Is there any evidence of actual intention not to use the land in controversy for railroad purposes? Is it not true that plaintiff since 1898 has never deeded away a foot of its right of way to defendant or any one else except to validate certain deeds made by its predecessors? Is it not true that plaintiff since 1898 has returned to the state board of equalization an assessment roll for taxes? It is a fact that taxes have been paid as levied by the proper authority on this land since its acquirement under foreclosure proceedings or the passage of the Norris act.

It is also true as a matter of law that a railroad company's failure to immediately use its right of way to its fullest extent is not a waiver of its right or an abandonment of its right of way. *Conabeer v. New York C. & H. R. R. Co.*, 156 N. Y. 474.

There is no evidence of any intention of abandonment. The plaintiff company for many years has used the land in question and occupied it as a matter of law for transportation purposes and kept it in good repair. It has equipped and maintained at least one or more tracks over this right of way for transportation purposes since the day of acquiring the right of way by foreclosure proceedings.

The issue of abandonment, to make it effective, must always be accompanied by an intention to do something which constitutes an overt act which carries out this express intention. Is there any evidence of an intention anywhere in this record that proves or tends to prove any purpose of abandonment? If there is, we are unable to discover it. It is no argument for the doctrine of abandonment to say that for the moment some portion of the right of way is not used, that this conduct

abandons the right of way. The answer to that theory or contention is that a vast railway system like the plaintiff's, that has its tracks extending over many states through a fertile agricultural empire, naturally would need many tracks within the next decade. Cities in this section and the entire country herein are growing by leaps and bounds, and the United States government, we think, acted wiser than it knew when it provided for a 400-foot right of way. Vast cities are developing in a territory immediately tributary to these wide plains, and of necessity they will depend in the not distant future upon a great railway system such as is being operated here for food supply and other transportation incidental to large centers of population. This theory is supported in *Townsend v. Michigan C. R. Co.*, 101 Fed. 757.

In this connection of abandonment of an easement it may be well to recognize the rule that a nonuser of an easement, temporarily, for a purpose not strictly authorized, does not constitute an abandonment. *Gurney v. Minneapolis Union Elevator Co.*, 63 Minn. 70.

It is true that a railroad company may seldom, if ever, have occasion to use all of its right of way. This may be why courts have been lenient and it has been their policy to consider a railroad right of way in full operation wherever it has a track over any portion of its right of way. This rule was laid down in *Paxton v. Yazoo & M. V. R. Co.*, 76 Miss. 536. Then it must follow that a railroad company does not in any sense lose its title to its right of way by mere nonuser, and the running of trains is a constant assertion which accompanies the right of way to its full extent as granted. Many more cases could be marshaled to show the situation as we have it, that the Norris act has no application.

It does not appear in the record anywhere that there is anything that points to a nonuser by the company where it shows a clear intention of abandonment. It is a rule of law that mere nonuser for even a period of

21 years by a railroad company of its entire width of right of way does not cause such unused part to revert to the public. *Pennsylvania R. Co. v. Borough of Freeport,* 138 Pa. St. 91.

Defendants in support of their claim for abandonment cite *State v. Chicago, St. P., M. & O. R. Co.,* 140 Minn. 440. This case is hardly in point, or rather does not convey much influence, because it has reference to a railroad company that had acquired by purchase some land which it never made use of for railroad purposes, but leased it for lumber and coal-yards, and never occupied it for railroad purposes at all, failed to pay taxes, or exercise other dominion over it.

It may be the weight of authority that it was the policy of the courts and of the public in general to lull plaintiff into the belief of the security of its possession. Whether or not this was the intention we cannot say, but it was the result of what they did. *McLucas v. St. Joseph & G. I. R. Co.,* 67 Neb. 603; *State v. Grimes,* 96 Neb. 719. Notably so is this statement true with respect to Nebraska courts.

The utmost defendants could claim is permissive user. There is nothing in the evidence that shows by a preponderance thereof an abandonment or nonuser that establishes any intention of abandonment.

The finding of the court below is

AFFIRMED.

MORRISSEY, C. J., and LETTON and ROSE, JJ., not sitting.

CHAUNCEY E. BEADLE, APPELLEE, v. SAMUEL S. SANDERS ET AL., APPELLANTS.

FILED APRIL 17, 1920. No. 21419.

1. **Taxation:** VALUATION. Section 1, art. IX of the Constitution, gives the legislature power to fix the basis of valuation of property for purposes of taxation.

2. ———: ASSESSMENT. It has been the practice of this state to assess property at a fraction of its actual value.

3. ———: LEVY. Under chapter 26, Laws 1919, county boards have no authority to levy a tax in excess of 15 mills of the dollar assessed valuation.

4. "**Statutes** *in pari materia* must be construed together." *State v. Clarke*, 98 Neb. 566.

5. **Taxation:** DISTRIBUTION OF LEVY. County commissioners have exclusive jurisdiction to distribute levy made to the various county funds.

6. ———: ———. County boards will not be required to make inadequate provision for necessary county agencies in order to create a special bridge fund to meet obligations imposed by the legislature when that body validated certain bridge contracts and made them obligations of the county.

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

*Strode & Beghtol* and *J. H. Barry*, for appellants.

*B. F. Good* and *Paul F. Good, contra.*

ALDRICH, J.

This is an action in equity to enjoin the county authorities of Saunders county from collecting a tax authorized by chapter 26, Laws 1919, which is an amendment to section 2971, Rev. St. 1913.

The county commissioners levied a tax of 15 mills for county purposes, and in addition made another levy of 5 mills for a special bridge fund as provided by chap-

ter 26, Laws 1919, making an aggregate of 20 mills. No part of this levy was authorized by vote of the people of the county. The trial court granted an injunction enjoining the collection of the 5 mills excess, held the statute valid, and directed that the excess of the levy should be deducted in proportionate amounts from each of the specific funds provided for in the levy of 20 mills. Defendants appealed, and plaintiff filed cross-appeal.

The appeal raises the question whether this additional levy of 5 mills is illegal and void because it contravenes section 5, art. IX of the Constitution. The issue raised by the cross-appeal is whether the trial judge erred in ordering a proportionate deduction from the levy for county purposes.

Appellants claim that section 5, art. IX of the Constitution provides and means that taxes can be levied in the amount of $1.50 per $100 valuation; that is, actual valuation, and not one-fifth of the actual value. This theory does not have the support of the statute and is contrary to our scheme of taxation.

This state assesses property at a fraction of its actual value. The legislature directs the basis and manner of ascertaining the value of property for taxation purposes. *Western Union Telegraph Co. v. City of Omaha*, 73 Neb. 527.

Section 5, art. IX of the Constitution is as follows: "County authorities shall never assess taxes the aggregate of which shall exceed one and a half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this Constitution, unless authorized by a vote of the people of the county."

Section 1, art. IX of the Constitution, provides: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value

to be ascertained in such manner as the legislature shall direct," etc.

"Valuation" as used in section 5, art. IX of the Constitution means the basis of valuation fixed by the legislature acting under authority of section 1, art. IX of the Constitution. Section 6300, Rev. St. 1913, makes the taxable value one-fifth of the actual or market value. Chapter 26, Laws 1919, makes no provision for valuation; hence we must look to section 6300, Rev. St. 1913, to ascertain the basis of valuation.

In subdivision 2, sec. 1, ch. 67, Laws 1919, approved on the same day as the statute in question, the legislature in prescribing laws governing county boards provided as follows: "In no case shall the levy of taxes made by the county board for all purposes, including the taxes levied herein provided for the erection of a courthouse or jail, exceed in any one year the sum of fifteen mills of the dollar of the assessed valuation of said county." Section 1, ch. 199, Laws 1915, provides as follows: "The rate of tax for county purposes shall not exceed one dollar and fifty cents on the hundred dollars valuation, unless authorized by a vote of the people," etc. These statutes are all *in pari materia* with chapter 26, Laws 1919, and must be construed together and "treated as having formed in the minds of the enacting body part of a connected whole, though considered at different dates." *Rohrer v. Hastings Brewing Co.*, 83 Neb. 111. *State v. Clarke*, 98 Neb. 566. Construing these statutes together to ascertain the intention of the legislature, it is apparent that, in enacting chapter 26, Laws 1919, there was no intention to give county boards authority to levy more than 15 mills on the dollar of the assessed valuation. Such a construction contended for by appellants would be inconsistent with chapter 67, *supra*. When the county commissioners attempted to levy 20 mills they exceeded statutory authority, because chapter 26, Laws 1919, will not bear such a construction.

Therefore it is apparent that we cannot adopt appellants' theory. The trial judge properly upheld the validity of the statute and properly held the levy in excess of 15 mills was illegal and void.

In his cross-appeal appellee claims that the injunction should be modified as to the prorating of the 5 mills excess among the various funds for which the levy was made; also that the injunction should specifically enjoin the 5-mill levy for the special bridge fund, because this 5 mills was intended by the commissioners to be the excessive portion of the levy.

The trial court held that the excess levy of 5 mills under the statute should be prorated and deducted in proportionate amounts from each of the special funds provided for in the levy of 15 mills for county purposes. This finding is contrary to the rule laid down in *Young v. Lane,* 43 Neb. 812. This levy by the county commissioners under chapter 26, Laws 1919, of 5 mills in excess of 15 mills is at variance with the express provisions of section 6300, Rev. St. 1913. The trial court erroneously assumed the authority of law to regulate the discretion of the county board in the application of taxes to various county funds. *Young v. Lane, supra.*

If a court were allowed to control the distribution of funds levied under and by virtue of a statute, it would be giving it control of the discretion of the board, which as a matter of law cannot be done. It would permit the trial judge to invade the province of county government and assume duties over which the county commissioners have exclusive jurisdiction. This court has spoken on the identical subject. *Whedon v. Lancaster County,* 76 Neb. 761.

Chapter 26, Laws 1919, among other things, provides: "If any county has before January first, 1919, entered into any contract for bridge construction or repair in excess of the amount herein permitted to be expended, and the county has received the benefits accruing by virtue of said contracts and the work has been done in

accordance with such contract prior to January 1, 1919, said contracts are hereby validated and made the obligations of the county, and the county board may levy a special tax not to exceed five mills in any one year until sufficient moneys are raised to pay said indebtedness."

The words "may levy" as used in the statute mean "must levy," thereby making the statute mandatory to a certain extent. The contracts are validated and made the obligations of the county and must be paid, that is, must be paid if possible to do so within constitutional limits. The county board will not be required to make a levy in excess of 15 mills of the dollar assessed valuation, but will be required to make such levy as it can. The board need not levy the full 5 mills, but must levy as much as is necessary to meet the indebtedness, staying within constitutional and statutory limits as herein defined, and at the same time must not stint any governmental function. Provision must be made for various county funds which are essential to maintenance of county government and agencies. This leaves the matter largely in the discretion of the county board, but the courts should not allow such a provision for a special tax to be wholly disregarded.

In the instant case, the trial judge had no jurisdiction to direct that the board make the 5-mill levy, because it appears from the record that the full 15 mills was necessary for general county purposes and was levied. With respect to Saunders county, the statute in question involved an increase of indebtedness in excess of constitutional and statutory limitation without a vote of the people. Then this special bridge fund in Saunders county must remain unprovided for unless the board can economize on the levies made, or until the financial situation of the county has improved, or the people have voted to make a levy in excess of 15 mills.

We hold that the trial judge was right in declaring the statute valid, and right in granting a perpetual injunction against the levy and assessment in excess of

15 mills; that he was wrong and in error when he directed that the excess 5 mills should be prorated from the various county funds. This decision is affirmed in limiting the tax levy to 15 mills, and holding chapter 26, Laws 1919, valid; reversed and dismissed as to order holding that the 5-mill special tax should be levied, prorated and deducted.

AFFIRMED IN PART, AND REVERSED IN PART.

LETTON and ROSE, JJ., not sitting.

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JOHN H. LUCAS, APPELLEE, v. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 17, 1920. No. 20764.

1. **Street Railways:** USE OF STREETS. The general public has the right to the use of a public street and every part thereof, regardless of whether there is a street car track on it or not; but the public has not at all times the same right to the use of that part of the street upon which the tracks are laid as has the street car.

2. ——: ——. When the time comes that the use of that part of the street upon which tracks are laid is required by the street car, it is the duty of the public to turn aside and allow the street car unobstructed passage. The public should not use the streets in such a manner as to unnecessarily hinder or interfere with the free movement of cars operated thereon.

3. ——: ——: CARE REQUIRED. The rights of the public and the street cars in the use of the street are equal and reciprocal. Each in the exercise of his rights must exercise ordinary care for his own safety and the safety of others.

4. ——: NEGLIGENCE: INSTRUCTION. When the cause of action is based upon the claim that the motorneer in charge of the car negligently ran into the plaintiff, an instruction that if the motorneer in charge of the car knew, or "should, in the exercise of reasonable care and caution, have known, that plaintiff was in a position of danger," and which instruction in other respects states the law correctly, is not erroneous.

5. ——: ——. Whether it is negligence for a pedestrian to exercise his right to use the street by walking upon a street car track, and, if so, the degree of such negligence, must be determined by the peculiar circumstances surrounding each case.

6. **Municipal Corporations: USE OF STREETS: CARE REQUIRED.** The user of the street, whether vehicle, pedestrian, or street car, must exercise the ordinary care of prudent men under the circumstances, and the care exercised must be commensurate with the danger.

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

*John L. Webster,* for appellant.

*W. J. Connell, contra.*

DAY, J.

Plaintiff recovered a judgment against the defendant for $13,937 for personal injuries claimed to have been sustained on account of the defendant's negligence. Defendant has appealed.

The defendant owns and operates by electric power a street railway system, a part of which is laid upon Military avenue in the suburbs of the city of Omaha, and at the point where the accident occurred the tracks run in what may be termed an east and west direction. There are but few houses in the vicinity of the accident, no street lights, and no sidewalks upon either side of the roadway. There was, however, a cinder path extending along the south side of the parallel tracks. Immediately north of the tracks there was a paved roadway wide enough for vehicles to pass, and north of the paved roadway a dirt road. On December 28, 1916, at about 10:30 o'clock on a dark and cloudy night, the plaintiff was injured by being struck by one of the defendant's cars. At the time of the accident he was walking west along the north track. The street cars en route to the Country Club and Benson pass over the north track, while the cars going in the opposite direction, towards Omaha proper, run upon the south track. The plaintiff was employed as a caretaker at the Country Club, and at the time of the accident was on his way to the club house. A few minutes before the accident he had passed over this street going to the house of an ac-

quaintance, and had observed a depression in the side of the street where the walking was particularly bad by reason of snow and ice, and on his return to the club house, in order to avoid and go around this bad place in the street, he went upon the defendant's north track. He proceeded to walk upon the north track 25 or 30 paces, a distance of 60 or 70 feet, when he was struck by a car approaching him from behind. He did not see or hear the car, and was totally oblivious of its presence. In fact, he did not know that it was a car which struck him until told the next day. The plaintiff testifies that before going upon the track he looked to see if there was a car approaching, and saw none; that from the point where he looked he could have seen the light on a car in the direction from which one would approach, a distance of 300 feet, at which point the crown of a hill would obstruct further vision. It appears from the testimony that the headlight on the car would reflect the light along the track a distance of 100 feet with sufficient clearness to observe objects; that the car was running without any power, drifting along a slight downward grade about 12 miles an hour, and could have been stopped by the use of appliances then in hand in a distance of 12 feet.

At the close of the testimony the defendant moved for a directed verdict in its favor, which motion was overruled. The basis of defendant's motion rests upon the claim that the plaintiff was guilty of such a degree of negligence in walking upon the north track without keeping a constant lookout as to preclude his right to recover. The first question suggested by the motion is: What are the respective rights of a street car and a pedestrian to the use of that part of the street occupied by the street car tracks? Are the rights equal and reciprocal, or does the street car possess a superior right? The authorities upon this question are not in entire accord. This court has adopted the rule that a traveler passing along the public street has the right to use every

part of it, regardless of whether there is a street car track on it or not. The streets and highways are intended for public use, and the public is not deprived of that use by the fact that a privilege has been granted to a street car company to lay a track along the street and operate cars thereon. The grant is a privilege to occupy and use the streets in conjunction with, and not to the exclusion of, the general public. *Omaha Street R. Co. v. Duvall,* 40 Neb. 29. The street car in its use of the street is a part of the public, and every user, whether street car, vehicle, or pedestrian, has the same equal and reciprocal right. Each is bound to take into consideration the rights of the other, and each is bound to exercise ordinary care for his own safety, and to prevent injury to others. In view of the inability of a street car to turn out of its course or leave the track, it becomes the duty of other users of the street not to unnecessarily hinder or delay the street car in its movements, and when a time comes when the use of a particular part of the street occupied by the tracks is required by the street car, the other users must turn aside and allow it unobstructed passage. To this extent the right of a street car may be said to be superior to the right of other users. This priority of right is based upon two reasons: First, the inability of the car to turn or leave the track; and, second, being engaged in a public service, the rights of the public are superior to the rights of the individual. While the driver of a vehicle and a pedestrian have an equal right with the street railway company upon a public street, they have not at all times the same right upon a track of the street car company, and the use by the public must be such as not to hinder or interfere with the cars operated thereon. *McKennan v. Omaha & C. B. Street R. Co.,* 97 Neb. 281.

The plaintiff having the legal right to use the street, the question then arises: Was he negligent in the exercise of his right under the circumstances of this case? Where a particular part of the street is set aside for

the particular use of pedestrians, and sidewalks are constructed and in proper repair, under ordinary circumstances the pedestrian should use that part of the street designated for his use, and his failure to do so would be a circumstance to be considered in determining whether he was negligent in using other parts of the street for travel. Generally speaking, the court cannot dogmatically say what group of facts may constitute negligence, and there can be no hard and fast rule to determine what facts may constitute negligence. Each case must be determined by its own peculiar facts, and measured by the standard of the act of an ordinarily prudent person. In the instant case the plaintiff went upon the track to go around, as he says, a bad place where the ice and snow had accumulated, and where the walking was extremely dangerous. There was no sidewalk in the vicinity. He looked before he went upon the track, and had walked thereon about 60 or 70 feet when he was struck by the car. Under all the circumstances shown, we are not prepared to say that, as a matter of law, the plaintiff's acts present such a degree of negligence as to require an instructed verdict against him on the ground of negligence in going upon the track. The facts presented are such that reasonable minds might take different views upon the question of the plaintiff's negligence, and under such circumstances, under the oft-repeated rule of this court, the question becomes one for the jury to pass upon, and not for the court.

There is a direct conflict in the testimony of the plaintiff and the defendant as to where the plaintiff was just prior to the happening of the accident. The plaintiff testifies that he went upon the north track, and walked thereon a distance of 60 or 70 feet, and that at no time was he upon the south track; whereas, the motorneer testifies that he saw the plaintiff about 75 feet ahead of the car, walking on the south track, and when the car approached within 6 or 8 feet of the plaintiff he suddenly

ran in front of the car on the north track, when it was too late to avert the accident. The motorneer is corroborated somewhat by one of the passengers, who testifies that just before the accident he saw an object on the south track, but was unable to say that it was a person, or to be more specific.

The defendant contends that the court erred in giving instruction No. 3. That instruction was, in substance, that the question of negligence to be considered by the jury was whether the motorneer in charge of the car knew, or "should, in the exercise of reasonable care and caution, have known, that plaintiff was in a position of danger," so that, in the exercise of ordinary and reasonable care, the defendant could have avoided the accident. The particular criticism of this instruction raises the point that by the use of the words, "or should, in the exercise of reasonable care and caution, have known," placed upon the defendant a greater burden than the law imposes. The defendant insists that the rule applicable to the last chance doctrine applies only in cases where the peril is actually discovered, and has no application where the peril might have been discovered by the exercise of ordinary care. There is ground for considerable doubt whether the facts of this case present a situation which calls for the application of the so-called last chance doctrine. Upon the plaintiff's theory of the case he was walking at all times upon the north track at such a distance ahead of the car that his presence could readily have been seen in ample time to have avoided the injury by the exercise of ordinary care. This situation calls for the application of the ordinary rules of negligence and contributory negligence. The testimony of the defendant was that the plaintiff was walking upon the south track, and that when the car approached to within 8 or 10 feet of him he suddenly stepped upon the north track. The testimony indicates that the car could have been stopped in a distance of 12 feet. Under this testimony, it would have been impossible for the motor-

neer to stop the car after he discovered the plaintiff's position. It does not appear to us that under defendant's version of the facts a case within the last chance doctrine is presented. But, even so, we think the rule announced by the trial court correctly states the law. Authorities are to be found, and a number are cited in defendant's brief, which support defendant's position; but this court has adopted the rule that liability arises when the peril is known, or by the exercise of ordinary care should have been known. A party is bound by what he knows, and the law charges him as knowing that which would have been discovered by the exercise of ordinary and reasonable care. This principle is stated in the following cases: *McKennan v. Omaha & C. B. Street R. Co.*, 97 Neb. 281; *Gross v. Omaha & C. B. Street R. Co.*, 96 Neb. 397; *Acton v. Fargo & M. Street R. Co.*, 20 N. Dak. 434.

A number of other objections are made against the instructions, but we do not deem it necessary to enter into a discussion of each of the objections raised. The points herein discussed, as we view it, are the ones of most importance. We have examined, however, all of the instructions of the court, and under the issues presented they fairly and fully state the law of the case, and the rights of the defendant have been carefully guarded, and the disputed questions of fact submitted to the jury. In our opinion, the defendant has no reasonable ground to complain against the instructions. This case in all of its phases falls within the rule announced in *McKennan v. Omaha & C. B. Street R. Co.*, 97 Neb. 281. In that case the injured party was driving a vehicle along the track, but we can see no legal distinction between the respective rights of a driver of a vehicle and a pedestrian. Outside of the question of contributory negligence, there can be no possible legal distinction.

Finally, it is insisted that the amount of damages awarded by the jury is excessive. The testimony indi-

cates that the plaintiff, at the time of the accident and for some time prior thereto, had been employed as a caretaker of the Country Club. Prior to that he had been employed in a similar capacity in another club. His earnings at the time were from $35 to $45 a month and his board. He was 54 years of age. The injury which he sustained resulted in the loss of the greater part of his foot, leaving remaining only the heel, and also some impairment of his hearing, although upon that question there is a conflict in the testimony. The amount of damages awarded was $13,937. We believe that the damages awarded, in view of all the circumstances as shown by the record, are excessive, and that the facts would not warrant a verdict to exceed $8,000. If the plaintiff will file a remittitur in this court within 40 days of such sum in excess of $8,000, the judgment will be affirmed; otherwise, it will be reversed and the case remanded for a new trial.

AFFIRMED ON CONDITION.

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COMMONWEALTH POWER COMPANY, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED APRIL 17, 1920. No. 21312.

1. **States:** ACTION: JUDGMENT. Where a suit is brought by a claimant against the state pursuant to a resolution of the legislature, or one branch thereof, under the provisions of section 1177 *et seq.*, Rev. St. 1913, such action is a special proceeding, and the court should "hear and determine the matter upon the testimony according to justice and right, as upon the amicable settlement of a controversy, and shall render award and judgment against the claimant, or the state, as upon the testimony right and justice may require." Rev. St. 1913, sec. 1180.

2. ———: WATERS: ACTION FOR MONEY HAD. Money paid to the state under sections 2427, 2428, Rev. St. 1913, on an application for water appropriation, where application is dismissed through no fault of applicant, may under the facts shown be recovered from the state.

3. ———: LIMITATION OF ACTIONS. Where a claim against the state cannot be prosecuted without leave of the legislature, or one branch thereof, the statute of limitations will not begin to run against an action on such claim until such leave to sue the state has been given. *Lancaster County v. State*, 74 Neb. 211.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

*Clarence A. Davis, Attorney General, Cecil F. Laverty* and *C. L. Dort*, for appellant.

*C. C. Flansburg, contra.*

DAY, J.

Pursuant to a resolution passed by the house of representatives on March 17, 1919, authorizing this suit, the Commonwealth Power Company, hereinafter designated the plaintiff, brought this action against the state in the district court for Lancaster county, and recovered a judgment for the principal sum of $2,435. The state has appealed. The plaintiff has filed a cross-appeal claiming interest on the money during the time it has been in the hands of the state.

It appears that in May, 1912, and prior thereto, the secretary of the state board of irrigation, highways and drainage (who is the state engineer) made a personal survey of the Loup river and its tributaries, including Beaver creek, for the purpose of ascertaining the volume of water in said streams subject to appropriation. A report of this survey was duly filed with the board. The secretary, by reason of his surveys and records, was familiar with the volume of the waters in said streams, the appropriations heretofore made, and the amount of water therein subject to appropriation for water and power purposes.

On September 30, 1912, the plaintiff inquired of the said secretary whether there was unappropriated water for power purposes in the Loup river and Beaver creek, at points of diversion designated, and was informed that there were 3,800 second feet subject to appropriation.

Thereupon the plaintiff, relying upon the accuracy of the statements of the secretary as to the volume of unappropriated water in said streams, filed its two applications to divert certain waters therefrom for power development—one to divert 2,700 second feet from the Loup river, and the other to divert 500 second feet from Beaver creek. The plaintiff at the time of filing its applications, as required by law, paid the fees to the secretary in the sum of $2,435 under the provisions of sections 2427, 2428, Rev. St. 1913. On the same day the secretary of the board turned the money over to the state treasurer. No survey of the Loup river or Beaver creek was made by any one with special reference to the plaintiff's applications, but the secretary did receive and examine and record the plaintiff's applications. On November 25, 1912, the plaintiff's applications were dismissed, for the sole reason that there was no unappropriated water in said streams at the date of filing the plaintiff's applications; that the power sites applied for by the plaintiff had previously been appropriated by application No. 709, approved by the board January 30, 1906. The plaintiff thereupon sought by appeal to have its applications declared superior to claim No. 709, the case finally reaching the supreme court, wherein it was held that application No. 709 was superior to plaintiff's rights. *Commonwealth Power Co. v. State Board of Irrigation, Highways and Drainage*, 94 Neb. 613.

A resolution of the house of representatives, acting under the provisions of section 1177, Rev. St. 1913, authorized the plaintiff to bring this suit upon the cause of action set forth in the petition, and also directed the attorney general on behalf of the state to defend the suit. At the outset it is important to determine whether the case is to be governed by the ordinary rules of law or upon broader principles of equity and good conscience. A careful examination of the sections of the statute (Rev. St. 1913, sec. 1177 *et seq.*) convinces us that in actions of this character it was intended that the

ordinary rules of law which prevail in controversies between individuals should not apply, but that the case should be determined upon equitable principles based upon justice and right. The sections of the statute contemplate a new remedy and a new right in this class of cases. It is a special proceeding by virtue of special statutory provisions, and the respective rights of the parties are to be determined by the rules therein prescribed. Were it intended that the ordinary rules of law were to govern in cases of this kind, there would have been no occasion for the enactment of several sections of the statute following section 1177, and particularly section 1180, which provides:

"The court in which such action may be brought shall hear and determine the matter upon the testimony according to justice and right, as upon the amicable settlement of a controversy, and shall render award and judgment against the claimant, or the state, as upon the testimony, right and justice may require."

The purpose of these sections is to take such cases out of the ordinary rules of law and to place their determination upon a much higher and broader ground, to make them triable to the court rather than a jury, and to make justice and right, as viewed by the court, the basis of its decision. With this rule as our guide, how should this case be decided? The state has in its treasury $2,435 paid by the plaintiff upon the belief, and upon the assurance of the secretary of the board, that there was water in the streams subject to appropriation. This statement of the secretary was undoubtedly made in the utmost good faith, but nevertheless it was erroneous and misleading, and the plaintiff in relying upon its truthfulness has suffered a wrong. It was a mistake of fact upon which both parties relied. No one believes the secretary would have taken this money knowing there was no water which plaintiff could take under its applications. The real thing of value which the plaintiff sought was the right to divert the water. It is a well-

recognized principle that, where money has been paid under a mistake of fact, it may be recovered. Through no fault of the plaintiff, it has received nothing of substantial value for its money, and under all of the circumstances justice and right, as well as equity and good conscience, would seem to dictate that the money be refunded. In the matter of fair dealing and high business integrity, the state should take advance ground, if for no other reason than by way of example to its citizens. We hold accordingly that, where money is paid in advance to the secretary of the board under sections 2427, 2428, Rev. St. 1913, upon an application for water appropriation, and where the application is dismissed through no fault of the applicant, under the peculiar facts disclosed by the record, the applicant is entitled to recover the money so paid from the state; and especially is this true when the rule of justice and right applicable to such cases is invoked.

One of the contentions urged by the state is that the plaintiff's claim is barred by the statute of limitations. It is a sufficient answer to this argument to say that actions of this character cannot be prosecuted against the state without leave of the legislature, or one branch thereof, and that the statute of limitations does not begin to run against such a claim until leave to sue the state has been given. *Lancaster County v. State* (on rehearing), 74 Neb. 215. It is also urged that the case of *Commonwealth Power Co. v. State Board of Irrigation, Highways and Drainage,* 94 Neb. 613, is *res judicata* of the question presented here. We do not so understand that case. The issue in that case was whether the plaintiff was entitled to have its applications for water granted, claiming that application No. 709 was inferior to plaintiff's application. The court held against the plaintiff. There was no attempt in that suit to recover the money paid. Such a contention would have been entirely inconsistent with its claim for appropriation of the water. The subject-matter in that case and the

present one is entirely dissimilar. The defense of *res judicata* is only available as to matters actually in issue and determined in a former suit. A number of other points are argued by the state, but we will not prolong this opinion by considering each separately. Suffice it to say, that we have examined them, and in our judgment they do not meet the controlling feature of this case that under the peculiar facts justice and right require that the money paid by the plaintiff be refunded.

By the plaintiff's cross-appeal it claims interest upon the amount of money during the time such money was in the hands of the state. During a portion of this time, however, the money was voluntarily left with the state authorities while the plaintiff was seeking by appeal to have priority rights over claim No. 709, and during that period it was not claiming a return of its money. So far as the record discloses, the first date the plaintiff was claiming a right to have the money refunded was the date of the resolution of the house of representatives granting plaintiff permission to sue the state—March 17, 1919. Apparently that was the view taken by the trial court as its judgment indicates interest allowed.

The judgment of the district court is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

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LOEY BUCHANAN ET AL., APPELLEES, V. JOHN SEIM ET AL., APPELLANTS.

FILED APRIL 17, 1920. No. 20884.

1. **Waters: "OVERFLOW WATER."** Water accumulating in flood seasons within the drainage area of a natural stream and seeking an outlet therein, which, uniting with the water in the main channel, flows in one body in the natural course of such stream over adjacent lands, and, when the flood subsides, finds an outlet in the ordinary channel of such stream, is to be considered "overflow water" thereof, and not "surface water."

2. ———: ———: OBSTRUCTION. The accustomed course of overflow waters in the flood channels of a natural stream cannot lawfully be obstructed or interfered with by one riparian owner to the injury of another.

3. ———: OBSTRUCTION: PRESCRIPTIVE EASEMENT. Where one owning land traversed by the flood channels of a natural stream, in order to protect his land from overflow, constructs and maintains thereon an embankment, the effect of which is to hold the water in times of flood and cause it to stand upon the land of an upper proprietor, the right by prescription to maintain such embankment is in the nature of an easement to flow back water upon said land, which can be acquired only by the open, continuous, uninterrupted and adverse use of the land for more than ten years for the purpose of flowage.

4. ———: ———: ———. If the land of an upper proprietor is not subjected to constant flowage as the result of an embankment across the flood channels of a natural stream maintained upon the land of a lower proprietor, but such embankment causes the water to back up and stand upon such upper land only for brief periods during flood seasons and at long and irregular intervals, though such conditions have been recurrent for more than ten years, it is not such evidence of the continuous and uninterrupted use of such land for the purpose of flowage as will establish an easement by prescription therein.

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

*Martin & Bockes* and *Prince & Prince,* for appellants.

*E. E. Ross* and *Horth & Ryan, contra.*

DORSEY, C.

The parties to this suit are the owners of adjoining tracts of land in section 32, township 13, range 8, in Merrick county. The half-section line running north and south through section 32 forms the boundary between the plaintiff's land, which lies west of the line, and the lands of the defendants, which lie east of the line. Prairie creek runs in a northeasterly direction through these tracts, and they adjoin each other for almost half a mile south of the creek. From a point a few rods south of the creek bank nearly to the south line of these adjoining

lands there is, on the defendants' side of the line and parallel therewith, an embankment, the effect of which is to hold back the flood waters of Prairie creek upon the plaintiff's land and keep it from flowing upon the defendants' lands. This suit was brought to enjoin the maintenance of the embankment and compel its removal. The trial court granted the relief prayed for after a full hearing, and the defendants have appealed.

Among the grounds for reversal urged by the defendants is the contention that the trial court erred in finding that the water obstructed by the embankment in this case was overflow water of Prairie creek, rather than surface water. Prairie creek drains a large territory extending many miles southwest of the land herein involved, and during periods of heavy rainfall and melting snow its ordinary bed and banks are insufficient to contain and carry off all the water accumulating within its drainage area. During such periods the water seeking an outlet in the creek, mingled with the water flowing in its ordinary channel, sometimes forms a stream half a mile to a mile or more in width. When the water subsides after floods of that description, that part of the water outside of the banks of the creek, if unobstructed, would follow a course substantially parallel with the south bank of the creek, across the lands of the defendants, eventually returning to the main channel of the creek. Under these facts, the trial court was right in holding that the water in question is to be considered overflow water of Prairie creek, and a constituent part of that water-course, and that it is not to be treated as surface water. *Murphy v. Chicago, B. & Q. R. Co.*, 101 Neb. 73; *Brinegar v. Copass*, 77 Neb. 241; *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237.

It is also well settled that the accustomed course of such overflow water in the flood channels of a natural stream cannot lawfully be obstructed or interfered with by one riparian owner to the injury of another. In the instant case, however, the defendants set up as a de-

fense the plea of a prescriptive right to maintain the embankment, because it has existed in its present location, as they allege, for more than 30 years, and was constructed and maintained with the knowledge, consent and acquiescence of the plaintiff and his predecessor in interest, and without objection on their part, for the purpose of protecting the defendants' lands from overflow.

The trial court found, in substance, that an embankment had, in fact, existed on the line of the present embankment for more than ten years before the commencement of this suit, but that it had never been effective in holding back the flood waters on the plaintiff's land until 1912, when, as the evidence showed, it was strengthened and enlarged by the use of a road grader.

The trial court held, in effect, that the plaintiff had no ground to complain of the embankment prior to 1912, because it had failed up to that time to detain the water, or to cause it to stand upon his land, and that, therefore, there was no such invasion of the plaintiff's rights as would form the basis of a claim on the part of the defendants to a prescriptive right to flow his land. We are convinced from the evidence, however, that from 1885, when the dam was constructed, to 1912 it had acted as a partial barrier to the water in times of flood.

The prescriptive right asserted by the defendants is the right to flow that part of the plaintiff's land lying west of the embankment, and to keep the water standing thereon, instead of allowing it to run off in its natural course over the defendants' premises. In order to establish such an easement by prescription, there must be open, continuous and adverse use of the plaintiff's land for that purpose for the period sufficient to acquire title by adverse possession; in this state, ten years. 9 R. C. L. 776, sec. 36. Assuming that more than ten years before this suit was commenced there occurred, by reason of the maintenance of the embankment, such an invasion of the plaintiff's rights as would have given

rise to a cause of action in his favor for unlawful obstruction of the water-course, our next inquiry is whether there was, during the ten-year period, such continuous use of the plaintiff's land for the purpose of flowage as would ripen into an easement by prescription. Will the fact that at intermittent and widely separated intervals the embankment caused water to back up and stand for a few days on plaintiff's land constitute such continuous use thereof as is required to perfect an easement by prescription?

In the case of a railroad embankment which arrests and holds upon adjacent land the flood waters of a natural stream, this court has held that the injury thereby occasioned to the land or crops is not to be treated as a continuing cause of action dating from the original construction of the embankment, but as severable into distinct causes of action arising at the times, respectively, when floods occurred causing such injury. *Reed v. Chicago, B. & Q. R. Co.*, 86 Neb. 54; *Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Neb. 456. By a parity of reasoning, therefore, it must be held that the fact that an embankment across the flood channels of a natural stream causes the water to back up and stand upon the land of an upper proprietor, for brief periods and at long and irregular intervals, is not such evidence of continuous and uninterrupted use of such land for the purpose of flowage as will form the basis of an easement by prescription therein.

The defendants furthermore contend that plaintiff himself erected an embankment in the road at some distance from the defendants' embankment, the effect of which was to throw more water upon the defendants' land than would naturally flow there, and that, under equitable principles, he is estopped to maintain this suit. The record satisfies us, however, that whatever obstruction the plaintiff may have placed in the course of drainage was temporary only, and was not being maintained by him at the time this suit was commenced.

For the reasons stated, we recommend that the decree of the court below be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

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IDA WOODS, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED APRIL 17, 1920. No. 20952.

**Municipal Corporations:** ACTION FOR INJURIES: PETITION: SUFFICIENCY. A petition in an action against a city of the first class to recover for injuries sustained by reason of a defect in a street or sidewalk, which does not allege compliance with section 4583, Rev. St. 1913, requiring written notice to the city of the existence of the defect at least five days before the accident, fails to state a cause of action, where the petition shows that the defect was the result of natural wear or decay, and was not caused by any positive negligent act on the part of the city, either in the original construction of the street or sidewalk or in afterwards creating a defective or dangerous condition therein.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

*Burr & Brown,* for appellant.

*C. Petrus Peterson* and *Charles R. Wilke, contra.*

DORSEY, C.

November 23, 1916, the plaintiff commenced an action against the city of Lincoln to recover for injuries sustained in crossing a bridge maintained by the city over the gutter at a street intersection. The court sustained a general demurrer to the plaintiff's petition; the plaintiff elected to plead no further and to stand upon her petition, and a judgment of dismissal was entered.

May 8, 1918, the plaintiff commenced another action for the same injury, and the city again interposed a general

demurrer, which was sustained by the trial court. The plaintiff again elected to stand upon her petition, and a judgment of dismissal was again entered, from which the plaintiff appeals.

The trial court sustained the demurrer to the petition in the present action, as well as the demurrer in the first action, upon the ground that it was not alleged that written notice of the defect causing the injury was given to the city at least five days prior to the accident, as required by section 4583, Rev. St. 1913.

It was alleged in the petition in the later action, from which this appeal is prosecuted, that the city had for more than 20 years maintained at the intersection of Twelfth and P streets a brick and stone bridge, with a wooden flooring, across the gutter, as a part of the pavement of the street, but not as part of the sidewalk space; that the wooden floor had become rotten, defective, and unsafe; and that, while walking across the gutter, the plaintiff stepped upon the bridge, and the boards of the floor broke under her weight, causing her to be thrown violently to the pavement and severely injured. It was also alleged that the defect in the bridge was known to the city and its officers long enough before the accident to have been put in repair, if the city authorities had performed their duty; that the gutter bridge was constructed as part of the original paving of the street; that the city was negligent in putting a bridge with a wooden floor at that place; and that it was the duty of the city "not to permit the wooden floor of said bridge to slowly decay and rot by the elements, and especially not to permit the same to be and become a nuisance, as well not to invite and induce the public to use and keep using the same for public travel, when it knew, or should have known, that said bridge, on account thereof, had become and was dangerous and unsafe for public use, and was a nuisance."

This court has recognized that, under some circumstances, recovery for injuries sustained by reason of

defective streets or sidewalks may be allowed, although the statutory written notice was not given prior to the accident. Where water was thrown by employees of the city upon a sidewalk and bridge connecting the sidewalk with the street crossing, which froze and formed a coating of ice, the city was held liable to one who fell thereon and was injured, although the statutory notice was not given, for the reason that the city is deemed to have knowledge of a condition that it creates, and the statute does not contemplate exemption from the city's own negligent act. *Tewksbury v. City of Lincoln*, 84 Neb. 571. Where, in filling up an excavation for a sewer, the earth settled because of the failure of the city to tamp it down solidly, thereby leaving a cavity underneath the street pavement, which broke through, the fact that the statutory notice had not been given did not bar the injured party from recovery, because the accident was caused by the negligence of the city in the original construction of the sewer. *Updike v. City of Omaha*, 87 Neb. 228. Where, in opening a street in the vicinity of a creek bed, the city left an unguarded declivity on the side of the street, a party injured by his horse plunging over it into the creek bed was not debarred from recovery because the statutory notice was not given. *McMasters v. City of Lincoln*, 101 Neb. 278.

It is an underlying principle in all cases in which it is sought to hold a city liable for injuries arising from defective streets or sidewalks that, in order to establish negligence, it must be shown that the city had knowledge of the existence of the defect prior to the time when the injury occurred. In cases where no positive negligent act on the part of the city is shown, either in the original construction of the street or sidewalk, or in afterwards creating a defective or dangerous condition therein as, for instance, where it appears that the defect causing the injury is attributable only to gradual wear or decay, there is nothing to bring home to the city that previous knowledge of the defect which is an essential element of

actionable negligence. In such cases, there is no reason to dispense with the statutory notice; but, where the defective condition springs directly from the negligent act of the city itself, it must be presumed that the city had knowledge of it, and the statutory notice would be superfluous.

"When a walk or a street through wear or some accidental cause becomes in an unsafe condition, the city authorities will perform this duty (of repair) if the necessity of so doing comes to their knowledge. This at least the statute assumes, and its object and effect is to make certain that the officers of the city shall have such knowledge. * * * If the act causing the dangerous condition is done by the officers of the city themselves, the knowledge of its existence is inherent in the act." *Updike v. City of Omaha,* 87 Neb. 228, 239.

The petition in the instant case shows upon its face that the flooring of the bridge became decayed from the effect of time and of the elements, not that it was defective when the bridge was originally constructed, nor that it became defective, after it was laid, by any affirmative act of the city or of its officers or agents. There is, to be sure, an averment that it was negligence on the part of the city ever to have built a bridge with wooden flooring over the gutter as part of the general plan of paving the street, but it was not alleged that unsound or defective material was used in its construction. If the flooring originally laid was not defective, the fact that the material used was not indestructible or impervious to gradual decay could not, it seems to us, charge the city with negligence in the initial construction of the bridge.

In its final analysis, therefore, the petition sets up nothing more than a defect arising from natural causes, without the interposition of any affirmative act of negligence on the part of the city to bring it about or to aggravate it. In such a case we are convinced that the statute requiring five days' prior notice to the city ap-

plies, and that, in the absence of any allegation of compliance therewith, the demurrer to the petition was properly sustained.

It appears from the record that the defendant filed an answer setting forth a plea of former adjudication based upon the judgment of dismissal rendered against the plaintiff in the first case that she brought. The plaintiff demurred to this plea, and the whole case was submitted to the court on the question whether the action was barred by the previous judgment, as well as upon the question whether the petition was demurrable for failure to allege the giving of the notice. The trial court having determined the case upon the demurrer to the petition, the plaintiff had no standing in court, and there was, in effect, no petition and no case which the defendant could meet by a plea in bar. As the trial court was right in his ruling upon the demurrer, the same situation exists here, and this court is without any basis upon which to consider the question of *res judicata,* although it has been ably presented in the briefs.

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

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

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WILLIAM GESFORD, APPELLANT, v. STAR VAN & STORAGE COMPANY, APPELLEE.

FILED APRIL 17, 1920. No. 20987.

1. **Bailment:** CONTRACT: TERMS. The parties to a bailment may diminish the liability of the bailee by special contract, and the bailee may impose whatever terms he chooses, if notice thereof

be given to the bailor, and he understands and assents to them, provided the contract is not in violation of law or of public policy, and does not undertake to exempt the bailee from the consequences of his own fraud or negligence.

2. ———: ———: ———. Where a building operated by a bailee for hire for storage purposes is without equipment or facilities for heating or for regulating the temperature, such bailee may, as a condition to the acceptance for storage of property likely to be damaged by heat or cold, by special contract relieve himself from liability for damage resulting from changes in the temperature which the building is not equipped to guard against or prevent.

3. ———: ———: ———. If a bailee, operating for storage purposes a building not equipped with heating facilities, notifies the bailor that he will not accept the property and be responsible for freezing, and that the risk of freezing must be assumed by the bailor, and the bailor understands and assents to such condition, the care which the bailee is required to exercise to protect the property is to be measured by the means and facilities at his disposal when the contract of storage was made, and the bailee is under no duty to provide other means of heating the building.

4. **Appeal:** INSTRUCTION: HARMLESS ERROR. Where the verdict returned by the jury was the only one justified by the evidence, inaccuracy in an instruction as to the burden of proof is not ground for reversal.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

*Burkett, Wilson & Brown,* for appellant.

*Henry F. Guile, contra.*

DORSEY, C.

This action is to recover damages for apples frozen while in storage in a building operated by defendant for storage purposes in the city of Lincoln. The verdict and judgment were for the defendant, and the plaintiff appeals.

In his petition the plaintiff averred that in November 1917, he entered into a contract with the defendant to store apples in its storage warehouse, and that, in accordance therewith, they were stored in the basement of the building; that he removed some of the apples

during November and December, but that the remaining 275 barrels were frozen and greatly damaged during the following January, because the defendant negligently permitted the basement where they were stored to become too cold.

The defendant, in its answer, pleaded that it had never operated a cold storage warehouse, and that the plaintiff well knew that its building contained no facilities for regulating the temperature; that, at the time the arrangements were made for storage, the plaintiff inspected the warehouse and selected that part of the basement in which he desired the apples to be stored, and that he then and there assumed all risk of loss or damage to the apples by freezing.

The record shows, without dispute, that the basement of the building where the apples were stored was divided by a partition wall into two rooms, each 70 feet by 45 feet in size. The room south of the partition was filled up at the time the plaintiff went to arrange for storage and the north room was alone available for storing the apples. There was a furnace in the south room, which incidentally threw out some heat there, but which was designed to heat the office upstairs, and not the basement. There were no facilities for heating the basement, and it was no part of the defendant's plan in the operation of its storage business that the basement should be heated. The only way by which any heat from the south room could reach the north room of the basement was through a door in the partition, which, however, was habitually kept closed. There is no evidence to indicate that, if it had been kept open, there would have been enough heat to materially raise the temperature in the north room.

When the plaintiff went to the defendant's office with a view to arranging for storage, an agent of the defendant went with him into the basement. They passed through the south room into the north room. The plaintiff made no inquiry or examination as to the facilities

for heating. Nothing was said by either party as to there being no method of heating the north room. The plaintiff testified that he inquired whether anything was ever frozen there, and that the defendant's agent answered in the negative. The latter testified, however, that he cautioned the plaintiff as to the risk of apples freezing in the north room and explicitly told him that it must be at his risk. The plaintiff denied that any such statement was made.

The trial court submitted to the jury the following interrogatory: "By the terms of the agreement under which said apples were stored in defendant's basement, did the plaintiff agree to assume the risk of freezing?" To which the jury answered: "Yes." The jury were instructed that, if they found that such risk was assumed by the defendant under the contract, "the defendant owed no affirmative duty to the plaintiff to protect said apples from freezing; it owed no duty to furnish heat for said basement, nor did it owe any duty in that event to make any changes or alterations of any kind in said basement to protect said apples from the result of low temperature, and if you find the contract was as defendant contends in said particular your verdict will be for the defendant."

The plaintiff contends that this instruction was erroneous, for the reason that under section 7472, Rev. St. 1913, the defendant could not contract for exemption from liability for failure to exercise such care with regard to goods stored "as a reasonably careful owner of similar goods would exercise;" that, notwithstanding any contract to the contrary, it was still the duty of the defendant to exercise ordinary care to protect the apples from freezing, which in this case, the plaintiff argues, required it to provide heat for the north basement, where the apples were stored.

"The parties to a bailment may diminish the liability of the bailee by special contract, the principle being that the bailee may impose whatever terms he chooses, if he

gives the bailor notice that there are special terms and the means of knowing what they are; and, if the bailor chooses to make the bailment, he is bound by them, provided the contract is not in violation of law or public policy, and that it stops short of protection in case of fraud or negligence of the bailee." 6 C. J. 1112, sec. 44.

In the instant case the defendant was entitled to attach whatever conditions it saw fit to the acceptance of the apples for storage, provided the plaintiff understood and assented to them, and that the contract did not assume to exempt the defendant from the consequences of its own negligence. The defendant's warehouse was not equipped for heating, and it was not in the regular line of its business to undertake to store property the preservation of which required the temperature to be regulated. It was, therefore, entitled to make its contracts conform to the limitations of its equipment and to confine them within the scope of its ordinary business. No rule of law governing bailments would forbid the defendant to make a contract to protect itself from liability for damages arising from some cause that could not be guarded against by the use of the ordinary means and facilities at its disposal.

In insisting upon the condition that it should not be responsible for freezing, the defendant did not thereby stipulate for exemption from liability for negligence. It merely foresaw and stipulated against a possibility which it was powerless to avert without other and greater facilities than it possessed. By assenting to that condition and assuming the risk of freezing, the plaintiff, in effect, agreed that the defendant's duty of reasonable care for the protection of the property should be limited to the means actually at its disposal in the ordinary course of its business, taking into consideration the lack of facilities to heat the warehouse. It became the defendant's duty then only to see that the apples were exposed to no greater risk of freezing than was naturally incident to their storage in a building which

had no heating facilities, and did not extend to providing special means for heating.

There is nothing in the record to indicate that anything that could have been done was not done to protect the apples, except, as the plaintiff suggests, that stoves might have been put up in the basement. Under the circumstances, however, we cannot say that the failure of the defendant to set up stoves constituted negligence.

In *Denver Public Warehouse Co. v. Munger*, 20 Colo. App. 56, relied upon by the plaintiff, apples were stored in a public warehouse for which a receipt was issued bearing upon its face the words "at owner's risk." The apples were damaged by freezing, and the plaintiff recovered a verdict and judgment, which was affirmed. The negligence claimed was in not exercising ordinary care to protect the apples against the cold weather. The facilities for heating included oil stoves, but these were not utilized. There was no evidence of any contract limiting the liability of the warehouseman, or of any assumption of the risk of freezing by the bailor, unless such a contract could be implied from the words, "at owner's risk," on the receipt. The supreme court of Colorado held that these words did not have the effect of releasing the bailee from the exercise of ordinary care, and that, under the circumstances of the case, ordinary care required the bailee to make use of its oil stoves.

The features that distinguish the case just referred to from the instant case are: (1) The absence in the Colorado case of any positive agreement on the part of the bailor to assume the risk of freezing, or of any affirmative notice to him by the bailee that it would not accept the apples for storage and be responsible for freezing; (2) the bailor in the Colorado case had no reason to suppose that the warehouse would not be so heated as to protect the apples from freezing, and the warehouse appeared to be suitable for that purpose; and (3) the bailee

had facilities for heating by means of oil stoves, which it failed to make use of.

Before he entered into the contract, the plaintiff in the instant case was fully advised that the defendant would not accept the apples for storage and agree to protect them against freezing, and the plaintiff definitely assumed that risk. In the face of that explicit understanding, he is in no position to urge that he had no reason to suppose that the defendant's warehouse would not be so heated as to guard against freezing, and it moreover clearly appears that the defendant, in the ordinary course of its business, neither possessed nor professed to have facilities for heating the building.

The plaintiff also complains of an instruction placing upon him the burden of proving that the defendant did not use ordinary care. He points to the rule announced in *Davis v. Taylor & Son,* 92 Neb. 769, that, when a bailee returns the goods in a damaged condition, the burden is upon him to show that the damage did not occur through his negligence. The jury in the instant case, however, were instructed that the burden of proof was upon the defendant to establish the special contract whereby the plaintiff assumed the risk of freezing. Having determined that issue in favor of the defendant, no other verdict was possible under the law and the undisputed evidence than the one which was returned by the jury. In the light of the special contract, it conclusively appeared from all the evidence that the defendant was not negligent, and any error in the instruction with reference to the burden of proof of negligence could not have been prejudicial to the defendant. *Bradley v. Chicago, B. & Q. R. Co.,* 90 Neb. 28.

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

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

EDWARD STERNAD, APPELLEE, v. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 17, 1920. No. 20922.

1. **Master and Servant:** ASSAULT: SCOPE OF EMPLOYMENT: QUESTION FOR JURY. When a servant, while in the discharge of the duties for which he was employed, commits an unprovoked assault upon another, the question whether he was acting within the scope of his employment or outside of it to effect some purpose of his own, is generally a question of fact for a jury, and its verdict is conclusive, provided there be sufficient testimony to support it.

2. ———: ———: LIABILITY OF MASTER. The master is responsible for the act of his servant committed in the scope of the employment, even where he departs from his instructions, acts wrongfully, wilfully, or illegally.

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

*John L. Webster* and *William M. Burton,* for appellant.

*W. J. Connell, contra.*

TIBBETS, C.

This is an action by the plaintiff, by his mother and next friend, to recover from the defendant damages inflicted upon the plaintiff by an employee of defendant. Verdict for plaintiff for the sum of $1,000, on which about 16 years of age. Defendant was and is a corpora-

Plaintiff was, at the commencement of this action, judgment was rendered. Defendant appeals.

tion owning and operating a street railway in the city of Omaha, Nebraska. On March 9, 1917, about 9 o'clock p. m., one of the cars of defendant was proceeding on Thirteenth street of said city near its intersection with Dominion street. The plaintiff was running to catch the car for the purpose of becoming a passenger thereon, when the conductor on the car fired a revolver at plain-

tiff, the bullet striking the plaintiff in the right arm and wounding him. There had been on different occasions collection of boys at said point who had frequently annoyed the employees of the defendant by jumping on and off cars without any intention of becoming passengers thereon, disconnecting the trolley pole from the power line, and in various ways sought to annoy the employees of defendant and hinder and delay the operation of the cars, and especially had been annoying the conductor who fired the shot that wounded plaintiff.

There is practically no controversy in the evidence, and the only questions to be determined are: Was the verdict based upon sufficient evidence? and, further, was the employee acting within the scope of his employment in shooting plaintiff?

The evidence is conclusive that the person who fired the shot was the conductor on the defendant's car, that the bullet he fired wounded plaintiff, and that the assault was unprovoked and unjustified. These facts are fully substantiated by the record, and the jury by their verdict so found. Counsel for defendant, however, maintains that the firing upon the plaintiff by the conductor was not within the scope of his employment, and cites numerous authorities to maintain his position. The record discloses that this particular conductor had been annoyed by the persistent and repeated acts of boys, at or near where the assault occurred, in jumping on the car and removing the connection between the line furperiors. In all of these matters he is acting within the nishing the power and the car. We think it is a reasonable conclusion that the duties of a conductor are to keep management of the car subject to the orders of his suprotect passengers, collect fares, and have the general the connection made, keep trespassers from the car, scope of his employment. It will be conceded that in the instant case the conductor was not expected or directed by the company to shoot down an inoffensive boy in the street for no better reason than that he suspected

the boy intended to interfere with the operation of the car, or had interfered with it in the past, or sought to annoy him in the discharge of his duties.

In protecting the property and operation thereof of his employers, he would be entitled to exercise such force and use such means as was necessary and the occasion demanded, and it was for that purpose he was placed in charge of the car. In shooting the plaintiff he was carrying out what was his mistaken idea of the necessary force to be used. The shooting was not only done while the conductor was in the employ of the company, but also while he was in the active discharge of the duties for which he was employed, and in charge of property it was his duty to protect. In the instant case the conduct of the conductor is not so indicative of malice, but of temperament. The cases cited by defendant are in some respect convincing of the contentions of defendant, but a review of the authorities cited demonstrates that the conclusions arrived at do not depend so much on the principles therein involved as upon the facts in each particular case. It is largely a question of fact for the jury to determine whether an employee who commits a tort is acting within the scope of his employment. In the case of *Nesbit v. Chicago, R. I. & P. R. Co.*, 163 Ia. 39, 50, the court held: "Whether the servant was at the time in question acting within the scope of his employment or outside of it to effect some purpose of his own is generally a question of fact for a jury, and its verdict is conclusive, provided there be any substantial testimony to support it. *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Cohen v. Dry Dock E. B. & B. R. Co.*, 69 N. Y. 170; *Schulte v. Holliday*, 54 Mich. 73."

In the case of *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597, Judge Andrews, writing the opinion, says: "The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack

of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another."

The New York courts are committed to the following rule contained in the opinion in the case of *Hewson v. Interurban Street R. Co.*, 88 N. Y. Supp. 816: "It is now well settled that the master is responsible for the act of his servant committed in the scope of the employment, even where he departs from his instructions, acts wrongfully, wilfully, or illegally, and even where the act is committed upon a trespasser." The rule therein declared is supported by numerous authorities.

In the case of *Burnham v. Elk Laundry Co.*, 121 Minn. 1, it was held: "In an action against the principal for an assault and battery committed by his agent upon plaintiff, it is held that the question whether the assault so committed was in the course of the agent's employment was one of fact and properly submitted to the jury."

The chief justice in the opinion says: "Upon the question as to what wrongful acts, committed by an agent, come within the 'scope or course of the agent's employment,' the authorities are in hopeless confusion. It is not at all difficult to find conflicting decisions from different courts upon the same, or substantially the same, state of facts. The old rule by which the question was made to turn upon a strict application of legal principles has undergone changes in later decisions, and the question under the modern trend of opinion resolves itself into one of fact, or mixed law and fact. Chief Justice Start, in referring to the subject in the case of *McLaughlin v. Cloquet Tie & Post Co.*, 119 Minn. 454, said: 'While the abstract rule is well settled, some confusion has arisen in applying it concretely, especially with reference to the meaning of the term "the course of and within the scope of his employment." No hard

and fast definition of the term, applicable to all cases, can be given. Some of the earlier cases in this court seemingly applied the rule with literal exactness; but the tendency of the later cases is to give the rule a more liberal and practical application, especially in cases where the business of the master intrusted to his servants involved a duty owed by him to the public.' *Penas v. Chicago, M. & St. P. R. Co.*, 112 Minn. 203, 30 L. R. A. n. s. 627, 140 Am. St. Rep. 470; *Theisen v. Porter*, 56 Minn. 555; *Anderson v. International Harvester Co.*, 104 Minn. 49, and other authorities cited by the chief justice in the *McLaughlin* case."

The *Burnham* and *Hewson* cases are in accord with the decisions of this court, and especially in the case of *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 1, wherein this court held: "The master is liable for the acts of his servant within the general scope of his employment while about his master's business, though the act be negligent, wanton, wilful, or malicious."

The case of *Allertz v. Hankins*, 102 Neb. 202, is in no wise in conflict with the *Kerr* case, and the *Allertz* case holds that the question whether the servant had some purpose of his own, and not connected with his employment, in doing the act was a question of fact for the jury.

As has been stated, on the question as to what wrongful acts committed by a servant come within the scope or course of the servant's employment, the authorities are in hopeless confusion. In the instant case the conductor undoubtedly supposed the plaintiff was endeavoring to reach the car to perpetrate some mischief, it was his duty and within the scope of his employment to prevent the same, and in his misjudged idea of the extent to which he might go he shot and wounded the plaintiff. Whether his action was within the scope of his employment was a question of fact for the jury, who by their verdict determined he was so acting. We find no error in the record, and recommend that the judgment be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

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LOUISE VONDORN, APPELLANT, V. LOUIS RUBIN ET AL., APPELLEES.

FILED APRIL 17, 1920. No. 20928.

1. **Limitation of Actions:** ALIENATION OF AFFECTIONS. Where affections of plaintiff's husband were alienated by another woman, and he, at that time, abandoned the plaintiff and entered into an alleged marriage with such other woman, and from that time cohabited with such woman as his wife, the cause of action in favor of the plaintiff immediately accrued, and the statute of limitations attached at the time the affections of plaintiff's husband were alienated and he abandoned her.

2. ———: ———. If, in such case, the plaintiff fails to bring suit within four years from the time of the accrual of her cause of action, and there is no showing that her husband has retransferred or returned his affections or attentions to her, and that the defendant then had, by renewed efforts, again alienated them, the fact that his affections have been retained from plaintiff through the continued efforts of the other party does not give rise to any new cause of action, and plaintiff's original cause of action would be barred.

APPEAL from the district court for Douglas county:



WILLIAM A. REDICK, JUDGE. *Affirmed.*

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

*W. J. Connell, contra.*

FLANSBURG, C.

Action by plaintiff for damages for alienation of the affections of her husband. A general demurrer and plea of the statute of limitations was interposed by the defendants and sustained by the court. Plaintiff elected

to stand upon the pleadings, and her suit was thereupon dismissed. Plaintiff appeals.

The petition states that plaintiff and John E. VonDorn were married April 13, 1896. On December 4, 1908, it is alleged plaintiff procured a divorce from her said husband, and that on the day following, December 5, 1908, upon the promise of her husband to properly conduct himself in the future, a reconciliation was effected and, though the decree of divorce was never set aside nor modified, plaintiff and her said husband from the time of their reconciliation continued to cohabit together for a period of 3½ years, with the understanding, the petition alleges, that their reconciliation and cohabitation, in effect, nullified the divorce decree and lawfully reinstated them as husband and wife, and the petition further states that they were in fact husband and wife at the time of the commencement of the suit.

It is further alleged that the defendant, Nellie Rubin, who, it may be stated, had been the corespondent in the divorce suit above mentioned, conspired with her parents, the other defendants in this action, and did on September 11, 1911, alienate the affections of plaintiff's husband, and with the connivance of the said defendants persuaded the said John E. VonDorn to desert and abandon the plaintiff and withdraw his support from her and to enter into a pretended marriage with the said defendant, and that the said John E. VonDorn and defendant, since that time, and up to the commencement of the suit on June 25, 1918, have been living together as husband and wife.

The defendant urges as one ground to sustain his general demurrer that the petition, by the facts pleaded, discloses that plaintiff and John E. VonDorn were not, at the commencement of this action, husband and wife, but, however that may be, we find it unnecessary to pass upon that question, for were we to assume, as plaintiff contends, that there was a valid marriage relation subsisting with the plaintiff, still it occurs to us that plain-

tiff has in no event brought her action within the time required by law.

More than four years had elapsed from the time her cause of action accrued before this suit was commenced. The completed alienation of the affections of the plaintiff's husband, his abandonment of her, and his cohabitation with the woman, with whom it is alleged he entered into a pretended marriage, all transpired in 1911, and that condition of affairs appears to have been continuous for a period of almost seven years prior to the commencement of this suit.

An action of this nature is based upon the loss of the affections and companionship of the husband, for loss of support, and for mental anguish and injuries to the plaintiff's feelings. The wrong of which the plaintiff complains occurred and was completed in 1911. The fact that the loss has been continuous is evidence only of the amount of damages suffered by her, and these accruing damages are not severable from her original cause of action. They are the natural and ordinary consequences of the initial wrong committed, and no new cause of action springs from them. It is the general rule, applicable here, that when, through a wrong committed, an injury is inflicted upon another, the statute of limitations attaches at once, even though at that time the plaintiff may not be fully advised of the extent of the damages suffered, and though subsequent substantial damages do not occur until a later date. Furthermore, a subsequent continuance or increase in damages results in no new cause of action. 25 Cyc. 1135.

Here no new cause of action is shown since the year 1911. The plaintiff alleges that defendant, through her wiles and connivance, retained the affections of the plaintiff's husband, but there is no allegation that plaintiff's husband, since 1911, had at any time transferred or returned his affections to the plaintiff, and that the defendant then had, by renewed efforts, again alienated

them. Under these allegations, as we view it, no new cause of action is shown, and plaintiff's case, we must hold, is barred by the statute of limitations. Such is the ruling in a similar case: *Farneman v. Farneman*, 46 Ind. App. 453, 459.

We therefore recommend that the judgment of the lower court be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

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LULU MCCOY, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED APRIL 17, 1920. No. 20942.

**Street Railways:** INJURY TO PASSENGER: DUTY OF CONDUCTOR. Where a street car is slowing speed for the purpose of stopping and discharging a passenger, in response to a signal, it is not the duty of the conductor to warn the passenger, who has proceeded to the rear platform with the apparent purpose of being in readiness to alight, that the car has not stopped, or of danger in attempting to alight, unless there is something in the appearance or conduct of the passenger which should reasonably give the conductor notice that the passenger is to some degree helpless, or that he apparently, under some misapprehension or from carelessness, has an intention of alighting while the car is still moving.

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

*John O. Yeiser*, for appellant.

*John L. Webster*, *contra.*

FLANSBURG, C.

Action for damages resulting from injuries sustained by the plaintiff while she was a passenger on one of the

defendant's street cars. At the close of the plaintiff's testimony, the court directed a verdict for the defendant. Plaintiff appeals.

Plaintiff was a passenger on defendant's street car at about 9 o'clock in the evening of November 6, 1917. She was then about 53 years of age, and weighed 185 pounds. Her eyesight, she said, was failing so that she had to wear glasses to read. She signaled for the car to stop, rose from her seat, near the middle of the car, and proceeded to the rear platform, speaking to and exchanging a few remarks, as she passed, with acquaintances who sat near the rear door. She walked out on the rear platform, took hold of the handrail at the side of the car, and looked out. She says that, though she was able to see the pavement, the night was dark, and the car was going so smoothly and so slowly, since it was about to stop, that she did not know it was still moving, and stepped off. As a result thereof she fell and sustained injuries.

The act of negligence complained of is that the conductor, who stood upon the rear platform, did not warn her that the car had not stopped. As the evidence stands, there was nothing proved in the appearance or conduct of the plaintiff from which it could be said that the conductor knew or should have known that she was to any degree helpless, or in need of protection or assistance, nor that he knew or should have known that she, at any instant before she stepped down and off the car, believed that the car was not moving, and that she therefore intended to get off before it stopped. Had the conductor known that she believed the car had stopped, and that she, therefore, intended to get off before it actually did stop, or if the circumstances had been such as to reasonably charge him with that notice, it would have been his duty from that instant to warn her and to do what he could to protect her against incurring any risk.

The plaintiff, so far as the evidence shows, would have appeared to any observer to have been active, alert, and normally in possession of her faculties. She passed back to the rear platform, and to the steps, as hundreds of other passengers do daily, in order, apparently, to take a position in immediate readiness to alight when the car stopped. The conductor is not possessed of occult powers, and, under the circumstances shown, was not bound to anticipate that she would attempt to alight from the moving car; and he was not bound to warn her, unless from some circumstance he had been given reason to anticipate what she might or was about to do. *Armstrong v. Portland R. Co.*, 52 Or. 437; *Sumner v. Grays Harbor R. & L. Co.*, 89 Wash. 55; *Hutchinson v. Capital Traction Co.*, 36 App. D. C. 251; *Gipson v. Shreveport Traction Co.*, 142 La. 498; *Mabry v. Boston Elevated R. Co.*, 214 Mass. 463; 10 C. J. 926, sec. 1350.

The following cases, which, upon first examination, may appear favorable to plaintiff's contention, are, it seems to us, distinguishable from the present case: *Indiana Union Traction Co. v. Swafford*, 179 Ind. 279; *Paducah Traction Co. v. Tolar*, 162 Ky. 50; *Blue Grass Traction Co. v. Skillman*, 31 Ky. Law Rep. 480.

In the Indiana case the petition affirmatively stated that the conductor actually knew that the plaintiff intended to alight while the car was moving, and the court therefore held that the petition stated a cause of action and was not vulnerable to demurrer.

In the *Paducah Traction Company* case the plaintiff had been carried past her stopping place, and went to the back platform and jumped off while the car was in the middle of the block, and the court said the peculiar circumstances presented a question for the jury as to whether the conductor should have known of her intention and warned her against getting off.

In the *Blue Grass Traction Company* case the conductor opened the door of the car, which might have been taken as an invitation for the passenger to alight, and

the failure of the conductor to warn the passenger, who passed and stepped out as soon as the door was opened, was held negligence. That case is, moreover, criticized as being against the weight of authority in the case of *Sumner v. Grays Harbor R. & L. Co., supra.*

In all these cases the general rule, as we have above stated it, that the conductor is not bound to give warning, unless something in the appearance or conduct of the passenger requires it, is recognized, and it is our opinion that the plaintiff's evidence shows that her case comes within that general rule and discloses no cause of action.

We therefore recommend that the judgment of the lower court be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

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## RILEY FIMPLE V. STATE OF NEBRASKA.

FILED APRIL 30, 1920. No. 21019.

**Witnesses:** PRIVILEGED COMMUNICATIONS. Statements made to an attorney, with a view to his employment in the litigation in which he is called to testify, are privileged, even though no fee has been paid and the attorney subsequently refuses a retainer.

Error to the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Reversed.*

*Bernard McNeny,* for plaintiff in error.

*Clarence A. Davis, Attorney General, George W. Ayres, J. B. Barnes, Ralph P. Wilson* and *L. D. Hunt, contra.*

MORRISSEY, C. J.

Defendant prosecutes error from a conviction in the district court for Harlan county, on an information charging him with assault and battery upon his wife. Two assignments of error are made. The first relates to the admission of certain testimony, and the second raises the question of the sufficiency of the evidence.

Defendant is 73 years of age, and his wife is 23. The half century that separates them appears to be responsible for the lack of domestic tranquility. The wife claims that her husband grabbed her by the throat and accused her of looking with too much favor upon a neighbor. To corroborate her story, the state called as a witness an attorney who was county attorney at the date of the alleged assault, and who drew the complaint. The testimony of this attorney showed that, soon after the disagreement between defendant and his wife, defendant called upon him in his office and made certain statements corroborative of the testimony given by the wife. This evidence was admitted over proper objection of defendant's counsel that it was a privileged communication made to the attorney while the relationship of attorney and client existed. It appears that the attorney was reluctant to give the testimony. As going to show that he believed the communication confidential, we quote his answer when asked to relate the conversation. He said: "Well, I don't know that I ought to tell what he said, because I think he was talking to me in a confidential relationship, or thought he was." Further examination shows that some time during their conversation the attorney said: "Now, Mr. Fimple, you better be careful what you say to me, because I am the county attorney." Whether this warning was given before or after defendant had detailed the happenings at his home, the witness was unable to say.

The testimony of defendant shows that he regarded the conversation with the attorney as confidential, and he claims that as soon as he was informed of the attor-

ney's official position he ceased to discuss the matter and proceeded to procure another attorney. The record indicates that for 20 years preceding this affair he had, on different occasions, consulted and employed this attorney, who always rendered satisfactory service. The natural conclusion to draw from all the circumstances is that, when defendant found himself in trouble with his wife, he went to employ the attorney who had successfully handled other business for him. This attorney, a man of ripe judgment, expressed the opinion on the witness-stand that he believed defendant thought the conversation was confidential, and he declined to testify until called to do so under the ruling of the court.

In order to bring a communication within the privilege accorded by the statute, it is sufficient if it be shown that the relation of attorney and client existed at the time the communication was made, and this privilege is extended also to communications properly made in negotiating for the employment of the attorney. *Nelson v. Becker,* 32 Neb. 99; *Farley v. Peebles,* 50 Neb. 723. The record brings this case within the rule.

The judgment is reversed and the cause remanded.

REVERSED.

LETTON, DAY and FLANSBURG, JJ., not sitting.

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FARMERS & MERCHANTS BANK OF DEWITT, APPELLEE, V. FARMERS & MERCHANTS BANK OF WALTON, APPELLANT.

FILED APRIL 30, 1920. No. 21024.

**Appeal:** AFFIRMANCE. When an issue of fact is submitted to a jury on instructions that fairly state the issue, and the verdict is supported by sufficient competent evidence, it will not be disturbed.

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

*T. J. Doyle,* for appellant.

*Strode & Beghtol, contra.*

MORRISSEY, C. J.

Defendant appeals from a judgment based upon two certificates of deposit issued by defendant to plaintiff. One certificate was for $2,200, dated May 21, 1914, and payable 30 days after date. The second was of the same date, payable in 60 days, and for the sum of $2,860. Defendant admitted the execution and delivery of the certificates, but alleged that they were issued pursuant to an agreement between the parties, whereby it was agreed that plaintiff should furnish to defendant the sum represented by the certificates, namely, $5,060, with which to pay certain dishonored checks of one Austin, and that upon payment by defendant of these checks plaintiff was to return the certificates of deposit to defendant. Defendant alleged that it paid the checks according to the agreement, and that it "received no consideration for the certificates other than the money to distribute to the payment of said dishonored checks."

In support of this allegation, defendant set out a contract between the Austin-Peterson Shoe Company, and DeRoy Austin, its secretary, as parties of the first part, and defendant bank and its cashier, J. R. Barger, parties of the second part, wherein it was agreed that in consideration of the obligations therein existing, and money loaned and to be loaned by the first party, Alex Franke was appointed agent and attorney in fact for the various mercantile concerns operated by the first party, and was authorized to take them over and operate them and to pay off the indebtedness, having full and general charge of all the business. It was further alleged that the overdrafts and dishonored checks of the Austin-Peterson Shoe Company and DeRoy Austin amounted to $5,060; that plaintiff agreed that if defendant would execute and deliver the certificates in suit to be held by plaintiff for the time stated in the respective

certificates, while the goods of the mercantile company were being converted into cash, plaintiff would surrender up the certificates to defendant; and that plaintiff would execute a writing evidencing the agreement alleged. A writing in the following form is set out:

"Walton, Neb., May 21, 1914. Received of Farmers & Merchants Bank, Walton, certificates of deposit for $2,200 for 30 days and one of $2,860 for 60 days which I agree to hold for time mentioned, unless sooner paid by receipts from stores of Austin-Peterson Shoe Co. as designated in agreement and assignment of Austin-Peterson Shoe Co., DeRoy Austin, Sec'y, of even date herewith in favor of Farmers & Merchants Bank, Walton, and Farmers & Merchants Bank, Dewitt, and L. A. Berge, J. R. Barger, Cashier.

"Farmers & Merchants Bank, Dewitt, Neb."

It is alleged that plaintiff fraudulently failed to incorporate in this receipt an agreement to return the certificates, and the court was asked to reform the same so as to include that stipulation. The reply was a general denial of all allegations of new matter pleaded.

The first assignment of error deals with instruction No. 6 given by the court. This instruction merely stated the measure of recovery in case the jury found for plaintiff. We see no error in the instruction, and we assume it is not seriously urged, since it was not called to the attention of the trial court in the motion for a new trial.

Instruction No. 5 told the jury that, if they found that the money represented by the two certificates in suit was furnished by plaintiff for the purpose of paying the checks set out in defendant's answer, and that they were to be surrendered up under the conditions alleged by defendant, the verdict should be for defendant; but if they were not so satisfied from the evidence, and if the money represented by the certificates was in fact loaned to defendant, the verdict should be for plaintiff. This instruction is criticized, but we find no error in it. It appears to fairly state the issue, which defendant in its

brief sums up as follows: "The whole issue before the jury was: Were these certificates given under an agreement that in 30 and 60 days they would be returned when the dishonored checks were paid with the money paid for that purpose?"

There is complaint on the rulings of the court relating to the admission of evidence, and especially to the cross-examination of the cashier of defendant bank, but we find nothing in these assignments that constitute prejudicial error. The whole question was one of fact, and the jury found against defendant. It may be conceded that there is sufficient dispute in the evidence to support the verdict had it been in favor of defendant, but there is also sufficient proof to support the verdict which the jury rendered.

AFFIRMED.

FLANSBURG, J., not sitting.

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LEMUEL M. CLAY ET AL., APPELLEES, V. FRANK H. PALMER ET AL., APPELLANTS.

FILED APRIL 30, 1920. No. 20871.

1. **Vendor and Purchaser:** NOTICE OF LEASE. One who purchases land, with knowledge that others are in possession of a portion of it under an agreement of the nature of a mining lease, takes it subject to the rights of the lessees.

2. **Mines and Minerals:** CONTRACT: CONSTRUCTION. The agreement set forth in the opinion, considered in connection with other evidence in the record, *held* to be more than a mere license to extract potash, and to confer upon the lessees the exclusive right to occupy the leased premises and remove potash.

3. ———: LEASE: ABANDONMENT. Evidence examined, and *held*, not to show abandonment by the lessees at the time defendants entered and removed mineral-bearing water from the leased premises.

4. **Partnership:** WRONGFUL ACTS: DISSOLUTION: PARTIES. Where a partner has, in violation of his duty to the partnership, wrongfully

disposed of property in which the partnership has an interest, or wrongfully surrenders partnership rights to third parties with notice of the same, a court of equity may, in a suit by the other partners against the wrongdoers, compel restitution, and, if requested and justified, dissolve the partnership and compel an accounting. In such a suit all parties who have knowingly received such property are proper parties defendant.

5. **Trover:** MEASURE OF DAMAGES In this state the rule is, that damages shall only be compensatory, and not punitive; and, where property wrongfully taken has been changed in its nature and can not be identified, the measure of damages is its value immediately after it has been taken and reduced to the possession of the wrongful taker.

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

*Herbert S. Hadley, E. P. Holmes, William V. Hodges, John S. Kirkpatrick, Mitchell & Gantz* and *L. J. Williams,* for appellants.

*Sullivan, Squires & Johnson* and *O. A. Abbott, contra.*

LETTON, J.

This action was brought by two members of a partnership to reform a contract and establish it as a lease, for a specific enforcement of the instrument as reformed, and to enjoin defendants from interfering with possession of the leased premises, for recovery of the property, or its proceeds, for an accounting, and praying for a dissolution of the partnership.

The petition alleges, in substance: Plaintiffs Clay and Irwin are members of a partnership named the Palmer Potash Products Company, each owning a one-third interest, the other one-third interest being owned by the defendants Frank H. Palmer and Emily W. Palmer, his wife.

In February, 1916, Henry J. Ashburger and Gottlieb Ashburger, owners of about 1,240 acres of land in Sheridan county, sold the same to Palmer for $12,400, $200 of

which was paid in cash. The remainder was to be paid on March 1, 1917, when the deed and abstract were to be delivered. Possession was given May 1, 1916. On part of this land there were two lakes, the waters and underlying soil of which contained potash. So far the allegations are undisputed. It is alleged that in June, 1916, Palmer entered into this partnership agreement with Lee Owen, Helmer Haglund, and L. M. Clay for the purpose of producing potash from the waters and deposits of part of the larger lake, known as Ashburger lake. It is alleged, and the evidence in behalf of plaintiff tends to prove, that an oral lease was made by Palmer to the partnership for the term of 20 years to all that part of the lake lying south of a line crossing the lake, which was marked out by the parties at that time, with the right to remove and appropriate all of the potash and other minerals in the lake and underneath the same. The lease further conveyed the right to use sufficient ground near the lake north of this lease for the necessary buildings, tanks, and machinery, and for a right of way across the tract to the line of the Chicago, Burlington & Quincy Railroad, and sufficient other land contiguous to the railroad upon which to erect necessary buildings and side tracks. It was agreed that each of the members of the partnership except Haglund, should contribute and pay in $500 cash, and that the partnership should pay Palmer a royalty of one-eighth of the proceeds of the potash produced. Haglund paid his $500 by transferring to the partnership at that price a certain boiler, engine, and other machinery. Afterwards the parties went to a bank at Alliance and procured an employee of the bank to reduce the agreement to writing. The writing is as follows:

"These articles of agreement, made and entered into this 24th day of June, 1916, by and between Frank H. Palmer, Lee Owen, L. M. Clay and H. H. Haglund, and Mrs. Emily W. Palmer, Witnesseth: That the said parties do hereby form themselves into a partnership, Frank

H. Palmer and Mrs. Emily Palmer to own a one-fourth interest in same, and each of the other three parties to own a one-fourth interest. The firm are to do business under the firm name of the 'Palmer Potash Products Co.' The officers of the company will be as follows till changed by consent of the partnership: Frank H. Palmer, president and general manager, L. M. Clay, vice-president, Mrs. Emily Palmer, treasurer, H. H. Haglund, secretary, and Lee Owen, superintendent.

"In consideration of Frank H. Palmer owning the land on which the deposits are located, which the company intend to work, it is mutually agreed that he shall remain permanently as president and general manager of the company. All funds belonging to the company shall be paid into the hands of the treasurer and disbursed by said officer. It is further mutually agreed that, in case any of the parties hereto shall sell their interest in the company, the other parties hereto shall have the first chance to buy said interest, and in case they do not purchase same, it shall not be sold except to such party or parties as shall be agreeable to the other parties hereto. Each party hereto is placing $500, or $2,000 in all, in the hands of the treasurer, the $500 share of Mr. H. H. Haglund being represented by two boilers and a steam engine, which are on the grounds where the company expect to operate at this time, the balance of the $1,500 being paid in in cash as follows: Frank H. Palmer and Mrs. Emily Palmer $509, Lee Owen $500, L. M. Clay $500.

"In consideration of the lease on the south part of the Ashburger lake to this company by Frank H. Palmer, it is hereby agreed to give the said Frank H. Palmer a royalty of one-eighth on all potash obtained by said company, it being agreed that the one-eighth royalty above mentioned shall mean that the said Frank H. Palmer shall receive one-eighth of the proceeds of the money received on all potash sold, after the one-eighth is taken out of the proceeds, the balance shall go to the company;

and no expense of the company shall be deducted from the royalty above mentioned. It is further agreed that, in consideration of the one-eighth royalty above mentioned, the said Frank H. Palmer agrees to lease to the company sufficient grounds for the buildings to be erected in the manufacture of said potash, also a right of way across his land to the Chicago, Burlington & Quincy Railroad, and sufficient lands adjacent to the railroad tracks for the purpose of erecting the necessary side tracks and buildings for the company.

"It is further agreed that the treasurer shall give a bond for $1,500 at this time, and a personal bond is hereby agreed to be satisfactory to the other parties hereto.

"In Witness whereof the parties hereto have hereunto set their hands this 24th day of June, 1916.

"Frank H. Palmer,
"Lee Owen,
"L. M. Clay,
"Helmer Haglund,
"Emily W. Palmer.

"Signed in presence of W. J. Root."

The petition alleges that the writing was defective, in that it did not provide that the partnership should last for 20 years, nor that the lease should be for a 20-year term, and lacked definiteness as to the premises leased.

Afterwards Haglund sold his interest to plaintiff Irwin, and the interest of Owen was purchased by the firm with partnership funds, so that Clay and Irwin now own two-thirds, and Mr. and Mrs. Palmer one-third, of the assets of the partnership. It is alleged that defendant Copsey, with full notice and knowledge of the partnership rights, bought the land from Palmer and executed a lease to the lake to the Nebraska Potash Works Company, a corporation, which also had full knowledge of plaintiffs' rights through its manager, defendant Hulen.

After the execution of the agreement the partners constructed buildings and improvements on the margin of

the lake and began extracting potash. In a somewhat crude manner they extracted about 13 tons of potash before October 1, 1916, but expenses were high, more capital was needed, and dissensions arose between them, so that they ceased the active manufacture of potash about the latter part of September, although Irwin continued to operate until in December, burning his own fuel. Two small houses had been erected on the land, in one of which Irwin and his family resided, and an employee lived in the other, and continued to reside there until after this action was begun, and the boilers, engines, tanks, pans, and other items of personal property still remained *in situ* upon the premises, and it is alleged they are still in possession.

In 1916 efforts were made by the partners to interest others who could provide the necessary capital to make the payment upon the land due on March 1, 1917, and for the successful prosecution of the work. Sometime before March 1, 1917, defendant Copsey, a doctor and banker of Alliance, became interested, visited and took samples of water from the lake, and finally purchased from Palmer all of his interest in the contract from Ashburger. Palmer testified that he told Dr. Copsey that the partnership had a plant at the lake, that the partners were trying "to beat me out of the whole thing * * * and I guessed there would be no more potash made, so far as I was concerned."

The amount due Ashburger was paid, and a deed executed to one Hargarden. Copsey furnished the money. Hargarden soon afterwards conveyed to Copsey. These deeds were recorded on March 5, 1917, and this action was begun in April, 1917. Within a week or two Copsey leased the lake and its deposits to the Nebraska Potash Works Company, hereinafter termed the company. It is admitted that Copsey and the company, by its president, Stevens, and its manager, Hulen, had full knowledge of the written agreement, but they deny knowledge that the lease was for 20 years.

The prayer of the petition is that the contract be reformed, so as to show that the term of the partnership and the term of the lease should each be for 20 years from the date of the written contract, and that, when so reformed, the contract be specifically enforced, that defendants be enjoined from interfering with the use and occupancy of the premises by the partnership, and that the title be confirmed and quieted in said partnership.

Defendants answered, admitting the execution of the written agreement, which it is alleged is the only agreement made between the parties, alleging abandonment of the enterprise by the partnership, denying that Palmer ever leased the lake or any part of it to them, admitting that the defendant company is now constructing a plant and intends to remove potash and other minerals, and prays that defendants' title be quieted. The cause was then removed by defendants to the federal court, and afterwards remanded. During the interval the company sank wells in the lake and began pumping water and extracting potash.

After remand, an amended and supplemental petition was filed, which alleges substantially the same facts as in the original petition, and, in addition, alleges that Palmer is still the owner of the land; that the company has taken out from 12 to 13 tons of potash a day, of the value of $136 a ton; that the partnership is indebted, and the Palmers refuse to pay or contribute to the payment of the debts; that the company has sunk over 400 wells in and about the lake, and are threatening to bring suit to eject the plaintiffs from the premises. The prayer is that the lease of the company be canceled; that it be restrained from operating upon the premises; that the title be quieted in the partnership; that an accounting be taken of the value of the potash extracted, and that this amount, with interest, be paid over to a receiver of the partnership to be appointed by the court; that the partnership be dissolved and its affairs wound up.

The defendants filed answers substantially as before, pleading, in addition, that the agreement between Palmer and the partnership is void under the statute of frauds, and that the defendants were purchasers in good faith. The reply denies abandonment.

The trial court made specific findings of fact in favor of plaintiffs, and, as conclusions of law, found that plaintiffs were entitled to a decree dissolving the partnership, to have a receiver appointed to wind up its affairs, and to enforce the specific performance of the oral lease, and that defendants Hulen, Copsey and the company are each liable to the partnership in the sum of $120,000, with interest from May 1, 1918, as damages sustained caused by the trespass of the company. Judgment and decree were rendered accordingly. Separate motions for a new trial were filed and overruled.

While the evidence is conflicting to some extent, we are fully satisfied that the partnership took possession in June, 1916, and still retained actual and visible possession of the leased premises at the time Palmer sold to Copsey; that Copsey and the other defendants had full knowledge of all the rights claimed by the partnership; that whatever rights they have were acquired with such knowledge, and are subject to the rights of the partnership, whatever they are.

An important question is: What was the nature of the agreement entered into between Palmer and the partnership? Was it merely a parol license, good for one year, or was it a lease for 20 years, void under the statute of frauds, unless partly performed? We are of the opinion that the recitals in the written agreement, "in consideration of the lease on the south part of the Ashburger lake to this company by Frank H. Palmer," etc., and further, "the said Frank H. Palmer agrees to lease to the company sufficient grounds" for buildings and right of way, etc., when considered in connection with the oral testimony, establish the fact that the writing does not contain the entire contract, but that the term of duration of the

partnership and of the lease was 20 years. We also believe that the taking and holding of possession was sufficient part performance to take the agreement out of the statute of frauds and vest all rights thereunder in the partnership.

The lease was, however, not an unconditional demise of the land and lake, as plaintiffs assert, but partook of the nature of both a lease and a license. It was a lease of the right to occupy land at and near the lake, and at the railroad, and of a right of way, subject, however, to determination before the end of the term in certain contingencies, such as the exhaustion of the deposits or the total abandonment of the enterprise. It is to be noted, also, that under the written agreement, when a corporation was formed as contemplated, Palmer, "on account of the ownership of the land," was to remain permanently as president and general manager of the corporation. This was evidently in Palmer's mind an additional consideration for the lease.

It is clear that Palmer never intended to give, nor the partnership to acquire, an absolute lease to the property. No rent was stipulated to be paid except as derived from the potash extracted. In such an instrument it is implied that the refusal or neglect of the lessee to work the deposits, if continued for such a length of time as to indicate that the enterprise was wholly abandoned, would work a forfeiture of the lease. Such agreements, though often called "leases," are not such, strictly speaking. They convey greater rights in certain respects than an ordinary lease, since they imply and require the removal of part of the corpus of the estate, which otherwise would constitute waste (*Fawn Lake Ranch Co. v. Cumbow,* 102 Neb. 288), though in the respect that failure to work the deposits warrants a forfeiture, they are less effective than an ordinary lease. They may be limited as to time or as to quantity, and are usually known as "mining leases." 3 Lindley Mines (3d ed.) secs. 861, 862, and cases cited.

Defendants argue that the evidence shows an abandonment by the partnership before Copsey purchased. The proper limits of this opinion do not permit a detailed statement of the evidence upon this point. It is sufficient to say that retention of the possession of the dwellings, other structures, and machinery, the continuance of work until in December, 1918, the repeated efforts to enlist capital in the enterprise with Palmer's concurrence and active participation, continuing up to January, 1917, within a few weeks of his sale to Copsey, the filing of the original petition before the company had expended any money upon the south portion of the lake, the refusal to vacate when notice was served by Palmer on the plaintiffs early in March, 1917, with other facts in evidence, are sufficient to convince us that no abandonment had taken place at the time Copsey bought, nor at the time the company obtained its lease and entered upon that part of the lake held by the partnership. We conclude, therefore, that the removal of potash from the south half of the lake was had subject to the rights of the partnership.

Defendants Copsey, Hulen and the company contend that this action cannot be maintined against them, that they are not in privity with the partnership, and cannot be joined with it in such an action.

Palmer occupied a dual relation to the partnership. First, he was the lessor, and it was his lessee. It had no interest in the contract with Ashburger, except that by force of circumstances it was deeply interested that Palmer should make his final payment and complete his title, since if his title failed, its lease would fall with it. Second, he was a partner occupying a fiduciary relation to the other members of the firm, and charged with the duty of good faith and fidelity to the interests of the partnership. Any wrongful disposition of partnership assets by him, in violation of this duty or in fraud of its rights, was liable to be set aside at the suit of his copartners, if the other parties to the transaction

had notice and knowledge that the property belonged to the partnership.

We are of the opinion that under the facts plaintiffs had the right to seek the aid of a court of equity to set aside a conveyance made by a partner in violation of his duty to the partnership, in so far as it affected its rights adversely. In such an action the wrongful grantees with notice are proper and necessary parties defendant. The court in such a case has power to compel restitution of the property or of its proceeds, and may retain the action for the purpose of winding up the affairs of the partnership, if it appears that this is requested and should be done. A court of equity will retain jurisdiction in order to do complete justice between the parties. *Bergeron v. Richardott,* 55 Wis. 129; *Palmer v. Tyler,* 15 Gil. (Minn.) 81.

Defendants assert there is no proof that the operations of the partnership were interfered with by the company, and that consequently no cause of action accrued. There is no proof of force being used by the company in the occupation of the south part of the lake or of physical resistance by the plaintiffs. But, when all the circumstances are considered, it seems obvious that the taking of actual possession and the sinking of over 400 wells by the company in the south part of the lake would effectually interfere with the raising of capital by the partners and the successful prosecution of their enterprise. As pointed out, this invasion took place after this action was commenced. It is true that, if let alone, the parties might have been forced to abandon their lease and thus lose all their rights; but, as long as it was in existence, no one had the right to interfere with them. Under its terms they had a right to quiet enjoyment for at least a reasonable time, under all the circumstances, to work out their enterprise, and those who, knowing their rights, ventured to oust them, other than by legal means, took the chance of having to

return a legal equivalent for whatever of value they were deprived of.

Defendants argue that, because Palmer only held an equitable interest in the land, he had no power to grant a lease to commit waste by the removal of mineral from the estate, and could not do so until after he acquired title. This might be a ground of complaint if made by the Ashburgers, the owners of the fee at that time; but, if they raised no such objection, we cannot see that any other party can complain.

In *Baker v. Hart,* 123 N. Y. 470, 12 L. R. A. 60, a lessee had the right to quarry stone on the demised lands for a period of ten years. It was held, in an action by the lessee to recover the value of stone quarried and taken by trespassers, that the plaintiffs had no title to the stone until quarried, and that, since it was not shown that during the term of the lease they would have exhausted all the stone, they had no right to recover. Other cases are cited to the same effect, and it is contended that plaintiffs have only a license, and and that, since they have not shown that the potash is exhausted, there can be no recovery. Even if only a license, it is shown that the lake was at one time pumped dry, and there is no evidence that there is any potash still remaining and susceptible of extraction. Furthermore, it is a matter of common knowledge that the chance of future profit from the reduction of potash from such waters is highly problematical after peace is declared with Germany and commerce is restored. The natural presumption under the facts shown is that the value of the deposit has been largely eliminated by defendants' operations.

But, as we have before stated, the partners held more than a mere license, and we are convinced that it was the intention that the partnership should have exclusive possession of the south end of the lake, with the right to extract all the potash therein or thereunder. It follows that for any interference with this possession,

with knowledge or notice, the lessee is entitled either to a return of the property removed or to compensation. The doctrine of *Baker v. Hart, supra,* therefore, cannot be applied.

We find it difficult to apply the principles relating to oil leases to the facts in this case. It appears that the distribution of potash in waters of the lake is by no means uniform, presumably for the reason that evaporation proceeds as the waters move southward. The natural drainage is toward the south or southeast, and the water in the south end of the lake is much the richer. Defendants first confined their operations to that portion of the lake north of the dividing line. That it was some time afterward before they invaded the southern portion of the lake seems to have been occasioned by this fact.

The question as to the proper measure of damages has given us much trouble. First, the general rule is that, where one having knowledge of the rights of another wilfully trespasses upon and takes his property, the owner is entitled to follow and recover it, even though its condition may have been changed and value added by the wrongdoer. On the other hand, if the taking of the property has been under an honest mistake of fact and with no wrongful intention on the part of the trespasser, the owner is only entitled to recover its value in its natural state. One of the leading cases on this proposition is *Woodenware Co. v. United States,* 106 U. S. 432, 1 Sup. Ct. Rep. 398. This case has been followed and cited many times. It states a principle derived from the civil law. *Baker v. Meisch,* 29 Neb. 227. In Nebraska, however, a slight modification of the rule has been adopted. In *Carpenter v. Lingenfelter,* 42 Neb. 728, 737, it is pointed out that there is a conflict of authority upon the matter: "There is one line of cases which holds that, where the value of property has been increased by another, the owner may recover the value of the property in its improved and

more valuable form. There is another line of decisions which states the rule broadly that the measure of the recovery is the value of the article before the same was improved by the other's labor and skill, and this whether the value was increased by a wilful wrongdoer or by a person acting in good faith. The last rule seems to us the better one. It gives the owner full compensation, and to the other party the increase of value for his labor bestowed on the property. *Single v. Schneider,* 24 Wis. 299, 30 Wis. 570; *Hungerford v. Redford,* 29 Wis. 345; *Herdic v. Young,* 55 Pa. St. 176; Cobbey, Law of Replevin, sec. 913; *Wetherbee v. Green,* 22 Mich. 311."

Plaintiffs rely upon *Guffey v. Smith,* 237 U. S. 101, 35 Sup. Ct. Rep. 526, holding in effect that, where a wrongdoer extracted oil from the leasehold of another and placed it in a pipe line, the lessee of the land from which the oil was extracted was entitled to a return of the value of the oil in the pipe line, without deduction for the cost and labor of sinking the wells and pumping the oil. Water containing potash in solution is not in a marketable form when pumped into a pipe line. Much the larger portion of the cost of what might be termed manufacturing the potash accrues thereafter. Large quantities of fuel must be consumed and expensive apparatus and machinery employed before potash in a marketable form is produced. If the partners had removed the water, they would have been compelled to incur like expenditures and change the nature of the product before a sale could be had. The condition, therefore, is the same as where material of comparatively small value has been taken and its nature or species has been changed, or its identity lost, by the process of manufacture. 1 C. J. 385, 386.

We feel compelled to adopt the rule in the *Carpenter* case, because we believe that the rule in that case is most in consonance with the principle, so often applied in this state, that damages should only be compensatory, and not include the element of punishment.

Copsey, being the owner of the ranch, had full right to recover potash both from the small lake spoken of, from another lake known as the Wilson lake, and from all except the southern portion of Ashburger lake. It is shown that, when the latter lake was pumped dry, water containing potash in a more diluted state was pumped into it by defendants, evidently for the purpose of leaching the subsurface deposits through the wells already sunk.

We have been unable to ascertain from the evidence any definite, clear and satisfactory basis upon which the ascertainment of the sum of $120,000 as the damages suffered was founded. We believe that justice will be more nearly subserved by affirming the judgment of the district court, except as to the amount of recovery, reversing the judgment as to this, and remanding the case, with directions to ascertain and determine as near as possible the proportion of potash derived from the waters of that portion of the lake leased to the partners; to charge the defendant Copsey and the company with the net proceeds of all potash derived from the same, less the royalty of one-eighth, and the cost of extraction after the water was in the pipe line; and to award the sum remaining, after the debts of the partnership and expenses of a receiver have been paid, to the respective parties or their assigns, as their interests appear. The evidence already in the record upon the question of damages is to be considered in connection with such other proof as may be produced by the parties, or either of them, upon this issue. At best, an amount only approximating the real damages can be ascertained; but we think other facts may be adduced which will aid the court, or a master, to more nearly fix the actual loss than the evidence now in the record.

Defendants, on the motion for a new trial, offered to show the net profits of their operations during the time they were reducing the water from Ashburger lake.

This inquiry is not relevant to the question at issue, and the offer was properly rejected.

AFFIRMED IN PART, AND REVERSED IN PART.

DEAN and FLANSBURG, JJ., not sitting.

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THOMAS MERKOURAS, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED APRIL 30, 1920. No. 21240.

1. **Appeal:** LAW OF THE CASE. The law of the case as declared in the former opinion in this case, *Merkouras v. Chicago, B. & Q. R. Co.*, 101 Neb. 717, controls.

2. **Master and Servant:** INJURY TO SERVANT: PROXIMATE CAUSE. If, as plaintiff testifies, at a time when his duties did not require him to be upon the switch-track, another workman jumped upon his back, forced him upon the track, and held him down until the slowly approaching cars reached them, and he was injured, the wilful act of the other workman was the proximate cause of the injury.

3. **Negligence:** PROXIMATE CAUSE. "A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with, but independent of his acts, not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produces the injury, it is the proximate and dominant cause." *Kitchen v. Carter*, 47 Neb. 776.

4. ———: COMPARATIVE NEGLIGENCE. If, on the other hand, as other evidence indicates, plaintiff and the other workman were voluntarily scuffling and playing on the track, the plaintiff having knowledge that cars were frequently pushed thereon, his negligence was more than slight, and a recovery cannot be had by virtue of the comparative negligence act, since, in order to recover under this law, the negligence of the plaintiff must be slight when compared with the gross negligence of the defendant.

5. **Appeal:** SUFFICIENCY OF EVIDENCE. In either event, the evidence does not support the verdict.

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

*Byron Clark, Jesse L. Root, E. C. Strode* and *J. W. Weingarten,* for appellant.

*Wilmer B. Comstock, contra.*

LETTON, J.

A judgment for the plaintiff in this case was reversed upon a former appeal. *Merkouras v. Chicago, B. & Q. R. Co.,* 101 Neb. 717. Two judges dissented from the former opinion, and a third did not sit in the case. The gist of the former decision is expressed in the second and third paragraphs of the syllabus, which are as follows:

"A railroad company, in ordering the movements of its cars, would not anticipate that two men would engage in scuffling upon its track, especially so when the men were its employees, working in its switch-yards and momentarily expecting the approach of cars.

"A railroad company does not owe its employees, engaged in its yards in which engines are constantly moving, the duty of keeping a constant lookout to warn them of dangers of which they already have knowledge."

A new trial resulted in a verdict for the plaintiff, and defendant appeals.

After reversal, an amended petition was filed pleading that plaintiff, while passing along the yard adjacent to the switch in front of the icehouse, was seized by another workman and thrown upon the track and held upon it at a place where he and his fellow servants were in the habit of being, and where they were of necessity required to be at times in the discharge of their duty in putting ice in the cars, and at a place where defendant had reason to expect him to be in the discharge of his duty. It is then alleged, as before, that the defendant, in violation of its own rule 102, without giving warning, negligently backed a train of cars over the plaintiff and negligently failed to stop the cars after it should have been aware of plaintiff's perilous position.

The answer alleges plaintiff was injured solely by his own carelessness, and also pleads the law of the case as laid down in the former opinion as a bar to the renewal of the action. As to defendant's negligence, the matter is in doubt. Rule 102 is as follows: "When cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."

The trial court instructed the jury that the rule is ambiguous, and testimony was received as to its interpretation, but we think the burden of proof was not sustained as to the act of moving the cars in this yard not being within the exception.

But assuming that the evidence sustains the verdict in this respect, may the plaintiff recover?

The testimony is much the same as at the former trial. In fact, much of it was read from the bill of exceptions, except that there is evidence bearing upon the new matter pleaded in the amended petition. Plaintiff says that Johnson jumped upon his back and forced him down upon the track, and this seems to be fairly well established. If plaintiff is correct in this, it seems to us that he cannot charge the defendant with the wrongful act of Johnson.

Unless the injury received by plaintiff was a natural and probable consequence of the negligence of defendant with no intermediate causal agency, there can be no liability. *Kitchen v. Carter*, 47 Neb. 776. The act of Johnson was a new and independent force, operating to cause the injury, and if it had not been exerted the accident would not have happened.

In such circumstances, the question is: "Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the

wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 475.

But, even if plaintiff and Johnson went upon the track and wrestled there, they voluntarily placed themselves in a position of great danger in such a manner as to make it difficult to remove from the track if it became necessary to move speedily. There was no necessity for them to be where they were at that time, they were not directed there, nor did their duties require their presence; in short, they were not then engaged upon their employer's business, but upon an affair of their own. Under ordinary circumstances plaintiff would have had ample time, at the very slow rate the cars were moving, to step aside and thus avoid injury, but he and his playmate voluntarily placed themselves in such an attitude as to make this impossible. Under the statute it is only when the negligence of the plaintiff is slight when compared with the gross negligence of the defendant that

recovery can be had. A majority of the court take the view that the evidence as to plaintiff's own gross negligence is so clear as to prevent recovery; that, even with the amended petition and additional evidence, the law announced in the former opinion still applies, and that nothing was developed at the trial, or upon this appeal, to require us to change our former decision; that the evidence does not support the verdict; and that neither on the ground of last clear chance, nor on any other ground, is plaintiff entitled to recover.

The judgment of the district court is reversed, and the cause dismissed.

REVERSED AND DISMISSED.

MORRISSEY, C. J., ROSE and FLANSBURG, JJ., not sitting.

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STATE, EX REL. C. GEORGE CARLBERG, APPELLANT, V. METROPOLITAN WATER DISTRICT, APPELLEE.

FILED APRIL 30, 1920. No. 21344.

1. Waters: WATER-WORKS: EXTENSIONS: ASSESSMENTS: MANDATORY STATUTE. The provision of section 5267, Rev. St. 1913, as amended, chapter 53, Laws 1919, which requires the assessment of special benefits to pay the cost of water main extensions in water main districts "upon all real estate in said water main district," is mandatory.

2. ———: MANDAMUS: ESTOPPEL. Under the facts stated in the opinion, *held* that relator is not estopped to maintain this proceeding.

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

*Thomas Lynch*, for appellant.

*John L. Webster*, *contra*.

LETTON, J.

This was an application for a writ of mandamus. The district court denied the writ, and relator appeals. The case was submitted upon the pleadings and an affidavit filed by respondent.

The controversy arises from the following state of facts. The metropolitan water district of Omaha is authorized by law to create water main districts and to levy special assessments to pay the cost of the extension of water mains therein. The plaintiff owns a corner lot at the intersection of Frederick street and Hanscom Park boulevard, facing 48 feet and 4 inches on Frederick street and 128 feet and 3 inches on Hanscom Park boulevard. He desired to extend a private water pipe from the main on Frederick street to two houses on the lot facing on the boulevard, but respondent refused permission unless relator signed a waiver of objections to a further assessment if a water main district was created on the boulevard. This he refused to do. The water main district includes the whole of each lot in the half block facing on Frederick street.

It is the purpose of the respondent in future to create a water main district and lay water mains along Hanscom Park boulevard in front of the two houses. The omitted two-thirds of the lot will then be assessed, with other real estate fronting upon the boulevard, for its proportionate part of the cost of the main. It has been the uniform rule and custom of the water district board to assess corner lots in Omaha upon this plan, so that the two-thirds of a lot facing upon a side street may be afterwards assessed to pay the cost of water mains on that street, and other corner lots in the district have been assessed in like manner.

Notice was duly published that the board of directors of the metropolitan water district would sit as a board of equalization at the city hall in Omaha on November 5, 1919, for the purpose of correcting errors, hearing

complaints, and for the purpose of considering and equalizing the proposed assessment. The notice described several pieces of real estate, among them "the south 42.78 feet of said lot thirteen (13)." The amount of the assessment made was $24.17. Relator did not appear, and made no objection to the assessment. The board found that the special benefits were as assessed, and levied the same against that part of the lot.

The board alleges that relator has practically subdivided the lot by erecting the three houses thereon, and that if he were permitted to connect the houses upon the rear end of his lot with the main on Frederick street, without executing such a waiver, he might afterwards object to paying any part of the cost of laying the water main upon the boulevard, on the ground that he already had connection with a water main and would receive no special benefits from the new main.

The respondent brings forward as reasons for the denial of the writ that the failure of relator to protest before the board of equalization deprives him of any right to complain of the assessment; that the statute give a right of appeal from its decisions; that this is his only remedy, and he is estopped by reason of his silence.

The principal argument of relator is that section 5267, Rev. St. 1913, as amended in 1919 (Laws 1919, ch. 53), which requires the assessment of special benefits "not exceeding fifty cents per front foot upon all real estate in said main district," is mandatory, and requires the assessment to be made against the entire lot; that, having included the whole of the lot in the district, the board must tax it. He calls attention to another provision of the same section: "No real estate in any city or village shall be subjected to more than one special tax or assessment for the extension or enlargement of water mains." He also denies that any estoppel has arisen against him.

As to the asserted estoppel: We understand that relator is not raising any objection to paying the amount assessed. He is making no complaint as to the amount of benefits assessed and charged against the lot, and it is immaterial to him whether the tax is a lien on the whole lot or only upon one-third of it. He would therefore have gained nothing by appearing and objecting to the assessment. We think no estoppel arose under such circumstances.

Respondent argues that section 4343, Rev. St. 1913, providing, in substance, that after the board of equalization has acted "no court shall entertain any action for relief against such special assessment, except upon appeal from such final order, which remedy shall be deemed exclusive," effectually bars relator of any right of action such as this. But relator is not asking "relief against such special assessment." He stands ready and willing to pay the same.

It is argued that the district board has express power to make rules and regulations relating to water service, and that if relator complies with its rules he may have the permit. The regulatory powers of the board, however, must be exercised in conformity with the statute. Respondent points out that the statute under which assessments are made makes no reference to the original plat of the ground. There is nothing in the law therefore, to prevent the inclusion of part of a lot or tract within, and the exclusion of another part from the limits of a district.

The statute seems plain. "All real estate in said water main district" should be assessed, as the statute directs. If the board desired to reserve the right to assess the cost of laying another main on the side street upon the rear two-thirds of the lot, it should have made the boundaries of the district include only the property it desired to assess.

The denial of the permit seems to us to be unwarranted by the law. The judgment of the district court is reversed and the cause is remanded, with direction to issue the writ, as prayed.

REVERSED.

FLANSBURG, J., not sitting.

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MISSOURI VALLEY TRUST COMPANY, APPELLEE, v. JOHN E. NELSON, APPELLANT.

FILED APRIL 30, 1920. No. 20870.

1. **Trusts:** DUTY OF TRUSTEE. The interest of one who acts in a fiduciary capacity should not be in conflict with the interest of the person whom he represents.
2. **Mortgages:** FORECLOSURE SALE: PURCHASE BY TRUSTEE FOR CREDITORS. Under the facts stated in the opinion, *held*, that the purchaser at foreclosure sale did not hold such a fiduciary relation, with respect to appellant and the property sold, as to render it disqualified to purchase.

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

*Frank A. Anderson* and *Beeler, Crosby & Baskins*, for appellant.

*James I. Rhea, Robert A. Brown* and *Richard L. Douglas, contra.*

CORNISH, J.

On June 30, 1914, John E. Nelson, defendant and appellant, owned real estate, the subject of this foreclosure action, mortgaged to assignor of plaintiff, also to S. F. Hutcheson, and a third lien to defendant Tootle-Campbell Dry Goods Company. He was also president of the Nelson (Merchandise) Company, which company was bankrupt and desirous of effecting a composition with its creditors. On said date, with this purpose in

view, a contract was entered into between defendant John E. Nelson, on the one hand, and the Tootle-Campbell Dry Goods Company and the First National Bank of Holdrege, on the other, in which it was agreed that Nelson would procure an assignment of the assets of the Nelson Company to the dry goods company and the bank, as trustees, to be disposed of and the proceeds applied in payment of advancements made and the indebtedness owing by Nelson or Nelson Company to the dry goods company or the bank.

Afterwards plaintiff brought this action to foreclose its lien in the sum of $9,008. The defendant dry goods company, in its answer and cross-petition, asked foreclosure of its lien, alleging a balance due on the note secured, dated February 28, 1914, in the sum of $23,990.26. In its decree the court found the amount due on each of the liens, and ordered sale of the lands for their satisfaction. The defendant Nelson, who had answered, requested a stay of execution, at the termination of which the land was sold and purchased at the foreclosure sale by the dry goods company, the highest bidder. Objection was made to the confirmation of the sale, on the ground that the property had not sold for its full value; that bidders had been discouraged from bidding by the agent of the dry goods company; and that the dry goods company was not competent to bid at the sale, because it sustained the relation of trustee to the defendant John E. Nelson. These objections to confirmation being overruled, defendant Nelson appeals to this court.

The main contention made in the brief of appellant is that the dry goods company, being a trustee for the defendant John E. Nelson, could not be a purchaser at the sale. He invokes a rule of law stated in *Stettnische v. Lamb*, 18 Neb. 619, as follows: "A party will not be permitted to purchase property and hold it for his own benefit, when he has a duty to perform in relation thereto which is inconsistent with his character as a pur-

chaser on his own account. *Columbus Co. v. Hurford*, 1 Neb. 146." The rule is more fully stated in *Anderson v. Butler*, 31 S. Car. 183, 194 (5 L. R. A. 166), as follows: "It is a well-established principle that a trustee cannot buy at his own sale. He cannot be vendor and vendee at the same time of trust property; that is, he cannot make a binding contract with himself in the purchase of the trust property under his control. On the contrary, all such purchases are subject to be vacated and set aside by the *cestui que trust* at his option, and this, too, without regard to the fact, whether said purchase was made in good faith, at full price, or was fraudulent and delusive. This doctrine has been long settled, both in England and in this country, and it is a wise and wholesome principle. It strikes at once at the root of danger, and destroys it. It removes from the trustee the temptation to do wrong, and guarantees the faithful execution of his trust in the sale of the property of his *cestui que trust*."

The inquiry is whether the dry goods company, in purchasing at the foreclosure sale, comes within the rule stated. We think not. The rule is one of good faith, growing out of the relations which exist between a trustee and his *cestui que trust*. The interest of one, acting in a fiduciary capacity, should not be in conflict with the interest of the person whom he represents. In the instant case, the real estate mortgaged never became trust property, although the assets of the Nelson Company did. The contract treats it as property mortgaged by Nelson to secure a debt, title remaining in Nelson, without possession or power of disposal of it lodged in the trustee. The contract did not change their relation to it. It would be unreasonable to suppose that the contract contemplated that the dry goods company could not foreclose its lien, or that, if, as the fact was, a prior mortgage was foreclosed, the dry goods company could not, as holder of a third lien, set up its lien and to avoid sacrifice, be a bidder at the foreclosure sale.

The sale made was not the dry goods company's sale, but a judicial sale, which it could not prevent. It is not inconsistent with the contract relation to say that in bidding at the sale the dry goods company was acting in its own right to protect its own interests, and not in a representative capacity at all.

If, in the foreclosure action, the dry goods company alleged the balance due upon the indebtedness incorrectly, or if an accounting was needed for the purpose of determining the amount of the balance, it would seem as if it was incumbent upon Nelson to show, in his answer, the facts, and see that proper credits were made upon the indebtedness incurred.

We see nothing in the contract that would preclude the dry goods company from proceeding against other property, not included in the trust, for the collection of the debt.

One clothing another with trusteeship in property, in which the trustee is known to have a private interest, will, ordinarily, anticipate that the trustee will do those things reasonably necessary to protect his own interests. The courts have held that even trustees, where they have individual rights to protect, may become purchasers at a judicial sale of trust property. In such cases, the trustee would occupy a delicate position, because of the general rule that no person should be permitted to be a purchaser, even at a judicial sale, where he has a duty to perform which is inconsistent with the character of purchaser. Somewhat, no doubt, would depend upon the application of the rule to the facts of each particular case.

In the instant case it cannot be said that the trustee was purchaser at his own sale. This sale was ordered by the court at the instance of the plaintiff, and the dry goods company was powerless to prevent it. If mortgagor Nelson is unable to pay the mortgages upon his land, he must reckon upon judicial sales of the land to the highest bidder.

The appellant in his brief cites *Hamilton v. Dooly*, 15 Utah, 280, 305, which he relies upon as holding to the contrary. To distinguish that case, we call attention to the fact that in its opinion the court said of the trustee: "As mortgagee his rights were in no way impaired by the sale. His situation was just the same after as before"—and to the further fact that there the trustee was also executor of the estate, although the action against him as executor was dismissed.

An examination of the proof convinces us that the decision of the trial court should not be reversed because of the other objections to the confirmation, stated above.

AFFIRMED.

FLANSBURG, J., not sitting.

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## DICK GIRCH V. STATE OF NEBRASKA.

FILED APRIL 30, 1920. No. 21112.

**Witnesses:** IMPEACHMENT: COMPETENCY. An impeaching witness, who has testified that he knows the reputation of the witness, sought to be impeached, for truth and veracity in the community in which he resides, and that it is bad, is not rendered incompetent by the fact that, on cross-examination, he testifies that he has heard 15 or 20 people in the community of 200 say that it is bad.

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

*C. C. Flansburg* and *J. G. Thompson*, for plaintiff in error.

*Clarence A. Davis, Attorney General*, and *Mason Wheeler, contra.*

CORNISH, J.

Defendant (plaintiff in error) was convicted of stealing a load of corn.

It is complained that when a question, put to the witness Smith, was objected to, and the witness erroneously permitted to answer, which answer was afterwards on motion stricken from the record by the trial judge, there was error in the court's failure in its instruction to direct the jury not to consider the answer. We cannot so hold. The defendant should have requested the instruction if he thought the evidence stricken might be prejudicial. Trial judges cannot be expected to so closely guard the interests of parties to the trial. In fact, we question whether the answer given in this instance, if allowed to stand, would have been either improper or prejudicial. *O'Connor v. Padget,* 82 Neb. 95; *Schroeder v. Lodge No.* 188, *I. O. O. F.*, 92 Neb. 650.

Another witness, who testified that the defendant's reputation for truth and veracity in the community in which he lived was bad, on cross-examination stated that he had heard 15 or 20 people in the community of 200 say so. It is urged that this answer showed him incompetent to testify. We do not think so. While it is true that the impeaching witness should know the general estimation in which the witness sought to be impeached is held by those among whom he dwells, yet so much depends upon the facts and circumstances under which the statements that the witness had heard were made, that it must be said the witness may have been informed as to the actual reputation of the defendant.

The trial judge told the jury that, "when it has been successfully established that the general reputation of a witness for truth and veracity in the community where he lives is bad, the witness is impeached, and you will be warranted, in that event, in disregarding the testimony of such witness, as unworthy of belief, except to the extent that the testimony of said witness has been corroborated." It is argued that by such an instruction the judge invades the province of the jury. *Matthewson v. Burr,* 6 Neb. 312.

We think the law is that, when it has been shown that the witness' reputation is bad, the witness is impeached, as the court instructed. *Watson v. Roode,* 30 Neb. 264, 274.

It is insisted that the evidence is not sufficient to sustain the verdict of guilty. After careful examination of the testimony, we are convinced that this assignment of error is not well taken.

AFFIRMED.

FLANSBURG, J., not sitting.

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GEORGE O. MEYER, APPELLANT, V. SUPREME LODGE, KNIGHTS OF PYTHIAS, APPELLEE.

FILED APRIL 30, 1920. No. 20849.

1. **Insurance:** INCREASE OF RATES: VALIDITY. Defendant issued a life insurance policy to plaintiff's decedent in this state in 1885, which was renewed in 1910. Subsequently, and while the policy was in force, a "supreme statute" was adopted at a convention of the supreme lodge that by its terms became effective January 1, 1911, and which provides that "the right to change, increase or adjust the schedule of rates," thereafter to be paid by policyholders, "is expressly reserved to the supreme lodge." Thereupon the schedule of rates was materially increased by the supreme lodge convention, the membership of that body being in part composed of persons other than delegates who were voted for or elected by members holding policies in the insurance department. *Held,* that the body assuming to change the schedule of rates did not constitute a "representative form of goverment" within the meaning of section 1, ch. 47, Laws 1897, at the time the rates were increased, and that such increase was therefore not enforceable in this state.

2. ———: CONSTITUTION AND BY-LAWS: CONSTRUCTION. The constitution or by-law of a fraternal association will be strictly construed against the association where a forfeiture is sought to be imposed thereunder. *Briggs v. Royal Highlanders,* 84 Neb. 834.

3. ———: INCREASE OF DUES: NONPAYMENT: FORFEITURE. A society that purports to be a "fraternal beneficiary association," to whom

the lawful dues under a policy are tendered, cannot lawfully forfeit such policy and escape liability on the ground that the increased portion of certain rates were not paid or tendered by or in behalf of the insured, when it appears that the by-law, which provides for such increase, was not adopted by a body having a "representative form of goverment." Section 1, ch. 47, Laws 1897.

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

*Livingston & Heinke* and *A. S. Churchill,* for appellant.

*W. J. Connell, contra.*

DEAN, J.

On December 15, 1916, plaintiff sued in the district court for Otoe county to recover $2,000 as beneficiary of a fraternal insurance policy issued to his father by defendant. A jury was waived, and the case tried to the court. Defendant prevailed, and plaintiff appealed.

The policy sued on bears date May 11, 1910, and is a renewal of a policy issued to the insured January 1, 1885, when he was 51 years of age. From the latter date until the new and advanced rates became effective, which was about January 1, 1911, the insured paid all dues assessed under the old rates against members of "class four" to which he belonged. Subsequent payments at the old rates were tendered by or in behalf of the insured that plaintiff alleges were wrongfully refused. He argues that the money, so tendered, in effect kept the insured in good standing until his death April 11, 1916.

In August, 1910, the supreme lodge of the defendant society adopted a by-law that increased the rates in its insurance department above the rates formerly paid by members of "class four," raising the dues on $2,000 policies from $5.70 a month to $26.30 a month. The insured refused to pay the increased rate on the ground, among others, that the defendant society did not have and was not working under a representative form of

government when the rates were increased, and that the society was therefore without authority to increase its rates so as to affect Nebraska members whose policies were taken out in Nebraska under the former rate. Section 1, ch. 47, Laws 1897, was in force when the increased rates were adopted. The act provided: "A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such society shall have a lodge system, with ritualistic form of work and a representative form of government."

It is pointed out in *Holt v. Supreme Lodge, Knights of Pythias,* 235 Fed. 885, that the present charter of defendant (Act June 29, 1894, 28 U. S. St. at Large, ch. 119, sec. 4, p. 97) authorizes amendments at will, provided they do not conflict with federal or state laws. Whether the defendant has the right in this state, under the act of 1897, to enforce the provisions of the amended by-law that was adopted in August, 1910, and that raised the rates in question, seems to be the decisive point in the case.

The laws of the order provide generally that the insurance department shall be governed by the supreme lodge. Defendant offered in evidence certain "amendments to the supreme statutes" relating to and governing the insurance department, which were enacted and adopted at the convention of the supreme lodge held at Milwaukee in August, 1910. Among other amendments, section 479 was adopted, under which the increased rates were imposed that are complained of. The amendment follows: "The right to change, increase or adjust the schedule of rates in the fourth and fifth classes, respectively, or any of them, is expressly reserved to the supreme lodge, as is also the right to apply any such changed, increased or adjusted schedule of rates to all the members as of the date of their

adoption without regard to the date of any member's certificate. This right of readjustment includes the right to advance members without reference to the plan or class of which they are members to their attained age at any time and apply new rates applicable thereto when deemed necessary by the supreme lodge to carry out the purposes of the insurance department."

The supreme constitution of the order provides: "The supreme lodge shall be composed of * * * all past supreme chancellors. * * * Its officers, as designated in this constitution. * * * The supreme representatives legally elected or appointed." The officers of the supreme lodge are eight in number, and as designated in the constitution they are: "The supreme chancellor, the supreme vice chancellor, the supreme prelate, the supreme keeper of records and seals, the supreme master of the exchequer, the supreme master of arms, the supreme inner guard and the supreme outer guard."

It seems to us that, under section 1, ch. 47, Laws 1897, defendant cannot enforce section 479 of its "supreme statutes" in the present case, because that section expressly provides that the right to increase the schedule of rates in the fourth and fifth classes is reserved to the supreme lodge, a body that by the supreme constitution appears to be composed, not only of elected delegates, but in part of "all past supreme chancellors" and some members that are appointive and eight supreme lodge officers. How many past supreme chancellors may sit as voting members of the supreme lodge convention, nor how numerous they are, or whether they are participating members in supreme lodge conventions, does not clearly appear, nor does it appear whether the past supreme chancellors and supreme lodge officers and the supreme lodge delegates are all elected by the members of the defendant society, or by the members of the "insurance department," or by delegates elected from that department. It does not

appear that a member of the supreme lodge or any of its officers shall, to be eligible to membership in that body, be a member of the insurance department. The general secretary of the insurance department testified that membership in that department was not a necessary qualification for membership in the supreme lodge convention of 1910. It appears too, from his evidence that approximately only 10 per cent. of the members of the defendant order in 1910 were members of the insurance department. So that, under defendant's constitution and laws, the insurance department could be governed by members of the defendant order, part or even a majority of whom were not insurance policyholders, and consequently not members of nor vitally interested in the insurance department.

It seems to us that this lacks much of being a representative form of government as defined by the act and interpreted by our former decisions that will be presently noted.

The supreme statutes provide, also, that a "board of control" shall be appointed by the "supreme lodge," and that this board, so appointed, shall "have full charge and complete control of the business and affairs of the insurance department, subject at all times and in all things to the direction of, and to account and report to, the supreme lodge." It does not appear that any person to be eligible to membership on the "board of control" must be a member of the "insurance department."

The detailed proceedings of the session of the supreme lodge convention that adopted the supreme statutes in question are not shown, as seems to be the usual practice in cases where like questions have been raised, so that in the present state of the record we are confined in our inquiry for the most part to a liberal display of exhibits. The rule is that the constitution or a by-law of an order that purports to be a beneficiary association will be strictly construed against it where

under its constitution or a by-law, there appears an attempt to work a forfeiture. *Lange v. Royal Highlanders,* 75 Neb. 196; *Briggs v. Royal Highlanders,* 84 Neb. 834.

Not only does the act of 1897, hereinbefore cited, provide that a fraternal beneficiary association shall have a representative form of government, but all succeeding legislation bearing on the subject has the same requirement. The question is not new in this jurisdiction, and does not now seem to require lengthy discussion, having been exhaustively reviewed in the following cases and in the citations therein noted: *Briggs v. Royal Highlanders, supra, Briggs v. Royal Highlanders* (on motion for rehearing) 85 Neb. 830. In the main *Briggs* case, in substance, we held that, to constitute a representative government within the meaning of the act, the delegates regularly elected by the members of a fraternal beneficiary association should absolutely control its government to the exclusion of appointive committee members who were not delegates. In the same case, wherein a rehearing was denied, it is pointed out that "Chapter 47, Laws 1897, did not by its own force amend the edicts of the Royal Highlanders so as to make its government representative in form."

The dues tendered by the insured, and in his behalf during his last illness, appear to have kept the policy in force until his death, thus creating a valid and subsisting claim against defendant in the sum of $2,000. Including exhibits, the record consists of over 1,500 pages. Attached thereto are books of constitutions and by-laws of more than 1,000 pages, to which the learned counsel have referred and with which they are apparently familiar, but we suggest that more specific reference in the briefs to book and page of such matter as they respectively rely on would greatly expedite the work of the court. Sup. Ct. Rule 12 (94 Neb. XI).

From the evidence before us it seems clear that the body assuming to change the schedule of rates did not

constitute a representative form of government, when the rates in question were raised, within the meaning of the act as construed by our former decisions. Many other assignments of alleged error are called to our attention that, in view of our conclusion, we do not find it necessary to discuss and do not decide.

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

REVERSED.

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

The following opinion on motion for rehearing was filed December 4, 1920. *Rehearing denied.*

**Insurance:** BENEFIT ASSOCIATION: GOVERNMENT. "Where, under the provisions of the constitution and by-laws of a fraternal beneficiary association, the delegates to the governing body thereof, regularly elected by the members of said association, cannot of themselves, and without the participation of members of committees appointed from members outside of such delegates, legally and of right adopt, alter, or amend the edicts and laws of such association and absolutely control the government of the same, such governing body is not a representative body, and an association so constituted and governed cannot be said to have a representative form of government." *Briggs v. Royal Highlanders*, 84 Neb. 834.

DEAN, J.

The defendant made an application for a rehearing, which must be denied. The former opinion, *Meyer v. Supreme Lodge, Knights of Pythias,* is reported, *ante,* p. 505. The question of the defendant's mere right to increase its rates is not the question that is involved here. The sole question before us is whether defendant had "a representative form of government" within the meaning of section 1, ch. 47, Laws 1897, cited in the former opinion; that being the law in force in this state when in August, 1910, the rates complained of by plaintiff were increased by defendant. The 1897 act was in force when the policy in question was issued to Meyer, under date of May 11, 1910. Putting the question in

another form: Was the governing body of defendant, when it increased the rates, representative in form within the meaning of the act as construed by our decisions that are cited in the former opinion? *Lange v. Royal Highlanders,* 75 Neb. 188, 196, 10 L. R. A. n. s. 666, 121 Am. St. Rep. 786; *Briggs v. Royal Highlanders,* 84 Neb. 834 (on motion for rehearing), 85 Neb. 830. If defendant was not working under a representative form of government in August, 1910, it follows that under section 8, ch. 47, Laws 1897, the society cannot in this state compel defendant to pay the increased rate. Section 8 of the 1897 act provides: "All such societies (fraternal beneficiary) organized under the laws of this state or any other state, territory, or province, and now doing business in this state, may continue such business provided they hereafter comply with the provisions of this act."

*Holt v. Supreme Lodge, Knights of Pythias,* 235 Fed. 885, 149 C. C. A. 197, relied on by defendant, does not seem to support the argument advanced. But it is significant that the *Holt* case affirmatively declares that the present charter of the defendant corporation was granted by an act of congress in 1894 that authorized amendments at will, and that the act expressly provides that such amendments shall not conflict with federal or state laws. 28 U. S. St. at Large, ch. 119, sec. 4, p. 97, is the act under which defendant was reincorporated. It provides: "That said corporation shall have a constitution, and shall have power to amend the same at pleasure: Provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any state." Will it be contended that a society so chartered may with impunity violate the settled policy of a state as declared by its court in the construction of its laws?

The facts in the *Holt* case seem to come under section 5043, Burns' Statutes of Indiana, Rev. 1914, which defines a fraternal beneficiary association. The act reads:

"Any association shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected by the members through a delegate convention system, together with such other members as may be prescribed by its constitution and laws: Provided, that the elective representatives shall constitute a majority in number and have not less than a majority of the votes." It will be noted that the Indiana act expressly provides for other than elective representatives. The Nebraska act in question does not so provide. Section 5, article 8 of the constitution of the defendant society, provides that the supreme lodge may be composed of persons who are "elected or appointed." The weak point, the vitally defective point, is that there is provision for appointive delegates or members.

The policy of Nebraska respecting fraternal beneficiary associations under the 1897 act is aptly stated in *Briggs v. Royal Highlanders,* 84 Neb. 834. Syllabus 3 reads: "Where, under the provisions of the constitution and by-laws of a fraternal beneficiary association, the delegates to the governing body thereof, regularly elected by the members of said association, cannot of themselves, and without the participation of members of committees appointed from members outside of such delegates, legally and of right adopt, alter, or amend the edicts and laws of such association and absolutely control the government of the same, such governing body is not a representative body, and an association so constituted and governed cannot be said to have a representative form of government." To the same effect is *State v. Bankers Union,* 71 Neb. 622.

Defendant cites *Supreme Lodge, Knights of Pythias, v. Mims,* 241 U. S. 574. That case, like the *Holt* case, construes an act that limits and qualifies the term

"representative form of government." Chapter 7, art. 4829, Tex. Civ. St. 1914. It seems that all of the cases cited by defendant have to do with statutes differing materially from the Nebraska act of 1897.

A federal question is not involved here. In view of the act of incorporation, it plainly appears that the congress intended that defendant corporation should not be permitted to violate the law or the policy of a state as its laws are construed by the courts of the respective states. *Murdock v. City of Memphis,* 20 Wall. (U. S.) 590.

Chapter 47, Laws 1897, does not seem to conflict with the full faith and credit clause of the federal Constitution as argued by defendant. *Supreme Council, Royal Arcanum v. Green,* 237 U. S. 531, 35 Sup. Ct. Rep. 724; *Hartford Life Ins. Co. v. Barber,* 245 U. S. 146, 38 Sup. Ct. Rep. 54. "Corporations are not citizens within the meaning of the first of these clauses. They are creatures of local law, and have not even an absolute right of recognition in other states, but depend for that and for the enforcement of their contracts upon the assent of those states, which may be given accordingly on such terms as they please." *Paul v. Virginia,* 8 Wall. (U. S.) 168.

It is to be borne in mind that chapter 47, Laws 1897, remained unchanged and unamended until 1913, when the Nebraska legislature qualified and defined the expression "representative form of government," so that the law now in some material respects conforms to the acts of some other states. But the present act, as amended, of course can have no bearing on the present case. The sole question here is whether the body that raised the rates was a representative body as defined by our former decisions where substantially the same state of facts were involved.

We adhere to our former decision. The application for rehearing is

DENIED.

LETTON, J., dissenting.

The point is made that the certificate in question was issued under a charter which provided that the society might amend the constitution and by-laws; provided the *amendments* did not conflict with federal and state laws. Under the recent decisions of this court the amendments do not conflict with the laws of the state of Nebraska. We have held in several cases that a member who agrees to be bound by subsequent changes in the by-laws cannot object if the changes are reasonable, and that an amendment allowing a necessary raise in assessments to meet liabilities is a reasonable amendment. *Funk v. Stevens,* 102 Neb. 681, and cases cited.

The question now before us is whether the judgment of the federal court in *Holt v. Supreme Lodge, Knights of Pythias,* 235 Fed. 885, that the order had power to increase the assessment, is an adjudication which is binding upon the courts of other states under the due faith and credit clause of the federal Constitution. The *Holt* case was a controversy between citizens of Louisiana and the defendant, a corporation created under act of congress. One of the issues in that case was whether the defendant had a representative form of government, and that this was judicially determined in the affirmative. The record in that case is pleaded in this case. When the federal court decided that the order had a representative form of government and had power to increase the assessments, this adjudication was binding upon all the members. *Supreme Council, Royal Arcanum, v. Green,* 237 U. S. 531, 35 Sup. Ct. Rep. 724; *Supreme Lodge, Knights of Pythias, v. Mims,* 241 U. S. 574; *Supreme Lodge, Knights of Pythias, v. Smyth,* 245 U. S. 594, 38 Sup. Ct. Rep. 210; *Hartford Life Ins. Co. v. Barber,* 245 U. S. 146, 38 Sup. Ct. Rep. 54.

JOHN V. BROWN, APPELLEE, v. YORK WATER COMPANY, APPELLANT.

FILED APRIL 30, 1920. No. 21029.

**Master and Servant:** EMPLOYERS' LIABILITY ACT: REVIEW. Under section 3642, Rev. St. 1913 (part I, employers' liability act), the court has power to reverse a judgment in a proper case if the evidence shows inadequacy in the amount of the verdict, or to reverse a judgment that from the evidence appears to be excessive, and grant a new trial, unless a remittitur be filed in such sum as to the court may seem just.

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

*C. C. Flansburg* and *W. W. Wyckoff,* for appellant.

*W. T. Thompson, contra.*

DEAN, J.

Plaintiff sued under part I of the employers' liability act to recover damages for personal injuries sustained as defendant's employee, while in charge of a water pumping plant that it owned and operated at York. He recovered judgment for $10,000, and defendant appealed.

Plaintiff is an electrician and mechanical engineer. Power to operate the pumps was supplied by an electric light plant located some blocks distant. The accident happened before 8 o'clock in the forenoon, while plaintiff was alone at the pump house, and it caused the loss of his right hand, the thumb only remaining. He was then 36, with an expectancy of 31 years, and had been actively working at his trade about 12 years. The injury was sustained a little more than two months after his employment began.

Defendant concedes that its liability was not insured as provided by section 3687, Rev. St. 1913, as amended by section 21, ch. 85, Laws 1917, part II, employers' lia-

bility act. But it argues at some length that plaintiff waived the requirement of section 21, as it affects defendant, and that he brought himself within the provisions of part II by accepting benefits from the water company within the time and in the manner provided in section 3661, Rev. St. 1913, as amended by section 6, ch. 85, Laws 1917.

On this point the superintendent of the defendant company testified that he showed plaintiff the hospital bill, and asked him if the company should pay it, and that "he said, 'Yes,' and I paid it;" that he made the same inquiry about the doctor bill, and upon receiving the same reply he paid that too, and that both bills approximated $150. He further testified: "I asked Mr. Brown whether he expected more benefits than he had received, and he said, 'Yes,' and that he thought he ought to have enough money to start a little business." Plaintiff's testimony on this point was to the contrary, and to the effect that the superintendent asked him for the hospital bill, and later the doctor bill, and that he voluntarily and without plaintiff's request paid both bills. Referring to the doctor bill, he said he told the superintendent that "he didn't have to pay the bill if he didn't want to," and that the superintendent replied: "If we pay this bill, will you release the company? and I says, 'No, I will not; I feel as though I ought to have more out of this than a $100 doctor bill.'" On this question of fact the evidence was about evenly balanced, and the jury seem to have accepted plaintiff's version rather than defendant's.

Defendant argues that plaintiff was wilfully negligent, and complains because its motion for a directed verdict was not sustained. It is insisted that he comes within the exception noted in section 3643, Rev. St. 1913, which provides generally: "In all cases brought under part I of this article it shall not be a defense (a) that the employee was negligent, unless and except it shall also appear that such negligence was wilful." In sec-

tion 3693, Rev. St. 1913, as amended in section 23, ch. 85, Laws 1917, wilful negligence is defined: "(d) For the purposes of this article, 'wilful negligence' shall consist of (1) deliberate act, or (2) such conduct as evidences reckless indifference to safety."

Respecting plaintiff's employment and as bearing on the question of wilful negligence, he testified on direct examination: That he was employed to "take charge of the plant—operate and take care of the outside work and meters—and reading meters;" that "it is not customary for any engineer or man working around mechanical machinery to stop it" to do the work he was doing when injured; that the main drive shaft has two pinions that mesh on two large gear wheels that make about 200 revolutions a minute; that he was cleaning off the grease "close to the pinion, and it caught the waste and jerked my hand in;" that it is dangerous to wear gloves when cleaning the gearing, and for that reason he took his gloves off; that the pumping machinery was controlled by two switches, one at the electric light plant and one in the pump house, the latter being about 16 feet from where he stood when he was injured. He said that he did not turn off the current before he began the work that resulted in the injury; that the pump was driven by a 35 horse power motor; that after the accident he saw some covering for the pinions in the back room of the pump house, but never saw it before, nor knew it was there, nor did he ever ask for any shield or covering for the pinions.

Defendant argues that plaintiff's conduct at the time of the accident, as shown by his evidence, comes within the meaning of "wilful negligence" as defined by the act, and that it so plainly "evidences reckless indifference to safety" that the court erred in overruling its motion for a directed verdict. We do not think, in view of all the circumstances, that the court erred in overruling the motion. It seems, though, the legislature has conferred upon the courts power to pass on the ques-

tion as to whether a verdict sufficiently responds in damages or whether it is excessive, this power of course to be exercised upon a review of the facts as shown by the evidence in each case.

Section 3642, Rev. St. 1913, being the first section of part I of the employers' liability act, provides: "When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawful imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employee was himself not wilfully negligent at the time of receiving such injury, and the question of whether the employee was wilfully negligent shall be one of fact to be submitted to the jury, subject to the usual powers of the court over verdicts rendered contrary to the evidence, or to law."

A number of other assignments of error have been made which we have examined, but none of the alleged errors complained of seem to have been prejudicial to the rights of the defendant.

We think that in view of the evidence the verdict is excessive. We therefore conclude that, under the express provisions of the act relative to the powers of the court over verdicts, if plaintiff files a remittitur of $2,500 with the clerk of this court within 20 days, the judgment will be affirmed for $7,500 with interest at 7 per cent. per annum from the date of the judgment, and for costs. Failing in this, a new trial will be granted.

AFFIRMED ON CONDITION.

FLANSBURG, J., not sitting.

JOHN HUENINK ET AL., APPELLEES, V. WILLIAM HEITBRINK ET AL., APPELLANTS.

FILED APRIL 30, 1920. No. 21156.

**Gifts:** DELIVERY. "An instrument is not delivered until it has passed beyond the dominion, control and authority of the maker, and is no longer capable of being recalled." *Paxton v. State*, 59 Neb. 460.

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

*G. E. Hager* and *R. O. Williams*, for appellants.

*Tyrrell & Westover* and *J. H. Walker*, *contra.*

DEAN, J.

The plaintiffs are children and heirs of John H. Huenink, who died intestate on April 20, 1912. They began this action on April 26, 1919, as his heirs, to quiet title in 80 acres of land of which, with other land, he died seised. The defendants, who are also children and heirs, claim ownership under a purported deed of conveyance to Minnie Heitbrink, a married daughter, that was jointly executed and acknowledged on August 17, 1909, by her parents. Plaintiffs obtained judgment, and defendants appealed.

Other conveyances are referred to in the record, but this case has to do only with the Minnie Heitbrink deed. All of the parties directly interested are children, grandchildren, or great-grandchildren of the elder Hueninks. These in brief are the main facts. About a week before his death, father Huenink, being ill and bedfast, called his children to his side. Only three were living. Gerritt Heitbrink, who is a son-in-law, was present. He is the husband of Minnie Huenink Heitbrink, who is a party defendant. He testified that besides himself there were present at the father's bedside his wife, Minnie, the sons, Herman and John Huen-

ink, and their mother; that the husband said he had divided his half section of land among his three children, Minnie, Herman and John, with conditions named in the respective deeds which provided, among other things, for the payment of certain sums of money by them to grandchildren and great-grandchildren. Continuing he testified: "Q. Where was Mr. J. H. Huenink at that time? A. He was lying on the lounge sick. He wasn't felling well. Q. How long had he been sick, if you know? A. Oh, I don't know; two or three weeks; I couldn't exactly say. He was just up and around part of the time. He was sick, and part of the time he wasn't. * * * He said he was about ready to die, and 'I gave my woman all the money, signed off the certificates of deposit, and I have got the deeds laying there for all you children.' And then he told me just like he told me in the fall before. * * * 'I give Minnie eighty and Herman'—well, he gave Minnie that eighty, 'but she has to give the Kroon children a thousand dollars.' * * * And then 'John and Herman have to give the Meinen boy a thousand dollars,' and John was to give the Huenink boys $700—there was seven of them—and he made it that way so as to give each an even hundred dollars, and 'The deeds are laying there, Mamma, I got them there for you, she will give them to you,' and then he said, 'I am all ready to die.' He said, 'I have given everything away, I don't own a thing in the world any more.' Q. Now, what, if any, questions did he ask those children? A. Why, he said, 'Are you all satisfied?' and they all said, 'Yes,' Minnie said, 'Yes,' Herman said, 'Yes.' Well, he said, 'John, I didn't hear you. Are you satisfied?' he said, and John said, 'Yes,' then. Well, he said, 'They are laying there, Mamma will hand them to you. Mamma will give them to the children.' And then is when he said—Q. Who did he say that to, 'Mamma will give those to the children?' A. To Mamma. Q. He said that to his wife? A. Yes, sir. Q. State what, if any-

thing, he said as to where the deeds were. A. He said, 'Mamma, she is taking care of them. Mamma, you know where they are.' "

Mrs. Heitbrink testified: "Q. Now, you may tell what your father said to your mother—not what he said to you—well, just what he said to your mother first. A. Well, he said, 'Mother, I have the deeds there in the drawer, and you hand them to the children.' " Respecting the time when she first saw the deed Mrs. Heitbrink said: "Well, I seen it that morning, but I didn't read it, and we took it into the record office, but I didn't read it. Q. Now, when was that with reference to the time your father died? A. About a week after, or ten days, I just couldn't say. Q. About a week after? A. Yes, sir." On this point Heitbrink testified that he did not see the deed until the day it was recorded; that he and his wife and Herman and John Huenink came with Mrs. Huenink, Sr., to Lincoln; that the old lady had said, "We will go up to Lincoln and put the deeds on record;" that she delivered them to the register of deeds and paid the filing fee.

Defendants present only two questions: "First, was there a sufficient delivery of the deed? Second, is the deed a sufficient instrument to convey title?" In their brief they concede that, if the trial court did not err in finding "that the deed was not delivered during the lifetime of the grantor," such finding was "sufficient to dispose of the case in favor of appellees without passing upon the other question."

An extended discussion of the facts does not seem to be necessary. From the evidence of Mr. Heitbrink and his wife, we conclude that the deed was in the possession and under the control of her father so long as he lived. Mr. Heitbrink testified that he was "up and around part of the time. He was sick, and part of the time he wasn't." It seems to us that under the circumstances he would himself have delivered the deed if such had been his intention. It is to be noted, too, that

the deed contains this, among other recitals of a like nature: "Provided that the title to this land shall remain in J. H. Huenink and Everdiena Huenink as long as either of them shall live." This seems to be the language of a devise, rather than that of a present conveyance, and, when considered with the evidence of defendants, seems to show that the grantor did not intend to vest the fee simple title in his daughter.

We have held generally: "An instrument is not delivered until it has passed beyond the dominion, control and authority of the maker, and is no longer capable of being recalled." *Paxton v. State,* 59 Neb. 460. We do not find it necessary and do not decide the question as to whether the deed in this case is "a sufficient instrument to convey title." We deem it sufficient to base our decision on the fact that the record fails to show an intention on the part of the grantor to deliver the deed or that it was delivered. *Flannery v. Flannery,* 99 Neb. 557.

The judgment is

AFFIRMED.

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

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JOHN HUENINK ET AL., APPELLEES, v. DENA JOHANNAH HUENINK ET AL., APPELLANTS.

FILED APRIL 30, 1920. No. 21236.

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

*R. H. Hagelin,* for appellants.

*Tyrrell & Westover, contra.*

DEAN, J.

Except that Dena Johannah Huenink *et al.* are minor defendants and appellants, being grandchildren of John

Huenink and Everdiena Huenink, the pleadings and the material issues involved here are the same as those in *Huenink v. Heitbrink, ante,* p. 520. The decision in that case controls in the present case. The judgment of the district court is therefore

AFFIRMED.

FLANSBURG, J., not sitting.

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EDWARD L. SIMON, APPELLANT, V. LONDON GUARANTEE & ACCIDENT COMPANY, APPELLEE.

FILED APRIL 30, 1920. No. 20997.

1. **Libel:** MATTER IN PLEADING. Whatever a litigant may properly plead as a cause of action or ground of defense, when relevant or material to the issue, he may plead with or without malice, and in such case the intent with which he pleaded the same cannot be inquired into or become an issue in an action for libel.
2. ———: ———. Where the relevancy and pertinency of matter alleged in pleading is to be inquired into, all doubt should be resolved in favor of relevancy and pertinency.
3. ———: ———. If there is no reason or object in furtherance of justice and fair dealing to use scandalous and libelous matter, then, when so used, it is not privileged.
4. ———: ———. In an action for libel based on an allegation in a pleading in another action, where it appears that the defamatory matter was wholly gratuitous, irrelevant, and immaterial, that it was well known by defendant to be false and untrue, that it was published without cause or justification and with express malice, it is not privileged.
5. ———: ———. Allegations in a pleading are privileged and cannot serve as a basis for a libel suit, unless it clearly appears that the same were not relevant or pertinent.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

*R. J. Green,* for appellant.

*Kennedy, Holland, De Lacy & Horan* and *Strode & Beghtol, contra.*

ALDRICH, J.

This is a suit on an alleged libel consisting of matter stated by defendant in his pleadings and briefs to this court in another action. The plaintiff sued defendant in a former action under the employers' liability act, alleging that plaintiff at the time of the injury was an able-bodied man. Defendant in answer to this allegation alleged that plaintiff prior to the injury was suffering with gonorrhea and syphilis. Plaintiff makes claim for damages by reason of this allegation, claiming it was false, spurious, gratuitous, and not a matter material to the defense. The trial judge held that the matter pleaded was absolutely privileged, and directed a verdict in favor of defendant. Plaintiff appeals.

The question to be decided by us is whether this alleged libel is absolutely privileged. The question whether language which would otherwise be libelous *per se* used in a pleading is privileged, and to what extent it is privileged, is not settled in this state. The law in England and some of the states of this country is that any publication in the course of judicial proceedings, including at least testimony of witnesses, arguments of counsel and pleadings, is absolutely privileged, and that nothing spoken or written, however false or malicious, will support an action for libel. But the prevailing rule in this country is different. Thus it is obviously a question of law, which the court is to determine, whether the alleged defamatory matter either in the petition or the answer was relevant and pertinent to the issues in the case. The trial judge then determines the materiality, relevancy and pertinency of this defense as tendered by the defendant, and it is the weight of American authority that a privilege is absolute when the matter tendered is pertinent or material. *Calkins v. Sumner,* 13 Wis. 215 (*193), 80 Am. Dec. 738. In *Carpenter v. Grimes Pass Placer Mining Co.,* 19 Idaho, 384, there is a very able and philosophical discussion upon the question of privilege in pleading de-

famatory matter either as a defense or matter in a petition, and as it reflects the doctrine of American authority along this line we have concluded to quote some of the syllabi of that case, and as it is based on reason and sound discretion we adopt it. The syllabi in that case are as follows:

"Whatever a party to an action may allege in his pleading as a cause of action or ground of defense that is pertinent or material to the charge made, or against which he is defending, can never give rise to a right of action for libel.

"The ends of justice and the public good can be best served by allowing litigants to freely plead any material matter in a judicial proceeding to which they are parties, holding them accountable only for defamatory matter which is neither pertinent nor material to the issue under inquiry.

"The privilege of freely pleading matters constituting causes of action or grounds of defense must be exercised in good faith, and the courts will determine, as a matter of law, whether the matter pleaded was in fact pertinent or material to the issue joined.

"Whatever a litigant may properly plead as a cause of action or ground of defense as relevant or material to the issue, he may plead with or without malice, and in such case the intent with which he pleaded the same cannot be inquired into or become an issue in an action for libel."

How far the theory of libel and slander may be used in judicial proceedings is fully set forth in the above quotations. It rests upon the sound principle of law that justice, and the greatest good to the greatest number, can best be served by allowing a pleader the benefit of all material matter, limiting him and holding him accountable only for that which is neither relevant nor pertinent; but it is plain that, even though the matter may be defamatory and malicious, yet if it is relevant or pertinent to the issues it is privileged. Parties act-

ing in good faith should be freely allowed to plead matters constituting a cause of action or ground of defense.

The law affords no protection to him who assails and wantonly besmirches the reputation of his adversaries. We hold that whatever a litigant may properly plead as a cause of action or ground of defense, when it is relevant or pertinent to the issues, is privileged.

The allegation of a pleading becomes privileged only when the same is relevant. In *Sherwood v. Powell,* 61 Minn. 479, we have this proposition verified. That case holds that, where it appears from a complaint in an action for libel based on an allegation in a pleading in another action that the defamatory allegation was wholly gratuitous, irrelevant and immaterial, that it was well known by defendant to be false and untrue, that it was published without cause or justification and with express malice, it was not privileged. This states the law as we understand the weight of American authority to be.

In *Hammer v. Forde,* 125 Minn. 146, is another discussion which is typical of the American rule, wherein it is held that allegations in a pleading are privileged and cannot serve as a basis for a libel suit, unless it clearly appears that the same were not pertinent, material or relevant to the controversy in litigation. All doubt should be resolved against the contention that the privilege has been exceeded. Many more cases could be cited in support of this rule.

The concensus of American authority is that, if there is no necessary object in furtherance of justice and fair dealing to use scandalous and libelous matter, then, when so used, it is not privileged. The object and purpose of these rules thus discussed is to get at the truth or to discuss certain indispensable facts upon which truth and justice rest. Also in *Kemper v. Fort,* 219 Pa. St. 85, 123 Am. St. Rep. 623, 13 L. R. A. n. s. 820, there

is a complete discussion that discloses amply the American doctrine on this subject.

Now, in applying this law to the facts herein, we are met with the proposition that plaintiff alleged in his petition that he was an able-bodied man in good health, and the defendant by way of defense alleged that at the time of the injury plaintiff was in poor health, debilitated, and debauched, suffering from venereal diseases, and that the injury complained of was only slight and had no causal relation, but that the real cause was venereal disease. The case came on for trial, and the alleged libel was allowed to remain in the answer. Evidence was taken on this issue of plaintiff's health.

Appellant lays great stress upon the fact that defendant failed to establish this defense, and he cites cases to show that syphilis accelerated by an injury may be compensated. But if the incapacity complained of had been shown to be wholly due to the disease, and not to an aggravation of it, it would have been a good defense. At any rate the matter pleaded was relevant and pertinent.

As hereinbefore stated, allegations in pleadings are privileged if material or pertinent to the controversy in litigation. In order that every one may feel free to seek justice, he should be allowed to state his cause of action or defense fully, and not be subjected to a lawsuit for so doing unless he has clearly abused the privilege. For this reason courts favor a liberal rule. "Where the question of the relevancy and pertinency of matters in pleadings is to be inquired into, all doubt should be resolved in favor of relevancy and pertinency." *Kemper v. Fort, supra.* The complaining party must show that the words, though libelous *per se,* were not relevant or material, and that the author of them was actuated by ill will and malice. These principles are vindicated by the adjudications upon the subject, and are consistent with reason.

Testing the alleged libel by these rules, we hold that the matter pleaded was privileged, and that the trial court was right in directing a verdict in favor of defendant. The judgment is

AFFIRMED.

ROSE and FLANSBURG, JJ., not sitting.

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JOHN W. BARNHART v. STATE OF NEBRASKA.

FILED APRIL 30, 1920. No. 21324.

1. **Criminal Law:** CHANGE OF VENUE: DISCRETION. A motion for a change of venue in a criminal prosecution is addressed to the sound discretion of the trial court, and, unless there has been an abuse thereof, its ruling thereon will not be disturbed. *Goldsberry v. State*, 66 Neb. 312, followed.

2. **Judges:** DISQUALIFICATION. A complaint charging defendant with forgery was filed in Dodge county March 10, 1910, but no further action was taken thereon until June, 1919, when defendant was apprehended. The trial judge was county attorney of Dodge county in 1913 and part of 1914, when he became district judge. As county attorney he, *ipso facto*, represented the state in criminal prosecutions in said county, but during his term of office no action whatever was taken in this case. *Held*, under the provisions of chapter 22, Laws 1915, relating to disqualifications of judges, the trial judge was not disqualified to hear this case.

3. **Instructions** examined, and found to contain no reversible error, and those requested were properly refused.

4. **Forgery:** SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* sufficient to sustain the verdict of the jury.

ERROR to the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

*Joseph E. Daly*, for plaintiff in error.

*Clarence A. Davis, Attorney General*, and *C. L. Dort*, *contra.*

DAY, J.

John W. Barnhart, hereinafter called the defendant, was convicted of forgery, and sentenced to the penitentiary under the provisions of the indeterminate sentence law of the state. He prosecutes error from this judgment, assigning a number of errors as a basis for a reversal of the case.

In March, 1910, a man, calling himself Henry G. Fisher, perpetrated a swindle by presenting a forged deed to one John O'Connor of Fremont, Nebraska, and, by representing himself to be the grantee named in the deed, secured a loan of $3,000 upon the property described therein by giving a mortgage as security. He immediately departed, and was not apprehended for several years thereafter, when he was identified in the Wisconsin penitentiary. That the crime charged was committed by the party claiming to be Henry G. Fisher, there can be no doubt; the important question being whether the defendant is the man passing himself as Henry G. Fisher. Upon being released from the Wisconsin penitentiary, the defendant was brought back to Dodge county in June, 1919, to answer to the complaint of forgery filed in March, 1910. Upon the preliminary hearing he was bound over to the district court. Before entering upon the trial the defendant filed a motion for a change of venue, supported by his own affidavit, and that of his counsel, to the general effect that there was a prevailing sentiment in the community that the defendant was guilty, and that, owing to the prominence of some of the state's witnesses, a fair and impartial trial could not be had. As a part of the showing, there was attached to the affidavit of defendant's counsel copies of newspaper articles which gave an account of the swindle, written in a rather vivid style. In the affidavit of defendant's counsel he states that he has talked with a number of persons who said that the defendant could not obtain a fair and impartial trial in Dodge county, but that said parties were unwilling to make an

affidavit to that effect. Most of the publications referred to were made at the time of the commission of the offense some nine years previous, and others at the time the defendant was first identified in the Wisconsin penitentiary some four years before the trial. A counter affidavit was made by J. C. Cook, the county attorney, to the general effect that the case had attracted but slight attention, and that no special interest was taken in the case by the public, and that a fair and impartial jury could be obtained in Dodge county. The application of the defendant for a change of venue was denied, and this ruling of the court is now assigned as error.

It is well settled that applications for a change of venue in a criminal prosecution are addressed to the sound discretion of the trial court, and, unless, it appears that there has been an abuse of discretion, the ruling will not be disturbed. *Goldsberry v. State,* 66 Neb. 312. It does not occur to us that there is anything in this class of cases, or in the publications which are set out, which would tend to inflame the public mind or bias the judgment of the community so as to deprive a person charged with such an offense of a fair and impartial trial. We see no abuse of discretion in the ruling of the trial court.

A motion was also made to have the case tried before a judge other than the presiding judge. The theory of this motion was that the trial judge was disqualified by reason of the fact that, while the complaint was pending before the justice of the peace, and before the defendant had been apprehended, the trial judge had occupied the official position of county attorney, and *ipso facto* represented the state in the prosecution. In this regard the record shows that the complaint was filed in March, 1910, by the present county attorney, who was county attorney at that time, and that the defendant was not apprehended and returned to Dodge county until June, 1919. The trial judge had filled the office of

county attorney during the years 1913 and 1914, and during the whole period the whereabouts of the defendant was unknown, and the record shows affirmatively that he took no action whatever in the case. The most that can be said is that the complaint was on file and pending. Our statute relating to the subject of disqualification of a judge to hear and determine a case (Laws 1915, ch. 22) provides: "A judge * * * is disqualified from acting as such * * * except by mutual consent * * * where he has been attorney for either party in the action or proceeding, * * * or in any wise interested." Under the facts shown it would be an extreme and unwarranted view to hold that the trial judge had represented the state in this case during the period he held the official position of county attorney. In the condition of the record there is nothing to indicate that the trial judge was an interested party in the action, and is within the exclusion of the statutory provision.

Another assignment of error relates to the instructions given to the jury, and in the oral argument stress was laid against instruction No. 11, relating to an alibi; the objection being that the effect of this instruction was to shift the burden of proof from the state to the defendant. The instruction, in the main, was in the usual form of an instruction on the subject of an alibi, and contained this phrase: "If the evidence on this subject, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant, you should acquit him." If this phrase stood alone, it might be misleading; but in the same instruction the jury were told that the evidence upon the subject of the alibi "does not shift the burden of proof from the state, but that the state is bound to prove his presence beyond a reasonable doubt." In the same instruction, it was also said: "The accused is not required to prove an alibi beyond a reasonable doubt, nor even by the preponderance of the evidence." Considering this instruc-

tion, especially in the light of the general charge to the jury, we are unable to say that there was prejudicial error in the instructions.

It is next urged that the court erred in refusing a continuance asked by the defendant for the purpose of securing the testimony of witnesses residing out of the state. In explanation that the testimony had not been previously taken, it was claimed that the defendant was without means, and that funds had not been available for the purpose of defraying the expenses of the taking of the depositions until the time the case was called for trial. Affidavits were presented stating what the defendant desired to prove by such witnesses. During the argument upon the motion the county attorney agreed that the witnesses named in the several affidavits, if present, would testify to the facts set out in their respective affidavits. Upon this statement by the county attorney the motion for continuance was denied. It is the established rule that, where a continuance is asked in a criminal case for the purpose of securing testimony of absent witnesses who are not within the reach of the process of subpœna, that where the state's attorney admits that, if such witnesses were present, or their depositions taken, they would testify to the facts stated in the affidavits accompanying the motion for a continuance, and that such statements may be introduced upon the trial, whether the motion shall be overruled or not is a matter resting within the sound discretion of the trial court, and, if no abuse of such discretion is disclosed by the record, it will not be disturbed in this court. *Fanton v. State*, 50 Neb. 351. Upon the trial the defendant was permitted to use the affidavits under the statements of the county attorney, and the court properly instructed the jury that they should regard such statements as evidence in the case. We cannot see that the defendant was deprived of any substantial right by the ruling of the court denying the continuance, or that there was any abuse of the discretionary power of the court.

It is contended in the brief that the defendant was arraigned for plea before the expiration of one day after the information was served on him, and thus deprived of a substantial statutory right. It is not necessary to consider the legal question involved in this point. The certified record, which must be our guide, shows that the information was served upon the defendant on the 5th day of September, and he was arraigned thereon for plea on the 8th day of September. In any view of the case which might be taken, more than the statutory 24 hours was allowed the defendant.

Lastly, it is urged that the evidence does not support the verdict of the jury, in that the defendant was not identified as the party claiming himself to be Henry G. Fisher. This question was purely a question of fact to be determined by the jury. A number of witnesses were very positive in their identification of the defendant as the man who had called himself Henry G. Fisher and they identified him positively as the man. Experts in handwriting testified that known handwriting of the defendant and handwriting in the forged instruments were the same. There was some evidence which tended to discredit the testimony of the expert witnesses on handwriting, but, taken as a whole, the question was purely one for the jury to pass upon. We have read the entire testimony, examined the instructions of the court, and are unable to discover any prejudicial error in the record.

The judgment is therefore

AFFIRMED.

ROSE and FLANSBURG, JJ., not sitting.

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WILLIAM O'CONNOR, APPELLANT, v. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED APRIL 30, 1920. No. 20948.

1. **Carriers:** STREET RAILWAY: RELATION OF CARRIER AND PASSENGER. The relation of carrier and passenger on street railways is con-

tractual, and, though a person takes a position where cars usually stop, and indicates by his attitude a desire to become a passenger, yet if the motorman makes no sign nor indication to him of his consent that such person get on the car, the fact, standing alone, that the speed of the car is slackened somewhat, if not slackened sufficiently to lead a reasonably prudent person to believe that the car is being stopped to take on passengers, and if the speed is not reduced to such an extent that it would be prudent for one to attempt to get on, does not justify an attempt on his part to board the car, nor does an attempt under such circumstances impose upon the street railway company the duty toward him that it owes a passenger.

2. ———: ———: ———: DUTY OF CARRIER. When a person attempts to board a moving street car under such circumstances as do not constitute him a passenger, the street railway company is, in any event, required to exercise reasonable and ordinary care to avoid injuring him; but when it is not shown that the operators of the car knew, or should, in the exercise of ordinary care, have known, of his attempt to board, the company will not be held liable.

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

*John O. Yeiser* and *E. A. Conaway,* for appellant.

*John L. Webster, contra.*

FLANSBURG, C.

Action for damages for personal injuries resulting to plaintiff while attempting to board one of defendant's street cars. The court directed a verdict for the defendant. Plaintiff appeals.

Plaintiff, by reason of an injury to his head sustained at the time of this accident, was caused to lose memory of the circumstances surrounding the accident, and at the time of trial he was still unable to recall how the accident occurred. His case therefore depends upon the testimony of one witness only, an employee of Armour Packing Company, who was a Lithuanian and spoke through an interpreter.

The accident happened at the corner of Thirty-first and Q streets in the city of Omaha at about 5:30 a. m., December 28, 1917, when it was still dark and very cold—about 15 degrees below zero. The witness just

mentioned was walking east on Q street, some 50 feet west of the corner of Thirty-first street, when the car passed him, also going east. At that time he said the car was going down hill and going very fast. The car was lighted, but the windows were frosted so that one could not see through them, and the conductor was not standing out on the rear platform. Witness noticed the plaintiff, at the southeast corner of Thirty-first and Q streets, step from the curb, just as the car reached him, and saw him take two or three steps slowly toward the car. He says the car slackened speed "a little," for about "a quarter of a minute," and just as the plaintiff reached for the handrail and lifted his foot to get on, the car went forward again very fast; that plaintiff ran about three or four steps along with the car, but failed to get on, fell, and sustained the injuries complained of.

There is no other testimony. No attempt was made to show by this witness how much the car slackened its speed, nor whether it slowed down to such an extent as to have reasonably allowed a person to attempt to board the car.

The relation of carrier and passenger as to street railroads is a contractual one, and arises from an offer on the part of a person to become a passenger, and an acceptance on the part of the operator of the car. The existence of the relation is usually implied from the particular attending circumstances. When a person takes a position at a place where cars usually stop, and by his attitude indicates a desire to become a passenger, and the speed of the car is slackened so as to reasonably lead him to believe that it is being stopped for him, and is slackened to such an extent that a person of ordinary care would have attempted to get on, then under those circumstances the person in attempting to board the car becomes a passenger, and the street railroad company owes him that high degree of care which springs from such relation. Such circumstances as just above described might create the relation of carrier and pas-

senger, even though the car was being stopped for some other purpose than to receive passengers, since the person seeking to become a passenger has a right to act upon appearances. *Boles v. Lincoln Traction Co.*, 98 Neb. 405; *Nocita v. Omaha & C. B. Street R. Co.*, 89 Neb. 209; *Omaha & C. B. Street R. Co. v. Martin*, 48 Neb. 65; *Vrooman v. Harvey*, 197 S. W. (Mo.) 118; *Chicago Union Traction Co. v. O'Brien*, 219 Ill. 303; *Lewis v. Houston Electric Co.*, 39 Tex. Civ. App. 625. When such relation is created, it is not negligence *per se*, as held in the above cases, for a person to attempt to board the car before it has come to a full stop, but the question of negligence in such instances is ordinarily one for the jury.

In the absence of any testimony from the plaintiff himself, there is no showing in the instant case, as there ordinarily is in cases of this kind, that the motorman saw the plaintiff, nor that he seemed to notice him, nor that he made any sign to him, nor that he did any such affirmative act as might show an intention to recognize the plaintiff as a passenger and indicate a grant of permission to board the car. Any such act on the part of the motorman might have gone far to create the relation of carrier and passenger, even though the speed of the car was not slowed as much as it should have been. *Chicago Union Traction Co. v. O'Brien, supra.*

Such acts on the part of the motorman, however, cannot be presumed, and the only evidence here is from the one witness, who did not see the operators of the car, and testifies only that the car slackened speed a little. The plaintiff must rely entirely upon the sufficiency of the proof of the one fact, that the speed of the car was slackened to such an extent as to lead to a reasonable inference that the motorman saw him and slowed the car for the purpose of receiving him as a passenger, and that the speed was so reduced as would cause a reasonably prudent person to believe that he might safely get on. Although it is the duty of the motorman

to keep a sharp lookout for passengers and stop the car at proper places to take on passengers, still, if he fails to do so, that does not authorize a person to endanger himself by attempting to board the car, nor does such an attempt under such circumstances create the contractual relation of carrier and passenger, except in such instances where the motorman by some affirmative act has reasonably led such person to believe that his attempt to board is known, approved of, and consented to. *Baltimore Traction Co. v. State,* 78 Md. 409. Where, however, it may be further said, the operators of the car arbitrarily refuse to stop and take on a person who offers himself as a passenger in a proper manner, such person, though he does not become a passenger, is relegated to his remedy for damages for wrongful exclusion.

In the instant case the witness for the plaintiff says the car was going very fast when it passed him and was going down hill, that it slowed a little, and that not until it had reached the plaintiff did he step out toward it. Whether plaintiff made any signal to the motorman, and whether he was seen or his signal responded to, we do not know. It is our opinion that the testimony is too indefinite on the question as to what extent the car slackened speed to present such a condition of circumstances as to lead to any reasonable inference that the plaintiff had been accepted as a passenger.

Where the relation of carrier and passenger does not exist, on the other hand, it is still true that the operator of the car owes a duty to exercise care toward any person on the street. Had the plaintiff attempted to board the car and placed himself in peril without the express or implied assent of the operator, and was then discovered, incurring a danger, or in the performance of a negligent act, it would have been the duty of the operator of the car to have exercised reasonable care to avoid an accident. However, in this case, if the plaintiff did in fact attempt to board the car, without first having been recognized as a passenger, there is no evidence to show

that the defendant's employees on the car ever became aware of the danger he had incurred, so that by reasonable care they could then have avoided injuring him.

We are therefore of opinion that the trial court properly directed a verdict in favor of the defendant, and recommend that the judgment be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

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WILLIAM SCHREINER, APPELLEE, V. CHARLES HUTTER ET AL., APPELLANTS.

FILED APRIL 30, 1920. No. 20982.

1. **False Imprisonment:** ARREST: WILFUL DELAY. A warrant does not protect a sheriff from liability for wrongful and unauthorized acts committed by him in connection with its execution; and where, after making an arrest, he delays for an unreasonable length of time in bringing his prisoner before the magistrate, and such delay is through his indifference to duty, or through wilfulness, he will be liable in damages as for false imprisonment.

2. ———: EVIDENCE: REPUTATION. In an action for damages for false imprisonment resulting from misconduct of such officer in the execution of a valid warrant, the reputation of the prisoner is not ordinarily in issue, since the arrest need not be justified, and it is proper to exclude testimony on behalf of defendant that plaintiff's reputation as a peaceable and law-abiding citizen is bad, nor can such testimony be introduced for the purpose of mitigation of damages, where damage to reputation is not specially pleaded by the plaintiff nor proved.

3. **New Trial:** MISCONDUCT OF COUNSEL. Where plaintiff's counsel is guilty of misconduct in making statements in argument of facts outside the record, and no objection is made by opposing counsel at the time nor until the argument is concluded, then, unless the misconduct of counsel is flagrant, a new trial will not be granted, where, upon the objections being made, the trial court admonishes the jury that the statements should be disregarded.

4. **False Imprisonment:** EVIDENCE. It is improper to admit, over objection, testimony to show that plaintiff had a wife and the number of his children.

5. **Damages.** Evidence examined, and verdict of $3,000 *held* excessive.

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

*John A. Rine, John P. Breen* and *Jamieson & O'Sullivan,* for appellants.

*Benjamin S. Baker* and *William R. Patrick, contra.*

FLANSBURG, C.

Action against the defendant Hutter, as sheriff of Sarpy county, and his bondsmen, the Lion Bonding & Surety Company, based on alleged abuse of process and oppression in office exercised by the sheriff in the arrest and confinement of the plaintiff. Verdict for the plaintiff, and defendant appeals.

Defendant contends that the evidence does not sustain the verdict. Plaintiff lives at Bellevue, Sarpy county, Nebraska. In the fore part of January, 1917, plaintiff's son-in-law filed complaint against him, charging him with assault and battery. Plaintiff was an acquaintance of the sheriff. The sheriff, instead of making the ordinary arrest and taking the plaintiff into custody, notified him that he held a warrant for his arrest, and requested him to appear the following morning at 9 o'clock, which plaintiff did. Plaintiff was released on personal recognizance, and appeared for trial on January 11, at which time the complaint was dismissed and he was discharged.

On the same day the county attorney prepared and filed a second complaint, based on the same charge. A warrant for plaintiff's arrest was regularly issued and placed in the hands of the sheriff. On the following day the sheriff appeared at the home of plaintiff at Bellevue and placed him under arrest. Plaintiff asked if he would be able to return that evening, and was informed by the

sheriff that he might if he could give bond. In the presence of the sheriff plaintiff then told his wife to telephone plaintiff's attorney to arrange for bail. At 4 o'clock they started in an automobile for Papillion, the county seat. Testimony was introduced tending to show that the direct route was practically impassable, and that it was necessary to detour by the way of South Omaha. There is evidence showing that the drive to South Omaha actually took about 15 minutes, and that the drive from South Omaha to Papillion another 15 minutes. The sheriff, however, instead of making a continuous trip, stopped at South Omaha, placed the plaintiff in the city jail, and, leaving him there, spent the evening in South Omaha on personal matters. He did not return until about midnight, when the trip to Papillion was continued. Plaintiff was thus deprived of any opportunity to procure bail and spent the remainder of the night in the county jail. At 9 o'clock the next morning he was released by the magistrate on personal recognizance, was later tried, found not guilty, and was again discharged.

Further evidence was introduced tending to show that defendant had, a few days before the arrest, made statements showing ill will toward plaintiff and to the effect that he was going to "get him." The evidence, taken as a whole, was sufficient to raise an issue of fact as to whether the defendant, after making the arrest, failed to bring the plaintiff before the magistrate "forthwith," as ordered by the warrant, and whether he unnecessarily confined the plaintiff in the South Omaha jail, and unreasonably detained him there, with indifference to, or with wilful disregard of, plaintiff's rights and interests. It was the duty of the sheriff to act in strict compliance with the law and the direction given him by the warrant, and to bring his prisoner before the magistrate "forthwith," which means "within a reasonable time and without unnecessary delay," as the trial court properly instructed. A warrant does not protect an officer from

liability for wrongful and unauthorized acts committed by him in connection with its execution; and where, after making an arrest, he delays for an unreasonable length of time in bringing his prisoner before the magistrate, by reason of indifference to duty, or through wilfulness, he will be liable in damages as for false imprisonment. *Blocker v. Clark,* 126 Ga. 484, 7 L. R. A. n. s. 268; *Smith v. Weeks,* 60 Wis. 94; *Von Arx v. Shafer,* 241 Fed. 649, L. R. A. 1917F, 427, 428; *Keefe v. Hart,* 213 Mass. 476, Ann. Cas. 1914A, 716; *Wood v. Graves,* 144 Mass. 365; 32 Cyc. 542; 11 R. C. L. 798, sec. 11.

The defendant next complains that it was error to admit, over defendant's objection, the testimony we have mentioned tending to show statements by the defendant, made prior to the arrest, evincing ill will toward plaintiff. It must be remembered, however, that this is not, strictly speaking, a case of false imprisonment, but the gist of this action is the wrongful act of the officer while in the execution of a valid warrant. The warrant, regular and valid on its face, would be a complete defense to an action for imprisoning the plaintiff under it, except for the wrong committed by the officer in its execution. Where the officer acts in good faith and without a disregard for duty, the warrant is his protection. 32 Cyc. 542; *Leger v. Warren,* 62 Ohio St. 500, 51 L. R. A. 193. That there must be some wilful departure from duty is recognized in the cases above cited, although as it is said in the case of *Blocker v. Clark, supra*: "If the officer act in good faith, he is protected; but good faith may be negatived in other ways than by proof of spite or recklessness. The mere want of ordinary care is in some circumstances inconsistent with good faith." It was therefore proper, as we view it, that this testimony should have been admitted. It had some bearing upon the question of whether or not the defendant's treatment of the plaintiff was consistent with good faith, or whether his actions were through a wilful or intentional disregard of duty.

Defendant further contends that he should have been permitted to introduce proof to show that plaintiff's general reputation in the community as a peaceable and law abiding citizen was bad. This the trial court refused to allow him to do. Plaintiff did not attempt to plead nor prove damage to his reputation. Unless special damages are pleaded, character is not an issue in false imprisonment cases. It could not be material here as tending to justify the arrest or the good faith of the defendant in taking the plaintiff into custody. This was not an action for malicious prosecution. The arrest was lawful and under a valid warrant. Probable cause to believe the plaintiff guilty was not an issue in the case. The plaintiff's reputation may have been injured by the charge that was made against him and by the arrest, but not, so far as it appears, by the irregular or unreasonable execution of the warrant by the sheriff. Defendant, however, claims that plaintiff pleaded damage to his reputation. The petition recites that the plaintiff was "humiliated, disgraced, and injured in his feelings." This is no more than to describe the mental suffering of shame and disgrace which it is alleged the plaintiff experienced. That was the construction placed upon the pleadings at the trial. The court in its instructions allowed damages for "mental pain and suffering," but not for injury to reputation. We are of the opinion that the evidence as to reputation was properly excluded. *Ryburn v. Moore*, 72 Tex. 85; *Bergeron v. Peyton*, 106 Wis. 377; *Diers v. Mallon*, 46 Neb. 121; 19 Cyc. 365.

Defendant complains of improper conduct on the part of plaintiff's counsel in argument to the jury. Statements were made of matters outside the record with reference to the credibility of police officers in criminal cases. Counsel said that it was a rule of law that their testimony should be taken with great care and caution. He alluded to the "police probe" and "conditions" of the police department of the city, and, referring to one of defendant's witnesses, exclaimed: "Do you know

him? I wish you knew him as well as I do." Defendant's counsel, however, made no objection to any of these statements during the argument, and remained silent in apparent acquiescence until the argument was concluded. Upon objection being then made, the court admonished the jury to disregard these statements, and to base their findings upon the testimony alone, and not upon statements of fact made in argument by counsel. The proper rule seems to be that, unless objections to improper statements in argument are made at once, and a ruling of the court obtained thereon, and exception taken, the questions of misconduct, unless flagrant, are not reviewable on appeal. *Clark v. State*, 79 Neb. 482; *Missouri, K. & T. R. Co. v. Nesbit*, 43 Tex. Civ. App. 630; *Western Union Telegraph Co. v. Apple*, 28 S. W. (Tex. Civ. App.) 1022; *Portland Gold Mining Co. v. Flaherty*, 111 Fed. 312; 3 C. J. 865, sec. 765.

We do not believe that the statements of counsel were of such a character that they would, in the face of the admonition of the court to disregard them, constitute such flagrant misconduct as to warrant the granting of a new trial. *Skagit Railway & Lumber Co. v. Cole*, 2 Wash. 57.

Defendant further complains that the trial court admitted in evidence over objection testimony to the effect that plaintiff had a family consisting of a wife and eight children. This testimony, we must hold, was improperly admitted. Though in one state it has been held that such evidence is admissible in a case of this kind, as tending to throw light upon the degree of mental humiliation the person wrongfully imprisoned would suffer (*Dodge v. Alger*, 53 N. Y. Super. Ct. 107), our court, in accord with the decisions in other jurisdictions, seem committed to the rule that the admission of such evidence is erroneous. *Kendall v. Aleshire*, 28 Neb. 707; *Bergeron v. Peyton, supra; Hotz v. Rediske*, 116 Wis. 353; *Carlile v. Bentley*, 81 Neb. 715.

In the instant case, the fact that plaintiff had a wife

and two children was incidentally in the record, since their actions concerning the matter in controversy were involved, and their testimony was introduced. The testimony complained of, however, unnecessarily disclosed the fact that there were six children other than those mentioned. The great preponderance of the testimony shows—in fact, it appears to us almost beyond reasonable dispute—that the defendant was guilty of acts of oppression exercised upon the person of the plaintiff, and that a verdict in favor of the plaintiff was the proper one. However, the evidence improperly introduced no doubt had some influence upon the jury in stirring their sympathy, and perhaps in enhancing damages.

The verdict appears to be excessive. The plaintiff was properly arrested and taken into custody. His right to damages rests solely upon unnecessary delay in bringing him before the magistrate. His testimony shows that he was treated in a courteous and gentlemanly manner by the defendant. At the time in question the weather was severely cold, and plaintiff's testimony shows that the jail at South Omaha was cold, and that he became sick and infested with vermin; that he was able to earn $7.50 a day, and that he was rendered incapable of performing any work for a month. Damages to reputation are not involved. The jury's verdict was for $3,000. That the jury was actuated by passion or prejudice or undue sympathy for the plaintiff or his family seems clear. *Kendall v. Aleshire, supra;* 19 Cyc. 372.

We recommend that the judgment be reversed and the cause remanded for further proceedings, unless the defendant shall, within 40 days, file a remittitur in the sum of $1,500; but that, in case such remittitur is so made, the judgment be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed unless remittitur is filed; otherwise affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED ON CONDITION.

ALBERT H. SCOTT, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED MAY 15, 1920. No. 20679.

1. **Municipal Corporations:** POWER TO CONTRACT. The city of Lincoln has no power to contract except through the action of its council as a body.

2. ———: ———: FIREMEN. Chapter 7, Laws 1913, requiring a city of not less than 40,000 nor more than 100,000 population to adopt a 12-hour working day for its firemen, and providing that "the proper officers having charge of the fire department of such city are required to make suitable rules and regulations to carry these provisions into effect," does not authorize a single member of the council to bind the city by a promise of additional compensation to a fireman, who has previously been required to be on duty 24 hours a day, if he will remain in the service while the city contests the validity of such legislative act, provided the act is upheld by the courts.

3. ———: CONTRACT: IMPLIED RATIFICATION: PETITION: SUFFIENCY. In an action against a city on an implied ratification of an unauthorized contract, the petition must show knowledge of the existence of such contract on the part of the governing body of the city. and where there is no express averment of knowledge, but plaintiff relies upon an implication from the facts pleaded, the petition is demurrable if the facts are consistent with a want of knowledge on the part of the governing body.

4. ———: ———: ESTOPPEL. The mere receipt of benefits under an unauthorized agreement made by a single member of a city council does not render the city liable on the contract, where such benefits are received without the knowledge of the other members of the council and there is no ratification.

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

*Fawcett, Mockett & Walford* and *Burr & Brown,* for appellant.

*C. Petrus Peterson* and *Charles R. Wilke, contra.*

PER CURIAM.

This is an appeal from an order sustaining a demurrer to plaintiff's petition and a judgment dismissing his cause of action.

In 1913 plaintiff was in the employ of defendant city as a fireman, at a salary of $80 a month. The legislature that year passed an act, applicable to cities of defendant's class, which provided: "No fireman, other than the chief and assistant chief of the fire department, shall be compelled or required to be on duty more than twelve (12) hours continuously in any one day, and each fireman shall be entitled to twelve (12) consecutive hours of each day, alternating from day to night and from night to day once each month, from seven (7) o'clock to seven (7) o'clock, without being subject to duty or called to do or perform any work or services as such fireman, and the proper officers having charge of the fire department of such city are required to make suitable rules and regulations to carry these provisions into effect; provided, however, in the event of a great conflagration, or unusual fire or fires, the chief of the fire department, at his discretion, may require such fireman, as may at that time be off duty, to assist in the protection of life and property." Chapter 7, Laws 1913. Up to this time plaintiff and the other firemen of the city had been required to be on duty 24 hours a day.

Defendant refused to recognize the act of the legislature and undertook to contest its validity. Plaintiff notified the fire chief, and the commissioner of public safety, who was intrusted with the supervision of the department as a member of the city commission, that he would no longer work for the compensation then paid him, except on a 12-hour day basis. The commissioner of public safety, according to plaintiff's claim, promised him, if he would remain in the service, and the double shift law should be upheld, the city would regard his salary as having been drawn on a 12-hour day basis, and would pay him at the same rate for the additional hours

he had put in. In December, 1915, the city was obliged to put the act of 1913 into effect, under the decision of this court. *State v. City Council of City of Lincoln*, 98 Neb. 634. Plaintiff thereupon claimed to be entitled to $2,312 additional salary, and, upon the refusal of the city to pay, he instituted this suit to recover "the amount due him under said agreement for said extra time * * * at the rate of $80 a month."

It is not contended that the contract upon which plaintiff sues was ever formally entered into by the city commission, and the demurrer to the petition raises only these two questions: (1) Did the chief of the fire department and the commissioner of public safety have power to make a contract of employment which *ipso facto* would bind the city? (2) If the fire chief and the commissioner of public safety had no such power, is the city liable on the ground of an implied ratification, under the facts stated in the petition?

In support of the power of the chief of the fire department and the commissioner of public safety to make the agreement alleged, plaintiff relies upon that part of the double shift act which provides that "the proper officers having charge of the fire department of such city are required to make suitable rules and regulations to carry these provisions into effect," and upon the assertion that persons applying for a position in the fire department were accustomed to go to the chief of the department or to the commissioner of public safety, and not to the city commission or council.

Section 4414, Rev. St. 1913, vests the contracting power of municipalities of defendant's class, under the old form of government, in a mayor and city council. When defendant adopted a commission form of government, this authority was, by section 5298, Rev. St. 1913, transferred to the city commission. Chapter 7, Laws 1913, requiring the "officers having charge of the fire department * * * to make suitable rules and regulations" to carry the double shift law into effect, is not

a modification of the contracting power of the city commission; it permits the making of supervisory and disciplinary regulations by the officers having charge of the fire department, but does not authorize the making of contracts of employment, or the altering of existing ones, by a single member of the city commission. Nor would the fact that this officer had been in the habit of employing men in the past override the provision of the statute; the city would not be liable on the contract unless it had previously been agreed to by the city commission so as to make the commissioner of public safety a mere administrative agent for its execution, and not a discretionary agent for its negotiation, or unless the unauthorized acts of the commissioner were subsequently ratified.

Plaintiff does not claim that the city commission directed the making of the contract in suit, and the question therefore turns on ratification. There can be no ratification without knowledge, and there is no allegation in the petition that the city commission knew or approved of the act of the commissioner of public safety in promising plaintiff additional compensation should the double shift law be upheld. Plaintiff relies upon an imputation of knowledge from the following facts: The city commission knew that the statute required the firemen of the city to work only 12 hours a day; plaintiff and the other firemen continued in the service for 28 months after the double shift act became effective; the commissioner of public safety met with the other members of the commission in daily session, and might reasonably be supposed to have spoken to them about the arrangement he had made with the firemen. But we cannot indulge in presumptions in favor of a pleader on demurrer. The facts stated do not unequivocally imply knowledge; there was no provision in the statute for extra compensation; the commissioner of public safety may not have informed the other members of the commission of the promise which he had made, and these

members may well have supposed that plaintiff and the other firemen were content to work under the old regulations while the city contested the legality of the legislative requirement.

It is urged that the city has received the benefit of plaintiff's services and is estopped to deny liability on the contract. The objection to this argument is that no contract with the city for additional compensation exists, either by virtue of previous authorization on the part of the commission, or by implied ratification through knowingly accepting the benefit of plaintiff's services. The petition is not based upon a contract which the commission has attempted to make or of which it had knowledge, or upon a claim in *quantum meruit.*

The demurrer was properly sustained.

AFFIRMED.

DAY and FLANSBURG, JJ., not sitting.

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STATE, EX REL. WILL M. MAUPIN, RELATOR, v. DARIUS M. AMSBERRY, SECRETARY OF STATE, ET AL., RESPONDENTS.

FILED MAY 15, 1920. No. 21484.

**Elections:** CERTIFICATE OF NOMINATION: OBJECTIONS. Unless objections to a certificate of nomination in apparent conformity with the statute providing for primary elections are made in writing and filed with the secretary of state within three days after the certificate is filed, such certificate of nomination must be deemed to be valid.

Original proceeding in mandamus to compel respondent, secretary of state, to issue a certificate of nomination of candidates for office, omitting the name of John H. Morehead as candidate for governor. *Writ denied.*

*Ritchie & Canaday* and *Ralph G. Coad,* for relator.

*Clarence A. Davis, Attorney General, I. L. Albert* and *Dexter T. Barrett, contra.*

PER CURIAM.

On March 31, 1920, the relator filed an original application for a peremptory writ of mandamus in this court to compel the respondent, the secretary of state, to issue and transmit to each county clerk and election commissioner in the state a new certificate of nomination of candidates to be voted for at the primary election to be held April 20, 1920, and to omit therefrom the name of John H. Morehead as a candidate for governor. The point is made by the relator that the failure to present to the secretary of state a county treasurer's receipt showing the payment of the necessary filing fee on or prior to March 20, 1920, is fatal to the respondent's right to have his name placed upon the primary ballot as a candidate for governor. The record discloses that on March 20 a petition of nomination, signed by 34 qualified electors, was filed with the secretary of state requesting that the name of John H. Morehead, of Falls City, Richardson county, Nebraska, be placed upon the official primary ballot of the democratic party as a candidate for governor. At the time of the filing of this petition no receipt of the county treasurer of Richardson county was presented to the secretary of state showing the payment of the regular filing fee. Such receipt was filed on March 25, and showed on its face that payment to the county treasurer had been made on March 20. A determination of the question presented involves an interpretation of some of the provisions of the general primary law. Speaking in general terms, it was the purpose of the primary election law to provide an easy method by which a person on his own initiative, or by petition of a designated number of electors, might become a candidate for state office.

Section 2157, Rev. St. 1913, provides: "The name of no candidate shall be printed upon an official primary

ballot unless at least thirty days prior to such primary, either he, or twenty-five qualified electors of the party with which such candidate affiliates shall have filed a written application with the proper authority and in substantially the following form: * * * In case a nomination shall be made by electors, * * * said nominee shall, within five days after the date the said certificate shall be filed with the proper officer, file a statement in writing duly verified under oath, stating that he affiliates with the party named in said certificate, that he will abide by the results of said primary, and if elected will qualify and serve as such officer."

Section 2156, Rev. St. 1913, provides: "No nominating paper shall be filed until the proper county treasurer's receipt showing the payment of such filing fee shall be presented to the officer with whom such nominating paper is to be filed."

The law further provides that nominating papers of candidates for state officers shall be filed with the secretary of state, and that there shall be paid to the county treasurer of the candidate's residence for the use of the general fund a fee of $10.

Section 2160, Rev. St. 1913, provides: "At least twenty-five days before any primary * * * the secretary of state shall transmit to each county clerk a certified list containing the name * * * of each person for whom nominating papers have been filed in his office, and entitled to be voted for at such primary."

Section 2162, Rev. St. 1913, provides: "All certificates of nomination or nomination statements, which are in apparent conformity with the provisions of this article, shall be deemed to be valid, unless objections thereto shall be duly made in writing within three days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby. * * * The officer with whom the original certificate was filed * * * shall, in the first instance, pass upon the va-

lidity of such objection, and his decision shall be final, unless an order shall be made in the matter by the county court, or by a judge of the district court, or by a justice of the supreme court at chambers, on or before the second Wednesday preceding the election."

The successful operation of the primary law requires that the successive steps prescribed shall be taken at the time and in the manner provided by the statute. Petitions requesting the names of candidates to be placed upon the primary ballot must be filed at least 30 days before the primary election, and in the instant case March 20 was the last day upon which names of candidates could be placed upon the primary ballot. Objections, if any, must be filed within three days thereafter. The purpose of this provision is to allow sufficient time so that notice of such objections may be given by mail to the candidates affected, and that a hearing may be had thereon before the proper filing officer, and sufficient time allowed for a summary review of the decision of such officer before the county court, or a judge of the district court, or by a justice of the supreme court at chambers, on or before the second Wednesday preceding the election. The evident intent is that a decision may be had thereon, if possible, before the fourteenth day prior to the election, at which time the county clerk is required to prepare for printing and posting the sample ballot. If no objections are filed within three days after the nominating papers are filed, they shall be deemed to be valid. This is a reasonable provision intended to facilitate the working of the law, for, as we have seen, unless objections are filed within a short period, there would not be sufficient time for a notice, hearing and review of the action of the filing officer before the time the county clerk is required to post and print the ballot. It may be objected that the complaint here is not that the papers are not "in apparent conformity with the provisions of this article," but the want of authority of the secretary of state to file them. Construing the

language of the statute literally and technically, this may be true, but we believe the law should be—to use the language of section 2134, Rev. St. 1913, relating to the giving of notice and the conduct of the primary—"liberally construed so that the real will of the electors may not be defeated."

Before the five days expired, in which the person named in the certificate must accept or reject the filing, the secretary of state received a telegram of acceptance from John H. Morehead, and a telegram from the county treasurer of Richardson county stating that the filing fee had been paid on March 20. The receipt itself and a formal acceptance was presented to the secretary of state on March 25; the receipt being dated March 20, 1920. No objection was made to the filing within the prescribed three-day period, and we are of the opinion that the action of the secretary of state therefore became final. The law favors the diligent, especially in such matters as concern political rights. Needless confusion and uncertainty would probably result if the legality of nominations was permitted to be questioned when the time for the necessary steps in the preparation of the ballot and its distribution to the polls would be inadequate. The provision limiting the time for objections is reasonable and a proper exercise of legislative power.

The writ is therefore denied.

WRIT DENIED.

MORRISSEY, C. J., took no part in this decision.

FLANSBURG, J., not sitting.

FRANK M. TYRRELL, ADMINISTRATOR, APPELLEE, V. EMMETT KELLEY ET AL., APPELLANTS.

FILED MAY 15, 1920. No. 20793.

1. **Homestead:** SELECTION: CONVEYANCE. Where a homestead has actually been selected by a husband and work commenced upon the erection of a dwelling, which was afterwards completed and occupied by the husband and wife as the family home until the death of the husband, the homestead character attached at the time that selection was made and work begun, and it could not afterwards be conveyed by the husband without the knowledge or consent of his wife.

2. **Deeds:** IMPLIED AUTHORITY TO FILL BLANK: REVOCATION. The implied authority given by a wife to a husband to fill in a blank in a deed of conveyance, executed by both, with the name of a grantee, may be revoked by changed conditions after the deed has been signed by her.

3. **Wills:** BEQUEST TO WIFE: DEVISE OF HOMESTEAD. A will which provided, "I give and bequeath all I possess to my wife Flora Kelley without any reservation of any kind," *held*, when considered in connection with other parts of the will and other facts, to evidence the intention of the testator to pass the title to the family homestead to his wife, and the failure to use the word "devise" is not controlling.

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

*Peterson & Devoe* and *George W. Ayres*, for appellants.

*J. C. McNerney* and *J. H. Walker, contra.*

MORRISSEY, C. J.

Action to quiet the title to a certain lot in Lincoln.

The issues involved are whether the title to the lot was conveyed to defendants by the former owner, Frank J. Kelley, or whether, if not so conveyed, his widow, Flora Kelley, took the entire estate by his will, or only took one-half interest in the property by the statute of descent.

There being no bill of exceptions preserved, the court presumes that the evidence sustains the general and special findings made by the district court. The findings of fact respond to the allegations of the petition and are consistent therewith, and the only question left to determine is whether the conclusions of law and the judgment based thereon are warranted by such findings.

The facts as found, in substance, are as follows: Flora Kelley was married to Frank J. Kelley about 1880, and they lived together until the death of Frank J. Kelley in April, 1916. Flora Kelley died on or about May 29, 1917. No children were born of the marriage. The lot in question on January 3, 1914, was worth about $1,200, and the title was in Frank J. Kelley. This was all the real estate that either of the Kelleys owned. On that date Kelley represented to his wife that he had sold the lot for $1,200, and requested her to join with him in a deed of conveyance. He presented to her a deed with full covenants of warranty, but leaving a blank space for the name of a grantee. Relying on the statement that he had sold the lot for $1,200, Mrs. Kelley signed and acknowledged the deed. A few days before Kelley had staked and laid out on the lot a foundation for a house and had commenced its erection. Immediately after its completion the family moved into the house, and continued to occupy it as their home and homestead until the death of Kelley.

Afterwards, while occupying the premises and claiming to be the owner, Kelley and wife executed a mortgage to secure a loan of $1,000 made to Kelley. In the belief that the lot belonged to her, Mrs. Kelley, after the death of her husband, paid the mortgage debt from her own money and received a release. She continued to live in this property until her death, believing herself to be the owner.

In fact Kelley had never sold this property, and the representations he made to his wife to induce her to sign the deed were false. Shortly before his death he

caused to be written the name of Emmett Kelley as grantee in the deed, and handed it to one Ankeny, with directions to deliver the same to Emmett Kelley upon the death of Flora Kelley, and in the meantime not to disclose the fact that he held such a deed, and he also then declared that he had made the false statements and representations to Mrs. Kelley for the purpose of preventing the premises from becoming her property. After the death of Mrs. Kelley, Ankeny delivered the deed to Emmett Kelley, who caused it to be recorded, took possession of the premises, claiming title, and is now in possession. No consideration was paid by him for the conveyance.

Kelley made a will, which was duly probated. This provided, "I give and bequeath all I possess to my wife Flora Kelley without any reservation of any kind," and contained other provisions. A decree was rendered in county court finding that Flora Kelley was entitled to all the property under the will, and the court assigned the lot in question to her.

The district court made special findings that Flora Kelley believed when she signed and acknowledged the deed that her husband was selling the premises, as he had stated; that at the time the deed was made the premises were the homestead; that, if Kelley had implied authority to fill in the blank as to grantee, such implied authority had been revoked by changed conditions at the time he wrote in the name of Emmett Kelley, and that the attempt to thus make a gift of it was in excess of and in violation of any implied authority, and a fraud upon Flora Kelley. Conclusions of law were that the deed was void as to her, and conveyed no title to Emmett Kelley, and that, by virtue of the will of her husband and the decree of the county court, the widow became and was the lawful owner of the property at the time of her death. Decree was rendered accordingly.

The appellants admit that the evidence establishes the facts found by the court, but they contend that the conclusions of law are erroneous. It is argued that the deed in question complied with the statutory requirements and conveyed every interest Mrs. Kelley had in the premises at that time; that the homestead character was afterwards acquired; that she had the benefit of the homestead estate by residing on the premises until her death, and at her death these rights became extinguished, citing *Des Moines Ins. Co. v. McIntire,* 99 Ia. 50, and *Quinn v. Brown,* 71 Ia. 376. But the facts stated from which this conclusion is drawn are not as found by the court, and are incorrect; hence the cases cited are inapplicable. The court found that, at the time Frank J. Kelley fraudulently procured Mrs. Kelley to sign the deed, he had selected the premises as his homestead. This vested a homestead interest in his wife of which he could not deprive her without her consent. *Hanlon v. Pollard,* 17 Neb. 368; *Davis v. Kelly,* 62 Neb. 642; *Hair v. Davenport,* 74 Neb. 117. The fact that the dwelling was only in process of erection is immaterial.

Having no children, if the will did not pass the whole estate to the widow, she took a life estate, and a one-half interest in fee in the property at her husband's death. The contention is made that, since the will does not mention real estate, and provided, "I give and bequeath all I possess to my wife," and the word "devise" was not employed, it only carried personalty. It is said that Kelley was a lawyer and knew the legal significance of the words "devise" and "bequeath," that the fact of his having the deed in his possession, which he intended to use to convey the real estate to his brother, and other circumstances, show that the intention of the testator was that the will should only convey personal property. But the will was executed on April 14, 1915, and Kelley did not die until April, 1916. The answer admits that the deed "was by the said Frank J. Kelley duly and legally delivered to the said Emmett

Kelley by placing the same, shortly before his death, in the possession and control of Harry R. Ankeny." So that when the will was executed, the title was in Frank J. Kelley, and the real estate was one of his possessions. Furthermore, the will is not in the usual form, and its language is not such as is usually chosen by skilled and accurate lawyers. It is somewhat rambling, treats of personal debts due from the testator, and speaks of debts due him. It resembles more in these respects a memorandum of assets than a formal will. The argument based on the presumption that a lawyer would be punctilious and technically accurate in the use of words loses force when these facts are considered. It is also worthy of mention that the will recites, "I commend my surviving widow to the kindly offices and generous friendship of those who were friendly to me," showing a kindly and thoughtful consideration for the welfare of his wife.

We conclude that Kelley had no authority to fill the blank in the deed at the time it was done, and that the will passed his entire estate to his widow, reaching tho same conclusion as did the district court, but upon slightly different grounds.

AFFIRMED.

FLANSBURG, J., not sitting.

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WILLIAM KELLEY, APPELLANT, v. CORA JUDSON, APPELLEE.

FILED MAY 15, 1920. No. 20994.

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

*C. J. Campbell,* for appellant.

*J. C. McNerney, contra.*

MORRISSEY, C. J.

Action to quiet title. A general demurrer to the petition was sustained, and the action dismissed. Plaintiff appeals.

The facts alleged in the petition are almost identical with those alleged in the case of *Tyrrell v. Kelley, ante,* p. 555. Briefly stated, Frank J. Kelley, without authority, undertook to convey all of his wife's interest in the homestead to one of his brothers. Plaintiff and the grantee are both brothers of Frank J. Kelley, deceased, and plaintiff claims to be entitled to a one-eighth interest in the property by descent.

The petition alleges the invalidity of the deed. It also alleges that Frank J. Kelley made a will giving and bequeathing all of his personal property to his wife, Flora Kelley, and that the will did not pass the title to his real estate. The prayer is that the title to an undivided one-eighth interest in the premises be quieted in plaintiff; that the will be construed as not having devised real estate; that the deed to Emmett Kelley be declared null and void, and a receiver appointed to take charge of the property.

The only question presented is whether the title to the real estate passed by the will to Flora Kelley. This question has already been decided in the case hereinbefore mentioned. We are content to abide by the construction of the will made in that case. Plaintiff has no title to the property, and his petition does not state a cause of action.

AFFIRMED.

FLANSBURG, J., not sitting.

DELLCENA HARTSHORN, APPELLEE, v. DAVID HARTSHORN, APPELLANT.

FILED MAY 15, 1920. No. 21027.

1. **Divorce:** EXTREME CRUELTY. A continuing course of conduct on the part of either spouse, which so grievously wounds the mental feelings or which so utterly destroys the peace of mind as to seriously impair the bodily health and endanger the life or reason of the other, or which nullifies the legitimate ends and objects of matrimony, constitutes extreme cruelty within the meaning of the statute.

2. **Evidence** examined, and *held* to support the decree.

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

*R. J. Greene,* for appellant.

*Clifford L. Rein, contra.*

MORRISSEY, C. J.

Defendant appeals from a decree of the district court for Lancaster county, awarding plaintiff an absolute divorce and the custody of their minor children. The decree also covers a property settlement, but the only matter presented by the record for our consideration is the sufficiency of the evidence to warrant the court in granting a divorce.

The decree is based upon an allegation of extreme cruelty. The parties have been married for nearly 30 years, and are the parents of eight living children. Their domestic differences have extended over a period of more than 20 years. Plaintiff testified to having been driven from home by defendant, to his frequent outbursts of passion, and to his use, at such times, of vile and indecent language. In this we think she is sufficiently corroborated, notwithstanding the denial of defendant. Plaintiff also testifies to defendant having

struck her with a clothes basket. There is no corroboration of this, however; but, to constitute extreme cruelty within the meaning of the statute, it is not necessary that one spouse be shown to have actually assaulted the other. The use of vile epithets, rude conduct, and a demeanor which leads to a disturbance of the peace of mind of the other spouse may, in its consequences, inflict greater pain and suffering than an occasional act of personal violence. A continuing course of conduct on the part of either spouse, which so grievously wounds the mental feelings or which so utterly destroys the peace of mind as to seriously impair the bodily health and endanger the life or reason of the other, or which nullifies the legitimate ends and objects of matrimony, constitutes extreme cruelty within the meaning of the statute.

Plaintiff's testimony is for the most part denied by defendant, but the preponderance of the evidence supports her contention, and the decree is

AFFIRMED.

ROSE and FLANSBURG, JJ., not sitting.

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CHARLIE ARENT ET AL., EXECUTORS, APPELLEES, V. MARGARET ARENT, APPELLANT.

FILED MAY 15, 1920. No. 21059.

1. **Descent and Distribution:** REALTY OF HUSBAND. Under section 1265, Rev. St. 1913, the real estate of a husband, other than the homestead, descends to the widow and heirs, subject to his debts.

2. **Case Overruled.** That portion of the second paragraph of the syllabus and that portion of the opinion in *McCormick v. Brown*, 97 Neb. 545, in conflict with the above statement of law, is overruled.

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

*F. L. Carrico,* for appellant.

*Lewis C. Paulson, contra.*

LETTON, J.

Appeal from proceedings to sell land for payment of debts of a deceased person. The main question presented is whether or not the widow of a deceased owner of real estate takes her distributive share of the land at his death, subject to his debts. The widow contends that the estate she takes by the statute is of the nature of dower, and therefore is not liable to sale to pay debts, while appellees rely upon the language of the statute. Appellant cites the cases hereafter mentioned to sustain her position.

In *Gaster v. Estate of Gaster,* 92 Neb. 6, the point decided was that, "If a married man by his will disposes of all his property, real and personal, to others, and gives nothing to his wife, she will be entitled to take the distributive share given her by the statute as though he had died intestate." The question as to whether she took the real estate subject to the claims of creditors was not involved in the case, although the matter is casually mentioned in the opinion.

In *In re Estate of Sanford,* 90 Neb. 410, a case involving the inheritance tax on the property, it was held, among other things, that the widow, by taking under the will instead of asserting her right to dower, was not entitled to deduct the value of the dower from the gross value of the real estate within this state. This decision was by a divided court. Afterwards, upon rehearing (91 Neb. 752), this portion of the judgment was set aside, and it was held that the dower interest, whether taken under a will or by operation of law, is not subject to inheritance tax. In *In re Estate of Strahan,* 93 Neb. 828, a like holding was made, also by a divided court.

In *McCormick v. Brown,* 97 Neb. 545, which opinion also was not unanimous, it was held that "Under the act of 1907 (Rev. St. 1913, secs. 1265-1272), a wife has an

interest in the real estate of her husband which he cannot alienate without her consent, and is not subject to his debts." The reason for the latter proposition is not stated in the opinion, and the language of the statute is not discussed. It will be seen that the only case deciding the point involved is the case last mentioned. An affirmance of the judgment of the district court in this case will require the overruling of *McCormick v. Brown,* so far as this proposition is concerned.

In the consideration of this question, the language of the statute, if plain and unambiguous, must control. Section 1265, Rev. St. 1913, provides: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seised of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband and wife while residents of this state, * * * which *has not been sold under execution or judicial sale,* and which has not been lawfully devised, shall descend *subject to his or her debts* and the rights of homestead in the manner following: First. One-fourth part to the husband or wife, if the survivor is not the parent of all the children of the deceased and there be one or more children, or the issue of one or more deceased children surviving."

It will be observed that, during the lifetime of the holder of the title, the real estate may be sold under execution or judicial sale, and this idea is also expressed in section 1269, which expressly provides: "Such right to inherit may also be barred by the sale of such real estate under execution or other judicial sale, during the lifetime of the owner."

The statute abolished dower and curtesy. It seems evident that the object was to place the rights of the surviving spouse of either husband or wife upon the same plane. Before this enactment a sale of the wife's real estate to pay her debts barred the curtesy of the

husband (*Miller v. Hanna*, 89 Neb. 224), but a sale of the real estate of the husband to pay his debts did not bar the dower right of the wife. *Butler v. Fitzgerald*, 43 Neb. 192. The new law places husband and wife on a parity in this as in other respects.

If the meaning of the statute were obscure or its language ambiguous, it would be the duty of the court to ascertain and declare its meaning in a proper case, but where there is no obscurity or ambiguity, and the legislature has spoken in plain and ordinary language, it is not for the court to interpret language that needs no interpretation, but it is its duty to declare what has been plainly written as the law.

Appellant has cited cases from Indiana and Iowa in support of her position. The Indiana statute provides the widow shall take "free from all demands of creditors." The Iowa statute omits the words "subject to his or her debts." Cases construing these statutes are not in point. That portion of the opinion and syllabus in the *McCormick* case in conflict with these views is therefore overruled.

It seems that the deceased and one Fred Arent owned some real estate in Phelps county, proceedings to partition which had been instituted during the lifetime of Henry Arent. The land was sold in these proceedings after his death, and the proceeds distributed among the heirs, the widow receiving one-fourth of the share of her deceased husband, and the children their proportionate share. It is now contended that this money should have been applied upon the debts, and that consequently the proceedings to sell the land are unauthorized. The widow, we think, is in no position to complain of this, having in common with the other heirs, and apparently by agreement, received the whole of her share without any deduction for debts.

The proof does not sustain the other objection as to value.

AFFIRMED.

ROSE, J., not sitting.

OMAHA ELEVATOR COMPANY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT: UPDIKE COMMISSION COMPANY ET AL., APPELLEES.

FILED MAY 15, 1920. No. 20832.

1. **Carriers:** BILL OF LADING. A bill of lading is a carrier's receipt for property and a contract to carry and deliver it.

2. ———: ———. A bill of lading is evidence of ownership in the hands of the holder; but it is not a negotiable instrument, and does not preclude inquiry into the circumstances under which it is transferred or surrendered.

3. ———: ———. Without the receipt or possession of property to transport, or to divert beyond the original destination, there can be no valid bill of lading.

4. ———: ———: DIVERSION OF CONSIGNMENT. After a carrier has transported property and permanently lost possession and control of it by delivery under the original bill of lading, a subsequent bill of lading issued by the same carrier for the purpose of diverting the original consignment to a different destination is void.

5. ———: ———: ———: INTERSTATE BUSINESS. After a carrier has received, transported and delivered an intrastate shipment under the original bill of lading, and has thus permanently lost possession and control of the property, the same carrier, by subsequently issuing a void bill of lading for the purpose of diverting the identical shipment to a station outside of the state, cannot make its services interstate business.

6. **Sales:** CONDITIONAL SALES. A contract of conditional sale of personal property may be valid between the parties, though unrecorded, where rights of innocent purchasers or creditors have not intervened.

7. **Estoppel:** EQUITY. Where one of two parties to transactions must suffer a loss through the misconduct or the wrongs of a third person, the superior equities will be determined from all of the material circumstances, and the burden will be allowed to fall where equity and justice place it.

8. ———: DISCLAIMER. Plaintiff's claim to specific property *held* not defeated by a disclaimer or by a judgment in a former action.

9. **Warehousemen:** LIABILITY. A promise by an elevator company to protect a carrier in the delivery of a car of corn, *held* not to go

beyond the obligation to retain the corn for the benefit of the owner.

10. **Principal and Surety:** INDEMNITY BOND. An indemnity bond executed by an elevator company to protect a carrier from losses occasioned by the delivery of grain before the surrender of the bills of lading is not breached by a proper delivery of a consignment, nor does such a bond protect the carrier from a loss resulting from its own negligence or from its own mistake.

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

*Byron Clark, Jesse L. Root* and *J. W. Weingarten,* for appellant.

*Smith, Schall & Howell, Brogan, Ellick & Raymond, W. H. Howard* and *J. C. Kinsler, contra.*

ROSE, J.

This is a suit in the nature of a bill of interpleader. The subject of litigation is a fund of $2,582.95, the proceeds of a car of corn loaded at La Platte, Nebraska, received there by the Chicago, Burlington & Quincy Railroad Company, carrier, from H. Rohn, consignor, consigned to the Dawson Grain Company, Omaha, Nebraska, transported to Omaha by the carrier, and unloaded by the Omaha Elevator Company, plaintiff, at its elevator in Council Bluffs. Plaintiff claims no interest in the consignment beyond the right to retain the customary charges for elevator services. After the corn became the subject of controversy, plaintiff brought into court in this action as defendants the rival claimants and other parties, pleading a willingness, upon an adjudication of their rights, to turn over to the owner the fund derived from an authorized sale; the proceeds, by agreement of all concerned, being held by plaintiff in lieu of the corn. The claimants are the Dawson Grain Company, consignee, and the Chicago, Burlington & Quincy Railroad Company, carrier. The controversy between them grew out of conflicting orders relating to the carrier's disposition or delivery of the car at Omaha.

The transactions through which the consignee traces the title to the corn and to the proceeds in the hands of plaintiff may be summarized as follows: Walter F. Dawson, a dealer in grain in the name of the Dawson Grain Company, consignee, was a member of the Omaha Grain Exchange. On the trading floor thereof, before procuring the bill of lading, Dawson conditionally sold the car of corn to William R. Richter, also a member of the Omaha Grain Exchange, doing business as the United States Commission Company. Under the rules of the Omaha Grain Exchange, Richter gave Dawson a receipt containing an agreement that the title to the bill of lading and to the contents of the car should pass to Richter only upon a surrender of the receipt and full payment of the purchase price, though the terms of the sale were not publicly recorded. Following the sale the carrier was directed in writing by Dawson to switch the car to the order of Richter, "bill of lading to follow." Richter authorized the Albers Commission Company to resell the corn, and to that end, under authority from the latter, the carrier was directed by plaintiff to deliver the car to it. In compliance with this direction, the carrier, without the surrender of the bill of lading, switched the car to a transfer track in Omaha, whence it was taken by the Union Pacific Railroad Company to plaintiff's elevator at Council Bluffs and there unloaded. Dawson insists that he procured the corn from Rohn by purchase, did not receive the purchase price after he sold it to Richter or part with his title, never lost his right to assert his ownership, and is entitled to the proceeds.

The other claimant, the carrier, contends that it is not bound by any rule of the Omaha Grain Exchange, or by any undisclosed condition of the sale by Dawson to Richter. The carrier relies in part on orders, transactions and facts which, for the purposes of one phase of the case, may be summarized as follows: Richter purchased the car of corn from Dawson, procured the bill

of lading, directed the carrier in writing to divert the consignment to Chicago, "notify the Updike Commission Company," and demanded what is termed an "order bill of lading," which the carrier issued in exchange for the surrendered original bill of lading, and delivered the order bill of lading to Richter, who indorsed it, attached it to a draft for $2,800, which was mailed to Chicago for collection and there paid by the Updike Commission Company. The car of corn was never diverted or shipped to Chicago. The Updike Commission Company sued the carrier for the loss, and recovered a judgment, which the carrier paid in full. The carrier contends that the title to the corn passed to the Updike Commission Company in the manner described, that the latter is entitled to the protection of a *bona fide* purchaser, and that the carrier is subrogated to the rights of the Updike Commission Company.

The facts on which the rival claimants base their claims are alleged in detail and traversed by formal pleas. The carrier also pleads other facts to show that its loss is recoverable from plaintiff, if it is not protected by the fund in controversy; but these pleas will be omitted here and considered later in proper order to prevent the confusion of complicated issues. The evidence in material respects is practically without conflict. The trial court found all of the issues in favor of plaintiff and of defendant Dawson. The carrier has appealed.

Who has the better claim? Who shall suffer the loss occasioned by Richter's double-dealing which resulted in the unloading of the car at plaintiff's elevator and in the issuing of an order bill of lading for the purpose of diverting the original consignment from Omaha to Chicago? Who first learned of the dual orders? Who trusted the perpetrator of the fraud? Who could have prevented the loss?

By means of the receipt, Dawson retained in himself the title to the original bill of lading and to the contents

of the car, when he sold his corn to Richter. Under the terms of the sale, title could pass only upon payment of the purchase price in full. These terms of the sale complied with the rules of the Omaha Grain Exchange and bound both parties, who were members thereof. The purchase price was never paid to Dawson, nor to any one for him. As between him and Richter the title remained in the former. Is either the Updike Commission Company or the carrier entitled to the protection of an innocent purchaser? The original bill of lading, when surrendered by Richter to the carrier under the circumstances, the order by him to divert the original consignment to Chicago, the issuance of the order bill of lading, and the making and the paying of the draft, did not necessarily destroy Dawson's title to the corn, nor make the Updike Commission Company or the carrier an innocent purchaser. A bill of lading is a carrier's receipt for property and a contract to carry and deliver it. It is not the consigned property, nor the title thereto, nor a negotiable instrument. It is evidence of ownership in the hands of the holder, but does not preclude inquiry into the circumstances under which it is transferred or surrendered. Without the receipt or possession of property to transport, or to divert beyond the original destination, there can be no valid bill of lading. The liability of a carrier for the transportation and delivery of property does not attach until it receives the property. *Chicago, B. & Q. R. Co. v. Powers*, 73 Neb. 816; *Burrowes v. Chicago, B. & Q. R. Co.*, 85 Neb. 497. It follows that, after a carrier has transported property and permanently lost possession and control of it by delivery under the original bill of lading, a subsequent bill of lading issued by the same carrier for the purpose of diverting the original consignment to a different destination is void. "The receipt of the goods," said the supreme court of the United States, "lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry

or to deliver." *Pollard v. Vinton,* 105 U. S. 7; *St. Louis I. M. & S. R. Co. v. Knight,* 122 U. S. 79; *Crenshawe v. Pearce,* 37 Fed. 432; *Missouri P. R. Co. v. McFadden,* 154 U. S. 155; *Friedlander v. Texas & P. R. Co.,* 130 U. S. 416. As required by the original bill of lading, the carrier transported the consignment from La Platte to Omaha. Pursuant to the first order of Richter, the car was switched by the carrier to a transfer track in Omaha for plaintiff's elevator. There the carrier thus permanently lost possession and control of the shipment. On these facts the carrier never had the car of corn as an interstate shipment, or authority to divert it into one. In this case, therefore, federal law is not involved. When Richter surrendered the original bill of lading to the carrier and directed the diversion of the consignment to Chicago, he did not own the car of corn, or have it to sell, or to divert, or to ship, and the carrier did not then or thereafter have it for transportation. The order bill of lading, therefore, did not represent anything. It was void, and did not protect the Updike Commission Company or the carrier. The Updike Commission Company had no interest in the corn to which the carrier could be subrogated. The carrier, without authority, issued and gave currency to the void order bill of lading, resulting in the loss to the Updike Commission Company. Furthermore, a few minutes after Richter procured the order bill of lading for the purpose of diverting the original consignment to Chicago, the carrier learned that the car had already been switched by his previous order to the transfer track for plaintiff's elevator. The carrier also knew that Richter was not the only claimant. With knowledge of these facts, the carrier requested Richter to return the order bill of lading before it had passed beyond his control, and trusted him to do so. After he failed to comply with the request, there was ample time for the carrier to notify the Updike Commission Company at Chicago that the outstanding order bill of lading issued to Richter did not represent any shipment.

This warning was demanded by ordinary business judgment and would have prevented the loss resulting from the payment of the draft, but was not given. In addition, the carrier was the first to discover the dual orders of Richter, and thereafter trusted him to return the void order bill of lading. With knowledge of the facts, the carrier did not avail itself of the means at hand to prevent the loss resulting in this controversy.

It is nevertheless argued by the carrier that Dawson should bear the burden, since he sold the corn to Richter, failed to publicly record the terms of his sale, put in the hands of his purchaser the evidence of ownership, and neglected to comply with a rule of the Omaha Grain Exchange, by omitting to stamp on the face of the original bill of lading before parting with it the following notice: "Receipt issued for this bill of lading under the rules of the Omaha Grain Exchange." It is insisted that Dawson, by his course of dealings, not only parted with his title, but thus lost his right to claim ownership, and that the carrier, in issuing the order bill of lading for the purpose of diverting the original consignment to Chicago, acted on proper evidence of Richter's purchase and of the subsequent sale to the Updike Commission Company. For reasons already stated, these considerations, on the undisputed facts, do not control the issue. Before the dealings or conduct of any party to the controversy had culminated in damages or had made a loss unavoidable, the carrier delivered the car of corn, under directions traceable to Richter, on a switch-track, where Dawson's ownership could be asserted and protected. This delivery would have also protected the carrier, notwithstanding Richter's subsequent misuse of the original bill of lading. At a time when the carrier had both knowledge and means sufficient for the protection of itself, Dawson, and the Updike Commission Company, it issued and delivered the void order bill of lading and permitted it to be used to the injury of the Updike Commission Company. On the facts outlined, the

superior equities are on the side of Dawson. Of the rival claimants to the proceeds of the corn, he was less at fault than the carrier. Under familiar rules of equity, Dawson has the better claim, and the loss must be borne by his rival.

The pleadings raise also the issue that in the former suit, brought by the Updike Commission Company against the carrier, the claim of Dawson is defeated by a disclaimer on his part and by a judgment in favor of the carrier. This point is ably and confidently argued, but a different view of the pleadings and judgment seems to be more logical and just. While Dawson disclaimed any interest in the controversy between the Updike Commission Company and the carrier, his disclaimer should not be construed as a renouncement of his title to the identical corn in the hands of plaintiff; nor should the judgment pleaded as a bar be regarded as an adjudication that he did not own such corn, or as an estoppel preventing him from claiming it.

There is another aspect of the case in which there is an issue of plaintiff's liability to the carrier for the value of the corn, if the latter's claim to the proceeds is disallowed. One ground on which this alleged liability is based is the promise of plaintiff to protect the carrier. The promise was made by telephone. The conversation does not disclose the nature of the protection promised, nor the manner of performing the obligation. The effect of the promise, therefore, must be determined by the circumstances. Plaintiff handled the corn for the elevator charges, and had no other interest in it except to deliver it to the owner. For that purpose the corn or the proceeds have been at all times available. Had the carrier relied on its delivery of the car to plaintiff, instead of issuing an order bill of lading after delivery of the original consignment, there would have been no loss to any one. Under the circumstances, therefore, the promise of protection does not go beyond plaintiff's ob-

ligation to retain the corn or the proceeds for the benefit of the owner—a promise which has been kept.

The pleadings raise the additional issue that plaintiff, if the carrier is defeated on other grounds, is liable on a bond to indemnify it against losses resulting from the delivery of consignments of freight before the bills of lading have been surrendered. A breach of the bond has not been established. The carrier, in delivering the corn to plaintiff, did not incur any loss. The damages suffered by the Updike Commission Company and the carrier were caused by the issuance of the void order bill of lading. The bond does not protect the carrier against loss resulting from its own negligence or its own mistake.

No error has been found in the record, and the judgment is

AFFIRMED.

LETTON, DAY and FLANSBURG, JJ., not sitting.

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## IN RE ESTATE OF JOHN B. PETERSON.
## MARY OLSON, APPELLEE, V. BERNARD A. PETERSON, ADMINISTRATOR, APPELLANT.

FILED MAY 15, 1920. No. 20944.

1. **Executors and Administrators:** CLAIMS: PLEA OF PAYMENT: BURDEN OF PROOF. Where an administrator pleads that a claim against the estate was paid in full during the life of decedent, the burden is on him to prove that defense.

2. **Witnesses:** PRIVILEGED COMMUNICATIONS. Where an administrator, in making the defense that decedent had paid a claim, introduces in evidence a receipt, and adduces proof of the circumstances under which the receipt was given, and of the decedent's oral statement that the claim had been paid in full, testimony by claimant on the same subjects does not violate the statutory rule that no person having a direct legal interest in the result of any civil action, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction between the deceased person and the witness. Rev. St. 1913, sec. 7894.

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

*Lewis C. Paulson*, for appellant.

*M. D. King* and *F. L. Carrico, contra.*

ROSE, J.

This controversy grew out of a claim filed in the county court of Kearney county by Mary Olson against the estate of her deceased brother, John B. Peterson, for her services as his housekeeper at $30 a month from June, 1906, until January, 1909, and from August, 1911, until August, 1914. Her claim includes an item of $60 for traveling expenses between her home in Worthington, Minnesota, and her brother's home on his farm near Hildreth, Nebraska, where her services were performed. Her entire claim amounts to $1,950, and there is a credit of $485, leaving a balance of $1,465, with interest. She was allowed $570 by the county court, but there was a verdict in her favor for $1,775 upon an appeal to the district court. From a judgment for that sum, Bernard A. Peterson, administrator of the estate of John B. Peterson, deceased, has appealed to this court.

It is argued that the court erred in admitting evidence in violation of the statutory rule that no person having a direct legal interest in the result of any civil action, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction between the deceased person and the witness. Rev. St. 1913, sec. 7894.

The administrator admitted the employment and the performance of the services, but pleaded payment in full during the life of decedent. Under the plea of payment the administrator properly assumed the burden of proof on that issue. *Tootle v. Maben*, 21 Neb. 617. To prove payment as pleaded, the administrator, in making his defense in chief, introduced a receipt for $100 paid by John B. Peterson to claimant August 17, 1914. The

receipt contained the statement that this was the last of the payments to claimant in full for all her work done for her brother on his farm in Kearney county. The proofs on the affirmative of this issue, however, were not confined to the execution and the delivery of the receipt and to the writing itself, but included oral testimony relating to the circumstances under which the receipt was given and to its importing payment in full as understood by the brother of claimant. One witness called by the administrator testified that John B. Peterson brought the receipt home and put it in his trunk, saying he had paid claimant in full. This gave claimant the opportunity to testify to the real nature of the receipt and to the circumstances under which it was given, without violating the statute. *Cline v. Dexter,* 72 Neb. 619; *Russell v. Estate of Close,* 83 Neb. 232; *In re Estate of Enyart,* 100 Neb. 337. Claimant could neither read nor write the English language. She had signed the receipt by mark. She was properly permitted to testify that the receipt was not drawn in her presence, that it was not drawn by her brother, that it was not read to her, that she did not know its contents, that the money received was not payment in full but only a partial payment, that her brother had made the payment with the understanding that the balance due her was to be paid later. The verdict of the jury is supported by the testimony adduced in claimant's behalf. On the record presented, no part of her claim is barred by the statute of limitation. With the law and the facts thus determined, there is no error in the record.

AFFIRMED.

FLANSBURG, J., not sitting.

IN RE ESTATE OF FREDA S. COSTELLO.
ROY J. CUSACK, APPELLANT, V. ESTATE OF FREDA S. COSTELLO, APPELLEE.

FILED MAY 15, 1920. No. 20954.

**Homestead.** Homestead interests of the husband become vested in him upon the death of the wife, and are not changed by subsequent legislation.

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

*R. E. Weaverling* and *N. H. Mapes,* for appellant.

*Henry M. Kidder, contra.*

ROSE, J.

This is a controversy over the distribution of a fund in the hands of the administrator of the estate of Freda S. Costello, who died November 24, 1915, while occupying her homestead in Fremont with her six minor children and her husband. At the time of the wife's death the homestead was incumbered by a mortgage for $1,800. By quitclaim deed executed May 9, 1917, the husband conveyed his homestead interests to Roy J. Cusack. The mortgage was foreclosed and the homestead sold. The fund for distribution in the hands of the administrator, after the payment of the mortgage debt and of the claims against the wife's estate, is $662.77. The minor heirs and Cusack are the claimants. By order of the county court the administrator was directed to distribute to Cusack one-third of the fund and to each of the six heirs one-ninth of it. From this distribution Cusack appealed to the district court, where the order of the county court was affirmed. This is an appeal from the judgment of the district court.

There is an obvious error on the face of the proceedings. The order of distribution was made under a stat-

ute providing that, where the surviving spouse "elects to partition the homestead premises, the homestead right of the survivor shall then terminate and the homestead premises shall then descend as other real property of which the deceased died seised." This act was passed in 1917. Laws 1917, ch. 68. The homestead interests acquired by the husband and transferred to Cusack had become vested under the statutes in force when the wife died November 24, 1915. The act of 1917 did not affect these interests. The judgment of the district court is therefore reversed, with directions to order a distribution under the statutes in force November 24, 1915.

REVERSED.

FLANSBURG, J., not sitting.

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ERNEST C. BRAGONIER ET AL., APPELLEES, V. BROUGHMAN STEVENSON, APPELLANT.

FILED MAY 15, 1920. No. 20961.

1. **Appeal.** Ordinarily a party cannot appeal from a judgment granting him the relief demanded by his pleadings.
2. ———. A wrong reason for a correct conclusion of the trial court is generally immaterial on appeal.
3. **Judgment.** It is the duty of the prevailing party to submit a proper decree or to assist in preparing one.
4. **Appeal:** OBJECTION TO FINDINGS. Where a defendant in whose favor a judgment dismissing the action is rendered objects to any of the findings, he should request the trial court to reform or correct them before seeking relief by appeal.

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

*Weaver & Giller,* for appellant.

*A. R. Davis* and *Fred S. Berry, contra.*

ROSE, J.

This is a suit in equity to cancel two notes aggregating

$1,100 and a mortgage securing them. Defendant sold to plaintiffs a one-fourth interest in a store at Sholes, and the notes and the mortgage were given for the purchase price. The action is based on the fraud of defendant in misrepresenting the value of the property and the amount of the store's indebtedness. Defendant denied the fraud imputed to him and prayed for a dismissal. Upon a trial of the issues the district court dismissed the action on the ground that plaintiffs had failed to rescind the contract of sale promptly upon discovering the fraud. Defendant has appealed from the judgment in his favor.

No complaint is made of the judgment itself, but findings that plaintiffs were induced by fraudulent misrepresentations of defendant to purchase his interest in the store and to execute and deliver the notes and the mortgage for the purchase price are assailed as unnecessary, improper, and prejudicial. The relief sought on appeal is the elimination of these findings. Ordinarily a party cannot appeal from a judgment granting him the relief demanded by his pleadings. A wrong reason for a correct conclusion of the trial court is generally immaterial on review. The record does not show that the trial judge was asked to correct or reform his findings, or that defendant tendered a proper journal entry. It is the duty of the prevailing party to draw the decree or to assist in preparing it. The judgment being in favor of defendant, he should have given the trial judge an opportunity to correct or reform the findings. Attention to this matter in the court below was required by proper practice and fairness to the presiding judge. Such a course might have prevented the expense and delay of an appeal. It follows that the findings assailed are not reviewable on the record presented.

APPEAL DISMISSED.

MORRISSEY, C. J., LETTON and FLANSBURG, JJ., not sitting.

## ADOLPH KOTOUC V. STATE OF NEBRASKA.

FILED MAY 15, 1920. No. 21069.

1. **Rape:** CORROBORATIVE EVIDENCE. In a prosecution for rape, the corroboration of prosecutrix may consist of circumstantial evidence.

2. ———: ———: SUBSEQUENT ACTS. "In the prosecution of a charge for rape upon a female child under the age of consent, testimony of subsequent acts of illicit intercourse, related in time to the offense charged, is admissible as corroborative evidence of the principal fact sought to be established." *Woodruff v. State*, 72 Neb. 815.

3. ———: ———. In the prosecution for the rape of an orphan 14 years of age, testimony of a search which her brothers made for her, while she was absent from her former home awaiting accouchement, *held* admissible to corroborate her story of the felony.

ERROR to the district court for Saline county: RALPH D. BROWN, JUDGE. *Affirmed: Sentence reduced.*

*Bartos & Bartos*, for plaintiff in error.

*Clarence A. Davis, Attorney General*, and *C. L. Dort, contra.*

ROSE, J.

In a prosecution by the state in the district court for Saline county, Adolph Kotouc, defendant, age 23, was convicted of rape upon a child 14 years old, and for that felony was sentenced to serve a term of 7 years in the penitentiary. As plaintiff in error here, defendant below presents for review the record of his conviction.

The principal assignment of error is the insufficiency of the evidence to sustain the verdict. The argument under this head is based on the proposition that the proof of defendant's guilt as disclosed by the testimony of prosecutrix is without corroboration. The scene of the felony charged was a farmhouse in Saline county where John Kotouc, a widower about 80 years

of age, and his unmarried daughter, about 50 years of age, made their home. This was also the home of prosecutrix from the time she became an orphan at the age of 6 until she disappeared when pregnant at the age of 14. Continuously for 3 years before her departure, defendant shared with her the same home, eating at the same table, sleeping in an adjoining room on the second floor of the farmhouse, and working the farm for John Kotouc, who was defendant's grandfather. Prosecutrix testified directly, in substance, that defendant, as charged in the information, assaulted her in her room August 21, 1917; that she became pregnant; that, by prearrangement between defendant and his attorney, defendant took her to Wilber February 12, 1918, from whence she was to go to Lincoln and to return after her trouble was over; that defendant's attorney took her by train from Wilber to Lincoln; that there they went to the home of Edith Wixson, where prosecutrix remained about two months; that from Wixson's prosecutrix went to the Lincoln Sanitarium, where her child was born May 21, 1918; that she afterward returned to Wixson's; that defendant's attorney left Edith Wixson a check for $25; that prosecutrix never paid Edith Wixson anything and never paid any railroad or bus fare or hospital bill or any other expense connected with her accouchement.

If prosecutrix told the truth, defendant committed the felony charged in the information. Is there any corroboration? Her age and the birth of her child three years before she could consent to sexual intercourse are shown beyond question without considering a word of her testimony. That she was the victim of a rape is therefore thus conclusively established. By evidence other than her own it is also shown: Prosecutrix and defendant lived under the same roof for nearly three years before she became pregnant. They saw each other on the second floor of the house, where their bedrooms adjoined; in the dining room, where they ate at the same

table; at the barn, where their duties took them. In conversation they indulged in ordinary pleasantries. The only other members of the household were defendant's grandfather and his aunt, whose domestic affairs frequently called them out of the farmhouse. The commission of a rape and the opportunity of defendant to commit it are therefore proved without the testimony of prosecutrix. Independently of her testimony, it is further shown that she was far advanced in pregnancy when defendant took her to Wilber and left her there. In like manner it is further shown that she did not return to her former home, but without delay appeared at Wixson's in company with an attorney who undertook the defense of defendant upon his arrest on the charge of rape. Defendant himself testified that the only trip he ever took with prosecutrix was the one resulting in his leaving her at Wilber, and that two weeks later he moved from his grandfather's to another farm. Outside of complainant's story there is proof of these facts: Prosecutrix had a number of brothers who missed her. After she had been gone for some time two of them began a search for her. They went to the home she had left and asked John Kotouc what had become of her. He gave them no information, but referred them to defendant. They went to the latter and made similar inquiry for information, which he refused to give, saying, among other things, that he had no knowledge of her whereabouts, and that her failure to return after he had left her at Wilber was the responsibility of his grandfather. The inference that this indifference to her fate, under all the circumstances in evidence, in view of former associations and of her disappearance upon leaving defendant at Wilber, is inconsistent with ignorant innocence of her pregnancy and whereabouts would naturally and properly arise in the minds of the jurors. Such a deduction may reasonably be drawn notwithstanding an explanation by defendant, while on the witness-stand, that he took prosecutrix to a dentist at Wilber and left her with the understanding

that she would visit with friends in town for a few days and return to her home.

The brothers finally appealed to the sheriff for assistance in their search, and he went with them to the attorney who had taken their sister to Lincoln. It was from this attorney, who subsequently appeared for defendant upon his arrest, that her address was procured. Since prosecutrix was a child under 15 years of age when defendant took her to Wilber and left her there in the family way, the trip, in connection with other circumstances disclosed independently of her testimony, gives rise to a reasonable inference that it had some connection with a prearranged plan to extend her journey to Lincoln, taking into consideration the promptness with which she arrived there and the facility with which she was concealed and protected. Corroborating evidence of the principal fact may be unnecessary. *Hammond v. State*, 39 Neb. 252. Corroboration may consist of circumstantial evidence, and in the present case is sufficient.

The next assignment of error is directed to the admission of testimony that defendant on later dates repeated the offense. This proof was admissible under the following rule:

"In the prosecution of a charge for rape upon a female child under the age of consent, testimony of subsequent acts of illicit intercourse, related in time to the offense charged, is admissible as corroborative evidence of the principal fact sought to be established." *Woodruff v. State*, 72 Neb. 815.

On motion of defendant, however, the testimony relating to subsequent acts was stricken out, and the jury were directed to disregard it under circumstances clearly showing that defendant was not prejudiced by its admission, without regard to the question of error in the first instance.

An additional assignment of error challenges testimony relating to the search that the two brothers of

prosecutrix made to find her. Testimony of this nature was properly admitted. Prosecutrix had testified that by prearrangement of defendant and his attorney defendant took her to Wilber and left her there as part of a secret plan to send her to Lincoln, to have her remain there during her accouchement and to have her return after her trouble was over. The testimony assailed tended to corroborate her story of this secret arrangement and to throw some light on defendant's connection therewith and participation therein.

The final assignment of error is directed to a ruling excluding from the evidence the complaint resulting in the preliminary hearing. Prosecutrix did not sign or verify this complaint, and there was clearly no error in excluding it.

No error has been found in the proceedings.

PER CURIAM. Defendant is young and appears to be industrious. Under all the circumstances, the court is convinced that a shorter sentence than that imposed will subserve the ends of justice. The term of penal servitude is reduced to three years, and as thus modified the judgment of the district court is affirmed.

AFFIRMED: SENTENCE REDUCED.

FLANSBURG, J., not sitting.

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## IN RE ESTATE OF CHARLES GENUCHI.
## ARTHUR MULLEN ET AL., APPELLANTS, V. ESTATE OF CHARLES GENUCHI, APPELLEE.

FILED MAY 15, 1920. No. 21308.

**Wills: PROBATE: ATTORNEY'S FEES.** In an unsuccessful litigation to probate a purported will, the intestate estate of the decedent is not ordinarily chargeable with compensation for the services of attorneys for the defeated devisees, and this rule may apply to devisees who offered the contested instrument for probate after the person named by the decedent as executor declined to do so.

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

*John J. Sullivan, E. C. Strode, Max V. Beghtol* and *Arthur F. Mullen,* for appellants.

*Berge & McCarty, contra.*

ROSE, J.

In the county court for Lancaster county two attorneys filed against the estate of Charles Genuchi, deceased, claims of $1,500 each for professional services. They had represented residuary devisees in an unsuccessful effort to probate as the will of Charles Genuchi, deceased, an instrument which required a trustee to pay the income from the realty of decedent to the latter's widow and children, and, upon the death of the last survivor, disposed of the estate in remainder as follows:

"Then all of said trust property I devise and bequeath to the board of control for dependent and neglected children, located at Lincoln, Nebraska, for the benefit of poor and dependent children, and to the hospital for crippled, ruptured and deformed children, also known as the Orthopedic Hospital located at Lincoln, Nebraska."

This instrument was found in the county court, but, as a will, it was renounced by decedent's widow and the heirs. A son of decedent had been named in the instrument as executor, but declined to act in that capacity. Claimants, as attorneys for the public boards in control of the institutions mentioned, offered the instrument for probate. A contest by the widow and the heirs followed. As the will of decedent the instrument was rejected by the county court, by the district court on appeal from the county court, and by the supreme court on appeal from the district court. The performance of the duties of the attorneys, their good faith and the reasonableness of their fees are not controverted, but the claims were disallowed by the county court in the first instance

and by the district court on appeal, because they are not allowable as charges against the estate of decedent. The claims are presented in the supreme court on appeal from the district court.

Claimants take the position that the executor named in the will declined to offer it for probate, thus shifting that duty and the burden of a proponent to the residuary devisees, and that the latter's attorneys, like attorneys for an executor in an unsuccessful effort to probate a will, are, for their services, entitled to reasonable compensation from decedent's estate. The principle of law invoked by claimants is stated in *In re Estate of Hentges*, 86 Neb. 75, as follows:

"An executor should ordinarily be credited in his final account with the estate for reasonable attorney fees paid by him in proceedings to probate the will of his testator."

The argument on the affirmative of this proposition seems to contain fallacies in induction. In offering the instrument for probate and in resisting the contest, the residuary devisees or public boards, in their legal aspect, acted for and represented the state in its relation to its own institutions. Their attitude was hostile to the estate against which the claims are filed. Considered as trustees, they sought to uphold a devise to state institutions. As public officers, they litigated for the benefit of the state the validity of the devise. To that end the offering of the instrument for probate was a mere incident. Their course in the contest would naturally have been the same had the executor named by decedent acted as proponent. Their efforts and the services of their attorneys were not beneficial to decedent's estate. They did not by their litigation create or preserve a fund available for the payment of their expenses. Their adversaries proved to be the owners of the real estate in controversy. The allowance of attorney fees would diminish the inheritance of the widow and the heirs under the statute of descent. The better view of the

claims seems to be that they were properly disallowed under the following principle of law:

"The estate of a decedent is not ordinarily liable to an attorney for services rendered by him for and at the request of a legatee under decedent's will, in a contest thereof." *St. James Orphan Asylum v. McDonald*, 76 Neb. 630.

The attorneys were employed on behalf of the state, and should be compensated by their client for the services rendered.

AFFIRMED.

DAY and FLANSBURG, JJ., not sitting.

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C. C. WHITNACK PRODUCE COMPANY, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MAY 15, 1920. No. 20643.

1. **Carriers:** INJURY TO GOODS: PRESUMPTION. When suit is brought against a terminal carrier, there being one or more intermediate carriers, to recover for goods delivered by it in a damaged condition, upon proof that the goods were in good condition when they came into possession of the initial carrier, the presumption is that they were in good condition when delivered to the terminal carrier. To overcome this presumption the burden is upon defendant to prove that the goods were in a damaged condition when they came into its possession.

2. ———: ———: LIABILITY. "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 provision of the Carmack amendment of June 29, 1906 (34 St. at Large, p. 584, ch. 3591), to the act of February 4, 1887 (24 St. at Large, p. 379, ch. 104, sec. 20, Comp. St. 1913, sec. 8592), making the initial carrier of an interstate shipment liable for any loss, damage, or injury 'caused by it' or by any other carrier to which the shipment may be delivered." *Cincinnati, N. O. & T. P. R. Co. v Rankin*, 241 U. S. 319, 36 Sup. Ct. Rep. 555.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

*Wymer Dressler, C. H. Gorman* and *Paul S. Topping,* for appellant.

*Burkett, Wilson & Brown, contra.*

DEAN, J.

This suit is based, as alleged, on defendant's common-law liability in the sum of $739.88 for damage said to have been sustained by the freezing of a part of each of three cars of apples while in possession of defendant as a common carrier. Two cars were interstate shipments from points in New York to Lincoln, and one car was an intrastate shipment from Omaha to Lincoln. It is alleged that the damage occurred as a direct result of the carelessness, negligence, and wrongful conduct of defendant. From a verdict and judgment thereon for $452, defendant appealed.

Of the two interstate shipments defendant was the terminal carrier, the cars having been transported by three or more intermediate carriers before being delivered to it.

It is argued on the part of defendant that its liability, if any, as to the interstate shipments arises under and is subject to the provisions of the Carmack amendment of June 29, 1906 (34 St. at Large, p. 584, ch. 3591), and that in the event of loss, under the facts herein, the amendment in question supersedes the common-law presumption that, if goods are received in good condition by the initial carrier and are damaged in transit, the loss occurred while they were in possession of the terminal carrier.

Under the authorities in like cases it seems that the burden is on plaintiff to show that the goods were in good condition when delivered to the initial carrier, and that they were in damaged condition upon arrival at destination; and that the burden is on the terminal carrier defendant to show that the injury did not result from any cause for which it was responsible. 10 C. J. 556, sec. 924. In section 925, at page 558, the text an-

nounces a rule that seems to be reasonable. It is there said:

"Two reasons have been assigned for the rule. One reason is that the presumption is necessary to preserve the shipper's rights, since the carrier, and not he, has control of the goods and is in a much better position to prove their condition at the time it received them than is the owner. Another reason is that it is within the power of the carrier to protect itself from responsibility for loss or injury occurring prior to its reception of the property by an inspection of its condition at the transfer point; and that it will be presumed *prima facie* that if the shipment had not been in good order the carrier would have refused to receive it otherwise than as in bad order."

The weight of authority in this class of cases, and the better rule, appears to be that when suit is brought against a terminal carrier, there being one or more intermediate carriers, to recover for goods delivered by it in a damaged condition, upon proof that the goods were in good condition when they came into possession of the initial carrier, the presumption is that they were in good condition when delivered to the next or terminal carrier. To overcome this presumption the burden is upon defendant to prove that the goods were in a damaged condition when they came into its possession. *Philadelphia, B. & W. R. Co. v. Diffendal,* 109 Md. 494.

In *Cincinnati, N. O. & T. P. R. Co. v. Rankin,* 241 U. S. 319, 36 Sup. Ct. Rep. 555, 60 L. ed. 1022, L. R. A. 1917A, 265, the court declared: "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 provision of the Carmack amendment of June 29, 1906 (34 St. at Large, p. 584, ch. 3591), to the act of February 4, 1887 (24 St. at Large, p. 379, ch. 104, sec. 20, Comp. St. 1913, sec. 8592), making the initial carrier of an interstate shipment liable for any loss, damage, or injury

'caused by it' or by any other carrier to which the shipment may be delivered."

On the question of damages generally, as to all of the shipments, we conclude that the verdict is amply supported by the evidence. There are other assignments by defendant of alleged error respecting certain instructions given and instructions refused, and also as to the admissibility of testimony. An examination of the assignments convinces us that defendant's substantial rights were not affected in the respects noted, and that reversible error does not appear.

The judgment is

AFFIRMED.

DAY and FLANSBURG, JJ., not sitting.

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STATE, EX REL. WILLIAM T. SCOTT, V. CLARA QUIMBY.

FILED MAY 15, 1920. No. 21337.

1. **Appeal:** HARMLESS ERROR. A judgment will not be reversed on appeal, when it clearly appears that the alleged error complained of does not affect the substantial rights of the complaining party.

2 **Habeas Corpus:** AFFIRMANCE. The record examined, and *held*, that it supports the judgment.

ERROR to the district court for Fillmore county: RALPH D. BROWN, JUDGE. *Affirmed.*

*Waring & Waring*, for plaintiff in error.

*Clarence A. Davis, Attorney General,* and *Mason Wheeler, contra.*

DEAN, J.

William T. Scott, relator, on August 6, 1919, sued out a writ of habeas corpus in the county court for Fillmore county, in the name of the state, to obtain the release of his daughter Ellen, a minor child then fifteen, from the custody of respondent, Clara Quimby, as super-

intendent of the girls' industrial school at Geneva, to which institution she was committed June 8, 1918, under article VII, ch. 16, Rev. St. 1913, by the county court for Dawes county. Respondent prevailed in the county court, relator's petition was dismissed, and he prosecuted error to the district court, where the judgment of the county court was affirmed. Relator now prosecutes error to this court.

No formal return was filed in the habeas corpus case, and relator contends here for the first time that "he had a right to have the return of the respondent on file," as provided by sections 9263, 9264, Rev. St. 1913, and that, respondent having failed to show "the authority by which Ellen Scott was held," she should therefore have been released.

Relator's contention seems to be without substantial merit. Section 9263, Rev. St. 1913, provides generally: "'The person in whose custody the prisoner shall be found, shall state in writing to the court or judge before whom the writ is returned, plainly and unequivocally: First. Whether he has or has not the party in his custody or power, or under restraint. Second. If he has the party in his custody or power, or under restraint, he shall set forth at large the authority and the true and whole cause of such imprisonment and restraint, with a copy of the writ, warrant, or other process, if any, upon which the party is detained. Third. If he has had the party in his custody or power, or under restraint, and has transferred such custody or restraint to another, he shall state particularly to whom, at what time, for what cause and by what authority such transfer was made."

It is not shown that the relator was misled by the neglect of the officer to indorse the statutory return on the writ. The proceedings in the county court for Dawes county appear in the record, the relator himself having introduced a transcript thereof in the present case. Included in the transcript is the complaint by the

Dawes county probation officer, in the county court of that county, setting forth the grounds of delinquency charged against relator's daughter. There also appears therein a waiver by relator and wife of the issuance and service of summons, and their joint consent to a hearing without further notice, and a statement showing that the parents joined the probation officer in her prayer that the court commit "said child to some suitable institution for her education and reformation." The foregoing waiver and consent and prayer were acknowledged in a single instrument by relator and wife before the county judge for Dawes county. There also appears in the transcript the order of commitment of relator's daughter to the girls' industrial school. The return thereon is in the usual form and shows the commitment to the school as of June 10, 1918.

In view of the record, we conclude that relator was not deprived of any substantial right complained of by him in the habeas corpus proceeding. Rev. St. 1913, sec. 7713. The judgment of the district court should be, and it hereby is,

AFFIRMED.

LETTON and FLANSBURG, JJ., not sitting.

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KATHERINE A. WALKER, APPELLEE, V. MILTON BURCH ET AL., APPELLANTS: LINCOLN TRUST COMPANY ET AL., APPELLEES.

FILED MAY 15, 1920. No. 20617.

1. **Husband and Wife:** AGENCY: PRESUMPTION. Whether or not the husband is the agent of the wife in dealing with her separate property is a question of fact to be determined as other like questions, and will not be presumed from the marital relations alone.

2. **Vendor and Purchaser:** RESCISSION: FALSE REPRESENTATIONS. "A false representation by the vendor of land situated in another

state, as to the character, location, and value of the property, relied on by the vendee, who had no other knowledge, is ground in equity for rescinding the contract." *Ross v. Sumner*, 57 Neb. 588.

3. ———: ———: LACHES. An action to rescind on the ground of fraud must be brought within a reasonable time after the discovery of the fraud.

4. Evidence examined, and *held* to support the findings and decree of the trial court.

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

*Fawcett, Mockett & Walford* and *J. J. Ledwith*, for appellants.

*Steck & Steck* and *O. S. Spillman, contra.*

DAY, J.

The plaintiff seeks a rescission of a land trade between herself and defendants Burch, also a quieting of the title in the land deeded by her, and for an accounting. She bases her right to the relief prayed for upon the ground of fraud. In the district court there was a decree in favor of the plaintiff, to review which the defendants have appealed.

Two main questions are presented by the record for determination: First, was fraud practiced by the defendant Milton Burch in procuring the exchange of the lands? and, if so, second, was there a rescission of the trade by the plaintiff within a reasonable time after the discovery of the fraud?

The record shows that on and prior to June 26, 1915, the plaintiff was the owner in her own right of a 280-acre tract of land in Pierce county, Nebraska, and the defendants Burch were the owners of about 70 acres situated in the lower Rio Grande valley, in Hidalgo county, Texas. The Burch land was improved with a brick house, built in bungalow style, with other necessary and convenient buildings, and is described by some

of the witnesses as being one of the "show places" of the valley. Mr. Burch had lived upon this place for a period of over two years, but had not been there, however, for about a year prior to the trade. The plaintiff had never been in Texas, and knew nothing of the value of such land, and was unacquainted with the general conditions.

On June 26, 1915, the plaintiff traded her Nebraska land for the defendants' Texas land. In the trade the plaintiff's land was valued at $80 an acre, and the defendants' land at $350 an acre. There was a mortgage of $4,400 upon the plaintiff's land, and to equalize the difference in values of the respective tracts, the plaintiff and her husband executed to the defendants vendor's lien notes, aggregating $7,300 payable in annual instalments from March 1, 1916, to March 1, 1922.

It further appears that the plaintiff's husband, Myron D. Walker, had, for some time prior to the trade, been in the employ of certain land companies, engaged in selling land in the lower Rio Grande valley, and in the vicinity of the Burch place, and had on several occasions accompanied the crowd of prospective purchasers to view the lands offered for sale, and had frequently visited the Burch place. In this manner he became acquainted with Mr. Burch, and more or less familiar with the Burch land and the general conditions of the country.

A few days prior to the trade Walker, without the knowledge of his wife, entered into negotiations with defendant Milton Burch for an exchange of the Pierce county land for the defendants' Texas land. Mr. Burch examined the Pierce county land, and negotiations were carried so far that Burch and his wife executed a deed to the Texas land, naming the plaintiff as grantee therein. Burch and Walker then went to Sioux City, Iowa, where the plaintiff resided, to have the plaintiff execute a deed to the Nebraska land and complete the trade. There is a sharp conflict in the evidence as to what was

said between the parties at the time the trade was consummated. Burch's version of the transaction was that he told Mrs. Walker that he and Myron (plaintiff's husband) had been talking of exchanging lands, and that Myron knew more about the Texas land than he did, and that Mrs. Walker then stated that she was willing to rely upon her husband's judgment in the matter, and, acting thereon, she executed and delivered the deed. We are convinced, however, that the preponderance of the testimony supports the plaintiff's version of the transaction. Her testimony, and which is corroborated by her son, is to the general effect that Burch represented to her that the Texas land was worth $350 an acre; that he had refused a cash offer of $26,000 for it; that the property would rent for from $1,000 to $1,200 a year; that it was a peaceable, quiet neighborhood, composed mostly of Americans; and that the newspaper stories with respect to trouble on the border were "hot air." The plaintiff testifies that in making the trade she relied upon the representations made to her by defendant Milton Burch, and believed them to be true. Undoubtedly Mr. Walker was in sympathy with the trade, and was desirous that the deal should go through, and, but for the positive assertion of Mrs. Walker that she relied upon the statements of Mr. Burch, we would incline to the view that she was relying upon her husband's judgment in the matter. Usually the wife accepts the judgment of the husband in matters pertaining to business, both with respect to his as well as her own property; and yet it is common knowledge that this is not always the case. Numerous cases are found in our own reports where the wife has refused to sign a deed to carry out a contract of sale made by the husband.

The testimony shows that the representations made by defendant Milton Burch with respect to the value of the land and the amount for which it would rent were greatly exaggerated. It was shown that the fair rental of the Texas land was about $700 a year, out of which the

owner paid the water rent, ranging from $4 to $6 an acre, depending upon the character of the crop. Upon the question of the value of the land, there is a wide difference of opinion between the several witnesses, but we conclude the value of defendants' land to be from $200 to $225 an acre.

It is the defendants' contention that the trade was made by Mr. Walker, and that he was acting as the agent of his wife in the transaction. Upon this question the plaintiff testifies that she had never authorized her husband to sell or trade her land, and knew nothing about it until Mr. Burch appeared at her home to close up the trade. The agency of the husband to deal with the separate property of the wife is a question of fact to be determined like all other questions of fact, and will not be presumed from the marital relations alone. *Rust-Owen Lumber Co. v. Holt,* 60 Neb. 80. We conclude that the testimony fails to show that Mr. Walker was the agent of his wife in making the trade. Upon this phase of the case, we are of the opinion that the facts establish fraud such as vitiates the transaction.

Did the plaintiff rescind the contract within a reasonable time after the discovery of the fraud? It appears that in September, 1915, the plaintiff requested her husband to look after the rental of the Texas property for her for the year 1916, and shortly thereafter she learned from him that the land could not be rented for the sum named by Burch; that the amount of rent obtainable was only $700 a year, the owner to pay the water tax, which amounted approximately from $4 to $6 an acre, depending upon the character of the crop. By failing to act within a reasonable time upon receiving this information from her agent, the plaintiff no doubt waived her right to rescind the trade based upon the misrepresentations in regard to the rental value of the land. There is no testimony, however, that at that time she ascertained that the value of the land was not as represented by Mr. Burch. Conceding that Walker may

have known that the value of the land was not as represented, his knowledge with respect to that subject could not be imputed to the plaintiff upon the doctrine of agency alone, and there is no proof that Walker ever actually communicated this fact to her. He was employed to rent the land. Knowledge which came to him within the scope of that employment would be the knowledge of his principal; but beyond that the principal would not be bound, unless the information was actually communicated to the principal. If Mrs. Walker had employed a stranger to look after the rental of her land, it would hardly be claimed that the knowledge of such person with respect to the value of the land would be her knowledge so that she would be bound to act thereon. The fact that her agent was her husband does not change the situation. The record is not entirely clear as to just when the plaintiff discovered that other representations made by Burch were untrue. In answer to a question upon this subject, she testifies: "I did not personally know any of these things, except that I was not getting as much rent as he said I would, until just before starting this suit I learned he had lied about all these things." As to how or when the plaintiff obtained this information, the record is silent. It is shown, however, that Burch still claimed that the land was worth the amount stated by him. In a letter dated October 3, 1916, written to the plaintiff's mother, who was contemplating advancing a sufficient sum to take up the past-due notes, Mr. Burch states: "I have been offered $30,000 cash for that farm. At that time, would not sell it, but afterwards made up my mind that I could not take care of same and travel around as I was doing, so I traded the farm to Myron. It would be a terrible thing for them to lose this place, as much of the land in that country, not as nice or good land, is selling as high as $1,000 per acre, and your security on that place would be absolutely good, for more than double the

amount which they owe me." A copy of this letter was sent to the plaintiff by Burch.

The vendor's lien notes given by the plaintiff contained a reservation that if the taxes or interest or any of the notes were not paid when due, the vendor had a right to declare the entire sum due. The plaintiff failed to pay the note due March 1, 1916, and the defendants elected to declare the entire sum due, and suit was brought upon said notes in El Paso, Texas. While the suit was pending, and in September, 1916, the plaintiff and her husband entered into a contract with the defendants Burch, by the terms of which they agreed to, and did, execute a deed to the Texas land to the Lincoln Trust Company, trustee for Milton Burch, conditioned that, if Walker and his wife should pay all of the costs of the case pending in El Paso before the 1st day of November, 1916, and should pay the Lincoln Trust Company, trustee, all of the vendor's lien notes which were past due, with interest, on or before January 1, 1917, and should also execute and deliver to said trust company vendor's lien notes to take up the vendor's lien notes held in the name of Milton Burch, the trust company should return to Walker and his wife the warranty deed named; that if Walker and his wife failed to comply with the terms of the agreement, then and in that case the company should file the warranty deed of record in Hidalgo county, Texas. The plaintiffs failed to make the payments as agreed, and on January 6, 1917, the trust company mailed the deed to the recorder of Hidalgo county, Texas, for record. Under this title, Mr. Burch has again sold the land. A false representation made by the vendor of land situated in another state, as to the character, location, and value of the property, for the purpose of inducing a purchase, and which is relied upon by the vendee, who had no other knowledge, is ground in equity for rescinding the contract. *Delorac v. Conna,* 29 Neb. 791; *Ross v. Sumner,* 57 Neb. 588.

It is claimed by the defendants that an action for rescission cannot be maintained, because the plaintiff has not offered to rescind and reconvey the property. The bringing of the suit to rescind the contract is a sufficient notice, and, as the defendants have repossessed themselves of the Texas land by filing the deed, it would seem to be a useless procedure for the plaintiff to offer back to the defendants that which they already had. The case is one, which frequently occurs, where the court would gladly welcome additional light upon some of the questions presented, but we are compelled to act upon what is before us.

Upon the phase of the case relating to the accounting, we are of the opinion that the findings of the trial court are sustained by the evidence.

From an examination of the entire record, we are satisfied that the findings and decree of the district court are sustained by the evidence.

The judgment of the district court is

AFFIRMED.

LETTON and FLANSBURG, JJ., not sitting.

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PETER J. LONG ET AL., APPELLEES, v. JOHN H. KRAUSE ET AL., APPELLANTS.

FILED MAY 15, 1920. No. 21214.

**Appeal:** REVIVOR. Under section 8186, Rev. St. 1913, the filing of the transcript for the review of a law case confers jurisdiction on this court, and, where a judgment is rendered against two defendants as joint tort-feasors, and both file notice of appeal and supersedeas bond in the district court, and one of them dies before the filing of the transcript here, *held*, that this court acquires such jurisdiction, through the filing of the transcript and the resulting removal of the case here, as will enable it to allow the representative of the deceased party to revive the action in this court, though no steps to revive have been taken in the lower court, and though the transcript is filed by the living party to the suit, without any

authority from and when the filing is not participated in by such representative.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Motion to dismiss overruled, and motion to revive sustained.*

*John J. Sullivan, John M. Macfarland* and *George B. Thummel,* for appellants.

*Byron G. Burbank* and *Thomas Lynch, contra.*

FLANSBURG, J.

This is an action charging defendants John H. Krause and Herman Krause with fraud in the purchase of land from plaintiffs. Judgment was for $75,000 against the two defendants.

Judgment was entered July 5, 1919. Each of the defendants filed in the district court written notice of appeal on July 16, 1919. On July 17 they filed a supersedeas bond, signed by them both, as principals, in the sum of $152,000. On July 19, John Krause, one of the defendants, died, and on the following day, July 20, transcript was filed in this court by the attorney who had been acting for both parties. A præcipe was also filed, designating each of the defendants as appellant.

On September 4, 1919, Herman Krause was appointed administrator of the estate of John Krause, deceased. No further steps were taken in the action until April 15, 1920. On that date, plaintiffs filed a motion in this court to dismiss the appeal as to John Krause, and soon thereafter Herman Krause, administrator, filed a motion to revive the action in his name as the representative of John Krause, deceased, and to allow a substitution of parties.

The question raised by these motions is whether this court has jurisdiction in the case, so far as the representative of John Krause is concerned.

The defendants below are held as joint tort-feasors. There is no doubt that one of two joint tort-feasors has

the right of a separate appeal, and that, where his codefendant does not join in the appeal, such codefendant is bound by the judgment in the lower court, and if he pays the judgment has no right to contribution. *Hayden v. Woods,* 16 Neb. 306; note, L. R. A. 1918C, 974. It is further true that the death of John Krause destroyed the relation of attorney and client, and that the acts of this attorney from that time forward were neither the acts of the deceased person nor of his representative.

At the time of the appeal no administrator had been appointed, and the attorney who filed the transcript, therefore, had no authority from the representative of the deceased to further perfect an appeal, so far as the interests of the deceased or of his estate were concerned.

The cases of *Ritchey v. Seeley,* 68 Neb. 127, and *Omaha Nat. Bank v. Robinson,* 73 Neb. 351, are relied on as controlling of the question here. In those cases it was held that, when one party to the suit dies after judgment, and the other party files petition in error in this court for review, this court acquires no jurisdiction until there has been a revivor in the district court and service of summons in error had upon the representative of the party who has died.

In the case of *Ritchey v. Seeley,* however, the court, through Judge Holcomb (68 Neb. 129, 133), distinguishes an error proceeding in a law case from a suit in equity, and in dictum says that in an equity proceeding, since the trial is *de novo,* the court acquires jurisdiction by the filing of the transcript, and, as to parties who have died after the judgment and before appeal, revivor may be had in this court after the appeal is taken. The statutes providing for review in law actions have been supplemented and changed since the cases just mentioned were decided, and the procedure for taking an appeal in a law case made more similar to the procedure theretofore provided in equity cases.

By the statute of 1907 (Rev. St. 1913, sec. 8186) it is provided that the filing of the transcript shall confer jurisdiction in the cause upon the supreme court in a law case. The summons in error is dispensed with, and it is made sufficient notice of appeal to file in the district court, within 90 days after the rendition of the judgment, a notice of intention to prosecute appeal, or, if such notice is not given, the supreme court has the authority to provide by rule for notice of appeal.

The statute does not require that each party desiring an appeal shall file a transcript, but the filing of a transcript by any party was evidently intended to vest the court with jurisdiction in the case, and the parties are required only to indicate by timely notice their intention of becoming appellants.

In this case all the statutory steps had been taken for an appeal by John Krause. Before his death he filed in the district court the statutory notice and gave supersedeas bond. Later, the transcript was filed in this court, not by him nor by his attorney, for his death had dissolved the relation of attorney and client; but nevertheless the filing of the transcript by one of the parties to the suit conferred jurisdiction of the cause upon the court. Had he still been living, it would have been unnecessary that he join in the filing of the transcript, or that he file a separate transcript, in order to perfect his appeal. There is no step which would have been required of John Krause, had he been living, which has not been taken by his representative here, in order to have entitled him to be admitted as a party to the appeal. Since he, without any further act on his part, would have followed the removal of the cause to this court in such a way that he could have become a party to this appeal, it seems logical that his representative, as the successor to his rights, can do the same thing. This holding finds support in the following cases: *Davis v. Catlettsburg-Kenova-Ceredo Water Co.*, 136 Ky. 66;

*Branham v. Johnson,* 62 Ind. 259; *Brockett v. Fair Haven & W. R. Co.,* 73 Conn. 428.

The cases of *Ritchey v. Seeley* and *Omaha Nat. Bank v. Robinson, supra,* seem to us easily distinguishable. At the time of those decisions, this court could only acquire jurisdiction when a petition in error was filed by an appellant and a summons in error served upon the opposite party. In each of the cases, just mentioned, the person against whom appeal was taken had died before the appeal and before service of summons in error could be had upon him. The attorneys of the parties who had died, with no authority to act, attempted to waive service of summons and enter a voluntary appearance in this court. Their acts were, of course, a nullity. If the attorney here had filed notice of appeal for John Krause after he had died, that would have been a nullity, so far as that notice was concerned, whether given in this court or in the district court. The filing of the transcript, as we view it, however, so removed the case that, had John Krause failed to give notice, his representative could have revived the action here and given notice in his stead.

Many cases are cited by counsel for appellee in support of his motion to dismiss the appeal here. These decisions were rendered under statutes similar to ours as it existed previous to the changes of 1907. The matter here is very largely a question of the interpretation of our statutes as amended. It is a question not without difficulty, but it seems to us the interpretation we have followed is the more reasonable one and most in furtherance of justice.

The motion to dismiss the appeal is therefore overruled, and the motion to revive sustained, and it is ordered that Herman Krause, administrator of the estate of John H. Krause, deceased, be made a party appellant, and the action be revived in his name.

JUDGMENT ACCORDINGLY.

ENNID M. BROADSTON, APPELLEE, V. BEDDEO CLOTHING COMPANY, APPELLANT.

FILED MAY 15, 1920. No. 20970.

1. **Negligence:** CARE REQUIRED OF STORE PROPRIETOR. The proprietor of a store is not an insurer against accidents to customers, but is bound to exercise reasonable care and prudence to keep the stairways therein, which the public is tacitly invited to use, safe for that purpose.

2. ———: PRESUMPTION. The fact that a customer falls upon a stairway does not raise any presumption of negligence on the part of the proprietor of the store, and the doctrine of *res ipsa loquitur* does not apply.

3. ———: BURDEN OF PROOF. Where recovery is sought for personal injury sustained by a customer in falling upon a stairway on the ground that the proprietor of the store was negligent in permitting the stairway to be defective in some particular causing the accident, the burden is upon the plaintiff to prove that the defective condition existed and was known to the proprietor before the accident, or that it had existed for so long a time theretofore as to charge the proprietor with notice and to have afforded him a reasonable opportunity to repair the defect.

4. ———: DUTY OF STORE PROPRIETOR. It is the duty of the proprietor of a store to maintain such a degree of light in those parts of the premises where the public is invited to go as not unreasonably to endanger a customer who exercises his faculties with due regard for his own safety.

5. ———: ACTION FOR PERSONAL INJURIES: PROOF. In an action for personal injuries alleged to have been sustained in consequence of the negligence of the proprietor of a store in failing properly to light the premises, the plaintiff cannot recover in the absence of evidence tending to show that lack of sufficient light bore a direct relation to the accident, as the proximate and efficient cause thereof.

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

*Brome & Ramsey* and *J. P. Uvick,* for appellant.

*Thomas Q. Harrison* and *James C. Kinsler, contra.*

DORSEY, C.

The plaintiff, Ennid M. Broadston, brought this action against the defendant, the Beddeo Clothing Company, to recover for personal injuries sustained in falling down a stairway in the defendant's store in the city of Omaha. The verdict and judgment were for the plaintiff, and the defendant appeals.

The plaintiff, having business as a customer with the credit manager of the store, was directed to his desk, situated in a gallery about 10 feet above the main floor and reached by a stairway. After transacting her business, she turned to descend the stairway and took one step down with her right foot, but in attempting to take the next step the heel of her left shoe, she alleged, caught or was twisted in the carpet on the floor of the gallery near the head of the stairway, causing her to trip and fall, the heel being detached from the left shoe in the operation.

In her petition the plaintiff alleged that the carpet in which her foot caught was loose, and that the gallery was insufficiently lighted; that the defendant was negligent in permitting the carpet to be loose and in failing properly to light the place; that this was a violation of the duty of the defendant to exercise reasonable care for the safety of those invited into the gallery; and that, if the defendant did not know that the carpet was loose and the gallery insufficiently lighted, it should, by the exercise of reasonable care, have known of those conditions.

The defendant in its answer denied that there was a loose carpet on the stairway or on the floor of the gallery or that there was any deficiency of light, but alleged that the accident occurred because the heels of the shoes which the plaintiff was wearing were too high for safety, and that the heel of her left shoe was insecurely fastened on, causing her to stumble and fall through her own negligence, and not because of any negligence of the defendant.

The defendant's contention is that the plaintiff's evidence is insufficient to sustain the verdict because she failed to produce any affirmative proof of any defect in the carpet in which she claimed her foot caught. Her testimony relating to the carpet was, in substance, that she thought it was the carpet that she was standing on; it felt like it; she felt it twist in contact with her heel and, whatever it was, it wound around her heel and held on very firmly. She felt it pull her heel off and distinctly felt the pull of the carpet; she had no chance to observe whether it was a carpet or the condition of it, but thought it was something like a carpet or a rug. There was no other testimony on plaintiff's part with reference to the carpet. Several witnesses for the defendant testified that the carpet on the stairway, which extended for a short distance beyond the head of the stairway onto the gallery, was practically new, without holes or defects, and was securely tacked down.

The proprietor of a store is not an insurer against accidents to customers, but must exercise reasonable care and prudence to keep the stairways therein, which the public is tacitly invited to use, safe for that purpose. *Schnatterer v. Bamberger & Co.*, 81 N. J. Law, 558, Ann. Cas. 1912D, 139; *Field & Co. v. LeBosky*, 133 Ill. App. 316; *Lord v. Sherer Dry Goods Co.*, 205 Mass. 1, 27 L. R. A. n. s. 232; *Larkin v. O'Neill*, 119 N. Y. 221. The mere fact that a customer falls on a stairway does not raise any presumption of negligence on the part of the proprietor of the store, and the doctrine of *res ipsa loquitur* does not apply. *Brace v. Kirby*, 43 Pa. Super. Ct. 389; *Belsky v. Fourteenth Street Store*, 121 N. Y. Supp. 321.

Where it is alleged as the basis of recovery that the proprietor of the store was negligent in permitting the stairway on which the accident occurred to be defective in some particular causing the plaintiff to trip and fall, as, for instance, that the carpet on it was loose or in a defective condition, the burden is upon the plaintiff to show

that such defect existed and was known to the proprietor of the store prior to the accident, or that it had existed for such a space of time prior thereto as to charge the proprietor with notice thereof and afford him a reasonable opportunity to repair the defect. *Schnatterer v. Bamberger & Co., supra; Douglas v. Shepard Norwell Co.*, 217 Mass. 127; *Toland v. Paine Furniture Co.*, 175 Mass. 476.

The record in the instant case discloses no evidence either that the carpet was defective before the accident or that any such condition was or could, by any principle of implied notice, have been within the knowledge of the defendant. All of the positive evidence on the subject was the testimony of the employees of the defendant to the effect that there was no such defect. The utmost that could be inferred from the plaintiff's testimony is that when her heel caught in the carpet a defect then developed, or made itself manifest, that had been theretofore latent or concealed.

The principle followed by the authorities cited is that, in the absence of actual knowledge of the alleged defect on the part of the proprietor, it must have existed so long before the accident that, if reasonable care had been exercised in inspecting the premises, it would have become apparent, in which event it would have been negligence not to repair it. In this case the plaintiff was herself uncertain as to just what it was that caused her to fall. She made no observation to determine whether there was any defect in the carpet. No effort was made on her part to prove that a defective condition existed in the carpet prior to the accident. Her evidence, in our opinion, fell short of the proof required to establish negligence on the defendant's part in permitting a carpet which it knew, or by reasonable care would have known, to be defective to remain on the stairway or gallery.

Plaintiff also alleged that the stairway was inadequately lighted, and we shall now inquire whether that aver-

ment and the proof in support thereof can be considered a sufficient basis for a finding of negligence, independently of the allegation that the carpet was defective. The evidence offered upon that question by the plaintiff was confined to her own testimony, which was to the effect that the gallery was poorly lighted and very dark; that there were individual lights on the desks in the gallery used by employees of the credit department, which, however, lighted only the tops of the desks; that the light on the top of the credit manager's desk, which was near the stairway, was turned off; and that no light was cast upon the stairway from any of the lights in the gallery. On behalf of the defendant it was shown that there were several arc lights and gas lamps suspending from the ceiling of the store, making about 24 separate lights; that there were 6 or 8 lights attached to drop cords especially for lighting the gallery, in addition to the desk lamps, and that there was a large light depending from a drop cord directly opposite the point where the stairway turned to go up to the gallery.

In determining whether the evidence as to lighting shows a sufficient compliance with the defendant's duty of ordinary care for the safety of its customers, it should be considered in relation to the circumstances of the accident, to see what relation insufficiency of light bore to the cause of the accident. Evidently the premises were well enough lighted to disclose to the plaintiff the existence and character of the stairway and the arrangement of that part of the gallery where the credit department was located. She had no difficulty in distinguishing objects and persons in the gallery. It is not shown that she looked down where she was standing before turning to descend the stairs, and that because of poor light she was unable to see the floor or carpet.

It having been determined that the allegation that the carpet was loose or defective furnishes no ground to charge the defendant with negligence, it follows that the defendant's duty of lighting the premises ought not to

be considered from the same point of view as if the evidence showed that there was a known defect there which it was the duty of the defendant to guard against by taking unusual precautions with regard to lighting at that point. Under the circumstances of this case, it was the duty of the defendant to light the premises in such manner as to make the stairway and gallery reasonably visible to the plaintiff, so that she might, by exercising her faculties with ordinary care, get up and down the stairs with safety. *Weller v. Consolidated Gas Co.*, 198 N. Y. 98.

Nothing in the record indicates that the steps of the stairway were so obscure that she did not see them plainly enough to descend in safety. It was not a case in which she was injured in stepping down into a dark place where the obscurity misled her. There is nothing to show that lack of light had anything to do with the catching of her heel, or that if there had been more light this would not have happened. There was an entire failure, in our opinion, to establish that defective lighting had any relation to the accident as an efficient cause thereof.

There being no evidence of actionable negligence on the part of the defendant, the evidence is insufficient to support the verdict, and we therefore recommend that the judgment of the court below be reversed and the cause remanded for further proceedings.

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

REVERSED.

BELLE F. KOR, APPELLEE, v. AMERICAN EAGLE FIRE INSURANCE COMPANY, APPELLANT.

FILED MAY 15, 1920. No. 20985.

1. **Insurance:** PAROL CONTRACT. It is essential to a valid parol contract of insurance that there should be a definite understanding, and the minds of the parties must meet, as to the company in which the insurance is to be placed, the property to be covered, the amount of the insurance, and the duration of the risk, and the premium to be paid must be agreed upon and paid, or exist as a legal charge against the party insured, where the contract is not conditioned upon payment in advance.

2. ———: ———: PREMIUM. Previous dealings between the parties may be looked to in determining whether an insurance contract was intended to be conditional upon the prepayment of the premium, or whether the extension of credit was contemplated.

3. ———: ———: DURATION OF RISK. Although no express agreement was reached as to the duration of the risk, a parol contract of insurance will not be invalidated for uncertainty in that particular, if the intention of the parties as to the duration of the risk can be gathered from the facts and circumstances in evidence.

4. ———: ———: ———: EVIDENCE. In an action to enforce an alleged parol contract to insure, proof that the insurance company previously had issued to the plaintiff a five-year policy covering the same property, which was afterwards canceled, was not evidence of a definite understanding between the parties that the duration of the risk should be the same under the parol contract, where nothing was said between the parties with reference to the prior policy, or from which a mutual intention to adopt its terms could be inferred.

5. ———: REMOVAL OF GOODS. It is not indispensable to recovery for the loss of goods insured, after their removal to a different place, that consent should have been first obtained for the removal; subsequent ratification and consent by the insurer, with knowledge of the facts, is equivalent to precedent consent.

6. ———: ———: FORFEITURE: WAIVER. In an action to recover for the loss of goods insured after their removal to a different location, the defense of forfeiture on the ground of such removal will be held to have been waived, where, prior to the loss, the insured gave notice of such removal and requested the authorized agent

of the insurer to transfer the insurance to cover the goods in their new location, and the agent agreed to make such transfer; although no formal consent or transfer was, in fact, executed.

7. ———: ———: AUTHORIZATION BY AGENT. An agent authorized to issue policies of insurance in a certain county, who enters into a valid contract to insure goods therein which are afterwards removed to another county, may bind his principal to transfer the insurance to cover the property in its new location, where, upon being notified by the insured of such removal, the agent promises on behalf of the insurer to make the transfer, and the insured is not informed by him, or otherwise, of any restriction upon the agent's authority in that regard.

8. Trial: INSTRUCTION. An instruction which ignores the principal issues in the case, and authorizes the jury to base their verdict upon their finding as to a single controverted fact not decisive of those issues, is erroneous.

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

*Charles Battelle, H. F. Guile* and *C. L. Clark,* for appellant.

*Berge & McCarty, contra.*

DORSEY, C.

The plaintiff recovered in this action upon an alleged parol contract to insure her household goods and piano, and the defendant appeals. She claims the contract in question was entered into in April, 1916, by the Fidelity Underwriters of New York, through J. M. Guile and Henry F. Guile, its agents in Lincoln, Nebraska. In August, 1916, the defendant took over the business and assumed the liabilities of the Fidelity Underwriters, and the Guiles thereafter became the defendant's agents.

The plaintiff's petition sets forth that in the spring of 1916, in consideration of a premium of about $21, the exact amount of which she does not remember, but which she promised to pay, the defendant insured the piano in the sum of $400, and the household goods in the sum of $400, against loss by fire for the period of five years,

and agreed to write a policy on its usual form in pursuance of said agreement; and thereafter she moved from Lancaster county to Platte county, Nebraska, and took the insured property with her; that, on November 30, 1917, through her husband and agent, John A. Kor, she informed the defendant of her change of residence and of the removal of the property, and requested that the insurance be made to cover it in Platte county; that at that time she paid, and the defendant accepted, $10 upon the premium; and that the property was wholly destroyed by fire on December 11, 1917.

The defendant, in its answer, denied that any contract to insure the property, or to issue a policy thereon, had been entered into as alleged, or that any request had been made of it to make the insurance cover the property after its removal to Platte county; admitted receiving the $10 payment, but alleged that it was paid upon a policy of insurance which it was carrying upon a dwelling-house belonging to the plaintiff in Lincoln.

The proof offered by the plaintiff to substantiate the contract consisted of the testimony of her husband that in April, 1916, he went to the office of the Guile agency and told Henry F. Guile that he wanted to insure the property in the sum of $400 on household goods and $400 on the piano; that Guile made out a list of the household goods, and that he told Guile to write the insurance; that the premium, the exact amount of which the witness could not recollect, was mentioned, but nothing was said obout paying it. He stated that Guile asked him if he could write the policy, and that the witness told him he could. The witness further testified that no other communication took place between the plaintiff and the Guile agency until November 30, 1917, when the witness came to Lincoln, and, as he stated, met Henry F. Guile, and remarked to him that he had not paid the insurance premium and that he would pay it; that Guile then asked him if he had the policy, and the witness replied that it had never been sent to him;

whereupon Guile searched for the policy, and, not finding it, looked in a book, and said it was $400 on the piano and $400 on the household goods, and that the premium was $21 and some cents; that the witness told him he would pay $10 then and the remainder when he returned to Lincoln. He also testified that he instructed Guile to make the policy cover the property in Platte county, and that Guile said he would transfer the insurance right away.

It appears from the record that, while the plaintiff was residing in Lincoln in 1912, she took out a policy of $600 on her piano and household goods in the Fidelity Underwriters of New York through the Guile agency. That policy expired in September, 1915, and a new policy for $800 was issued on the same property, which, however, was lost and never delivered to the plaintiff, the company obtaining from her a "lost policy voucher," releasing it from liability thereunder. The plaintiff moved to Platte county in April, 1917.

Henry F. Guile denied that his agency had issued, or entered into any agreement to issue, a policy on the property in question after the cancelation of the policy issued in September, 1915. He admitted that he met and talked with Kor on November 30, 1917, and that he collected $10 from him at that time. He stated, however, that this was paid upon a premium due upon insurance covering the plaintiff's house in Lincoln, which his agency was carrying. Guile further testified that, after the plaintiff removed to Platte county, her husband at one time requested him to insure the property there, but that he stated that he was not authorized to do so. He denied that anything was said on that subject during the interview November 30, 1917, or that Kor ever talked with him about transferring the insurance to cover the property in Platte county.

The defendant contends that the evidence is insufficient to establish the alleged oral contract of insurance in April, 1916. An oral agreement to insure must be

definite as to all of the material terms of the contract. *Glatfelter v. Security Ins. Co.*, 102 Neb. 464; *Bridges v. St. Paul Fire & Marine Ins. Co.*, 102 Neb. 316. In order to make a valid contract of insurance, a definite understanding must be reached, and the minds of the parties must meet, as to the company in which the insurance is to be placed, the property to be covered, the amount of the insurance and the duration of the risk, and the premium to be paid must be agreed upon and paid, or exist as a legal charge against the party insured, where the contract of insurance is not conditioned upon payment in advance. *Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Society*, 34 Or. 228; *Todd v. German-American Ins. Co.*, 2 Ga. App. 789. The testimony offered on behalf of the plaintiff establishes with sufficient certainty that the insurance was to be placed in the Fidelity Underwriters of New York, the predecessor of the defendant, whose liabilities the defendant assumed. There is no uncertainty in the testimony on behalf of plaintiff as to the property to be covered or the amount of the insurance; but it was lacking in definiteness with reference to the premium and the duration of the risk.

With regard to the premium, the plaintiff's husband testified that in his conversation with Henry F. Guile the amount of the premium—about $21—was mentioned, but nothing was said about paying it. In September, 1915, however, the Guile agency wrote a policy for $800 in the Fidelity Underwriters on the identical property, which was afterwards canceled. The premium upon this policy was $20 for the term of five years. It appeared, furthermore, that in August, 1915, a policy in the same company had been issued upon the plaintiff's dwelling-house in Lincoln, the premium upon which was still unpaid in November, 1917, when, according to the testimony of Henry F. Guile, the plaintiff paid him $10 to apply upon it. It is the rule that previous dealings between the parties may be looked to in determining whether a cash payment or credit was intended, and

whether prepayment of the premium was waived by the insurer. *Western Assurance Co. v. McAlpin,* 23 Ind. App. 220, 77 Am. St. Rep. 423; *Commercial Fire Ins. Co. v. Morris & Co.,* 105 Ala. 498; *Home Ins. Co. v. Adler,* 71 Ala. 516; *Boice v. Thames and Mersey Marine Ins. Co.,* 38 Hun (N. Y.) 246. The course of dealing between the parties with reference to insurance premiums affords some basis for the inference that definite terms of payment of the premium upon the alleged contract of insurance were not exacted by the insurer's agent, and that there was a tacit or implied understanding that credit should be extended.

The testimony upon which the plaintiff relies to establish the terms of the alleged contract is silent as to the duration of the risk; it is not stated that the agent Guile agreed to write it for five years or for any other definite term. In spite of the absence of specific testimony upon that point, the alleged contract of insurance might be enforced, if the intention of the parties as to the duration of the risk could be gathered from the circumstances in evidence. *Concordia Fire Ins. Co. v. Heffron,* 84 Ill. App. 610; *Home Ins. Co. v. Adler, supra.* The only circumstance that could throw light upon the matter is the fact that the policy issued in September, 1915, and later canceled, was for five years, and that the premium thereon was approximately the same as the amount of premium which the plaintiff's husband testified was mentioned in the conversation in April, 1916. There was no testimony, however, that reference was made to the previous policy during that conversation, or that anything was said to the effect that the contract which they were then discussing should be upon the same terms as the canceled policy.

The conversation upon which plaintiff relies to establish the alleged parol contract occurred in April, 1916, while the property was destroyed by fire in December, 1917. According to the plaintiff's own evidence, she made no demand for the policy which she claimed the

insurance agent agreed to issue, nor did she make any inquiry in regard to it, until November 30, 1917. The proof adduced was, in our opinion, too vague to justify a finding, even by inference, that a complete contract was entered into to insure the property for any certain time. *Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Society, supra; Strohn v. Hartford Fire Ins. Co.*, 37 Wis. 625, 19 Am. Rep. 777.

Another element of the plaintiff's case was the effect of the removal of the insured property to Platte county upon her rights under the alleged contract of insurance. The plaintiff, in her petition, alleged that the insurance company agreed to issue its usual form of policy in conformity with the parol contract. The policy probably would have contained an express provision relative to the location of the property and invalidating the insurance in case of removal without the insurer's consent. But no such stipulation of the company's ordinary form of policy was pleaded or offered in evidence. The plaintiff, however, by pleading that in November, 1917, she gave notice of the removal and requested that the insurance be made to cover the property in Platte county, conceded that it was necessary to her right to recover to show, either that the defendant consented that the insurance should cover the property in its new location, or that, by its conduct after receiving notice of its removal, the defendant waived its right to claim a forfeiture of the insurance on that ground.

That such right of forfeiture may be waived by the duly authorized agent of the insurer is well established. *Burlington Ins. Co. v. Campbell & Talbot*, 42 Neb. 208. It is not indispensable to recovery for the loss of goods insured after their removal to a different place that consent should have been first obtained for the removal; subsequent ratification and consent by the insurer, with knowledge of the facts, is equivalent to precedent consent. *Williamsburg City Fire Ins. Co. v. Cary*, 83 Ill. 453.

If there was a valid contract to insure, and the plaintiff thereafter notified the defendant's authorized agent of the removal of the property, requesting that the insurance be made to cover it in its new location, and the defendant's agent promised to transfer the insurance, those facts would be sufficient to constitute a waiver. The testimony for the plaintiff as to such facts is controverted; but, in determining whether the waiver was established by sufficient evidence, this court is required to adopt the plaintiff's version of the facts. After receiving notice of the removal, the insurer could not lead the insured to believe that it was willing to continue the risk, remain quiescent until after the property had been destroyed by fire, and then claim that the insurance was forfeited. After notice of removal under such circumstances, it would be incumbent upon the insurer affirmatively to rescind the contract and cancel the insurance. *Williamsburg City Fire Ins. Co. v. Cary, supra; Cooper v. German-American Ins. Co.*, 96 Minn. 81.

The only question with regard to the alleged waiver is whether it was within the scope of Guile's authority as agent to bind the defendant by consenting to the transfer, and whether notice to him was notice to the defendant. The principal is bound by the acts of his agent within the apparent scope of the agent's authority. Guile was agent with authority to issue policies of insurance. He testified that, in case the policy had been issued by him in Lincoln and the insured moved to another city or town, he was authorized to transfer the insurance, but not in case the insured removed to a farm. It was not shown that this restriction upon his authority ever had been brought to the knowledge of the plaintiff. Guile testified that, on one occasion when the plaintiff's husband spoke to him about insurance, he told him he was not authorized to write insurance in Platte county, but not that he could not transfer insurance already written. So far as appeared to the plaintiff or her agent, Guile was authorized to transfer the insurance.

The defendant is in no position to maintain that Guile was without apparent authority to consent to the transfer. Whether he did in fact consent was a question for the jury, and there was, we think, sufficient evidence to warrant its submission, provided there had been sufficient proof to establish the alleged parol contract of insurance in April, 1916.

In the instructions given by the trial court appears the following: "If the evidence satisfies you that the agent of defendant, or of said Fidelity Underwriters, received said $10 payment upon the understanding that it was in part payment for insurance upon said goods and piano in Platte county, the plaintiff will be entitled to recover from the defendant. On the other hand, if you believe from the evidence that said $10 payment was for credit on the real estate policy, then the plaintiff would not be entitled to recover in this action."

The principal issues in the case were: First, whether the insurance contract was made in April, 1916, as alleged; and, second, whether, in the event the evidence was sufficient to establish the contract, the defendant agreed to transfer the insurance to cover the property in Platte county. The alleged payment in November, 1917, had a bearing upon these issues, but was not conclusive of them. In directing the jury to base their verdict upon their finding upon the question of the premium payment alone, the instruction was erroneous, and upon a retrial should not be given.

Because of the deficiency of proof to establish the alleged contract, as well as for error in the instruction referred to, we recommend that the judgment be reversed and the cause remanded for further proceedings.

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

REVERSED.

PATRICK J. LANGDON, GUARDIAN, APPELLEE, v. MARGARET LANGDON, DEFENDANT: UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT.

FILED MAY 15, 1920. No. 21003.

1. **Guardian and Ward:** ACTION ON BOND. The county court has exclusive jurisdiction to determine the state of accounts between the guardian and ward, and no action can be maintained upon a guardian's bond until the amount to be due from the guardian is first ascertained on the settlement of the guardian's final account by the county court.

2. ———: ACCOUNTING: DECREE: CONCLUSIVE ON SURETY. The order and decree of the county court as to the amount due from the guardian to his ward upon the final accounting and settlement of the guardian is final and conclusive upon the sureties upon the guardian's bond, both as to the bond entered into upon his appointment or for any bond he may have been required to give under a license to sell his ward's real estate.

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

*Strode & Beghtol,* for appellant.

*Anthony E. Langdon* and *William R. Patrick, contra.*

TIBBETS, C.

This is an action brought by Patrick J. Langdon, as guardian of William Kieran Langdon, an incompetent, to recover from the defendants, Margaret Langdon, former guardian of the person and estate of the incompetent, and her surety, the defendant United States Fidelity & Guaranty Company, the amount claimed to be due the plaintiff, William Kieran Langdon, from the defendants, upon a bond in which Margaret Langdon was principal and the United States Fidelity & Guaranty Company was surety. Trial was had to the court and judgment rendered for the plaintiff and against the defendant surety company for $5,755.35. The defendant surety company appeals.

The defendant Margaret Langdon is the mother, and was in 1905, and for some considerable period thereafter, the guardian of the person and estate of William Kieran Langdon, the plaintiff herein; that during said year of 1905, and as guardian of the plaintiff, and the then minor, she duly obtained a license from the district court for Lancaster county, Nebraska, to sell 80 acres of land in Sarpy county, Nebraska, in which her ward had an interest, and the defendant surety company became her surety upon a bond running to the judge of the district court with the usual and statutory requirements and conditions that the guardian account for the proceeds of the sale in the manner provided by law. The land was sold, and on September 7, 1906, the ward became of legal age, and on the 6th day of November, 1906, he executed and delivered to the guardian two receipts similar in form and substance—one was filed in the office of the clerk of the district court for Lancaster county, Nebraska, January 30, 1907, the other was filed in the office of the county court of Lancaster county, Nebraska, November 10, 1906—in full satisfaction of the proceeds due him from the sale of said real estate, and requested that the surety be discharged. On the 5th day of June, 1907, the ward was confined in the state hospital for the insane at Nevada, Missouri, where he remained for the greater portion of the time until April 30, 1915.

In July, 1915, he filed a petition in the county court of Lancaster county, of which the material allegations, as far as the issues in this case are concerned, were that, as guardian of his person and estate, Margaret Langdon had received large sums of money belonging to the petitioner, had never accounted for the same, and praying that a citation be issued and that she be compelled to account for all the moneys and property coming into her possession as guardian of the petitioner. Citation was accordingly issued, the parties appeared personally and by their attorneys, and upon a hearing the court found that the receipt given by the ward to the guardian should

be canceled and held for naught, and so ordered. The court further found that there was due from the guardian from the sale of the said lands in Sarpy county, principal and interest, the sum of $6,726.13.

The instant action was brought for the recovery of that sum with interest against the guardian and her surety, United States Fidelity & Guaranty Company. No service was had upon the guardian in this action. The answer of defendant guaranty company consists practically of a statement of facts as heretofore set forth; further, that the receipt heretofore mentioned was on file in the office of the clerk of the district court in Lancaster county from the 30th day of January, 1907, and that the plaintiff is estopped by laches from the prosecution of this action; that more than five years had elapsed since the application of the guardian to dispose of the proceeds of said sale according to law accrued, and thereby the plaintiff is barred by the statute of limitations; further, that the surety company was not a party to the proceedings in the county court and therefore not bound by the decree therein rendered.

There are practically only two issues involved in this case. The first and primary issue is: Did the decree of the county court bind the surety company? Second, was there such laches on the part of the plaintiff as would estop him in prosecuting this action? In the first contention it is self-evident that, if it was necessary, in order to bind the defendant, it should have been made a party to the proceedings for a final accounting in the county court, the plaintiff is not entitled to recover, as the evidence of the indebtedness was based entirely upon the decree rendered by that court. The rule is well settled and is almost the universal rule of every court of last resort in the United States, where the statute is similar to that of this state, that the county court must first determine the amount due from the guardian to the ward before an action can be brought on the guardian's bond.

"A right of action on a guardian's bond, to recover the amount remaining in the hands of the guardian, first accrues to the ward, when such amount is ascertained by the county court on the settlement of the guardian's final account." *Ball v. LaClair,* 17 Neb. 39. The court in the opinion say: "Upon the granting of the letters of guardianship, and approving the bond, the probate court in a sense acquired jurisdiction of the case and of the parties, and it seems to me to be not only logical, but in accordance with the weight of authority, that such jurisdiction remains exclusive for the purpose of fixing the liability of the guardian." The rule laid down in the case of *Ball v. LaClair, supra,* was adhered to and cited with approval in the case of *Bisbee v. Gleason,* 21 Neb. 534. In the last-cited case this court in the opinion cites and adopts the rule as laid down in the case of *Allen v. Tiffany,* 53 Cal. 16, in which it was held: "The probate judge has exclusive jurisdiction to determine the state of accounts between the guardian and ward. An action against the guardian for default will not lie in the district court until after an accounting and settlement in the probate court."

In the instant case the theory of the defendant seems to be that the guardian may settle with his ward after he attains his majority or pay the proceeds of any funds belonging to the ward in his hands into court, or, as in the instant case, where the funds in his hands are the proceeds of the sale of real estate in which the ward has an interest, by turning it over to the regular guardian appointed by the probate court, and the presumption is that the funds in the instant case were so turned over, and defendant insists that, where the same person acts in a dual capacity, the presumption arises that the funds were turned over in accordance with the directions of the statute; but that is not the condition in the instant case. The guardian did not act in a dual capacity, and that rule contended for by defendant does not apply in this case.

The citation of authorities therefore by the defendant guaranty company that money received by a person who acts in two representative characters will be conclusively presumed to be held in that capacity in which the lawful duty rests to eventually hold it is not applicable to the instant case, as the citations referred to by the defendant are where the party making the sale acted as the administrator of an estate and was also guardian, except the case of *Fay v. Taylor,* 52 Mass. 529. However, that case is not in accord with more recent decisions of the supreme court of Massachusetts, in which that rule has not been adhered to. The Massachusetts court at a later date modified the rule laid down in the last-cited case in the case of *Mattoon v. Cowing,* 13 Gray (Mass.) 387, and in the case of *McKim v. Morse,* 130 Mass. 439. The application of the defendant Margaret Langdon for a license to sell the real estate of her ward was made by her as guardian; the statutes of this state requiring that she give a bond to answer for the proceeds of the sale of the real estate according to law. This bond was for such additional funds as might come into her possession as such guardian by reason of the sale under the license. Her right to make the application was by virtue of her guardianship. She was under no responsibility to the district court as to her disposition of the same. Her accounting for those funds must be made to the county court. The proceedings in the district court simply operated in transferring real property into money, and, as soon as it came into her possession after the termination of the proceedings in the district court, it was the same as though it came into her possession originally upon her appointment as guardian, and the county court obtained sole and exclusive original jurisdiction over the matter. The functions of the district court had ceased. The fact that a receipt had been filed in the district court by the ward operated in no manner as a release of the guardian in the county court. It served no useful purpose whatever as far as the ac-

counting in the county court was concerned. There is some reason in the contention of the surety company that the decree and finding in the county court should not be binding upon it in view of the fact that it was not made a party, but the general tendency of the courts is, under statutes similar to those of this state, to hold the guardian and surety responsible for the proceeds of the sale in the county court upon the final accounting of the guardian, and the surety must take notice of the proceedings in that court, although not made a party to the proceedings therein. The tenor of the cases is that the county court fixes the liability. *Newton v. Hammond*, 38 Ohio St. 430. "The order and determination of the probate court as to the amount due from the guardian to his ward, made after due notice to the guardian, is final and conclusive upon the sureties upon the guardian's bond in an action against them thereon." *Cross v. White*, 80 Minn. 413. And to the same effect, *Jacobson v. Anderson*, 72 Minn. 426; *Braiden v. Mercer*, 44 Ohio St. 339.

As to the question of laches, in this jurisdiction, this court has not looked with any great favor upon the defense of laches, and it is only in those cases where the party has been guilty of inexcusable negligence in enforcing a right that the rule has been enforced. The facts in the present case disclose there was no such laches on the part of the plaintiff as would warrant a reversal of this case. The ward, very shortly after his majority, gave the receipts offered in evidence. Within a very short period of time thereafter he was confined in the state insane asylum. Almost immediately after his release he filed his petition in the county court of Lancaster county for the purpose of obtaining a final accounting from his guardian. There is no evidence to our minds that he has in any way been guilty of laches. It would seem that the receipt was given by the ward to his guardian in 1906. Nearly 10 years had elapsed from that time until the filing of the petition in the

county court to compel the guardian for an accounting. It became the duty of the guardian within a reasonable time under the statutes of this state to make a final accounting to the county court for her acts and doings as guardian of her ward and for a final settlement of her account. The ward had attained the age of 21 years. There was no authority of law for the guardian to retain the funds in her hands for a longer period. She neglected her duty in that respect, and the amount found due from her to her ward is final and conclusive as to the sureties upon the guardian's bond.

In view of the reasons heretofore given and the authorities cited, we are of the opinion that the judgment of the district court is correct, and recommend the same be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

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GRAND LODGE, ANCIENT ORDER OF UNITED WORKMEN OF NEBRASKA, APPELLANT, V. ANCIENT ORDER OF UNITED WORKMEN TEMPLE ASSOCIATION ET AL., APPELLEES.

FILED JUNE 7, 1920. No. 20887.

**Insurance:** SUBORDINATE LODGE: CONSTRUCTION OF CHARTER. A provision in the charter of a subordinate organization of a fraternal beneficiary society that in case of dissolution or forfeiture of charter "all property, money, books, and papers shall become the property" of the superior body will not be held to work a forfeiture of a fund raised by the subordinate organization for the conduct of its local work, known as the "general fund," or of property purchased with such fund for purely local advantage, where the by-laws of the superior body provide that in the event of suspension or dissolution it shall be the duty of the subordinate organization to de-

liver to a named officer of the superior body "all its funds, *except its library, furniture, and general fund.*" The by-law in such case will be construed as interpretative of the provision in the charter.

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

*Nelson C. Pratt, E. J. Lambe, John Stevens* and *Edward F. Leary,* for appellant.

*Byron G. Burbank, contra.*

MORRISSEY, C. J.

This is a suit to cancel some certificates of corporate stock held by defendants, and to have new certificates on these shares issued in favor of plaintiff. The court gave judgment for defendants. Plaintiff appeals.

Plaintiff is a fraternal beneficiary society, consisting of a number of subordinate lodges. In 1917 plaintiff became insolvent and was forced to increase its insurance rates. A number of subordinate lodges thereupon withdrew, among those surrendering their charter being four lodges in the city of Omaha, which reorganized and affiliated themselves with the Grand Lodge, A. O. U. W. of Iowa. These lodges constitute the principal defendants in this suit.

The charter of each of the seceding lodges contained a provision that, in case they "should be dissolved or forfeit this charter, then all property, money, books, and papers shall become the property of the Grand Lodge of Nebraska." At the time of their withdrawal, each of these lodges held stock in the Ancient Order of United Workmen Temple Association, a corporation owning property in the city of Omaha. This stock was transferred to the respective lodges into which they reorganized themselves on affiliating with the Iowa order. Plaintiff now attempts to assert title to this stock, claiming that, under the charter provision above set out, ownership vested in it on the secession of the subordinate lodges.

Defendants deny plaintiff's right to the stock, on the ground that it was not purchased with funds intended for the conduct of the Grand Lodge's business, or over which the latter had any right of control. The stock was purchased with surplus from the general fund of each of the lodges, which consisted solely of revenue raised for local needs and purposes. The Grand Lodge never claimed any jurisdiction to name the purposes for which this fund should be expended. The authority to collect and create a general fund, however, was derived from the by-laws of the Grand Lodge, and the steps necessary to be taken in making payments out of the fund were also defined.

Whether a superior body of this character, under a provision that on dissolution, forfeiture, or surrender of the charter of a subordinate organization all money, property, etc., held by the latter shall become the property of the superior body, may claim a fund created by the members of the subordinate organization solely for local purposes, but collected under the warrant and authority of the constitution and by-laws of the superior body, is a question upon which the authorities are not agreed. A discussion of this point is found in *Grand Court, F. O. A. v. Court Germania,* 192 Mich. 380. We do not deem it necessary to determine that question in this case.

While the charter of each of the subordinate lodges contained a provision that in case of dissolution or forfeiture of charter "all property, money, books, and papers shall become the property of the Grand Lodge of Nebraska," the by-laws of the Grand Lodge provide that "when a lodge is suspended or dissolved it shall be the duty of the master workman to deliver to the grand master workman or his deputy all its funds and effects, *except its library, furniture, and general fund.*" This by-law should, we think, be construed in connection with the charter, as defining the property intended to be covered by the provision of the charter. The by-laws of the

Grand Lodge give no right to its officers to claim possession of the general fund of a subordinate organization, or to follow, as a trust, property purchased with this fund.

The court properly dismissed plaintiff's cause of action, and the judgment is

AFFIRMED.

LETTON and FLANSBURG, JJ., not sitting.

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JENNIE DUNN, APPELLEE, v. SAMUEL M. ALEXANDER, APPELLANT.

FILED JUNE 7, 1920. No. 20930.

**Release as Bar.** An instrument purporting to be "a full acknowledgment and acquittance of every claim of every kind from the beginning of time" cannot be urged in this court as an absolute bar to a cause of action, where the instrument was offered by defendant "for the purpose of showing an admission," and plaintiff was permitted to testify, without objection, that the matters in suit were not considered by the parties nor intended to be covered by the writing.

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

*Leslie G. Hurd* and *F. E. Williams,* for appellant.

*K. W. McDonald* and *Wright, Mothersead & York, contra.*

MORRISSEY, C. J.

Plaintiff recovered a judgment for $3,000, from which defendant appeals.

For a first cause of action plaintiff alleged a conversion by defendant of 41 head of cattle, the property of plaintiff. The second cause of action consisted of a claim for money derived from the sale of certain other live stock in which plaintiff claimed to be entitled to a one-third interest by virtue of a contract of employ-

ment, under which she acted as housekeeper for defendant from 1903 to 1915. The third cause of action was based upon an alleged conversion of 58 head of cattle, in which plaintiff also claimed an undivided one-third interest. Defendant filed a general denial as to each of the three causes of action, coupled with a plea of settlement. The jury returned a verdict in favor of plaintiff for $1,000 on each cause of action.

The principal question presented on this appeal relates to the following instrument, offered in evidence by defendant:

"Receipt

"*Know all men by these presents*: That I, Jennie Dunn, in consideration of one dollar in hand paid and a further consideration to my satisfaction received, hereby acknowledge full payment and settlement of all claims and demands of every kind and nature against Samuel M. Alexander, and howsoever incurred or heretofore claimed or in any way asserted, this being a full acknowledgment and acquittance of every claim of every kind from the beginning of time to the present date.

"Witness my hand this 27th day of April, 1915.

"JENNIE her x mark DUNN.

"Signed in the presence of J. E. Trinnier, G. E. Evey."

When plaintiff and defendant first became acquainted, defendant was the owner of a farm in Kearney county. Here it was that plaintiff went as a domestic, and where the agreement relied upon in this suit was alleged to have been made. Later both parties moved to Morrill county, and each entered land under the homestead laws of the United States. After plaintiff had been granted a patent to her land, she conveyed it to defendant. Sometime later a dispute arose between the parties. Plaintiff brought action to have the deed given by her to defendant canceled, and it was while this suit was pending that the "receipt" in question was executed.

Plaintiff alleges that the "receipt" was intended to cover only the controversy over the land, and that the

matters involved in the present suit were in no way considered or discussed at the time. Defendant himself testifies: "It was a matter of settlement in regard to our land that I had bought from her and she sued for to get the land back again, and then she agreed to go to Mr. Hunt's office and settle it up without going into court, so we came down for that purpose."

Defendant insists in this court, however, that the instrument in question was a release of all existing causes of action between plaintiff and defendant, and constituted an absolute defense to the present suit. It is claimed that the trial court erred in not sustaining defendant's motion "for an order dismissing plaintiff's suit, for the reason that there is no evidence sufficient to sustain a verdict on either the first, second, or third cause of action."

We find no error in the action of the trial court. The instrument relied upon by defendant was not set out in the answer, and its sufficiency as an absolute bar was not raised by the pleadings. So far as the pleadings were concerned, defendant was free to introduce any evidence tending to establish a settlement, and was not limited to the legal sufficiency of the language of the "receipt" as a bar. When it came to the matter of proof, defendant made the following offer: "We now offer in evidence defendant's exhibit 1, for the purpose of showing an admission on the part of plaintiff." Under this offer, even if we were to regard the instrument as a contract or release, and not as a mere receipt, plaintiff was not excluded from introducing evidence to explain its meaning, since evidence to explain the meaning of a written instrument offered in evidence as an admission does not fall within the rule excluding parol evidence which tends to vary the apparent meaning of the language used in the instrument. 10 R. C. L. 1024. But, further than this, defendant allowed plaintiff to testify that the matters in suit were not included in the

settlement evidenced by the writing, without making any objection to the testimony.

Under this state of the record, it was proper for the trial court to submit to the jury the question whether the matters in suit were embraced within the settlement evidenced by the written instrument. Defendant cannot complain of the court's instructions in this regard. There is sufficient competent evidence to sustain each of plaintiff's three causes of action, in the amounts found by the jury. The judgment is

AFFIRMED.

ROSE, ALDRICH and FLANSBURG, JJ., not sitting.

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CITIZENS SAVINGS TRUST COMPANY, APPELLANT, v. INDEPENDENT LUMBER COMPANY, APPELLEE.

FILED JUNE 7, 1920. No. 20260.

1. **Corporations:** UNAUTHORIZED ACTS OF OFFICERS: RATIFICATION. The unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the act in question. Such ratification may be express, or may be inferred from silence and inaction, and if the corporation, after having full knowledge of the unauthorized act, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed to have ratified it.

2. **Guaranty:** RELEASE: AFFIRMATIVE DEFENSE. In an action upon a guaranty, the defense that the guarantor has been released for the reason that the debt of the principal has been extended without the knowledge of the guarantor is an affirmative defense which must be pleaded in order to be available.

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

*Brown, Baxter & Van Dusen,* for appellant.

*Switzler, Goss & Switzler, contra.*

LETTON, J.

The defendant corporation was a stockholder in the Lumbermen's Cement & Brick Company of Kansas City, Missouri. On January 22, 1913, the cement company desired to obtain $28,000 additional working capital. In order to raise this amount it executed its notes to the Corn Belt Bank of Kansas City by a written guaranty to the amount of $2,000 each, signed by a number of its stockholders. The name of the defendant was signed by its vice-president to the guaranty thus, "Independent Lumber Co., of Omaha, by John W. Towle, V. Pres." The notes and guaranty were afterwards transferred to the plaintiff in this action. Afterwards other notes were executed for the same debt and these notes attached as collateral. Defendant's share of the obligation, if bound, remains unpaid, and this action is to recover the same.

The signature is not denied, but the defense is that Towle had no authority to execute the guaranty, that it has not been ratified, and that the Lumbermen's Cement & Brick Company and the Corn Belt Bank had full knowledge of the want of authority of Mr. Towle. The reply pleads ratification, and pleads that plaintiff is an innocent holder of the notes. The cause was tried to a jury, and a verdict rendered in favor of the defendant. Plaintiff appeals.

Mr. Towle was also a stockholder in the cement company individually, and was a director of that company. He is a director and vice-president of the defendant company, but according to the evidence takes no active part in the management of the business. Mr. Towle testified that he did not inform the manager or other officers of the defendant that he had signed its name to the guaranty until Mr. Millard, the president and manager of the company, after receiving a letter from Kansas City dated March 28, 1914, asked him about the transaction. Mr. Millard testified that he never knew of the guaranty until he received this letter. It appears

that second mortgage bonds were issued to secure the guarantors, and that some of these had been sent to Mr. Towle as security for the guaranty, and were still in his possession. The letter is from the secretary of the plaintiff to the Independent Lumber Company and in substance states that, at the special request of Mr. John M. Byrne, the plaintiff had extended accommodations to the Lumbermen's Cement & Brick Company to June 1, 1914, at which time there would be due $21,005.82, and that three of the signers to the guaranty agreement of January 22, 1913, had paid their proportionate part of the guaranty. Mr. Millard testified that when this letter was received he read or handed it to Towle, and asked him if he knew anything about it, and that at that time Mr. Towle told him the facts as to the signing of the guaranty, and told him about the bonds which were sent to him as collateral security. The original notes of the cement company were attached to the new note as collateral. The new note contains a provision that if the security should depreciate in value the cement company agrees to give additional security upon demand. It also provides that the trust company is authorized to apply on the debt any money of the maker in its hands on deposit, and any notes, drafts, accounts, bonds or stock of the maker held by the trust company, or in transit to it.

If the trust company had received prompt information that the defendant repudiated the guaranty, it might have at once demanded additional security or applied on the debt any securities it might have belonging to the cement company. An act performed for a corporation by an authorized person may be ratified by conduct, and it is the duty of one who learns of an unauthorized act committed in his name, or who desires to repudiate it, to disaffirm the transaction and refuse to be bound by it within a reasonable time, so that one who has relied upon the act may not be prejudiced.

Upon the question of ratification, the court instructed the jury in part as follows: "In determining whether or not the act of Towle in signing said guaranty was subsequently approved or ratified by the defendant company, you are instructed that an act done in behalf of a corporation by one of its officers having no original authority to perform such act may be ratified by the corporation by conduct implying approval and adoption of the act in question, and such ratification may be inferred from silence, or inaction, indicating acquiescence and consent, when it was its duty to speak or to object to the act complained of. The acts of an agent or officer of a corporation, which he was not originally authorized to perform, may be ratified by express action, or such ratification or approval may be by an acceptance of the act, or by acquiescence therein, or it may be inferred from the facts and circumstances shown surrounding the transaction."

The admissions of Towle and Millard show conclusively that the defendant was given full information as to the execution of the guaranty by the letter of March 28, and the conversation with Towle immediately after its receipt. Notwithstanding this, it took no steps to repudiate the transactions, to return the bonds, or in any wise to notify the plaintiff of its disaffirmance. Since after full knowledge the defendant continued to treat the transaction as valid until after the maturity of the note, and did not disaffirm it, there was an implied ratification of Towle's act. *Alexander v. Culbertson Irrigation & Water Power Co.*, 61 Neb. 333; *Rich v. State Nat. Bank*, 7 Neb. 201; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68; *German Nat. Bank v. First Nat. Bank*, 59 Neb. 7; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371. The verdict of the jury is contrary to the instruction quoted, and must be set aside.

Defendant insists that any error occurring at the trial was without prejudice because the guaranty itself con-

tained a provision against extension after January, 1914. The case was not tried on this theory. No issue of this kind was raised by the pleadings nor tendered at the trial, and it cannot be considered on appeal. It is elementary that the release of a guarantor by an extension of time to the principal debtor is an affirmative defense which must be pleaded. The reason for this is obvious, since in reply to such a plea the plaintiff might be able to show that such a defense had been waived, or might make other defense. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ALDRICH and DAY, JJ., not sitting.

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PEARL CARPENTER, APPELLANT, V. JAMES CARPENTER ET AL., APPELLEES.

FILED JUNE 7, 1920. No. 21050.

1. **Judgment:** PERSONAL JUDGMENT AGAINST NONRESIDENT. A court cannot acquire jurisdiction to render a personal judgment upon a money demand against a nonresident of the state without personal service within the state, or appearance in the action.
2. **Fraudulent Conveyances:** SUIT TO SET ASIDE. An action to set aside a deed and subject a tract of land to the payment of a money demand on the ground of fraud in the transfer, cannot be maintained until the demand has been reduced to judgment and a lien has been acquired upon the property.

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

*John Stevens,* for appellant.

*Lambe & Butler, contra.*

LETTON, J.

This is an action brought by the plaintiff to set aside a deed of conveyance made by her former husband, de-

fendant Carpenter, and to recover for personal maintenance for several years past.

It is alleged that the parties were married in 1911; that at the time of their marriage they were residents of Nebraska, and the husband was the owner of 200 acres of land in this state; that in 1916, without consideration, he conveyed the property to his mother; that in 1917 the mother sold it to Fred Jensen; that the other defendants Jensen claim some interest in the land.

The Jensens entered their appearance. Constructive service was sought to be had on Carpenter by publishing a notice setting forth the object and purpose of the suit. Objections to jurisdiction by special appearance were filed by him setting forth that he is, and has been for several years past, a resident of Iowa, and that no summons has been personally served upon him. Evidence was taken as to the facts alleged in the special appearance. The court sustained the objections to jurisdiction, further found that Carpenter was an indispensable party to the suit, and that for that reason the court had no jurisdiction to proceed further, and the action was dismissed. Plaintiff appeals.

This action was purely *in personam.* The plaintiff did not seek to claim or assert any title or interest in the land itself. What she asked for was a personal judgment against Carpenter, and a removal of the cloud created by the deeds so that the judgment, when obtained, might become a lien against the land. She was not a judgment creditor; the land had not been attached nor sequestered in any manner; and she had acquired no lien of any nature upon the interest, if any, of her husband therein. It has repeatedly been decided by this court that, in order to set aside a deed as fraudulent, the plaintiff must have reduced his claim to judgment (*Weil v. Lankins,* 3 Neb. 384; *Crowell v. Horacek,* 12 Neb. 622; *Kennard, Daniel & Co. v. Hollenbeck,* 17 Neb. 362), and, following the leading case of *Pennoyer v. Neff,* 95 U. S. 714, 24 L. Ed. 565, that a court cannot

acquire jurisdiction to render a personal judgment upon a money demand against a nonresident of the state without personal service within the state, or an appearance in the action. *Rhoades v. Rhoades,* 78 Neb. 495, cited by plaintiff, is distinguishable. In that case the property was still in the husband's name, and the court had seized the *res* at the beginning of the action by the appointment of a temporary receiver, who had taken possession of the land.

The judgment of the district court is clearly right and must be

AFFIRMED.

ALDRICH, J., not sitting.

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FARMERS GRAIN & SUPPLY COMPANY, APPELLEE, V. JENNIE M. BLANCHARD, APPELLANT.

FILED JUNE 7, 1920. No. 21467.

1. **Evidence:** DEATH: PRESUMPTION. When there is a question as to whether a violent death has been caused by accident or by suicide, there is no presumption in favor of suicide, and, as between accident and suicide, the law presumes accident until suicide is established by the evidence.

2. **Master and Servant:** WORKMEN'S COMPENSATION ACT: "RECKLESS INDIFFERENCE TO SAFETY." "Reckless indifference to safety," as used in section 3693, Rev. St. 1913 (workmen's compensation act), means more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree, a willingness to take a chance.

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

*Bernard McNeny* and *Howard S. Foe,* for appellant.

*Lewis C. Paulson, contra.*

LETTON, J.

The appellant was awarded compensation by the compensation commissioner for the death of her husband while employed by the appellee. On appeal to the district court the award was set aside and judgment of dismissal rendered. Claimant appeals.

The husband of the appellant, on June 30, was manager of the grain elevator of appellee at Minden. The bookkeeper, whose duty it was to attend to the correspondence and make out reports, was absent from the town for a few days. A report had been called for by the United States Grain Corporation, which, according to a letter accompanying the same, was due in Omaha the next day. The post office in Minden was about six blocks from the elevator, and the elevator was about two blocks from the railroad station. The deceased procured assistance in making out the report from the manager of a nearby elevator, placed it in an envelope, and when the accident happened was proceeding to the railroad station in order to post the letter upon the mail car of a train coming from the west. There are three parallel tracks at Minden—the elevator track, the passing track, and the main track. The evidence shows that deceased crossed the elevator and passing tracks. He looked west and presumably saw the train approaching. An eyewitness testifies that he then proceeded between the main and passing tracks in the direction of the station at a rapid walk, or dog trot, was struck by the engine of the train and thrown about 20 feet. The train, according to this witness, was running faster than usual. The space between the tracks was about 10 or 12 feet, and, so far as this witness could see, deceased had not veered toward the main track when he was struck. The fireman on the train, however, testifies that he saw the deceased cross the tracks, and saw him running between the main line and the passing track; that at one point he took a very slight angle toward the main track, and

had reached about the end of the tie when he was struck, presumably by the pilot beam of the engine.

The district court made a general finding that appellant was not entitled to compensation; but from the briefs it would appear that the court found that death was caused by an accident which did not arise out of and in the course of Blanchard's employment, or that the accident was caused by his wilful negligence. The preparation of the report to the grain corporation was one of the duties which devolved upon Blanchard when the bookkeeper was absent, and the fact that the post office was six blocks distant from the elevator while the station was only two blocks away, and that he was alone in the elevator, showed that he desired to spend as little time as possible away from his main post of duty. We are satisfied that the accident arose out of and in the course of his employment. The fact that the bookkeeper always mailed letters at the post office when he attended to the correspondence is not material.

The other question presented is whether the accident was caused by the wilful negligence of the deceased. "Wilful negligence" is defined in the statute as follows: "For the purposes of this act, 'wilful negligence' shall consist of (1) deliberate act, or (2) such conduct as evidences reckless indifference to safety, or (3) intoxication at the time of injury, such intoxication being without the consent or knowledge or acquiescence of the employer or the employer's agent." Rev. St. 1913, sec. 3693, as amended, Laws 1917, ch. 85, sec. 23.

The deceased was 66 years of age. He had been moving rapidly, one witness saying it was a fast walk, or trot; another called it a run. He suddenly swerved toward the main track at or near a switch. Whether he made a misstep, whether his progress was interfered with by means of the switch, or whether from the exertion or from some other cause, he became dizzy and swerved toward the train, it is impossible to determine. There is nothing in the record which would indicate

that his domestic relations were unpleasant, that he was worried or depressed on account of other trouble, or that would in any wise indicate that he contemplated self-destruction. The presumption of law is against such a conclusion. "When violent death is shown, the presumption arises that it was not self-inflicted. As between accident and suicide, the law supposes accident until the contrary is shown." *State v. District Court of St. Louis County,* 138 Minn. 138; *Wishcaless v. Hammond, Standish & Co.,* 201 Mich. 192.

Does the testimony show "such conduct as evidences reckless indifference to safety?" There were 10 or 12 feet of space between the tracks, which to an ordinary mind would indicate there was plenty of room for a person to travel safely in the same direction as the train. While there is no doubt that it was careless to attempt to move rapidly, side by side with a rapidly moving train, in the narrow space between the tracks, we think it does not necessarily show "reckless indifference to safety." In Webster's Dictionary "reckless" is defined as "rashly negligent; utterly careless or heedless." The word "reckless" has been defined by courts many times. The definitions do not always agree, some saying that a reckless act is the equivalent of a wilful one, while others say the word does not imply wilful, but merely heedless, careless, rash, indifferent to consequences. "Reckless indifference to safety" as used in the statute means more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree, a willingness to take a chance. We may well conclude that deceased believed there was ample space between the tracks in which he might move with safety. An error of judgment of this kind would not evidence recklessness, and, while a prudent and careful man might have stepped away, the true test is not what such a man would have done under the circumstances, but whether the act was in itself more than merely careless, and was within

the statutory definition of wilful negligence. Since the divergence from the middle of the space between the tracks may have resulted from several different causes, we think the evidence does not sustain a conclusion that the accident was the result of "wilful negligence" as defined in the statute. The judgment of the district court is reversed and the cause remanded, with directions to affirm the award of the compensation commissioner.

REVERSED.

ALDRICH, J., not sitting.

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CLARENCE J. BURRIS ET AL. V. STATE OF NEBRASKA.

FILED JUNE 7, 1920. No. 21409.

**Receiving Stolen Goods:** EVIDENCE. Evidence that recently after an automobile had been stolen in the state defendant was in possession of it outside of the state, and other incriminating circumstances connecting him with receiving it in the state, knowing it to have been stolen, may be sufficient to sustain a conviction for that felony.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

*Frank C. Yates,* for plaintiff in error.

*Clarence A. Davis, Attorney General,* and *Henry J. Beal, contra.*

ROSE, J.

In a prosecution by the state, Clarence J. Burris and Wade Gregory, defendants, were charged jointly in separate counts of the same information with stealing in Douglas county, Nebraska, July 21, 1919, a Chevrolet automobile, engine No. 35,849, license No. 191,783, the property of Hans C. Peterson, and with receiving in

Douglas county, Nebraska, July 21, 1919, the automobile described, knowing it to have been stolen. The jury found defendants not guilty on the count for larceny, and guilty on the count for receiving stolen property. Defendant Burris was sentenced to serve in the penitentiary a term of five years, and defendant Gregory a term of one year. As plaintiffs in error they present for review the record of their conviction.

Defendants rely for a reversal on the insufficiency of the evidence to prove that they received the automobile in Douglas county, Nebraska, as charged in the information. The complaining witness, Peterson, bought the car June 30, 1919, and it was stolen from him July 21, 1919, shortly after 2 o'clock p. m., while standing on a street in Omaha. Early in September, 1919, defendants drove the car into Dekalb, Missouri. They undertook at the trial to explain their possession by proof that the car used by them had been driven to the home of J. M. Gregory, father of defendant Gregory, and father-in-law of defendant Burris, at Wallace, Missouri, by J. H. King, about noon July 21, 1919; that J. M. Gregory bought the car from King the next day; and that it was not identified as Peterson's. The testimony relating to this explanation and to the plea of not guilty was adduced at some length, but the jury were justified in disbelieving the crucial parts of it. There is conclusive proof that Peterson's automobile was stolen in Omaha as late as 2 o'clock p. m., July 21, 1919, and that therefore it was not in Wallace, Missouri, about noon or at any other hour of that day. The car found in possession of defendants in Missouri was positively identified as Peterson's. The engine bore the original number, which had not been entirely effaced. The electric battery in the car when purchased by Peterson had been temporarily removed before the car was stolen, and had been replaced by a different battery, which was still in the car when it was taken from defendants. The car found in their possession and restored to Peterson was

also identified by other earmarks. While the possession of defendants in Missouri is not of itself evidence that they received the automobile in Douglas county, Nebraska, knowing it to have been stolen, it may be considered with other circumstances in determining that issue. *Commonwealth v. Phelps,* 192 Mass. 591. There is additional evidence tending to prove the following facts: Defendants were acquainted with Peterson, having lived in the same rooming house with him in Omaha. They knew he owned the identical car subsequently stolen from him. They had occupied it with him. One of them taught Peterson how to operate it. They were in Omaha shortly before it was stolen, and shortly thereafter they were in Wallace, Missouri, where it was kept after it was stolen. Three days after the commission of the larceny defendant Burris met Peterson on a street in Omaha, and the former acted peculiarly, turning his head away. When defendants first saw Peterson in Dekalb, Missouri, with an officer, they started across a park, and hid in a patch of weeds, where they were arrested. A brother of defendant Gregory was an occupant of the car when it was driven into Dekalb, but he made no effort to join defendants in their attempt to evade Peterson and the officer. There is proof of these incriminating facts, and in connection with the possession of defendants under the circumstances disclosed the evidence is sufficient to sustain the conviction.

AFFIRMED.

ALDRICH, J., not sitting.

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I. L. BEISEL ET AL., APPELLEES, v. WILLIS C. CROSBY, APPELLANT.

FILED JUNE 7, 1920. No. 21492.

Nuisance: FUNERAL HOME: INJUNCTION. Where an undertaker purchases and uses for a funeral home in a city a dwelling-house

situated within a few feet of private dwellings in an exclusive residential district, in disregard of timely protest by residents thereof, and thus encroaches on the repose, the comfort, and the freedom of their homes, depreciates the value of their property, depresses their spirits, and weakens their power to resist disease, injunction is their proper remedy, but the allowance of the writ depends upon the facts and the circumstances of the particular case considered.

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

*Switzler & Switzler,* for appellant.

*Baker & Ready, contra.*

ROSE, J.

This is a suit for an injunction to prevent defendant from conducting an undertaker's establishment at No. 2020 Wirt street, Omaha. The name given by defendant to his place of business is "Crosby's Funeral Home." His building was formerly occupied as a private residence. It is situated in what is known as "Kountze Place," and 80 residents thereof are plaintiffs. They plead that defendant, in disregard of timely protest, is conducting his undertaking business in a residential district, is encroaching on the repose, the comfort, and the freedom of their homes, is depreciating the value of their property, is constantly reminding them of death, of preparations for the tomb, of the sorrow of mourners, of the requiem, and of the funeral cortege, and is thus depressing them mentally and weakening their power to resist disease. Interference by injunction is resisted by defendant on the ground that other business enterprises are creeping into Kountze Place; that the homes of plaintiffs are not in a district devoted exclusively to residences; that the present conditions of society and the advancements in modern undertaking demand funeral homes properly conducted in quiet places away from congested centers; that funeral homes are properly and frequently located near

residences; that defendant preserves the residential appearance of his building and grounds; that he performs the duties of undertaker according to modern methods and ethics, in strict conformity with law and with the rules of the board of health; that he is not maintaining a nuisance; and that an injunction would deprive him of his right to own property and to use it in a legitimate and a necessary business. On the principal issues the trial court found the facts to be as pleaded by plaintiffs and allowed an injunction as prayed by them. Defendant has appealed.

The question presented by the appeal is the equitable right of plaintiffs to an injunction on the facts established by the evidence. Originally Kountze Place was a quarter section of land platted as an addition to Omaha. The deeds for the lots limited the grant to residential purposes for 25 years. With this common purpose Kountze Place became an exclusive, compact, residential district, where there are paved streets, ornamental grounds, well-kept lawns, private driveways, and beautiful homes. In the pursuit of health, recreation and happiness, families resorted to open porches and children played on lawns. In the midst of these homes and grounds defendant bought a large, handsome residence after the limitation restricting the use of the lot to residential purposes had expired. Over the protest of plaintiffs, defendant occupies and uses this residence for an undertaking establishment. In front of it he erected a sign four feet high and nine feet long, advertising the premises before their eyes as "Crosby's Funeral Home." In addition, he has constructed and intends to maintain an electric sign. There is an operating and embalming room in the basement, where the dead are prepared for burial. To and from the premises an automobile hearse, with unavoidable noises, is driven night and day. Mourners and friends of the dead visit the place. The building is used as a chapel, where sermons are delivered and dirges are sung. Fu-

nerals are weekly occurrences, and there were as many as two services in one day. The congestion in the street more than once prevented neighbors from stopping automobiles in front of their own doors. Boxes used to protect caskets are piled on the grounds of the funeral home in view of the public. The dead are carried to and from the hearse a few feet from the windows in the home of one of the plaintiffs. Flowers intended for the funeral home have sometimes been delivered by mistake at private residences. Complete freedom and full enjoyment of home life in the neighborhood have been lost. Lawns, porches, and front rooms have in some instances been partially abandoned, and property in the vicinity has decreased in value. There is a natural shrinking from the scenes and the sounds at the funeral home. Respect for the presence of the dead and for the mourners at funerals grows out of gentle manners and good impulses and influences human conduct. Recurring changes from happy demeanor in private homes to solemnity in the presence of death affect the spirits of rightly constituted individuals, both old and young. The business which defendant conducts among the homes of plaintiffs will tend to depress them mentally, to lower their vitality, and to weaken their power to resist disease. With full knowledge of their protest, the conditions of which they complain were forced upon them by defendant. In the exercise of their right to life, liberty, and the pursuit of happiness, they had united as a community in a lawful purpose to confine their district to residential purposes. On these facts and conclusions are plaintiffs entitled to equitable relief?

Defendant contends that plaintiffs are not entitled to an injunction on the ground that Kountze Place is devoted exclusively to residences. He testifies that business is creeping in; that his funeral home is within one and one-half blocks of a garage, within two blocks of an automobile filling station, and within three blocks of a

grocery. Accepting his word in these respects as verity, he nevertheless invaded a district hitherto devoted exclusively to beautiful residences. Furthermore, the most serious objections to his funeral home do not apply to the other enterprises mentioned by him. On the record made the district selected by defendant for business purposes was formerly residential.

It must be conceded, as insisted by defendant, that undertaking is a necessity, and that individuals and public alike must submit to the unavoidable incidents of the business when conducted according to approved methods and advancements in science. Undertaking has an intimate relation to all who are distressed by the death of loved ones and must always be considered in connection with public health. It would be unfortunate, therefore, if either the state, in the exercise of police power, or the court, by means of injunction, should put unnecessary restraints on the class of private and public services performed by defendant, or lower the standards or efficiency of embalmers and undertakers, or deter men of high character from entering such vocations. The selection of the place of business, however, is not necessarily left to the undertaker alone. That subject is often a matter of both private and public concern. No amount of skill or tact can wholly eliminate the depressing influence of the business of undertaking or its effect upon public health.

The constitutional or fundamental liberty of a citizen to consult his own tastes in selecting a lawful vocation and in buying and using property is limited by the obligation which his citizenship imposes upon him to respect the equal rights of others. The Republic came into existence with a declaration expressing "a decent respect to the opinions of mankind." Blasphemy, resulting only in the mental suffering of an individual who is shocked by it, is not the exercise of the liberty of citizenship or of the freedom of speech. A law forbidding the desecration of the flag protects the patriotic

sentiments of citizens from outrage. The constitutional liberty of a citizen, including his right to buy and control land, does not permit him to construct on his own premises an unsightly and an unnecessary fence for the sole purpose of injuring the feelings of a neighbor. These principles recognize the mental factor in considering the rights which the Constitution guarantees to citizens. In a proper case a court of equity may consider the same subject. Though defendant was not prompted by malice or by any evil design, and meant only to exercise the privileges of citizenship, he failed to show proper respect for the property rights and the personal feelings of plaintiffs when he opened his undertaking establishment in their midst. He was in the wrong when he encroached on the repose, the comfort, and the freedom of their homes, depreciated the value of their property, depressed their spirits, and weakened their power to resist disease. His business was not a necessity at the place selected by him. He equipped his funeral home at his peril, after he had been warned by plaintiffs of their objections. Under all of the circumstances the injunction was properly allowed. There is no fixed or arbitrary rule, however, governing cases of this kind. Each case must be determined by the facts and circumstances developed therein.

AFFIRMED.

ALDRICH, J., not sitting.

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CHARLES D. HALSEY, APPELLEE V. ORVIN C. PHILLIPS, APPELLANT.

FILED JUNE 7, 1920. No. 21052.

**Assault:** ARREST WITHOUT A WARRANT. When an arrest without a warrant is sought to be justified, it must appear that a crime has been committed, and there must be reasonable ground to believe the person arrested is guilty of the offense.

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

*Torgerson & Higgins* and *Rodman & Rodman,* for appellant.

*Halligan, Beatty & Halligan* and *W. T. Wilcox, contra.*

DEAN, J.

Defendant appealed from a verdict and judgment rendered against him for $700 as damages for personal injuries sustained by plaintiff while being placed under an alleged unlawful arrest.

Defendant was a deputy sheriff. In his answer he alleged that in arresting plaintiff he used only such force as was necessary to overcome plaintiff's resistance.

These facts seem to be established. Plaintiff was riding slowly in his car, and alone, when defendant appeared, and, jumping on the fender, told him, as defendant testified, "to consider himself under arrest for assault and battery for beating up Mr. Biggs." After an exchange of a few words he struck plaintiff over the head with a 44 or 38 Colt six-shooter, the blow cutting through plaintiff's cap and making a wound in his head about two inches in length, in which "they took three stitches." As a result of the first blow plaintiff sank down in the car seat and raised his left arm to cover his face and head, when he was again struck by defendant with the revolver on his head and face and arm three or four times. Plaintiff's left hand and arm were bruised by the beating so that he was unable to do any work for a month or six weeks.

Plaintiff testified that he offered no resistance; that he told defendant he would go with him if he would let him put his car away; that defendant refused, and after he had beaten him pulled him out of his own car and put

him into another car and held the six-shooter on him until they reached Kimball; that on arrival there they went to a doctor's office, where plaintiff's wounds were dressed, and thence to the sheriff's office; that he was not taken before any court, but was released from custody; that he then hired a car and went home; that by reason of his injuries he was compelled to hire a man to do his work on the farm for more than a month; that his wounds caused intense pain, which continued up to the time of the trial, and that as a result of the beating he was continually subject to headaches.

Plaintiff's testimony as to the beating was corroborated in the main by two or three witnesses and in large part by defendant. As tending to show animus, a witness testified that defendant said to plaintiff, "'You got me up here the other day when I had a team and nothing to defend myself.' He then jumped onto the footboard of the car and pounded Mr. Halsey with a gun;" that defendant struck plaintiff six times over the head and arm, and that he made no resistance and no attempt to strike defendant at any time.

Defendant admitted making the arrest without a warrant on the request of the man named Biggs, who had informed him that plaintiff "had just about killed him up there." He testified that when he went to make the arrest, accompanied by Biggs, and told plaintiff about the alleged assault and battery on Biggs, and, "that he was to consider himself under arrest," plaintiff refused to go, and he was compelled to take him by force; that when plaintiff drew back his arm as though to strike he "landed on him with the gun and struck him until he said 'all right, I will go,'" that he "probably struck him four or five blows;" that when he struck him on top of his head he "settled down into the auto and remained in that position until he said he would go."

Defendant complains because the court instructed the jury, among other things, "that it is not claimed that

plaintiff was guilty of the commission of any felony, nor is it claimed that defendant found or saw the plaintiff violating any law of the state or any municipality, nor does the defendant claim that he had any warrant for the plaintiff's arrest." The court did not err in so instructing the jury. Defendant's answer and the evidence show that defendant did not have reasonable or just cause to believe that a felony or any crime had been committed. It appears that no complaint was filed against plaintiff at any time.

Section 8938, Rev. St. 1913, provides: "Any person not an officer may, without warrant, arrest any person, if a petit larceny or a felony has been committed, and there has been reasonable ground to believe the person arrested guilty of such offense, and may detain him until a legal warrant can be obtained."

That defendant overstepped his official prerogative plainly appears. Plaintiff did not commit a felony, nor was he guilty of petit larceny, nor was there reasonable ground to believe that he was guilty of committing either offense. Defendant argues that the verdict is the result of passion and prejudice, and that it is excessive. We do not agree. That defendant used excessive force and that plaintiff was brutally beaten by him sufficiently appears.

When an arrest without a warrant is sought to be justified, it must appear that a crime has been committed, and there must be reasonable ground to believe the person arrested is guilty of the offense. This has not been shown in the present case. The facts were fairly submitted, and the verdict is abundantly sustained by the evidence.

The judgment is

AFFIRMED.

MATTHEW DONOVAN ET AL., APPELLANTS, V. BANK OF PALMYRA ET AL., APPELLEES.

FILED JUNE 7, 1920. No. 20798.

1. **Homestead:** SALE BY HEIRS: DISTRIBUTION OF PROCEEDS. Where the owner of a homestead dies intestate, leaving surviving, as heirs at law, his widow and brothers and a sister, and where the homestead has been sold to pay debts, the remaining sum, under the provisions of section 3092, Rev. St. 1913, and section 1265, Rev. St. 1913, should be distributed: First, to the widow the present worth of the use of the fund for the period of her life expectancy, based upon a fair rate of interest at the time; second, of the remaining sum one-half should go to the widow and one-half to the brothers and sister, share and share alike.
2. **Evidence** examined, and *held* to support findings and decree.

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

*W. F. Moran,* for appellants.

*Paul Jessen, contra.*

DAY, J.

Plaintiffs have appealed from a decree of the district court for Otoe county distributing $3,227.70, being the proceeds of the sale of the homestead of John Donovan, deceased.

The facts out of which the controversy arises are as follows: On November 27, 1915, John Donovan died intestate in Otoe county, Nebraska, leaving surviving him as his heirs at law his widow, Mary Donovan, appellee, and three brothers and one sister, the appellants. At the time of his demise John Donovan was the owner of a quarter section of land upon which he and his wife resided as their homestead. This property was incumbered for about $14,000, and in addition thereto claims had been allowed in the county court against said estate of approximately $1,300. There was no other property out of which the debts could be paid, so that it was neces-

sary that the homestead property be sold for that purpose.

Confronted by this situation, the heirs at law agreed among themselves that it would be better for all concerned to sell the property at private sale, if a satisfactory price could be obtained, and, in furtherance of the understanding, Mary Donovan entered into a contract to sell the property, which was approved by the appellants; they signing, at the bottom of the contract, a statement as follows: "We agree to the above and will join in a deed with Mary Donovan for this farm upon receiving our share of the purchase price." The deed was executed and the money paid to the defendant bank as a stakeholder for distribution among the heirs at law.

Under the provisions of the homestead act, in force at the time of the demise of John Donovan (Rev. St. 1913, sec. 3092), the widow, as against the rights of the heirs at law, is entitled to a life estate in the homestead, and when, as in this case, the homestead is sold to pay debts, the widow's right follows the proceeds of the sale and she is entitled to receive the income, during life, of the proceeds of the sale.

Under the provisions of section 1265, Rev. St. 1913, the widow is an heir at law, and, under the facts of this case, is entitled as an heir at law to receive one-half of the real estate, and the brothers and sister the remaining one-half, share and share alike, subject to the homestead right of the widow. The homestead being reduced to money, the fund must be distributed in accordance with the law affecting homestead rights.

Applying these principles to the case before us, in the distribution of this fund there should be first set off to the widow the present worth of the income of the proceeds of the sale, based upon her life expectancy and upon a fair rate of interest at the time. Of the remaining sum, one-half should be paid to the widow as an heir at law and the remaining one-half to the brothers and sister, the appellants, share and share alike.

It is contended on behalf of the appellants that, at the time of the agreement between the heirs at law to sell the property at private sale, it was also agreed that the proceeds of the sale should be divided one-half to the widow and one-half to the appellants. Upon this question there is a direct dispute in the testimony between the appellants and the appellee. The appellee's testimony is to the effect that the proceeds of the sale were to be divided, but she denies that the agreement was that the proceeds should be divided one-half to her and one-half to the brothers and sister of deceased. If the agreement between the parties went no further than that the proceeds of the sale should be "divided," it would mean, of course, divided in accordance with the terms of the law. The burden of proof was upon the appellants to establish that the agreement was in the terms claimed by them, and, while the greater number of witnesses have testified in support of the appellants' version of the agreement, we have taken the view that appellants have not established their contention by a preponderance of the testimony.

There would be no consideration for appellee relinquishing such a substantial right, and, while lack of consideration is not specially pleaded, still it is proper to be considered in determining the probability of appellee entering into such a contract as claimed by the appellants. Besides, when appellants signed the contract of sale, they signed a statement on the contract, in which they stated they would sign the deed "upon receiving our share of the purchase price." In the absence of explanation, this would imply their share under the law. Other circumstances in the record tend to corroborate appellee.

The trial court distributed the fund in accordance with the rule above announced. The decree is supported by the evidence.

AFFIRMED.

ROSE and FLANSBURG, JJ., not sitting.

ANNA ZANTOW, APPELLEE, v. OLD LINE ACCIDENT INSURANCE COMPANY, APPELLANT.

FILED JUNE 7, 1920. No. 20513.

1. **Insurance:** CHANGE OF OCCUPATION. Where a person, classified for insurance as a farmer, makes a trip accompanying stock in shipment, which he has sold before shipment to another party, *held*, that such trip does not constitute such a substitution of one occupation for another that it can be said that he has changed his occupation from a farmer to a "shipper tending stock," within the meaning of a clause in an insurance policy, providing reduced benefits in case insured changes his occupation to a more hazardous one.

2. ———: INCREASED HAZARD. When such person is killed in a wreck during the shipment, but while he is riding in a caboose, where other passengers are allowed to ride who have regularly paid their fare, *held* that, at the time of accident, the insured, not being engaged in any duties peculiarly pertaining to those of a tender of stock, but being subjected to those hazards only which are common to the other passengers in the car, was not performing any act or thing pertaining to the more hazardous occupation.

3. ———: CONSTRUCTION OF POLICY. Though punctuation marks may be considered as an aid to the interpretation of an insurance policy, they will not control nor change a meaning which may be plainly gathered from the words and their arrangement.

4. ———: "PASSENGER CAR." When a caboose, attached to a train carrying live stock, is used as an essential part of the freight train, for the purpose of carrying the train crew and the caretakers of live stock, *held* not to be a passenger car provided for the exclusive use of passengers, though a few passengers, in the strict sense of the term, have been permitted to ride upon it.

Opinion on motion for rehearing of case reported in 103 Neb. 685. *Former judgment of affirmance adhered to.*

FLANSBURG, J.

On motion for a rehearing on an opinion and order affirming the judgment of the trial court. *Zantow v. Old Line Accident Ins. Co.*, 103 Neb. 685.

Plaintiff, who recovered a $1,000 judgment below, urges that, under the opinion as rendered in this court, she is entitled to a $3,000 judgment. Plaintiff's husband, the insured, was classified for insurance as a farmer. He was killed in a wreck while riding in a caboose on a freight train. Regular passengers, who had paid fare, were riding in this car at the time of the accident. Insured, however, held a stock shipper's pass as a cattle tender. The cattle which he was accompanying to market had, just previous to the shipment, been sold by him to another party. The insured, who had planned to take the trip, agreed to go as cattle tender, in order to have the benefit of the shipper's pass. It appears from the evidence that the occupation of being a "shipper tending in transit" is, by the classifications of the company on file with the state insurance board, classed as a more hazardous occupation than that of being a farmer.

Two questions arise: First, whether the benefits under this policy should be reduced from $1,000, the face of the policy, to $300, by reason of a clause in the policy providing that benefits should be so reduced in case insured should be injured after having changed his occupation to a more hazardous one, or while doing any act or thing pertaining to any such more hazardous occupation; or, second, whether the benefits should be increased to $3,000 under a provision of the policy that the benefits should be so increased in case the insured be injured "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 provision in the policy, providing for reduced benefits in case the insured should change his occupation to a more hazardous one, it seems to us, does not apply, since such provisions as these only contemplate the actual substitution of one occupation for another, and not merely a temporary resort to other activities. It can-

not be said that the insured, a farmer, who, as incidental to his occupation, raised live stock for market, and would therefore at some time ship it to market, had, within the meaning of the clause just mentioned, changed his occupation from farmer to stock shipper by the one act of accompanying this stock in shipment, even though he had previously sold it to another. Temporary duties thus assumed should not be held to effect a change of occupation within a restricted and literal meaning of that clause. *Redmond v. United States Health & Accident Ins. Co.*, 96 Neb. 744; *Taylor v. Illinois Commercial Men's Ass'n*, 84 Neb. 799, 24 L. R. A. n. s. 1174, and note; *Wheeler v. Standard Accident Ins. Co., ante*, p. 219; *Gotfredson v. German Commercial Accident Co.*, 218 Fed. 582, L. R. A. 1915D, 312, and note; 1 C. J. 439.

The policy, however, goes further, and provides that the benefits shall be reduced if insured is injured while doing any act or thing pertaining to any such more hazardous occupation. At the time the insured was killed, he was riding in the caboose, seated with other passengers, who had paid their fares and who had been accepted, strictly as passengers, upon that train. The act or thing which he was then doing, riding upon a seat in this car, did not peculiarly pertain to tending cattle in transit. The cattle tender's duties, from which the extra hazards arise, are in being compelled to alight at all times and places; in being about the cars; in going back and forth from the caboose to the cattle car in railroad yards where cars are moving and being switched; and in the actual handling and caring for the live animals, which are closely constrained and under excitement of shipment. It is the duties of the occupation, which cause an increased likelihood of accident, that this clause is obviously intended to guard against, and when the insured is injured, not from a risk growing out of those duties, but from a risk common to other persons not so employed, it cannot be said that he was in the

actual performance of an act peculiarly pertaining to an occupation creating an extra hazard, and that he should therefore lose the benefits of his insurance. The reasoning in the following cases is found somewhat analagous: *Price v. National Accident Society,* 37 Pa. Super. Ct. 299; *Standard Life & Accident Ins. Co. v. Koen,* 11 Tex. Civ. App. 273; 1 C. J. 439.

When a person undertakes to perform the several duties of a hazardous occupation, though his undertaking is but temporary and casual, and under such circumstances or for so brief a period as to show no actual substitution of that occupation for his own, all of his acts, during the period over which the performance of these duties is distributed, do not necessarily pertain strictly to the hazardous occupation, but very many acts which he performs are acts to which no special hazard is attached, are not peculiar to such more hazardous occupation, and are common to people generally in different walks of life. If these same acts were performed as independent acts, and injuries should result during their performance, no penalty would accrue in the nature of a reduction of the insurance benefits. Insured in this case could, without taking charge of live stock, have taken passage on the caboose, paid his fare, remained seated within the car, and have been in the performance of the very act which he was, in fact, performing when injured, and, if then injured, could, without question, have recovered the full amount of his insurance. If the identical act complained of, then, is an act which he could have performed without penalty, if done as an independent act, surely it cannot be said, merely because he was at that particular time in charge of cattle being shipped to market, that this same act is so related to the more hazardous occupation that it should bar recovery by the reduction of benefits.

It follows that the benefits under the policy are not required to be reduced by reason of the fact that the insured was riding in a car, as he was, with other pas-

sengers regularly received, though he was at the time accompanying live stock to market.

It then becomes necessary to determine whether insured was, 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, so as to entitle his beneficiary to the $3,000 benefit.

From a reading of the clause as an entirety, we are constrained to hold that the words, "provided for the exclusive use of passengers," were intended to apply to the several conveyances named, as well as to a licensed elevator. It is true that no comma was placed before the word "provided," and, were the punctuation looked to alone, this proviso might be limited to elevators only; but, as is said in *Holmes v. Phenix Ins. Co.*, 98 Fed. 240: "The Century Dictionary tells us, what is common knowledge, that 'there is still much uncertainty and arbitrariness in punctuation.' It is always subordinate to the text, and is never allowed to control its meaning. The court will take the contract by its four corners, and determine its meaning from its language, and, having ascertained from the arrangement of its words what its meaning is, will construe it accordingly, without regard to the punctuation marks, or the want of them. The sense of a contract is gathered from its words and their relation to each other, and, after that has been done, punctuation may be used to more readily point out the division in the sentences and parts of sentences. But the words control the punctuation marks, and not the punctuation marks the words." See cases cited in 13 C. J. 535.

The very evident meaning and purpose of the clause referred to was to allow increased benefits, should injury occur while insured was riding as a passenger in those conveyances only which are exclusively used for passengers, and about which therefore the carrier or operator is required to throw all possible safeguards and protection to insure safe passage. The several con-

veyances named, we believe, were intended to be definitely described and limited, in kind, to those provided exclusively for passengers.

The caboose in this case cannot be said to have been used exclusively for passengers. Though it carried some passengers, and might therefore be said, in a limited sense, to have been a passenger car for that reason and to that extent, and though some particular passengers may have paid fare and may have been, unless riding under a special permit limiting the obligation of the railroad, entitled to hold the company to the same extent and liability as if they were passengers on any other railway passenger car or on a passenger train, still this car was nevertheless essentially a part of a train which was loaded with live stock, and, as a part of that train, was furnished for the purpose of carrying the train crew, their accessories, and the cattle tenders who accompanied stock and were riding under contracts, restricting the obligation of the company towards them as passengers.

Our court has held that a railroad company may limit its liability to passengers, riding in the caboose of a freight train, to the common-law liability, and is not liable in such case under the statute. *Chicago, B. & Q. R. Co. v. Mann*, 78 Neb. 541; *Chicago, B. & Q. R. Co. v. Troyer*, 70 Neb. 293.

Here the car was not used strictly as a passenger car, nor for the exclusive use of passengers, but as an essential part of the freight train, and for the use of the freight crew and cattle tenders. *Standard Accident Ins. Co. v. Hite*, 37 Okla. 305, 46 L. R. A. n. s. 986.

The car would therefore not be operated as a car used exclusively for passengers, but would be subjected to the jolting, jarring, switching, and other inconveniences necessarily attendant upon the operation of a freight train, and the character of its use would, in fact, directly affect and increase the risks and hazards of those passengers riding upon it.

The insured, moreover, was riding on a stock shipper's pass, and, under our decisions, was a passenger in a restricted and modified sense only (*Chicago, B. & Q. R. Co. v. Troyer, supra*); and it is our conclusion that he was not, when the accident occurred, "riding as a passenger in * * * a railway passenger car * * * provided for the exclusive use of passengers" within the meaning of that provision of the policy. It is our judgment that the conclusion reached in the former opinion is correct, and that the plaintiff is entitled to recover $1,000, and it is therefore ordered that the judgment and order taxing attorney's fees in the trial court be

AFFIRMED.

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

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UPDIKE GRAIN COMPANY, APPELLEE, v. ALBERT SWANSON, APPELLANT.

FILED JUNE 7, 1920. No. 21443.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: DELINQUENT PAYMENTS: PENALTY. Under a statute, providing that a penalty be added for all delinquent payments under the workmen's compensation act (Rev. St. 1913, sec. 3666, as amended), *held* that, where there is a reasonable controversy between the employer and the employee as to liability for certain instalments of compensation, the payments of such compensation do not become due, in the sense that they may become delinquent, until the obligation of the company is definitely ascertained or settled.

2. ——: ——: ATTORNEY'S FEES. Where a statute allows the employee to recover attorney's fees, in case an order for compensation is made in his favor, and in event the employer refuses to abide by the order, but appeals, and on appeal fails to reduce the award, *held* that, the power to allow attorney's fees being statutory, the court has no authority to allow them where the employee himself appeals, though by such appeal the award is increased; nor to allow fees where it is shown that the employer, upon the rendition of the award, instead of appealing, offers to pay it.

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

*Myers & Mecham,* for appellant.

*Gurley, Fitch, West & Hickman, contra.*

FLANSBURG, J.

Action to recover, under the workmen's compensation act (Rev. St. 1913, sec. 3666, as amended, Laws 1917, ch. 85, sec. 9½, and Laws 1919, ch. 91, sec. 4), a penalty, by reason of alleged delinquency in payment of compensation, and to recover attorney's fees. The trial court denied the relief, and Swanson, the petitioner, appeals.

The case is presented here on the transcript alone, showing the petition of Swanson, the answer of the company, and the decree of the court. No reply was filed, and the allegations of new matter in the answer, therefore, stand admitted.

Swanson, while an employee of the Updike Grain Company, was injured July 12, 1918. The company recognized its liability and paid to him his medical and hospital expenses, and $12 a week for a period of 17 weeks. On July 11, 1919, the company filed a petition with the compensation commissioner, praying that a definite award be fixed. The commissioner fixed the award at $12 a week for a period of 30 weeks, and, as the company had made payments for 17 weeks only, it developed, under this award, that the company was liable for 13 additional weeks, during a period prior to the rendition of the award, and which payments it had not, in fact, made. Swanson appealed to the district court, where the award was affirmed.

The company, it appears, was satisfied with and was ready and willing to abide by both the award of the compensation commissioner, when rendered, and the judgment of the district court affirming it, and offered payment at that time of the amounts determined to be due.

Swanson again appealed from the judgment of the district court to the supreme court, and on November 15, 1919, the supreme court increased the award by ordering payments of $12 a week for a period of 45 weeks over and above what had been allowed by the compensation commissioner and the judgment of the district court, making a total award of $12 a week for 75 weeks. *Updike Grain Co. v. Swanson,* 103 Neb. 872. Upon the filing of the mandate in the district court, the company paid all instalments, with interest, for the 13 and 45 weeks, as required under the increased awards.

The statute (Rev. St. 1913, sec. 3666, as amended, Laws 1917, ch. 85, sec. 9½, and Laws 1919, ch. 91, sec. 4) reads as follows: "Except as hereinafter provided, all amounts of compensation payable under the provisions of this article shall be payable periodically in accordance with the methods of payment of the wages of the employee at the time of the injury or death: Provided, fifty per centum shall be added for waiting time for all delinquent payments after 30 days' notice has been given *of disability.*" The words "of disability" were added by the amendment effective in July, 1919 (Laws 1919, ch. 91, sec. 4).

Did the instalments for the 13 and 45 weeks, provided for under the increased awards, become delinquent within the provisions of that statute?

The statute contemplates some sort of notice to the employer or knowledge of the duty required of him, and 30 days' opportunity to act, in order that he may perform the duty and avoid default and the resulting penalty. It is argued that no notice was required in this case, since the employer is shown to have been fully apprised of the injury and the disability resulting. We need not take up the question of notice, as we find that in no event was there any delinquency on the part of the company.

The company paid the medical bill and hospital expenses and instalments for 17 weeks. It does not ap-

pear that Swanson made demand or claimed to be entitled to further payments. On the other hand, it is the company that instituted the proceedings before the compensation commissioner for the purpose of procuring a definite determination of the amount due. The company did not, until the time when the award was made, have notice that it was liable for 30 instalments, instead of 17; nor can it be said that these additional instalments became due prior to the award, since the liability of the company until that time was uncertain. When Swanson appealed from the judgment of the district court, it is true the company was aware of the fact that he was claiming more than the district court had given him. What Swanson's exact claim at that time was, however, does not appear. It seems sufficient to say that all that could at that time be expected of the company was to offer payment of what the district court said was due. Whether that amount would be increased by the supreme court was not known. There was nothing definite, over and above the award for 30 weeks, upon which the company could act. The total amount of liability, or the number of instalments, which would in the end be required to be paid, was still undetermined.

It cannot be said that the company was in default of those payments, over which there was a reasonable controversy, and especially when the district court had decided that the company was liable for 30 weeks only. It cannot be said that these controverted instalments, the 45 additional instalments, became due until the decision by the supreme court allowing them was rendered, and the judgment entered accordingly in the district court. The company promptly offered payment of the award fixed by the compensation commissioner and the judgment of the district court, and, when the award was increased to 75 weeks in the supreme court, paid the amount in full. Under such circumstances, the company was not delinquent in its payments, nor could it be subjected to the statutory penalty.

It was not intended by this provision of the statute that an employer should comply with every demand of the employee at his peril, and in every case, when it is later proved that the employer was mistaken as to his liability, that he should be required to increase the award 50 per cent. and be penalized in that amount. The statute was not intended to prevent the employer from having a fair opportunity to be heard and to have his just controversies tried, but, as said in *United States Fidelity & Guaranty Co. v. Wickline,* 103 Neb. 21, the penalty is provided "to make it thereby reasonably certain that the payments would not be delayed for trivial reasons and the act be thereby nullified." To say that the employer has been delinquent in providing compensation carries with it the idea that he has failed to perform his duty. An instalment of compensation cannot become delinquent until it becomes due, and it cannot be said to be due until there is some reasonable certainty as to the amount and the number of payments to be made. *Cornell v. Maverick Loan & Trust Co.*, 95 Neb. 9; 18 C. J. 475.

The petitioner further claims to be entitled to attorney's fees. The right to tax attorney's fees is purely statutory. *O'Brien v. Industrial Ins. Department,* 100 Wash. 674; *State v. District Court of St. Louis County,* 129 Minn. 423; *Friedman Mfg. Co. v. Industrial Commission,* 284 Ill. 554. The statute (Rev. St. 1913, sec. 3666, as amended, Laws 1919, ch. 91, sec. 4) provides that, where the employer refuses to abide by the award of the compensation commissioner and appeals, but fails to reduce the award, the employee shall, in such event, be allowed to recover attorney's fees. The appeal in this case was not taken by the company, nor did it refuse to abide by any award made, and the provisions of the statute do not apply.

It is therefore ordered that the judgment be

AFFIRMED.

ALDRICH, J., not sitting.

JOHN D. DONELSON, APPELLANT, V. FRED H. MICHELSON, APPELLEE.

FILED JUNE 7, 1920. No. 21058.

1. **Fraud:** SALE OF LAND: MISTAKE OF VENDOR. A vendee prevented from inspecting the land conveyed to him by the mistake of the vendor in pointing out the wrong land may recover the damages sustained, although the vendor was not aware of the falsity of his representation, and there was no intent on his part to deceive, if the vendor had assumed the duty of pointing out the land, and the vendee, without knowledge of the true location, relied upon such representation.

2. ———: ———: ERRONEOUS INSTRUCTION. It was stipulated that, before closing the deal, the vendee in a land contract might inspect the property, situated in a distant county. He previously had held title to the land, but testified that he had never seen it. There was no direct evidence that he knew its character or location. In an action for damages for deceit of the vendor in pointing out the wrong land, and thus preventing the vendee from making the inspection, it was error to instruct the jury that they might find that, "by virtue of such ownership," the vendee had previous knowledge of the character and location of the land, as the mere fact that he had once owned it would not authorize that inference, in view of the uncontradicted testimony and circumstances to the contrary.

APPEAL from the district court for Hall county: JAMES R. HANNA, JUDGE. *Reversed.*

*Prince & Prince,* for appellant.

*T. O. C. Harrison* and *B. J. Cunningham, contra.*

DORSEY, C.

In September, 1915, plaintiff traded city property in Grand Island, Nebraska, for a quarter section of land in Chase county, Nebraska, belonging to the defendant Michelson. The exchange was evidenced by a written contract which contained the following provisions pertinent to this case:

"The said John D. Donelson is to go to Chase county, Nebraska, and examine said land, and the said Fred H. Michelson guarantees that there are eighty (80) acres, a trifle more or less, of good, level, tillable land and under cultivation and in one body on the said one hundred and sixty (160) acres of land, and not what is called or known as 'sandy land' but what is known as a 'sandy loam.' Within the next week from this date, that is, the week commencing with September 26, 1915, said John D. Donelson will go to said land, make his examination of said land and return, and if satisfied therewith then this trade to be completed. If not as reported and as above stated, and satisfactory to John D. Donelson, then the said Fred H. Michelson is to pay the railroad fare of the said John D. Donelson expended in making the trip to and from the said land for said examination, and the said John D. Donelson will report on or before the end of the week just mentioned."

After setting forth the written exchange contract, it is averred in the petition that one Niedfeldt, acting for the defendant, took the plaintiff to Chase county, and there met one Ryan, also an agent for the defendant, and that they together "took this plaintiff out and showed him a quarter section of land, 80 acres of which was under cultivation and in corn and of the kind of land as described in said contract, representing to the plaintiff that it was the identical piece of land which they proposed to sell him and as described in the agreement; that plaintiff relied upon all said statements, representations and acts of the defendant and his agents, and not knowing the falsity thereof, and so relying thereon, did purchase said land; that said statements, representations and acts of the defendant and his said agents, and each of them, were false and untrue and were known by them and each of them to be false and untrue at the time they were made, and were made for the purpose of deceiving the plaintiff and to induce him to purchase said land and to cheat and defraud him." It is further al-

leged that the land shown was not the tract for which the plaintiff was trading; that the latter was rough and unfit for cultivation, and was of the value of only $1,200, whereas, if it had been as represented, it would have been worth $3,500; and the plaintiff prayed judgment for the difference.

The defendant's answer set up the defense, in substance, that the contract required the plaintiff to make an examination of the land; that he went to Chase county for that purpose, made his examination without interference or persuasion on the part of the defendant or his agents, and on his return reported that he was satisfied, and concluded the trade.

There was a jury trial and a verdict for the defendant, and from the judgment dismissing his action the plaintiff appeals.

Counsel for the plaintiff advance the contention that, primarily, this is not an action for fraud or deceit, but for damages for breach of specific warranty as to the quality of the land. In our opinion, however, the pleadings clearly negative that contention. The defendant, it is true, represented the land to be of a certain character and quality, but, in another clause of the same contract, the plaintiff explicitly declared his intention not to rely upon the defendant's representation, and it was agreed that the contract should be binding only in the event that plaintiff should report after a personal investigation that he was satisfied. After having returned from an ostensible examination of the land and reported himself satisfied, the plaintiff manifestly would have been estopped to rely upon breach of warranty or misrepresentation as to the character or quality of the land, unless, through the defendant's fault, he had been prevented from making a full and fair examination. It is charged in the petition that the defendant, through the acts and representations of his agents, deceived the plaintiff by inducing him to believe he was inspecting the land he was trading for, when, in fact, it was a dif-

ferent tract. The ultimate fact to be determined was not whether the land traded for was as represented, but whether the defendant's conduct had operated to prevent the plaintiff from inspecting it.

Counsel for the plaintiff insist that the verdict returned in favor of the defendant was not warranted by the evidence, but that all of the elements essential to the plaintiff's right to recover were established. In order to determine that question, a brief review of the evidence will be necessary.

By the terms of the written contract, the plaintiff was to go to the land, make his examination of it, and report whether he was satisfied. It was not stipulated in the contract that the defendant was to go or to send an agent with him. It is undisputed, however, that at the time the contract was entered into the plaintiff insisted he would not go out alone to view the land, and it was arranged between the plaintiff and the defendant that Niedfeldt should go.

After their arrival in Chase county, Niedfeldt procured one Ryan to drive out with them and help locate the land. The plaintiff was without information as to the location or boundaries of the land; he relied upon Niedfeldt to locate and point it out to him. Niedfeldt, in turn, relied upon Ryan, whom he supposed to have sufficient local knowledge to guide them. Ryan showed them a tract with about 80 acres of corn on it, which was not the land for which they were looking, but adjoined it on the west. From the fact that it had about the acreage of cultivated land on it that the contract called for, Niedfeldt assumed that it was the tract they had come to see, and, acting under that mistake, but without any intention to deceive, he made remarks which imparted to the plaintiff the belief and assurance that the land they were viewing was the tract for which he was trading. The effect of this was to prevent him from making any further investigation, and to cause him to

return home without having inspected the land he was trading for.

The evidence clearly establishes the absence of any intent on the part of Niedfeldt or Ryan to deceive the plaintiff, and the case is one of mistake rather than fraud. The conduct of Niedfeldt and Ryan amounted, in substance, to an innocent misrepresentation as to the location of the land, which was, nevertheless, as injurious to the plaintiff as if it had been intentional. If Niedfeldt was acting as the defendant's agent, charged with the duty of locating and pointing out the land to the plaintiff, under the rule adopted in this state that averment and proof of *scienter* are unnecessary, and that it need not be shown, in an action for deceit, that the false representations were made with knowledge of their falsity on the part of the person making them, we think that the defendant would be liable, regardless of the fact that the wrong land was pointed out mistakenly rather than purposely. *Omaha Electric Light & Power Co. v. Union Fuel Co.*, 88 Neb. 423; *Hilligas v. Kuns*, 86 Neb. 68. Such has been the holding in the following cases from other states: *Lawson v. Vernon*, 38 Wash. 422, 107 Am. St. Rep. 880; *Bradford v. Adams*, 73 Wash. 17; *Gunther v. Ullrich*, 82 Wis. 222, 33 Am. St. Rep. 32.

There was no controversy in the evidence in this case except upon the question whether Niedfeldt was acting as the defendant's agent in showing the land. That issue was submitted to the jury under proper instructions, and the court correctly stated the law with reference to the liability of the defendant for the consequences of Niedfeldt's conduct in pointing out the wrong land by mistake, in case the jury should find that he was the defendant's agent.

The plaintiff complains, however, that the trial court was in error in submitting to the jury the question whether the plaintiff, at the time he went with Niedfeldt to view the land, had prior knowledge of its quali-

ty, character, and boundaries. The only evidence from which such knowledge might have been inferred was that the plaintiff had, some time before the transaction involved in this case, held title to the land in Chase county. In answer to the question how he had acquired it, he testified that he had traded a pool hall for it, and, when asked if he had ever seen it, he replied: "No, sir; only the way it was described to me."

The court instructed the jury that, "if by virtue of such ownership he knew the quality, character and boundaries thereof, together with its value, then any false representation made by the defendant to him as to the above would not be grounds for an action and he could not under such circumstances claim that he was deceived thereby." All the circumstances surrounding the negotiations for the trade negative the theory that the plaintiff had prior knowledge of the location or boundaries of the land. He testified that he had never seen it, and, as a condition of the bargain, the defendant assented to his requirement that he should have the right to inspect the land before concluding the trade. The only question is whether the plaintiff was charged with the duty of finding it for himself, or whether Niedfeldt, as the defendant's agent, was under the obligation to locate and point it out to him. That being the situation, it was not, it seems to us, competent for the jury to infer from the mere fact that he had once held title to the land that he knew its location and boundaries. Yet the instruction complained of permitted the jury to find that he had such knowledge "by virtue of such ownership," in the face of positive testimony and circumstances clearly pointing to the contrary. In this, we think, the court erred, and the error must have been prejudicial to the plaintiff.

We therefore recommend that the judgment be reversed and the cause remanded for further proceedings.

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

REVERSED.

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GEORGE SCHMELZEL, APPELLANT, v. E. J. LEECY, APPELLEE.

FILED JUNE 7, 1920. No. 21068.

1. **Appeal:** DIRECTED VERDICT. In determining whether a peremptory instruction was justified, the party against whom the verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence.

2. **Brokers:** ACTION FOR COMMISSIONS: QUESTION FOR JURY. In an action by a broker for commissions for a sale of real estate, the issue whether the plaintiff's efforts were the efficient procuring cause of the sale is ordinarily for the jury.

3. ———: ———: DIRECTED VERDICT. Where, in a broker's action for commissions, there was evidence tending to show that, after initiating the negotiations with the purchaser and bringing the parties together, the plaintiff, with the defendant's knowledge and without any revocation of his authority, continued his efforts to effect a sale until the land was sold, the fact that the sale was concluded through the medium of another broker will not warrant the trial court in holding, as a matter of law, that the plaintiff was not the efficient cause of the sale, and in withdrawing the case from the jury on that ground.

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

*John Wiltse* and *James E. Leyda,* for appellant.

*Kelligar, Ferneau & Gagnon, contra.*

DORSEY, C.

This is an action by a broker to recover a commission for the sale of land. The court directed a verdict for the

defendant, and from the judgment dismissing his action the plaintiff appeals. The action is founded upon a written contract authorizing the plaintiff to sell the land for $125 an acre, and providing that, if the plaintiff should sell the land or furnish the defendant a purchaser therefor, he should be entitled to a commission of $250.

Shortly after the contract was executed, the plaintiff, who was a real estate agent in Falls City, Nebraska, spoke to J. W. Neeld about the defendant's land and took him out to see it. The next day the defendant and the plaintiff met Neeld at the plaintiff's office and talked with him about buying the place. In this conversation the defendant expressed his willingness to accept $23,000, instead of $23,125, at which the land was listed, and the plaintiff agreed to reduce the commission specified in the contract to $200. Mr. Neeld, however, stated that he wanted to look around before concluding the deal, and it was agreed that he might have a few days' time within which to make up his mind. A contract embodying the terms tentatively agreed upon was left by the defendant in a local bank, with directions to turn it over to Mr. Neeld, upon his making the first payment provided therein. Along with the contract the defendant deposited his check for $200, to be delivered to the plaintiff when the deal should be closed and the contract taken up by Mr. Neeld.

A few days later the defendant inquired of the plaintiff, by telephone, whether Neeld had concluded to buy the land, and the plaintiff replied that he had not, and that he was still looking around. With regard to this telephone conversation occurs the principal conflict in the testimony. The plaintiff testified that the defendant, when advised that Mr. Neeld had not yet decided to buy, said that thereafter he would not sell the land for less than $125 an acre. The defendant, on the other hand, testified that he told the plaintiff that the

deal was off, intending not only to withdraw his offer to reduce the price, but to terminate all further negotiations. Whatever may have been the purport of this conversation, the plaintiff informed Neeld that it would take $125 an acre to buy the land, and continued his efforts to induce him to make the deal. In the meantime the defendant decided to lease the land for the ensuing year, and entered into negotiations to rent it to one Zimmerman.

About three weeks, we infer, after the making of the contract sued upon, the defendant and Zimmerman went to the office of I. B. Whitaker, a real estate agent in Falls City, to have a lease drawn up. Mr. Neeld was in Whitaker's office, inquiring about farms for sale, when they came in. Having no one in the office to operate the typewriter, Whitaker suggested that the defendant go to another office to have the lease drawn up. After he left the office, Whitaker remarked to Neeld that he had made a mistake not to buy that farm, and Neeld told Whitaker to call the defendant back and see if it could not be bought. Whitaker, accordingly, went after the defendant, found that he was willing to sell, and came back and told Neeld the farm could be bought. A contract was immediately drawn up, and the land sold to Neeld for $125 an acre. The defendant paid Whitaker a commission for making the sale.

The plaintiff's contract was that he should sell or furnish the defendant a purchaser for the land. In order to entitle him to the compensation provided in the contract, he must show performance on his part; in other words, that he was the efficient, procuring cause of the sale. The trial court took the view that the evidence fails utterly to support that hypothesis, and that it shows, as a matter of law, that the plaintiff was not such procuring cause.

The peremptory instruction in favor of the defendant can be upheld only upon the theory that, if the case had been submitted to the jury, and the jury had adopted

the plaintiff's view of every controverted issue of fact, and had drawn every inference favorable to the plaintiff that reasonably could be deduced from the facts in evidence, proof of some essential element of the plaintiff's cause of action would still be wanting. In this case, accordingly, the jury, if they had adopted the plaintiff's version of the facts, might have found that he had a valid contract of employment as agent to sell or to find a purchaser for the property; that he introduced to the defendant the man who finally bought the property; that the plaintiff at no time abandoned the employment, or gave up trying to induce the purchaser to buy, but continued his exertions down to the very day of the sale; that, with full knowledge of the plaintiff's efforts, the defendant did not revoke or terminate his authority, although, after he was informed in the telephone conversation that Neeld had not yet decided to buy, he insisted that he should have $125 an acre for the land; and that, until Whitaker mentioned the land to Neeld on the day it was sold, no agent other than the plaintiff had approached him on the subject.

Viewing the evidence from the plaintiff's standpoint, the jury might have concluded that, after the plaintiff's efforts had created a favorable disposition in Neeld's mind, the sale was finally made, not through the influence of Whitaker, but as the result of the accidental circumstance that Neeld happened to overhear the defendant speaking about leasing the land in Whitaker's office, and saw that he must act at once or lose his chance to buy the land.

The controlling question, therefore, is whether, under that state of facts, the plaintiff's right to his commission will, as a matter of law, be defeated by the fact that another agent, through a fortuitous circumstance arising without design or effort on his part, was enabled to intervene and effect the sale. Counsel for the defendant rely upon *Higinbotham v. McKenzie,* 88 Neb. 323, in which this court, in the syllabus, has said: "When the

owner of real estate authorized several respective brokers or agents to sell or exchange the same, but gives neither an exclusive agency, the agent or broker who actually effects the sale or exchange is entitled to the commissions. The agent under such contract who negotiates with a purchaser, but does not effect a sale, cannot recover commissions."

In that case the land had been listed by the owner with several brokers, among them the plaintiffs and another firm to which the defendant had paid the commission for making the sale. The plaintiffs sued the owner, claiming that the exchange of properties had been effected through their efforts. The issue was submitted to the jury, who returned a verdict for the defendant owner.

It is contended by counsel that the language of the syllabus, "The agent or broker who actually effects the sale or exchange is entitled to the commissions," and that the agent "who negotiates with a purchaser, but does not effect a sale, cannot recover commissions," means that, regardless of any preliminary efforts put forth by an agent, or of the influence of such efforts in the chain of causation leading to the final consummation of the sale, he is not entitled to his commission, unless he participates in the act or contract by which the sale is finally evidenced, and that if, as did Whitaker in this case, another agent intervenes and consummates the sale, the latter is to be conclusively regarded, in law, as the procuring cause.

We cannot so interpret the language of *Higinbotham v. McKenzie, supra,* in view of the issues presented therein. The question whether the plaintiffs, or other agents, were the procuring cause of the sale had, in that case, been submitted to the jury, and the jury had found against the plaintiffs. Upon their appeal, they argued in this court that they were entitled to recover upon proof merely that they had brought the defendant and the purchaser together, and that the parties afterwards had made the exchange of properties. This court held

that another element must be shown, namely, that the plaintiffs, through their efforts, had "effected the exchange," and it was to that point that the statement of law in the syllabus was directed.

This court did not undertake to define and limit the meaning of the word "effect," or to say that it could include only the bringing of the negotiations to a conclusion by the execution of a contract, excluding every preliminary step. It was not intended, in that case, to lay down the ironclad rule that, in every case where a commission for effecting a sale was claimed, the court should look only to the termination as evidenced by the actual contract of sale; nor was it held that, whenever the agent, however diligent and effective his work may have been, had been circumvented or superseded at the end by another agent, it would be the duty of the court to direct the jury to find against him.

We fully agree with the proposition stated in *Crain v. Miles,* 154 Mo. App. 338: "Where an agent sets on foot a sale of property which wholly fails, and after such failure another agent steps in and makes the sale to the parties negotiated with by the first agent, if the first agent has shown his inability to make the sale, and even though there is a possibility that the work of the first agent made some impression or had something to do with the sale," the first agent is not entitled to compensation. If, without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commission, although what he has done proves of use or benefit to the principal, who afterwards consummates the sale with the same purchaser through another agent. *Sibbald v. Bethlehem Iron Co.,* 83 N. Y. 378; *Livezy v. Miller,* 61 Md. 336.

It is equally true, however, that, if the sale is directly attributable to the broker originally employed, his right to commissions cannot be defeated by the mere fact that the transaction was finally consummated through

the medium of another broker. *Masters v. Hunt*, 197 S. W. (Tex. Civ. App.) 219; *Cunliff v. Hausman*, 97 Mo. App. 467. We are clearly of the opinion that neither the fact that the negotiations were commenced by one broker, nor the fact that they were closed by another, is, as a matter of law, alone decisive of the issue, but that where the plaintiff, as in the instant case, shows, by the evidence adduced in his behalf, that he introduced the purchaser to the defendant, and at no time abandoned his efforts to make the sale, and that the defendant, with knowledge of his efforts and without terminating his authority, concluded the sale through another agent, the controversy as to whether the plaintiff was the efficient, procuring cause of the sale is for the jury. *Votaw v. McKeever*, 76 Kan. 870.

We recommend, therefore, that the judgment of the court below be reversed and the cause remanded.

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

REVERSED.

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ALMEDA BERENICE YATES, APPELLANT, V. MARION WAYNE YATES, APPELLEE.

FILED JUNE 7, 1920. No. 20768.

1. **Deeds:** CONSTRUCTION. The rule in Shelley's case was brought to this state as a part of the common law, and does not conflict with, and is not abrogated by, our statute (Rev. St. 1913, sec. 6195) providing that the court shall carry into effect the expressed intent of the parties.

2. ———: ———. Where the grantor in a deed conveys real property to a person for life, with a limitation over to the "heirs" or "heirs of the body" of such person, the words "heirs" or "heirs of the body" have a technical meaning, and will be so interpreted as words of limitation, unless the context or other expression in

the deed shows that a remainder was intended to go to certain described individuals, and that the words "heirs" or "heirs of the body" refer to them in aid of other description and were not intended to be used in their technical sense.

3. ———: ———. Where the limitation over is to "the heirs begotten of the body" of the person taking the life estate, these words, which at common law would create an estate tail, create here a conditional fee only, so that the tenant in tail, after issue born, is able to bar both the inheritance and the reversion by a deed.

4. ———: ———. Where property is conveyed by deed to a person for life and "remainder in *fee simple* to the heirs begotten of the body" of such person, it is evident that the words "heirs begotten of the body" cannot have been used in their technical sense so as to create a conditional fee, since an intention is expressed that those persons, taking the remainder, shall take in "fee simple" and, if they take in fee simple, they could not, at the same time, be limited to a conditional fee. The words "heirs begotten of the body" *held*, in the light of the context, to have been used as words of purchase and to have referred to the immediate children of the first taker.

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

*Thomas, Vail & Stoner*, for appellant.

*H. D. Landis* and *McKillip & Barth, contra.*

FLANSBURG, C.

Suit to quiet title by the plaintiff as grantee under a deed. Case dismissed, and plaintiff appeals.

The deed in question was made and delivered to the plaintiff in the year 1906 when she was a single woman Her name was at that time Almeda Berenice Welty Since then she has been married, her name now being Yates, and her son by this marriage is the sole defendant in the case.

By the terms of the deed in question the premises were conveyed to plaintiff, then Almeda Berenice Welty "for life * * * to have and to hold the same to the said Almeda Berenice Welty during her natural life

remainder in fee simple to the heirs begotten of the body of the said Almeda Berenice Welty," and it was further provided that "we (the grantors) do covenant with the said Almeda Berenice Welty and with her heirs above specified that we are lawfully seized of said premises."

The plaintiff contends that by operation of the rule in Shelley's case she has a fee simple title to the property covered by the deed.

It is strongly argued by defendant's counsel that the rule mentioned has long outlived its usefulness, is not a part of the law of this state, is not in accord with the genius of our institutions, is an arbitrary rule which violates the intention of the parties, and that, in fact, it has been abrogated by our statutes and decisions.

The rule in Shelley's case has been generally recognized by the courts of other states as having been brought to this country as a part of the common law, and it has been enforced by those courts except where the rule has been modified, or abolished, or its operation interfered with, by express statutory enactment. 18 C. J. 319.

As originally stated in the decision itself (*Wolfe v. Shelley,* 1 Coke, 93b, 76 Eng. Rep. Reprint, 206, 234), it was a rule of law that "when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase."

Words of "limitation" were understood as terms describing the extent or quality of the estate conveyed, while words of "purchase" were such words as would disclose an intention of the grantor or devisor to describe certain particular individuals who should take an estate direct from him and should not derive their estate as an inheritance from the first taker.

In all cases, then, where the words "heirs" or "heirs of the body" were not further qualified or explained, by the context in which they were used, so as to indicate an intention to designate particular individuals or a particular class of individuals to be determined, who should take an estate direct, and not by inheritance from some person to whom the estate had been first conveyed, such words were construed as words of limitation.

This gave a legal definition to those terms. They were technical terms, and were taken to be used in their technical sense unless it could be gathered from other expressions in the instrument that they were intended to be used otherwise.

Opponents of the rule in Shelley's case argue that, when a grant is made to a person for life, and at his death to his heirs, it is apparent a life estate only is intended to be conveyed to the first person, and that this express intention should be preserved. However, it is also apparent that the estate given to such person was intended, after his death, to be handed down from him to his heirs in the ordinary line of descent. To give effect to both intentions, therefore, would hold the fee in abeyance until the death of the first taker, and then an inheritance springing from him to his heirs, when he, in fact, had been possessed of a life estate only and had never been seised of a fee title which could descend from him. Such an estate was then, and is even now, impossible to create. If the property is to descend from the first taker to his heirs as an inheritance under the law of descent, obviously he must first be vested with a fee, and there is no estate known in the law as an inalienable fee. It is thus apparent that, in order to carry out the general intention, expressed in the instrument, to the effect that the property shall descend from the first taker to his heirs through the process of an inheritance from him, it is found necessary to construe his estate as a fee title, though it may be denominated in the instrument as a life estate only.

That an estate cannot be devised to a person and then be required to be handed down by such person to his heirs has been decided by our court in *Loosing v. Loosing,* 85 Neb. 66.

When, therefore, the remainder was to descend to the heirs of the first taker, an ambiguity resulted, for both intentions of the devisor or grantor to create a life estate only and then let the property descend by inheritance from such life tenant could not, under the law, be carried out. The rule in Shelley's case determined simply which intention should be allowed to control in those instances where the instrument left that matter in ambiguity.

Had the rule in Shelley's case, on the other hand, been that these terms, when used in their technical sense, should always be understood as words of purchase, that would have sacrificed the general intention to the particular intention; for then, instead of the estate descending from the first taker to his heirs in the ordinary line of inheritance, it would have gone equally to all the particular descendants, children, grandchildren, and perhaps great-grandchildren, living at his death, and passed on through those particular individuals as sources of new lines of descent.

"The rule in Shelley's case is not really an exception to the rule that the intention of the testator must guide in interpreting a will, but only sacrifices a particular to a general intent." Note, 29 L. R. A. n. s. 1047, and cases cited.

In *Bowen v. Lewis,* L. R. 9 App. Cas. (Eng.) 890, Earl Cairns explains the matter thus: "You have an indication of a general intention, which you gather from the whole of the will, that the estate shall travel through the issue generally of a certain person. You have that accompanied, no doubt, with a particular intention that the first taker shall take an estate for life; but in order to give effect not to a technical construction, which would limit the first taker to a life estate, but to give effect to

the general intention of the testator, and to make the estate travel through the issue generally, as the testator intended it to do, you apply the rule in Shelley's case. Otherwise, if you do not do that, the consequence is that the only other resource which you have is to give the first taker in the series of issue an estate by purchase, in which case it will not go through the issue generally, but only through the descendants of that particular head of the issue."

It is said in *Kirby v. Broaddus,* 94 Kan. 48: "There is a reasonable basis for saying that the real intention of the grantor * * * is that upon the death of the grantee the new owners shall derive their title by inheritance. He obviously has in mind no particular beneficiaries of his own grant. He is content that the law, as it shall exist when the grantee dies, whatever it may be, and however it may have been changed since the execution of the deed, shall determine the disposition of the title. His essential purpose is as the rule interprets it—to vest the fee in the grantee, but to disable him from alienating it. This he cannot do, and the attempted restriction is ineffective."

In determining whether the rule in Shelley's case is applicable, it is first necessary to determine the intention with which the terms have been used; that is, whether or not they were used in their technical sense. The rule in Shelley's case is primarily based upon intention. When the rule, which had been previously announced and recognized before Shelley's case was decided, was, before that decision, referred to in the case of *Perrin v. Blake,* 10 Eng. Rul. Cas. 689, 695, Blackstone, commenting upon it, said: "I conceive that the great and fundamental maxim, upon which the construction of every devise must depend, is 'that the intention of the testator shall be fully and punctually observed, so far as the same is consistent with the established rules of law, and no further.'" And further, in that same connection, in answer to an argument that a better

rule would be to determine the intention of the testator alone and entirely from the instrument and without regard to rules of law, he said: "It were better that the statute of wills should be totally repealed than be made the instrument of introducing a vague, discretionary law, formed upon the occasion from the circumstances of every case; to which no precedent can be applied, and from which no rule can be deduced."

Mr. Fearne, in his work on Contingent Remainders (vol. 2, p. 221), says: "Hargrave has justly observed that the rule cannot be treated as a medium for discovering the testator's intention, but that the ordinary rules for the interpretation of deeds should be first resorted to; and that when it is once settled that the donor or testator has used words of inheritance, according to their legal import, has applied them intentionally to comprise the whole line of heirs to the tenant for life, has made him the terminus, by reference to whom the succession is to be regulated, then the rule applies."

It seems clear to us, therefore, that this rule does not operate in conflict with, and has not been modified by, our statute providing that: "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 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." Rev. St. 1913, sec. 6195.

The tendency of the rule in Shelley's case is to prevent estates from being held in abeyance and to throw land into commercial channels one generation sooner. We find many judicial expressions of approval of the rule, declaring it to be entirely in accord with American institutions and ideas. *Doyle v. Andis*, 127 Ia. 36.

The cases of *Albin v. Parmele*, 70 Neb. 740, and *Moran v. Moran*, 101 Neb. 386, are relied upon by the defendant

as establishing an abrogation, in part at least, of the rule in question.

In the case of *Albin v. Parmele,* the court decided the rule did not apply when inconsistent with the expressed intent of the parties. In that case there was an express prohibition against alienation by the first taker, who was given the right to use and enjoy the property only, and there was a limitation over to his "heirs," who at one place in the will were described as his "issue." The court determined that the limitation over was intended to be to the children of the life tenant, and not to his heirs generally. In that case, we might say, the word "issue" and the word "heirs" seem to have been used synonymously, and the word "issue" as ordinarily construed is a word of purchase. 18 C. J. 328. The intention of the testator being ascertained from the terms of the will, and it appearing that the word "heirs" was used *descriptio personæ* to designate the issue or children of the life tenant, the rule in Shelley's case, therefore, would not apply.

In the case of *Moran v. Moran, supra,* it appears that the court, by reason of the express restrictions placed upon the life tenant, confining him to the use of the property and expressly restricting alienation, allowed the particular intent of the grantor to create a life estate, to overcome the general intent that the estate should descend from the life tenant to his heirs. To allow that to be done is contrary to the rule stated. The meaning of the word "heirs," whether it was used as a word of limitation or of purchase, and, if a word of purchase, what particular individuals were intended to be described by such term, is not discussed in the opinion, nor did the court pass upon that necessary question.

On motion for rehearing in that case the court said: "In our former opinion it was said: 'We might concede that the rule in Shelley's case would continue and be the law in Nebraska, "unless abrogated by statutory enactment." ' If the discussion in that opinion follow-

ing this statement indicates that we consider that the rule in Shelley's case is abrogated in whole or in part by the 'intent' statute (Rev. St. 1913, sec. 6195), we desire to modify that opinion in that respect, as it is not necessary in this case to determine that question."

We therefore feel that these decisions are not controlling and have not squarely passed upon the question of whether or not the rule in Shelley's case exists in this state.

As to the general recognition of this rule in other states, we call attention to the following citations: *Kirby v. Broaddus,* 94 Kan. 48; *Bails v. Davis,* 241 Ill. 536; *Newhaus v. Brennan,* 49 Ind. App. 654; *Woodford v. Glass,* 168 Ia. 299; *Waller v. Pollitt,* 104 Md. 172; *Hughes v. Titterington,* 168 S. W. (Tex. Civ. App. 1914) 45; *Williams v. Blizzard,* 176 N. Car. 146; and see 18 C. J. 319.

Giving recognition to the rule, then, since we must hold that it exists as a rule of law in Nebraska, what was the intention of the grantor, in the deed in the present case, when he used the words "remainder in fee simple to the heirs begotten of the body of Almeda Berenice Welty," and warranted the title "to the heirs above specified?"

It is the contention of the plaintiff that the deed created an estate tail, limited under our law to a conditional fee, and that by the birth of issue a fee title absolute vested in the plaintiff.

At common law estates limited to the heirs of the body of the grantee were known as conditional fees, by reason of the condition that, should the grantee die without the particular heirs, the land would revert to the grantor. As soon as issue was born, the condition being accomplished, title vested in the grantee, and he then had power to convey a fee title, cutting off, not only the rights of the issue, but the right of reverter to the grantor. However, even after issue was born, should the grantee die without leaving any issue or lineal descend-

ants, and without having made conveyance, the title reverted to the original grantor or his heirs.

It then became the practice for the grantee, upon issue being born, to make a conveyance and then repurchase from the person to whom he had conveyed, thus obtaining a title in fee simple in himself, which would descend to his heirs generally, instead of to his lineal descendants, and the right of the possibility of reverter of the estate to the grantor would also be foreclosed. To put a stop to this practice the statute *de donis* was enacted, providing that an alienation of the estate by the tenant in tail would carry the life interest of such tenant only, and would not destroy the right of inheritance to lineal descendants, nor prevent a reverter in case of the failure of issue.

The statute *de donis* was later, by court decision, rendered practically ineffective, and a disposal of land, so as to defeat the entail, was allowed through the process of what were known as fines and recoveries.

The statute *de donis,* preventing alienation of estates, repudiated at common law, is also contrary to the spirit of our institutions and cannot be held to be a part of the law of this state. In Iowa it has been expressly so held, and a conditional fee results in the place of an estate tail. *Pierson v. Lane,* 60 Ia. 60; *Kepler v. Larson,* 131 Ia. 438. And in Kansas a similar result is obtained by a holding that the common law, as taken by that state, recognized the right of alienation by the tenant in tail. *Ewing v. Nesbitt,* 88 Kan. 708.

The reasoning in those cases is sound, and it is our opinion that words which would at common law create an estate tail under the statute *de donis* would in this state create a conditional fee only; in other words, a grantor may, by proper terms, create an estate to descend to the lineal descendants of the first taker, and, upon failure of issue, provide a reverter to such grantor or his heirs. The title holder would, however, have power to alienate the property, after birth of

issue, so as to bar both the inheritance and the reversion.

The question, then, is whether the deed in this case created such a conditional fee in the plaintiff. The *habendum* clause in the deed in question recites "remainder in *fee simple* to the heirs begotten of the body of the said Almeda Berenice Welty." Our statute (Rev. St. 1913, secs. 6191, 6192) provides that the term "heirs" is unnecessary to create an estate of inheritance, and that every conveyance of real estate shall pass all the interest of the grantor therein unless a contrary intent can be reasonably inferred from the terms used. At common law the word "heirs" was necessary to create an estate of inheritance. Unless that term was used the grantee took a life estate only. By our statute the title passes in fee simple from the grantor unless a reservation can be inferred from the terms used in the deed. The use of the term "remainder in fee simple" both negatives the fact that the grantor intended to retain a reversionary interest and, furthermore, affirmatively expresses an intention that the "heirs begotten of the body of Almeda Berenice Welty" shall take the full title, and not one limited to lineal descendants. If these heirs take in fee simple, and if there is no reversion, then, obviously, the term "heirs begotten of the body" was not used in its technical sense, and cannot be construed as creating a conditional fee.

Those who are to take after the life estate are confined, by the terms of the deed, to the heirs of the body, a special class of heirs, and, if these heirs were to hold as tenants in fee simple, the land would descend from them and their general heirs, and in such event there would not be a succession from generation to generation to the same special class of heirs as that prescribed to take after the life tenant. If the heirs of the body of Almeda Berenice Welty were to take as tenants in fee simple, this would be neither a fee tail nor a fee simple in the first taker, but the heirs of her

body would constitute an original stock; that is, they would take by purchase, and not by descent. It is so held in the following cases: *Tucker v. Adams*, 14 Ga. 548; *Stephenson v. Hagan*, 15 B. Mon. (Ky.) 282; *Ætna Life Ins. Co. v. Hoppin*, 214 Fed. 928, and, also, 249 Ill. 406.

In the case of *Tucker v. Adams, supra*, where the limitation over was to the heirs of the body in fee simple, the court said: "Now, if the persons intended to take were intended to take in fee simple, they could not have been intended to take in fee tail—to take as 'heirs of the body.' Therefore the words, 'heirs of the body,' were not intended to have their ordinary legal import. What other import can they have? They cannot have the import of the words, 'heirs general.' * * * If they cannot have the ordinary legal import of the words heirs of the body, nor the import of the words heirs general, it follows that they cannot have any import which implies persons who are to take by descent, but must have an import which implies persons who are to take by purchase."

Treating the terms used in the instant case, then, as words of purchase, what particular individuals or class of individuals were the words "heirs begotten of the body of the said Almeda Berenice Welty" intended to designate?

We are of opinion that the words "heirs begotten of the body" were intended to describe children—those heirs only who were the immediate offspring. They are the only heirs, when the expression is taken in its literal, and not technical, sense, who are begotten of her body. We find such words have been so construed in other cases when the context of the deed was such as to show that they were used, not in their technical sense, but were used as words of purchase; and we take it that the words "fee simple," as used in this deed, have that effect.

In the great mass of cases upon this subject, the words "heirs of the body" and "heirs of the body begotten," used in their technical sense, and where there is no explanatory context, are used indiscriminately, and are taken to indicate indefinite succession by inheritance. "Heirs of the body begotten" was the term used in the instrument upon which Shelley's case was decided.

Where, however, a remainder is limited to the heirs begotten of the body of the life tenant, and where the context in the deed demonstrates that these terms are used as words of purchase, they are, in many cases, held to show an intention on the part of the grantor to include the children only of the life tenant, and not all lineal descendants to be determined as a class at the death of such life tenant. *Stephenson v. Hagan, supra; Tucker v. Adams, supra; Granger v. Granger,* 147 Ind. 95; *Ault v. Hillyard,* 138 Ia. 239; *Sullivan v. McLaughlin,* 99 Ala. 60; *Fletcher v. Tyler,* 92 Ky. 145; *Rogers v. Rogers,* 3 Wend. (N. Y.) 503; *Reeves v. Cook,* 71 S. Car. 275.

We are therefore of opinion that plaintiff is possessed of a life estate only, with a limitation over to her children upon her death.

The deed was delivered when Almeda Berenice Welty was a single woman. The provision limiting the fee simple title to her children obviously contemplated children that should be born to her thereafter in case she should marry. The enjoyment of the estate by such children was postponed until after her death. The remainder is not to be construed as a limitation to those children only, as a class, who should be living at her death, but, as a remainder to such children as should be born to her, as the particular individuals who are objects of the grant. The defendant, then, has a vested remainder, subject to be opened at the birth of each succeeding child, so that afterborn children would take

as tenants in common with the defendant, and subject to the plaintiff's life estate.

We are of opinion that plaintiff should not be allowed to prevail in this action, even if she were possessed of a conditional fee. If she had such an estate, she no doubt could convey a fee title, but should she fail to convey, and should die intestate, seised of such an estate, and leaving lineal descendants, they would be entitled to inherit. Her action is not based upon title derived through a conveyance made by her which would carry a fee, but her action is based upon her own interest in the deed itself, and is brought against the heirs to foreclose their right of inheritance. This would allow her both to keep the estate and to deny her descendants the right to inherit, in case of her death, in preference to her heirs generally, and would destroy the possibility of reverter to the grantor, even though she should make no conveyance and should die seised of the property. Such an action, certainly, between the life tenant, as such, and those entitled to the inheritance, could not be maintained.

For the reasons given, we are of opinion the case should be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

ALDRICH, J., not sitting.

LETTON and ROSE, JJ., dissenting.

We dissent from that part of the opinion holding that the rule in Shelley's case is in force in this state notwithstanding the Nebraska statute relating to the construction of instruments conveying real estate and making it "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."

If, as the majority opinion holds, the intent statute does not have the effect to abrogate the rule, then in our opinion the next legislature may well consider whether Nebraska should join the majority of the states and specifically and definitely make an end of it.

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AUSTIN E. DODDS, APPELLEE, v. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JUNE 7, 1920. No. 20921.

1. **Appeal:** VERDICT: REVIEW. The rule that a verdict will not be disturbed when there is evidence tending to support it does not apply where the verdict is opposed to the undisputed physical facts of the case, or is in flat contradiction of recognized physical laws, and where the testimony presented, taken as a whole, is capable of no reasonable inference of such a state of facts as would allow the plaintiff to recover.

2. **Carriers:** INJURIES TO PASSENGER: NEGLIGENCE. Where a passenger alights from a moving street car at a point where it does not customarily discharge passengers, and, without stopping to look or listen, immediately passes behind it so as to suddenly emerge and come in contact with, and be injured by, a car passing in the opposite direction, he is guilty of negligence, and he has no right to assume that, at such place, the motorman on the opposite track will so have his car under control as to be able to make an immediate stop in anticipation of the discharge of passengers at that place.

3. **Negligence:** COMPARATIVE NEGLIGENCE: QUESTION FOR COURT. In an action for damages caused by the alleged negligence of the defendant, where it is shown beyond reasonable dispute that the plaintiff's negligence is more than slight as compared with that of the defendant, the case should not be submitted to the jury, and it is the duty of the court to enter judgment of dismissal.

4. **Evidence:** NEGATIVE TESTIMONY. When there is positive and substantial affirmative testimony by a number of witnesses that a gong was sounded, the fact that there is testimony by one or more witnesses that they did not hear the gong and that it did not ring does not authorize that question to be submitted to the jury,

where it is shown that the attention of such witnesses was diverted at the time the gong is said to have rung, and when their position, mental condition and surroundings were not such as would raise a presumption that they would have heard it if it had sounded. Before their negative testimony is entitled to weight, it must appear that they had such knowledge as would justify them in speaking affirmatively in denial of the fact.

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

*John L. Webster* and *William M. Burton,* for appellant.

*D. L. Johnston, W. J. Connell* and *L. J. Wall, contra.*

FLANSBURG, C.

Action for damages for personal injuries sustained by the plaintiff when struck by one of defendant's street cars. Verdict for plaintiff. Defendant appeals.

Defendant contends that the plaintiff's version of how the accident occurred is contrary to the undisputed physical facts in the case, and that the verdict is not sustained by the evidence and is contrary to law.

The accident happened on Tenth street in front of the entrance to the Burlington station in Omaha. Tenth street runs north and south. Mason street terminates at the entrance to the station and extends west from Tenth street.

Plaintiff arrived at his office that morning, he says, at two minutes before 8 o'clock, gathered together some papers, went out on the street, and at Sixteenth and Farnum streets waited for a street car, intending to catch a Burlington train due to leave Omaha at 8:20.

He boarded a car, which, defendant's testimony shows, would not be due in front of the station until 8:20. The conductor on this car testified that plaintiff showed anxiety about catching the train; that plaintiff asked and was informed as to the time the car would arrive at the station; that the conductor also told him that very often the train would be seen pulling out just as this

street car passed over the viaduct before reaching the station, though at some times passengers on this car made the train. The car that morning passed over the viaduct while the 8:20 train was to be seen standing ready to leave. This witness further testified, and in this he was corroborated by two disinterested witnesses, a passenger on the car, and a newsboy who was standing on the street nearby, that just as the car, as it passed south on Tenth street, reached the north side of Mason street, and while the car was running at a rate of three or four miles an hour, the plaintiff swung off and started to hurry across the track behind it. And witness says that he immediately heard a crash, looked back, and saw the plaintiff lying on the pavement, he having been struck by a north-bound car. The newsboy testified that he, just at that time, was waiting to sell papers to any one who might get off this car, and that he saw the plaintiff alight from the car while it was moving and start to run across the parallel track toward the station, and just at that moment the car on that track struck him. The motorman on the car which struck plaintiff testified that he was in the act of slowing the car to stop at the Mason street intersection, since this was a regular stop and a lady passenger was about to get off, and that his car was running not more than three or four miles an hour, when the plaintiff suddenly came running from the rear of the moving south-bound car, was struck by the corner of the north-bound car, and was thrown back upon the west track. The carmen on both cars and a number of disinterested witnesses testified that the north-bound car was going only three or four miles an hour when it struck the plaintiff, and that the gong was repeatedly sounded while the two cars were passing, just before the accident. Several witnesses testified that the north-bound car was stopped within four or five feet after the plaintiff was struck.

The following very significant facts are undisputed: That plaintiff fell to the pavement on the west track and

remained there unconscious at a point from 5 to 10 feet north of the center of Mason street, the paved portion of which street is 60 feet wide, and that the front end of the car which struck him, after it stopped, was only 4 or 5 feet north of the place where plaintiff fell; also that the south-bound car from which the plaintiff alighted made its stop, as was regular and customary, at a place south of the paved portion of Mason street, where it remained standing for some time after the accident occurred. This car stopped at a greater distance than 35 or 40 feet south of the place where the plaintiff fell, and it is further established that, at the moment the plaintiff was struck, the rear end of the south-bound car and the front end of the north-bound car were almost even. Upon these essential facts the evidence introduced by both parties is all in accord.

Plaintiff, however, testified that when riding on the south-bound car he was so sure of having plenty of time to catch his train that he gave it no particular thought and was in no hurry. He denied having any conversation with the conductor, and testified positively that he did not alight from the car until it came to a full stop on the south side of Mason street; that after the car stopped he walked back around the rear end, and, when behind it, momentarily hesitated and listened to see if any car was on the other track; that, hearing no noise, he stepped out and was struck so suddenly that he was given no time even to catch sight of the car that struck him.

Two witnesses testified for the plaintiff. They were railway mail clerks and were waiting at the northeast corner of Tenth and Mason streets for a north-bound street car. They were in conversation with each other, but saw the car approaching, they said, when it was in the middle of the block south of Mason street, and also at a point perhaps a car's length from Mason street, and testified that the car at those places was running from 10 to 15 miles an hour. Neither of them saw the

car from that time until after the plaintiff had been struck, and were unable to estimate the speed within the intersection. They both started and looked when they heard plaintiff struck by the car. One of them testified that when he looked he saw the plaintiff shooting through the air like a rocket; that the plaintiff was thrown horizontally through the air 4 feet from the ground and about half the width of the street. The other witness looked in time only to see the plaintiff lying in the street, but did not see him strike the pavement. He says the ends of the two cars were then about even, but he could not state how near they were to the center of Mason street. Neither of them heard the gong, but their testimony on that was practically negative. They were engaged in conversation, and very naturally may have failed to hear the gong, which many other disinterested witnesses say was sounded. One of these witnesses for plaintiff, the one who told the unnatural story of the plaintiff's body being hurled 40 feet, was positive in his statement that no gong was sounded; but his testimony shows that he was at that time, standing at some distance facing away from the scene of the accident, engaged in conversation, and on cross-examination he testified that he was not listening for a gong and had no reason to.

Had the plaintiff alighted from the south-bound car after it had stopped and proceeded to cross the parallel track, he could rightfully have assumed that the motorman on the opposite car would be expecting passengers to emerge from the rear of the standing car, and would have the car so under control as to be able to reduce the speed to any extent required, or even stop if necessary to avoid an accident. 36 Cyc. 1515; *Bremer v. St. Paul City R. Co.*, 107 Minn. 326, 21 L. R. A. n. s. 887.

But the plaintiff's story is inconsistent with the physical facts in the case. Plaintiff received a brain injury at the time of this accident. Such injuries have been known in some cases to obliterate entirely the mem-

ory of all incidents immediately surrounding the accident, and it may be that plaintiff's memory of the exact facts is lacking or has been perverted by the injury that he then received.

But, however that may be, he could not have been struck on the south side of Mason street and have fallen to the pavement north of the center of the street, at least 35 to 40 feet away. There is no testimony on behalf of plaintiff to show the speed of the car within the intersection, and, even though it had been moving at a rate from 10 to 15 miles an hour, as plaintiff contends it had been moving some distance south of Mason street, it would have been impossible that a car going at that rate of speed could have thrown the plaintiff such a distance. Plaintiff gives no reasonable explanation—in fact, none can be given—as to how he could be struck at the south side of Mason street, which position he positively fixes, and have fallen at the place described. No witness says he was carried on the fender. All the testimony is that he fell, and that when he fell he went to the west, landing between the car tracks of the car from which he had alighted. That he so remained on that car track after his fall is one of the undisputed facts in the case.

Plaintiff's counsel contends that plaintiff, after alighting from the car as it stood at the south side of Mason street, may have walked in a northeasterly direction and may have been nearer the center of Mason street when he was struck, but that supposition is in direct conflict with all the conceded facts in the case. The plaintiff's testimony, as well as all other testimony upon that question, is that he was close to the rear of the south-bound car when he started across the other track. In fact, if he had not been, then both he and the motorman on the car which struck him could have seen the danger in time perhaps to have avoided an accident. Plaintiff says that, as he stepped from the rear of the south-bound car, the other car was upon him so sud-

denly that he had insufficient time even to see it, though he was facing the car when it struck him. This would not have been true had he been 30 or even 10 feet back from the rear of the car which he was leaving. All other testimony, furthermore, points to the fact that the cars were almost even when the accident occurred.

The physical facts in the case lead irresistibly to but one conclusion: That the plaintiff was struck at a point as far north, at least, as the center of Mason street, and, it being without dispute that he was struck just as he suddenly emerged from the rear of the south-bound car, it therefore follows that the car upon which he had been riding could not then have reached its stopping place, and that plaintiff must have alighted near the north side of Mason street and while the car was running. No other reasonable inference is possible. The great preponderance of the testimony and practically all the definite testimony offered, aside from that of the plaintiff himself, is in strict accord and consistent with these established physical facts. That version of the evidence this court is forced to adopt regardless of the jury's verdict, even though the verdict, by reason thereof, cannot be allowed to stand.

The rule that a verdict will not be disturbed when there is evidence tending to support it does not apply where the verdict is opposed to the undisputed physical facts in the case, or is in flat contradiction of recognized physical laws, and where the testimony presented, taken as a whole, is capable of no reasonable inference of such a state of facts as would allow the plaintiff to recover. *Spiro v. St. Louis Transit Co.*, 102 Mo. App. 250; *Blakeslee's Express & Van Co. v. Ford*, 90 Ill. App. 137; *Holden v. Pennsylvania R. Co.*, 169 Pa. St. 1; *Kalman v. Pieper*, 158 Wis. 487; *Quigley v. Naughton*, 91 N. Y. Supp. 491; *Hill v. Keezer*, 115 Me. 548; 4 C. J. 856-861.

Where a passenger alights from a moving car and immediately passes behind it, as that evidence, which is

in accord with the undisputed facts, shows the plaintiff did in this case, he is guilty of negligence, and he has no right to assume that a motorman on a car going in the opposite direction will anticipate that he will suddenly emerge from behind the car from which he has alighted, and therefore no right to assume that such motorman will be in readiness to make an immediate stop. It is true that the motorman must at intersections slow his car and keep a sharp lookout for pedestrians and vehicles. These, through care on his part, he is able to see, but passengers on a moving car are hidden from his view, and he has no way of anticipating that they will alight and suddenly come around the car, except in case of special circumstances or where some general custom is shown which would charge the motorman with the duty of expecting passengers of a passing car, at that place, to so conduct themselves, or where it is evident that the car has stopped, or practically stopped, for the purpose of discharging passengers. *Critchfield v. Omaha & C. B. Street R. Co.*, 99 Neb. 240. In the case just mentioned, holding that such act on the part of a passenger is negligence, as a matter of law the comparative negligence rule (Rev. St. 1913, sec. 7892) was not involved, since the accident upon which that case was based occurred before the statute was enacted. Under that statute the question of negligence is not always for the jury. *Sodomka v. Cudahy Packing Co.*, 101 Neb. 446; *McCarthy v. Village of Ravenna*, 99 Neb. 674; *Disher v. Chicago, R. I. & P. R. Co.*, 93 Neb. 224.

The plaintiff's negligence, as the evidence now stands, appears as the sole contributing cause of the accident. There is little, if any, substantial evidence of negligence on the part of the defendant. Plaintiff's witnesses did not observe and were unable, and did not attempt, to fix the speed of the car within the intersection at Mason street, and, in fact, for some little distance before it reached that street, and their testimony as to the sounding of the gong was of a negative character only, as

hereinbefore pointed out. The testimony on behalf of the defendant, on the other hand, established by several disinterested witnesses, as well as by four car operators, was strong and positive that the north-bound car, at the time of the impact, was running at the rate of only three or four miles an hour, that it stopped within four or five feet after plaintiff was struck, and that the gong was sounded repeatedly.

The fact that plaintiff's witnesses did not hear the gong sounded does not tend to disprove the fact established by strong and positive evidence, where it is shown that their attention was diverted, and where, from their position, the fact that they were engaged in conversation, their surroundings, the noises of street cars passing one another, and the customary noise attendant at railway stations, a reasonable presumption would not arise that they would have heard it if it had sounded. This evidence does not make it appear that the witnesses were possessed of such knowledge as to enable them to deny affirmatively that the gong had sounded. The testimony on behalf of plaintiff as to the ringing of the gong, therefore, is insufficient in this case to require a submission of that issue to the jury. *Critchfield v. Omaha & C. B. Street R. Co., supra; Rickert v. Union P. R. Co.*, 100 Neb. 304; *Hajsek v. Chicago, B. & Q. R. Co.*, 5 Neb. (Unof.) 67; *Chicago, R. I. & P. R. Co. v. Sporer*, 69 Neb. 8; *Zancanella v. Omaha & C. B. Street R. Co.*, 93 Neb. 774; *Culhane v. New York C. & H. R. R. Co.*, 60 N. Y. 133; *Hoffard v. Illinois C. R. Co.*, 138 Ia. 543; *Britton v. Michigan C. R. Co.*, 122 Mich. 359.

It occurs to us, from the record as it now stands, that the negligence of the plaintiff was so much in excess of being slight, as compared with that of the defendant, that, as a matter of law, plaintiff was not entitled to have that question submitted. The evidence, therefore, is insufficient to support a verdict, and, in

order to avoid an apparent miscarriage of justice, a new trial should be granted.

We therefore recommend that the judgment be reversed and the cause remanded for further proceedings.

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

REVERSED AND REMANDED.

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LINCOLN GAS & ELECTRIC LIGHT COMPANY, APPELLANT, V. ADDIE E. CROWLEY, APPELLEE.

FILED JUNE 19, 1920. No. 21336.

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

*Strode & Beghtol,* for appellant.

*Charles S. Roe, George W. Ayres* and *Ira D. Beynon, contra.*

PER CURIAM.

This is a claim under the workmen's compensation act. The employee was engaged in the services of the Lincoln Gas & Electric Light Company, plaintiff, his duties requiring him to inspect and repair arc lamps. This employment had extended over a period of years. While at work at Sixteenth and O streets in Lincoln, January 25, 1919, he fell into a coal hole and was injured. He died March 23, 1919. He had been earning $110 a month. The district court found that the accident resulted in his death and awarded defendant $12 a week for 350 weeks. Plaintiff has appealed.

Plaintiff contends that the death of the employee was not caused by any accident, but was the result of pneumonia following an attack of influenza. It is argued, therefore, that on the evidence in the record a finding

that the accident arose out of and in the course of the employment cannot be sustained. An impartial examination of the evidence, however, leads to a different conclusion. It may fairly be inferred from the proofs that the accident resulted in the death of the employee, and that the injury arose out of and in the course of the employment. The decision on appeal is controlled by *American Smelting & Refining Co. v. Cassil, post,* p. 706. With the issues of fact determined in favor of defendant, there is no error in the record.

AFFIRMED.

ALDRICH, J., dissents.

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MABEL DEVORE, APPELLEE, v. HILRA DEVORE, APPELLANT.

FILED JUNE 19, 1920. No. 20732.

1. **Divorce:** EXTREME CRUELTY. "A continuing course of conduct on the part of either spouse, which so grievously wounds the mental feelings, or which so utterly destroys the peace of mind as to seriously impair the bodily health and endanger the life or reason of the other, or which nullifies the legitimate ends and objects of matrimony, constitutes extreme cruelty within the meaning of the statute." *Hartshorn v. Hartshorn, ante,* p. 561.
2. ———: ALIMONY. In entering a decree for alimony, the court may take into account all of the property owned by the parties at the time of entering the decree, whether accumulated by their joint efforts or acquired by inheritance, and make such award as is proper under all the circumstances disclosed by the record.

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

*B. F. Good* and *Thomas, Vail & Stoner,* for appellant.

*George E. Howard* and *Reese & Stout, contra.*

MORRISSEY, C. J.

Plaintiff was awarded a decree of absolute divorce and a judgment for alimony. Defendant appeals.

Plaintiff's cause of action is based on a charge of extreme cruelty. Defendant denied the charge, and insists that the evidence does not warrant the granting of a decree. The parties were married in the year 1899, plaintiff being then 17 years of age and defendant slightly older. No children have been born to them, and during the major portion of their married life they have lived by themselves. As to the disputes and quarrels, if any there were, we must judge largely from the parties' own testimony. At the date of the marriage they were without means, and they set up housekeeping on a rented farm. They were industrious and frugal and prospered in business, but, as the years went by, they quarreled. According to the testimony of plaintiff, defendant frequently used profane and abusive language toward her. She testifies that on one occasion, when they were together at a hotel in Omaha, she protested against his conduct there, whereupon he cursed her and threatened to "slap her if she didn't shut her mouth." On another occasion, while at their home, in the presence of company, without apparent provocation, defendant called plaintiff "a bitch" and said he would wring her neck. It is claimed that he repeatedly called her a "damn whore and a damn bitch." Defendant undertook to deny this testimony, but the denial is not convincing.

The final act in the domestic drama was played in Lincoln, from which city they were about to depart in an automobile for their home. A dispute arose as to whether the side curtains on the car should be put in place. Defendant insisted on their use because of the inclement weather conditions. Plaintiff objected and announced that if they were put on she would tear them down, and defendant threatened her with personal violence if she did so. She thereupon left the automobile, and this suit for divorce followed. In the final quarrel, the evidence indicates that defendant was warranted in suggesting the use of the side curtains on the

car and plaintiff was unreasonable in her objections to their use. But she had only recently left a sick bed and defendant ought to have made allowance for her condition. At all events, his threat of personal violence, although he made no move to carry it out, is not easily condoned.

In many respects defendant is shown to have been a good husband, but on the whole evidence, which we cannot undertake to set out at length, he appears to have conducted himself in disregard of her rights and without due consideration for a woman's sensibilities. He worked hard to provide for her material needs; but a husband owes more to his wife than food and raiment. "A continuing course of conduct on the part of either spouse, which so greviously wounds the mental feelings, or which so utterly destroys the peace of mind as to seriously impair the bodily health and endanger the life or reason of the other, or which nullifies the legitimate ends and objects of matrimony, constitutes extreme cruelty within the meaning of the statute." *Hartshorn v. Hartshorn, ante,* p. 561.

The remaining question has to do with the award of alimony, which defendant insists is excessive. The trial court found, on evidence fully sustaining the findings, that defendant at the date of the decree had property of the value of $46,266, and that of this amount $29,717 was accumulated by the joint efforts of the parties. The difference between the two amounts represents approximately the amount defendant received from his father's estate. The court gave plaintiff $17,200 alimony, together with a fee for her attorneys. We are pointed to the case of *Pierce v. Pierce,* 96 Neb. 511, where the court awarded the wife one-half of the joint accumulations of the parties, and from this it is argued that in the instant case plaintiff should share only in the amount found by the court to be the joint accumulation of the parties while living together as husband and wife. This would exclude from considera-

tion the property inherited by defendant. We see no reason why this should be done. In the case of *Pierce v. Pierce, supra,* each of the parties had contributed substantially the same amount in money and property; each had worked industriously from the marriage to the separation; neither appeared to have been entirely free from blame; and the court very properly divided their joint accumulations, which was all the property they possessed, between them. Here we have a young couple beginning without property, but by the industry and economy of each accumulating a substantial sum, and the husband during the later years of their married life inheriting an additional sum. This inheritance was not unexpected by either husband or wife. At the time of the marriage defendant's father was a well-to-do farmer; plaintiff and defendant early set up housekeeping on one of his farms. When plaintiff, a girl of 17, entrusted her life and fortune to the keeping of defendant, she knew that in the natural course of events defendant would inherit a part of his father's estate and she had the right to take this into account when she entered into the marriage relation. The court in awarding alimony might well take this property into consideration and make such award as seemed just and equitable on the basis of all the property owned by the parties at the date of the decree. This was done, and the decree will not be disturbed.

AFFIRMED.

ROSE and FLANSBURG, JJ., not sitting.

AMERICAN SMELTING & REFINING COMPANY, APPELLEE, v. CATHERINE CASSIL, APPELLANT.

FILED JUNE 19, 1920. No. 21288.

**Master and Servant:** WORKMEN'S COMPENSATION: REVIEW. On appeal from the district court to the supreme court in a workmen's compensation case, findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong.

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

*William J. Hotz* and *George A. Lee,* for appellant.

*Crofoot, Fraser, Connolly & Stryker, contra.*

MORRISSEY, C. J.

Under the workmen's compensation act Catherine Cassil, defendant, presented to the compensation commissioner, on account of the death of her husband, A. C. Cassil, a claim against the American Smelting & Refining Company, plaintiff, for $12 a week for 350 weeks and $100 for expenses of his last illness and funeral. On the premises of plaintiff defendant's husband was shot by Terrence Casey at night, January 27, 1919, and died the next morning. Plaintiff is engaged in the smelting and the refining of ores in Omaha. At the time of the shooting Cassil was assistant superintendent of a department and Casey was head watchman of that plant. Defendant contends that the death of her husband was caused by an accident "arising out of and in the course of his employment" within the meaning of those words as used in the workmen's compensation act. Rev. St. 1913, sec. 3642. It is conceded by plaintiff that the homicide occurred in the course of Cassil's employment, but it is insisted that it did not arise out of such employment, being, from the standpoint of plaintiff, solely the result of a quarrel

between Cassil and Casey over personal matters. The compensation commissioner allowed the claim of defendant, but deducted therefrom $1,690 which she had received as insurance carried by plaintiff on the life of her husband. From the award of the compensation commissioner plaintiff appealed to the district court for Douglas county. There the claim of defendant was disallowed. From a dismissal of the proceeding she has appealed to the supreme court.

The district court found that the death of Cassil arose out of a personal quarrel between him and Casey, and held that therefore defendant was not entitled to compensation. On review, what is the effect of this finding? The workmen's compensation act provides: "Any appeal from such judgment shall be prosecuted in accordance with the general laws of the state regulating appeals and actions at law except that such appeal shall be perfected within thirty days." Rev. St. 1913, sec. 3680, as amended, Laws 1917, ch. 85, sec.15.

The workmen's compensation act further provides: "All disputed claims for compensation or for benefits under this article must be submitted to the compensation commissioner for an award. 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, either at or during a regular term of the district court of said county or during any portion of time between the regular term time of the district court of said county, which court shall have authority to hear and determine the cause as in equity and enter final judgment therein determining all questions of law and fact in accordance with the provisions of this article, which judgment shall be final and conclusive unless reversed, dismissed or modified, on appeal or otherwise modified pursuant to the provisions of this act." Rev. St. 1913, sec. 3678, as amended, Laws 1919, ch. 91, sec. 5.

These provisions, in connection with the workmen's compensation act as a whole, were intended to simplify the procedure in cases of this kind and to do away with a jury in determining the issues. Any appeal from the judgment of the district court, however, must be prosecuted in accordance with the general laws of the state regulating appeals in actions at law. It follows that a finding of the district court on an issue of fact in a compensation case should not be set aside on appeal where it is supported by sufficient evidence, or where the evidence is substantially conflicting, unless the finding is clearly wrong. *Manning v. Pomerene,* 101 Neb. 127; *Miller v. Morris & Co.,* 101 Neb. 169; *Kanscheit v. Garrett Laundry Co.,* 101 Neb. 702; *Anderson v. Kiene,* 103 Neb. 773. This is the general rule elsewhere. L. R. A. 1916A, note, p. 266. It is adopted here as being in harmony with the workmen's compensation act of this state.

In the present case there is ample evidence to sustain the judgment from which defendant has appealed. With the issues of fact thus determined, there is no error in the record.

AFFIRMED.

ALDRICH and DAY, JJ., not sitting.

ROSE, J., dissenting.

I interpret the workmen's compensation act to mean that an appeal from the compensation commissioner shall be tried in the district court as a suit in equity. The district court, says the statute, "shall have authority to hear and determine the cause as in equity." In my opinion the legislature, having made the appeal from the compensation commissioner to the district court a suit in equity, did not intend to make the appeal from the district court to the supreme court an appeal in an action at law, and thus prevent a trial *de novo* here. The proceeding, being designated by the legisla-

ture as one in equity, should be reviewed in the supreme court without regard to the findings of fact by the district court. The opinions in *Miller v. Morris & Co.*, 101 Neb. 169, *Kanscheit v. Garrett Laundry Co.*, 101 Neb. 702, and *Anderson v. Kiene*, 103 Neb. 773, were rendered without referring to that part of the workmen's compensation act requiring the district court to try cases of this kind as suits in equity, and should in my view of the law be overruled.

I have considered the evidence in the present case with care, and, while there is sufficient proof to sustain the findings below, I am fully convinced that the preponderance of the evidence is in favor of defendant, that the quarrel which resulted in the death of Cassil arose out of his employment, and that defendant is entitled to compensation. For these reasons, as I view the law and the facts, the judgment of the district court should be reversed.

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## MILAN SHEPPARD V. STATE OF NEBRASKA.

FILED JUNE 19, 1920. No. 21365.

1. **Information:** SEPARATE COUNTS: ELECTION. Different felonies of the same class or grade, subject to the same punishment, may be charged in separate counts of an information, and whether the state shall be required to elect between the several counts at the beginning of the trial is a matter for the sound discretion of the trial court.
2. **Criminal Law:** EVIDENCE: MOTION TO STRIKE. A motion to strike *all* the testimony of a witness is properly overruled where part of such testimony does not fall within the objections raised.
3. ———: INDORSEMENT OF WITNESSES AFTER TRIAL BEGUN: REVIEW. Under chapter 164, Laws 1915, the court may, in its discretion, permit the names of additional witnesses to be indorsed upon the information after the trial has begun, and such action cannot be availed of as error where defendant makes no showing of prejudice, or does not ask for a continuance or postponement of the trial.

ERROR to the district court for Hamilton county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

*Prince & Prince* and *Patterson & Patterson,* for plaintiff in error.

*Clarence A. Davis, Attorney General,* and *J. B. Barnes, contra.*

MORRISSEY, C. J.

Defendant prosecutes error from a conviction in the district court for Hamilton county for receiving a stolen automobile.

The information was in three counts, the first of which charged defendant with receiving, on or about November 1, 1918, a stolen automobile belonging to George W. Jewel. The second count charged the receiving of a stolen automobile, on or about May 1, 1919, the property of J. E. Schaeffer, and the third count charged the receiving of a stolen automobile, on or about April 15, 1919, the property of Lloyd Magney. Defendant was convicted on the third count.

The principal assignment of error is the refusal of the trial court to require the state to elect, at the beginning of the trial, upon which count of the information it would rely for a conviction. Each count of the information was complete in itself, and there was no allegation of any connection between the various offenses charged. The state introduced evidence on each of the three counts. Defendant did not renew his motion to elect until all the testimony had been adduced, and the court then required the state to elect upon which count it would go to the jury.

The question of election is one resting largely in the sound discretion of the trial court. As was said by Justice Harlan in *Pointer v. United States,* 151 U. S. 396, 403: "While recognizing as fundamental the principle that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of

charges embraced in one indictment and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different felonies, at least of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer or upon motion to quash or on motion in arrest of judgment, and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect upon what one of the charges he will go to trial. The court is invested with such discretion as enables it to do justice between the government and the accused." The same rule has been announced by this court in *Korth v. State,* 46 Neb. 631, and in *Bartley v. State,* 53 Neb. 310, although in these cases there was a closer relationship between the offenses charged than in the instant case.

But the determining question in each case is whether defendant has been embarassed or confounded in his defense. Practically all of the evidence introduced relating to the crimes charged in the first and second counts was admissible for the purpose of showing scienter under the count on which defendant was convicted. When the state closed its case in chief, defendant proceeded to make his defense without again asking that the state be required to elect until after he had introduced all his evidence. Under these circumstances we fail to see that defendant has been so confounded or prejudiced in his defense as to call for a reversal of the judgment.

Complaint is made of the testimony of a witness named Guard, who stated that shortly prior to the commission of the crime in question defendant asked him to obtain a Ford coupé for him and agreed to pay him $200 for one which he subsequently "spotted out."

This witness further testified that some time later he delivered a stolen Buick automobile at Friend, supposedly for defendant, but it was not shown to whom the delivery was made. Defendant moved to "strike all the evidence given by this witness for the reason that it is incompetent, irrelevant, and immaterial, and, also, that the introduction of this evidence constitutes misconduct on the part of the state." The ruling of the court was as follows: "Part of it is competent. The motion as made will be overruled." The first part of this testimony was clearly competent, as showing that defendant was in the business of receiving stolen automobiles. *St. Clair v. State,* 103 Neb. 125. The motion, in the form in which it was made, was properly overruled.

Error is predicated upon permission granted the state to indorse the name of a witness upon the information after the trial had commenced. Defendant made no showing of prejudice, nor did he ask for a continuance. Prejudice will not be assumed. The action of the trial court does not constitute reversible error. *Kemplin v. State,* 90 Neb. 655; Laws 1915, ch. 164.

Defendant's other assignments of error are disposed of by the views just expressed. There is nothing in the record to call for a reversal, and the judgment is

AFFIRMED.

FLANSBURG, J., not sitting.

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ARTHUR ALLEN EVANS, APPELLEE, v. J. H. KELLY, ADMINISTRATOR, ET AL., APPELLANTS.

FILED JUNE 19, 1920. No. 20812.

1. **Specific Performance:** AGREEMENT FOR ADOPTION AND INHERITANCE. A husband and wife, being childless, agreed to take and to adopt a boy of seven years under a promise that they would make a good home for him, and that he would be to them "just the same

as an own son," and that "he would inherit their wealth at their death." So long as the husband and wife lived, the surviving husband having died when the foster son was thirty, they spoke of and treated him in all respects as parents would a son, he having industriously and faithfully served them during that period in all respects as a dutiful and obedient son. Both husband and wife died intestate and without fulfilling the adoption agreement. *Held* that, under the facts discussed in the opinion, such foster child, plaintiff herein, is entitled to specific performance.

2. **Evidence:** DECLARATIONS AGAINST INTEREST. It is fundamental that declarations against interest cannot ordinarily be annulled or explained away by counter declarations.

3. **Specific Performance:** PAROL CONTRACT. "Specific performance of a parol contract will be enforced by a court of equity, where one party has wholly and the other partly performed it, and its nonfulfilment on the one hand would amount to a fraud on the party who has fully performed it." *Kofka v. Rosicky*, 41 Neb. 328.

4. ———: DISCRETION OF COURT. "Specific performance is a matter of discretion in a court, which withholds or grants relief according to the circumstances of each particular case, where the general rules and principles governing the court do not furnish any exact measure of justice between the parties." *Kofka v. Rosicky*, 41 Neb. 328.

5. **Evidence:** DECLARATION AGAINST INTEREST. A foster father was appointed by the county court guardian of his minor foster son to collect an inheritance of $380. *Held*, that an averment by the ward, made in that proceeding soon after he became 21, with respect to having received payment for "work and labor," bore no relation either to the guardianship proceeding or to the issues in the present case, it clearly appearing that the petition for appointment and the decree discharging the guardian, when his trust was fulfilled, had to do solely with the collection of and the payment to the ward of the $380 in question, and it being clearly established in the present case that the ward never received any wages or remuneration from the guardian for work and labor.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Affirmed in part and reversed in part.*

*Richard S. Horton, E. A. Cook, W. M. Cook, H. M. Sinclair, H. Francisco* and *W. A. Stewart*, for appellants.

*Hainer, Craft & Edgerton* and *T. M. Hewitt, contra.*

DEAN, J.

This is an action against the estate of Peter Hammond, deceased, to compel specific performance of a contract alleged to have been made in 1894 between plaintiff's legally appointed guardian, of the one part, and Hammond's wife, of the other part. It is pleaded that Mr. Hammond subsequently ratified the contract. Mrs. Hammond died in 1903. Her husband died in 1917. The Hammonds were childless and both died intestate. It is alleged that by the terms of the contract the Hammonds, not only agreed to legally adopt plaintiff, but they also agreed to make him "heir to their property as a son of their own blood." The brothers and sisters of Hammond and two nephews, in all seven relatives, and Susan R. Hearle, who claimed to be a common-law wife of Hammond, were made parties defendant. The court awarded specific performance of the contract as prayed by plaintiff and rendered judgment against the claim of Mrs. Hearle. All defendants appealed.

Plaintiff was born August 9, 1887. His parents died when he was about two years old. He was then taken to the home of his grandmother Mercer, who became his guardian, and was then living with her second husband, who is known in the record as plaintiff's "step-grandfather." He remained in the Mercer home until his grandmother died in June, 1894. A few days thereafter plaintiff, as alleged, was taken to the Hammond home by Mr. Mercer and left there pursuant to the agreement made about ten days before between Mrs. Mercer and Mrs. Hammond.

Plaintiff contends, and there is testimony tending to prove, that the contract for the relinquishment of plaintiff by Mrs. Mercer was in writing, and that she signed it in her own home, a few days before she died, in the presence of Mrs. Hammond and three or four others. Mrs. Hammond retained possession of the contract at the time, but subsequently it was lost. It

does not, however, appear that it was signed by either of the Hammonds.

Ten or more disinterested witnesses testified on the part of plaintiff in respect to the contract sued on and as to the relations between the parties. Before Mrs. Mercer signed the "adoption paper" two or more conferences were had between her and Mrs. Hammond. Mrs. Small was at the Mercer home on one occasion when the subject was talked about between Mrs. Mercer and Mrs. Hammond. She testified that Mrs. Hammond said they would "make the boy a good home and he should be just the same as an own son," and that "he would inherit their wealth at their death." Another witness corroborated this, and in addition testified, as did other witnesses, that Mrs. Hammond said she did not want plaintiff's relatives to visit him at her home lest he become homesick and be enticed to return to his people. She testified that Mrs. Hammond said: "When he is 21 years of age he shall have his name back, Arthur Evans." Another, who was present and saw Mrs. Mercer sign the relinquishment, testified that when the doctor handed it to her he remarked to Mrs. Mercer that this is what "they agreed to sign for this little boy to give away." Three or four witnesses testified that they were present and saw Mrs. Mercer sign the instrument, and two or more besides the doctor heard it referred to at the time by the parties as "an adoption paper."

Ten or more witnesses testified in regard to declarations and statements made by Mr. Hammond against interest that covered a series of more than 20 years. One testified that some time after plaintiff was brought put down a well on the farm for Mr. Hammond about to his new home he heard Mr. Hammond say to a neighbor, "We will take care of the boy and he will be our boy," that the Hammonds taught the boy to call them "papa and mamma," and that Mr. Hammond said that Arthur "will have what we have got." To an-

other he referred to plaintiff as "the little boy Mrs Hammond and I have adopted." To a witness, who put down a well on the farm for Mr. Hammond about four years before he died, he said, "You will board at my home there with my son, my adopted son, Evans." The then county judge testified that Mr. Hammond on two different occasions told him that he was going to legally adopt plaintiff; that in 1898, when the guardianship proceedings were pending that will presently be noted, Mr. Hammond inquired about the cost of taking out adoption papers, and at that time, plaintiff then being eleven, told him that he would adopt Arthur "later on, when I get around to it."

When plaintiff was 17 he was treated for appendicitis. Upon paying the doctor Mr. Hammond spoke of Arthur as his adopted son, and seemed to express the solicitude of a father for his welfare. A few years afterward he suffered another attack and was again treated, this time by a physician at Omaha; Mr. Hammond having learned of his condition and having sent for him to come to Omaha for that purpose. This bill was also paid by Mr. Hammond.

Business men, farmer neighbors, the Hammond family physician, the physician's wife, and the minister who preached at the home church, all testified that Mr. Hammond throughout the years, and with more or less frequency, not only referred to plaintiff as his adopted son, but treated him in all respects as a son. He referred to himself as "grandpa," when in playful mood he would talk to plaintiff's infant child. Plaintiff was known in the home neighborhood as Arthur Hammond until he reached manhood, and it appears that many persons believed him to be a son of the Hammonds. For some time after his majority he retained the name of Hammond and kept a bank account in that name; the bank book being issued to him in the name of Arthur Hammond by Mr. Kelly, then a banker, and now administrator of the Hammond estate. A check

is in evidence, dated July 3, 1909, written by Peter Hammond, payable to Arthur Hammond's order, and indorsed by plaintiff in that name when it was cashed. In the Sunday school record his name appeared as Arthur Hammond, and by that name he was baptized into the communion of the church. An infant child of the Evans family was buried in the Hammond family lot in the cemetery.

Early in 1910 Peter Hammond moved from the farm to Gothenburg. Soon afterward he moved to Omaha, where he resided four or five years. From Omaha he returned to Gothenburg, and there he made his home until he died in 1917. During this seven-year period, plaintiff, having married in the meantime, was left in sole possession and charge of the farm and personal property owned by Mr. Hammond, apparently in all respects as though he had been a son, and he was in possession when this suit was tried. While Mr. Hammond lived, plaintiff had charge of his business affairs and of his range lands, collecting the farm rentals and the like. He painted his foster father's Gothenburg house, put in the chandeliers, and changed the doors at his request, and built for him a chicken house. He did his plumbing and car-repairing and accompanied him on drives when requested. All of these and other like services were rendered by him in all respects as a son would serve a father, and it does not appear that plaintiff received any remuneration for any of the services so rendered. When Mr. Hammond lived at Omaha he frequently requested plaintiff to visit him there. At such times he stayed at the Hammond home from two days to two weeks, as occasion might require. Besides taking up business matters pertaining to the farm, he performed services for Mr. Hammond in his Omaha home similar to those performed for him in the home at Gothenburg. Mrs. Evans' testimony corroborated that of the other witnesses called by plaintiff respecting the apparent father and son relation between

Mr. Hammond and her husband and the work that he performed for him. Mr. Hammond died suddenly at Omaha. Plaintiff was notified of his death, and brought his remains home for burial in Dawson county.

That Mrs. Mercer voluntarily relinquished all right to the lawful custody of and power and control over plaintiff, as his guardian, to the end that he should be fully adopted by the Hammonds, as provided by the law then in force (Ann. St. 1893, sec. 5263); and that the Hammonds agreed so to adopt plaintiff and make him their heir seems to be established. It seems clear, too, that the relation between the Hammonds and plaintiff, and their demeanor toward and their treatment each of the other, was that of parent and child from the time that he entered their home in his infancy until he was 30, when Mr. Hammond died. The contract in the present case appears to be sufficiently definite in its terms, and the relation between the Hammonds and plaintiff seems to be referable solely to the contract as made. That its conditions were substantially performed by plaintiff is clearly established. It is not unreasonable to believe that the Hammonds would be desirous of adopting a likely boy to take the place of a son in their childless home, that he might be to them an aid and comfort in their middle age and in their declining years.

Defendants argue that the contract sued on is void under the statute of frauds. Section 2626, Rev. St. 1913, being a part of the fraud statute, provides: "Nothing in this chapter contained shall be construed to abridge the powers of the court of equity to compel the specific performance of agreements in cases of part performance."

Section 2626 seems to be applicable to the facts before us. Mr. Hammond having died without fulfilling his part of the contract, and plaintiff having wholly performed his part, and it appearing that its nonfulfilment would amount to a fraud as against him, it follows

that under the rule announced in *Kofka v. Rosicky,* 41 Neb. 328, 25 L. R. A. 207, 43 Am. St. Rep. 685, specific performance of the contract should be enforced by a court of equity. The *Kofka* case has been followed and affirmed in numerous decisions of this court, and recently in *Moline v. Carlson,* 92 Neb. 419; *Parks v. Burney,* 103 Neb. 572.

On the part of defendants some testimony was offered tending to prove that Mr. Hammond made statements respecting his relations with plaintiff that were inconsistent with his alleged statements of an intention to make him his heir, and there was some testimony by persons residing in the vicinity to the effect that they never heard him say that it was his intention to adopt plaintiff or to give him any property. Admissions or declarations against interest are ordinarily conclusive as against the party making them and cannot be annulled or explained away by counter declarations. *Harrison v. Harrison,* 80 Neb. 103. The rule seems to be applicable in the present case.

The defendant heirs contend that plaintiff by his own averment in a certain guardianship proceeding waived his right to claim any part of the estate. While he was yet a minor, plaintiff inherited $380 from the estate of a relative. To obtain the money it was necessary that he have a guardian. Naturally Peter Hammond was appointed. Among the gaurdianship papers that are in evidence there is an instrument signed by plaintiff and acknowledged December 1, 1908, before Mr. W. A. Stewart as notary public. Among other things it contains an averment of payment by the guardian of the money that came into his hands as guardian, and payment "for all money due me for work and labor done by me for him during my minority." Defendants argue that this is inconsistent with plaintiff's claim. When the instrument in question is considered in connection with the evidence in this case and in connection with the guardianship proceeding that

had to do solely with the collection of $380 from an estate, any statement or averment therein respecting payment for work and labor apparently bears no relation to the subject-matter. This is borne out by the petition for the appointment of Mr. Hammond as guardian and the decree of the county court discharging him from his trust, both petition and decree having to do solely with the $380 that came into Hammond's hands as guardian and the payment of that sum to plaintiff. Plaintiff testified that he never received any wages from Mr. Hammond, and that he never gave him anything except a colt. His testimony in this respect is undisputed. The statement relied on by defendants finds support neither in the petition nor in the decree of the county court, nor elsewhere in the record.

The Hammond heirs pleaded an alleged contract that purports to be a compromise settlement with them. In addition to the names of the heirs, the names of plaintiff and of the defendant Susan R. Hearle, and one other who made a claim for services, but who is now making no claim, were appended to the alleged contract by W. A. Stewart, now one of the attorneys in the case for parties other than plaintiff. Mr. Stewart testified that he had authority to make the proposed settlement and to affix the name of plaintiff to the contract. This the plaintiff denied. The instrument bears date of August 15, 1917. Plaintiff not only denied that he authorized the signing of his name, but he testified that the alleged contract was not made with his approval. That he did not ratify the contract sufficiently appears. It also appears that it was repudiated by both of the other parties whom Mr. Stewart also claimed to then represent. Mr. Stewart admitted that he never showed the contract to plaintiff, and plaintiff testified that he did not even tell him about it. Mr. Stewart further testified that plaintiff told him "that he thought he had been adopted;" that "we searched for the adoption papers here and found nothing except the guardianship

papers;" and that "finally I told him I was going to St. Louis on some business and would take this matter up with the folks in Indiana," meaning the defendant heirs.

Plaintiff testified that he employed Mr. Stewart as attorney in the probate of the Hammond estate; that he prepared the petition for the appointment of an administrator and that he acknowledged it before him; that Mr. Stewart told him the Hammond heirs had written to him about getting a settlement, and had asked him to meet them at St. Louis, and that later "he had to go on up to Madison to meet them there." He testified that he did not send Mr. Stewart to see the Hammond heirs, nor did he authorize him to make a settlement with them. He said he paid Mr. Stewart $50 for expense money because Mr. Stewart asked him for it. The record, considered in its entirety, convinces us that Mr. Stewart must be mistaken in his expressed belief that plaintiff authorized him to execute the contract or to effect a settlement. We conclude that plaintiff is not bound by the contract in question.

One other point must be mentioned in respect of the claim of Mrs. Hearle. The decree not only adjudges specific performance, but it is adjudged that plaintiff is the sole and only legal heir to all the property left by Peter S. Hammond, deceased. The county court has sole original jurisdiction to determine the question of heirship in proceedings to settle the estate of deceased persons. Such proceedings in the Hammond estate are still pending. This is an original action in the district court. That court therefore had no jurisdiction to determine this question originally. This portion of the decree must be set aside. In all other respects the judgment is affirmed.

JUDGMENT ACCORDINGLY.

LETTON, DAY and FLANSBURG, JJ., not sitting.

EMIL SCHREIER, PLAINTIFF, V. LUCINDA GRIFFIN, APPELLEE: MAYLARD & BUTTERFIELD, APPELLANTS.

FILED JUNE 19, 1920. No. 21044.

1. **Accord and Satisfaction:** PLEADING AND PROOF. "The defense of accord and satisfaction is not sustained, without allegations and proof that there was a substantial difference between the parties as to the amount due, and that the accord and satisfaction was in settlement thereof." *Wilder v. Millard*, 93 Neb. 595.
2. **Dormant Judgment:** LIEN. When a judgment is dormant, the judgment debtor's interest in real estate cannot be subjected to its payment.

APPEAL from the district court for Wheeler county: BAYARD H. PAINE, JUDGE. *Affirmed.*

*T. J. Doyle, G. N. Anderson* and *J. M. Shreve,* for appellants.

*A. L. Bishop* and *B. F. Johnson, contra.*

DEAN, J.

This action was begun February 21, 1916, against Lucinda Griffin, widow of Patrick Griffin, her son John C. Griffin and wife, Maylard & Butterfield, a firm of money lenders, and another defendant against whom a default was entered but against whom no judgment was taken. Plaintiff prayed that a deed of conveyance that was executed jointly with other heirs by John C. Griffin and wife to his mother be canceled so far as it purported to convey John's interest in a tract of land as an heir of his father; the elder Griffin having died intestate February 10, 1916, being then the owner of 640 acres of farm land. The deed in question was executed by his children, all being adults, and recorded April 15, 1916. Plaintiff alleged that he was the owner of a judgment for $246.58 against John C. Griffin and prayed that it be decreed to be a lien against the judgment debtor's alleged interest in the land. May 13, 1918, Schreier's

attorney dismissed his petition with prejudice, his claim having been paid from the proceeds of a loan, made by Maylard & Butterfield to Mrs. Griffin, that will presently be discussed. The action, however, now remains solely as a contest between Mrs. Griffin and Maylard & Butterfield on their respective pleadings and proofs.

Lucinda Griffin in her answer and cross-petition prayed for an accounting and for a judgment for damages sustained by her for alleged fraud committed by Maylard & Butterfield in wrongfully and without her authority paying out about $500 from the proceeds of a $2,000 loan made by them to her and secured by a mortgage on the land. The alleged fraud consisted in the payment of the John C. Griffin judgment and in the payment of a judgment for $76.97 against another son, W. C. Griffin; neither of the judgments, as contended by Mrs. Griffin, constituting a lien on the land at the time. The court found generally in favor of Mrs. Griffin on her cross-petition and against Maylard & Butterfield against whom judgment was rendered for $569.90. From the judgment so obtained an appeal was taken.

Substantially these facts appear: In October, 1917, or about a year and a half after her husband's death, Mrs. Griffin contracted in writing with Maylard & Butterfield for a loan of $2,000 to be secured by a mortgage on the 640-acre farm. The loan contract provided for payment of a commission of 10 per cent., or $200, for obtaining a $2,000 loan. The deed to Mrs. Griffin from her children conveyed to her all of their respective interests in the land almost a year and a half before she made application for the loan. The proofs show that the judgment against John C. Griffin was dormant when the loan was obtained, and that the judgment against her son, W. C. Griffin, was not obtained until a little more than four months after the deed of conveyance was executed. Nevertheless there was deducted from Mrs. Griffin's

loan the following items: "To commission $200; to mortgage release J. P. Hess Co. $824; to G. E. Andrews $6.05; judgments and releases $481.44." On the basis of this statement $488.51 was sent to Mrs. Griffin in Idaho where she was then living alone.

There is no dispute respecting the Hess item of $824, that sum being in payment of a mortgage given by Mrs. Griffin and her husband several years before his death, nor as to the farm abstract item of $6.05. The "$200 commission" and the item of "judgments and releases" are in dispute. The proof shows and the court found that neither judgment was a lien against the land; that Mrs. Griffin did not consent that they be deducted from her loan; that they did deduct $481.44 therefor; that this item of $481.44, so wrongfully deducted, was due plaintiff with 7 per cent. interest; that, while a commission of $200 for a net loan of $1,800 was agreed on, only $1,318 was paid in her behalf, and the lenders were therefore entitled to only 13/18 of $200 or $144.44, leaving $55.56 due on this item, and that a total sum of $559.90 was due plaintiff from Maylard & Butterfield for wrongful deductions of the judgments and for an overcharge on commission and for interest.

Defendants argue that the acceptance by Mrs. Griffin of the proceeds of their $488.51 draft constituted an accord and satisfaction. We do not think the rule applies to the facts before us, nor is it sustained by the pleading. There are no allegations nor is there proof that when Mrs. Griffin received the draft there was a substantial controversy or difference between the parties, nor that the draft was in settlement of such difference nor of any controversy. *Wilder v. Millard,* 93 Neb. 595. Mrs. Griffin testified that when the draft came she knew that there was yet due her about $600 more on the loan, and that she expected that it would be sent to her. It appears that she was well advanced in years and unacquainted with business transactions, and when the draft came she was living in Idaho almost penniless

and alone and among strangers, with no person to whom to go for advice. It also appears that as soon as she discovered the true situation this action was begun.

It is contended by defendants that Mrs. Griffin promised to pay the judgments against her sons. This she denied, and said that when she was asked if she would do so replied that she would pay them only under compulsion. Defendants insist that the court erred in refusing to permit them to have a jury to pass on the disputed questions of fact. This ruling, at best, if error at all, is without prejudice, as appears from the evidence of one of the partners. With respect to the John C. Griffin judgment, he frankly testified, as of course he must, that if it was dormant it was not a lien. That it was dormant and that neither judgment was a lien is established without question.

It is pointed out that, even though the partnership may have been misled by certain of their employees, as it maintains it was, it is not thereby relieved from responsibility. On this point it was voluntarily stated in open court by a member of the firm that it did not seek to evade responsibility on that ground.

Reversible error does not appear. The judgment is therefore

AFFIRMED.

ALDRICH, J., not sitting.

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ROSE ELLEN FOX, APPELLEE, v. SCANDINAVIAN MUTUAL AID ASSOCIATION, APPELLANT.

FILED JUNE 19, 1920. No. 21441.

1. **Insurance: FRAUD: PROOF.** When it is sought to defeat recovery on a policy of life insurance on the ground of concealment of material facts by the insured, it is incumbent on the insurer to prove that the representations were made knowingly and with a fraudulent intent to mislead and deceive, and that they were material to the risk, and were relied on by the insurer. *Ætna Life Ins. Co. v. Rehlaender*, 68 Neb. 284.

2. ———: ———: QUESTION FOR JURY. When the question of concealment of material facts is sought to be interposed to avoid liability on a life insurance policy, such question of concealment is one of fact for submission to the jury.

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

*J. L. McPheely,* for appellant.

*Thomas Lynch, contra.*

DEAN, J.

Mrs. Rose Ellen Fox sued to recover $1,000 on a life insurance policy issued to her daughter, Margaret Marie, by defendant, in which Mrs. Fox was named beneficiary. The daughter was about 22 when, on September 25, 1915, defendant issued the policy in question. April 18, 1916, the insured died. This is the second appeal here. On the former appeal a judgment for defendant on a directed verdict was reversed and a new trial granted. *Fox v. Scandinavian Mutual Aid Ass'n,* 103 Neb. 117. At the second trial plaintiff recovered a verdict and judgment for the full amount of the policy, and defendant appealed.

In the answer it is pleaded, and among other arguments in the brief it is contended, in substance: That Mrs. Fox and her daughter conspired to deceive defendant, in that they fraudulently concealed from the agent who took the application and from the physician who made the examination these material facts, well knowing them to be material, namely; that the insured was not in sound health when the application was made; that they had knowledge of physical infirmities of the insured at the time which would tend to shorten her life; that in October, 1913, the insured was afflicted with tubercular trouble, and under medical advice went to and was treated at the tuberculosis hospital at Kearney.

E. C. Sikes was defendant's agent, who, on September 20, 1915, obtained the written application for insurance from Miss Fox. At the first trial he did not testify. At the second trial he was a witness and testified on the part of defendant: "Q. In taking this application, I would ask you to state if you read the questions propounded there to Margaret Marie Fox? A. Some of those questions we didn't dwell on particularly; the detail I left out usually; inquired if they were in good health, if they had ever been rejected, is my custom; farther than that, I never went into the details particularly on these applications. Q. What would you say as to whether or not you asked this question: '(16) Have you been an inmate of any infirmary, sanitarium, retreat, asylum or hospital?' A. I don't recollect having asked the question; no, sir. Q. What would you say as to whether or not you asked her: '(18) Is there anything, to your knowledge or belief, in the physical condition of the family or personal history or habits, tending to shorten life?' A. I couldn't state that I positively asked that question; no, I considered it covered by the question if they were in good health, if they had ever been rejected. Q. State to the jury, in writing these answers, what you asked the applicant, Margaret Marie Fox, as to her health and her physical condition. A. My recollection was I asked her if she was in good health, if she had ever been rejected. Q. And what did she say as to her health? A. That she was."

Mr. Sikes testified on cross-examination: "Q. Now, I call your attention to several questions * * * which are as follows: 'No. 6. Have you ever applied for life insurance?' And the answer, 'No.' * * * A. I didn't consider it cut any particular figure. Q. You knew, at the time you wrote that 'No' down, that you had made her up an application for insurance yourself two years before, didn't you? A. Yes, sir. Q. You remembered that at the time? A. Sure did. * * *

Q. I call your attention to question No. 9: * * * 'When were you last examined for life insurance?' And the answer written in in ink, 'Never'? * * * A. For the same reason, I answer that question: No; it didn't cut any particular figure. Q. Well, you knew she had been examined? A. Yes. Q. You just wrote in the word 'Never'? A. Yes, sir. * * * Q. The question is, did she look strong and healthy? A. I would not say she did look strong and healthy as others do; no, sir. However, there was nothing to arouse suspicion in my mind particularly, as I had had her examined—had her—in 1913. Q. The fact that you had examined her in 1913 did influence you with regard to this application, did it? A. Not especially; but I might perhaps have been a little more inquisitive had I not gotten her a policy at that time in 1913. Q. While you were talking to the members of the family there at the Fox household, did they withdraw at any time to consult among themselves? A. No, sir. * * * Margaret Marie Fox and a young lady, the friend of this young lady, and Mrs. Fox, and young Mr. Jackson; I don't know his given name, I have forgotten. * * * It is my recollection they all stayed there."

Defendant read from the testimony of Dr. William Curry taken at the former trial. Respecting the examination he testified: "Q. That is, did you examine the patient at the time as to the force and volume of the pulse sitting and standing? A. I don't think that was required there. Q. Did you make the forced expansion? A. I measured the applicant on the full forced expansion and on contraction; expansion of the chest by taking a deep breath, and then a forced contraction by breathing it all out again. Q. Now, doctor, did you make any examination as to the lungs? A. Yes, sir. Q. Now, state whether it is true, or not, that by palpitation and percussion, as I understand it, and by hearing and listening, the doctor investigates? A. He does. Q. Did you do that? A. I could not say

that I did by palpitation or by percussion, but by auscultation I did. Q. As described here, doctor, question No. 7, 'What is the shape of the chest?' the word 'Normal' is written—who wrote that word 'Normal'? A. I did. * * * Q. The further question is asked: 'Is the vascular murmur clear and distinct over both lungs?' (The answer "Yes" appears in the exhibit.) Now, who wrote the answer to that? A. I did. * * * Q. Now, calling your attention to question 14, who wrote the answer to that? A. I did. Q. That is the 'first-class risk'? A. Yes, sir. * * * Q. And you believed that to be true at that time? A. Yes, sir. * * * Q. Now, the party that you examined, doctor, was there any indication in her appearance that would attract the eye of the doctor, and you there present, as to whether or not she was suffering from an ailment; that is, consumption? A. There wasn't anything that attracted my attention at that time. Q. What was the appearance of the young lady that you examined? A. She appeared to have good health. * * * Q. Doctor, was there anything in the appearance of the party you examined, when this application was signed by you, that would indicate to you in the first instance, as a doctor, that the applicant had tuberculosis or consumption? A. There wasn't anything that I observed." It may also be noted, as pointed out in the former opinion, that the doctor testified: "Q. Now, doctor, * * * you propounded the questions to the applicant at that time? A. I think I did. I always have; that was my custom to do so, and, unless there happened to be a question I knew by just seeing the applicant, or something of that kind, I would always ask the question; these I could not see without asking."

Defendant's answer "admits that the party signing the application representing herself to be Margaret Marie Fox was examined by a physician," leaving it to be inferred from the pleading and from the questions put to the doctor that some one impersonated the

insured and was examined in her stead. But his answers do not seem to so indicate. Edward Jackson was present when the doctor made the examination and testified at both trials. Except as to minor details, his evidence, which is reviewed at some length in the former opinion, is not materially different from that given at the former trial. He testified in substance that, besides himself, Marie, and the doctor, Mrs. Fox and Catherine Fox were present at the time. Clearly the question of the identity of the person examined by the doctor was for the jury. Mr. Jackson also testified that the doctor was present not to exceed 15 minutes; that he did not interrogate the insured as to her health, nor was the condition of her health talked about.

That the insured was an inmate of the state tubercular hospital for a period of 10 or 12 months is not controverted, but there is testimony in support of plaintiff's theory that a recovery was had. Clearly the doctor's diagnosis supports plaintiff's theory in respect of recovery as disclosed by his own evidence, unless indeed he is mistaken about having made an examination, as he testifield with respect to chest expansion and chest normality, vascular lung murmur, and the like. It may also be noted that he testified that an examination as to pulse force and volume did not seem to be necessary. Assuming, then, that the examination was made, it is clear that his conclusion on these points was the result of his own examination, based upon professional knowledge, and not on the answers of the insured. And if after so extended a personal examination he then pronounced her a "first-class risk," and if, as he further testified, there was nothing in her appearance to indicate that she was tubercular, but was to all appearance in good health, the jury were justified in relying upon his testimony. The testimony of Mr. Sikes shows that many of the answers to material questions on the examination sheet were his answers, and not the answers of the insured. The

same observation may be made with respect to much of the doctor's examination.

The defendant pleads and argues that there was concealment of material facts by the insured. The rule is that, when it is sought to defeat recovery on a policy of life insurance on the ground of concealment of material facts by the insured, it is incumbent on the insurer to prove that the representations were made knowingly and with a fraudulent intent to mislead and deceive, and that they were material to the risk, and were relied on by the insurer. *Ætna Life Ins. Co. v. Rehlaender,* 68 Neb. 284. When the question of concealment of material facts is sought to be interposed to avoid liability of a life insurance policy, such question of concealment is one of fact for submission to the jury. Bliss, Life Insurance (2d ed.) sec. 384.

The question whether the insured made false answers and whether she and the beneficiary, or either of them, concealed material facts from the defendant, upon which it relied, was properly submitted to the jury under the instructions of the court.

The verdict seems to be supported by the evidence. Finding no reversible error, the judgment is

AFFIRMED.

LETTON and ALDRICH, JJ., not sitting.

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JOSEPH MATOUSEK, APPELLANT, v. JOHN F. GALLIGAN, APPELLEE.

FILED JUNE 19, 1920. No. 21042.

1. **Sales: CONTRACT: NONPERFORMANCE: ACT OF GOD.** Where defendant is prevented from performing his contract to deliver specific hay by storms and unusual rains, constituting an act of God, he is not liable for nonperformance.

2. **———: INSTRUCTIONS.** The instructions of the trial court were proper, and we find no prejudicial error in them.

3. Evidence examined, and *held* sufficient to sustain the verdict of the jury.

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

*Edward H. Whelan,* for appellant.

*J. J. Harrington, contra.*

ALDRICH, J.

This is an action upon a written contract of sale. Judgment below was for defendant. Plaintiff appeals.

On April 5, 1917, the parties entered into the following written contract: "April 5, 1917. This is an acknowledgment of $150 payment on about 60 tons of hay at $9,25 per ton delivered in barn or cars at Atkinson, Neb., good No. 1 merchantable hay to be delivered on or before May 10, said hay sold to Joseph Matousek.

"J. F. Galligan,
"Joseph Matousek."

Plaintiff alleged that by mutual agreement the time of delivery under the contract was extended to the 16th of June, 1917, on which day defendant finally told plaintiff that he would not deliver the hay at all; that, by reason of defendant's failure to deliver the hay as agreed, the plaintiff, by reason of the great increase in the price of hay of that kind and quality, suffered a loss of $9.75 a ton on all the hay mentioned in the contract, or a total loss of $585, which sum, together with the sum of $150 already paid, amounts to $735.

Defendant in his answer admitted that he entered into the contract set forth in plaintiff's petition, and admitted that he received $150 from plaintiff, and also that he had not delivered the hay or any part of it. Defendant further claimed that the hay was situated on land seven miles south of Atkinson, which fact was well known by defendant at the time they made the contract, and that almost immediately after the contract

was made there came frequent and unusual storms and rainfall, making it impossible to bale and deliver No. 1, merchantable hay. He claims performance was prevented by an act of God.

On the question of act of God the court submitted the following instruction: "You are instructed that an 'act of God' is a part of every contract, whether it is written therein or not, and if a party is prevented from performing his contract directly and exclusively by an act of God, the law excuses him, and he cannot be held for any injury or damage in the nonperformance of the contract. An act of God, such as will excuse the performance of a legal contract, must be an act or occurrence so extraordinary and unprecedented that human foresight could not foresee or guard against it, and the effect of which could not be prevented or avoided by the exercise of reasonable prudence, diligence and care, or by the use of those means which the situation of the party renders it reasonable that he should employ. It must be the sole proximate cause of the nonperformance, without the participation of man, whether by active intervention or negligence or failure to act. The burden of proving this defense by a preponderance of the evidence is upon the defendant." We think this instruction states the law in regard to the act of God under the evidence. The jury were justified in finding that the act of God excused him from performance of the contract. The instruction fairly submitted the question.

It was reasonable for the jury to believe the testimony of defendant's witnesses with reference to the condition of the weather, the roads and the meadows. There was some evidence to the effect that a hay baler could not be hauled from one place to another on the roads or in the hay meadow. Defendant did not own a baler, and had to hire the hay baled. According to defendant's witnesses, the hay was short, the stacks small and wet through. Defendant claimed, and several

witnesses supported him, that the hay was wet and could not be baled and delivered as No. 1, merchantable hay. The record discloses that No. 1 hay must be dry.

The evidence also shows that this hay in question was practically a total loss, as defendant gave some of it away and sold a carload for $24, which would be something like $3 a ton.

The defendant denied that there was ever any extension of the time for delivery under the contract, and this issue was submitted to the jury in the instructions of the trial court.

On the question of defendant's inability to deliver this hay by reason of the continual and heavy rains there is a conflict of evidence. The jury found for the defendant. Also on the question whether defendant and plaintiff contracted for this hay with reference to specific hay situated on the land of defendant, there is a conflict in the evidence, but the jury found in favor of defendant. Defendant claims that plaintiff bought specific hay, that is, hay located on his land and which hay he bought from his landlord. Counsel for defendant admits that defendant would be liable if the parties did not contract with reference to specific hay.

The jury based its verdict on conflicting evidence in favor of defendant and against plaintiff. Under the rule we will not disturb the verdict unless clearly wrong. The record discloses that there is sufficient evidence to sustain the finding of the jury, and there was no error in the instructions of the court. They fairly submitted the issues, giving each side the benefit of its own particular theory of the case. We are obliged, then, as a matter of law to affirm the decision of the trial court.

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

REUBEN T. JONES, APPELLEE, v. HARTFORD FIRE INSURANCE COMPANY, APPELLANT.

FILED JUNE 19, 1920. No. 21054.

**Evidence:** OPINION EVIDENCE. Where, as in this case, the action is for personal service or the reasonable value of one's time, involving matters arising out of an implied contract, and where the evidence as to the reasonable value of such service rests solely upon the expression of the opinion of witnesses, it is generally held that such evidence is not conclusive upon that issue, and should be submitted to the jury for its determination.

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

*Morrow & Morrow,* for appellant.

*Wright, Mothersead & York, contra.*

DAY, J.

The appellee recovered a judgment against the appellant for $70 upon an instructed verdict. The appellant brings error, urging that the question of the reasonable value of appellee's time, the question in issue, should have been left to the determination of the jury. The record discloses that at the instance of appellant the appellee made a trip from Scotts Bluff, Nebraska, to Mohall, North Dakota, to testify in a case in which appellant was a party, under an implied contract at least that he was to be paid the reasonable value of his time. Seven days were consumed in the trip, and appellee made a charge for his service of $70, or $10 a day. Upon the trial appellee was the only witness called, and his testimony was the only evidence offered. Upon the issue of the value of his time, he testified that it was fairly and reasonably worth $10 a day; that at the time he made the trip, in January, 1918, he was engaged in the general insurance business, and also in buying and selling potatoes; that in 1917

he was employed as an insurance adjuster at $8 a day and expenses; that the usual and customary charge for special work adjustments was $10 a day, and that by being away from his business he lost from $10 to $20 a day. At the conclusion of the testimony, on motion of appellee's counsel, the trial court directed a verdict in favor of appellee for $70. Appellant duly excepted to this instruction.

The pivotal point in the case turns upon the question whether the testimony of the appellee as to the value of his time falls within the rule of opinion testimony, or is it to be regarded as a statement of a fact. As we view it, the testimony was a mere expression of opinion. It is true he stated the matters in positive terms, but they were none the less mere expressions of opinion. In the case of *Davis v. School District*, 84 Neb. 858, the only witnesses called were the plaintiff's witnesses, and between them there was no dispute. It was held: "The opinion of expert witnesses in a case involving the value of the service of an architect, based upon facts in evidence before the jury, need not be substituted by such jury for its own deliberate judgment." In *Fowle v. Parsons*, 160 Ia. 454, the value of the service of a surgeon was the question in issue. There was no dispute in the evidence as to the value of the service. Nevertheless, it was held that the jury must be permitted to determine the question of value, and cannot be directed to return a verdict for the amount claimed. In *Converse v. Morse*, 149 Ia. 454, the service rendered was as a farm-hand. There was no dispute in the evidence as to the value of the service, but the court held that opinion testimony was not conclusive as to the value of the service, and that the issue should have been submitted to the jury. For other cases bearing generally on the question, see note under *Fowle v. Parsons, supra*, 45 L. R. A. n. s. 181; *Head v. Hargrave*, 105 U. S. 45; *Chicago, A. & N. R. Co. v. Whitney*, 143 Ia. 506; *Sanders v. Graves*, 105 Fed. 849. In discussing

the question of expert testimony, the court, in *Moore v. Chicago, R. I. & P. R. Co.*, 151 Ia. 353, aptly said: "The jury does not sit simply to register the opinion of an expert witness, even though it be undisputed. It is its own exclusive function to pass upon the fact put in issue. The testimony of the expert may not be arbitrarily rejected, but, like the evidence of every other witness, is to be considered by the jurors, who are to accord to it influence, much or little, according as it appeals to their intelligent and impartial minds, in view of all the facts and circumstances developed upon the trial and the common knowledge and experience of mankind."

While there is a class of cases in which the opinions of experts are entitled to great weight and may be binding upon the jury when undisputed, yet, by the weight of authority, we understand the rule to be, and so hold, that generally in actions for personal service or the reasonable value of one's time, involving matters arising out of an implied contract, and where the evidence of such value rests solely upon the expression of opinion of witnesses, such evidence is not conclusive upon that issue, and should be submitted to the jury for its determination. We do not wish to be understood as holding that the appellee's charges were unreasonable, nor do we express any opinion either way upon that subject. We simply hold that under the evidence offered the question of the reasonable value of the appellee's time should have been submitted to the jury.

For the reasons assigned, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

ALDRICH, J., not sitting.

A. L. BARTLETT, APPELLEE, V. PETER DAHLSTEN ET AL., APPELLANTS.

FILED JUNE 19, 1920. No. 21045.

1. **Counties:** CLAIMS. The board of county commissioners has jurisdiction to pass upon a claim filed against the county, though the claim is not, in form, in strict compliance with the statute.
2. ———: ———: APPEAL: AUTHENTICATION OF TRANSCRIPT. On appeal to the district court from an order of the county board, where the party taking the appeal duly files his notice and his bond, and where the transcript, though filed within the time required, is, through fault of the county clerk, whose duty it was to prepare and file it, not properly authenticated, *held*, that the district court had power, when objection was made to the transcript on that ground, to allow the proper certificate of authentication to be attached, even though the time for filing the transcript had then elapsed, if it does not appear that the party taking the appeal is himself guilty of neglect or laches.
3. **Health:** COUNTY BOARD: EMPLOYMENT OF PHYSICIAN. In case of an epidemic of smallpox, *held*, that the county board of health, when it finds it necessary, by reason of the fact that the epidemic is not otherwise under control, and that persons afflicted with the disease are not being quarantined, may employ the services of a physician for the purpose of examining and inspecting persons thought to have the disease, to the end that the individuals afflicted with the disease may be located and quarantined.
4. ———: ———: JURISDICTION. Jurisdiction of the county board of health extends only to that territory within the county which is outside of the limits of incorporated cities and towns.

APPEAL from the district court for Wheeler county: BAYARD H. PAINE, JUDGE. *Affirmed on condition.*

*T. J. Doyle, G. N. Anderson,* and *J. M. Shreve,* for appellants.

*A. L. Bishop, John E. Kavanaugh* and *T. F. A. Williams, contra.*

FLANSBURG, J.

Action against Wheeler county on an alleged contract made between the county and the plaintiff, a physician.

Plaintiff was requested, at the instance of the board of health, to diagnose and examine the ailments of a number of persons, residents of the county, during a smallpox epidemic.

There is evidence tending to show that the physician on the board of health was unable to diagnose the disease and called it "Cuban itch." No quarantine had been established, and many persons afflicted with the disease walked about the streets and in public, so that the epidemic got well under way before it was discovered what the ailment was.

Plaintiff undertook the work, in this emergency, at the instance of the county board of health. Each of the specific examinations was made at the request of the board. There is evidence, also, that the chairman of the board of county commissioners requested that the county board of health take this action. Plaintiff made extended trips over the county, examining cases, so that quarantine might be established. When he made these examinations, he also instructed the persons afflicted how to care for themselves and, in some cases, prescribed for them. These first trips are the only ones charged against the county. When his services were completed, he filed a claim. The claim was disallowed by the board of county commissioners, and he appealed to the district court, where the matter was tried without a jury and judgment was rendered in his favor for the full amount of the claim.

The fees charged by plaintiff are shown to be reasonable; no issue is raised on that question by the evidence. But the defendant contends that the individuals receiving the services should be required to pay for them, and not a county, since these people, with one exception, were not paupers and not a county charge.

It is first urged, however, that the county commissioners had no jurisdiction to pass upon the claim, since the written verified statement of the claim, filed under section 965, Rev. St. 1913, was not in strict compliance

with the statute. The statute requires a showing that the items are "just and true" and that the amount claimed is "due and unpaid." The claim as filed alleged that the "account is just and correct" and the "amount claimed, after allowing all just credits, is wholly unpaid," but contained no affirmative allegation that the amount was due. The claim had attached to it a statement, purporting to be an account in favor of the plaintiff and against the county, and showing a balance of $214 in plaintiff's favor. Though the claim was not, perhaps, in strict compliance with the law, nevertheless, under our decisions, the board was vested with jurisdiction, regardless of the irregularity of the form in which the claim was presented. *State v. Board of County Commissioners,* 60 Neb. 566; *State v. Farrington,* 80 Neb. 628; *Gibson v. Sherman County,* 97 Neb. 79.

The contention is further made that the appeal should have been dismissed by the district court by reason of failure to properly authenticate the transcript of the record of the proceedings had before the county board. It appears that the county board disallowed the claim June 17, 1918. Appeal bond was filed June 22, and on the same day the transcript of the proceedings was filed in the district court. The transcript was not signed nor sealed by the county clerk. Motion was made to dismiss the appeal September 17, 1918, on the ground of failure of the clerk to authenticate the transcript, and an attempt was made by the clerk at that time to complete the certificate, but this was defectively done, and the transcript was not finally authenticated in proper form until, during the trial, on September 20, 1918, where it was signed and sealed by the clerk under order of the court.

The statute (Rev. St. 1913, sec. 965) provides that, when a claim is disallowed by the county board, the person aggrieved may appeal to the district court by serving written notice on the county clerk within 20 days, and by executing a bond to the county, conditioned for the

faithful prosecution of the appeal and the payment of the costs. These acts the claimant in this case had done, strictly in accord with the statute.

The statute further provides (section 967) that "upon such appeal being taken" the county clerk shall prepare and file the transcript in the district court. The duty of properly preparing and filing the transcript is, then, primarily enjoined upon the county clerk and not upon the claimant.

This procedure is somewhat similar to that provided for appeals from a justice of the peace to the district court. With regard to appeals from the justice court, it is held that, where the party appealing has taken the statutory steps directly required of him, and is not guilty of neglect or laches on his part, he does not lose his right of appeal because of failure or default in performance of a duty on the part of a public officer upon whom the duty in enjoined. Within the ruling in *Goetz Brewing Co. v. Waln,* 92 Neb. 614, it appears that the district court had jurisdiction to allow the transcript to be properly authenticated during the trial, as was done in this case. See, also, *Bree Bros. v. Firestine,* 84 Neb. 126; *Stewart v. Raper,* 85 Neb. 816. The claimant is required to take certain steps to perfect the appeal and to be diligent to see that the duties imposed upon the county clerk are carried out, but the claimant does not lose his right of appeal by the mere default of the county clerk when the claimant himself is not at fault.

As to the liability of the county for the services rendered, we must look to sections 2737 and 2738, Rev. St. 1913. By these sections of the statute, the county board of the county is directed to make and enforce regulations to prevent the introduction and spread of contagious diseases within the county, and, to that end, to establish a county board of health, which is given jurisdiction over the matter throughout the county, except in incorporated cities and villages. Where the local board fails to act with sufficient promptitude and efficiency in

any emergency, it is expressly provided that the state board of health shall step in and enforce its own regulations in that county, and that the necessary expenses so incurred shall be borne by the county. It would seem to follow that, when the county itself acts in an emergency, it was not intended that it be limited in its powers more than the state board, and that the necessary expenses incurred should, in that event, also be chargeable to the county. Though it is not expressly provided that, when the county acts in providing regulations to prevent the spread of disease, the necessary expenses so incurred shall be a charge against the county, that liability must necessarily be inferred. If that were not true, then the county would, by law, be required to perform a duty, and at the same time be prevented from using the means necessary to its performance. The county board could not quarantine without learning, through the services of a physician, whom to quarantine, and such services of a physician could not be procured without pay.

It might be questioned whether section 1104, Rev. St. 1913, has any bearing on this case. This statute declares unlawful all contracts or orders made by the county board or members thereof, in behalf of the county, "in the absence of a statute expressly authorizing such contract to be entered into."

It has been repeatedly held by this court that, though counties have no inherent powers, yet their agents, acting in their behalf, have not only such powers as are specially granted, but also such as are incidentally necessary to carry into effect those which are granted. *Lancaster County v. Green,* 54 Neb. 98; *Christner v. Hayes County,* 79 Neb. 157. Those powers, incidentally necessary to carry into effect the authority specially described, are a part of that authority itself, and are as expressly authorized, within the meaning of this statute, as when specially mentioned. It was not the intention of this statute that counties should be denied the exercise of those powers which are found to be necessary to

carry into effect a power specially granted. It that were the intention it would in many instances effect a repeal of those very provisions of the statute expressly granting the power, for to take away the means of performance is to destroy the power itself. Such would be the result in this case. The provision of the statute referred to, we take it, was intended to prevent counties from entering into those contracts, express or implied, and was intended to declare such contracts unlawful, where no statutory authority is to be found justifying the making of such a contract.

The right of the duly constituted county authorities to employ a physician in an emergency of this kind seems to us to come clearly within the express authority given to the county to provide and enforce regulations in order to prevent the introduction and spread of contagious diseases, and it must be that the examination and diagnosis necessary for purposes of quarantine of contagious diseases is one of the regulations contemplated and intended to be covered by the statute. *Town of Knightstown v. Homer,* 36 Ind. App. 139; *Hawthorne v. Board of County Commissioners,* 79 Kan. 295.

When a physician performs services of such kind for the county, he, of course, ought to be allowed to recover from the county, though the individuals examined and quarantined were not paupers nor a county charge. The obligation of the county rests upon contract, and, though it might be that the individual would be liable, the county is at least primarily liable to the physician. *City of Mankato v. County of Blue Earth,* 87 Minn. 425; *McKillop v. Board of Supervisors,* 116 Mich. 614; *Elliott v. Kalkaska Supervisors,* 58 Mich. 452; *Rae v. City of Flint,* 51 Mich. 526.

The jurisdiction of the county board in this case was limited by statute to that territory outside of incorporated cities and towns, and, though it may be presumed, so far as the petition and proof are concerned, until the contrary appears, that the contract of em-

ployment was for those patients only who were within the jurisdiction of the county board, nevertheless it affirmatively appears from the evidence that a number of individuals to whom plaintiff rendered services were residents of incorporated towns when the services were rendered. The services to Brush, Branak, Brown, Wammich, Fletcher, Harding, Flynn, Dickinson, and Palmer were rendered within the incorporated town of Bartlett; and the charge of $57 for services to these persons plaintiff should not be allowed to recover.

It is therefore ordered that in case plaintiff shall, within 20 days from the entry hereof, file a remittitur in the amount of $57, the judgment of the lower court, so reduced in such amount of $57, shall be affirmed, plaintiff to recover costs; but, in the event such remittitur is not so filed, the case is ordered reversed and a new trial granted.

AFFIRMED ON CONDITION.

ALDRICH, J., not sitting.

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## IN RE ALLEN VINCENT GRAMMER.
## ALLEN VINCENT GRAMMER, APPELLANT, v. W. T. FENTON, APPELLEE.

FILED JUNE 19, 1920. No. 21497.

1. **Criminal Law**: INSANITY OF FELON: TRIAL BY COMMISSION. Section 9098, Rev. St. 1913, providing that, if a person convicted of a capital offense is thought to have become insane, he should be entitled to a jury trial to determine that question, has been repealed by implication by section 9212, Rev. St. 1913, which provides for a commission in the place of a jury.
2. ———: ———: SUSPENSION OF SENTENCE. To entitle a person, convicted of a capital offense, to a suspension of sentence under section 9212, Rev. St. 1913, it must appear that he has become insane, not in some slight or peculiar or classical degree, but that his state of mind and mental condition are such that he does not understand, and is incapable of understanding, the nature of the

proceeding against him and of his impending fate and execution, and is unable, in a rational manner, to offer a defense or make objection to execution.

3. ———: ———: SUFFICIENCY OF PETITION. Where a proceeding is brought to determine the sanity of a person convicted of a capital offense, and no attempt is made to set out in the petition substantive facts or other allegations, showing such a degree of insanity as is contemplated by the statute, the petition is demurrable, and, where no other showing is seasonably made or offered that such insanity exists, the proceeding may be dismissed.

4. ———: FRIVOLOUS APPEAL. Where an appeal appears to be based upon a proceeding having no apparent substantive foundation, and operates only to create delay, without protecting substantive rights, it may be dismissed as frivolous.

APPEAL from the district court for Howard county: JAMES R. HANNA and BAYARD H. PAINE, JUDGES. *Motion to stay execution overruled and appeal dismissed.*

*Sterling F. Mutz* and *Clinton J. Campbell,* for appellant.

*Clarence A. Davis, Attorney General,* and *Mason Wheeler, contra.*

FLANSBURG, J.

Application was made to the district court for Howard county on February 6, 1920, petitioning the court to impanel a jury and determine the mental condition of defendant Grammer. Demurrer was filed to this petition on the same day, and on that day the demurrer to the petition was sustained and the action dismissed. Motion was made for leave to file an amended petition within ten days, and praying that the order of dismissal be set aside. It does not appear that any amended petition was tendered, nor that the court was informed what facts the petitioner expected to be able to set up by such amendment, and the motion was, on February 9, overruled. A transcript of these proceedings is attached to the motion to suspend sentence, filed in this court as a showing upon which the suspension of sentence is asked. The stay is sought for the purpose of

allowing a review of the lower court's order, sustaining the demurrer and dismissing the case.

Defendant claims to be entitled to a jury trial under section 9098, Rev. St. 1913. The attorneys for the state, on the other hand, claim that section 9098 has been repealed, and that section 9212, Rev. St. 1913, applies to this case. The former section, above referred to, provided that, in case a person convicted of a capital offense, should be thought to have become insane, he should be entitled to a jury trial to determine that question, and, if found insane, execution should be stayed.

Section 9212, passed in 1901, originally provided that, in case a person convicted of a capital offense should become insane after judgment, the district court for Lancaster county should have sole jurisdiction, and the matter of insanity should be tried to a jury. By the 1909 amendment of this section, it was provided that the matter should be tried in the county where the person was convicted, and that a commission of experts, instead of a jury, should pass upon the question. It would appear that the provision of the statute (section 9212, *supra*), effected a repeal by implication of the former section (section 9098, *supra*), since the two provisions of the statute cover the identical subject-matter and are in conflict with each other.

Under this latter statute, the court has held in *Barker v. State,* 75 Neb. 289, and *State v. Barker,* 79 Neb. 361, that the district court is the court which has jurisdiction to suspend sentence, and that the matter is committed largely to the discretion of the district judge.

It is argued that the supreme court has no jurisdiction to enter an order suspending sentence in such a proceeding. Though it might seem, by the decision just mentioned, that the matter is left somewhat doubtful, yet we believe the rule to be that this court, when it takes jurisdiction of the case, in which the insanity is tried or sought to be tried, has the right to suspend

sentence until the matter can be finally determined, and that such was within the contemplation of the act.

As this case is now presented, there is no showing of fact by the allegations of the petition, admitted by the demurrer, nor by the showing attached to the motion and contained in the transcript, which indicates that the defendant Grammer has become insane since judgment was rendered against him, and it would seem that, until it reasonably appears from the record presented here that he has become insane, this court should not, merely as a matter of course, grant a suspension of sentence, pending the review of a ruling in the matter by the lower court. The court cannot presume that the defendant is insane, but must depend entirely on the showing made, and, if the showing is insufficient to make a *prima facie* case, it would be the manifest duty of this court at this time to refuse to enter an order staying execution.

The petition, filed in the lower court, does not state a cause of action, and does not show that the plaintiff was entitled to the relief sought. The petition states that since the conviction defendant Grammer has become "insane," "as specifically shown by affidavit of Dr. G. E. Williams," attached to the petition. The affidavit referred to states that Doctor Williams feels convinced that the defendant "is and has been *classically* insane." By such allegations as these, it is not shown that Grammer had become insane within the meaning of that term as used in the statute. Why the doctor limited his allegation by the word "classically," and omitted all other statement of fact or description of condition of mind, which might point to the kind or degree of insanity referred to, we are unable to tell. It is apparent, however, that he desired to qualify the term "insanity," and he does not explain what he meant by it.

It is not every degree or kind of insanity which would entitle the petitioner to the relief sought. Generally speaking, insanity, as defined by this court, is not mere imbecility or weakness of mind, however great that may

be. *Witte v. Gilbert,* 10 Neb. 539. In referring to insanity, this court in *Hawe v. State,* 11 Neb. 537, approved a definition stating that the word "insane" means "exhibiting unsoundness of mind; mad; deranged in mind; delirious; distracted." The term insanity, as used in the statute in question, has a clear and well-defined meaning at common law.

Under a statute, very similar to the one in question, it is held in *In re Lang,* 77 N. J. Law, 207: "The statute does not alter the common-law rule that to prevent the execution of such sentences the insanity must be of such character as to render the prisoner incapable of understanding the nature of the proceedings against him, and his impending fate and execution." As pointed out in the case of *Barker v. State,* 75 Neb. 289, the true reason for the rule that a man shall not be executed who becomes insane is not that his execution, in such mental condition, would not be a fit example, but the real reason is that "he is incapable of saying anything in bar of execution, or assigning any error in the judgment." This court in that case states that it was not the purpose of the statute to do away with the definition of insanity as it was understood in such cases at common law. For further discussion of this rule, see *In re Martin,* 34 N. J. Law J. 17.

The defendant, Grammer, before he could reasonably ask a suspension of his execution in this court, should have made a showing here that he has become insane, not in some slight or peculiar or classical degree, but that his state of mind and mental condition are such that he does not understand, and is incapable of understanding the nature of the proceedings against him and of his impending fate and execution, and therefore is unable, in a rational manner, to offer a defense or make objection to execution. The record presented to us is wholly insufficient in its showing of fact in that regard. The petition does not show, nor is it supplemented by any record which shows, that the defendant Grammer is

insane, within the meaning of the statute, as we interpret it.

Though this matter was acted upon in the trial court on February 9, the transcript was not filed here until April 14, and the motion to suspend sentence not until May 28. The attorneys in this case have not argued as to the sufficiency of the petition, evidently intending that those questions in the case should be presented at some later time. It does not appear that they have taken any steps to immediately present the matter on that issue, and, though that matter has not been argued, it appears now that the court is forced to look to the sufficiency of the petition, in order to determine whether a sufficient showing has been made on the part of defendant, Grammer, to support the motion to suspend sentence.

Upon the consideration of this question, it has been necessary for us to look to the merits of the case. We find the petition utterly insufficient. Though some four months have elapsed since its filing, no showing has been offered, other than that Grammer is classically insane. The opinion of the one doctor, without any statement of his observation or facts supporting his opinion, nor indicating what kind or degree of insanity is meant, stands alone as the entire basis of this proceeding. No substantive facts are pleaded. No showing is made of insanity, as evidenced by attendant facts or circumstances. Had such a showing been made in the lower court, the petitioner should have been allowed to amend his petition and have had the opportunity to set it up. He did not, however, disclose the nature of any amendment he desired to make, nor did he file any amended pleading, nor offer any specific amendment, and has not done so up to this time. The trial court was justified in treating the proceeding as frivolous and in dismissing the case. In overruling the motion to allow the petitioner ten days in which to amend, when the nature of the amendment was not disclosed, the court

committed no error. *Camp v. Pollock,* 45 Neb. 771, 776; *Hurlbut v. Proctor,* 88 Neb. 491.

It appears that no substantive rights are protected by this proceeding, and that the only purpose it will serve, should this court entertain it, is to create delay. It is now more than a year since the judgment of Grammer's conviction was sustained by this court and his execution ordered to be carried out. His case, in its different phases, has been before this court numerous times since, and, though execution has been stayed, the repeated efforts of this defendant to gain relief from the judgment and execution have, in each instance, been unsuccessful.

Even though the case here had presented technical errors in the ruling of the trial court, necessitating a reversal, we would have no assurance, from the showing now made, that there is any reasonable probability that a showing of insanity, within the meaning of the statute, could or would be attempted to be made. For some reason, no one, so far, has made a sworn statement of any facts even tending to bear upon that question. This case and the appeal appear from the record to be frivolous and without substantive foundation to support it.

It is therefore ordered that the motion to stay execution be overruled, and the appeal

DISMISSED.

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GEORGE H. TUTTLE, APPELLEE, v. ISABELLE WINCHELL, APPELLANT.

FILED JUNE 19, 1920. No. 21015.

1. **Specific Performance:** ADOPTION: PAROL CONTRACT. A parol agreement of adoption, whereby a parent surrenders a child to others upon their promise to adopt, rear and educate it as their own, and to give it the same right of inheritance as a natural child, but

which is not consummated by a statutory adoption, will, if otherwise fully performed, be enforced in case the adoptive parents die intestate, by decreeing to the plaintiff the same share in their property to which he would have been entitled if the agreement to adopt had been fulfilled.

2. ———: ———: ———: CONSIDERATION. The parent's sacrifice in giving up the child to those who promise to adopt it, and the subsequent society, companionship and filial obedience of the child, constitute the consideration for a parol contract of adoption.

3. ———: ———: ———: INVALIDATION OF CONTRACT. Where an infant child is taken by those who, in pursuance of a parol contract, agree to adopt, rear, educate, and make it an heir as if it were their own, and the child remains in their family on that footing until he attains his majority, when he leaves with their approval and consent; in an action to enforce the child's right to a share in the estate of the adoptive parents, who died intestate, faults of character or behavior on the part of the child during his minority are not proof of failure to perform his filial duty sufficient to invalidate the contract, unless it is shown that the adoptive parents rescinded the contract and terminated the relation because of such conduct.

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

*Hainer, Craft & Edgerton,* for appellant.

*Fawcett, Mockett & Walford* and *M. F. Stanley, contra.*

DORSEY, C.

The plaintiff brought this suit, and obtained a decree therein in the court below, for the specific performance of an alleged parol agreement by Earl Tuttle and Catherine Tuttle, his wife, to adopt the plaintiff and to make him their heir. The only other interested party is Isabelle Winchell, the daughter of Mr. Tuttle, in whom the interests of all the heirs at law are merged, and who prosecutes this appeal. The effect of the decree is to vest her with the title to the undivided half of the property and the plaintiff with the remaining half; whereas, if the plaintiff should not prevail, she would be entitled to all of it. Mr. Tuttle died in 1914, and his wife in 1917, both intestate.

The appellant, Isabelle Winchell, admits that the Tuttles took the plaintiff and reared him, but denies that they entered into any contract to adopt him or to make him an heir. She also alleges that his behavior toward Mr. and Mrs. Tuttle was not such as was due from a son to his parents, and that he is thereby precluded from recovery.

In 1881 the plaintiff's mother, Ellen Purdy, widow of David Purdy, his father, was living in Hamilton county, Nebraska, at the home of an aunt, and had the little boy, then between two and three years old, with her. It appears that she was working out, and, as her aunt was old and infirm, there was no one to give the child proper care during her absence. Earl Tuttle and his wife were well-to-do people, owning and residing upon a quarter section of land in the neighborhood.

The circumstances surrounding the taking of the boy by the Tuttles are related by the plaintiff's mother in her deposition taken in California in January, 1919. Her name then was Ellen Criddle; she having married again shortly after the Tuttles took the boy. She testified that, having heard she was trying to get some one to look after the boy, they called upon her, stating that they wanted him; that they would take him and educate and provide for him as their own; that they would have the papers made out and adopt him, and that he should live with them the same as the daughter and be an equal heir with her; that she did not want to give up the boy, but thought it was better for him to have a home, and that she accordingly assented to the proposition of the Tuttles. About a week later, while she was away working, they came, she said, and took the boy away. She lived in the neighborhood until the boy was grown, but never after that asserted any right or control over him. The Tuttles, she said, never complained to her about the boy or asked that he be taken back.

It appeared, without substantial dispute, that the boy remained a member of the Tuttle family until he had grown to manhood; that he was known in the neighborhood and at school as George H. Tuttle; that he addressed Mr. and Mrs. Tuttle as his parents, and that they treated him the same way and on the same footing as the daughter, Isabelle. In 1885 the daughter, then 24 years of age, married I. H. Winchell and left the Tuttle home. Thereafter the plaintiff was the only child in the household. After he became 21 the plaintiff left the Tuttle home, with the approval and consent of Mr. and Mrs. Tuttle, so far as the record shows.

As tending to discredit the testimony of Ellen Criddle relative to the contract, three women, who lived in the neighborhood at the time, testified for the defendant to statements made by the plaintiff's mother to the effect that the Tuttles had not adopted the boy, but intended only to take care of him. Letitia Wright testified that Mrs. Purdy told her that she had not made out adoption papers because she might want the boy herself after she married Criddle. Alice Chaney testified that Mrs. Purdy told her the Tuttles were not going to adopt him, because it would not look well to change his name. The trial court likewise admitted, over the plaintiff's objections, the testimony of three witnesses that Mrs. Tuttle had told them that she and her husband had not adopted George and did not intend to, but had only taken him to raise. Charles Fry also testified, over objection, that Mrs. Tuttle told him the boy had never been legally adopted; "that they thought they would when they first got him, but that they didn't do it."

It is upon the testimony of Ellen Criddle that the establishment of the alleged contract of adoption principally depends. The defendant assails the credibility of her story upon the ground that she detailed language used by Mr. and Mrs. Tuttle with too much pre-

cision, in view of the fact that 38 years had elapsed since their conversation, and that the language which she says they used was so nearly like that required to make a case for the plaintiff as to indicate a desire to manufacture testimony to help the plaintiff. It is said, moreover, that her story is improbable, for the reason that a mother situated as she was, incumbered with a child that she was without means of properly caring for, who had been trying to get someone to take it, was not likely to have insisted upon an agreement to adopt, but would have been glad to shift her responsibility to any suitable person, who would agree merely to assume the custody, nurture and education of the child.

A careful reading of this testimony, with the foregoing criticism in view, leads us to the conclusion, however, that Mrs. Criddle related the facts as she remembered them, and that she did not embellish her story in order to assist the plaintiff. However difficult or impossible it might be, after such a lapse of time, to recall ordinary and unimportant matters, it is by no means so remarkable as to arouse suspicion that a mother should retain an accurate recollection of the import and details of a conversation dealing with her permanent separation from an infant child, nor does it seem improbable that the plaintiff's mother should have felt some concern for plaintiff's future interests, in arranging to surrender him to the care of strangers. Although such an arrangement may have suited her, it is not to be assumed that she would relinquish her child without assurances as to its future status and welfare. It was to go at a tender age into another family, to grow up in a different environment, and the tie that bound it to its only living parent was to be permanently severed.

The fact that a definite and final separation was contemplated as a consideration of the agreement is borne out by the fact that the mother never afterwards re-

claimed or sought to interfere with the child, although she married again and continued for 20 years to live in the same neighborhood. During that time she visited the plaintiff at the Tuttle home only at infrequent intervals, and the relation of parent and child was never resumed between them. Considering also the attitude, circumstances and conduct of Mr. and Mrs. Tuttle in the matter, we find nothing to indicate that they would have been reluctant to adopt the boy and to give it the rights and status of a child of their own. Mr. Tuttle's daughter, Isabelle, was 20 years of age, and likely before long to leave them, as she did when she married in 1885. It was quite natural that they should feel the need and desire for another child in the family, and it is not unreasonable to suppose that, after finding a child that suited them, which they were willing to take into the family and to keep in that intimate relationship from early infancy, they intended in taking it to make the child, by adoption, in every sense of the word their own.

There is no improbability, therefore, in the testimony of Mrs. Criddle that, when they came to see the boy and expressed their satisfaction with him, they suggested, as an inducement to her to surrender him, that they would adopt him and give him the same rights as if he were their own. Nor is the fact that they neglected to institute formal adoption proceedings evidence that the promise was not made. Except for their neglect in that particular, they fulfilled the substantial part of their agreement. The plaintiff was reared and educated as their child and bore their name. He was treated in no different way than children are ordinarily treated by their parents. He lived with the Tuttles until he came of age, and then went his way, as children are wont to do, with their apparent consent and approval.

We are mindful of the rule that parol contracts of this character must be established by clear, convincing,

and satisfactory evidence. *Peterson v. Bauer,* 83 Neb. 405. Giving due weight to the evidence and arguments presented by the defendant, we are, nevertheless, convinced that there was a contract on the part of Mr. and Mrs. Tuttle to adopt the plaintiff and to give him the same rights as if he had been their own child.

It is the defendant's contention, however, that there was not such performance of the alleged contract as to entitle the plaintiff, in equity, to specific performance. In that connection counsel cite *Overlander v. Ware,* 102 Neb. 216, that—"The work constituting the performance required under the statute of frauds must be such as is referable solely to the contract sought to be enforced, and not such as might reasonably be referable to some other and different contract or relation. Nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the agreement be fully performed."

The fact that the mother surrendered the boy, and gave over her authority over him to the Tuttles, without executing a formal written relinquishment under the adoption statute, cannot, it is urged, be taken as performance on her part of a supposed agreement to adopt, since her act is to be accounted for upon the theory that she was anxious to get rid of the boy, even without an agreement to adopt, in order to be free to marry again. It is likewise argued that the evidence shows the boy was insolent, mischievous, and unwilling to work; that he made little return for what the Tuttles did for him; and that his conduct was not such as to constitute performance of the contract on his part within the meaning of the rule.

In determining whether there was adequate performance of the contract on the part of plaintiff and his mother, it is important to note the distinction, in the nature and terms of the contract involved, between *Overlander v. Ware, supra,* and cases of that nature,

and the case in hand. The contract established in the instant case was that Mr. and Mrs. Tuttle would adopt the boy, and that he should live with them the same as the daughter and be an equal heir with her. This was not an express contract to convey, by will, to the plaintiff all or any specific part of the property of Mr. and Mrs. Tuttle. It did not in terms restrict their right to dispose of their property before or after their death. It only gave the plaintiff the right to inherit what remained undisposed of on equal terms with the daughter. The question of the rights of the plaintiff as against one to whom the Tuttles might have conveyed their property by will is not here involved, for they never made a will.

In *Overlander v. Ware, supra,* on the contrary, the claim sought to be enforced was to the entire estate of the decedent, not under a contract to adopt the claimant or to make him an heir, but under an alleged contract to convey all the decedent's property, in consideration of the claimant living with the decedent and caring for him as a son until his death. The consideration for the promise to convey in such cases is based upon the fundamental idea of services to be rendered, while, in the case of contracts of adoption, the consideration is the society, companionship and filial obedience of the child, together with the parent's sacrifice in giving up the child to another. *Healy v. Healy,* 66 N. Y. Supp. 927; *Winne v. Winne,* 166 N. Y. 263, 82 Am. St. Rep. 647.

The mother's performance of the contract in this case was complete upon surrender of the child. In taking into their keeping and agreeing to rear a child of tender years, Mr. and Mrs. Tuttle could not know what disposition and character the boy might develop. They could not reasonably expect the child to be wholly free from faults or defects of character. There is some testimony indicating that in his boyhood the plaintiff was of a mischievous disposition; that he would

tease and annoy Mrs. Tuttle; and that he was disobedient and averse to work. Nothing so serious occurred, however, as to cause a breach in his relations with the family, and he continued a member of it until he became of age. The record contained letters indicating that, in their latter years, Mr. and Mrs. Tuttle had not withdrawn their affection and confidence from the plaintiff. There was nothing to indicate that the plaintiff's conduct had induced them to break their connection with him. In the absence of any proof of an intention on their part to rescind the contract because of his conduct, it will be presumed that he yielded them the companionship and obedience demanded by the contract. *Burns v. Smith,* 21 Mont. 251, 69 Am. St. Rep. 653.

If the promise to adopt the plaintiff had been consummated by formal adoption under the statute, it would have carried with it a child's right of inheritance in the property of Mr. and Mrs. Tuttle. They made no will, and their property was left to descend by operation of law. Equity considers that done which should have been done, and, since the plaintiff's right to the share to which he would have been entitled if legally adopted can be recognized without violating any expressed intention of the deceased to the contrary, the decree awarding him that share was just and equitable. *Pemberton v. Heirs of Pemberton,* 76 Neb. 669.

We accordingly recommend that the decree of the court below be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

LETTON, J., dissents.

LYMAN B. CORNELL, APPELLANT, V. TOM TUCK ET AL., APPELLEES.

FILED JUNE 19, 1920. No. 21066.

1. **Continuance.** It is not abuse of discretion to deny a continuance after the issues have been made up and the cause set for trial, if the pleading of the party applying for continuance fails to disclose a meritorious cause of action or defense.

2. **Specific Performance:** SUFFICIENCY OF PETITION. A petition for specific performance of a unilateral agreement to sell and convey land upon certain terms, which provides that it shall be in effect only for a certain period, and shall terminate if the holder fail to "consummate a purchase" according to its terms within said period, is fatally defective in the absence of averments showing that the plaintiff, within the time specified, brought to the knowledge of the vendor his acceptance of the option and his election to be bound by its terms.

APPEAL from the district court for Box Butte county: WILLIAM H. WESTOVER, JUDGE. *Appeal dismissed as to appellee Tuck, and decree affirmed as to appellees Walker.*

*Burkett, Wilson, Brown & Wilson,* for appellant.

*Mitchell & Gantz, A. K. Barnes* and *C. C. Flansburg, contra.*

DORSEY, C.

January 4, 1918, Tom Tuck entered into a written agreement to sell and convey a quarter section of land in Box Butte county, Nebraska, to the appellant, Lyman B. Cornell, or to such purchaser as he might procure within 30 days, for the sum of $2,180, of which the appellant paid down $100, and $1,580 was to be paid by him upon delivery of the deed. The agreement provided that the land was to be clear except for a mortgage of $500 to be assumed by the appellant. Tuck agreed to furnish an abstract showing a perfect and marketable title, and to deposit the abstract and a deed

to the land in the Alliance National Bank, to be delivered to the appellant when the payment of $1,580 should be made.

The instrument in question contained the following provision: "It is further agreed by and between the parties hereto that the foregoing contract and agreement shall be in force and effect for the term of thirty (30) days from the date hereof and no longer, and that in case said party of the second part, or a purchaser whom he shall procure, shall not consummate a purchase upon the terms hereinbefore set forth, within such period, all right or claim of said party of the second part under this agreement shall terminate and be at an end."

February 2, 1918, a further agreement was entered into by Tuck extending the time for the expiration of the contract to March 4, 1918. On April 30, 1918, Tuck conveyed the land to the appellee, Jay O. Walker, by warranty deed.

This suit was commenced by the appellant against Tom Tuck and the appellees Walker and wife, for the specific performance of the contract, and the prayer was that, in the event the court should find itself unable to decree specific performance, the appellant might have judgment for damages against Tuck. The appellees Walker filed an answer setting up the defense, in substance, that Tuck had deposited the deed and a proper abstract in the bank in compliance with the contract, but that the appellant had failed to exercise the option to purchase the land or to make the payment provided in the contract within the time limited, and that, in consequence thereof, the contract had terminated and become void, and that the appellees Walker were without knowledge thereof at the time of the conveyance. They prayed that their title be quieted and that the appellant's suit be dismissed. Tom Tuck also filed an answer setting up the same defense and praying that the appellant's suit be dismissed. To these answers the

appellant filed replies in the nature of a general denial.

When the case came on for hearing February 15, 1919, the appellant applied for a continuance on the ground that his principal counsel, H. H. Wilson, of Lincoln, Nebraska, was unable to be present. Upon the refusal of the court to continue the hearing, the appellant declined to offer evidence, and the cause was heard upon the answer and cross-petition of the appellees Walker, and a decree was entered quieting title to the land in the appellee Jay O. Walker.

The question first arising upon the record is whether or not the court abused its discretion in refusing to grant a continuance. As the circumstances appear from the affidavits in support of the motion for continuance, H. H. Wilson was the only attorney employed by the appellant and had the files and papers connected with the case. The case had been set by the court to be heard on February 14, 1919. Mr. Wilson left Lincoln on a regular passenger train scheduled to reach Alliance, where the court was sitting, at 4:50 in the morning of February 14. In consequence of an unusual storm, the train was snow-bound at Aurora, Nebraska, and could not reach Alliance until after February 15. It thus appears from the showing for continuance that the only attorney employed by the appellant was unavoidably prevented from reaching the place of trial, although he used due diligence to be present, and that, if compelled to go to trial in his absence, the appellant would be deprived of the documents connected with the case, and would be exposed to the hazards incident to going to trial without the counsel and assistance of the attorney upon whom he depended. The situation presented at the time of the application in this case was, it occurs to us, of such a nature as would ordinarily justify a continuance for such time, at least, as would be required to restore train service and enable counsel to reach the place of trial.

But the decree ought not to be reversed on the ground of abuse of discretion in refusing to defer the hearing, unless it appears that the appellant had a cause of action, and that, if he had been afforded the opportunity to make proof, his averments, if supported by evidence, would have entitled him to recover.

The contract upon which he sued was unilateral; it was not an agreement by the appellant to purchase the land; it was an agreement on the part of Tom Tuck to sell the appellant the land in question, if the latter should "consummate a purchase" within a certain time, but that otherwise it should terminate. Thus time was unequivocally and expressly made of the essence of the contract. Until acted upon by the appellant it was a mere option to purchase, which did not impose any obligation upon the appellant or give Tuck any right of action against him.

In order to constitute a contract enforceable in a suit for specific performance, there must have been a meeting of the minds of the parties as to the subject of the contract, viz., the purchase and sale of the land. So long as the appellant was not bound to purchase there was no contract. The instrument in question was a mere offer on Tuck's part to sell, operative for a limited time, which could become a contract only in case of acceptance by the appellant in conformity with its terms. This is recognized in the provision that appellant's rights should be at an end if he should not "consummate a purchase" within the prescribed period.

Before a purchase could be said to be consummated, some affirmative action signifying his acceptance of the offer was required of the appellant. Such acceptance would have been clearly manifest if the appellant had, on or before March 4, paid or tendered either to Tuck or to the bank the sum of $1,580. The appellant, in his petition, does not plead any payment or tender within that time or at any later time. He alleges merely that Tuck failed to furnish an abstract showing title

as provided by the agreement, and that he neglected to pay certain interest. Not only is there no allegation of payment or tender, but the petition is also lacking in any averment that the appellant at any time signified or communicated to Tuck in any other way his intention to accept the terms of the option or to consummate a purchase. The appellant was not, it seems clear to us, entitled to rely upon defects in the title or unpaid interest as an excuse for his failure either to pay or tender the money, or to communicate to Tuck by some other method, prior to the expiration of the option, his acceptance of its terms. If he had made known his acceptance before the option expired, circumstances might have transpired in the nature of a waiver of the right on Tuck's part to insist upon payment until the title had been adjusted. In the absence however, of anything that could be construed into an election on the appellant's part, prior to the expiration of the option, to accept and be bound by its terms, we are convinced that the appellant was in no position to insist upon specific performance. *Kelsey v. Crowther,* 162 U. S. 404; *Lockman v. Anderson,* 116 Ia. 236; *Breen v. Mayne,* 141 Ia. 399; *Levy v. Lyon,* 153 Cal. 213.

The appellant's petition being evidently insufficient to sustain a decree for specific performance, he was not prejudiced by the refusal of the court to grant a continuance, if the case is viewed simply as a suit for specific performance. It involved, however, another phase, namely, that of a suit to quiet title, introduced into the case by the prayer of the answer and cross-petition of the appellees Walker. They averred in their pleading, that there was no acceptance or exercise of the option by the appellant within the time limited. It was necessary for the appellant to plead and prove such acceptance as a prerequisite to specific performance. If he was not entitled to specific performance, then the very state of facts that denied him that

relief gave the appellees the right to have the title quieted.

After the continuance was denied the appellant refused to offer evidence in support of his petition, and the case proceeded upon the cross-petition of the appellees Walker to quiet title. Mr. Basye, a local attorney, objected, on the appellant's behalf, to a part of the testimony of one witness, and, at the conclusion of the appellees' evidence, asked leave to dismiss the appellant's case without prejudice. The court granted leave to dismiss so far as the appellant's cause of action was concerned, but declared that, since the appellees were asking affirmative relief, their part of the case could not be dismissed, and entered a decree quieting title in the appellee Jay O. Walker.

At the time the motion to dismiss was made the situation was as follows: The appellees had introduced the testimony of Tom Tuck and of the officer of the bank where the deed and abstract were deposited, showing affirmatively that the appellant had failed to pay or tender the money or otherwise to signify his acceptance of the option. The plaintiff, although present in person, offered no testimony to the contrary. Under these circumstances, the court, we think, was justified in assuming that, since the plaintiff's petition was lacking in those essential averments, and he remained silent while the other parties to the transaction testified that he had not accepted the option, he had no good grounds upon which to maintain either his cause of action for specific performance or his defense to the appellees' cross-petition to quiet title; the vital point in each being essentially the same. When the motion for continuance was overruled, the court was undoubtedly entitled to look to the appellant's petition to see whether it contained the elements of a meritorious cause of action, and, if it did not, to decline to defer the hearing. Since the facts upon which the appellant's right to specific performance depended were identical with those re-

quired to constitute a defense on his part to the cross-petition to quiet title, the appellant, we think, had no better right to a continuance in his attitude as a defendant to the suit to quiet title than as plaintiff in the suit for specific performance. The motion to dismiss, made after all the evidence in support of the cross-petition was in, did not, in our opinion, alter the situation.

Some controversy has been raised as to whether Tom Tuck should be treated as an appellee here, and there is a motion to dismiss the appeal as to him. In view of the record, although it is somewhat confusing upon that point, we believe the motion should be sustained, upon the ground that there was a dismissal of the case against him in the court below.

For the reasons stated, we recommend that the appeal be dismissed as to the appellee Tom Tuck, without prejudice to a future action by the appellant against him, and that the decree of the court below in favor of the appellees Walker and against the appellant be affirmed.

PER CURIAM. For the reason stated in the foregoing opinion, the appeal is dismissed as to the appellee Tom Tuck, without prejudice to a future action by the appellant against him, and the decree of the court below in favor of the appellees Walker and against the appellant is affirmed, and this opinion is adopted by and made the opinion of the court.

JUDGMENT ACCORDINGLY.

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WILLIAM E. DELOZIER, APPELLEE, V. VILLAGE OF MAGNET, APPELLANT.

FILED JUNE 19, 1920. No. 21092.

1. **Municipal Corporations:** DISCONNECTING TERRITORY: PARTIES. **Section 5090, Rev. St. 1913, gives to "a majority of the legal voters" residing in territory within and adjacent to the corporate limits**

of any city or village the right to maintain an action to disconnect such territory therefrom. *Held*, that a person who is the only legal voter residing within such territory comes within the designation and can maintain the action.

2. ———: ———: ———. Liability to the assessment and payment of taxes for municipal purposes is a sufficient interest to entitle one to maintain the action.

3. Appeal: STIPULATION OF FACTS. A stipulation of facts, not incorporated in a bill of exceptions, cannot be considered in this court.

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

*H. E. Burkett*, for appellant.

*B. Ready, contra.*

CAIN, C.

Plaintiff bought this action to disconnect a half section of land, upon which plaintiff resided, from the defendant village of Magnet. There was a decree in plaintiff's favor disconnecting the land from the village, and the village appeals.

There is no bill of exceptions in this case. The case was tried upon the pleadings and a stipulation of facts, but the stipulation of facts cannot be considered here for the reason that it is not incorporated in a bill of exceptions. *Bankers Life Ass'n v. Board of Commissioners*, 61 Neb. 202; *Keeler v. Manwarren*, 61 Neb. 663; *Bush v. Tecumseh Nat. Bank*, 64 Neb. 451; *State Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 47 Neb. 1. Moreover the stipulation neither adds to nor detracts from the statement of facts herein contained.

The errors complained of are that the court erred in overruling the defendant's demurrer to the petition, that the findings are not sustained by sufficient evidence, and that the judgment is contrary to law. After defendant's demurrer to the petition was overruled, it filed an answer, and hence there is no prejudicial error in overruling the demurrer.

The answer contained no denial of the allegations of the petition, which alleged the following facts: That

plaintiff resides upon and occupies the north half of section 31, in township 29, north, range 1 west of the 6th p. m., in Cedar county, Nebraska, and is the only voter residing thereon; that the land was within the corporate limits of the village of Magnet and adjacent thereto, and is now, and ever since the incorporation of the village has been, used for agricultural purposes exclusively, and has never been laid out in village blocks, lots, or streets; that the village levied taxes upon plaintiff's property situated on the land for village purposes for the years 1915, 1916, 1917, and 1918, amounting in all to $60, which the plaintiff paid, and that the village will continue to levy taxes for village purposes on the property of the plaintiff located on said land; that plaintiff received no benefits from the taxes so levied; and that the assessment, levy and collection of village taxes upon the plaintiff is unjust and inequitable. The answer contains no denial, but avers that plaintiff is not the "owner" of, or one of the "owners" of, the real estate described in the petition; that plaintiff has never paid any taxes on the real estate; that there are no legal "voters" residing on the real estate; and that the plaintiff has no interest in the real estate sought to be detached except as a mere cropper thereon.

The decree of the trial court contains findings in harmony with the allegations of the petition, and in the absence of a bill of exceptions we must assume that the findings were sustained by sufficient evidence. The fact that the allegations of the petition were not substantially denied conclusively corroborates this presumption.

This proceeding was brought under section 5090, Rev. St. 1913, which provides as follows: "Whenever a majority of the legal voters residing on any territory within and adjacent to the corporate limits of any city or village * * * shall desire to have the same disconnected therefrom, they may file their petition in the district court of the county in which such city or village is situated praying that such territory be detached there-

from. * * * If the court find in favor of the petitioners, and that justice and equity require that such territory, or any part thereof, be disconnected from such city or village, it shall enter a decree accordingly."

The chief objection of the appellant is that the plaintiff, being the only legal voter in the territory sought to be detached, does not come within the designation of the statute requiring "a majority of the legal voters." In other words, the appellant contends that the plaintiff cannot be a "majority" of himself. There is no merit in this contention. The statute regulating the disconnection of territory from any city or village designates two classes of persons who may maintain the action. One is "a majority of the legal voters" and the other is "the owner or owners of any unoccupied territory so situated." Obviously the intent of the legislature was that no such action could be maintained by a minority of the voters residing in the territory sought to be disconnected. When, therefore, all the voting population of the territory sought to be detached makes the petition, the design of the legislature is fully complied with, even though the total voting population consists of but one person. We do not doubt the accuracy of the definitions of the word "majority" set out in appellant's brief, but they are inapplicable here. If appellant's contention is sound, then a solitary voter residing in territory wholly unsuited to municipal purposes could escape the burdens of municipal taxation of no benefit to himself only by the method pointed out in appellant's brief of taking up his belongings and going elsewhere. We cannot believe this to have been the design of the legislature in enacting the statute upon which this action is based. The land sought to be detached was a half section of farm land that had been used wholly for agricultural purposes and had never been laid out in town lots or blocks and was wholly unsuited to municipal purposes. Still the plaintiff was required to pay taxes for village purposes from which he got no benefit. The petition

alleged that the assessment of village taxes on plaintiff's property was unjust and inequitable, and that justice and equity require that the land be disconnected from the village. Even this allegation was not denied. The allegations of the petition undenied by the answer are amply sufficient to sustain the judgment of the district court, without having recourse to the presumption of law that the judgment is supported by sufficient evidence. Appellant contends that plaintiff is not the real party in interest, but liability to municipal taxation is a sufficient interest to enable him to maintain the action.

We recommend that the judgment of the district court disconnecting the half section of land described in the petition from the village of Magnet be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

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STATE, EX REL. JOHN H. HOPKINS, APPELLEE, v. DARIUS M. AMSBERRY, SECRETARY OF STATE, APPELLANT.

FILED JUNE 29, 1920. No. 21235.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Appeal dismissed.*

*Clarence A. Davis, Attorney General,* and *George W. Ayres,* for appellant.

*John H. Hopkins* and *John P. Breen, contra.*

*L. M. Pemberton* and *W. T. Thompson, amici curiæ.*

PER CURIAM. The decision of this case is controlled by that in *State, ex rel. Ayres v. Amsberry, ante,* p. 279, and the appeal is therefore dismissed.

JEANETTE JESSOP ET AL., APPELLANTS, V. AUGUSTA C. BROWN ET AL., APPELLEES.

FILED JUNE 29, 1920. No. 20824.

1. **Wills:** MUTUAL WILLS: TRUSTS. An agreement between a brother and sister for the execution of mutual wills, which in specific terms purports to bind the survivor to bequeath the property received under the will to blood relations, but does not clearly and reasonably establish a similar obligation as to the survivor's individual property, will not be held to create a trust except as to the property which the survivor has taken under the will.

2. ———: ———: ———: SATISFACTION OF TRUST. Property was bequeathed under an agreement to dispose of it to the blood relations of the parties. The taker, during his lifetime, paid to or for the benefit of such relations an amount equal to the property received. *Held*, such payment constituted a satisfaction of the trust.

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

*Weaver & Giller*, for appellants.

*Fawcett, Mockett & Walford*, and *Lysle I. Abbott*, *contra.*

MORRISSEY, C. J.

Plaintiffs brought this suit to establish a trust for their benefit in property conveyed by deed, or devised under the will of Edward J. Brown, deceased, to his wife, Augusta C. Brown. There was judgment for defendants, and plaintiffs have appealed.

Mrs. Jeanette Benson conducted a dry-goods store in Omaha, from 1887 until her death in 1905. During these years, there lived with her, David Benson, her husband, her widowed sister, Mrs. Jessop, and Mrs. Jessop's children. In Quincy, Illinois, lived Edward J. Brown, a bachelor brother of Mrs. Benson and Mrs. Jessop. Brown loaned money to Mrs. Benson for use in her dry-goods business and took her promissory notes as

evidence thereof. Mrs. Jessop acted as housekeeper, while the money to maintain the house and family was supplied from the mercantile business of Mrs. Benson.

It is alleged by plaintiffs that in 1903 Mrs. Benson and her brother, Edward J. Brown, entered into a contract for mutual wills, whereby Mrs. Benson was to name Brown as legatee in her will, subject to certain provisions made for her husband, and the brother was to name Mrs. Benson as legatee under his will; it being understood that the survivor was to distribute the property in such amounts and proportions as the survivor thought best among their blood relations. It is sufficiently alleged and shown that plaintiffs are the children and grandchild of Mrs. Jessop, and are the blood relations who would inherit the property if the trust relationship were established.

Mrs. Benson and Mr. Brown each executed a will as agreed, and, in March, 1905, Mrs. Benson died. The will already mentioned was duly admitted to probate, and Mr. Brown took charge of all of the property belonging to Mrs. Benson, aggregating some $50,000. Among other claims presented, allowed, and paid, were the promissory notes executed by Mrs. Benson and payable to Mr. Brown, aggregating with interest, $32,000. No dispute or controversy arose between any of the parties until after the distribution of the assets of Mrs. Benson's estate. Subsequently, family discord arose: Mr. Brown left the home of his sister, Mrs. Jessop, where he had established a residence immediately after the death of his sister, Mrs. Benson, and on December 4, 1909, he married defendant, Augusta C. Brown. He was then about 70 years of age. October 19, 1911, probably with a view of adjusting all difficulties between himself and his kin, he entered into a contract whereby he conveyed valuable property to certain of them, and they executed what, no doubt, he regarded as a release of any claim they might have upon his property. Thereafter he conveyed certain real estate to his wife and

executed a will making her the sole devisee. He died in March, 1916.

It is the contention that, by the agreement entered into between Mrs. Benson and Mr. Brown, a trust for the benefit of plaintiffs was created in all of the property of which either party might die seised, except only the provision made in the will of Mrs. Benson for the benefit of her husband, about which there is no controversy. The terms of this agreement, so far as it is shown, must be gathered mainly from two letters written by Mr. Brown to his sister, Mrs. Benson, taken in connection with the subsequent execution of wills by the parties. The first letter is dated Quincy, Illinois, January 21, 1903, and reads as follows:

"Dear Net: I arrived home this a. m. on time and all right. Last night I went to bed early and I think have thought out a way to fix that matter we were discussing. Now, in no event we do not want those notes to become public if we can well avoid it. So here is my suggestion. I will substitute your name in the place of Jennie's in my will so far as the notes are concerned. And you substitute my name in the place of Jennie's in your will. I think we are both of the same mind as to where we eventually want it to go. Now, I am willing to let the survivor dispose of it in such amounts and proportions as the survivor may think best to our blood relation. That part relative to Dave need not be changed at all. Now, if this idea strikes you favorably I will have a couple new wills drawn up and send them to you, and if you approve of them you can sign one and I will sign the other.

"If you fall heir to the notes, you can immediately destroy them. It on the other hand I become the heir I would hold the notes to offset any possible contest of the will that might possibly arise.

"I certainly would dispose of all that you left me, as I think you would desire. And I am sure that you would

do the same with what you might be heir from me. Think this over and let me know how it strikes you.

"Your brother, Ed. J. Brown."

The second letter is dated Quincy, Illinois, January 27, 1903, and is as follows:

"I inclose you my will duly signed for your reading. Also one for you to sign, made as per my letter to you on the subject. Of course if either one of us go first then it would be the immediate duty of the survivor to make another will disposing of the property as the deceased one would desire as we each understand it.

"It would be well to take this up to Judge Fawcett and let him look them over, and then you sign and have your will properly witnessed.

"I have had them made as short and to the point as it seems to me it could have been done, at the same time covering all necessary points. I will retain your old will until you return these to me and will at once destroy my old one, and will return your old one for you to destroy.

"Affectionately, Ed."

May it be said from a reading of these letters that it was the intention of the parties to this correspondence to create a trust for the benefit of their blood relations, not only in the property which one might inherit from the other, but in the property which each then and there held separately? In support of their contention plaintiffs cite the case of *Brown v. Webster,* 90 Neb. 591, 37 L. R. A. n. s. 1196, where this court enforced an agreement entered into between husband and wife for mutual wills. In that case the contract was for the benefit of the parties thereto, and it expressly covered the property owned by each. In the instant case neither party was legally bound for the support of the sister, Mrs. Jessop, or the members of her family. It is evident that a strong bond of affection existed, and there can be little doubt that Mrs. Benson, a childless wife of advanced years, and her bachelor brother, intended that

the property should ultimately descend to the children of the sister.

But for either to intend to surrender full power and control over individual property, acquired by years of toil, is contrary to human experience. It is quite reasonable to assume that one of these parties might be willing to take the property of the other, hold it in the nature of a trust, and at death transfer it to the blood relations; but it is unreasonable to assume that either, while still actively engaged in business, intended to surrender control over his own property. In this connection, it may be noted that in the last paragraph of the first letter Mr. Brown stated: "I certainly would dispose of all that you left me, as I think you would desire. And I am sure that you would do the same with what you might be heir from me." This suggests the obligation to pass on the amount inherited to the blood relations, but it does not constitute an agreement to thus deal with the property accumulated and owned by the individual.

While the decree of the district court finds in favor of defendant on a number of grounds, including the contract entered into between the parties on October 19, 1911, to which we have previously referred, we do not deem it necessary to a disposition of the case to set out that contract, or to make it the basis of our judgment. We are convinced from the record that no trust was created for the benefit of plaintiffs in any of the property owned or held by Mr. Brown, other than the property he took under the will of his sister, Mrs. Benson.

This leads us to a consideration of the property thus acquired. It is claimed by plaintiffs that the promissory notes presented by Edward J. Brown and allowed against the estate of Mrs. Benson did not represent a *bona fide* indebtedness. It is said by defendant that the genuineness of this claim cannot be determined in this collateral proceeding, but it is not necessary to pass upon that question. The evidence preponderates in favor of defendant's claim that the notes constituted a

valid claim against Mrs. Benson's estate for money which her brother had actually loaned for use in her business. The district court found, and the record abundantly supports the finding, that there came into the hands of Edward J. Brown, as legatee under the will of Mrs. Benson, only the sum of $7,332.25 and a diamond breastpin, the value of which is not shown. He paid to, or for the benefit of, the sister, Mary A. Jessop, and her children, an amount in excess of $13,000, and also conveyed to certain of them real estate of the value of several thousand dollars. He has fully accounted for all the property he received under the will of Mrs. Benson.

Plaintiff's petition is without equity, and the judgment of the district court is

AFFIRMED.

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

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MARTIN I. BROWER, APPELLEE, v. MARY E. UMSTEAD ET AL., APPELLANTS.

FILED JUNE 29, 1920. No. 20450.

1. **Insane Persons:** DISCHARGE OF GUARDIAN: NOTICE. In a proceeding for the discharge of a guardian of an incompetent person, notice should be given to the children, next of kin, or the close personal friends of the ward, as the circumstances of the case may require in the discretion of the county court, though there is no statutory provision therefor.

2. **Deeds:** INCOMPETENCY OF GRANTOR. Evidence examined, and *held* that the grantor in the conveyances sought to be set aside was incompetent and under guardianship on account of such incompetency at the time the conveyances were executed.

Rehearing of case reported in 103 Neb. 828. *Former judgment vacated, and judgment of district court affirmed.*

LETTON, J.

A former opinion in this case is reported in 103 Neb. 828.

The district court rendered a decree setting aside certain conveyances made by an alleged incompetent. Defendants appeal.

In October, 1912, Margaret Lamb, upon the application of her daughter, Mary E. Umstead, was placed under guardianship, the court finding that, by reason of old age and mental weakness, she was mentally incapable and incompetent to manage her property. The guardian was appointed and continued to act until May 22, 1914. On that date Mrs. Lamb filed an application for the discharge of the guardian. The guardian filed his resignation and his final accounts. This was all done without notice to the children of Mrs. Lamb. On the same date, Mary E. Umstead, daughter of Mrs. Lamb, and Charles B. Lamb, a son, procured certain transfers to property to be made by her to them. The other children did not discover what had been done until about three weeks later; then they perfected an appeal from the judgment of the county court discharging the guardian.

While there is no statute providing for notice before the guardian of an incompetent can be discharged, notice should in all cases be given to the children, next of kin, or close personal friends of the incompetent, as the circumstances may require in the discretion of the court; and, while the order of the county court discharging the guardian may not be subject to collateral attack, the method of discharge was not to be commended, and should not have been had without sufficient evidence to show restoration of the ward's mental competency. *Prante v. Lompe,* 77 Neb. 377.

There is no difference in our statute with respect to notice for the appointment or discharge of such a guardian. In many instances it might cause a real hardship if a guardian could not be appointed to care

for the person and property of an incompetent person in a prompt and speedy manner. The majority of courts hold that, unless required by statute, such a notice is not essential to jurisdiction, though the county court may require it in his discretion, but where property rights are involved and the parties interested are not before the court, notice should be given, unless speedy action is advisable to conserve the interests of the incompetent.

The record shows that Mrs. Lamb was not before the county court on the date of her release; there was no personal examination, and no testimony was taken as to her condition. It is shown that Mrs. Lamb was not physically able to take care of herself, or administer to her own wants; that she resided with her daughter, Mrs. Umstead, at the time the guardian was appointed, and continued so to reside until the date of her death. She could not see very well, and her condition was such as to require assistance in moving from one room to another, and her daughter or a trained nurse was in attendance upon her during all this time.

The evidence regarding her mental condition is in direct conflict, but we are satisfied from the whole record that she was incompetent to take care of her own affairs on the date the transfers were made. The former judgment of this court is set aside, and the judgment of the district court

AFFIRMED.

ROSE, J., not sitting.

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JOHN G. HARRAHILL, APPELLANT, v. ED. BELL, APPELLEE.

FILED JUNE 29, 1920. No. 21070.

**Trial:** DIRECTION OF VERDICT. "Where the plaintiff's evidence in an action at law tends to establish every fact which he is required to prove to entitle him to a verdict, and reasonable men might differ, upon a consideration of all of the evidence, as to whether

all of the necessary facts were established, the trial court should refuse to direct a verdict for the defendant." *Straight v. Coleman*, 90 Neb. 92.

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

*S. S. Bishop* and *Burkett, Wilson & Brown*, for appellant.

*Fawcett, Mockett & Walford, contra.*

LETTON, J.

The petition alleges that the defendant, a farmer, furnished plaintiff, a farm hand, with a team of mules, wagon and harness for the purpose of hauling corn; that the mules were vicious and inclined to run away; that the harness was old and ill-fitting, and the tugs were so long that the tongue was easily dropped; that the wagon tongue dropped, the team became frightened and started to run, and plaintiff was thrown from the wagon, breaking his left ankle and suffering other severe injuries, for which he asks damages.

The answer alleged that plaintiff was familiar with the disposition of the mules, with the condition of the harness and wagon, which was open and obvious, that he assumed the risk, and that the accident was caused by the plaintiff's own carelessness. The trial court directed a verdict for defendant at the close of the evidence. Plaintiff appeals.

The evidence shows that plaintiff was experienced in farm work. He testified that the tugs were so long and the tongue so short that it was liable to drop out of the neck-yoke; that he had been using a clevis in such a way as to prevent this, but that defendant, upon being told of this, ordered him not to use it; that the harness could be used upon other wagons safely, but not upon this wagon, because of the shortness of the tongue, unless the clevis was used; and that the clevis was not used at the time of the accident. He also testifies that he told defendant he could not shorten the tugs on account of an iron

piece upon one of them which would not pass through the buckle, and denies that defendant ever told him to shorten the neck-yoke straps.

The testimony of defendant is substantially to the effect that he had directed the plaintiff to take off the clevis and shorten the tugs or breast straps; that this had not been done; and that plaintiff immediately after the accident told him that he had the clevis in the end of the tongue; that the pin came out and let the tongue down, and the team ran away; and that plaintiff then handed him the clevis.

Plaintiff contends that the direction to shorten the tugs could not be complied with; that this fact was called to defendant's attention, but nothing was done, and plaintiff had no other recourse than to go ahead and use the equipment furnished; and that "where a servant, in obedience to the requirements of his master, uses and operates machinery which, though defective, is not of such dangerous character that it may not with reasonable probability be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury resulting from the master's negligence." *Usher v. American Smelting & Refining Co.*, 97 Neb. 526; *Lee v. Smart*, 45 Neb. 318; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578; *Thomsen v. Jobst*, 93 Neb. 375.

On the other hand, defendant insists that the team, wagon and harness come under the rule belonging to "simple tools," and that because plaintiff knew that the appliances were defective he assumed the risk.

The party against whom a verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of any inference that reasonably can be deduced from the facts in evidence. The court must assume that all facts which the plaintiff's evidence reasonably tends to establish must be taken as true, unless facts to the contrary are established by uncontrovertible physical laws,

or by such an overwhelming mass of testimony that no reasonable mind could accept it as being true. We must accept, therefore, that the harness was defective when used upon the particular wagon which plaintiff was required to drive; that it was impossible to shorten the tugs; and that plaintiff was not using the clevis, which he had been forbidden to use, at the time of the accident. These facts, standing alone, would support a verdict for the plaintiff. Accepting plaintiff's evidence, defendant was negligent. The questions involved should have been submitted to the jury, and the court erred in directing a verdict for defendant.

REVERSED.

FLANSBURG, J., not sitting.

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## ALSON B. COLE V. STATE OF NEBRASKA.

FILED JUNE 29, 1920. No. 21462.

1. **Criminal Law: CORAM NOBIS: PETITION.** Even if the right to a writ of error *coram nobis* exists in this state, which is not decided, a petition for the same must allege specific facts, which if known at the time the judgment was rendered, would have prevented its rendition.

2. **Petition** examined, and *held* not to state facts sufficient to warrant the district court in granting such a writ.

ERROR to the district court for Howard county: BAYARD H. PAINE, JUDGE. *Affirmed.*

*J. M. Priest,* for plaintiff in error.

*Clarence A. Davis, Attorney General,* and *Mason Wheeler, contra.*

LETTON, J.

A "petition for a writ of error *coram nobis*" was filed in the district court for Howard county on February 20, 1920, directed to Honorable Bayard H. Paine,

one of the judges of that court, setting forth a number of facts occurring at the joint trial of one Grammer and Cole, the petitioner, for murder, resulting in conviction on March 28, 1918, and sentence of death. The district court denied the relief prayed, and dismissed the case A motion for a new trial was filed after the statutory time had elapsed, and was properly overruled.

The first complaint made in the petition for the writ is that three days had not expired after conviction and before sentence. Errors of fact only are grounds for the issuance of such a writ. *State v. Calhoun,* 50 Kan. 523, 18 L. R. A. 838, note; *Fugate v. State,* 85 Miss. 94, note to 3 Am. & Eng. Ann. Cas. 328; *Asbell v. State,* 62 Kan. 209; *Hamlin v. State,* 67 Kan. 724, 2 R. C. L. 305. Notwithstanding this, we will consider all the allegations of the petition.

It is alleged that counsel then representing the petitioner, but not now acting for him, refused to file a motion for a new trial, and so informed the trial judge. There is no charge in the petition of bad faith or wrong-doing on the part of the former counsel. He doubtless believed that his client was guilty, and that when one accused of a heinous crime, confessed it in open court by a plea of guilty, and the jury, after hearing the testimony, imposed the statutory penalty, a motion for a new trial would be useless. The court did not err in pronouncing sentence.

It is next alleged that the court did not comply with section 9130, Rev. St. 1913, relative to the method of proceeding when a plea of guilty of murder is entered, and that the instructions to the jury, informing them that it was their duty under the laws of the state to determine which of the penalties, imprisonment for life, or the death penalty, should be inflicted, were erroneous. We have construed the law in these respects in the cases hereinafter mentioned, and abide by these decisions. The district court after the term cannot grant a new trial on such grounds.

It is also said that other evidence exists material to the defense of the petitioner, and that evidence in his favor was suppressed at the trial. These are mere conclusions. No facts are set forth, no witnesses named, what the alleged evidence would establish is left to the imagination, and no offer to produce testimony was made. So far as the record shows, these are baseless and unfounded allegations.

The complaint that the defendant was entitled to a new trial because not indicted by a grand jury is equally baseless. This has been decided adversely to the petitioner's contention repeatedly. *Hurtado v. California,* 110 U. S. 516; *Davis v. Burke,* 179 U. S. 399.

The facts in this case have been stated in the cases of *Grammer v. State,* 103 Neb. 325, and *Cole v. Fenton,* 103 Neb. 802, 807. Petitioner was represented at the time of his conviction by able and experienced counsel, against whose conduct nothing derogatory has been established by the attorney now acting for him. The trial court properly held that the petition did not set forth facts justifying such a writ, or a new trial of the case.

AFFIRMED.

ALDRICH, J., not sitting.

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ANTONIO VENUTO, APPELLANT, V. CARTER LAKE CLUB ET AL., APPELLEES.

FILED JUNE 29, 1920. No. 21464.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: DEPENDENT. Evidence examined and *held* to establish that an aged mother in poor circumstances, residing in Italy, whose children lived in this country, and to whom the deceased had been sending periodical sums of money from his wages for her support, was entitled to compensation as a dependent under the workmen's compensation law.

2. ———: ———: ESTOPPEL. Where an insurer issues a policy to insure employees of a Nebraska corporation, which policy recites

that it is issued under the Nebraska workingmen's compensation act, and the place of business or occupation is "south side of Carter Lake adjacent to Omaha, Neb., consisting of 55 acres more or less," and it accepts and retains the premium money, it is estopped to deny that it insured against accidents to employees of the corporation while at work upon the premises described upon the plea that such premises were in the state of Iowa, and it did not insure against accidents not occurring within the state of Nebraska.

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

*Anson H. Bigelow,* for appellant.

*Carl E. Herring* and *Brome & Ramsey, contra.*

LETTON, J.

Frank Musco, a laborer, was killed by an accident arising out of and in the course of his employment with the Carter Lake Club, a Nebraska corporation. An action was brought against the club and the Georgia Casualty Company, the insurer, in the name of the administrator of the deceased, and afterwards the Italian vice consul was substituted as plaintiff in the petition, alleging that the only person dependent on deceased was his mother, an alien, who resides in Italy. The court found that under the evidence the claimant was not a dependent within the meaning of the compensation act, and reserved decision upon the other issues. Plaintiff appeals.

When Musco died he left a mother, stepfather, and two brothers surviving him. On January 26, 1916, and at other times, deceased purchased money orders in Omaha, payable to his mother, amounting in all to $101 in United States money, receipts for which were introduced in evidence. The deceased was the only unmarried son; he was about 22 years of age when he was killed. The other two brothers lived in Omaha, are both married, and have children. One brother testifies that the mother lived in Certino, Italy; that he could not support her on account of having a family of his

own to support. He testifies that her husband had left her years ago; that she was in need of assistance; and that he sent her a little money whenever he could, but he was very indefinite as to the intervals of time between remittances. It is admitted that the other brother will testify that he has not contributed anything to the support of the mother. A witness testified that Musco had procured him to write letters home inclosing the money orders, and that he had told the witness he had been supporting his mother; that her second husband did not do so; and that he was trying to save enough money to bring her to this country to keep house for him.

In *Victor Chemical Works v. Industrial Board,* 274 Ill. 11, 23, a brother of the deceased testified that the father and mother were living in Italy; that the deceased contributed to the support of the family prior to his death; that he had seen the receipt for a money order for $40, which the deceased showed to him. Another witness testified that he knew the deceased in Italy, and knew him when he arrived in this country; that he assisted him as interpreter in procuring a money order, which was sent to the father. Another witness testified to the same effect. "There was other evidence, consisting of declarations of the deceased at the time he sent the money to his father and his purpose in sending it, and that his parents depended upon him for support, which was objected to, and which objections should have been sustained." After stating the necessity for competent and legal evidence, the court held that there was sufficient competent evidence to sustain the finding of the industrial board that the deceased left parents, and that he had within five years contributed to their support. The evidence in the case at bar is stronger than the evidence in that case, even after disregarding the declarations of the deceased, which were incompetent as hearsay testimony.

In *Tirre v. Bush Terminal Co.*, 158 N. Y. Supp. 883, it was held that the evidence as to dependency was insufficient, but the court intimated that the claimant daughter, who lived in New York, might be presumed to know if the mother was still living, and, if so, as to her financial circumstances, and since no explanation was made as to why she did not testify at the hearing, and the findings of dependency were based solely upon hearsay and insufficient testimony, the case was sent back to the commission, to the end that her testimony and that of any other witnesses might be taken as to the existence and dependency of the mother.

We are satisfied that there is sufficient evidence in this record to justify a holding that the mother is dependent. The facts that the brother in Omaha had heard from her by letters at intervals for nearly 20 years, that it was a matter of family knowledge that the stepfather had deserted her, and that she was in poor circumstances, and the positive and undisputed evidence that the deceased and his brother had been sending her money at intervals for the purpose of her support, in connection with the fact that the brother testified that the deceased was not indebted to his mother, constitute, in the absence of any evidence to the contrary, sufficient reason to hold that the mother was dependent upon the deceased. The case does not fall within the rule that where the judgment of the trial court is based upon conflicting testimony, and there is sufficient competent evidence to sustain the verdict, it will not be disturbed unless clearly wrong, because the evidence here is undisputed, and part of it is documentary. We are of the opinion that the finding of the district court upon the issues of support and dependency should be set aside.

The defense is made by the casualty company that the defendant was employed upon the grounds of the Carter Lake Club, in the state of Iowa; that the Nebraska workmen's compensation act has no applica-

tion; that the policy only covers losses under the Nebraska act, and it is not authorized to insure, and did not insure, injuries to employees under the Iowa workmen's compensation act. This defense and the reply pleading estoppel were not passed upon by the trial court.

The question whether workmen's compensation acts have extraterritorial operation is one as to which the courts are divided. The question very largely depends upon the construction given to the statute of each particular state. We find it unnecessary to now determine the question of extraterritoriality, and are the more reluctant to do so on account of the fact that this issue has been briefly argued only by the defendant casualty company. Neither in the petition nor in the answer of the employer is there any allegation that the deceased was employed to work in Iowa, or that he was injured in that state. No such issue is raised. So far as the answer of the employer is concerned, if the facts are established that the accident causing the death of Musco arose out of and in the course of his employment, and his mother was a dependent, the plaintiff is entitled to a judgment against the Carter Lake Club. Only in the answer of the casualty company is it alleged that the deceased was employed in Iowa and was killed in that state. A cross-petition against the casualty company and a reply to the answer of the casualty company were filed by the employer, and both in the cross-petition and in the reply facts are pleaded as constituting an estoppel against the casualty company to defend upon the ground that it is not liable because the policy was issued to indemnify against liability under the Nebraska act, and the injury occurred in Iowa. These facts, in substance, are as follows: That at the time the insurance was solicited the club was a Nebraska corporation, with its principal place of business in Omaha, but operating a private club for corporate members, on the south side

of Carter Lake adjacent to Omaha; that the insurance company maintained an agency in Omaha, and has been engaged in this state in soliciting and obtaining insurance risks under the workmen's compensation law; that the casualty company issued its policy pursuant to the provisions of the laws of Nebraska, for which policy the club paid the premium demanded; that the policy was delivered, insuring against any loss arising under or by virtue of said act, from January 9, 1916, to January 9, 1917. A copy of the policy is attached. This recites the name of the club, its address, specifies the place where the occupation or business is to be carried on as "south side of Carter Lake adjacent to Omaha, Neb., consisting of 55 acres more or less," and the kind of trade, business, profession, or occupation as a "private club for various corporate members." "Estimated pay roll for the policy period" is named as $3,000, and "premium rate per $100 of pay roll" as $75.

The casualty company issued the policy and accepted and retained the premium to insure the club from liability for loss or damage to its employees while working upon the 55 acres of land lying upon the "south side of Carter Lake adjacent to Omaha, Neb." It is a geographical fact, of which the court is required to take judicial notice, that, while the Missouri river constitutes in the main the boundary line between the states of Iowa and Nebraska, in occasional localities the river has changed its channel, and that the present boundary line now lies at varying distances to the west of the present channel. Carter Lake is in the environs of Omaha. The fact as to the location of the 55-acre tract on this side of the Missouri river must have been known to the agents of the casualty company. If it was not its intention to insure the employees upon this 55-acre tract, then the insurance company would be guilty of accepting a premium when it knew that no liability could accrue under the policy. Such a course of conduct cannot be upheld, and we are of the opinion

that, having accepted the premium and issued the policy to insure the employees of the club, upon its grounds adjacent to Omaha, it cannot now claim that the policy is practically void and of no effect.

What has been said in this connection is really anticipatory, and is based upon the allegations of the pleadings with the view of avoiding another appeal upon this point. For the foregoing reasons, the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED.

ALDRICH, J., not sitting.

FLANSBURG, J., dissents.

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FOREST M. OAKES, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JUNE 29, 1920. No. 20906.

1. **Evidence.** Ordinarily a question involving the rate of speed of a street car is not a question for expert testimony.
2. **Street Railways:** PROXIMATE CAUSE OF INJURY: QUESTION FOR JURY. When the evidence is in direct conflict in respect to the proximate cause of an injury arising from collision with a street car, the question is one of fact for the jury.
3. ———: USE OF STREETS: NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. "Street railway companies have no such proprietary interest in that portion of the streets upon which their tracks are laid as limits the right of the general public also to use the same territory as a part of the public highway. Whether an injury resulting from such joint use is attributable solely to the negligence of the railway company, or is wholly or in part imputable to contributory negligence of the person by whom injury has been sustained, is a question of fact to be determined by the jury." *Omaha Street R. Co. v. Duvall*, 40 Neb. 29.
4. **Negligence:** QUESTION FOR JURY. When different minds may reasonably reach different conclusions from a given state of facts as to whether negligence or contributory negligence has been established, the question of negligence is for the jury.

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

*John L. Webster* and *William M. Burton,* for appellant.

*Myron L. Learned* and *Joseph T. Votava, contra.*

DEAN, J.

Plaintiff recovered a verdict and judgment thereon for $427 as damages for seven head of lambs that were destroyed and 40 that were injured by the negligent and unlawful operation, so it is alleged, of one of defendant's street cars on Twenty-fourth street, that being the main thoroughfare between Omaha and South Omaha. Defendant appealed.

The colliding car was coming from the north and the sheep were being driven from the south. The accident happened about 150 or 200 feet south of the point where U street intersects Twenty-fourth street.

Plaintiff resides on a farm about 3 miles south of Omaha, where he buys and feeds lambs for market. Between 3 and 4 o'clock in the afternoon of January 30, 1919, he left home, driving a flock of 280 lambs to be sold at the stock-yards at South Omaha. Assisting him as drivers were his son, Loren, about 13, and George Mosher, a stock-yards employee and sheep driver of 20 years' experience. At the time of the collision it was about 7 in the evening and dark. Twenty-fourth street swerves to the east about its own width just before and as it crosses the U street intersection and continues thence directly south. The street is 40 feet in width and slopes to the south.

Plaintiff testified that the car did not stop at U street; that he with his flock was about 150 feet south of the street car when he first saw it coming at or about U street; that the motorman, to whom he shouted at the top of his voice, did not slacken his speed; that the street lamp was lighted at the intersection and the electric headlight of the car was lighted; that it ran 100 feet

or more through the flock before it stopped; that when the lambs were struck they were piled up promiscuously in front of the car and on each side of it and beneath it; that just before the impact the sheep occupied about two-thirds of the width of the street and about 150 or 200 feet of its length; that the car finally came to a stop when it was about opposite plaintiff; that the shortest route between plaintiff's farm and the stock-yards lay directly north on Thirtieth street, but that owing to snow drifts it was impractical to drive the sheep that way; that the route he took was about a mile longer than by Thirtieth street, on which he would also be compelled to cross two or three tracks; that the snow was two or three inches deep on the level; that just before the collision they met four or five cars only a few minutes apart that were not running on regular schedule; that these cars and also a car they met after the collision stopped until they got the sheep off the track; that the prevailing conditions were substantially the same as when they met the car that caused the loss; that when the car struck the sheep its speed was from 20 to 25 miles an hour.

Roy Mace lives about 400 feet south of U street on Twenty-fourth street. He testified on the part of plaintiff that he saw the car approaching from the north, and that it was moving at the rate of 20 miles an hour; that it is customary for stockmen to drive sheep and cattle in the daytime on that street, and that it is not unusual to see them pass by in the nighttime on their way to the stock-yards, that are distant about eight or ten blocks. George Mosher, called by plaintiff, testified that the car came on at the rate of 20 miles an hour. He further testified: "The car come around there and ran into these sheep, and I put up my hands and hollered at him. I couldn't make him hear me, and he just missed me. I just got out of the road in time myself, or he would have got me. He piled these sheep all up in front of the fender, clean up to the glass before

he passed me. Then he carried these sheep down 100 feet, I guess, maybe better, maybe 150 feet, made a good run at it. * * * Q. When did you first see the street car, Mr. Mosher? A. I seen it when it came around the corner. Q. That was about how far in front of your sheep? A. Oh, about, I should say, 75 to 100 feet. Q. And do you know whether or not it let off a passenger there at that——A. They didn't stop to let nobody off, unless he jumped off."

The motorman and conductor and a passenger testified on defendant's part that the car stopped at U street, and that at the time of the collision it was running at the rate of about 6 to 8 miles an hour; another passenger that it was running "at medium speed." The conductor also testified that the motorman reversed his brakes, and when the car struck the sheep "it kind of slid into them," and stopped within a space of about 20 feet. The motorman further testified that he first saw the sheep about 30 or 35 feet away; that he then reversed the car and sanded the track, and that it "ran about 15 feet into the sheep;" that there was no light at U street; that the sheep were "kind of dirty, looked like the snow;" that snow was on the rails and they were "slippery;" that Twenty-fourth street south of U Street is on a down-grade; that he was in the service for about 8 years, and never before had he "seen any sheep being herded along either Railroad avenue or Twenty-fourth street at night."

An Omaha ordinance in evidence provides that a street car shall not exceed a speed of 15 miles an hour. Defendant argues that Oakes and Mosher were not qualified to testify on the question of speed. This court has held on this point that, while the evidence of an observer is not competent for the purpose of determining the exact speed of a street car, it is properly admissible as tending to support an allegation that the motorman failed to reduce its speed. *Zancanella v. Omaha & C. B. Street R. Co.*, 93 Neb. 774. Chief Jus-

tice Cooley observed that the speed of a passing train involves no question of science and is not a question for experts. He adds: "Any man possessing a knowledge of time and of distances would be competent to express an opinion upon the subject." *Detroit & M. R. Co. v. Van Steinburg,* 17 Mich. 99; *Omaha Street R. Co. v. Larson,* 70 Neb. 591; *Pierce v. Lincoln Traction Co.,* 92 Neb. 797.

The evidence as to the speed of the car is in direct conflict. But it is a question of fact for the jury, and, having been properly submitted, and having been determined by that body after seeing and hearing and observing the demeanor of the witnesses, we decline, under the oft-repeated rule, to disturb the verdict.

Defendant argues that the court erred in refusing to give an instruction offered by it to the effect that "defendant had a preferential right to operate its street cars" at the time and place of the accident. In *Omaha Street R. Co. v. Duvall,* 40 Neb. 29, it is said: "Street railway companies have no such proprietary interest in that portion of the streets upon which their tracks are laid as limits the right of the general public also to use the same territory as a part of the public highway. Whether an injury resulting from such joint use is attributable solely to the negligence of the railway company, or is wholly or in part imputable to contributory negligence of the person by whom injury has been sustained, is a question of fact to be determined by the jury."

In its brief defendant argues: "It was a direct affirmative act of gross negligence of the plaintiff to drive 280 head of sheep upon and along the street car tracks, in the nighttime, when the plaintiff was bound to anticipate that street cars would pass at frequent intervals." We do not think this objection is sound, in view of the fact that the court instructed the jury on comparative negligence. The question of negligence is for the jury, and, in view of the record before us, we

are not prepared to say that the evidence does not sustain the verdict in the respect noted.

Defendant further argues: "The court erred in instructing the jury that the plaintiff was entitled to recover damages if the motorman could have seen the sheep in time to have stopped the car and avoided running into them. * * * The last chance doctrine only applies in cases where the motorman had actual knowledge that the sheep were upon the track, and not to a case where he did not have actual knowledge." Our former decisions do not seem to go so far. *McKennan v. Omaha & C. B. Street R. Co.*, 97 Neb, 281, wherein a rehearing was denied, points out that the motorman in charge should exercise ordinary care to avoid a collision after he knew, or in the exercise of ordinary care should have known, the dangerous situation of the person or object in front of the car. In the *McKennan* case numerous decisions of this court are cited that hold to the same rule.

"Under what is commonly known as 'the last clear chance' doctrine, or as it is sometimes called, the 'doctrine of discovered peril,' or 'humanitarian doctrine,' a person may recover for injuries sustained through the negligent management or operation of a street railroad, although he is guilty of negligence in getting into a dangerous position upon or near the company's track, if, notwithstanding such negligence on his part, the servants of the company may, by the exercise of ordinary care and diligence, avoid injuring him after they discover his peril, or by the weight of authority after they discover, or by the exercise of reasonable care could discover, his peril in time to avoid the injury." 36 Cyc. 1565.

Besides the assignments of error discussed herein, we have examined those with respect to instructions given by the court and those offered by defendant which were refused, and also the objections made to the introduction of certain testimony by plaintiff. In

view of the record, we do not think there was prejudicial error in the respects noted. The case seems to have been fairly submitted, and there is sufficient evidence to support the verdict. The judgment is

AFFIRMED.

LETTON and FLANSBURG, JJ., not sitting.

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MARK BRIGHTENBURG, APPELLANT, v. WILLIAM H. MULCAHY, APPELLEE.

FILED JUNE 29, 1920. No. 21030.

1. **Petition** examined, and *held* to state a cause of action.
2. **Personal Injuries:** PROXIMATE CAUSE: QUESTION FOR JURY. Where plaintiff was injured while coasting down hill by being crowded over the curb and running into a fence maintained by defendant unlawfully and negligently extending into the public thoroughfare, the question of what was the proximate cause of the injury is for the jury.

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

*John O. Yeiser,* for appellant.

*Piatti & Wear* and *John F. Moriarty, contra.*

ALDRICH, J.

Omitting the formal parts, the plaintiff's petition is as follows:

"Comes now plaintiff and alleges that he is an infant eight years of age and a child of such tender years not capable of sound discretion in protecting himself.

"That defendant owns the south 76 feet of lot 1, block 1, in Drakes addition to the city of Omaha, facing on the south side on Chicago street.

"That defendant for more than a year previous to the injury complained of and down to the time of said

injury and since said time has maintained a fence around said property and on the south side has maintained said fence south of the lot line into the public thoroughfare for the space of about ten feet (and only six feet and six inches north of the north curb).

"That said fence was an obstruction and nuisance maintained in violation of the law and the ordinances of the city of Omaha in a part of a public street.

"That on the 27th day of January, 1917, plaintiff was coasting down the hill going west on Chicago street with other little boys, and plaintiff's sled was crowded over the curb when near said fence which caused plaintiff to run into said fence where in said manner negligently and unlawfully maintained by defendant.

"That as a result of coming in contact with said fence plaintiff was injured in his spine, legs and body and has been permanently crippled and has permanently and totally lost the use of one leg and been permanently injured in his health and growth and suffered great pain and will permanently suffer great pain and mental worry.

"That by reason of said injuries plaintiff has been damaged in the sum of $20,000.

"Wherefore, plaintiff prays judgment against defendant in the sum of $20,000 with costs of suit."

A general demurrer to this petition was sustained. The plaintiff elected to stand on the demurrer and not further plead. Then the trial judge dismissed the cause of action, and plaintiff appeals.

The only issue presented is: Does the petition state a cause of action?

Going into the merits of the case, the principal issue for discussion is: What was the proximate cause of the injury? The fence in question was unlawfully in the road and negligently and unlawfully maintained. Plaintiff, a small boy, while coasting down hill, was crowded over the curb into the fence and severely injured. This or similar questions have been before this

court many times. On a similar state of facts we have said that, where the evidence is sufficient to establish concurrent negligence on the part of defendants, they are jointly and severally liable therefor.

In *Pacific Telephone & Telegraph Co. v. Hoffman*, 208 Fed. 221: "Where an automobile, driven at a high rate of speed at night, first struck a railroad crossing and then a guy wire attached to one of the defendant's telephone poles and extending into the highway, resulting in injuries to the car and the occupants, whether the railroad crossing or the wire was the proximate cause of the accident, and how far the preceding event of the car striking the crossing operated in producing the final catastrophe, *held* for the jury."

This case is precisely in point. As to how far or whether at all acts of the parties coasting was the proximate cause would be a matter of defense, and hence a question for the jury. The situation then is a question of concurring or successive acts of negligence of numerous persons combined which caused plaintiff's injury. As a matter of law, he may recover of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury. See, also, *Williams v. San Francisco & N. W. R. Co.*, 6 Cal. App. 715; Rev. St. 1913, sec. 8845.

It would seem clear that one negligently causing an unlawful obstruction in the highway where someone is injured when in lawful pursuits, the party guilty of the obstruction might be held as liable in damages. Anyhow, such a situation constitutes a question for the jury. Therefore it is plain that this petition states a cause of action, and the issues presented were the issues for the consideration of a jury.

REVERSED AND REMANDED.

MORRISSEY, C. J., and ROSE, J., dissent.

NEBRASKA STATE RAILWAY COMMISSION, APPELLANT, V. ALFALFA BUTTER COMPANY ET AL., APPELLEES.

FILED JUNE 29, 1920. No. 21048.

1. **Corporations:** BLUE SKY LAW: LIMITATIONS. Section 798, Rev. St. 1913, before the amendment of 1919 (Laws 1919, ch. 259), construed, and *held* to cover Nebraska corporations, created after the law was enacted, for a period of one year only, after which time such corporations were released from the operation of its provisions.

2. **Statutes:** CONSTRUCTION. Relative and qualifying words or phrases are to be applied to the words or phrases immediately preceding, and as not extending to or including other words, phrases or clauses more remote, unless such extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by an examination of the entire act.

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

*Clarence A. Davis, Attorney General,* and *Hugh LaMaster,* for appellant.

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

FLANSBURG, J.

Suit in equity, brought by the Nebraska State Railway Commission, to require, for the alleged benefit of stockholders, an accounting of corporate funds, and to enjoin the defendant company, its officers and agents, from the further sale of defendant's corporate stock. The trial court sustained a demurrer to the petition, and, plaintiff having elected to stand upon the petition, the case was dismissed. Plaintiff appeals.

Plaintiff claims its authority for this action under the provisions of the so-called "Blue Sky Law" (Rev. St. 1913, secs. 796-811), and the primary question to be determined is whether or not the defendant company is a corporation within the purview of that act.

The petition discloses that this company was incorporated in October, 1915, and had been in existence for more than one year at the time of the commencement of this proceeding. It is contended that the defendant corporation, having been in existence for one year, was exempted from the operation of the act under that provision of section 798, Rev. St. 1913, which reads as follows: "This article shall not include within its purview sales of stock in Nebraska corporations already in existence, and in Nebraska corporations hereafter created, but which have been in existence one year or more at the time of such sale, and in corporations of other states which have been in existence five years or more at the time of such sale, the majority of stockholders, directors and officers of which were at the time of commencing business, and are at the date of the approval of this article, citizens of the state of Nebraska, nor individual sales of securities owned by the seller prior to the taking effect of this article and purchased by such seller prior to March 1, 1913, when no commission or other compensation of any character whatsoever is to move in the transaction, and no publicity is used in accompanying the sale."

The question is whether or not the words, "when no commission or other compensation of any character whatsoever is to move in the transaction, and no publicity is used in accompanying the sale," refer only to those individual sales of securities by the owner, or whether they refer back to Nebraska corporations already in existence, to Nebraska corporations to be created, and to foreign corporations of five years' existence where a majority of the officers and stockholders are citizens of this state.

The intention of the legislature is the law, and such intention is to be gathered from the meaning of the language used, in the light of the necessity for or reason of the enactment and the objects sought to be attained, and, in determining the meaning of the lan-

guage, its ordinary and its grammatical construction is to be followed, unless an intent appears to the contrary, or unless, by following such construction, the intended effect of the provisions would apparently be impaired.

The evident purpose of this enactment was to stop the sale of stock in companies organized for fraudulent stock exploitation. The frauds thus perpetrated seem to have been considered by the legislature to especially arise in the organization and sale of stock in new companies and promotion schemes, having no proper plan or *bona fide* intent of applying the proceeds from the sale of such stock to the carrying on of any actual business, but for the purpose only of exploiting the public. A statute of this kind is to be given a prospective effect only, rather than a retroactive operation, unless another intent is expressed. It is reasonable to assume that, as to the great number of Nebraska corporations, then existing and actually doing business in this state, no regulation was considered necessary. In such corporations the stock had, for the most part, been sold prior to the time of this enactment, and the great body of such corporations would not, therefore, come within the purpose of the act. For this reason, and for the reason that outstanding stock in such corporations was not intended to be affected, the general exemption of Nebraska corporations, then existing, may have been provided.

As to corporations to be thereafter created in this state, the legislature evidently considered it necessary to prohibit the sale of stock unless the organization and plan of the enterprise to be carried on and the sale of stock should be under the supervision of and be approved by some agency of the state. Such supervision by the railway commission was limited to one year only, no doubt because it was thought such corporations could come into existence only under the supervision and permission and direction of the railway commission,

and that, if properly organized upon a legitimate plan of business, and with proper assets and valuation representing the stock, the danger of stock speculation would have been avoided. By this supervisory power, the railway commission could, by criminal or other proceedings, prevent the sale of stock in that class of companies which were organized for the purpose of exploitation in the sale of stock and not for legitimate business.

If, as plaintiff contends, the proviso in question applies to Nebraska companies created after the enactment, we can see no reasonable purpose of fixing the one-year limitation, for, if a corporation is to continue under the operation of the law in all practical manner the same after the year has elapsed as before, why did not the legislature leave out the provision of the one-year limitation entirely? It is true that under plaintiff's construction such a corporation, after a year, would not be prohibited from selling stock when no commission or publicity was resorted to, which sales, prior to that time, would have been prohibited; but it is during the first year of a corporation's existence that commissions and publicity are necessary, and it is then that stock is not ordinarily sold without such means being employed. In other words, it is more likely that stocks may be sold without resort to commissions and publicity after the first year of the corporation's existence than before, and, if the corporation was one which the legislature considered should be under the supervision of the railway commission after a year's existence, it would seem plausible that the same power of supervision should continue, to prevent the fraudulent sale of stock, regardless of how such sales should be effected.

Having exempted the sale of stock in those corporations expressly mentioned, it was in the mind of the legislature that still other stock in other corporations, not exempted (since all foreign corporations, less than five years old, and all foreign corporations, a majority

of whose stockholders, officers and directors were not residents of the state, were not exempted), was at that time held by owners who had purchased the same prior to the enactment of the law, and it was considered that those persons should be protected in their property rights in that stock. It was therefore provided that such persons or owners might dispose of their stock in the ordinary course of business, and thus derive a fair value therefrom, but provided that such sales should not be made without a permit and approval of the sale by the state, if agents were employed or publicity used in effecting the sale, since such means might make possible the sale of securities at more than a fair valuation.

That sales of stock by an owner, in the ordinary course of business, are placed upon a different footing from all other sales, is now definitely and expressly stated in the re-enactment of this statute in 1919. Laws 1919, ch. 259.

The language of the statute under consideration is so employed that it is difficult of interpretation, but we feel that the construction contended for by the plaintiff leads to a complex situation, never intended by the legislature.

We have examined the history of this amendment and the form in which it was originally introduced, as disclosed by legislative journals, but find nothing which would control the interpretation of the act, as it emerged after amendments and in final form.

It is urged by plaintiff that other sections of the act provide that permits for the sale of stock were to be issued for one year and were to be renewed or continued from year to year, and that this discloses an intent that all corporations be within the act for all time, but such provisions are entirely consistent with the construction which we have given the statute, as there are many foreign corporations which would continue under the provisions more than one year and indefinitely.

The attorney general of this state, immediately after

this law went into effect, interpreted the statute in the same manner that we have now interpreted it (Opinions Attorney General, 1913-1914, p. 111), and for many years corporations have operated in this state under that interpretation. The contemporaneous construction by such executive officer, whose duty it was to enforce the statute, is entitled to consideration now. 36 Cyc. 1140.

One canon of construction, known as the doctrine of the "last antecedent clause," is that relative and qualifying words or phrases are to be applied to the words or phrases immediately preceding, and as not extending to or including other words, phrases or clauses more remote, unless such extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by an examination of the entire act. In the application of that rule, there is a strict analogy to the case before us in the following decisions: *City of Traverse City v. Township of Blair,* 190 Mich. 313; *Dagan v. State,* 162 Wis. 353; *State v. Scaffer,* 95 Minn. 311; *Zwietusch v. Village of East Milwaukee,* 161 Wis. 519; *Summerman v. Knowles,* 33 N. J. Law, 202; 36 Cyc. 1123.

In the case of *Summerman v. Knowles, supra,* it is said (p. 205): "It would be highly convenient to extend the remedy provided by the third section to all cases where materials are furnished. * * * But mere convenience in attaining a right given by the statute, in an expeditious and inexpensive way, not to be obtained by the application of established rules of construction, ought not to influence this court in dealing with the intent of the legislature, as expressed in a statute. A departure from, or relaxation of, these rules will introduce doubt and uncertainty in the administration of justice. Better by far, resort to the legislature to simplify the remedy in the future, and preserve, in full vigor, those established rules of con-

struction which give certainty and uniformity to the construction of statutes and legal instruments."

It is not within the province of this court to deal with the policy of the law, nor to attempt to extend it, even though an extension should be considered desirable; but its duty is to go so far only as to interpret the law as it stands, and determine what the legislature, at the time of the enactment, intended by it. As is usual in the enactment of statutes covering a new field of legislation, there are ambiguities and discrepancies which sometimes leave the law incomplete or inadequate; but if the law, as enacted, has proved inadequate, that is for the legislature to decide, and not for the court.

The statute now involved was by the act of 1919 repealed, and is no longer the law in this state, and the difficulties of interpretation, now involved, have become settled by the 1919 law, enacted in the place of this one.

The statute now in question contains another provision (Rev. St. 1913, sec. 806) to the effect that no corporation, having complied with the provisions of the law, shall transact any business after the adoption of any change in its articles or organization, by-laws or plan of doing business, until transcripts of such changes shall be filed with the railway commission. It is contended that the defendant company has, by virtue of this provision, come within the act, since it amended its articles of incorporation after it had been in existence for one year. It seems manifest, from a reading of the section, that this provision was intended to apply to those corporations within the purview of the act, and not to those expressly exempted, and that this provision has no application here.

The lower court refused to grant an injunction in this case, and no injunction has been allowed to the present time. By the law of 1919, enacted after this suit was commenced, covering the subject-matter of the statute under consideration, the exemptions of sales of stock, in-

volved here, have been dispensed with, and that law, it appears, affords full relief in the matters here in controversy.

For the reasons given, the judgment of the lower court is

AFFIRMED.

DEAN, ALDRICH and DAY, JJ., not sitting.

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NEBRASKA STATE RAILWAY COMMISSION, APPELLANT, V. PAINLESS WITHERS DENTAL COMPANY ET AL., APPELLEES.

FILED JUNE 29, 1920. No. 21098.

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

*Clarence A. Davis, Attorney General,* and *Hugh LaMaster,* for appellant.

*John P. Breen, contra.*

FLANSBURG, J.

The ruling in the case of *Nebraska State Railway Commission v. Alfalfa Butter Co., ante,* p. 797, is decisive of the questions involved in this case. The judgment of the lower court is therefore affirmed without further opinion.

AFFIRMED.

DEAN, ALDRICH and DAY, JJ., not sitting.

W. E. WHITTIER, APPELLEE, v. L. J. RILEY ET AL., APPELLANTS.

FILED JUNE 29, 1920. No. 21057.

1. **Judgment:** COMITY. "A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force, when sued on here, as a judgment on adversary proceedings." *Snyder & Dull v. Critchfield*, 44 Neb. 66.
2. ———: ———. A judgment was rendered upon warrant of attorney, without service of process, in a sister state, in which that procedure is not expressly authorized by statute, but in which the courts have uniformly held it to be justified by the common law. In an action upon such judgment, the courts of this state are bound by the interpretation placed upon the common law by the courts of the state in which the judgment was rendered, with regard to the validity of such procedure to sustain the judgment.
3. ———: POWER OF ATTORNEY. A power of attorney to confess judgment signed by two parties, which reads, "I authorize any attorney at law * * * to appear for me," will, notwithstanding the words "we" and "us" were not used, be construed to be the act of either or both of the signatory parties.
4. ———: ———. Where a warrant of attorney contained in a promissory note authorized any attorney at law to confess judgment "in favor of the payee above named, or assigns," the word "assign" will be construed to mean any person into whose hands the instrument may come by assignment or indorsement, including one who becomes a holder of the note by indorsement in blank.

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

*Cook & Cook*, for appellants.

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

DORSEY, C.

December 31, 1910, at Haxtum, Colorado, the defendants, L. J. Riley and Anna Riley, gave their promissory note for $111.60, due in eight months and payable at the bank of Haxtum, to Glass & Bryant Mercantile Company. In the body of the note appeared the following: "If not paid when due, then I authorize any attorney

at law, at any time after this obligation becomes due, to appear for me before any court in Colorado, or elsewhere, either in term or vacation, and waive the issuing and service of process and confess judgment against me and in favor of the payee above named, or assigns, for the said sum, interest, and costs, and attorney's fee of 10 per cent., and to thereupon for me release all error, and waive all right and benefit of a second trial, writ of error, or appeal in my behalf, and as well also the exhibition of a bill in equity to interfere in any manner with such judgment."

W. E. Whittier, the plaintiff, became the holder of the note by indorsement, and in February, 1917, filed a complaint in the county court of Logan county, Colorado, alleging the transfer of the note to him, and praying for judgment thereon. Acting by virtue of the warrant of attorney in the note, one A. E. Seidel assumed to appear for the defendants, Rileys, and filed a cognovit on their behalf, in which it is recited that, through the said attorney they waived the issuance and service of process and confessed judgment in favor of the plaintiff for $292.16 together with the costs. The county court of Logan county, Colorado, thereupon entered judgment in conformity with the confession.

This action was commenced in the county court of Dawson county, Nebraska, to recover upon the Colorado judgment, and was tried, upon appeal, in the district court for that county to the judge, a jury being waived. The findings and judgment were in favor of the plaintiff, holding the Colorado judgment valid and enforceable in this state. The defendants appeal.

The appellants contend, in the first place, that the Colorado court was not vested with jurisdiction to enter judgment upon warrant of attorney without process issued and served upon them. "A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force, when sued on here, as a judgment on adversary proceed-

ings." *Snyder & Dull v. Critchfield,* 44 Neb. 66. It was established by the testimony of a competent witness, learned in the law and practice of Colorado, that, while there is no statute expressly authorizing the court to recognize a warrant of attorney and to enter judgment upon an appearance of an attorney purporting to act thereunder, it has been the invariable practice of their courts to enforce that procedure, and that the supreme court of Colorado has determined that the procedure in question is justified under the common law. *Cross v. Moffat,* 11 Colo. 210; *Vennum v. Holmberg,* 51 Colo. 306.

Counsel cite *Pierce v. Hamilton,* 55 Colo. 448, as indicating that the Colorado supreme court was in some doubt whether the rule followed in the earlier cases should be upheld, but in no case has that court expressly overruled those decisions. It is furthermore pointed out by counsel that, in some cases, of which *Farquhar & Co. v. Dehaven,* 70 W. Va. 738, Ann. Cas. 1914A, 640, is an example, it has been held that, in the absence of statute, the procedure by warrant of attorney cannot be sustained under the common law. It therefore becomes necessary for this court to decide whether the view taken by the Colorado court, in holding that the procedure is justified by the common law, is controlling upon this court as to a judgment rendered upon warrant of attorney in that state, or whether, on the contrary, this court, in view of its duty to give full faith and credit to the judical proceedings of another state, could pursue an independent inquiry into the question.

"Whether a warrant of attorney is sufficient under the laws of another state to authorize the appearance entered thereunder, is a question to be determined from the evidence as to the laws of that state." *Snyder & Dull v. Critchfield, supra.* We are of the opinion that the principle just quoted precludes this court from questioning the interpretation placed by the Colorado court upon the common law as administered in that

state, and that its determination that a judgment entered upon warrant of attorney, without the issuance or service of process, is valid in that state under the common law, is conclusive upon the courts of Nebraska in a suit upon the judgment here.

The next point raised by counsel for the appellants is that the singular personal pronoun is used in the warrant of attorney, "I authorize any attorney at law * * * to appear for me," etc., and that, since the signatures of both appellants "L. J. Riley, Anna Riley" are appended to the instrument, it is too indefinite to be binding upon either of them. We believe, however, that, although the words "we" and "us" were not used, the warrant of attorney must be construed to be the act of either or both of the signatory parties. *Barron v. Kimball,* 124 Ill. App. 268.

Finally, it is contended by the appellants that the Colorado court had no jurisdiction to enter judgment in favor of the appellee, because the warrant of attorney authorizes the attorney acting under it to confess judgment "in favor of the payee above named, or assigns," and the appellee was not an "assign." The note containing the warrant of attorney was indorsed by the payee in blank, and the appellants point to the statute of Colorado providing that an instrument indorsed in blank is payable to bearer, and may be negotiated by mere delivery. They argue that the appellee in this case was a holder or indorsee of the note, and that, in the language of *Palmer v. Call,* 7 Fed. 737, "In strict legal parlance we do not use the term 'assignee' when we mean to designate the indorsees of bills and notes."

In support of their position, counsel cite *McClure v. Bowles,* 5 Ohio Dec. 288, in which it was held that where the power was "to confess judgment against us in favor of the payee above named or assigns," the holder who acquired the note by indorsement in blank "was not an 'assign' of the payee and the judg-

ment in his favor was not authorized." In the opinion in that case the rule was enunciated that authority to confess judgment against the maker of a note by warrant of attorney must be clear and explicit. The reasoning is as follows: "Does the term "assigns" include John D. Bowles, the stranger to the note, one whose name nowhere appears thereon? Nobody can say from the writing itself, but that half a score of persons have held and owned this note, between the payee, W. R. Cochran, Jr., and John D. Bowles; if this turn out to be the case, shall it be said that each and all are 'assigns' of the original payee? The question depends upon whether or no a note indorsed in blank passes from hand to hand by assignment, or by delivery. * * * The note, being indorsed in blank, passed by mere delivery, and there is no assignment in the case."

We are of the opinion, nevertheless, that where the word "assign" is used with reference to a promissory note it should be given the broad meaning which includes any of the modes whereby it may be assigned or transferred. Indorsement is a method of assignment pertaining peculiarly to notes and bills. If indorsed in blank, such an instrument, it is true, passes from hand to hand by mere delivery; but the person who becomes its holder by that means is just as effectually vested with title as if a formal assignment had been executed. The intention of the parties should be looked to in determining the meaning of the word "assigns" in the warrant of attorney, and, if it is to have any force at all, it must be taken to mean those into whose hands the note may come by transfer of ownership from the payee. *Mundy v. Whittemore,* 15 Neb. 647. The term might include, not only transfer by indorsement, but transfer by a separate instrument of assignment, or even an assignment in equity. The language of the warrant of attorney could have no other intention than to vest subsequent holders of the note, to whom it had been transferred by the payee, with the same right to have judg-

ment confessed in their favor as that possessed by the payee himself. It has even been held that, where a negotiable note contained a power of attorney authorizing confession of judgment in favor of the payee, but did not specifically authorize it in favor of assignees or subsequent holders, the power was nevertheless effective to authorize confession of judgment in favor of an indorsee. *Jarrett v. Sippely*, 175 Mo. App. 197; *Colona v. Parksley Nat. Bank*, 120 Va. 812.

We accordingly recommend that the judgment of the court below be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

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CARRIE T. WARREN, APPELLEE, V. GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF NEBRASKA, APPELLANT.

FILED JUNE 29, 1920. No. 20859.

1. **Insurance:** OFFICER OF SUBORDINATE LODGE: AGENCY. An officer of a subordinate lodge of a benevolent fraternal insurance order having authority, under its by-laws, to collect and receive dues and assessments from its members is the agent of the grand body of which the subordinate lodge is a part within the scope of his authority. *Modern Woodmen of America v. Colman*, 64 Neb. 162.
2. ———: ———: ———. The acts, omissions and mistakes of such an officer, within the scope of his authority are the acts, omissions and mistakes of the grand body with which the subordinate lodge of which he is an officer is affiliated.
3. ———: ASSESSMENTS: FORFEITURE: WAIVER. Where an officer of such a subordinate lodge, having authority to collect and receive dues, receives, receipts for and retains, without objection, a sum of money from a member in payment of an assessment in the *bona fide*, but mistaken, belief on the part of both the member and the

officer that the sum so received was sufficient to pay the assessment in full, the grand body has waived any right of forfeiture for nonpayment of the assessment, and is estopped to assert it, even though the amount so received was insufficient to pay the assessment in full. *Modern Woodman of America v. Colman*, 68 Neb. 660; *Modern Woodmen of America v. Berry*, 100 Neb. 820.

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

*Edward J. Lambe*, for appellant.

*J. H. Agee* and *R. M. Proudfit*, *contra.*

CAIN, C.

Plaintiff, who is the widow of the deceased insured, brought this action upon a beneficiary certificate issued by the defendant fraternal insurance order, on May 7, 1895, in the sum of $2,000, payable to her upon the death of her husband, Seth C. Warren, which occurred July 24, 1917. The defendant admitted the issuance of the certificate and the death of the insured, and pleaded that he was not "a member in good standing" at the time of his death as required by the contract, but had been suspended and had forfeited his certificate on May 29, 1917, for nonpayment of the May, 1917, assessment. To this plaintiff replied that the acts and conduct of defendant's agent constituted a waiver of the right of forfeiture, and that there was no suspension. A jury was waived and trial had to the court, and plaintiff recovered judgment for the sum of $2,135, and the additional sum of $250 as attorney's fees. The defendant appeals.

Appellant's complaint of the taxing of this attorney's fee is confessed to be just in open court by plaintiff, and suggestion made that a remittitur for that sum be entered. It is, therefore, eliminated from further consideration.

Appellant's formal assignments of error are that the judgment is contrary to law and the evidence, and that improper evidence was admitted over objection.

The substantial complaint, and the one insisted upon in appellant's brief and oral argument, is that the insured had become suspended and had forfeited his beneficiary certificate for nonpayment of the May, 1917, assessment, and had not been reinstated.

There is no material dispute about the facts, which are substantially as follows: Seth C. Warren and his wife, Carrie T. Warren, had resided near Nelson, Nebraska, for many years. On May 7, 1895, he became a member of Nelson Lodge No. 78, at Nelson, Ancient Order of United Workmen, a subordinate lodge of the defendant, and the beneficiary certificate sued upon in this action was issued to him, whereby his life was insured in the sum of $2,000, payable to his wife upon his death. He died at Duluth, Minnesota, on July 24, 1917. As far as the record discloses, he promptly paid all dues and assessments during the 22 years of his membership in the order up to May, 1917, and the facts in regard to that assessment will presently appear. On July 5, 1915, Mr. Warren had a stroke of paralysis which affected his right hand so that he could not write, and thereafter his wife attended to his writing, and, under his direction, to the payment of his lodge dues and assessments. Up to May 1, 1917, Mr. Warren's assessments had been $3 each. On January 6, 1917, at a special session of the defendant Grand Lodge, and by section 159 of the by-laws duly adopted, this assessment was raised to $13.38, to become effective May 1, 1917. The grand master, whose duty it was, duly and legally promulgated this section and mailed a copy of the promulgation to W. I. Templeton, recorder and financier of the Nelson lodge. There is no evidence that the insured ever had any actual knowledge of this increase in the assessment until about June 24, 1917, when he received a letter from Templeton dated June 4, while the insured was at North Yakima, Washington, in which he was told the amount of the new assessment but not when it became effective.

On January 18, 1917, Mr. and Mrs. Warren left their home in Nuckolls county and went to California. Thereafter, until Mr. Warren's death, they were traveling from place to place elsewhere than in Nebraska, and had no knowledge of any increase in assessments, except that derived from correspondence with Mr. Templeton, who had been recorder and financier of the Nelson lodge ever since Mr. Warren became a member in 1895, and they were close friends. Mr. Templeton died June 24, 1917, just one month before Mr. Warren's death, and his successor in office, J. W. Robey, was not appointed, or at least did not assume his duties, until some time between the 1st and 10th of July, 1917.

Before Mr. and Mrs. Warren left for California, they had a conversation with Mr. Templeton about the increase in rates, which at that time was a matter of uncertainty, and he told them that he did not know just how much they were, but would inform them when he found out. Under these circumstances and with this understanding, the Warrens left for California. On March 27 Templeton wrote Mr. Warren that there would be a raise in rates, but he could not tell how much, and further stated: "Will try to keep you informed." On May 23 Mrs. Warren wrote Templeton a letter from North Yakima, Washington, inclosing a money order for $3 for "May assessment in the A. O. U. W. for S. C. Warren." Regarding this remittance, Mrs. Warren testified: "Q. Why did you send him just $3? A. Because he had written me in March that he would keep me informed, and I had not been informed anything different." Mr. Templeton made no objection to the amount sent him, but, on the contrary, retained the $3, and on June 4 wrote Mr. Warren acknowledging receipt of that sum "for May." In this letter Templeton also said: "The new rate is $13.38 a month for you." However, he did not say when it became effective. Delivery of this letter was delayed until about June 24 on account of Warren's change of location. On June 20

Mrs. Warren wrote Templeton, asking what Mr. Warren's rate would be for June. On June 22 Templeton wrote Mrs. Warren, informing her that "the new rate went into effect June 1. Seth's would be $13.38 a month." Not knowing of Templeton's death, which occurred June 24, Mrs. Warren remitted the June and July assessments of $13.38 each and $1 for lodge dues on June 27, 1917, in conformity to the information given in Templeton's letter of June 22. Mr. J. W. Robey, who succeeded Mr. Templeton in office, testified that he received the assessments for June and July, 1917, from Mrs. Warren in the sum of $27.76, but later returned it to her sister's son. On July 13, 1917, Mrs. Warren wrote Mr. Robey from West Duluth, Minnesota, saying that she was surprised to receive his letter with draft returned, "as I paid the May assessment when in No. Yakima, Wash., and have a letter from Mr. Templeton acknowledging same." From this letter it appears that as late as July 13, 1917, eleven days before her husband's death, Mrs. Warren believed that Templeton's statement that the new rate did not become effective until June 1 was correct. The raising of rates was a matter of uncertainty and discussion in the order as late as May 10, 1917, when the defendant Grand Lodge, in session held at Omaha, decided to let the increase of January stand. The correspondence between the Warrens and Templeton clearly shows that they were much interested in any change in rates, and that Templeton was their sole source of information on that subject, and that they relied upon him entirely. Templeton's letters were all signed in his capacity as an official of the Nelson lodge. The $3 remitted by Warren and acknowledged by Templeton in payment of the assessment "for May" was never refunded. Mr. Templeton erroneously believed that the new assessment did not become effective until June 1, and so informed the Warrens. If it had not been for this erroneous belief evidenced by the information given by Templeton, the

full amount of the May assessment undoubtedly would have been paid. Otherwise, the remittance of the June and July assessments at the new rate would not have been made.

The record of the Nelson lodge contains the entry opposite Mr. Warren's name, "Suspended 5/29." Section 160 of the defendant's by-laws provides that nonpayment of an assessment on or before the 28th day of the month shall of itself work a suspension of the member and a forfeiture of his rights, and this court has held this provision to be self-executing. *Field v. National Council, K. & L. of S.*, 64 Neb. 226. Section 57 of the by-laws, which are made part of the contract of insurance, authorizes the financier to "receive all moneys for the lodge," and section 54 imposes on the recorder the duty to "conduct the correspondence and have charge of the seal and records of the lodge." And there is provision that the two offices may be combined.

It appears from the foregoing that the determining factor in this case is the group of facts relating to the May assessment. That it was not paid in full is clear, but that Mr. Warren, whose duty it was to pay it, and Mr. Templeton, who was solely authorized to receive it, both believed it to have been paid in full, is equally clear. Moreover, it is conclusively shown that the $3 remitted "for the May assessment in the A. O. U. W. for S. C. Warren" was received and retained by Mr. Templeton without objection. When Templeton wrote the Warrens on June 22 that the new rate went into effect June 1, they promptly remitted the June and July assessments at the new rate; and it is a reasonable and, we think, a necessary inference that, if it had not been for the fault of the financier-recorder in failing to inform the insured of the increase in rates, as that officer had expressly agreed to do, the May assessment would have been seasonably paid in full. The question therefore, seems to be whether this mistaken belief of the financier-recorder that the new rate

did not become effective until June 1, and his consequent failure to inform the insured of the correct date when it did become effective, can work his suspension as a member and a forfeiture of his benefit certificate through no fault of his own, and when the officer, without objection, retained the amount actually remitted and intended as payment of the May assessment. This question, in turn, depends upon the authority of the financier-recorder to bind the defendant Grand Lodge.

Under the by-laws of the order, which were expressly made part of the contract of insurance, Mr. Templeton, who had the combined offices of financier and recorder, had authority, and it was his duty, to collect and receive all dues and assessments and keep a record of them, and to conduct the correspondence. Everything, therefore, relating to these matters was within the scope of his authority. It follows that all letters in this record written by Mr. Templeton were written in his official dual capacity, and all letters addressed to him by the Warrens were addressed to him as a lodge official. The office held by Mr. Templeton was the only means of communication between the defendant Grand Lodge and its subordinate lodge at Nelson and its members. The courts uniformly hold that such an officer is the agent of the parent body. *Pringle v. Modern Woodmen of America,* 76 Neb. 384; *Modern Woodmen of America v. Berry,* 100 Neb. 820, and cases cited; *Collver v. Modern Woodmen of America,* 154 Ia. 615; *Hendrickson v. Grand Lodge, A. O. U. W.,* 120 Minn. 36; 19 R. C. L. 1216, sec. 31. Therefore the acts, conduct, mistakes and omissions of Templeton were the acts, mistakes and omissions of the defendant Grand Lodge. Hence it was the defendant itself which, without objection, accepted, receipted for and retained the $3 from the insured for the May assessment, and by its silence assured and convinced the Warrens that it was paid in full, and, so believing, they paid the June and July assessments at the new rate. Now, after the death of the insured, can

the defendant be heard to say to his beneficiary that the benefit certificate was forfeited because the Warrens relied upon defendant's implied assurance by retention of the May remittance that it was payment in full, or because, through fault of defendant's own agent, they were kept in ignorance of the date when the new rate became effective? In other words, can the defendant stand upon its own fault? We think not. By its conduct, through its authorized agent, the defendant clearly waived its right to a forfeiture, and is now estopped to assert it. *Modern Woodmen of America v. Colman,* 68 Neb. 660; *Modern Woodmen of America v. Lane,* 62 Neb. 89; *Grand Lodge, A. O. U. W., v. Scott,* 3 Neb. (Unof.) 851; *Trotter v. Grand Lodge,* 132 Ia. 513; *O'Connor v. Knights and Ladies of Security,* 178 Ia. 383.

From the foregoing consideration, it follows that the alleged suspension was wrongful and reinstatement unnecessary, and the benefit certificate did not become forfeited.

Counsel for appellant cites the case of *Royal Highlanders v. Scovill,* 66 Neb. 213, in support of a proposition that an officer of a subordinate lodge could not waive a forfeiture for nonpayment of assessment; but the case is not in point. In the *Scovill* case a member became suspended for intentional nonpayment of assessment, and, when she was in a dying condition, her beneficiary sought to reinstate her by paying the back dues, in the face of a provision that a suspended member could be reinstated only when in good health. Of course, the officer had no authority to waive the requirement of good health as a condition precedent to reinstatement, and it would have been a fraud upon the order to have permitted it. In the instant case, the officer had express power to receive the assessment, and it would be a fraud upon the beneficiary to permit the officer's mistake as to the amount to avoid the insurance.

Appellant also complains that the court erroneously excluded its offer of evidence that the Grand Lodge

officers knew nothing of what Templeton was doing in the premises. The complaint is without merit, as the defendant is conclusively presumed to know all the acts of the subordinate lodge officers within the scope of their authority. *Grand Lodge, A. O. U. W., v. Scott, supra.*

There is no error in the record.

We recommend that, upon plaintiff's filing with the clerk of this court, within 30 days from the filing of this opinion, a remittitur for $250 allowed for attorney's fees, the judgment of the district court be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, on condition that plaintiff file a remittitur of $250 within 30 days, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

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DANIEL C. HELLERICH, APPELLEE AND CROSS-APPELLANT, V. CENTRAL GRANARIES COMPANY, CROSS-APPELLEE: NEBRASKA ELEVATOR COMPANY, APPELLANT AND CROSS-APPELLEE.

FILED JULY 14, 1920. No. 20736.

1. **Master and Servant:** PERSONAL INJURIES: NEGLIGENCE. In an action to recover damages for personal injuries resulting from the sudden spinning of a sprocket wheel while plaintiff was at work with his arms between the spokes, the evidence discussed in the opinion *held* sufficient to sustain a finding that the machinery was negligently set in motion by the automatic shifting of a belt from a loose pulley to a fast pulley while the engine was in motion.

2. ———: ———: ———: APPLIANCES. The failure of an employer to furnish an appliance required by statute for the safety of employees may be evidence of negligence.

3. ———: APPLIANCES: DUTY OF EMPLOYER. It is the duty of the employer to exercise reasonable care for the safety of a workman in a hazardous position, and not to expose him to injury by use of dangerous appliances or unsafe places to work, when the exercise

of due skill and care will make the appliances and places reasonably safe.

4. ———: NEGLIGENCE: QUESTION FOR JURY. Where the evidence is sufficient to sustain a finding that an employer did not furnish the employee a reasonably safe place to work, the issue is one for the jury, if properly raised by the pleadings.

5. **Damages.** A judgment for $18,900 for personal injuries *held* not excessive.

6. **Appeal:** REMITTITUR. Where the trial court, in an action to recover damages for personal injuries, orders plaintiff to file a remittitur as a condition of overruling a motion for a new trial, the order will not be reversed on appeal, if there is a substantial basis in the evidence for a finding that the verdict is excessive to the extent of the amount required to be remitted.

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

*F. M. Hall, H. W. Baird* and *F. D. Williams,* for appellant.

*W. B. Comstock, contra.*

MORRISSEY, C. J.

The plaintiff, Daniel C. Hellerich, brought this action against his employer, the defendant, Nebraska Elevator Company, to recover damages for personal injuries resulting from alleged negligence. In the answer to the petition, the defendant, in addition to a general denial, pleaded contributory negligence and assumption of risk. Upon a trial of the issues there was a verdict for the plaintiff in the sum of $28,900. As a condition of overruling the motion for a new trial, the district court ordered, and the plaintiff filed, a remittitur in the sum of $10,000. From a judgment in favor of the plaintiff for $18,900, the defendant appeals.

The principal assignment of error is the failure of the trial court to sustain a motion by the defendant to direct a verdict in its favor on the ground that the evidence is insufficient to show negligence on its part or to sustain a verdict in favor of the plaintiff.

The defendant operated a grain elevator at Agnew, using a gasoline engine for power. Chris Hellerich, father of the plaintiff, was the defendant's agent in charge of the elevator when the injury occurred. The plaintiff had formerly acted in that capacity, but had not recently been in the employ of the defendant. While a car was being loaded with grain April 26, 1917, the grain-cup pulley in the elevator head in the cupola of the building slipped on the shaft and the movement of grain stopped. Chris Hellerich employed the plaintiff, who understood the machinery, for the specific purpose of tightening the pulley described so that it would not turn on its shaft. During the afternoon on the date mentioned, the plaintiff, in an effort to tighten with a monkey-wrench the set screws running to the shaft through the hub of the grain-cup pulley, put his arms between spokes of the sprocket wheel on the same shaft, a proper method, and, while at work in that position, the sprocket wheel was suddenly set in motion by power from the engine, and both of his arms were broken and mangled.

The engine is in a pit in a lean-to below the floor of the elevator, and the power is transmitted to a fast pulley on the line shaft by a horizontal engine belt. By means of a sprocket wheel on the line shaft under the elevator floor and a perpendicular endless chain, the power is transmitted to the sprocket wheel on the shaft in the elevator head, the elevator leg being 30 feet or more in height. In addition to the sprocket wheel on the line shaft and the fast pulley on the same shaft, there is a loose pulley. The engine is started by revolving a wheel on the engine shaft. While the belt is on the loose pulley, the sprocket chain which turns the shaft in the elevator head does not move, though the engine is in motion. To start the sprocket chain and to revolve the sprocket wheel in the elevator head, it is necessary to shift the belt from the loose to the fast pulley. The shifting device is a belt shifter, and the one used by the

defendant had been made out of a two by four scantling about six feet long. It is suspended through the elevator floor above the belt near the fast and the loose pulleys. Bolted to the lower end of the scantling there is a metal fork with a prong extending below the upper part of the belt on either edge. The upper end of the scantling is tapered for a handle, and it is operated on the elevator floor by moving it back and forth at right angles with the belt below.

The theory of the plaintiff is that by reason of defects, growing out of negligence, the machinery was set in motion automatically or without direct human agency at the time he was injured. Under issues raised by the pleadings, the trial court submitted to the jury four allegations of negligence, namely: (1) The belt shifter was defective and would not keep the belt on the loose pulley; (2) a rest hook to keep the belt away from the shafting was required by statute but not furnished; (3) the defendant permitted the engine to run while the plaintiff was at work in a hazardous position; (4) the plaintiff was not provided with a reasonably safe place to work.

In the argument by the defendant it is insisted that there is no evidence to sustain a finding in favor of the plaintiff on any issue submitted to the jury, and that a failure of proof on any one of them requires a reversal.

1. The first question to be considered is the evidence relating to the charge that the belt shifter was defective. The metal fork on the lower end was loose, and there is testimony that it would swing back and forth a distance variously estimated from an inch and a half to about four inches. The belt is about five inches in width. The face of the loose pulley is six inches wide and that of the fast pulley is seven inches wide. The diameter of each at the edge is the same. They are an eighth of an inch or more apart, without any friction between them. Both are crowned; that is, the face is

slightly convex to keep the center of the belt on the center of the pulley. The corners at the ends of the belt where it had been recently laced had been known, according to a witness, to strike the prongs of the belt shifter which, when free, hung perpendicularly. In that position, says one witness, about half of the belt would be on each pulley. A pin was used to keep the belt shifter in place. The hole where the pin was inserted in a timber was worn, and sometimes the pin as a result of shocks or vibrations would drop out. It had fallen out and was not in place at the time of the injury. In addition to evidence of this nature, there is also testimony by Chris Hellerich that the belt often automatically ran off the fast pulley onto the loose one; that the fast pulley would turn "as soon as it was caught by the least little bit of the belt;" that he was near the belt shifter when the accident happened, and that neither he nor any one else then shifted the belt to the fast pulley; that the engine was left running with the belt on the loose pulley while the plaintiff was working in the cupola, without warning, his arms being through the sprocket wheel there. Looking at the case thus far considered as if the witnesses who so testified told the truth, and as if no one started the machinery, it may be inferred that the belt shifter, in connection with all of the other machinery and appliances under all of the circumstances, the engine being in motion, was defective; and it may also be likewise inferred that the machinery which injured the plaintiff was automatically set in motion through the negligence of the defendant.

On the contrary, the defendant insists that inferences of negligence in view of other evidence do violence to unquestioned physical conditions, to natural laws, and to the laws of mechanics as shown by uncontradicted evidence. The defendant argues that there can be no reasonable difference of opinion on these issues, and that the jury should not have been allowed to indulge in mere speculation as to the proximate cause of the acci-

dent. The evidence relating to the premises from which defendant proceeds in its argument has been examined in detail, but only a portion of it can be epitomized here. It tends to show that the belt shifter had no office to perform except to shift the belt from one pulley to the other while the engine was in motion, and that for such a purpose it was without defect; that the belt shifter was not intended to keep the belt on either pulley, but that the pulleys were crowned for that purpose; that neither the weight nor the position of the belt shifter under the existing conditions could possibly result in shifting the belt from the loose to the fast pulley; that the belt had often shifted from the fast to the loose pulley of its own volition, but had never shifted the other way; that the crowning of the pulleys and a slight variance in the alignment of the engine and the line shafts tended to pull the belt away from the fast to the loose pulley; that the edge of the belt hung over the edge of the engine pulley on the side next to the loose pulley, showing a tendency to run away from the fast pulley; that it required considerable weight, ten or twelve pounds, to shift the belt from the fast to the loose pulley, and practically nothing to shift it the other way; that there was no weight or friction sufficient to move the belt from the loose to the fast pulley; that the belt, running from the loose pulley to the fast pulley, would not set the sprocket wheels in motion until the belt lapped four inches on the fast pulley; that the belt in running automatically from the loose to the fast pulley would not start the machinery suddenly, as it had been started, but would give a warning application of power by a jerk and recede from and reapproach the highest surface of the crown on the fast pulley alternately until the lap was sufficient to produce a continuous motion—an operation which did not take place; that these facts are established by actual tests of the machinery in controversy; that the tests were made by experts whose testimony cannot be refuted, when con-

sidered with physical conditions and the laws of mechanics.

On the evidence as a whole, it is argued by the defendant that there is no reasonable hypothesis on which testimony that no one set the machinery in motion is believable; that the defendant did not know and could not have discovered by ordinary care any defect which could cause the belt to shift to the fast pulley of its own accord; that the accident could not have been foreseen by any degree of diligence on the part of the defendant.

There is testimony, however, that the belt shifter had in fact been used by the defendant to keep the belt in place when the machinery was in motion, and that in pursuance of such a purpose it had been fastened in a stationary position at different times; that the crown on the loose pulley was increased subsequent to the accident; that the experts made their tests after the change; that the load on the engine when the tests were made was heavier than the load at the time of the accident. This leaves the issue in doubt with sufficient proof on each side.

It seems to follow that the tests and the testimony of the experts in connection with the proofs as a whole do not amount to a demonstration that the accident did not result from the automatic shifting of the belt, and, there being sufficient evidence in favor of the plaintiff on this point, there was no error in submitting the issue to the jury. On the questions of the plaintiff's assumption of risk, of his contributory negligence, and of the defendant being chargeable with knowledge of conditions, the evidence justifies the verdict rendered.

2. Was there error in submitting to the jury the issue of negligence on the part of the defendant in failing to furnish a rest hook? The statute provided for one. The legislature required the defendant to furnish or construct such guards and protection as will protect all employees against injury from belting or shafting,

to furnish belt shifters or other safe mechanical contrivances, for the purpose of throwing on or off belts or pulleys, and to provide rest hooks which will hold the belting free from the shafting. Rev. St. 1913, sec. 3597. There is evidence tending to show that the use of a rest hook would have prevented the belt from shifting to the fast pulley automatically, and that the system of the loose and the fast pulleys, as operated by the defendant, did not prevent such shifting. The rest hook was not furnished. The defendant answered this charge of negligence by proof that the loose pulley took the place of the rest hook and was a compliance with the law. The statute, however, uses the specific term "rest hook," which is not the same device as a loose pulley, and we think the trial court did not err to the prejudice of the defendant, under the circumstances, in submitting to the jury proof of the failure to comply with the statute as evidence of negligence.

3. Was the evidence sufficient to carry the case to the jury on the issue of negligence in allowing the engine to run with the belt on the loose pulley while the plaintiff was working with his arms through the sprocket wheel in the cupola? In this hazardous place the plaintiff, according to his testimony, was at work on the machinery without knowing that the engine in the pit below was in motion. At the time, it may be inferred, the loose handle of the belt shifter was vibrating above the floor of the elevator where a slight movement would apply the power below and spin the sprocket wheel in the cupola. A brother of the plaintiff was near the engine when the plaintiff was injured. Others had access to the floor of the elevator. The agent in charge spent a portion of his time in an office in a separate building. Under such circumstances, we see no error in permitting the jury to find negligence in allowing the engine to run. If defendant had stopped it, the hazard of revolving machinery would have been removed and the injury prevented. It is

the duty of the employer to exercise reasonable care for the safety of a workman in a hazardous position, and not to expose him to injury "by use of dangerous appliances or unsafe places to work, when the exercise of due skill and care will make the appliances and places reasonably safe." *Myers v. Pittsburgh Coal Co.*, 233 U. S. 184. We think that there was no error in allowing the jury to find that there was negligence in allowing the engine to run.

4. Was there evidence that the defendant was negligent in failing to provide the plaintiff a reasonably safe place to work? If the conclusions already reached on the other issues are proper deductions from the evidence, and we think they are, it may fairly be inferred that the plaintiff did not have a reasonably safe place to work, and that his exposure in this respect was a failure on the part of the defendant to exercise ordinary care. If we have made no mistake in our rulings on the sufficiency of the evidence, there is no error in submitting the issues to the jury.

Complaint is also made of the recovery as excessive after the amount was reduced by remittitur from $28,900 to $18,900. When injured, the plaintiff was a robust man 28 years of age. He testified he had been earning $200 a month as a live stock buyer and shipper. He was in the hospital 14 weeks, suffered intense pain, and underwent four surgical operations. He lost his right arm, and at the time of the trial the bones of his left arm had not united. On these facts we do not think the judgment is so excessive as to require a reversal or an additional remittitur.

The plaintiff appealed from the order requiring him to file a remittitur in the sum of $10,000 as a condition of overruling the motion for a new trial. The right to file a remittitur conforming to an order of the trial court and afterward to assail the order as erroneous is granted by statute. Laws 1915, ch. 247. Where the trial court orders a remittitur, there must be a substantial

reason or basis in the evidence for the decision that the verdict is excessive. In the present case the evidence does not show that the plaintiff will be prevented from pursuing his business of buying and selling live stock, or that he will be permanently deprived of the use of his left arm. For these reasons, there is no error available to the plaintiff.

AFFIRMED.

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

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WALTER J. BERLO, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED JULY 14, 1920. No. 20905.

1. **Negligence:** IMPUTED NEGLIGENCE. The negligence of the driver of a vehicle cannot be imputed to one riding with him as a mere invited guest.

2. **Street Railways:** ACTION: SUFFICIENCY OF PETITION. Where plaintiff sued a street car company for injuries received while riding as a guest in the automobile of a third person, which injuries were alleged to be due to defendant's negligence in backing a street car out of a Y, *held*, that a demurrer to the petition was properly sustained, where the case was not brought within the rule of the last clear chance, and where the petition showed that it was not the negligence of defendant, but the negligence of the driver of the automobile, that was the proximate cause of plaintiff's injuries.

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

*Kennedy, Holland, DeLacey* and *Horan,* for appellant.

*John L. Webster, contra.*

MORRISSEY, C. J.

This is a suit for damages for personal injuries alleged to be due to defendant's negligence in backing one of its street cars out of a Y at Forty-sixth and Cum-

ing streets in the city of Omaha, and thereby causing the automobile in which plaintiff was riding to strike against the curb. The trial court sustained a demurrer to the petition and dismissed the action. Plaintiff appeals.

At the time of the accident plaintiff was riding in the automobile of one Mallo as a guest. Defendant urges that the petition shows that Mallo was guilty of negligence in driving, and that such negligence is a bar to this suit. Under the holdings of this court, and of the great majority of American courts, the negligence of the driver of a vehicle cannot be imputed to one riding with him as a mere invited guest. *Loso v. Lancaster County,* 77 Neb. 466; *Craig v. Chicago, St. P., M. & O. R. Co.,* 97 Neb. 586; *Reudelhuber v. Douglas County,* 100 Neb. 687. To state a cause of action, however, the petition must show that the negligence of defendant was a material factor in causing the injury complained of.

Does the petition show actionable negligence on the part of defendant? The material averments of the petition are: Defendant was operating an electric street car line on Cuming street in the city of Omaha, terminating at Forty-sixth street, where a Y was maintained. At the northwest corner of the intersection of these streets, there was a building which "obstructed the view * * * and prevented any one coming east on Cuming street from knowing whether or not one of defendant company's cars was on said Y and about to back out therefrom onto Cuming street."

Plaintiff was riding east on Cuming street in the automobile of one Mallo, as an invited guest.

"Cuming street from Fiftieth street on the west toward Forty-sixth street on the east is a very steep hill sloping downward to the east, and it is difficult to descend this Cuming street hill with any character of automobile at a slow speed. As the automobile in which plaintiff was riding descended the Cuming street

hill and had passed over Forty-seventh street, the defendant company, without warning or signal of any character, and without having any employee stationed on the rear platform, and with full knowledge of the approach of the automobile in which plaintiff was riding, suddenly and negligently backed one of its cars southwesterly out of the Forty-sixth street Y toward the extension of the south Cuming street track.

"Notwithstanding the automobile in which plaintiff was riding was in plain view coming down the hill, where it would be difficult to stop it, defendant company negligently continued to back its car southwesterly at an angle at which, if the car was continued to be backed onto the extension of the south Cuming street track, there would be a collision between the street car and the approaching automobile, or the automobile would be forced against the south curb. And the defendant company continued to so negligently back its car * * * after having a clear and unobstructed view of the approaching automobile, and * * * notwithstanding it could have stopped its car immediately.

"When plaintiff's host suddenly saw defendant company's car backing out at an angle across Cuming street, he first turned his automobile toward the north, with the hope of passing around defendant's car to the north side, in order to escape a collision; but as the passageway on the north side of the street was still blocked by the front end of defendant's car not having cleared same, plaintiff's host, in the emergency thus created, was compelled and did then turn his automobile * * * so far to the south that without fault on his part he came into contact with the south curb. The automobile was overturned and thrown against one of the defendant company's iron trolley posts, and the occupants of the automobile, including plaintiff, hurled out of the car against said iron trolley post."

Briefly summarized, the negligence alleged against defendant consisted in the failure to have a man on the

rear end of the street car as it was being backed into Cuming street; the failure to wait until the street was clear before backing into it; the failure to give any warning or signal indicating an intention to back the car out of Forty-sixth street; and the failure to stop the street car after having ample opportunity to discover the danger of the oncoming automobile with reference to the backing car, and before the street car projected so far into Cuming street as to force the automobile against the south curb.

The petition does not show that in the normal course of events it was necessary for defendant to stop its cars until the street was clear of oncoming automobiles. The mere allegation that "it is difficult to descend this Cuming street hill with any character of automobile at a slow speed" is not sufficient, as against a demurrer, to establish such an absolute duty on the part of defendant. Nor would the fact that defendant used a car that, in rounding the curves of the Y, projected over the rail "to such an extent as to leave an inadequate, insufficient, and unsafe passageway for automobiles and other vehicles" necessarily give rise to an obligation to stop. Unless the driver of the automobile was in such a position that he might reasonably have the right to attempt to pass, and might reasonably be expected to try to do so, or unless other special circumstances were present, the projection of the car, which was regularly used upon this line, and which fact was not claimed to be unknown to the driver of the car, is not such a circumstance as, by itself, would make the continued backing of the car constitute actionable negligence. In this case the street car backed into plain sight of the automobile when the latter was a block away. The automobile was on a slope, and its occupants had an excellent opportunity to discover the presence of the street car. There is no allegation in the petition that any effort was made to stop the automobile, or that it was impossible to control it. When

these facts are considered, together with the fact that the accident occurred, not as the result of a collision with the street car, but from a striking of the curb, it is impossible to reach any other conclusion than that it was the negligent driving of Mallo, and not any act or omission on the part of defendant, that was the proximate cause of plaintiff's injury, unless defendant, despite the negligence of the driver, had such an opportunity to save plaintiff from injury as would bring the case within the rule of the last clear chance.

The rule of the last clear chance is not applicable, however. The petition does not, as previously pointed out, allege that the automobile could not be controlled, nor does it set out any facts from which defendant ought reasonably to have known that the occupants of the automobile were in danger and not able to stop, and that an accident was inevitable if the backing of the car was continued. In the absence of such a showing, we can only infer that defendant had a right to assume that the automobile would follow the usual course and get safely through the regular channels of traffic.

The demurrer was properly sustained, and the judgment is

AFFIRMED.

ALDRICH, J., not sitting.

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JUDDIE JOHNSON, APPELLEE, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLANT.

FILED JULY 14, 1920. No. 21047.

1. **Insurance:** CANCELATION. The statutory right of insured to a cancelation of his fire insurance is by construction a part of the insurance contract, and may be exercised by his request for cancelation and surrender of the policy for that purpose. Rev. St. 1913, sec. 3208.

2. ———: LOSS: SETTLEMENT: CONSIDERATION. After the exact amount of a loss by fire has been definitely determined by the insured and

an insurer that carries the entire risk, a partial payment, a receipt by insured in full satisfaction of the loss, and a claim asserted by the insurer, without any foundation in fact, law or equity that other insurance covering a proportion of the loss was in force when the fire occurred, do not constitute a consideration for a compromise and settlement, or for an accord and satisfaction, or require insured to refund or tender back the partial payment as a condition of recovering the remainder of the loss.

3. **Costs:** ATTORNEY'S FEES. Statutory authority to tax as costs an attorney's fee upon the rendition of a judgment in favor of plaintiff in an action on "any policy of life, accident, indemnity, sickness, guarantee, or other insurance of a similar nature," extends to an action on a fire insurance policy, since "indemnity" as thus used includes fire insurance. Rev. St. 1913, sec. 3212.

4. ———: ———. Under the statute authorizing the taxation of an attorney's fee upon rendition by the district court of a judgment in favor of plaintiff in an action on an insurance policy, as amended in 1919, an additional attorney's fee is allowable in the supreme court for appellate proceedings. Laws 1919, ch. 103, sec. 2.

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

*Montgomery, Hall & Young,* for appellant.

*Hainer, Craft & Edgerton* and *C. C. Fraizer, contra.*

ROSE, J.

This is an action on a fire insurance policy issued September 27, 1917, to plaintiff by defendant for $7,500 on a stock of merchandise in Stockham. The insured property was destroyed by fire October 11, 1917. Plaintiff's loss was $7,412.30. Defendant paid $5,657.91 October 22, 1917, and through its adjuster procured a receipt containing the recital that the payment was in full satisfaction of all claims by plaintiff for his loss. The relief demanded in this action is the recovery of $1,754.39—the difference between the loss of $7,412.30 and the payment of $5,657.91. There is no dispute about the validity of the policy in suit, or about the amount of the loss, but the theory of the defense is that the insured property was protected by two policies, the one on which this action is based and another issued by

the Springfield Fire & Marine Insurance Company for $2,500; that both policies were in force at the time of the fire; that the proportion of the loss for which defendant was liable was the amount of the payment of $5,657.91, and that of the other insurer $1,754.39. The theory of plaintiff is that the smaller policy had been canceled before the loss occurred, and that at the time of the fire defendant was carrying the entire risk. There was a judgment in favor of plaintiff for the full amount of his claim, and defendant has appealed.

The first point argued is assigned error in a finding of the trial court that the policy for $2,500 issued by the Springfield Fire & Marine Insurance Company had been canceled before the insured property was destroyed by fire. Under this head it is argued by defendant that insurance is not terminated until the steps essential to a cancelation of the policy are taken, and until the minds of the parties to the contract have met on that proposition.

Prior to the issuance of the policy for $7,500 September 27, 1917, defendant had been carrying plaintiff's risk to the extent of $6,000 only under a policy expiring on that date, and the smaller policy for $2,500 issued by the Springfield Fire & Marine Insurance Company had not expired. Several days before defendant's risk was increased from $6,000 to $7,500, plaintiff expressed to the agent of defendant a purpose to have the latter carry all of the insurance and to cancel the 2,500-dollar policy, trusting defendant's agent to transact the business. The agent communicated the contemplated change to defendant, increased the insurance to $7,500 September 27, 1917, and on that date, under authority from plaintiff, delivered the 2,500-dollar policy to the agent of the Springfield Fire & Marine Insurance Company, with a request to cancel it. The latter company, upon notification by its agent of the request for cancelation, and upon his inquiry for information as to

the amount of the unearned premium, wrote to him October 3, 1917, as follows:

"If the owner wants the policy canceled, he is entitled to $4.50 return premium, which amount you can pay him and take his receipt for same on the blank attached to the policy, and forward same to this office, and we will credit you with the proper return premium, less return commission."

The agent to whom this letter was directed received it, and promptly went to the store of plaintiff to comply with instructions, but plaintiff was temporarily absent at the time, and the fire occurred before the unearned premium was refunded. On the facts as they appear in evidence defendant states its position as follows:

"The Springfield agent never carried out his instructions, and the policy was never canceled, and the unearned premium was never paid, because Johnson, the insured, was out of town at the time; and thus matters stood at the date of the fire. It is therefore apparent from the facts that while it was the intention of Johnson to have his Springfield policy canceled, that intention was never carried into effect, and on the day of the fire, October 11, 1917, the Springfield policy was in force, and is liable for its *pro rata* amount of the loss."

Is this position tenable? Defendant issued and plaintiff accepted the 7,500-dollar policy with the understanding that the entire risk was thus assumed and that the smaller policy should be canceled. In addition, the agent of defendant undertook to procure the contemplated cancelation. An insured's right to cancel a policy at any time and the terms of the cancelation are creations of statute. Rev. St. 1913, sec. 3208. "Any company or association transacting the business of insuring property against loss or damage from any cause shall," declares the legislature, "cancel any policy of insurance at any time upon the request of the party insured," and return the amount of the unearned premium. This statute is by construction a part of the policy

of insurance. The insured's right to a cancelation is exercised by a request and a surrender of the policy. The imperative terms imposed on the insurer upon such a request are "cancel" and "return." Upon these statutory and contractual terms the minds of the parties met when the policy was issued and accepted. Upon a request for cancelation and a surrender of the policy the only alternative of the insurer is to cancel the policy and return the unearned premium computed according to a definite rule adopted by statute. In these respects there is nothing left open to call for a meeting of the minds of the parties. In the present case the intention of plaintiff to cancel the smaller policy was free from doubt when defendant issued and delivered the policy for $7,500. The parties meant that defendant should carry the entire risk, and both understood that the other policy had been surrendered for cancelation. To that end plaintiff did all the statute and the insurance contract required of him. He surrendered the smaller policy. He requested its cancelation, and never renounced his request. He asked for his unearned premium, and would have received it had he been at his place of business when the agent of the Springfield Fire & Marine Insurance Company called to refund it according to statutory and contractual requirements. The latter company, by inserting in its reference to the request for cancelation, its doubting "if," and its agent by a mere delay in returning the unearned premium, though he once called for that purpose when plaintiff was temporarily absent, did not defeat plaintiff's exercised right to cancelation. The request and the surrender before there was any loss, under all of the circumstances, amounted to a cancelation within the meaning of the statute when considered a part of the insurance contract. At the time of the fire, therefore, the smaller policy was not in force, and the entire loss fell on defendant.

Other defenses interposed are compromise and settlement, accord and satisfaction, and failure of plaintiff to tender back the payment as a condition of maintaining the action for the unpaid remainder of the loss. These defenses are untenable. Before settlement or partial payment the entire amount of plaintiff's loss by fire had been definitely determined to be $7,412.30. This was the estimate of defendant itself and the amount was conceded by plaintiff to be correct. Defendant carried the entire risk, and under its policy was liable to plaintiff for the whole of the loss. On the undisputed facts there was no foundation in law or equity for the claim that other insurance on the same property was in force at the time of the fire or that another insurer was liable for a proportion of the loss. The payment of $5,657.91 was an indebtedness of defendant in every aspect of the case, and in making it defendant surrendered or yielded nothing but what it concededly owed on its policy. That sum could have been collected from it in any event according to its own admissions. The partial payment, the unfounded claim and the receipt in full, therefore, did not amount to a consideration for a settlement, or for a release of the unpaid balance, or for an accord and satisfaction. In law and justice the alleged settlement or compromise was void for want of consideration. In other words, when the adjuster for defendant induced plaintiff to sign the receipt, the recital that payment was in full satisfaction of insurer's liability for the loss was procured for nothing. Under such circumstances the receipt merely evidenced the amount of a credit on the indebtedness. Plaintiff was not required to refund the partial payment as a condition of recovering the remainder. Reduced to a form applicable to the facts the sum of the law is: After the exact amount of a loss by fire has been definitely determined by the insured and an insurer that carries the entire risk, a partial payment, a receipt by insured in full satisfaction

of the loss, and a claim asserted by the insurer, without any foundation in fact, law or equity that other insurance covering a portion of the loss was in force when the fire occurred, do not constitute a consideration for a compromise and settlement, or for an accord and satisfaction, or require insured to refund or tender back the partial payment as a condition of recovering the remainder of the loss. *Prudential Ins. Co. v. Cottingham,* 103 Md. 319; *Mintzer v. Supreme Council, A. L. H.,* 85 N. Y. Supp. 23; *Weidner v. Standard Life & Accident Ins. Co.,* 130 Wis. 10; *Goodson v. National Masonic Accident Ass'n,* 91 Mo. App. 339; *Farmers & Mechanics Life Ass'n v. Caine,* 224 Ill. 599; *Girard Fire & Marine Ins. Co. v. Canan,* 195 Pa. St. 589; *Chambers v. Niagara Fire Ins. Co.* 58 N. J. Law, 216; *New Amsterdam Casualty Co. v. Mesker,* 128 Mo. App. 183; *American Workmen v. James,* 14 Ala. App. 477. In these views of the facts and the law there is no defense to plaintiff's cause of action.

In one of the assignments of error an attorney's fee of $200, taxed below as costs, is assailed on the ground that it is unauthorized. When the judgment was rendered the statutory power to allow such a fee extended to actions on "any policy of life, accident, indemnity, sickness, guarantee, or other insurance of a similar nature." Rev. St. 1913, sec. 3212. The legislature by the use of these terms, including "indemnity" or "other insurance of a similar nature," intended to include fire insurance. In both a popular and a legal sense one of the meanings of indemnity is a contract of insurance, and in the connection used includes indemnity against loss by fire. In so construing the statute the trial court did not err.

Plaintiff has applied for an additional attorney's fee to be taxed as costs on appeal. This application seems to be meritorious, and authority to allow it was recently granted by the legislature. Laws 1919, ch. 103, sec. 2. Complying with the purpose and the spirit of the law,

the sum of $100 is here allowed as a reasonable attorney's fee for the appellate proceedings.

AFFIRMED.

ALDRICH, J., not sitting.

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STATE, EX REL, HALL COUNTY FARM BUREAU ET AL., APPELLEES, V. FRED MILLER ET AL., APPELLANTS.

FILED JULY 14, 1920. No. 21351.

1. **Statutes:** TITLE. The title of an act, "to provide for county farm bureaus, for the improvement of agricultural methods and production and for cooperation with state and federal agencies," is broad enough to include provisions relating to the duties of a county farm bureau, to the employment and payment of a county agent, to the appropriation and disbursement of public funds for the payment of expenses of such a bureau, and to the duties of the county board in relation to these matters.
2. **Agriculture:** APPROPRIATION FOR FARM BUREAU. Legislation making provision for farm bureaus as governmental agencies of an educational nature to disseminate among farmers for practical purposes scientific knowledge for the improvement of agriculture is for a "public purpose" within the taxing power of the state.
3. ———: ———: CONSTITUTIONAL LAW. Legislation directing a county board, on petition of a specific number of residents of the county, to appropriate from the general fund raised by taxation and to disburse money to pay the expenses of a farm bureau is not void as taking property without due process of law or without representation.
4. **Statutes:** MODIFICATION OF EXISTING STATUTES. An independent legislative act covering the entire subject of legislation to which it relates may incidentally modify or change existing statutes without referring to them.
5. **Agriculture:** FARM BUREAUS: CONSTITUTIONAL LAW. County farm bureaus are governmental agencies entrusted with the duty of disseminating among farmers scientific knowledge of an educational nature for the improvement of agriculture, and the statute recognizing them as such is not void as delegating power to an unauthorized body or as creating new county officials.

APPEAL from the district court for Hall county: BAYARD H. PAINE, JUDGE. *Affirmed.*

*Prince & Prince,* for appellants.

*Horth & Ryan, contra.*

ROSE, J.

This is an application by the members of the farm bureau of Hall county and others to compel the members of the county board of Hall county to make an appropriation of county funds for the purpose of carrying on the work of the county farm bureau. The county board refused to make the appropriation on the alleged ground that the legislative act authorizing it is unconstitutional. The district court upheld the act and granted the writ. The county board appeals.

At the outset the county board concedes that the question presented is the constitutionality of the county farm bureau act. Laws 1919, ch. 203. It will not be necessary, therefore, to consider the organization of the county farm bureau or its proceedings or the reasonableness of the appropriation demanded.

One objection to the act is that it violates the constitutional provision declaring that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." Const., art. III. sec. 11. Under this head it is argued that the act contains legislation not clearly expressed in its title, which reads:

"An act to repeal sections 70, 71 and 72, Revised Statutes of Nebraska for 1913, and to provide for county farm bureaus, for the improvement of agricultural methods and production and for cooperation with the state and federal agencies therein." Laws 1919, ch. 203.

Among the legislative subjects enumerated by the county board as not clearly expressed in the title are these: Powers and duties of the farm bureau; hiring of county agent; appropriations to pay expenses of farm bureau and county agent; organization of farm bureau; duties of county board in paying bills. Are these subjects covered by the title? The purpose of the constitutional provision relating to titles is to prevent surrep-

titious legislation. The title quoted serves that purpose. The one general subject clearly expressed is provision for county farm bureaus, for the improvement of agricultural methods and production, and for cooperation with state and federal agencies. The act contains no matter not germane to this general subject. State and federal legislation to improve and increase the products of the farm for the general welfare and education with that end in view, through farm bureaus and other agencies of government, are matters of current history within common knowledge. There is no mystery about the purpose of such legislation or the agencies used to make it effective. The title and the act refer to both in terms well understood. The title covers all provisions on which the farm bureau's right to the appropriation is based. While a separate section provides for penalties for violations of the act, it is unnecessary for the purpose of this application to inquire into the sufficiency of the title to include that subject, since the invalidity of the provisions for punishments would not invalidate the rest of the legislation in any event. The act is not unconstitutional for want of a proper title.

The act is also challenged on the ground that it provides for the expenditure of public funds for a private purpose as distinguished from a public purpose within the taxing power of the state. The argument seems to be that the act requires the county board to use money raised by general taxation for the sole benefit of individual farmers engaged in a private industry. What the legislature had in mind was an efficient educational government agency to be conducted on an honest basis with a reasonable expenditure of public money. There is nothing in the act itself or in the record to indicate that such a mission has failed in any respect. It will be presumed that the legislature acted with a full knowledge of all facts and conditions essential to intelligent legislation. The lawmakers were without limit in sources of knowledge and in the means of obtaining in-

formation. They did not donate to individuals lands or the implements of agriculture. A small portion of the public funds raised by taxation in the ordinary manner is devoted to a branch of education affecting the chief industry of the state. The federal and state government at an enormous expense employ experts who apply themselves continuously to scientific research affecting agriculture and stock-raising. Federal and state bureaus and county farm bureaus are educational in their nature. All are agencies through which important discoveries and scientific knowledge essential to the proper tilling of the soil and to stock-raising are communicated to farmers. Instruction in fertilization of land, in selection of seeds, in destruction of pests, in diseases of domestic animals, and in kindred subjects, is imparted directly to husbandmen for practical purposes. Research of this nature and dissemination of resulting knowledge are proper functions of government.

The state has undertaken nothing new in this respect. The government of ancient Peru, not only instructed its subjects in agricultural pursuits, but collected, stored and preserved immense quantities of grain for the protection of the people in times of drouth, flood, pests, and other public disasters. The vigilance of government experts and the dissemination of practical knowledge increase with the demand for food. Results of study and investigation should not remain the secrets of philosophers and scientists. The time and means for continuous scientific research are not available to the tillers of the soil generally, but they must make the practical application of beneficial results. Society as a whole gets the benefits when new discoveries minister to universal needs and comforts. According to the old philosophers of Athens, investigation and knowledge justified themselves as the means of culture and mental development for scholars only, but the new philosophy includes practical benefits to mankind.

The question here is not whether the legislature has adopted the best means of disseminating agricultural knowledge, but whether the purpose is a public one to which funds raised by taxation may be applied. The supply, quantity and character of food affect the public at large, and in trusting a county farm bureau to deal with those subjects in an educational capacity, the legislature was clearly within the taxing power of the state. This conclusion disposes also of the contention that the act is void as special or class legislation.

The county board further contends that the act is void as authorizing the taking of property by taxation without due process of law and without the taxpayers being represented. The methods of levying and collecting taxes remain unchanged. The taxing and disbursing officers are the same. Out of the general fund created by taxation the county board is directed by the legislature, on petition of residents, to make a limited appropriation based on an estimate of the county farm bureau, and, by warrant on the county treasurer, to pay claims approved by the board of directors of the county farm bureau. Kindred legislation to aid in the work of agricultural societies has been upheld. *State v. Robinson,* 35 Neb. 401. By analogy the act in question is not open to this attack. The legislature may provide for the expenditure of public funds of a county for public purposes without providing a means for ascertaining the views of all residents or of nonresidents having taxable property in the county. *Westlake v. Anderson,* 33 N. Dak. 326. The act does not sanction a sham bureau, or fictitious, dishonest or unreasonable claims. The county board has power to protect the public from fraud.

A further argument is directed to the proposition that the act is void as amending existing statutes without referring to them; the Constitution providing that "No law shall be amended unless the new act contains the section or sections so amended." Const., art. III, sec. 11. In this connection it is insisted that the act

changes many statutes affecting county governments. The answer to this argument is that the act is a new and independent one covering the entire subject of legislation to which it relates, and for that reason may incidentally change or modify existing statutes without setting out those amended.

The act is also assailed as delegating power to an unauthorized body and so creating new county offices, the county farm bureau is a voluntary organization. Its members are not county officers within the meaning of the Constitution. It is not a money-making concern. It is above the aim of pecuniary individual enterprise or official compensation. Its relation to the public is like that of agricultural societies, of which it was said:

"Agricultural societies are not corporations in the ordinary sense of the term, but rather agencies of the state created for the purpose of assisting in promoting our most important industry." *State v. Robinson,* 35 Neb. 401.

The Constitution does not prohibit the legislature from resorting to this means of promoting the interests of the public by providing for technical and experimental education on agricultural subjects. 2 C. J. 989, sec. 3; *Westlake v. Anderson,* 33 N. Dak. 326, and cases cited therein.

No fatal objection to the act has been pointed out.

AFFIRMED.

ALDRICH, J., not sitting.

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STATE, EX REL. EQUITABLE BUILDING, LOAN & SAVINGS ASSOCIATION, RELATOR, v. DARIUS M. AMSBERRY, SECRETARY OF STATE, RESPONDENT.

FILED JULY 14, 1920. No. 21540.

**Building and Loan Associations:** ORGANIZATION. The law requires a building and loan association to file its articles of incorporation with the secretary of state and to pay in advance a filing fee based on the amount of authorized capital stock. Rev. St. 1913, secs. 568, 2423.

Original proceeding in mandamus to compel respondent to file amended articles of incorporation of relator. *Writ denied.*

*Reeder & Lightner,* for relator.

*Clarence A. Davis, Attorney General,* and *Mason Wheeler, contra.*

ROSE, J.

The Equitable Building, Loan & Savings Association, relator, amended its articles of incorporation to increase its authorized capital stock from $500,000 to $1,000,000, and this is an application for a writ of mandamus to compel the secretary of state, respondent, to file the amendment in his office. Respondent resists the allowance of the writ on the ground that relator failed to pay in advance a filing fee of $250. Relator contends that the law requiring the payment of such a fee does not apply to a building and loan association.

The statute requires payment of fees in advance to the secretary of state for filing "articles of association, incorporation or consolidation, domestic or foreign," and "for filing certificate of increase of capital stock of any corporation, association or consolidation, domestic or foreign." The principal fee for this particular service of the secretary of state is based on the amount of the capital stock. If the statute requiring payment of these fees applies to building and loan associations, the fee demanded by the secretary of state is payable in advance as a condition of filing the amendment. Rev. St. 1913, sec. 2423.

It was formerly held that building and loan associations need not file articles of incorporation with the secretary of state, and that therefore they were not required to pay the fee in question. *State v. Searle,* 86 Neb. 259. Later, however, the legislature amended the law and these associations are now required to make the filing. Rev. St. 1913, sec. 568. The literal

terms of the statutes as they now stand, therefore, require relator to file its amendment with the secretary of state and to pay in advance a fee of $250.

Relator argues, nevertheless, that building and loan associations do not have "capital stock" in the ordinary sense of that term, and that their capital more nearly resembles bank deposits, which are not a basis for fees payable to the secretary of state. This proposition is answered by the provisions of the statutes themselves. A building and loan association is a corporation. It must adopt articles of incorporation, have authorized capital stock, make filings, and comply with other requirements of the general law. The legislature made no exceptions based on a mere difference in the nature of capital stock. Building and loan associations were required to file their articles of incorporation with the secretary of state after this court had reviewed the history of legislation on this subject and had observed:

"We can see no reason in requiring the articles to be filed with the secretary of state, another copy to be filed with the state auditor, and still another copy to be filed with the state banking board, and, in addition to these filings, to require a certificate to be filed with the secretary of state showing the filing of the articles with the auditor; and, unless such an intention of the law is plain, it ought not to be imputed to the legislature." *State v. Searle,* 86 Neb. 259.

It might have been further observed with equal propriety that there is no obvious reason for exacting a large fee from an economic association devoted largely to preserving and increasing savings in small amounts and to providing funds on easy terms for home-building. The legislation, however, is plain, and it does not exempt building and loan associations from the filing or from the payment of the filing fee.

It is further argued that recent legislation exempts relator from the payment of the fee, reference being made to the following provision:

"The capital stock of every such association shall consist of the accumulated payments made by its members and dividends credited thereon, and shall be represented by shares." Laws 1917, ch. 10, sec. 1.

The point urged is that this provision makes the capital stock an uncertain and varying amount without a basis for the filing fee demanded by respondent. The legislation seems to limit to payments and dividends the character of property receivable by the association for capital stock, rather than to make a definite amount of authorized capital stock unnecessary. The language quoted is the concluding sentence of a mere amendment of a particular section of the act relating to building and loan associations. Laws 1917, ch. 10, sec. 1, Rev. St. 1913, sec. 485. The provision itself refers to "capital stock" and to "shares." The section as amended requires dealings between members and the association according to the "par value of the shares of stock." The statute relating to corporations generally seems to contemplate a definite amount of capital stock authorized by the articles of incorporation. Rev. St. 1913, secs. 565-586. Published notice of the amount of capital stock authorized is specifically required. Rev. St. 1913, sec. 572. Building and loan associations are not excepted. The conclusion is that the amendment quoted from the statute does not exempt relator from the payment of the fee. The writ is therefore denied and the action is

DISMISSED.

DEAN and ALDRICH, JJ., not sitting.

WILLIAM HOLLMAN ET AL., APPELLEES, v. J. S. PATTISON & COMPANY ET AL., APPELLANTS.

FILED DECEMBER 31, 1920. No. 20831.

1. **Executors and Administrators:** SALE OF REAL ESTATE: ESTOPPEL. Plaintiffs contracted with the heirs of a deceased person for a quitclaim deed of conveyance to real estate of which the ancestor died seised, it being subject, however, to sale for the payment of

the debts of the ancestor. It was provided in the contract that, in addition to the quitclaim deed, the purchasers should be furnished an administrator's deed to be procured by proper procedure in the courts. The administrator, by and with the consent of the heirs, had previously executed a lease of the premises to a third party. In pursuance of the contract, the quitclaim deed was executed and delivered and the proper proceedings were had for the sale of the premises by the administrator for the payment of the debts. The plaintiffs became the purchasers at the administrator's sale, the sale was confirmed and the administrator's deed issued to the purchasers. *Held*, plaintiffs are not, as against the lessee of the heirs and the administrator, estopped to assert their right of possession of the premises from the date of the confirmation of sale and delivery of the deed.

2. **Syllabus Withdrawn.** The syllabus of our former opinion, *ante*, p. 313, is withdrawn.

Opinion on motion for rehearing of case reported, *ante*, p. 313. *Syllabus of former opinion withdrawn, and judgment affirmed.*

MORRISSEY, C. J.

This case is before us on motion for rehearing. The original opinion may be found, *ante*, p. 313. It is an action to recover possession of the storeroom and basement in a business block in the city of Minden. There was judgment for plaintiffs, and defendants appealed. By our former opinion the judgment of the lower court was affirmed. On rehearing it is urged that certain statements of fact contained in our opinion are not borne out by the record.

The building formed part of the estate of Hannah E. Haws. The administrator of the estate, by and with the consent of each of her heirs, executed a lease of the premises to defendants for the term of one year, defendants having the option to continue the lease for a term of four more years. Subsequent to the execution of this lease the administrator and the heirs negotiated for a sale of the property to plaintiffs Hollman and Jensen for the sum of $10,000. This agreement provided that the heirs should execute a quitclaim deed running to the purchasers, but further provided that an administra-

tor's deed be procured by proper proceedings through the courts. Two of the heirs were minors and their guardian acted for them in the execution of the contract and lease. Proceedings were instituted in the proper court to have the real estate sold to satisfy the debts of Hannah E. Haws, her personal property being insufficient therefor. When the real estate was offered at the administrator's sale, plaintiffs Hollman and Jensen bid the amount agreed upon in their contract theretofore made. No other bid was made and, June 30, 1917, the sale was duly confirmed by the district court, and a deed issued and delivered by the administrator to the purchasers, Hollman and Jensen. On the same day a quitclaim deed from the heirs was delivered. Hollman and Jensen then conveyed an interest in the property to plaintiffs Anderbery. Defendants paid the rent up to July 1, 1917, to the administrator. In our former opinion it is said that defendants, who were in possession of the property at the time of the sale, recognized the validity of plaintiffs' title by paying rent to the purchasers, and that the purchasers received the same. This statement is not supported by the record.

Defendants contend that plaintiffs hold title by virtue of their agreement made with the heirs and the administrator and finally merged in the quitclaim deed, and that the proceedings had in the district court constitute merely a means of conveying the title of the minor heirs, or completing the contract made by the parties out of court, and that plaintiffs took title subject to the lease held by defendants. Defendants invoke the doctrine of estoppel. They also contend that the action was prematurely brought and that the court was without jurisdiction because this action was commenced before the administrator had made distribution of the funds of the estate and obtained his final discharge from the county court.

We find in the brief an excerpt from the opinion of the trial court which clearly states the controlling issues and reaches the correct conclusion, and we adopt it as our own:

"The law is clear that, unless an estoppel arises by reason of their having taken the deed from the heirs, the administrator's deed vested Jensen and Hollman with title to the lots free from the burden of any lease or other conveyance or incumbrance made by the heirs or by the administrator while the estate was in process of administration. Purchasers at administrator's sale have the right to possession as against the administrator or the heirs, as well as tenants claiming under them. It is contended by the defendants, however, that the present case is an exception to the rule; that, by negotiating with the heirs for their title to the property and by accepting a deed from them, the plaintiffs have placed themselves in such a position of privity with the heirs that they are precluded and estopped from denying the validity of the defendants' lease.

"The plaintiffs in this case hold two distinct lines of titles, one from the heirs of Hannah E. Haws, which conveyed the interest of the heirs, subject and inferior, of course, to the liability of the real estate for the payment of debts of the estate if the personalty is insufficient; the other through the court proceedings, in which the court, assuming under the statute to act in the place of intestate, sells the property to obtain money with which to discharge the debts. The deed from the heirs extinguishes their rights, while the administrator's sale extinguishes the rights of creditors. The latter being superior to the former, and the title of the heirs being merely contingent, the administrator's deed extinguishes the rights of the heirs as well as of the creditors.

"Are there, then, any facts or circumstances in evidence in this case which would estop the plaintiffs as against the lessee of the Haws heirs from claiming the right of possession of the premises which ordinarily flows from the administrator's sale and deed and vests in the purchaser at such sale? Such estoppel could arise only in one of two ways, by deed or *in pais*.

"The attitude of the plaintiffs and the defendants toward each other during the negotiations between the

Haws heirs and the plaintiffs, and before and at the time of the administrator's sale, seemed to have been entirely passive. No representations or statements of any kind took place between them, and they did not come into contact with reference to the sale. The contract and the deeds were silent as to the rights of the lessee. Did the plaintiffs owe any duty to the defendants in the premises to take any active step with reference to the lease? No specific duty on the plaintiffs' part toward the defendants has been pointed out, and it may therefore be said that there is no basis for estoppel by conduct, except such as would arise, if at all, from the mere fact of entering into the contract of sale, or of accepting the deed from the heirs.

"The question, though, is whether, negotiating with parties for a quitclaim deed, and afterwards accepting from such parties a deed which is in legal effect a quitclaim deed, the grantees in such deed are estopped, as against the lessee of their grantors, from disputing the title of their grantors; that is, are they estopped in an action to dispossess such lessee from asserting that their grantors, at the time they gave the lease in question, had no power to make the lease? In other words, may the grantees in the deed from the heirs, after accepting the deed, deny that their grantors had any title at the time they made it, and set up as against their grantors' lessee a superior title derived through judicial proceedings in which the rights of their grantors have been devested?

"The current of authority seems to be uniform upon the position that the grantees in such a case are not estopped (*Wenzel v. Schultz,* 100 Cal. 250; *Moore v. Smead,* 89 Wis. 558; *Robertson v. Pickrell,* 109 U. S. 608, 27 L. Ed. 1049)."

The syllabus of our former opinion and the statements in the opinion heretofore mentioned are withdrawn, and the judgment is

AFFIRMED.

# INDEX.

**Accord and Satisfaction.**

Defense of accord and satisfaction requires proof of a substantial difference as to the amount due and settlement thereof. *Schreier v. Griffin* ..... 722

**Adverse Possession.**

1. Title to realty may be established by proof of actual, open, exclusive, and continuous possession under claim of ownership for the statutory period of ten years. *DeWulf v. DeWulf* ..... 105
2. Evidence *held* to support verdict. *Yates v. Hoctor* ..... 195
3. Limitations do not run in favor of one maintaining a nuisance in a highway. *Donovan v. Union P. R. Co.* ..... 364
4. Act of congress *held* not retroactive to aid an abutting landowner to acquire title to railroad right of way by adverse possession. *Union P. R. Co. v. Wooster* ..... 421

**Agriculture.**

1. Act providing for county farm bureaus *held* not void as delegating power to an unauthorized body or as creating new officials. *State v. Miller* ..... 838
2. Appropriations for farm bureaus *held* to be for a "public purpose." *State v. Miller* ..... 838
3. Provision in act for appropriation for expenses of a farm bureau *held* not void as taking property without due process of law. *State v. Miller* ..... 838

**Animals.**

In an action for damages for dog bite, evidence *held* to support verdict for plaintiff. *Herbert v. Katzberg* ..... 395

**Appeal and Error.** See CRIMINAL LAW. TRIAL.

1. A bill of exceptions in one case cannot, by stipulation, be made a part of the record of another case. *Bee Publishing Co. v. State* ..... 1
2. When the trial court dismisses an intervener from the case, and he appeals to the supreme court, but presents no brief, he will be considered to have abandoned the appeal. *Palmer v. Parmele* ..... 30

**Appeal and Error**—*Continued.*

3. When the principal issues in a case are determined on appeal, and specific questions are referred for trial, the issues so determined become the law of the case, as between the parties to the appeal. *Palmer v. Parmele* ..... 30

4. The trial court on a second trial should state the law in his instructions as determined on the appeal, and assigning a wrong reason therefor does not necessarily render such instructions erroneous. *Palmer v. Parmele* ..... 30

5. An affidavit in support of motion for new trial will not be evidence of rulings of the court in the trial or in proceedings preparatory for trial. *Palmer v. Parmele* ..... 30

6. An appeal to the supreme court from confirmation of sale on foreclosure will not be dismissed because appellant has, after entry of decree, disposed of his interest in the land, where such disposition is by warranty deed on whose covenants he may be rendered liable. *Dahlsten v. Libby* ..... 84

7. On appeal in equity the supreme court must try issues of fact *de novo*, but when witnesses in open court disagree as to an important fact, the supreme court in determining that fact will consider the advantages of the trial court in concluding which version is more probable. *Dovey v. Schlater* 108

8. Where supreme court rule 12 is not observed in preparation of briefs, they are subject to be stricken. *Walla v. Kavan* 134

9. Error or defect in pleadings or proceedings, when not prejudical, is not ground for reversal. *White v. First Nat. Bank* ..... 142

10. Ruling as to expert's competency will not be disturbed unless prejudicial. *Schmidbauer v. Omaha & C. B. Street R. Co.* ..... 250

11. Case *held* to be an appeal, and not an original action for mandamus. *State v. Amsberry* ..... 279

12. The opinion on a former appeal is the law of the case. *Merkouras v. Chicago, B. & Q. R. Co.* ..... 491

13. A party cannot appeal from a judgment granting him the relief he demanded. *Bragonier v. Stevenson* ..... 578

14. A wrong reason for a correct conclusion is immaterial. *Bragonier v. Stevenson* ..... 578

15. A judgment will not be reversed for error not affecting substantial rights. *State v. Quimby* ..... 590

**Appeal and Error**—*Continued.*

16. After filing of transcript by one of two joint tort-feasors, the supreme court may allow revivor by the representative of the other, who died before the filing of the transcript in the supreme court. *Long v. Krause* ..... 599

17. Order of remittitur approved. *Hellerich v. Central Granaries Co.* ..... 818

18. The time for taking an appeal from district court in an equity suit begins to run when final judgment is entered of record. *Dahlsten v. Libby* ..... 84

19. The time within which to file a supersedeas bound under sec. 8189, Rev. St. 1913, for appeal to supreme court in a law action begins to run, not from entry of judgment, but from overruling of motion for new trial. *First Nat. Bank v. Gates* ..... 230

20. The filing of a transcript on appeal within time is jurisdictional. *State v. Amsberry* ..... 279

21. Under ch. 159, Laws 1913, as amended by ch. 86, Laws 1919, appeals to the supreme court must be taken within ten days. *State v. Amsberry* ..... 279

22. Where the probative force of the evidence is so strong that the jury would not be justified in rendering any other verdict, it will not be set aside. *Dodder v. Ætna Life Ins. Co.* 70

23. Where the verdict was the only one permissible under the law and evidence, the judgment will be affirmed. *Dodder v. Ætna Life Ins. Co.* ..... 70
*Dodder v. Pacific Mutual Life Ins. Co.* ..... 74

24. When the testimony conflicts, the judgment will not be set aside unless the verdict is clearly wrong. *Livingston v. Omaha & C. B. Street R. Co.* ..... 113

25. Findings on credibility of affidavits in support of motion for new trial sustained. *Farmers Irrigation District v. Calkins* ..... 196

26. In a trial to the court, its findings will not be disturbed if sustained by competent evidence. *Wickersham v. Phillips* 296

27. In absence of bill of exceptions, findings will be presumed sustained by evidence. *Prairie Life Ins. Co. v. Schumann* 363

28. A verdict supported by evidence is conclusive. *Sternad v. Omaha & C. B. Street R. Co.* ..... 460

29. A verdict supported by evidence will not be disturbed. *Farmers & Merchants Bank v. Farmers & Merchants Bank* 473

**Appeal and Error**—*Concluded.*

30. A party objecting to findings on dismissal in his favor should request the trial court to correct them. *Bragonier v. Stevenson* ..... 573

31. Where a verdict is directed, appellant is entitled to the benefit of all controverted questions of fact, and to inferences deducible therefrom. *Schmelzel v. Leecy* ..... 672

32. A verdict will not be upheld, where opposed to physical facts. *Dodds v. Omaha & C. B. Street R. Co.* ..... 692

33. An erroneous instruction will not require a reversal on appeal of one not prejudiced thereby. *Palmer v. Parmele* .. 30

34. Where appellant was not injured by an erroneous instruction, it is error without prejudice. *Fried v. Ellis* ..... 163

35. It is not error to refuse an instruction covered by one given. *King v. Day* ..... 353

36. Where the verdict is the only one justified, instruction as to burden of proof is immaterial. *Gesford v. Star Van & Storage Co.* ..... 453

**Appearance.**

Where default judgment was entered against a corporation, *held* error to refuse to allow intervening stockholders to make special appearance, objecting to jurisdiction of the court over the corporation for want of notice; no summons having been served upon any officer or agent of the corporation. *Schwabe v. American Rural Credits Ass'n* ..... 46

**Assault.**

To justify an arrest without a warrant, there must be reasonable ground to believe the person arrested is guilty of a crime. *Halsey v. Phillips* ..... 648

**Attorney and Client.**

Settlement pending appeal *held* not to deprive lienors of right to enforce lien on entire amount of judgment. *Griggs v. Chicago, R. I. & P. R. Co.* ..... 301

**Bailment.**

1. Parties to a bailment may diminish liability of the bailee by special contract, not in violation of law or of public policy. *Gesford v. Star Van & Storage Co.* ..... 453

2. Warehouseman may by special contract relieve himself from liability for damage from changes in temperature. *Gesford v. Star Van & Storage Co.* ..... 453

Bailment—*Concluded.*

3. Where a bailee by special contract exempts himself from liability for freezing he is not bound to provide heat. *Gesford v. Star Van & Storage Co.* ..... 453

Bankruptcy.

In a suit to subject land to payment of debts, evidence *held* not to show fraudulent conveyance of the land. *Willman v. Peterson* ..... 128

Bastardy.

In bastardy, a verdict on conflicting evidence will be sustained unless clearly wrong. *Torske v. Johansen* ..... 378

Bills and Notes.

A note for a pre-existing debt will not discharge the original obligation, unless taken in payment by agreement. *Spear v. Olson* ..... 139

Bonds. See BRIDGES.

Bridges.

1. Labor and material used in performance of a contract for public work is within the obligation of a contractor's bond given pursuant to sec. 3840, Rev. St. 1913. *Iddings Co. v. Lincoln Construction Co.* ..... 124
2. A bond given under sec. 3840, Rev. St. 1913, for construction of a public bridge will be construed in connection with the statute, and the obligors must consider coal used in the work as within its obligation. *Iddings Co. v. Lincoln Construction Co.* ..... 124
3. Sec. 3840, Rev. St. 1913, is remedial and will be liberally construed. *Iddings Co. v. Lincoln Construction Co.* ..... 124

Brokers.

1. Authority of agent to sell specific land will not be extended by implication to include other land. *Spanogle v. Maple Grove Land & Live Stock Co.* ..... 342
2. Whether a broker's efforts were the efficient cause of the sale is ordinarily for the jury. *Schmelzel v. Leecy* ..... 672
3. Evidence *held* not to warrant holding, as a matter of law, that a broker was not the efficient cause of a sale. *Schmelzel v. Leecy* ..... 672

Building and Loan Associations.

A building and loan association must file articles of incorporation and pay a filing fee in advance. *State v. Amsberry* 843

**Carriers.**

1. A street railway company cannot evade its duty to passengers by operating contracts with other corporations, nor thus avoid liability for negligence resulting in personal injury to passengers. *Tankersley v. Lincoln Traction Co.* .. 24
2. In an action against a carrier for personal injuries resulting from negligence, it is prejudicial error to instruct the jury, in estimating the damage, to consider "the probable expense of his personal livelihood." *Tankersley v. Lincoln Traction Co.* ..... 24
3. Where the testimony was conflicting as to whether plaintiff's injuries were sustained while a passenger and about to alight or at a short distance from the car after she had safely alighted, the rule of *res ipsa loquitur* does not apply. *Livingston v. Omaha & C. B. Street R. Co.* ..... 118
4. Ordinarily a conductor need not warn a passenger that the car has stopped, or of danger in attempting to alight. *McCoy v. Omaha & C. B. Street R. Co.* ..... 468
5. Facts *held* not to justify attempt to board a moving street car, nor to create relation of carrier and passenger. *O'Connor v. Omaha & C. B. Street R. Co.* ..... 534
6. Where a person attempted to board a moving street car without the knowledge of the operators of the car and was injured, company held not liable. *O'Connor v. Omaha & C. B. Street R. Co.* ..... 534
7. The provision in the uniform bill of lading as to carrier's liability *held* not a limitation of the carrier's liability for negligence. *Bowman-Kranz Lumber Co. v. Bush* ..... 165
8. A bill of lading is a carrier's receipt for property and a contract to carry and deliver it. *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.* ..... 566
9. A bill of lading, though evidence of ownership, does not preclude inquiry into its transfer. *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.* ..... 566
10. Without receipt or possession of property there can be no valid bill of lading. *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.* ..... 566
11. A subsequent bill of lading after delivery under the original bill, to divert shipment, is void. *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.* ..... 566

**Carriers**—*Concluded.*

12. After delivering an intrastate shipment under bill of lading. the carrier cannot, by issuing a void bill, make its services interstate business. *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.* ..... 566

13. Proof that goods were in good condition when delivered to the initial carrier raises the presumption that they were in good condition when delivered to the terminal carrier. *Whitnack Produce Co. v. Chicago & N. W. R. Co.* ..... 587

14. The common-law liability of a carrier as an insurer was not changed by the Carmack amendment as to loss on its own line. *Whitnack Produce Co. v. Chicago & N. W. R. Co.* .... 587

15. Where a passenger alights from a moving street car, and without looking or listening goes behind it and is struck by a car on the opposite track, he is guilty of negligence. *Dodds v. Omaha & C. B. Street R. Co.* ..... 692

**Chattel Mortgages.**

1. Sale of mortgaged chattels without mortgagee's consent is punishable under sec. 534, Rev. St. 1913. *State v. Butcher* 380

2. Payment of mortgage debt bars prosecution for sale of mortgaged chattels. *State v. Butcher* ..... 380

3. Sale of mortgaged chattels constitutes the crime. *State v. Butcher* ..... 380

**Commerce.**

Contract for sale of drugs *held* to constitute interstate commerce. *Watkins Medical Co. v. Hunt* ..... 266

**Constitutional Law.** See AGRICULTURE. CRIMINAL LAW, 19. FINES.

1. Ch. 234, Laws 1917, prohibiting barbers from working at their trade on Sunday *held* constitutional. *State v. Murray* 51

2. Since it ought never to be presumed that the legislature intended to violate the Constitution, an ambiguous statute should be so construed as to uphold its validity. *Nebraska District of Evangelical Lutheran Synod v. McKelvie* ..... 93

3. If ch. 249, Laws 1919, should be construed to mean that parents or private tutors might teach a foreign language, but that others could not employ teachers to give such instruction in a class or school, it would be an invasion of personal liberty, discriminative, and void; there being no reasonable basis of classification. *Nebraska District of Evangelical Lutheran Synod v. McKelvie* ..... 93

**Constitutional Law**—*Concluded.*

4. Ch. 249, Laws 1919, does not prohibit the teaching of a foreign language if taught in addition to the regular course of study in the elementary schools, so as not to interfere with the elementary education required by law, and outside of regular school hours during the required period of instruction. *Nebraska District of Evangelical Lutheran Synod v. McKelvie* ..... 93
5. Ch. 249, Laws 1919, is not strictly a penal statute, but is mostly remedial. *Nebraska District of Evangelical Lutheran Synod v. McKelvie* ..... 93
6. Ch. 249, Laws 1919, is not broader than its title; and is not an unreasonable interference with liberty or property. *Nebraska District of Evangelical Lutheran Synod v. McKelvie* ..... 93
7. A statute which imposes more than compensatory damages is unconstitutional. *Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.* ..... 319
8. A statute making a railroad company liable for delay and also for actual damages for such delay is unconstitutional. *Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.* ..... 319
9. Sec. 2, ch. 109, Laws 1919, providing for forfeiture and sale of vehicles used for unlawful transportation of intoxicating liquors *held* constitutional. *Robinson Cadillac Motor Car Co. v. Ratekin* ..... 369
10. Sec. 1, art. IX, Const., providing for levying a tax by valuation is not self-executing. *Laub v. Furnas County* ..... 402
11. Legislative classification of property for taxation will not be interfered with, unless it attempts to violate the constitutional inhibition against special legislation. *Cunningham v. Douglas County* ..... 405

**Continuance.**

Application for continuance not showing a meritorious cause of action or defense is properly denied. *Cornell v. Tuck* .. 759

**Contracts.**

1. When plaintiff can maintain his cause of action on contract without the aid of an illegal act he can reover. *In re Estate of Lowe* ..... 147
2. When an agent collects money for his principal upon an executed illegal transaction which is not pleaded nor necessary to plaintiff's right of recovery, the principal can recover it in an action for money had and received. *In re Estate of Lowe* ..... 147

Contracts—*Concluded.*

3. When parties are compelled to rely upon a transaction that is *contra bonos mores*, courts will refuse to aid them. *In re Estate of Lowe* ..... 147

4. A promise of marriage in consideration of cohabitation before marriage is void. *Rich v. Fulton* ..... 262

5. A promise of marriage within five years from absence of spouse is against public policy. *Rich v. Fulton* ..... 262

6. False representations as to death of husband absent less than five years does not validate promise of marriage to another. *Rich v. Fulton* ..... 262

7. A promise to protect a carrier in delivery of corn *held* not to go beyond the obligation to retain it for benefit of owner. *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.* ..... 566

Corporations. See APPEARANCE. JUDGMENT, 1.

1. A foreign corporation which was not doing business in the state and had not filed with the state auditor written authority for him to accept service cannot be served by service of summons upon the deputy state auditor. *Schwabe v. American Rural Credits Ass'n* ..... 46

2. 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 in fault with others, cannot sue as creditor of the corporation for such omission. *Spear v. Olson* ..... 139

3. Stockholders in default for want of the annual notice of indebtedness are not liable for debts of the corporation incurred before default. *Spear v. Olson* ..... 139

4. Sec. 577, Rev. St. 1913, is not in violation of sec. 4, art. XIb of the Constitution, providing for the liability of stockholders. *Spear v. Olson* ..... 139

5. A corporation which changes its name may sue in the new name on contracts made in its old name. *Rawleigh Medical Co. v. Bunning* ..... 179

6. A change of corporate name does not make a new corporation. *Rawleigh Medical Co. v. Bunning* ..... 179

7. Warranty *held* indefinite. *King v. Day* ..... 353

8. Damage for breach of warranty in sale of stock is the difference between its value as warranted and its actual worth. *King v. Day* ..... 353

**Corporations**—*Concluded.*

9. Ratification of unauthorized acts of officer of corporation may be inferred from silence and inaction. *Citizens Savings Trust Co. v. Independent Lumber Co.* ..... 631

10. "Blue sky law" *held* to cover Nebraska corporations for only one year. *Nebraska State Railway Commission v. Alfalfa Butter Co.* ..... 797

**Costs.**

1. Statutory authority to tax an attorney's fee on a judgment in an action on an indemnity policy extends to a fire insurance policy. *Johnson v. St. Paul Fire & Marine Ins. Co.* ... 831

2. An additional attorney's fee is allowable in the supreme court on appeal from a judgment on a fire insurance policy. *Johnson v. St. Paul Fire & Marine Ins. Co.* ..... 831

**Counties and County Officers.** See PAUPERS.

1. When valuable services are rendered a county under a void contract, the county will be liable for the value of the benefits received if the county board could have made a valid contract for such services. *Hustead v. Richardson County* 27

2. A county must use reasonable care to keep its roads and bridges safe. *Morrison v. Scotts Bluff County* ..... 254

3. Statute authorizing tax not exceeding, with other taxes, 15 mills on actual value of property to pay bonds is not unconstitutional. *Cunningham v. Douglas County* ..... 405

4. County commissioners can pass on claims though not in statutory form. *Bartlett v. Dahlsten* ..... 738

5. The district court on appeal from the county board can allow a proper certificate of authentication to the transcript. *Bartlett v. Dahlsten* ..... 738

6. The county board of health may employ a physician in case of an epidemic. *Bartlett v. Dahlsten* ..... 738

7. Jurisdiction of the county board of health does not extend to territory within incorporated cities and towns. *Bartlett v. Dahlsten* ..... 738

**Courts.** See JUSTICE OF THE PEACE. REPLEVIN.

**Criminal Law.** See ASSAULT. FALSE IMPRISONMENT. FORGERY. HOMICIDE. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS. LARCENY. RAPE. RECEIVING STOLEN GOODS. SUNDAY. WITNESSES, 2.

**Criminal Law**—*Continued.*

1. A conviction will not be set aside for the giving of an instruction which, because of apparent errors in phraseology, is rendered meaningless, where the other instructions given clearly and correctly state the law, and no prejudice to accuse appears. *Francis v. State* ..... 5

2. Instructions, in a prosecution for murder while accused was perpetrating a burglary, *held* not erroneous. *Francis v. State* ..... 5

3. Evidence *held* sufficient to sustain conviction of murder in the first degree. *Francis v. State* ..... 5

4. The burden of proof in a criminal prosecution is upon the state, and if the evidence fails to establish any essential element of the crime charged, the defendant must be acquitted. *Gerdes v. State* ..... 35

5. Where a criminal conspiracy is shown, declarations of a conspirator are admissible in evidence, though made after commission of the crime. *Neal v. State* ..... 56

6. The court need not instruct that defendant introduced no evidence to overcome the state's evidence. *Neal v. State* .. 56

7. The jury may pass on the probative value of testimony though believing the witness has wilfully sworn falsely in a material matter. *Neal v. State* ..... 56

8. One who instigates commission of a felony is an aider, abettor or procurer within sec. 8579, Rev. St. 1913. *Neal v. State* ..... 56

9. Sec. 9114, Rev. St. 1913, *held* substantially complied with in an instruction as to the presumption where accused fails to testify. *Neal v. State* ..... 56

10. Error cannot be predicated upon refusal of an instruction covered by one given. *Neal v. State* ..... 56

11. When evidence of other acts are admissible in a criminal prosecution. *Neal v. State* ..... 56
*Katleman v. State* ..... 62

12. Objection to evidence as "incompetent, irrelevant and immaterial" will not require its exclusion on the ground that there is not sufficient foundation for its introduction. *Neal v. State* ..... 56

13. Matters inhering in the verdict cannot be attacked by affidavits of the jurors. *Katleman v. State* ..... 62

**Criminal Law**—*Continued.*

14. Opinion of an expert as to effect of use of a narcotic on the credibility of a witness is not admissible in evidence. *Katleman v. State* ..... 62

15. A dealer in automobile accessories *held* competent to testify as to value of tires. *Manion v. State* ..... 130

16. On a trial for larceny of automobile tires, invoices were admissible to establish their identity, though in the invoice the numbers were listed as D-53457, -679, -745, etc., without repeating the D-53. *Manion v. State* ..... 130

17. Verdict *held* not a privy verdict. *Manion v. State* ..... 130

18. An appellate court will not set aside the verdict as unsupported by the evidence unless the evidence is so deficient that all reasonable minds, if uninfluenced by passion or prejudice, must agree that there is reasonable doubt of the guilt of accused. *Fagan v. State* ..... 161

19. The title of ch. 201, Laws 1917, relating to larceny of motor vehicles, is broad enough to include the crime of buying or receiving stolen automobiles. *Sandlovich v. State* .... 169

20. The trial court may, in its discretion, refuse to permit a plea of guilty to be withdrawn after sentence, and where there has been no abuse of such discretion, the supreme court will not interfere. *Sandlovich v. State* ..... 169

21. The legislature has power to declare possession and transportation of liquors misdemeanors, and to provide for trial before magistrates without a jury, where the penalty does not exceed a fine of $100 or imprisonment for three months. *Bell v. State* ..... 203

22. Conviction of misdemeanor will not be reversed for harmless error in failing to formally arraign defendant. *Bell v. State* ..... 203

23. A confession induced by fear is not admissible. *Tramp v. State* ..... 222

24. Refusal of evidence that a confession was procured by fear may be prejudicial. *Tramp v. State* ..... 222

25. In a prosecution under sec. 8833, Rev. St. 1913, for carrying concealed weapons, an instruction that the act must have been done "knowingly and intentionally," *held*, not erroneous in failing to instruct that criminal or felonious intent must be shown. *Nugent v. State* ..... 235

**Criminal Law**—*Continued.*

26. One charged with carrying concealed weapons may prove in mitigation of punishment the circumstances under which such weapons were carried. *Nugent v. State* ..... 235

27. Persons other than fugitives from justice are guaranteed preliminary hearing. *Meyers v. State* ..... 356

28. Preliminary hearing may be waived. *Meyers v. State* .... 356

29. Objection that preliminary examination has not been had must be raised before trial. *Meyers v. State* ..... 356

30. A ruling on motion for change of venue will not be disturbed unless abuse of discretion is shown. *Barnhart v. State* ..... 529

31. Instructions as to alibi *held* not erroneous. *Barnhart v. State* ..... 529

32. In a prosecution for rape, evidence of subsequent acts, related in time to the offense charged, is admissible. *Kotouc v. State* ..... 580

33. Whether the state shall be required to elect between several counts at beginning of trial is discretionary with the court. *Sheppard v. State* ..... 709

34. A motion to strike all the testimony of a witness is properly overruled where part of it is admissible. *Sheppard v. State* ..... 709

35. Indorsement of witnesses on information after trial begun is not error where no prejudice is shown nor a continuance requested. *Sheppard v. State* ..... 709

36. Sec. 9098, Rev. St. 1913, providing for jury to determine sanity of one convicted of a capital offense *held* repealed by implication by sec. 9212, Rev. St. 1913, providing for a commission in place of a jury. *In re Grammer* ..... 744

37. To entitle one convicted of a capital offense to suspension of sentence under sec. 9212, Rev. St. 1913, it must appear that he is incapable of understanding his impending fate. *In re Grammer* ..... 744

38. Petition for determination of sanity after conviction of a capital offense *held* demurrable. *In re Grammer* ..... 744

39. An appeal merely for delay will be dismissed as frivolous. *In re Grammer* ..... 744

40. Petition *held* not to state facts warranting writ of error *coram nobis*. *Cole v. State* ..... 780

**Criminal Law**—*Concluded.*

41. Petition for writ of error *coram nobis* must allege specific facts which would have prevented judgment. *Code v. State* 780

**Damages.** See CARRIERS, 2. FINES, 1.

**Deeds.** See GIFTS.

1. A deed by parents to a son in consideration of money paid and future labor, not personal, cannot be set aside for partial nonperformance. *Wit v. Wit* ..... 293
2. The wife's implied authority to her husband to fill in name of grantee in their joint deed may be revoked. *Tyrrell v. Kelley* ..... 555
3. The rule in Shelley's case is not abrogated by the statute requiring courts to give effect to the expressed intent of the parties. *Yates v. Yates* ..... 678
4. "Heirs" and "heirs of the body" *held* to be words of limitation. *Yates v. Yates* ..... 678
5. Limitation over to the "heirs begotten of the body" of the life tenant creates a conditional fee. *Yates v. Yates* ..... 678
6. Where property is conveyed to a person for life and "remainder in *fee simple* to the heirs begotten of the body," the words "heirs begotten of the body" *held* words of purchase. *Yates v. Yates* ..... 678
7. Evidence *held* to show grantor incompetent and under guardianship. *Brower v. Umstead* ..... 775

**Depositions.**

The fact that depositions are taken during the term at which the cause is pending for trial is not ground for suppressing them. *Gray v. Middaugh* ..... 409

**Descent and Distribution.** See JUDGMENT, 2.

1. The term "lawful issue," as used in sec. 1266, Rev. St. 1913, *held* to mean descendants generally, and not merely children. *Godden v. Long* ..... 13
2. Proof of heirship is not confined to the records of the probate court, but may be established by the testimony of any one who knows the facts constituting such relation. *Gillespie v. Truka* ..... 115
3. An action to quiet title is an appropriate remedy to determine title to land, as between a posthumous child, claiming as heir at law, and one in possession, having a life estate in the land and asserting ownership. *Gillespie v. Truka* .. 115

**Descent and Distribution**—*Concluded.*

4. Real estate of husband, other than homestead, descends to the widow and heirs, subject to his debts. *Arent v. Arent* 562

**Divorce.**

1. Continuous conduct which seriously impairs bodily health, endangering life or reason, constitutes extreme cruelty. *Hartshorn v. Hartshorn* ..... 561
   *DeVore v. DeVore* ..... 702
2. Evidence *held* to support decree. *Hartshorn v. Hartshorn* 561
3. In awarding alimony, the court may consider property accumulated by joint efforts and acquired by inheritance. *DeVore v. DeVore* ..... 702

**Dower.**

Prior to ch. 49, Laws 1907, a widow took no interest in the realty of her deceased husband except the right of dower, and if dower was not assigned, and she made no claim therefor, nor in the proceeds of a sale of the realty by the heirs, she had no interest in such realty nor the proceeds thereof which she could convey by will. *Dovey v. Schlater* .... 108

**Drains.**

1. Owners of irrigation ditches must construct and keep in repair bridges on highways crossed by their ditches. *Dawson County v. Dawson County Irrigation Co.* ..... 137
2. If the owner of a canal refuses to repair a bridge on notice, the county may repair and recover from the owner. *Dawson County v. Dawson County Irrigation Co.* ..... 137

**Elections.**

Certificate of nomination will be deemed valid unless objections are filed. *State v. Amsberry* ..... 550

**Eminent Domain.**

1. Rule for ascertainment of damages applies to irrigation districts. *Farmers Irrigation District v. Calkins* ..... 196
2. Stipulation and appearance confer jurisdiction to award damages. *Farmers Irrigation District v. Calkins* ..... 196
3. The legislature cannot appropriate private property to private use. *Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.* 319

**Equity.**

Where one of two parties must lose through misconduct of a third person, the loss will fall where equity places it. *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.* ..... 566

**Estoppel.**

1. Claim to specific property *held* not defeated by disclaimer in an action between other parties. *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.* ..... 566

2. Purchaser at administrator's sale *held* not estopped to claim possession as against lessee of administrator. *Hollman v. Pattison & Co.* ..... 846

**Evidence.** See APPEAL AND ERROR. CRIMINAL LAW. DESCENT AND DISTRIBUTION, 2. HUSBAND AND WIFE, 2, 3. WITNESSES.

1. Presumption against death by suicide is *prima facie* only and rebuttable, and it prevails when cause of death is unknown, but not where facts are present bearing upon whether death is intentional or accidental. *Dodder v. Ætna Life Ins. Co.* 70

2. Courts are entitled to take judicial notice of the facts disclosed by the operation of the federal selective draft law with reference to the inability of thousands of men born in this country to speak the language of their country, or understand words of command given in English. *Nebraska District of Evangelical Luthern Synod v. McKelvie* ..... 93

3. Partnership leger is admissible to disprove third person's claim against member of partnership. *Waltham Piano Co. v. Pierson* ..... 199

4. Newspaper advertisement *held* admissible to show that a partner knowingly permitted himself to be held out as a partner. *Waltham Piano Co. v. Pierson* ..... 199

5. The law presumes death by accident rather than by suicide. *Farmers Grain & Supply Co. v. Blanchard* ..... 637

6. Affirmative evidence that a gong was sounded *held* not overcome by negative evidence. *Dodds v. Omaha & C. B. Street R. Co.* ..... 692

7. Statement by ward in guardianship proceeding *held* not available in suit to enforce performance of adoption agreement. *Evans v. Kelly* ..... 712

8. Declarations against interest cannot be anulled by counter declarations. *Evans v. Kelly* ..... 712

9. An opinion as to reasonable value of service is not conclusive *Jones v. Hartford Fire Ins. Co.* ..... 735

10. Rate of speed of a street car is not ordinarily a question for expert testimony. *Oakes v. Omaha & C. B. Street R. Co.* .. 788

**Executors and Administrators.** See DESCENT AND DISTRIBUTION. PARTNERSHIP, 1.

1. A petition stating jurisdictional requirements for the appointment of an administrator confers jurisdiction to make such an appointment, notwithstanding the petitioner may file a dismissal of his petition before action is taken thereon. *In re Estate of Glover* ..... 151
2. A petition for the appointment of an administrator is not an action within sec. 7654, Rev. St. 1913. *In re Estate of Glover* ..... 151
3. Administrator cannot lease estate beyond his term of office. *Hollman v. Pattison & Co.* ..... 313
4. A purchaser at administrator's sale is entitled to possession notwithstanding lease *Hollman v. Pattison & Co.* ..... 313
5. Administrator can lease land for only one year. *Hollman v. Pattison & Co.* ..... 313
6. A purchaser at administrator's sale is entitled to rents from date of confirmation. *Hollman v. Pattison & Co.* ..... 313
7. Administrator pleading payment of claim against the estate has the burden of proof. *In re Estate of Peterson* ..... 574

**False Imprisonment.**

1. An unreasonable delay in bringing a prisoner before the magistrate renders an officer liable for false imprisonment. *Schreiner v. Hutter* ..... 539
2. Evidence of reputation of prisoner *held* inadmissible in an an action for damages for false imprisonment. *Schreiner v. Hutton* ..... 539
3. Evidence of reputation in mitigation of damages *held* inadmissible, where damage to reputation was not specially pleaded. *Schreiner v. Hutter* ..... 539
4. Evidence that plaintiff had a wife and children *held* inadmissible in an action for damages for false imprisonment. *Schreiner v. Hutter* ..... 539

**Fines.**

1. A statutory liability in addition to actual damages is a fine or penalty. *Sunderland Bros. Co. v. Chicago, B. & Q. R. Co* ..... 319
2. Provision of demurrage act that fines and penalties shall go to the injured party is unconstitutional. *Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.* ..... 319, 322

**Forgery.**

Evidence *held* to sustain verdict of guilty. *Barnhart v. State* 529

**Fraud.** See LIMITATION OF ACTIONS, 3.

1. In a suit for fraud in purchase of land and sale of stock, evidence *held* to sustain verdict for plaintiff. *White v. First Nat. Bank* ..... 142
2. Authority of agent to make contract for sale of land must be in writing. *Spanogle v. Maple Grove Land & Live Stock Co.* ..... 342
3. A vendee may recover for mistake of the vendor in pointing out the wrong land. *Donelson v. Michelson* ..... 666
4. In an action for deceit, instruction as to purchaser's knowledge of land *held* erroneous. *Donelson v. Michelson* ..... 666

**Fraudulent Conveyances.** See BANKRUPTCY.

1. In a suit to set aside conveyances as in fraud of a judgment creditor, petition not alleging filing of transcript of judgment in the county where the land is situated is demurrable. *Thies v. Thies* ..... 248
2. A suit to set aside a deed for fraud and to subject the land to payment of a money demand cannot be maintained before a judgment lien has been acquired. *Carpenter v. Carpenter* 635

**Gaming.**

1. A grain option contract is void. *In re Estate of Lowe* .... 147
2. A broker who receives money in an illegal transaction is liable as agent for money had and received. *In re Estate of Lowe* ..... 147

**Gifts.**

1. What constitutes delivery of deed stated. *Huenink v. Heitbrink* ..... 520
2. Evidence *held* insufficient to show delivery of deed. *Huenink v. Heitbrink* ..... 520

**Guaranty.**

1. A waranty that accounts are collectible and will be paid is a guaranty of payment. *King v. Day* ..... 353
2. Defense of release of guarantor by extension of debt without notice must be pleaded. *Citizens Savings Trust Co. v. Independent Lumber Co.* ..... 631

**Guardian and Ward.**

1. An action cannot be maintained on a guardian's bond until settlement of his final account by the county court. *Langdon v. Langdon* ..... 619

**Guardian and Ward**—*Concluded.*

2. The amount found due on settlement of guardian's final account is conclusive on sureties on his bond. *Langdon v. Langdon* ..... 619

**Habeas Corpus.**

1. Regularity of proceedings before sentence cannot be inquired into on habeas corpus. *Fuller v. Fenton* ..... 358

2. One pleading guilty cannot maintain habeas corpus on ground that sentence was irregular. *Fuller v. Fenton* .... 358

3. Judgment denying release of minor from industrial school affirmed. *State v. Quimby* ..... 590

**Highways.**

1. Evidence *held* to show that highway was acquired by dedication. *Donovan v. Union P. R. Co.* ..... 364

2. Width of highway acquired by user or dedication will be determined by extent of user or amount dedicated. *Donovan v. Union P. R. Co.* ..... 364

**Homestead.**

1. Where a wife voluntarily joins in conveyance of the homestead, she is thereafter estopped from asserting title or interest therein. *Laughlin v. Gardiner* ..... 237

2. When land is conveyed to a wife, or in trust for her, in exchange for a deed to a homestead in which she joins, a decree holding the land conveyed to her as security for a judgment lien against such homestead that was fraudulently concealed from the vendees will be upheld. *Laughlin v. Gardiner* ..... 237

3. Homestead exemption attaches when selection is made. *Tyrrell v. Kelley* ..... 555

4. Homestead interests of husband, vested on wife's death, cannot bechanged by subsequent legislation. *In re Estate of Costello* ..... 577

5. Rule for distribution of proceeds of homestead sold to pay decedent's debts. *Donovan v. Bank of Palmyra* ..... 652

6. Evidence *held* to support decree for distribution of proceeds of homestead. *Donovan v. Bank of Palmyra* .... 652

**Homicide.**

1. No special period of time for premeditation and deliberation is required to constitute unlawful taking of human life murder in the first degree. *Francis v. State* ..... 5

2. Where a party, discovered in the act of burglarizing a building, attempts to escape, and, in furtherance thereof, shoots and kills another, such killing may constitute murder in the first degree under sec. 8581, Rev. St. 1913, though the killing does not occur at the site of the burglary. *Francis v. State* ..... 5

**Husband and Wife.** See LIMITATION OF ACTIONS, 4, 5.

1. In a wife's action for alienation of her husband's affections, it is error to instruct that "the wrong of the one who succeeds in withdrawing the husband's affection from the wife is almost impossible of measurement." *Hanna v. Hanna* ..... 231

2. To maintain an action for alienation of affections, the proof must show, not only intent, but that the affections were alienated. *Potter v. Howser* ..... 367

3. There is no presumption that the husband is the wife's agent in dealing with her separate property. *Walker v. Burch* ..... 592

**Indictment and Information.**

1. An immaterial variance between the complaint on which accused was given a preliminary hearing and the information filed is not sufficient basis for a motion to quash the information. *Francis v. State* ..... 5

2. An information charging an offense in the language of the statute is sufficient. *Sandlovich v. State* ..... 169

3. Indictment in language of statute is sufficient. *State v. Butcher* ..... 380

4. Surplus matter in information for larceny describing manner of entering building *held* immaterial. *Meyers v. State* 356

5. Different felonies of the same grade, subject to the same punishment, may be charged in separate counts. *Sheppard v. State* ..... 709

**Injunction.**

Injunction will not lie to obtain possesssion of real estate, where legal remedies are adequate. *Reed v. Wellman* .... 292

**Insane Persons.** See CRIMINAL LAW, 36-38.

Notice should be given of a proceeding to discharge a guardian of an incompetent. *Brower v. Umstead* ..... 775

**Insurance.**

1. In an action on an accident policy, the burden is on the plaintiff to show that death was accidental. *Doddor v. Ætna Life Ins. Co.* ..... 70
2. There is no forfeiture or denial of liability when the insurance company treats the policy sued upon as valid. *Dodder v. Pacific Mutual Life Ins. Co.* ..... 74
3. Where an insurance company denies liability, and sends blanks to make proof of loss, reserving the right to make defense, there is no waiver of defense. *Dodder v. Pacific Mutual Life Ins. Co.* ..... 74
4. Notice of disability *held* sufficient, and company *held* liable. *Wheeler v. Standard Accident Ins. Co.* ..... 219
5. Question of change of insured's occupation is for the jury. *Wheeler v. Standard Accident Ins. Co.* ..... 219
6. Occasional performance of acts in an occupation more hazardous than the occupation named in the policy will not reduce the amount of recovery. *Wheeler v. Standard Accident Ins. Co.* ..... 219
7. Voluntary payment of liability of another does not give right of subrogation. *Scandinavian Mutual Ins. Co. v. Chicago, B. & Q. R. Co.* ..... 258
8. Body assuming to change rates of a beneficial association *held* not to constitute a "representative form of government" within sec. 1, ch. 47, Laws 1897. *Meyer v. Supreme Lodge, K. of P.* ..... 505
9. The constitution or by-law of a fraternal association will be strictly construed where a forfeiture is sought. *Meyer v. Supreme Lodge, K. of P.* ..... 505
10. A beneficial association cannot forfeit a policy for nonpayment of increased dues where such increase was not lawful. *Meyer v. Supreme Lodge, K. of P.* ..... 505
11. Governing body of beneficial association *held* not a representative body, and that the association could not be said to have a "representative form of government." *Meyer v. Supreme Lodge, K. of P.* ..... 511
12. Right of fraternal association to increase rates is not a federal question. *Meyer v. Supreme Lodge, K. of P.* .... 511

Insurance—*Continued.*

13. Requisites of a valid parol contract of insurance stated. *Kor v. American Eagle Fire Ins. Co.* ..... 610

14. Previous dealings are admissible in determining whether an insurance contract was conditioned on prepayment of premium or extension of credit. *Kor v. American Eagle Fire Ins. Co.* ..... 610

15. A parol contract of insurance *held* not invalid for uncertainty as to duration of risk. *Kor v. American Eagle Fire Ins. Co.* ..... 610

16. Evidence *held* not to show that duration of risk under parol contract was to be the same as under a prior policy. *Kor v. American Eagle Fire Ins. Co.* ..... 610

17. Subsequent ratification by insurer, with knowledge of the facts, is equivalent to consent to removal of goods. *Kor v. American Eagle Fire Ins. Co.* ..... 610

18. Defense of forfeiture on the ground of removal of goods to new location *held* to have been waived. *Kor v. American Eagle Fire Ins. Co.* ..... 610

19. An insurance agent may bind his principal to transfer insurance to cover goods removed to location outside agent's territory. *Kor v. American Eagle Fire Ins. Co.* ..... 610

20. Charter of a subordinate lodge *held* not to require forfeiture of its "general fund" on dissolution, in view of by-law of the superior body. *Grand Lodge, A. O. U. W. v. Ancient Order U. W. T. A.* ..... 625

21. Punctuation marks in a policy will not control a meaning plainly to be gathered from the words. *Zantow v. Old Line Accident Ins. Co.* ..... 655

22. An insured killed while riding in a caboose on a shipper's pass *held* not riding in a passenger car provided for the exclusive use of passengers. *Zantow v. Old Line Accident Ins. Co.* ..... 655

23. One insured as a farmer who accompanies a shipment of stock does not thereby change his occupation to a "shipper tending stock." *Zantow v. Old Line Accident Ins. Co.* .... 655

24. Where one insured as a farmer was killed while riding in a caboose while accompanying stock, *held* that he was not a "shipper tending stock." *Zantow v. Old Line Accident Ins. Co.* ..... 655

25. Whether material facts were concealed was a question for the jury. *Fox v. Scandinavian Mutual Aid Ass'n.* .... 725

**Insurance**—*Concluded.*

26. To defeat recovery for concealment of material facts, the insurer must prove that the representations were made with fraudulent intent, that they were material, and were relied on. *Fox v. Scandinavian Mutual Aid Ass'n.* ..... 725

27. An officer of a subordinate lodge authorized to collect dues is agent of the grand lodge. *Warren v. Grand Lodge, A. O. U. W.* ..... 810

28. Acts of officer of a subordinate lodge *held* acts of the grand lodge. *Warren v. Grand Lodge, A. O. U. W.* ..... 810

29. Receipt of assessment *held* a waiver of right of forfeiture. *Warren v. Grand Lodge, A. O. U. W.* ..... 810

30. Insured's statutory right to cancel fire insurance is a part of the contract, and may be exercised by request for cancellation and surrender of policy. *Johnson v. St. Paul Fire & Marine Ins. Co.* ..... 831

31. After agreement as to amount of loss by fire, partial payment with receipt in full *held* no consideration for settlement. *Johnson v. St. Paul Fire & Marine Ins. Co.* ..... 831

**Intoxicating Liquors.**

1. Evidence *held* insufficient to sustain a conviction under sec. 11, ch. 187, Laws 1917. *Hutter v. State* ..... 9
*Parker v. State* ..... 12

2. Sec. 35, ch. 187, Laws 1917, providing for assessment of $300 against a building enjoined as constituting a nuisance, and its owner, is unconstitutional. *State v. Macfarland* .... 42

3. Eighty per cent. of the $300 assessment under sec. 35, ch. 187, Laws 1917, being a payment required, not to cover costs, but for violation of a criminal law, cannot be considered as a judgment for payment of liquidated damages. *State v. Macfarland* ..... 42

4. A contract between licensee and a third person, making such third person an undisclosed principal for the operation of a saloon, is against public policy. *Bankers Surety Co. v. Willow Springs Beverage Co.* ..... 173

5. An undisclosed principal of a saloon-keeper *held* liable to indemnify the obligor in the saloon-keeper's liquor license bond, though agreement between the undisclosed principal and his agent was against public policy. *Bankers Surety Co. v. Willow Springs Beverage Co.* ..... 173

**Intoxicating Liquors**—*Concluded.*

6. Forfeiture and sale of an automobile under sec. 2, ch. 109, Laws 1919, is a valid exercise of police power. *Robinson Cadillac Motor Car. Co. v. Ratekin* ..... 369

7. Under sec. 2. ch. 109, Laws 1919, conviction of an owner of an automobile for unlawfully transporting intoxicating liquor subjects the automobile to forfeiture and sale. *Robinson Cadillac Motor Car Co. v. Ratekin* ..... 369

8. Forfeiture of an automobile under sec. 2, ch. 109, Laws 1919, is an incident to the conviction of the owner. *Robinson Cadillac Motor Car Co. v. Ratekin* ..... 369

9. Sec. 2, ch. 109, Laws 1919, *held* to authorize forfeiture of vehicles used to unlawfully transport liquors. *Robinson Cadillac Motor Car Co. v. Ratekin* ..... 369

10. An automobile used to unlawfully transport liquors is subject to forfeiture and sale as against a *bona fida* mortgagee. *Robinson Cadillac Motor Car Co. v. Ratekin* ..... 369

11. Transportation of intoxicating liquors within the state is unlawful. *McLaughlin v. State* ..... 392

12. A complaint for unlawful transportation of liquors need not specify the quantity. *McLaughlin v. State* ..... 392

13. The right to keep liquors for personal use does not imply lawful means for obtaining possession of it. *McLaughlin v. State* ..... 392

**Judges.**

Trial judge who had been county attorney between time of filing complaint and trial *held* not disqualified. *Barnhart v. State* ..... 529

**Judgment.**

1. Where judgment by default was entered against a corporation for damages, and during the same term certain stockholders intervened, asking that the default be vacated and for permission to defend, *held* error to deny their application. *Schwabe v. American Rural Credits Ass'n* ..... 46

2. In the settlement of an estate, a county court by decreeing the descent of title to land cannot conclude parties to a *bona fida* controversy over such title. *DeWulf v. DeWulf* 105

3. Decree enjoining defendant from flooding plaintiffs' lands *held* warranted by the evidence. *Walla v. Kavan* ..... 134

Judgment—*Concluded.*

4. It is the duty of the prevailing party to submit a proper decree. *Bragonier v. Stevenson* ..... 578

5. A personal judgment against a non-resident without personal service or appearance is void. *Carpenter v. Carpenter* .... 635

6. Real estate cannot be subjected to payment of a dormant judgment. *Schreier v. Griffin* ..... 722

7. A foreign judgment on warrant of attorney is enforceable in Nebraska. *Whittier v. Riley* ..... 805

8. Interpretation of common law as applied to a judgment of sister state on warrant of attorney will be followed in Nebraska. *Whittier v. Riley* ..... 805

9. Power of attorney to confess judgment signed by two parties, which in form applies to one, *held* binding on both *Whittier v. Riley* ..... 805

10. Warrant of attorney in a promissory note to confess judgment in favor of payee or assigns, *held* to include a holder by indorsement in blank. *Whittier v. Riley* ..... 805

Jury. See CRIMINAL LAW, 7, 21, 36.

Parties cannot demand a jury on issue of adverse possession in suit to quiet title. *Krumm v. Pillard* ..... 335

Justice of The Peace.

1. Justices of the peace and county courts exercising the jurisdiction of justices of the peace have no equity power to vacate a judgment after time for appeal has expired, though the judgment was procured by fraud. *Carlson v. Ray* ..... 18

2. Where plaintiff attempts to enforce a justice's judgment, procured by fraud, in another county, the district court in which the transcript is filed may enjoin its enforcement. *Carlson v. Ray* ..... 18

Larceny.

1. On a charge of larceny as bailee, the proof must show that accused was bailee; and, when it fails, there is a fatal variance between the pleading and proof. *State v. McCutchan* ..... 80

2. Evidence *held* sufficient to sustain verdict. *Manion v. State* 130

**Libel.**

1. The intent with which proper matter is pleaded cannot be an issue in an action for libel. *Simon v. London Guarantee & Accident Co.* ..... 524
2. Doubts should be resolved in favor of relevancy of alleged libelous matter in pleading. *Simon v. London Guarantee & Accident Co.* ..... 524
3. Irrelevant, scandalous, and libelous matter in pleading is not privileged. *Simon v. London Guarantee & Accident Co.* 524
4. Libelous matter in a pleading *held* not privileged. *Simon v. London Guarantee & Accident Co.* ..... 524
5. Allegations in pleadings are privileged unless irrelevant. *Simon v. London Guarantee & Accident Co.* ..... 524

**Limitation of Actions.** See ADVERSE POSSESSION. STATES, 3.

1. Where sons, in management of partnership business, acted as trustees of their mother's interests without questioning her right thereto, limitations would not run against her claim of an interest in the business. *Dovey v. Schlater* .... 108
2. A cause of action to recover indemnity does not accrue until a loss occurs. *Bankers Surety Co. v. Willow Springs Beverage Co.* ..... 173
3. Where an undisclosed principal by fraud prevents a person having a cause of action against him from obtaining knowledge thereof, limitations will not run until the cause of action is, or by due diligence should have been, discovered. *Bankers Surety Co. v. Willow Springs Beverage Co.* ..... 173
4. An action for alienation of affections accrues when the affections are alienated and abandonment occurs. *VonDorn v. Rubin* ..... 465
5. That affections have been retained through continued efforts of the offending party does not create a new cause of action. *VonDorn v. Rubin* ..... 465

**Master and Servant.**

1. A railroad employee walking along the track in the country assumes risk of accident. *Tsiampras v. Union P. R. Co.* .. 205
2. Where the foreman indicated to a section-man to go in a certain direction and he walked in the direction indicated along the railroad track, and was struck by an engine, *held* not negligence on the part of the company. *Tsiampras v. Union P. R. Co.* ..... 205

**Master and Servant**—*Continued.*

3. In an action under the federal liability act, evidence *held* not to show negligence in failing to exercise care to prevent accident after discovery of decedent in a place of danger. *Tsiampras v. Union P. R. Co.* ..... 205

4. The district court has jurisdiction to approve or disapprove an agreement to commute payments under the employers' liability act. *Perry v. Huffman Automobile Co.* ..... 211

5. Application for approval of agreement to commute payments under employers' liability act *held* sufficient to confer jurisdiction. *Perry v. Huffman Automobile Co.* ..... 211

6. The employers' liability act is construed liberally and is intended to avoid formal court procedure. *Perry v. Huffman Automobile Co.* ..... 211

7. Ascertainment of the amounts payable under the employers' liability act is a prerequisite to commutation. *Perry v. Huffman Automobile Co.* ..... 215

8. The public has an interest in commutation of an employee's compensation. *Perry v. Huffman Automobile Co.* ..... 215

9. Commutation of compensation to improvident employees or dependents is not contemplated. *Perry v. Huffman Automobile Co.* ..... 215

10. Commutation of compensation is granted only upon statutory terms. *Perry v. Huffman Automobile Co.* ..... 215

11. The nature and extent of injury are material inquiries upon application for approval of commutation agreement. *Perry v. Huffman Automobile Co.* ..... 215

12. Commutation of employee's compensation is subject to the court's approval. *Perry v. Huffman Automobile Co.* ..... 215

13. Policeman is not an employee within the workmen's compensation act. *Rooney v. City of Omaha* ..... 260

14. A railroad company is not liable for injury to an experienced workman caused by his using as a handhold, in climbing upon an engine, a loose pipe placed thereon by a fellow servant. *Davis v. Chicago, B. & Q. R. Co.* ..... 345

15. A master must use ordinary care in providing a safe place to work. *Davis v. Chicago, B. & Q. R. Co.* ..... 345

16. The master fulfils his duty when he provides light for ordinary purposes, and portable individual lights when needed. *Davis v. Chicago, B. & Q. R. Co.* ..... 345

**Master and Servant**—*Continued.*

17. An experienced workman, accustomed to climb upon engines by means of handholds, assumes the risk of using same. *Davis v. Chicago, B. & Q. R. Co.* ..... 345

18. Under the federal act a railroad company is liable for negligence of a fellow servant. *Davis v. Chicago, B. & Q. R. Co.* 345

19. An employee injured by the negligence of a third party in the course of his employment is entitled to compensation. *Murphy Construction Co. v. Serck* ..... 398

20. A negligent third party cannot by settlement with an injured employee preclude recovery over by the employer. *Murphy Construction Co. v. Serck* ..... 398

21. The master is responsible for his servant's act within the scope of employment. *Sternad v. Omaha & C. B. Street R. Co.* ..... 460

22. Wilful act of fellow servant *held* the proximate cause of injury. *Merkouras v. Chicago, B. & Q. R. Co.* ..... 491

23. Power of supreme court under the employers' liability act defined. *Brown v. York Water Co.* ..... 516

24. "Reckless indifference to safety" as used in sec. 3693, Rev. St. 1913 (workmen's compensation act) defined. *Farmers Grain & Supply Co. v. Blanchard* ..... 637

25. The penalty for delinquent payments under the workmen's compensation act does not attach until the obligation of the company is definitely ascertained. *Updike Grain Co. v. Swanson* ..... 661

26. When attorney's fees may be allowed a compensation claimant stated. *Updike Grain Co. v. Swanson* ..... 661

27. On appeal in a compensation case, findings of fact supported by evidence are conclusive. *American Smelting & Refining Co. v. Cassil* ..... 706

28. Evidence *held* to establish mother as dependent within the compensation law. *Venuto v. Carter Lake Club* ..... 782

29. Insurer *held* estopped to deny compensation liability for death beyond state. *Venuto v. Carter Lake Club* ..... 782

30. In an action for damages for personal injuries, evidence *held* to show machinery was negligently set in motion. *Hellerich v. Central Granaries Co.* ..... 818

31. Failure to furnish statutory safety appliance *held* evidence of negligence. *Hellerich v. Central Granaries Co.* ..... 818

**Master and Servant**—*Concluded.*

32. Duty of employer in safeguarding workman defined. *Hellerich v. Central Granaries Co.* ..... 818
33. Whether an employer furnished a reasonably safe place to work was a question for the jury. *Hellerich v. Central Granaries Co.* ..... 818
34. Judgment for $18,900 for loss of arm *held* not excessive. *Hellerich v. Central Granaries Co.* ..... 818

**Mines and Minerals.**

1. Agreement *held* to give lessee the exclusive right to occupy premises and to remove potash. *Clay v. Palmer* ..... 476
2. Evidence *held* not to show abandonment of lease to extract potash. *Clay v. Palmer* ..... 476

**Monopolies.**

To construe sec. 2726, Rev. St. 1913, as limiting the sale of patent medicines to pharmacists would render it unconstitutional. *Watkins Medical Co. v. Hunt* ..... 266

**Mortgages.** See APPEAL AND ERROR, 6.

1. Where a third party, claiming an interest in mortgaged realty, took over two overdue coupon notes to prevent foreclosure, evidence *held* to show that he took by purchase, and not as a volunteer. *State Bank of Omaha v. Waldron* ..... 81
2. Where defendant desires to redeem from a decree of foreclosure pending appeal in the supreme court, he should make application to that court. *Dahlsten v. Libby* ..... 84
3. Where defendant in foreclosure, pending appeal in the supreme court, paid the amount due to redeem to the cleck of the district court, and the plaintiff accepted the money and released the decree, such redemption will be approved upon payment of the costs in the supreme court by appellant. *Dahlsten v. Libby* ..... 84
4. A mortgagee is charged with notice of the rights of one in possession of the mortgaged land. *Laughlin v. Gardiner* ... 237
5. Trustee for creditors *held* not disqualified to purchase at foreclosure sale. *Missouri Valley Trust Co. v. Nelson* ..... 499

**Municipal Corporations.**

1. As a general rule, municipal bonds must be issued in conformity with the statutes in force at the time of issuance. *State v. Marsh* ..... 159

**Municipal Corporations**—*Concluded.*

2. Where a municipality makes a valid contract for sale of municipal bonds voted in conformity with the statute then in force, but not yet issued, their validity is not affected by a subsequent statute changing the terms of municipal bonds. *State v. Marsh* ..... 159

3. An insecure platform constructed in a village street, which fell and injured a pedestrian, *held* a nuisance, for which the village was liable. *Chaney v. Village of Riverton* ..... 189

4. A platform in a village street *held* a defect, requiring notice of injury within 30 days. *Chaney v. Village of Riverton* .. 189

5. Municipalities must keep streets free from defects or obstructions. *Chaney v. Village of Riverton* ..... 189

6. User of street must exercise care commensurate with the danger. *Lucas v. Omaha & C. B. Street R. Co.* ..... 432

7. Petition in action for injuries from defect in a street *held* demurrable for failure to allege notice of the defect. *Woods v. City of Lincoln* ..... 449

8. City of Lincoln cannot contract except by action of council as a body. *Scott v. City of Lincoln* ..... 546

9. A single member of council of city of Lincoln cannot bind the city by promise of additional compensation to a fireman. *Scott v. City of Lincoln* ..... 546

10. In an action against a city on an implied ratification of contract, petition *held* demurrable, where the facts pleaded failed to show that the city counsel had knowledge of the contract. *Scott v. City of Lincoln* ..... 546

11. Receipt of benefits *held* not to render city liable on unauthorized contract. *Scott v. City of Lincoln* ..... 546

12. Where there is only one voter in territory sought to be disconnected he is "a majority of the legal voters" in the territory. *Delozier v. Village of Magnet* ..... 765

13. Liability for municipal taxes entitles one to maintain an action to disconnect territory. *Delozier v. Village of Magnet* 765

14. A stipulation of facts not in bill of exceptions cannot be considered. *Delozier v. Village of Magnet* ..... 765

15. Petition for damages for personal injuries *held* to state a cause of action. *Brightenburg v. Mulcahy* ..... 794

16. Where a boy was injured while coasting, the question of proximate cause of the injury was for the jury. *Brightenburg v. Mulcahy* ..... 794

**Negligence.**

1. The mere fact that an accident occurs raises no presumption of negligence. *Tsiampras v. Union P. R. Co.* ..... 205

2. Rule as to comparative negligence. *Morrison v. Scotts Bluff County* ..... 254

3. When the evidence, viewed most favorable to plaintiff, fails to establish actionable negligence, the court should direct a verdict for defendant. *Davis v. Chicago, B. & Q. R. Co.* 345

4. "Proximate cause" defined. *Merkouras v. Chicago, B. & Q. R. Co.* ..... 491

5. In an action by a railroad employee for injury, his negligence *held* to preclude recovery under the comparative negligence act. *Merkouras v. Chicago, B. & Q. R. Co.* ..... 491

6. The proprietor of a store must use reasonable care to keep stairways safe for use. *Broadston v. Beddeo Clothing Co.* 604

7. The doctrine *res ipsa loquitur* does not apply to a customer falling on a store stairway. *Broadston v. Beddeo Clothing Co.* ..... 604

8. Where a customer sues for injury from falling on a store stairway, the burden of proof rests on him. *Boadston v. Beddeo Clothing Co.* ..... 604

9. A proprietor of a store must keep it lighted. *Broadston v. Beddeo Clothing Co.* ..... 604

10. In an action for personal injuries from defective store light, a customer must show that lack of light was the proximate cause thereof. *Broadston v. Beddeo Clothing Co.* ..... 604

11. Where plaintiff's negligence is more than slight as compared with that of defendant, the court should enter judgment of dismissal. *Dodds v. Omaha & C. B. Street R. Co.* ..... 692

12. Where different minds may reasonably reach different conclusions from the facts, negligence is a question for the jury. *Oakes v. Omaha & C. B. Street R. Co.* ..... 788

13. Negligence of driver of vehicle cannot be imputed to an invited guest. *Berlo v. Omaha & C. B. Street R. Co.* ..... 827

**New Trial.**

1. Grounds for a new trial for newly-discovered evidence. *Neal v. State* ..... 56

2. Where attorneys for plaintiff secure a verdict by collusion with one of defendants, a new trial will be granted. *Raitt v. Colson* ..... 167

**New Trial**—*Concluded.*

3. Argument of counsel *held* not ground for new trial. *Schreiner v. Hutter* ..... 539

**Nuisance.**

A funeral home in a residential district may be enjoined. *Beisel v. Crosby* ..... 643

**Parent and Child.**

1. Surrender of custody and loss of society of a child constitute consideration for a parol contract of adoption. *Tuttle v. Winchell* ..... 750
2. Misbehavior of adopted child during minority *held* not to invalidate a parol contract to adopt. *Tuttle v. Winchell* .... 750

**Partition.**

A contract between heirs for conveyance of shares in certain lands *held* not to require a better title to be conveyed than that held by their intestate; the covenants of the warranty relating to title to the shares. *Lang v. Coil* ..... 15

**Partnership.**

1. Several heirs, inheriting the interest of one of two equal partners and joining in management of the business without contract with former partner, will be presumed to each have an equal share in the profits with the partner; but it will not be presumed that they are to share in the undivided one-half of the capital of the former partner, nor that the former partner is to be paid interest on his excess capital. *Dovey v. Schlater* ..... 108
2. Power of managing partner to pledge partnership credit is implied. *Waltham Piano Co. v. Pierson* ..... 199
3. The law presumes that a note executed in partnership name by a partner is note of partnership. *Waltham Piano Co. v. Pierson* ..... 199
4. Evidence that defendant created a liability by permitting himself to be held out as a partner may be admitted under allegation that he is liable as a partner. *Waltham Piano Co. v. Pierson* ..... 199
5. Agreement for sale of drugs *held* not to constitute a partnersship. *Watkins Medical Co. v. Hunt* ..... 266

**Partnership**—*Concluded.*

6. Where a partner has wrongfully disposed of partnership property, a court of equity may compel restitution, dissolve the partnership, and compel an accounting. *Clay v. Palmer* 476

7. Parties knowingly receiving partnership property wrongfully disposed of by a partner are proper defendants. *Clay v. Palmer* ..... 476

**Paupers.**

A contract by a county board to pay a specified sum to one who will undertake to satisfy all contingent claims under the poor laws that might arise against the county is in the nature of insurance against such claims, and is not authorized by the statute. *Hustead v. Richardson County* ..... 27

**Physicians and Surgeons.**

1. A physician may disclose information to prevent spread of disease. *Simonsen v. Swenson* ..... 224

2. A physician may disclose information to prevent spread of disease, though mistaken in his diagnosis. *Simonsen v. Swenson* ..... 224

3. Itinerant vendor of drugs must publicly profess to cure or treat diseases to be guilty of violating sec. 2726, Rev. St. 1913. *Watkins Medical Co. v. Hunt* ..... 266

**Pleading.**

1. Where a petition is first assailed in the supreme court, its allegations will receive a liberal construction. *Moore v. Moore* ..... 122

2. Where from the answer and the evidence it appears that both parties have placed the same construction on the petition, the supreme court will not ignore such construction in ruling on its sufficiency. *Moore v. Moore* ..... 122

3. A defective or ambiguous petition may be aided by the answer. *Moore v. Moore* ..... 122

4. Where no reply is filed, and a cause is tried on the theory that a material allegation of the answer is in issue, a claim that such allegation stands admitted comes too late, after the verdict. *Moore v. Moore* ..... 122

**Principal and Agent.** See CONTRACTS, 2. INTOXICATING LIQUORS, 4.

1. An undisclosed principal is bound by contracts made by his agent within the scope of his authority and in the course

**Principal and Agent**—*Concluded.*

of his employment. *Bankers Surety Co. v. Willow Springs Beverage Co.* ..... 173

2. A power of attorney will be construed with respect to the natural import of the language used. *Watkins v. Hagerty* 414

3. A power of attorney by husband and wife with reference to his real estate is not revoked by wife's death. *Watkins v. Hagerty* ..... 414

4. Parties dealing with an agent acting under a power of attorney will not be defeated by a subsequent adjudication that the grantor was incompetent. *Watkins v. Hagerty* .. 414

**Principal and Surety.** See INTOXICATING LIQUORS, 5.

1. An elevator company's indemnity bond *held* not to protect a carrier from loss resulting from its own negligence or mistake. *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.* ..... 566

2. Extension of time to principal *held* sufficient consideration to support contract of suretyship. *Watkins Medical Co. v. Hunt* ..... 266

3. Delivery of a bond will be presumed to be unconditional. *Watkins Medical Co. v. Hunt* ..... 266

4. On breach of undertaking to pay prior indebtedness, the obligee may recover the amount. *Watkins Medical Co. v. Hunt* ..... 266

**Process.** See CORPORATIONS, 1.

**Quieting Title.** See DESCENT AND DISTRIBUTION, 3.

Evidence *held* sufficient to sustain decree for plaintiff. *Krumm v. Pillard* ..... 335

**Railroads.** See CARRIERS.

1. Clear intent is essential to abandonment of right of way. *Union P. R. Co. v. Wooster* ..... 421

2. Daily operation of trains shows intent to use the full width of right of way. *Union P. R. Co. v. Wooster* ..... 421

3. Nonuser does not constitute abandonment of unused part of right of way. *Union P. R. Co. v. Wooster* ..... 421

**Rape.**

1. In a prosecution for rape, corroboration may consisst of circumstantial evidence. *Kotouc v. State* ..... 580

**Rape**—*Concluded.*

2. In a prosecution for rape, evidence of a search made for the the prosecutrix is admissible. *Kotouc v. State* ..... 580

**Receiving Stolen Goods.**

Evidence *held* to sustain conviction. *Burris v. State* ..... 641

**Release.**

Release *held* not a bar to an action, in view of the evidence. *Dunn v. Alexander* ..... 628

**Replevin.**

1. An action of replevin is in part a proceeding *in rem*, and the district court on appeal is authorized to try the case *de novo*. *Lemer v. Hunyak* ..... 2
2. Where plaintiff in replevin prosecuted an appeal from a judgment against him in county court, and procured an order from the district court to deliver the property to him, it was error to permit him to dismiss his appeal and deny defendant an opportunity to have the issues tried in the district court. *Lemer v. Hunyak* ..... 2

**Sales.** See PARTNERSHIP, 5.

1. A manufacturer impliedly warrants that goods sold are reasonably fit for the purpose for which sold, and that they are free from any latent defect due to process of manfacturing. *Plymouth Cordage Co. v Phelps* ..... 64
2. Evidence *held* proper to be submitted to the jury on the question as to whether goods sold had latent defects due to process of manufacture. *Plymouth Cordage Co. v. Phelps* 64
3. Contract for sale of drugs *held* not violative of sec. 2726, Rev. St. 1913. *Watkins Medical Co. v. Hunt* ..... 266
4. An unrecorded contract of conditional sale may be valid between the parties. *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.* ..... 566
5. The seller is not liable where an act of God prevents performance. *Matousek v. Galligan* ..... 731

**Schools and School Districts.**

1. "School" as used in ch. 249, Laws 1919, forbidding teaching in a foreign language, refers to and means a school which presents a course of study such as that prescribed in the compulsory education act, and attendance upon which would satisfy the requirements of that act. *Nebraska District of Evangelical Lutheran Synod v. McKelvie* ..... 93

**Schools and School Districts**—*Concluded.*

2. A single surety on a contractor's bond is not estopped to question its validity, where the statute required two sureties. *Nye-Schneider-Fowler Co. v. Roeser* ..... 389

**Sedition.**

1. In a prosecution under ch. 5, Laws 1918, the "Sedition Act," the essential element of the offense is intent to obstruct the government in prosecution of the war, and words spoken in anger will not justify a conviction, unless there is evidence from circumstances, or otherwise, that defendant realized that the effect might be to so obstruct the government, and that he intended that effect. *Gerdes v. State* ..... 35
2. Evidence in prosecution under the "Sedition Act" *held* not to prove intent to obstruct the government in prosecution of the war. *Gerdes v. State* ..... 35

**Seduction.**

Requisites of seduction stated. *Rich v. Fulton* ..... 262

**Specific Performance.**

1. Adopted child *held* entitled to specific performance of agreement that he should inherit the property of his adopting parents. *Evans v. Kelly* ..... 712
2. The party performing a parol contract can enforce it. *Evans v. Kelly* ..... 712
3. Specific performance is a matter of discretion depending on the circumstances of each case. *Evans v. Kelly* ..... 712
4. A parol agreement of adoption *held* to give the adopted child the same share in the adopting parents property as if the agreement to adopt had been fulfilled. *Tuttle v. Winchell* 759
5. Petition *held* defective for failure to aver acceptance of option. *Cornell v. Tuck* ..... 759

**States.**

1. Where the legislature authorizes suit against the state, the court should render judgment as justice may require. *Commonwealth Power Co. v. State* ..... 439
2. Money paid on application for water appropriation, thereafter dismissed without fault of applicant, may be recovered. *Commonwealth Power Co. v. State* ..... 439

**States**—*Concluded.*

3. Limitations do not run on claim against the state until legislative leave to sue has been given. *Commonwealth Power Co. v. State* ..... 439

**Statutes.**

1. Statutes pertaining to the same subject-matter should be construed together, particularly if passed at the same legislative session. *Nebraska District of Evangelical Lutheran Synod v. McKelvie* ..... 93
2. The legislature must be presumed to have had in mind all previous legislation upon the subject, so that in construing a statute we must consider the pre-existing law and any other acts relating to the same subject. *Nebraska District of Evangelical Lutheran Synod v. McKelvie* ..... 93
3. Where the general intent of the legislature may readily be discerned, yet the language of the law leaves the application uncertain, courts may have recourse to historical facts or general information to aid them in its interpretation. *Nebraska District of Evangelical Lutheran Synod v. McKelvie* ..... 93
4. The rule *ejusdem generis* is only an aid to interpretation, and yields to the rule that an act should be construed to carry out its intent. *Dillard v. State* ..... 209
5. A full copy of act to be referred need not be attached to each sheet of referendum petitions. *State v. Amsberry* ..... 273
6. If referendum is desired on only part of an act, that part only need be printed on the petition. *State v. Amsberry* .. 273
7. A referendum petition must have attached to it a full and correct copy of the act to be referred. *State v. Amsberry* 273
8. Legislation to carry into effect the referendum must be reasonable. *State v. Amsberry* ..... 273
9. The secretary of state cannot exercise judicial functions in reference to referendum petitions. *State v. Amsberry* .... 273
10. Title of initiative and referendum act (Laws 1913, ch. 159) *held* sufficient to cover provisions relative to procedure in the district court and limitation of time for appeal. *State v. Amsberry* ..... 279
11. The word "may" in public statutes should be construed as "must" when necessary to carry out intent of legislature. *State v. Amsberry* ..... 279

**Statutes**—*Concluded.*

12. Practical construction of a statute by officials is entitled to weight in interpreting it. *Laub v. Furnas County* ..... 402
13. Statutes *in pari materia* must be construed together. *Beadle v. Sanders* ..... 427
14. Relative and qualifying words or phrases are ordinarily to be applied to words or phrases immediately preceding. *Nebraska State Railway Commission v. Alfalfa Butter Co.* 797
15. An independent legislative act may incidentally change existing statutes without referring to them. *State v. Miller* 838
16. Title of act providing for county farm bureaus *held* to include provisions of act for appropriation of funds. *State v. Miller* ..... 838

**Street Railways.** See CARRIERS.

1. While the public has the right to go upon a street car track, its right must yield to the right of the street car company. *Lucas v. Omaha & C. B. Street R. Co.* ..... 432
2. The public must allow a street car unobstructed passage. *Lucas v. Omaha & C. B. Street R. Co.* ..... 432
3. Rights of public and street cars in use of street are reciprocal. *Lucas v. Omaha & C. B. Street R. Co.* ..... 432
4. Instruction as to duty of motorman colliding with a pedestrian *held* not erroneous. *Lucas v. Omaha & C. B. Street R. Co.* ..... 432
5. Whether it is negligence to walk upon a street car track, and the degree thereof, depends on circumstances. *Lucas v. Omaha & C. B. Street R. Co.* ..... 432
6. A street railway company does not have exclusive use of the part of the street occupied by its tracks. *Oakes v. Omaha & C. B. Street R. Co.* ..... 788
7. Where the evidence is conflicting the proximate cause of an injury from collision is a question for the jury. *Oakes v. Omaha & C. B. Street R. Co.* ..... 783
8. Petition for personal injuries by a guest of an automobile driver *held* demurrable. *Berlo v. Omaha & C. B. Street R. Co.* ..... 827

**Sunday.**

1. The legislature may impose such penalty for violation of the Sunday law as to make the act effective. *State v. Murray* ..... 51

**Sunday**—*Concluded.*

2. The legislature has power to declare that keeping barber shops open on Sunday is not a work of necessity. *State v. Murray* ..... 51

3. The words, "place of business," in a Sunday observance ordinance, *held* to include moving picture shows. *Dillard v. State* ..... 209

**Taxation.**

1. Sec. 1, art. IX, Const., gives legislature power to fix basis of valuation for taxes. *Beadle v. Sanders* ..... 427

2. The practice in Nebraska is to assess property at less than its value. *Beadle v. Sanders* ..... 427

3. County boards cannot levy a tax exceeding 15 mills. *Beadle v. Sanders* ..... 427

4. County commissioners alone can distribute tax levy to county funds. *Beadle v. Sanders* ..... 427

5. County boards need not make inadequate provision for county agencies in order to meet obligation imposed by the legislature. *Beadle v. Sanders* ..... 427

6. Failure to provide a method for ascertaining the value of life insurance policies prevents their taxation. *Laub v. Furnas County* ..... 402

**Tender.**

A tender must be unconditional. *Baird v. Union Mutual Life Ins. Co.* ..... 352

**Trial.** See APPEAL AND ERROR. CRIMINAL LAW. HUSBAND AND WIFE, 1.

1. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. *Palmer v. Parmele* ..... 30

2. In stating issues to the jury, it is error, which may be prejudical, to include pleas of which there is no proof, or to adopt allegations of petition in which plaintiff inserted evidence, conclusions, and arguments. *Hanna v. Hanna* ..... 231

3. It is proper to submit an issuable question of fact to the jury. *Schmidbauer v. Omaha & C. B. Street R. Co.* ..... 250

4. It is the court's duty to instruct on the issues. *Schmidbauer v. Omaha & C. B. Street R. Co.* ..... 250

**Trial**—*Concluded.*

5. Quotient verdict upheld in absence of previous argeement that it should control. *Herbert v. Katzberg* ..... 395
6. Whether a servant who commits an unprovoked assault is acting within the scope of his employment is a question of fact for a jury. *Sternad v. Omaha & C. B. Street R. Co.* .. 460
7. An instruction which authorizes a verdict on a finding as to a single controverted fact not decisive of the issues is erroneous. *Kor v. American Eagle Fire Ins. Co.* ..... 610
8. Where reasonable men might differ as to whether all necessary facts were established by plaintiff's evidence, the trial court should not direct a verdict for defendant. *Harrahill v. Bell* ..... 777

**Trover.**

Where property wrongfully taken cannot be identified, the measure of damages is its value when taken. *Clay v. Palmer* ..... 476

**Trusts.**

The interest of a trustee should not conflict with the interests of the persons whom he represents. *Missouri Valley Trust Co. v. Nelson* ..... 499

**Vendor and Purchaser.**

1. A purchaser with knowledge of a mining lease takes it subject to the lessee's rights. *Clay v. Palmer* ..... 476
2. False representation as to location and value of land, relied on by purchaser, is ground for rescission. *Walker v. Burch* 592
3. Suit to rescind for fraud must be brought within a reasonable time after discovery of fraud. *Walker v. Burch* .... 592
4. Evidence *held* to sustain decree for rescission. *Walker v. Burch* ..... 592
5. The bringing of a suit is sufficient notice of offer to rescind. *Walker v. Burch,* ..... 592

**Waters.** See JUDGMENT, 3. STATES, 2.

1. The common law as to the rights and duties of riparian owners is in force in Nebraska, except as modified by statute. *Yearsley v. Gipple* ..... 88

Waters—*Concluded.*

2. If lands become riparian by the washing away of adjoining lands, the owner is entitled to the right of a riparian owner to accretions, though they extend beyond the original boundary line of his land. *Yearsley v. Gipple* ..... 88

3. Flood water which flows in the natural course of a stream over adjacent lands is "overflow water," and not "surface water." *Buchanan v. Seim* ..... 444

4. The accustomed course of overflow waters in flood channels cannot be obstructed by one riparian owner to the injury of another. *Buchanan v. Seim* ..... 444

5. Requisites of easement of flowage stated. *Buchanan v. Seim* ..... 444

6. Evidence *held* to establish right of easement of flowage by prescription. *Buchanan v. Seim* ..... 444

7. The statute requiring all real estate in the district receiving benefits to pay cost of water-main extensions is mandatory. *State v. Metropolitan Water District* ..... 495

8. A property owner assessed for water-main extensions *held* not estopped to maintain mandamus. *State v. Metropolitan Water District* ..... 495

Wills. See DESCENT AND DISTRIBUTION, 1.

1. A will, not providing for, nor showing an intention not to provide for, a child to be born, is revoked *pro tanto* by the subsequent birth of the child. *Gillespie v. Truka* ..... 115

2. Where a testator devises all his property to his wife, making no mention in his will of his unborn child, the instrument does not, on its face, manifest an intention that such child shall not be provided for. *Gillespie v. Truka* ..... 115

3. Devise of a life estate to one living, then over to one not living, with reversion to heirs of testator, is within the rule against perpetuities, and the last taker takes free from reversion. *Bunting v. Hromas* ..... 383

4. What may occur, rather than what did occur, is the test in determining perpetuities. *Bunting v. Hromas* ..... 383

5. A will containing provisions violating the rule against perpetuities will not be set aside *in toto*, but the last taker within the rule takes the entire estate. *Bunting v. Hromas* ... 383

6. A will giving all the grantor possessed to his wife construed to pass title to homestead. *Tyrrell v. Kelley* ..... 555

Wills—*Concluded.*

7. Where probate of a will is denied, the estate is not ordinarily liable to attorneys for defeated devisees. *In re Estate of Genuchi* ..... 584

8. An agreement for execution of mutual wills *held* not to create a trust except as to property taken by the survivor under the will. *Jessop v. Brown* ..... 770

9. Payments during lifetime *held* a satisfaction of a trust created under a contract to execute mutual wills. *Jessop v. Brown* ..... 770

Witnesses. See EVIDENCE.

1. A plaintiff who derived title from a decedent is a competent witness against a defendant who denies her right, and if parties intervene claiming as representatives of decedent, against whom plaintiff would not be allowed to testify, such testimony would be competent as against defendant on his appeal. *Palmer v. Parmele* ..... 30

2. An accomplice cannot be compelled, on cross-examination, to testify as to whether he participated in a crime not connected with that for which defendant is being tried. *Neal v. State* ..... 56

3. An adverse party who is a representative of a deceased person is not disqualified by sec. 7894, Rev. St. 1913, from testifying to a conversation between the person deceased and a third party. *DeWulf v. DeWulf* ..... 105

4. When plaintiff offers testimony in chief tending to prove freedom from venereal disease, defendant may offer testimony tending to show that plaintiff called upon and was examined by a physician, but such physician cannot testify as to the result of his examination. *Livingston v. Omaha & C. B. Street R. Co.* ..... 118

5. An experienced street-car man is competent to testify as to speed and distance in which a car may be stopped. *Schmidbauer v. Omaha & C. B. Street R. Co.* ..... 250

6. Statements to an attorney are privileged, though a retainer is subsequently refused. *Fimple v. State* ..... 471

7. Evidence of impeaching witness as to reputation *held* not rendered incompetent by his evidence on cross-examination. *Girch v. State* ..... 503

8. Claimant may testify to matters testified to by administrator of estate. *In re Estate of Peterson* ..... 574

**Work and Labor.**

1. Services of a child after attaining majority are presumed to be gratuitous. *In re Estate of Wieland* ..... 412

2. To overcome the presumption that services of a child after majority are gratuitous a promise to pay therefor must be clearly proved. *In re Estate of Wieland* ..... 412