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HORACE C. AMOS ET AL., APPELLEES, V. FRED J. EICHENBERGER ET AL.: GILLINSKY FRUIT COMPANY, APPELLANT.

FILED JANUARY 13, 1922. No. 21857.

1. **Courts:** NUNC PRO TUNC ENTRY. "A court has the power at a subsequent term to amend or correct its records to conform to the facts, and may proceed upon any satisfactory evidence." *Ackerman v. Ackerman*, 61 Neb. 72.
2. **Appeal:** BILL OF EXCEPTIONS. "The evidence used in the district court, upon a hearing of a motion to correct an entry in the journal, must be preserved in a bill of exceptions, or it will not be considered in this court." *Miller v. Brown*, 1 Neb. (Unof.) 754.
3. ———: ———. In the absence of a bill of exceptions, this court will presume that the judge had before him competent evidence on which to base his findings sustaining the order complained of.

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

Beeler, Crosby & Baskins, for appellant.

Rodman & Rodman and *Jefferis & Tunison, contra.*

Heard before LETTON, DEAN and ALDRICH, JJ., CLEMENTS (E. P.) and DILWORTH, District Judges.

CLEMENTS, District Judge.

This is an appeal from an order of Honorable H. M. Grimes, district judge, correcting notes made by him upon his docket at the close of a trial of this cause to a jury in the district court for Kimball county and directing the entry of a judgment herein *nunc pro tunc*. The defendant objected to the making of the order, a hearing was had, the objection overruled, and the order entered; the defendant excepted.

The appeal is brought here by the filing of a transcript. No bill of exceptions was prepared or settled. In the transcript are set out certain exhibits used as evidence upon the hearing, and the clerk in his certificate says

such exhibits and the proposed journal entry were all the evidence offered at the hearing.

It is well settled in this state that "A court has the power at a subsequent term to amend or correct its records to conform to the facts, and may proceed upon any satisfactory evidence." *Ackerman v. Ackerman,* 61 Neb. 72.

The question for this court to consider is, therefore, was the evidence taken at the hearing satisfactory and did it justify the order made? But this court cannot consider evidence not preserved in a properly authenticated bill of exceptions. "The evidence used in the district court, upon a hearing of a motion to correct an entry in the journal, must be preserved in a bill of exceptions, or it will not be considered in this court." *Miller v. Brown,* 1 Neb. (Unof.) 754. Also *Stuart v. Burcham,* 50 Neb. 823. In the absence of a bill of exceptions, this court will presume that the judge had before him competent evidence on which to base his findings sustaining the order complained of. *Van Etten v. Test,* 49 Neb. 725; *Prairie Life Ins. Co. v. Schumann,* 104 Neb. 363.

The judgment is

AFFIRMED.

LEWIS J. PINN V. STATE OF NEBRASKA.

FILED JANUARY 13, 1922. No. 21927.

1. **Grand Juries.** District courts are empowered under the provisions of chapter 148, Laws 1917, and section 8143, Rev. St. 1913, to order the calling of a grand jury at any time during a term of court, whenever, in the judgment of the court or a judge thereof, the necessities of the public business require it.

2. **Statutes:** REENACTMENT. The provisions of section 8143, Rev. St. 1913, relating to grand juries, held in *Jones v. State,* 18 Neb. 401, to have been repealed by implication, were reenacted by the adoption of the revision of the codes and statutes by section 1, ch. 3, Laws 1913.

3. **Grand Juries:** PROCEDURE. The procedure outlined and desig-

nated in sections 8137-8139, Rev. St. 1913, has no application to the calling of a grand or petit jury after the commencement of the term at which such jurors are to serve.

4. **Perjury:** EVIDENCE. Upon the trial of a defendant charged with the crime of perjury, the pleadings upon which the case was tried where the perjured testimony is charged to have been given are properly admissible in evidence, for the purpose of showing whether the alleged false testimony was material to the issues then being tried.

5 **Witnesses:** IMPEACHMENT. One of the modes recognized by law for impeaching the veracity of a witness is the introduction of persons as witnesses who testify that they are acquainted with the general reputation for truth and veracity of the person sought to be impeached in the neighborhood or community where he resides, and that such reputation is bad, and this rule applies where a defendant upon trial charged with the crime of perjury testifies as a witness upon such trial.

6. **Instructions** criticised, examined, and, when considered together, *held* to correctly state the law.

7. **Evidence** examined, and *held* to sustain the verdict.

ERROR to the district court for Kearney county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

W. D. Oldham and *H. M. Sinclair,* for plaintiff in error.

Clarence A. Davis, Attorney General, Jackson B. Chase and *J. L. McPheely, contra.*

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

CORCORAN, District Judge.

The defendant was indicted by a grand jury called by order of the judge of the district court for Kearney county, and placed upon trial and convicted by a jury of the crime of perjury upon three counts of the indictment, and found not guilty as to one count. His motion for a new trial was overruled and he was sentenced to a term in the state penitentiary. He brings his case to this court for review upon a petition in error.

The record discloses that the defendant and a nephew,

Charles Wirth, both of whom were farmers in Kearney county, got into some difficulty over business transactions, resulting in a suit being brought by Wirth against the defendant Pinn to recover for certain work claimed to have been performed by Wirth for the defendant, his uncle, and for other items of account. The trial of this suit was concluded in the district court for that county on November 30, 1920, resulting in a verdict and judgment for the plaintiff. On the following day, December 1, 1920, the trial judge made an order directing the sheriff to "summon without delay sixteen good and lawful men from the body of the county of Kearney, having the qualifications of jurors, to appear on December 2, 1920, to serve as grand jurors." The grand jurors appeared as directed, were duly organized and proceeded to their work, and upon December 9, 1920, returned an indictment, indorsed "a true bill," charging the defendant Pinn with having committed perjury upon the trial of the civil case before mentioned on November 30, 1920. To this indictment a plea in abatement was made by the defendant on the ground that the grand jury was not selected as provided by statute from a list prepared by the county board; that the court was without authority in law to call the grand jury or to direct the sheriff to call the members thereof from the body of the county, and other objections presenting the same general questions. The reply of the state traversed the allegations of the plea and set up at length the different steps taken in ordering, selecting and impaneling the grand jury. This plea was tried to the court without a jury and was overruled, after which the defendant entered his plea of not guilty to the several counts and was placed upon his trial.

The question of the validity of the indictment found by this grand jury is the important and controlling question presented for decision by the petition in error. The determination of this question turns upon the power of the district court, under the present statutes, to make an order during a term of court, directing the calling of a

grand jury by the sheriff from the body of the county. The plaintiff in error contends that such power no longer exists. If this contention is correct, then it must follow that the calling of the grand jury in the present case was without authority of law, and the indictment returned by it was invalid, and the subsequent trial and conviction of the defendant was likewise without warrant or authority of law and cannot be permitted to stand. Regarding, as we do, the matter of supreme importance, not only to this defendant, whose liberty is at stake, but to the courts and profession in this state, we will again undertake to review this very important branch of the legislation of the state. Prior to 1885 all prosecutions in the courts of record in the state were upon indictments, presented by a grand jury. At the session of 1885 the legislature adopted a new method of prosecutions; that is, by means of an information filed by the prosecuting attorney, after a preliminary examination before a magistrate. From that date forward it was not necessary that a person charged with crime should first be presented by the indictment of a grand jury, as a prerequisite to being placed upon trial. The same session adopted section 584 of the Criminal Code, section 7, ch. 108, Laws 1885, providing:

"Grand juries shall not hereafter be drawn, summoned, or required to attend at the sittings of any court within this state, as provided by law, unless the judge thereof shall so direct by writing, under his hand, and filed with the clerk of said court."

This was the law of the state for 24 years. In 1909 the legislature again provided for the calling of grand juries by the adoption of chapter 171, Laws 1909, as follows:

"Unless otherwise ordered in writing by the court, or a judge thereof, a grand jury shall be drawn and summoned in the manner provided by law, on the first day of the first regular term of the district court of each county in the state."

This section was carried into the revision of 1913 (Rev. St. 1913, sec. 9031), with the addition of the words "in each year" in the body of the section. Under this section, which continued in force for eight years, if a grand jury was not desired, the trial judge was under the necessity of making an order to that effect in writing in advance of the terms of court named in the statute, in order to legalize prosecutions by information at such terms. This law stood until the session of 1917, when the legislature again turned their attention to the matter of grand juries, and by chapter 148, Laws 1917, section 9031 was again amended, and as the last word of the legislature upon the subject declared:

"The district courts are hereby vested with power to call grand juries. A grand jury may be called and summoned in the manner provided by law on such day of a regular term of the district court in each year in each county of the state as the district court may direct; and at such other times and upon such notice as the district court may deem necessary."

In addition to these several acts of the legislature attention is directed to section 8143, Rev. St. 1913. This general statute has been in force without amendment since Nebraska became a state. Its provisions are:

"Whenever the proper officers fail to summon a grand or petit jury, or when all the persons summoned as grand or petit jurors do not appear before the district courts, or whenever at any general or special term, or at any period of a term for any cause there is no panel of grand jurors or petit jurors, or the panel is not complete, said court may order the sheriff, deputy sheriff, or coroner to summon without delay good and lawful men, having the qualifications of jurors, and each person summoned shall forthwith appear before the court, and if competent, shall serve on the grand jury or petit jury, as the case may be, unless such person may be excused from serving or lawfully challenged."

It is contended that this statute, so far as it pertained

to grand juries, was repealed by implication by the session of 1885, in the act before referred to. In fact this court is committed to that doctrine in *Jones v. State*, 18 Neb. 401, which decision has since been cited with approval in *State v. Lauer*, 41 Neb. 226, and *Ellis v. State* 81 Neb. 284. Even though this be found to be the fact, section 8143 was reenacted by the session of 1913, which carried the old section just as it had stood for a half century into the revision of the laws prepared by the code commission authorized by the session of 1911, for the revision of the codes and statutes of the state. This action of the legislature is set forth in section 1, ch. 3, Laws 1913:

"That the code of laws embodying the general statutes, the Code of Civil Procedure and the Code of Criminal Procedure of the state of Nebraska, as prepared and reported to the thirty-third general assembly of the legislature of Nebraska by A. M. Post, J. H. Broady, and E. L. King, pursuant to the authority of chapter 166 of the Laws of 1911, be, and the same is hereby adopted, approved and made of force as the Revised Statutes of the state of Nebraska of 1913."

The provisions of section 8143 are self-executing. It is complete within itself, and reference to any other section is not necessary to carry out its provisions. The authority to provide for prosecutions by indictment presented by a grand jury is amply furnished by section 9031, as adopted by the session of 1917. It is idle to insist that, when an emergency arises after the opening of the term of court which, in the judgment of the court or judge, requires the services of a grand jury, none can be called because it is then impossible to have the members selected by the county board and the names drawn from a box by the sheriff and clerk ten days before the opening of the term. The law does not require the performance of impossible acts. The same exercise of common sense should be applied to the interpretation of the laws as obtains in other important affairs of life. The

people of the state are not impotent and powerless to execute their will, as expressed by the acts of the legislature. Through the legislature the people have spoken in 1909, 1913, and 1917. What the people in these several instances demanded was the restoration of prosecutions upon indictments presented by grand juries, and the power of their courts to provide the grand juries, when it appeared expedient or best calculated to serve the interests of the people and the state. It is not the province of this court to deny their demand.

The defendant cites *Jones v. State, supra,* and *Ellis v. State, supra,* as decisive of the question at issue. It must be remembered that *Jones v. State* was decided shortly after the act of 1885 was adopted, and that the decision in *Ellis v. State* was announced in 1908, before any of the acts before referred to were passed. The legislation adopted since 1908 has materially changed the situation, and the district courts now have the undoubted power and authority to order the calling of a grand jury at any time during a term of court. The procedure outlined in sections 8137-8139, Rev. St. 1913, providing for the selection of the names by the county board, reporting the list of names by the county clerk to the clerk of the court, and the drawing of the jury by the sheriff and the clerk, has and can have no application to either a grand or petit jury ordered during the term of court at which their services are required. As before stated, the law does not require the performance of that which is impossible. When a jury, either a grand jury or a petit jury, is needed, and none has been provided by the usual method, the way to procure a legal and proper jury is made clear by section 8143. This court has held in *Carrall v. State,* 53 Neb. 431, that the provisions of this statute are "broad enough to cover and include any and all possible reasons for which at any term of a court there may be no panel of jurors present."

The conclusion is irresistible from what has been said that the district courts of the state are clothed with

ample power and authority to order the calling of a grand jury during a term of court, whenever the necessity of the public business appears to require it. This authority is clearly conferred by chapter 148, Laws 1917, and section 8143 provides the proper procedure. It must follow as a logical conclusion that the plea in abatement was properly overruled in this case.

Counsel for defendant, in their very able and comprehensive brief, recite many alleged errors of the trial court in their effort to secure a reversal of the judgment. Among these is the admission in evidence of the original pleadings filed in the county court, from which the cause was appealed to the district court. As it appears without controversy in the record that the case was tried upon the same pleadings in both courts, no new pleadings being filed in the district court, this assignment is without merit. It was necessary for the prosecution to show the pleadings in the cause where the alleged perjury was committed, in order to establish that the evidence was material to the issues thus made.

Complaint is also made of the admission of the journal entry and judgment in the civil case. There might well be complaint made by the defendant of this action, if the offer had not been limited, as disclosed by the record. The offer was: "The state offers the journal entry and judgment for the purpose only of showing the ending of that trial and showing the date with relation to the time of the indictment, and not for the purpose of showing who judgment was rendered against or for whom judgment was rendered; only that the case was ended prior to the return of the indictment." To which the court added, presumably in the presence of the jury: "I am going to admit the journal entry and judgment not to show the judgment, but for the sole purpose of showing that the case has been terminated. The pleadings I have admitted may go to the jury, the judgment to that extent." Thus limited, the admission of this record could in no wise prejudice the defendant.

Complaint is also made that a number of witnesses were allowed to testify that the reputation of the defendant for truth and veracity in the community where he resided was bad. Reading the brief, the impression is at once created that this evidence was offered in support of the charge of perjury upon which the defendant was being tried. An examination of the record, however, discloses that the defendant took the stand in his own behalf and gave his testimony. Upon rebuttal the state produced these witnesses as discrediting the testimony given by him upon the present trial. This procedure was entirely proper. If the testimony given by the defendant upon this trial was to be believed by the jury, it would be their plain duty to acquit him. Or if it was sufficient to create a reasonable doubt in the mind of the jury of the truth of the charge made against the defendant, the duty of the jury would be the same. The state was clearly within its rights by offering evidence in rebuttal which might tend to discredit the testimony given by the defendant.

The assault made upon the third and seventh instructions given by the court is not warranted by the record. The third instruction is not one, as charged, intended to cover the whole case, but setting forth the material allegations of each count of the indictment which the state must prove beyond a reasonable doubt before it would be entitled to a conviction. Complaint is particularly made of the fourth subdivision or paragraph of that instruction which set out "that said testimony was material to an issue then and there being tried," etc. And in connection therewith that the jury were told in the seventh instruction that the testimony set forth was material as a matter of law. It is claimed that these instructions are contradictory and confusing. A careful reading of the instructions establishes the fact that this claim is without merit. In the first instance the jury were told what the state must prove to make out its case, and in the second the jury were properly advised that the evidence upon

which the alleged perjury was based was material. In neither instruction was any added burden placed upon the defendant. If either party had a cause for complaint it would be the state. But there exists no ground for complaint from either party. Each instruction occupied a proper place in the charge to the jury and correctly stated the law.

It is finally urged that the evidence does not sustain the verdict. It is particularly pointed out that upon the important question of whether Wirth was employed by the defendant, Wirth testified that the defendant made the contract of employment with him at the home of his mother, and that this being denied by the defendant, and there being no corroboration, in a prosecution for perjury there could be no conviction upon the testimony of a single witness. This would be important if sustained by the record. Counsel have overlooked the testimony of Caroline Wirth, the sister of the defendant, upon this point. True, she was not present at the alleged conversation at the side of the barn, but she testified that when her brother, the defendant, came into the house he talked with her about the same matter, and she testifies that her brother, the defendant, said to her: "He said that he would like to have Charlie work for him. I didn't want him to at first, but I said it wouldn't hurt the boy to earn a little money and that was the way it was done." This was corroborative of the story of young Wirth that his uncle came over to the home that day to employ him, and that after they had their talk by the side of the barn the defendant went into the house and talked to his mother.

It is manifest from a careful examination of this record that there was a sharp conflict in the evidence. Upon some phases of the case the defense produced a greater number of witnesses than the prosecution. The quantum of proof, however, is not determined by counting the witnesses. There was ample evidence, if believed by the jury, to establish beyond a reasonable doubt that the

defendant had given false testimony upon the trial of the civil case in question. This was all that was necessary to satisfy the requirements of the law. It must be a matter of sincere regret to all concerned that this prosecution arose out of a chain of incidents revealing a serious family disagreement. This defendant and his sister, Mrs. Wirth, are each of mature years and appear to have developed a feeling for each other that is not at all commendable. The two principal witnesses for the prosecution were the nephew and his mother, the sister of the defendant. As their evidence appears in the record, little effort was made to conceal the bitterness which existed between the parties. There is danger in such instances that testimony will be colored to the disadvantage of the defendant. All of these facts, however, must have been plain and obvious to the jury. They were not only the best judges, but the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each and all of them. This being so, if the case was properly submitted to the jury, the court should not disturb the verdict. The record shows that the case was well tried and properly submitted. It is unfortunate that it should become necessary to punish a citizen of the state for an offense of this character. A jury selected from the representative citizenship of the county where Lewis J. Pinn has resided for years has found and declared him guilty of this dangerous crime to civil society.

There appears to be no error of a substantial nature in the record, and the judgment must be, and is,

AFFIRMED.

MINNIE L. COON ET AL., APPELLANTS, V. ROBERT D. O'BRIEN ET AL., APPELLEES.

FILED JANUARY 13, 1922. No. 21853.

1. **Husband and Wife: JOINT ACTIONS.** Husband and wife may jointly bring action relative to title to real estate belonging to either of them.

2. **Judgment:** PLEA OF RES JUDICATA. Plea of *res judicata* cannot be maintained except in cases where the issues and the necessary parties in the instant case are the same as in the case wherein the judgment pleaded as a bar was rendered. In the present case, the facts, which are fully set forth in the opinion herein, show that neither the issues nor necessary parties in this action are the same as in the case in which judgment pleaded as a bar was rendered. *Held*, that the plea of *res judicata* is not sustained.

3. **Appeal:** REVERSAL: RECOVERY OF LAND SOLD TO SATISFY JUDGMENT. This is an action brought under section 8087, Rev. St. 1913, to recover lands sold to satisfy a judgment which was not superseded and was afterwards reversed and vacated by this court. Section 8087 reads as follows: "If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but, in such case, restitution shall be made by the judgment creditor, of the moneys for which such lands or tenements were sold, with lawful interest from the day of sale." *Held*, that the term "purchaser" used in this section means a *bona fide* purchaser; that is, one who is not a party to the erroneous judgment nor responsible therefor; one that does not have reason to believe that such erroneous judgment will be vacated by an appellate court. It applies only to strangers to the judgment who have purchased under the honest belief that the judgment is sufficient. *Held*, also, that the assignee of the party against whom such erroneous judgment was rendered may demand restitution of the property sold to satisfy such judgment, and maintain action to recover the same. *Held*, further, that real estate so sold may be recovered by an action to quiet title.

4. ———: ———: RIGHTS OF PURCHASER AT EXECUTION SALE. One who makes a *bona fide* contract to purchase land sold to satisfy a judgment, which was not superseded, and was afterwards vacated on appeal to the supreme court, and pays part of the purchase price before notice that such judgment was erroneous, will be protected by said statute to the extent of the amount so paid, with interest, but no further.

5. ———: ———: ———. A judgment was rendered against C., and his real estate levied on and sold to the judgment creditor to satisfy the same. The judgment was appealed to the supreme court, but no supersedeas bond was given, and was by said court vacated. *Held*, that the wife of C., to whom he had conveyed his interest in the land after the same had been sold to satisfy

the judgment erroneously rendered against him, could maintain an action to recover the land; and that the facts developed on the trial in district court, and which are fully set out in the opinion herein, warrant a decree in her favor, subject, however, to the payment of $950 and interest thereon at the legal rate to one S., who had made a *bona fide* contract with the grantee of the purchaser, *i. e.*, the judgment creditor, at the execution sale, and had paid that amount of the purchase price agreed upon. And judgment in favor of C. should be rendered against the judgment creditor for said amount so required to satisfy the *bona fide* interest of S. in said land.

6. ———. Where one is properly in court as a defendant and makes no claim of interest in the subject-matter of the action, files an answer denying generally the allegations of a cross-petition of a codefendant only, and takes no appeal from a decree of the trial court adverse to himself, and makes no appearance in this court, there is nothing for this court to consider, so far as his interest is concerned, and no order or judgment can be made in respect thereto.

7. ———: REVERSAL: ACTION TO RECOVER LAND SOLD TO SATISFY JUDGMENT: EVIDENCE. In an action brought under section 8087, Rev. St. 1913, for restitution of property sold on execution issued on a judgment not superseded, and afterwards vacated by the supreme court, it is immaterial as to what further proceedings were had regarding such erroneous judgment, and evidence tending to show that a second judgment was rendered was properly rejected by the trial court; and the same is true as to evidence offered to show that such second judgment had been fully paid.

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

C. E. Tefft, C. A. Robbins and *Radcliffe & Hyde,* for appellants.

D. O. Dwyer, Peterson & Devoe and *Halligan, Beatty & Halligan, contra.*

Heard before LETTON, DEAN and ALDRICH, JJ., CLEMENTS (E. P.) and DILWORTH, District Judges.

DILWORTH, District Judge.

Appellants, Minnie L. Coon and Omar A. Coon, wife and husband, commenced this action in Cheyenne county

against Robert D. O'Brien, Dennis O. Dwyer, Joseph M. Swensen, Christian E. Metzger, and Etta Belle Metzger, to quiet title to certain land situated in that county. Afterwards, by stipulation of parties and order of the court, H. F. Brinkman and C. W. Bish were also made defendants. The proceedings in this court being a trial *de novo* of the cause, we deem it proper to set out somewhat in detail the facts as developed on the trial in district court.

The undisputed evidence, and the stipulation of the parties, show that on the 26th day of April, 1916, Robert D. O'Brien obtained a judgment in the district court for Cass county, Nebraska, against Omar A. Coon for the sum of $3,978, together with costs amounting to $148.75; that an appeal was taken from such judgment to the supreme court, and that no supersedeas bond was given. A transcript of said judgment was filed in the office of the clerk of the district court for Cheyenne county on May 1, 1916. On May 3, 1916, a quitclaim deed was filed in the office of the register of deeds of said county, whereby Omar A. Coon conveyed the lands involved herein to his wife, Minnie L. Coon. On July 16, 1916, an execution on this judgment issued out of the office of the clerk of the district court for Cass county, directed to the sheriff of Cheyenne county, who levied the same on and sold the lands in question to the judgment creditor, Robert D. O'Brien, for $4,000, being the appraised value thereof, and approximately the amount of the judgment. The sale was confirmed by the district court for Cass county, and the sheriff deeded said lands to O'Brien on September 12, 1916. By deed, dated October 14, 1916, O'Brien conveyed the land to H. F. Brinkman, who was the young lady stenographer in the office of Dennis O. Dwyer, the attorney for O'Brien in all the proceedings had to obtain and force said judgment. This deed expressed no consideration, and covenanted only to warrant and defend the premises against any acts of the grantor. It was filed for record March 21, 1917. On April 7, 1917,

O'Brien made a correctional deed to said Brinkman, in which the consideration was stated as $4,000. This deed was filed for record on March 18, 1918. On the same day that the first deed to Brinkman was dated, October 14, 1916, she entered into a contract with appellee Joseph M. Swenson to sell him said lands for the sum of $4,450, to be paid as follows: $950 cash, which was paid, and $3,500 on March 1, 1917.

O'Brien instituted an action in the district court for Cheyenne county against Minnie L. Coon sometime in December, 1916, to set aside and cancel the deed of her husband to her on account of fraud as to his creditors, and quieting title to the lands in O'Brien as to any claim of right, title or interest therein of said Minnie L. Coon. On March 21, 1917, a decree as prayed for was entered in such action. From this decree Minnie L. Coon appealed to this court, and gave a supersedeas bond fixed by the court at $750. On May 31, 1917, H. F. Brinkman executed a deed, blank as to grantee, for said lands, and gave the same to defendant Dwyer. On February 16, 1918, the supreme court reversed and vacated the judgment rendered in the district court for Cass county in favor of O'Brien and against Omar A. Coon. On March 18, 1918, the deed in blank executed by Brinkman on May 31, 1917, with the name of C. E. Metzger inserted as grantee, was filed for record in Cheyenne county. At the January term, 1919, of the supreme court, Minnie L. Coon moved to have her appeal in the case of O'Brien against her dismissed without prejudice to her rights in the district court. This court at that term granted said motion and dismissed said appeal without prejudice to her rights in the lower court. Thereafter, on July 9, 1919, this action was commenced. Swenson filed an answer and cross-petition, setting up his contract of purchase, claiming to be a *bona fide* purchaser, and asking that such contract be carried out and title to the land be quieted in him. Metzger filed an answer and cross-petition, claiming to be a *bona fide* pur-

chaser by virtue of the deed of Brinkman to him, and prayed that title to the premises be quieted in him as against the plaintiffs and his codefendants. Dwyer filed a disclaimer; O'Brien made default of any answer; Bish filed an answer only to the cross-petition of Swenson, denying generally such answer and cross-petition. No process was served on Brinkman. Trial was had and a decree rendered in favor of the defendant Swenson, providing that he pay into the district court, "within five days from the date of this decree, the sum of $3,500, provided to be paid in his contract with the defendant Brinkman, for the use and benefit of the said Brinkman, or her assigns, the said Brinkman shall execute and deliver, within ten days from the date of this decree, a good and sufficient deed conveying to said defendant Swenson the lands involved herein and that the deed from said H. F. Brinkman to defendant O'Brien (evidently a mistake in name made by transcriber, as Metzger was undoubtedly meant), and the deed from said O'Brien to defendant Bish, and the mortgage given thereon by the defendant Bish, be and the same hereby are canceled and held to be null and void."

The plaintiffs and the defendants O'Brien, Bish, Brinkman, and Metzger, jointly and severally except. Plaintiffs perfect appeal to this court. The plaintiffs, and defendant Swenson only of all the defendants, appeared or participated in the hearing of this cause in this court in any manner.

This action is brought under section 8087, Rev. St. 1913, which reads: "If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but, in such case, restitution shall be made by the judgment creditor, of the moneys for which such lands or tenements were sold, with lawful interest from the day of sale."

It is insisted by appellee Swenson that no one but the

defendant in the action in which the judgment was rendered can take advantage of a reversal of a judgment where no supersedeas bond has been filed. This court in the case of *Hier v. Anheuser-Busch Brewing Assn.,* 60 Neb. 320, recognized the contrary rule and sustained an action brought by the assignee of a judgment debtor for restitution, or recovery of money from the judgment creditor realized on a judgment in which no supersedeas bond was given, and was afterwards reversed.

It is also urged that the plaintiffs cannot maintain this action, either individually or jointly; that Omar A. Coon has no interest in the land; that the deed made by him to his wife disposed of all his interest therein, and is effective notwithstanding the decree in the case of O'Brien v. Minnie L. Coon. There is merit in this proposition. The deed from Coon to his wife, Minnie L., is good between themselves, and as to all parties except the creditors of Omar A. Coon. *Lewis v. Holdrege,* 56 Neb. 379.

While Omar A. Coon did not have sufficient interest in the land to permit him to maintain this action individually, yet he was a proper party to join with his wife. *Holladay v. Rich,* 93 Neb. 491.

It is insisted, however, that the wife, Minnie L. Coon, cannot maintain this action for the reason that she is barred by the decree in the case of *O'Brien v. Coon.* Such is not the fact. The issues in that case were not the same as in this. The issue in the *O'Brien v. Coon* case was as to her interest in the land as a purchaser thereof, as against the demands of her husband's creditors. The present action is to determine her right in the land as the assignee of her husband's right to demand restitution of his lands sold under a judgment, not superseded, that was, after the sale had been made, reversed and declared void. The doctrine of *res judicata* does not apply in this instance. The issues are not the same. This court has declared in what instance the rule of *res judicata* does apply, and that is:

"A judgment of a court of competent jurisdiction upon

a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but, to this operation of the judgment, it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in a former suit." *Morgan v. Mitchell*, 52 Neb. 667.

Not only were the issues not the same, but the necessary parties were not the same The plaintiff in the former suit, Robert D. O'Brien, was not a necessary party in this action. He could have been left out of the suit and the issues fully determined. Minnie L. Coon and her husband, Omar A. Coon, are the proper parties to demand restitution of the land sold.

The only question remaining to be determined, and the one most strongly contested, is whether such restitution should be awarded them. The section of the statute under which this suit was brought protects only *bona fide* purchasers. The supreme court of Kansas, in construing a statute similar to that under consideration, clearly states the rule in the case of *Hubbard v. Ogden*, 22 Kan. 671 (cited by appellants), as follows:

"This section has application solely to *bona fide* purchasers, who are not parties to the erroneous judgment, nor responsible therefor, and who do not have reason to believe that such erroneous judgment will be reversed or vacated by the appellate court. * * * It applies only to strangers to the judgment, who have purchased under the honest belief that the judgment is sufficient. It would not be in consonance with justice or equity to allow a party who had procured an erroneous judgment, and who had procured property thereunder, to retain the fruits of such judgment after it had been set aside and annulled by the superior court."

If there is any *bona fide* purchaser of this land, then this action fails as to such purchaser. Let us see if there is such. Robert D. O'Brien, judgment creditor, who purchased the land at the sale on the execution issued on

his judgment, is not a *bona fide* purchaser. *Stroud v. Casey,* 25 Tex. 740, 78 Am. Dec. 556.

O'Brien conveyed the lands so purchased by him to H. F. Brinkman, who the evidence shows was a clerk or stenographer in the office of defendant Dennis O. Dwyer, attorney for O'Brien in the action in which the judgment was rendered, and in all the proceedings taken to enforce the collection thereof. Her deposition was taken by appellants and used by them in the trial of this cause in the district court. She testified that she merely held the land for her employer, Dennis O. Dwyer; that she neither paid nor received anything for the land, but held it subject to the order of Dwyer. She is not a *bona fide* purchaser.

Defendant Dwyer was probably the real purchaser of the land from O'Brien, and there is some testimony of a doubtful nature that he gave O'Brien his (Dwyer's) check or note in payment for the same. It would make no difference if he had paid cash in full for the land. Being the attorney for O'Brien, as hereinbefore stated, he is in the same position as O'Brien. *Stroud v. Casey, supra.* He is not a *bona fide* purchaser.

We will next consider the claim of defendant C. E. Metzger, that he is a *bona fide* purchaser. Metzger claimed title to the land by virtue of a deed made by Brinkman, May 31, 1917. This deed when made was blank as to grantee, and was delivered by Brinkman to Dwyer. On March 18, 1918, after the decision of the supreme court, vacating the judgment in favor of O'Brien against Omar A. Coon, to satisfy which the land had been sold, had been announced, this deed, with the name of C. E. Metzger inserted as grantee, was filed for record in Cheyenne county. Metzger's deposition was taken by the plaintiffs in this action and used in the trial in the district court. From it, and other evidence produced in the hearing in that court, it appears that Metzger never saw this land, and knew nothing as to its condition or title. His attention was called to it by

Dwyer, who was his attorney when he needed one, and with whom he was intimately associated. It is shown that he gave his check to Dwyer for $3,500 in payment therefor; that this check was drawn on a Plattsmouth bank, the home town of Dwyer, and delivered to Dwyer in Omaha; that Dwyer cashed it in Omaha; that at the time this check was given Metzger's account in the Plattsmouth bank on which it was drawn was overdrawn some $79; that the day after the check was cashed in Omaha some one—Metzger does not know who and it seemed impossible to learn from him or the president of the bank on which the check was drawn, whose deposition was also taken by the plaintiffs—deposited in the bank $3,500 to the credit of Metzger, which was used to take up this check. A close examination of the testimony of Metzger and the bank officials and of Brinkman leads one to the conclusion that the trial court was well justified in finding that "the connection of Metzger with the transaction seems to have been had with Dwyer, the attorney for O'Brien. Brinkman, Dwyer's stenographer, seems to know little about the transaction by which she obtained title to the land, or the transaction by which she conveyed the title to Metzger. These two transactions almost convince one that the real party in interest was Dwyer, the attorney for O'Brien."

We will go farther than the trial court went in its findings in this respect, and say that the entire evidence fully convinces us that Dwyer was the real party in interest in these transactions and that the deed purporting to carry the title to Metzger was in fact made solely for Dwyer's benefit and was not a *bona fide* transaction. This conclusion is supported very strongly by the failure of Metzger to appeal from the decision of the district court denying his claim of title to the land, and his nonappearance in this court to protect his interests, as would be expected from a man with $3,500 at stake. Metzger was not a *bona fide* purchaser.

Defendant C. W. Bish is said to have a mortgage on

the land for $11,200 given by the appellants. He appeared in the district court, filed answer only to the cross-petition of defendant Joseph M. Swenson, but did not set up his mortgage or make any claim or offer any evidence in respect thereto. He took no appeal from the decree of the district court, canceling his mortgage; neither has he appeared in this court. Such being the fact, this court is in no position to pass upon the rights of Bish, and does not do so.

The remaining question to determine is as to the claim of Joseph M. Swenson. He claims to be a *bona fide* purchaser of the land through a contract for the purchase thereof, entered into October 14, 1916, with Brinkman. The evidence shows without dispute that on that day, it being the same day that O'Brien conveyed the land to Brinkman, she contracted to sell the land to him for $4,450. Of this sum $950 was to be in cash at that time, which was paid, and the balance of $3,500 was to be paid on March 1 following. This contract provided that Brinkman was to immediately make a warranty deed to said premises in favor of Swenson and deliver the same to D. O. Dwyer, to be held by him and delivered to Swenson on March 1 or prior thereto upon his paying to Dwyer the sum of $3,500, as stipulated. Brinkman was to furnish Swenson an abstract, showing merchantable title to the premises. Swenson refused to make the final payment until the claim of Minnie L. Coon to the land, by reason of the deed to her from her husband, was disposed of. Before that was finally determined this action was commenced, and the final payment of $3,500 has not been made, although since tendered. The evidence clearly shows that this transaction with Swenson was *bona fide*. Therefore, Swenson has a *bona fide* interest in the land to the extent of the sum paid by him, to wit, $950, together with interest at the legal rate from the time said sum was paid, October 14, 1916.

Evidence was offered in the district court, tending to show that upon a retrial of the case of O'Brien v. Omar

A. Coon, in Cass county, another judgment was obtained against Omar A. Coon. The court rejected this evidence. This was correct.

On the other hand, the plaintiffs offered evidence that said second judgment had been fully paid and satisfied. This offer the court correctly refused.

We find that appellee Joseph M. Swenson has a *bona fide* interest in the lands involved herein to the extent of $950, being the amount paid by him on the purchase thereof, and interest on said sum at the legal rate from October 14, 1916, the date of such payment; that Robert D. O'Brien, Dennis O. Dwyer, H. F Brinkman, Christian E. Metzger, and Etta Belle Metzger, and none of them, are purchasers of said premises, and have no *bona fide* interest therein; that Minnie L. Coon, as the assignee of Omar A. Coon, as to all his rights and interest in said real estate, is entitled to restitution thereof, and that the title thereto, subject to the *bona fide* interest of said Joseph M. Swenson, should be quieted in her as against all persons claiming any right, title or interest therein growing out of or resulting from the sale of said premises on the execution issued on the judgment rendered by the district court for Cass county, Nebraska, on the 26th day of April, 1916, in an action therein pending, wherein Robert D. O'Brien was plaintiff and Omar A. Coon was defendant, and which judgment was afterward vacated and set aside by the supreme court; that said Minnie L. Coon, as the assignee of Omar A. Coon, should have judgment against Robert D. O'Brien for the amount of the *bona fide* interest of Joseph M. Swenson, as hereinbefore stated; that appellee Robert D. O'Brien should pay the costs of this action, including the costs in this court.

It is therefore ordered and adjudged that the decree rendered in the district court be reversed, and that this cause be remanded to said court, with directions to render a decree, quieting title to the land involved, in Minnie L. Coon, subject to a lien thereon in favor of

appellee Joseph M. Swenson for $950 and interest at the legal rate from October 14, 1916; that judgment be rendered against said Robert D. O'Brien and in favor of Minnie L. Coon for the amount found due on the lien of Joseph M. Swenson on said land, and costs of this suit, including costs in this court.

REVERSED.

WILHELM KROGER, APPELLANT, V. GORDON FIREPROOF WAREHOUSE & VAN COMPANY ET AL., APPELLEES.

FILED JANUARY 13, 1922. No. 21712.

1. **Contributory Negligence: Question for Jury.** On an issue of plaintiff's contributory negligence, where the facts, as disclosed by the evidence, were such that different minds might draw different conclusions, the question was properly submitted to the jury.
2. **Negligence: Instruction: Burden of Proof.** Where, in an action founded on negligence, the jury were instructed that, if the plaintiff proved by a preponderance of the evidence the negligence of the defendant charged in the petition, that it was the proximate cause of his injury, and the amount of damages he suffered, if any, he was entitled to recover; but that, if the jury found by a preponderance of the evidence that the plaintiff was guilty of negligence which contributed to his injury, then his right of recovery would be governed or modified by the rule set forth in another instruction, *held* to sufficiently set forth upon whom rested the burden of proof, in the absence of a request for a more specific instruction.

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

Martin L. Sugarman and *James C. Kinsler*, for appellant.

R. T. Coffey and *McGilton & Smith, contra.*

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., BROWN and ELDRED, District Judges.

ELDRED, District Judge.

The plaintiff brought this action to recover for damages on account of injuries alleged to have been sustained by falling on a sidewalk in front of defendants' place of business in the city of Omaha. The plaintiff contends that a down-spout on the east side of defendants' building discharged water upon and across the sidewalk adjacent to the defendants' premises; that the defendants negligently permitted the water to freeze and form ice on the sidewalk; that they failed to remove the ice; that a light snow fell on the ice; and that the plaintiff, being wholly unaware that there was ice on the sidewalk, stepped on the covering of snow, and slipped on the ice underneath, causing him to fall and receive the injuries of which he complains.

The defendants deny all liability, and in addition thereto plead that, if any injuries were suffered by the plaintiff, the same were due to the carelessness and negligence of the plaintiff, in this, that the plaintiff knew, or had cause to know, of the existence of the ice on said sidewalk, if any existed at the time, and that the plaintiff was at said time passing along said street in a careless and negligent manner, and was not observing or attempting to observe the condition of the sidewalk, and that his injuries, if any, were due to the careless and negligent manner in which he was proceeding, and that he was not exercising due care and caution.

The trial resulted in a verdict and judgment for the defendants.

Error is assigned in submitting to the jury the question of negligence on the part of the plaintiff. The evidence, while conflicting, shows that the plaintiff had at least some familiarity with the location and condition of the walk at the place of accident; that he occasionally walked over it, and had done so during the cold and freezing weather the same month. The weather had been continuously cold for some days, and at the time of the accident was very cold, about six degrees above zero,

the plaintiff was carrying some groceries and was going on a slow trot or a "dog trot" along the sidewalk in question; the sidewalk was of concrete, and had a driveway where automobiles entered the building, which was somewhat slanting toward the curb. Under the testimony in this case, whether the plaintiff was proceeding with such care as an ordinarily prudent person would exercise under similar circumstances was a question of fact, as to which different minds might draw different conclusions, and was therefore properly submitted to the jury.

Complaint is made of giving instructions Nos. 5 and 11 to the jury. These instructions were called for on account of submitting the issue of plaintiff's negligence to the jury. Having reached the conclusion that the court was justified in submitting the question of contributory negligence to the jury, it follows that such instructions were properly given.

Instruction No. 11 is further criticised as advising the jury that, if they should find certain facts to be true, they must find that the plaintiff was negligent. As we read the instruction, it is not subject to that criticism. The jury are merely informed that, if the plaintiff had knowledge of the facts referred to, then the plaintiff was bound to use due care and caution in passing over the walk, and that the failure of the plaintiff to use such due care and caution would be negligence.

It is further contended by the appellant that the trial court erred in failing to instruct the jury that the burden was upon the defendants to prove by a preponderance of the evidence, the plaintiff's alleged contributory negligence. By instruction No. 4 the jury were told that the burden of proof was on the plaintiff to prove by a preponderance of the evidence the negligence charged in the petition; that such negligence was the proximate cause of his injury; and the amount of damages he suffered, if any; and that, if the plaintiff had proved all the above facts by a preponderance of the evidence, the plaintiff

would be entitled to recover; but, if the jury found from a preponderance of the evidence that the plaintiff was guilty of negligence, which contributed to cause his injury, then the plaintiff's right to recover would be governed or modified by the rule set forth in instruction No. 5.

We believe that instruction No. 4 clearly sets forth the rule applicable in this case. The plaintiff was told what he must establish by a preponderance of the evidence, and that, if he did so, he could recover; but, if the jury found by a preponderance of the evidence that he was guilty of contributory negligence, that his recovery would be governed by the rules set forth in instruction No. 5. Instruction No. 5 states the right of recovery in the event of contributory negligence and of comparative negligence. Under instruction No. 4 the jury could not have mistaken on whom the burden rested to prove contributory negligence. While the burden rested upon the defendants, yet, the jury, in determining that question, would properly take into consideration, not only the evidence offered by the defendants, but the evidence offered on behalf of the plaintiff as well. The instructions given sufficiently stated the rule. If the plaintiff desired a more specific instruction on that point it should have been requested.

AFFIRMED.

ETTA V. HIGGINS, APPELLEE, V. IRA R. DOTY, APPELLANT.

FILED JANUARY 13, 1922. No. 21691.

1. **Appeal: DIRECTION OF VERDICT.** Where the evidence on the trial in the district court is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, a verdict directed by the court in accordance with such conclusion will not be disturbed on appeal.
2. **Marriage Contract: BREACH: EVIDENCE.** In an action for damages for breach of promise to marry, it was proper for the trial

court to receive in evidence testimony of the plaintiff giving conversations during the courtship, in which defendant told her what he was worth financially and of what his property consisted.

3. ———: ———: INSTRUCTION. In such a case, where plaintiff was the only witness and the above was the only proof on the subject, it was not error for the court to instruct the jury that an element for them to consider, in measuring the damages, was the value of the defendant's property and his financial standing.

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

Stiner & Boslaugh, W. G. Hastings and *W. M. Whelan,* for appellant.

J. E. Willits, contra.

Heard before LETTON, DAY and DEAN, JJ., CORCORAN and GOSS, District Judges.

GOSS, District Judge.

Plaintiff sued defendant for damages for breach of his alleged promise to marry her. The jury returned a verdict for plaintiff, judgment was rendered thereon, and defendant appeals.

Plaintiff was the only witness. She introduced thirteen letters received from the defendant, testified in her own behalf, was cross-examined, and rested. Defendant offered no evidence. The court, on his own initiative, gave the jury two instructions: First, to return a verdict for the plaintiff; and, second, defining the measure of damages. The defendant tendered three instructions on his theory of the case and they were refused.

Appellant argues strenuously that the court erred in deciding as a matter of law that the evidence conclusively showed a contract of marriage between the parties. He insists that the evidence does not show mutual promises, and particularly does not show that she agreed to marry him.

The letters from appellant to appellee were written by

him at Hastings, his home, to her at Beatrice, where she was temporarily, between August 2, 1915, and June 4, 1916. He was a bachelor, an auctioneer, trader, owner of farm lands and of rental property in the city of Hastings. She had been unmarried for about eight years, following a divorce obtained from her husband. The parties had been acquainted for years. At one time she had rented a house from him and he had boarded with her and her family therein. She says there had been oral talk of marriage between them, and she was pleased when she received a letter, dated August 15, 1915, from him, in which, following some observations about members of his family, he wrote: "I expect they will all go up in smoke when you and I are married. But they will have to go. I only wish I had of built last summer and now I would of had a home." His letters are replete with suggestions of repairing a house to live in and of building a new one, and the like. They contain expressions such as: "And it is going to be hard to get a place while we build." "My, how I wish we had the house finished and we were settled in it." "Erma (his niece) is planning on staying with us for a while at least. * * * The north flat is vacant. Believe I will rent it and put her things in it and then we will be handy to build." "It is you I want to be careful, for I am going to need you so bad by and by and you cannot tell how soon." "We may have to take Erma to live with us. I told her I was going to marry you. Lovingly, Ira."

These sufficiently express the marital intention of appellant and she testified that there were oral expressions by him of like character. But it is argued that the promises were not mutual, in that she failed to show any promise on her part. Appellant seems to overlook the question on cross-examination and her answer, when she said that her letters to him (none of which were put in evidence) indicated that she wanted to marry him. Moreover, the oral evidence shows that he went to visit

her several times in Beatrice, and they discussed this marriage, the building of their future home on his Fifth street lot in Hastings, and he set the first of the year as the date for their marriage.

We conclude from all the evidence that there were mutual promises of marriage, and that both parties were bound thereby. Different minds could not honestly draw different conclusions from the undisputed facts. No jury of reasonable men could have found differently. The court did not err when he directed a verdict for plaintiff. *Burke v. First Nat. Bank,* 61 Neb. 20; *Cannell v. Roush,* 89 Neb. 289; *Thomas v. Otis Elevator Co.,* 103 Neb. 401.

Appellant says the court erred in his second instruction to the jury, in which he instructed the jury that, in taking into consideration the loss of a home and the comforts which ordinarily would result to the plaintiff, they might consider the value of the defendant's property and his financial standing. He asserts that there is no competent evidence in the case as to his actual wealth or as to his reputed financial standing. The plaintiff testified that the defendant told her during the engagement that he was well fixed, was making money right along, and that he was worth $70,000 or $75,000. But appellant argues that it was error, under the rule announced in *Stratton v. Dole,* 45 Neb. 472, to permit her to testify to statements made by appellant to her as to his property or as to his actual wealth. We find, however, that in *Stratton v. Dole* the plaintiff was permitted to relate what the mother of the defendant told her, touching the defendant's property and its value. Ordinarily hearsay, this evidence was admitted on the theory that the mother, at the request of the son, having procured the plaintiff to receive him as a suitor and being otherwise actively engaged in promoting the marriage agreement, was his agent. If the agent can bind her principal in such circumstances, it must be true that the principal can bind himself to similar declarations as

to property and as to financial worth in a like case.

The only evidence in this case was that furnished by the plaintiff. She did not undertake on her own initiative to specify defendant's property or to give his reputed financial worth. She merely told what he had said to her as to his property and his financial worth. The context, separated only by a semicolon, properly limited their consideration to the evidence in the case. So we cannot find, under the unique circumstances of this particular case, that the court erred in telling the jury that one element in the evidence for them to consider was the value of defendant's property and his financial standing.

It is urged that the damages are excessive. Such matters are, within reason, for the jury to assess. However, when we consider the meager, indefinite and second-hand character of the evidence as to the financial worth of the defendant and the general circumstances shown in the evidence, we think $7,500, will fully compensate the plaintiff. If plaintiff will file a remittitur of $2,500 in this court within 20 days, the judgment in the lower court will be affirmed for $7,500 as of its date; otherwise, it will stand reversed.

AFFIRMED ON CONDITION.

THOMAS REIGLE, APPELLANT, V. MICHAEL CAVEY, APPELLEE.

FILED JANUARY 13, 1922. No. 21577.

1. **Appeal:** REVIEW. When a case is brought to the supreme court on appeal without a bill of exceptions or special findings, the only question that can be considered by this court is the sufficiency of the pleadings to sustain the judgment of the lower court.
2. **Pleadings** examined, and found sufficient to sustain the judgment of the district court.

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

V. E. Garten, A. E. Garten and *O. M. Needham,* for appellant.

Albert & Wagner and *Vail & Flory, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., GRAVES and WELCH, District Judges.

GRAVES, District Judge.

This action was brought by the plaintiff and appellant against the defendant and appellee, in the district court for Boone county, to recover the sum of $978.62 and interest accrued.

Plaintiff alleges in his petition that at a general election held on the 7th day of November, 1916, the plaintiff was duly elected to the office of county commissioner for district No. 1, of said county, the term of office commencing January 4, 1917; and duly qualified and gave bond as required by law, and the same was duly approved; that on said 4th day of January, 1917, plaintiff presented himself as such commissioner at the courthouse and demanded to be recognized as said commissioner and attempted to exercise the duties of said office; that on said day plaintiff was prevented from taking possession of said office by reason of a restraining order duly issued at the instance of the defendant herein, and by reason of said restraining order plaintiff was kept from exercising the duties of his office or from receiving the salary connected therewith; that upon a trial thereon said restraining order was made permanent by the district court for Boone county; that plaintiff appealed from this decision to the supreme court of this state, and upon a hearing thereon the supreme court reversed the judgment and orders of the lower court, dissolved said injunction, and dismissed the action of said Mitchael Cavey, defendant herein; a mandate from the supreme court was filed in the office of the clerk of the district court for Boone county, and thereupon this plaintiff obtained possession of said office on or about the 5th day of March, 1918; that the said Michael Cavey took possession of said office and held the same from the 4th day of

January, 1917, to the 5th day of March, 1918, and collected and was paid the entire salary and earnings of said office by the county treasurer of said county; that the salary so unlawfully and wrongfully collected during said period by said Cavey, with interest, amounted to the sum of $978.62, to the damage of the plaintiff in said sum, no part of which has been paid by said Cavey, and the same is still due and wholly unpaid; that during all of said time plaintiff was a resident of said county, ready and willing to perform the duties of said office, and would have done so if not wrongfully restrained by defendant.

On the 5th day of February, 1920, defendant filed his answer, containing a general denial to the allegations of the petition not admitted therein, and admitted the holding of the election on November 7, 1916, for said office, and that the term of office commenced January 4, 1917; admitted that defendant received the income of the said office from January 4, 1917, to the 5th day of March, 1918, in the amount claimed in the petition. Other matters are alleged in the answer unnecessary to consider. The prayer of the answer was for a dismissal of the action.

It appears that the answer was not on file on the date of the trial, but was afterward drawn, presented to counsel for plaintiff, and with their consent and by order of the trial judge the clerk filed the answer of date February 5, 1920, on which date trial was had, and judgment entered as follows, to wit:

"This case came on for decision, it having been heretofore tried and submitted to the court first on a demurrer of the defendant to the petition, and thereafter the parties in open court agreed to dispense with the services of a jury, and the plaintiff stating in open court that if said demurrer was sustained the plaintiff would stand upon his petition, and the defendant stating in open court that if the demurrer was overruled he would stand upon his demurrer; and, thereupon, the parties

agreed to submit the case on the merits to the court.

"Evidence was received, and the court now being fully advised in the premises finds generally for the defendant and that plaintiff has no cause of action.

"It is therefore considered and adjudged by the court that the petition of the plaintiff be dismissed and the defendant go hence without day. Costs of this action taxed at $———," etc.

On the 7th day of February, 1920, motion for new trial was filed, in substance, as follows: (1) The finding and judgment of the court are contrary to law. (2) The finding and judgment of the court are contrary to the evidence. (3) The court erred in his finding and judgment for the defendant and against the plaintiff. (4) For errors of law occurring during the trial in admission of evidence.

On the 15th day of March, 1920, motion for new trial was overruled, and the case is here on appeal.

The record contains no bill of exceptions, the only question presented to this court being, do the pleadings sustain the judgment of the district court? With a general denial in the answer it was incumbent upon plaintiff to establish by a preponderance of evidence all the allegations of his petition not admitted in the answer.

All presumptions are in favor of the regularity of the proceedings of the district court. Error is never presumed, and must affirmatively appear from the transcript. *McIntyre v. Mote,* 77 Neb. 418; *Wilson v. Dallas,* 84 Neb. 605; *Davison v. Land,* 89 Neb. 58.

In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence, and such issue correctly determined. *Backes v. Schlick,* 82 Neb. 289; *Miles v. State,* 74 Neb. 684; *Kerr v. Adams County,* 96 Neb. 178.

The pleadings sustain the judgment. It follows that the judgment of the district court should be affirmed.

AFFIRMED.

JOHN A. ECKERMANN, APPELLEE, V. JAMES MCDONOUGH, APPELLANT.

FILED JANUARY 13, 1922. No. 21885.

Leases: ALTERATION: PAROL EVIDENCE. The lessee, who has not the original lease or a duplicate in his possession or under his control, may introduce in evidence the original lease, in the possession of the lessor, or a photostat copy of the same, when such copy is authorized by law; and if such lease shows upon its face material alterations or additions, he may introduce parol evidence to prove that such alterations or additions were not a part of the lease at the time he signed the same, and that they were made without his knowledge and consent.

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

Mark J. Ryan and *Baldrige & Saxton,* for appellant.

A. M. Smith and *O. C. Anderson, contra.*

Heard before MORRISSEY, C. J., ALDRICH and FLANSBURG, JJ., HOSTETLER and MORNING, District Judges.

HOSTETLER, District Judge.

This is an action of forcible detention brought by the plaintiff against the defendant in the county court of Thurston county.

Plaintiff alleged that on December 14, 1918, he purchased from the heirs of Red Cloud Woman at an Indian land sale held at Winnebago Indian Agency, Winnebago, Nebraska, the real estate in controversy; that said purchase was duly approved by the department of the interior; that on November 3, 1919, he received a patent from the United States conveying to him the premises in fee simple; that he is the owner of said land and entitled to the immediate possession thereof; that defendant wrongfully remains in possession of said premises under leases which clearly show that they are terminated by the sale of the property; that on February 25, 1920,

plaintiff served notice upon the defendant to vacate said premises on March 1, 1920.

To this petition the defendant entered the plea of not guilty. The case was tried in the county court and the county judge found for defendant and entered judgment in his favor. Plaintiff appealed.

The case was tried in the district court before a jury. After plaintiff introduced his evidence and rested, defendant moved for a directed verdict, which the trial judge denied, and this ruling was excepted to by defendant. Defendant then introduced his evidence and rested. Plaintiff then moved for a directed verdict in his favor and against the defendant, which motion the trial judge granted, and a verdict and judgment were duly rendered in said court in favor of the plaintiff and against the defendant. From this verdict and judgment defendant appeals to this court.

Defendant claims to hold the premises under three written approved government Indian leases executed by the heirs of Red Cloud Woman to the defendant for the term of five years, beginning on the 1st day of March, 1918. Defendant contended that the leases could not be terminated by a sale of the property, and that certain typewritten words, "all lands are leased subject to sale," were not in or a part of said leases when he signed the same. These words were typewritten; they were at the top of the lease; in at least two instances they were changed by handwriting. Plaintiff claimed these words were a part of the leases. Defendant denied such claim, and contended that they were not a part of the leases, either legally or as a matter of fact, and offered testimony to show that they were not on the leases when he signed the same.

The undisputed evidence shows that defendant did not retain copies of the leases at the time they were executed. In order to prove such leases he was compelled to procure and use photostat copies of the same. Such certified copies were admissible under 27 U. S. St. at Large, ch.

256, p. 272. They were admitted in evidence. The defendant, then, for the purpose of showing what the instruments were when they became binding on the parties, and that the words, "all lands are leased subject to sale," were a memorandum or addition made subsequent to the signature of defendant, asked the following question:

"Q. When you signed that original lease (Exhibit 4), was there any provision in it, 'all lands are leased subject to sale?' "

An objection thereto was sustained on the ground that defendant having offered the instrument could not impeach the same. The offer of this answer was then made:

"I examined the lease before I signed it and I know to a certainty that such words were not on it or in the lease when I signed it up."

Similar questions were asked and offers made to the other two leases. Objections to such offers were sustained, and defendant excepted.

The question as squarely presented is, "Did the court err in refusing that evidence?" The leases show material alterations upon their face. Such alterations might be valid or invalid, depending upon the evidence. The presumption is that any alterations of an instrument shown upon the face of the same were made before it was signed and delivered, and the burden of proving an alteration lies upon the person who asserts it to have been made. *Musser v. Musser,* 92 Neb. 387; *Dorsey v. Conrad,* 49 Neb. 443; *Colby v. Foxworthy,* 80 Neb. 239. It follows that if defendant could not introduce evidence as to such alteration, he must be bound by the leases as altered, no matter how wrongfully they may have been changed. In the case of *Henny Buggy Co. v. Patt,* 73 Ia. 485, it is held that written instruments are not witnesses. A party may offer in evidence an instrument in writing and afterwards discredit it for the purpose of showing the fraud connected therewith. In the case of *Dorsey v. Conrad,* 49 Neb. 443, this court has held that an instrument showing material alterations may go in evidence in the first

instance, leaving the parties to such explanations of the alterations as they may choose to offer. In said case it is held that either party may offer evidence. It is immaterial which party offers the instrument. It often happens that a plaintiff offers in evidence an instrument that shows changes. He is allowed to explain that such alterations were made by a stranger or by subsequent agreement of the parties. The defendant certainly has the right to repudiate material alterations in his contract, made without his consent and subsequent to the time he signed the same. The defendant in this case was compelled to offer copies of the leases in the possession of the lessor. If the defendant must be bound by such lease, no matter how much it may have been changed, then the door to fraud would be wide open. A party who is compelled to call a witness may discredit him. 40 Cyc. 2560, and cases cited. In this case defendant was compelled, in order to prove his right to possession, to introduce the leases in possession of the lessor. He clearly had the right to show that the alterations or additions were not on the leases when he signed the same.

From the above cited authorities and upon reason we conclude that the trial court erred in refusing to permit defendant to introduce in evidence the proffered testimony. Since there must be a retrial of the case, it is suggested that in support of the defendant's theory of the case the notice of the sale of the land, in which it is stated that defendant's leases expire March 1, 1922, should be admitted in evidence, if the proper foundation is laid and if same is offered by defendant as a part of his own evidence. If it is found that the words, "all lands are leased subject to sale," were a part of the lease at the time defendant signed the same, then, as said in *Van Sant v. Beuder*, 101 Neb. 680, such clause may be interpreted as being a conditional limitation, and, when sale was made of the premises, the lease terminated, and

the purchaser would be entitled to possession at the end of the rental year.

REVERSED AND REMANDED.

JOHN THOMAS RYNE, APPELLEE, V. LIEBERS FARM EQUIPMENT COMPANY, APPELLANT.

FILED JANUARY 13, 1922. No. 21894.

1. **Master and Servant:** NEGLIGENCE OF CHAUFFEUR. Where a servant, while driving an automobile, in his master's service, from the garage where it was kept to his place of employment, deviates slightly from the direct route, the master will not, merely on account of such deviation, be relieved from responsibility for the servant's negligence in the use of the automobile, whereby a third party is injured.
2. **Appeal:** REVIEW. A party will not be heard to complain in this court of the admission of evidence in the trial court to which he made no objection or exception.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

Max V. Beghtol, Rinaker, Kidd & Delehant, Carl E. Sunden and *Carlisle L. Jones,* for appellant.

Richard F. Stout, contra.

Heard before LETTON, DEAN and DAY, JJ., BEGLEY and HOSTETLER, District Judges.

HOSTETLER, District Judge.

John Thomas Ryne prosecuted this action to recover damages from the Liebers Farm Equipment Company for personal injuries sustained by him as a result of being run into by a Ford truck owned by the Liebers Farm Equipment Company and operated by one L. F. Lindgren. Plaintiff alleged that said Lindgren was in the employ of the defendant and engaged in its business at the time of the collision. Negligence in the operation of the car by Lindgren was charged and damages were asked in the sum of $10,500.

The defendant denied generally the allegations of the petition, and alleged that, if plaintiff sustained any injuries, the same were caused by his own negligence.

The case was tried to a jury, and a verdict for $2,700 was returned for the plaintiff. Judgment was entered upon the verdict, and defendant appeals to this court.

The defendant admits that the driver, L. F. Lindgren, was guilty of negligence which caused plaintiff's injuries, and that the verdict is not excessive. The facts upon which these concessions are made and the instructions in so far as they relate to these propositions will, therefore, not be further considered in this opinion.

The appellant contends that the evidence fails to show that L. F. Lindgren, the driver of the truck, was at the time of the collision in the employ of defendant and engaged in its business with its knowledge and consent; that, for that reason, the verdict is not sustained by sufficient evidence. An examination of the evidence upon this point must be made.

O. H. Liebers, president of defendant, testified: "Q. And that truck was owned by the Liebers Farm Equipment Company? A. It was. Q. Upon the date of this injury? A. Yes, sir."

C. B. Gregory, who kept the Motor Inn, testified that defendant kept the truck in question there at the time of the accident.

Plaintiff testified: "Q. What did Liebers say about Mr. Lindgren? A. He said he was working for him. Q. When? A. At the time he hit me."

Mr. L. Ryne testified, in substance, that he talked with Mr. Liebers about Lindgren, and that Mr. Liebers said Lindgren was working for them after school hours, and that on the evening he hurt my boy he (Liebers) sent him over for the truck, and that he told Lindgren to get the truck and come back as he usually had done; Liebers said Lindgren was driving the truck at the time he ran over the boy; Liebers said Lindgren was working for him at the time he ran over the boy; Liebers said I

or we sent Lindgren over, I am sure he said one or the other.

Lawrence Lindgren's deposition was offered by defendant. He testified as follows: "Q. Had you ever driven a truck for them? A. At times. * * * Q. Went down and got their truck? A. Yes. Q. Where were you going to take the truck to, back to the store? A. Back to the Liebers Farm Equipment Company. * * * Q. You had driven the truck before that day? A. Yes. * * * Q. Who did you see down there that afternoon? A. Down where? Q. At the Liebers Farm Equipment Company? A. I saw the members of the firm. * * * Q. And prior to this time you had gone after the truck yourself? A. Yes. Q. And taken it over there? A. Yes. * * * Q. And you had been doing that for some time; is that true? A. Why, in part true. Q. In what part? A. I would not know where the truck was unless I was told to go and get it, and where it was. Q. That is true, isn't it? A. Yes. * * * Q. You had taken it out of there (Motor Inn) before? A. Yes. Q. Then you went there to get it, for the defendant in this case, that is true, isn't it? A. Yes. * * * Q. You were on your way back to the Farm Equipment Company when this accident happened? A. Yes. Q. With the intention of delivering the truck to them? A. Yes. Q. Did not have any other purpose, did you? A. No, did not have any other purpose. Q. Did you ever know of it (the truck) being used for any other purpose than making deliveries? A. Not specifically. Q. And you never used it for any other purpose than for making deliveries, that is a fact, isn't it? A. Presently, I cannot think that I used it for any other purpose. * * * Q. So, as far as you know, that car was always used in the business of the Liebers Farm Equipment Company and for no other purpose? A. Perhaps not always used. Q. So far as your knowledge goes? A. There was another car used at times. Q. But, so far as your knowledge goes, that

car was never used for anything else than their business? A. That is probably true. * * * Q. But you never used it for any purpose other than the business of the company? A. No. Q. And whenever you drove the car it was on their business? A. As far as I know. Q. At the time you drove north on Fourteenth street, and came to the end of the north side of Fourteenth and O, you were driving that truck? A. Yes. Q. And it is the same truck you have referred to in this testimony? A. Yes. * * * Q. Why did you go to get the truck? A. Perchance I should make some deliveries that afternoon the reason I got it. Q. For the Farm Equipment Company? A. Yes. Q. And you had been in the habit of going after the truck without their giving you express direction? A. Yes." On cross-examination he stated, in substance, that he was a sort of a shipping clerk; not a regular employee; Mr. Shelley was his superior; so far as he recalled he went after the truck on that day without specific instructions; could not recall why he went the route from the Motor Inn to the store; may have been curiosity, could not recall; did not deliver goods for them on the way; the Western Paint & Glass Company fire had been a big one.

Charlie Smith testified that the truck in question had been kept in the Motor Inn for some time prior to the accident; that prior to the accident he had upon several occasions observed Lindgren coming after the truck and taking it away, and had observed him returning the truck to the garage; that the engine was giving trouble by back-firing on the day of the accident when Lindgren took the car.

Walter Anderson testified that after the accident Lindgren drove the car to defendant's place of business, where he talked with the men in charge.

Mr. Liebers denied the testimony of plaintiff and L. Ryne as to his admission, and he was corroborated by other witnesses. The evidence of Mr. Lindgren is more or less uncertain and contradictory; he appeared re-

luctant to testify; he was defendant's witness. It was the duty of the jury to weigh the evidence. It was undoubtedly conflicting. The jury could fairly find from the evidence that Lindgren, according to his custom and by previous direct or implied authority, went after the truck with the intention of bringing it to the place of business of defendant and making deliveries, as he had often done before. Express directions from the master are not necessary to make him responsible for the acts of his servant. The character of his work had been outlined for him before the day of the accident. He was not required to wait for specific orders for every act or performance. A servant of that kind would be useless. A farm hand who would wait to have the master tell him every morning to hitch up his team and go to work would not hold his job very long. There is no evidence that this young man went after the truck for his own personal use. He went after it so he could deliver orders. He certainly had implied authority to do that.

The fire referred to was near the Motor Inn, and was not on the route he took and could not have been the cause of the detour. The detour he made was slight and negligible. The defendant had never directed him as to what route he should take. He therefore had a reasonable discretion. The traffic was heavy on the nearest route. His engine was not working well. Perhaps he thought best to keep out of the crowd. It is common knowledge to every one who runs an automobile that situations in front of one frequently require detours as a matter of safety.

From a careful reading of the evidence in this case, the court finds that the evidence is conflicting, and that the verdict of the jury is sustained by sufficient evidence. The verdict of a jury based on conflicting evidence will not be disturbed in this court. *Parker v. Loudon,* 80 Neb. 647. When the verdict of a jury is found upon conflicting testimony, the supreme court will not inquire into the preponderance of the evidence. *Cady Lumber*

Co. v. Wilson Steam Boiler Co., 80 Neb. 607.

Appellant insists that the trial court erred in refusing to give instruction No. 1, requested by defendant, as follows: "You are instructed to find the verdict in favor of the defendant and against the plaintiff." In *Bank of Cortland v. Maxey,* 102 Neb. 20, this court held: "The trial court should not direct the verdict of the jury unless the evidence is so clear upon every point upon which the verdict must depend that reasonable minds could not come to any other conclusion." The evidence in this case is conflicting. The jury, and not the court, must determine the facts. The instruction was properly refused.

Appellant complains that the court erred in refusing to give defendant's instruction No. 3. The first part of the court's instruction No. 11 is practically identical with defendant's instruction, except that the trial judge used the word "directions" and the requested instruction used the words "express directions." The language of the court fairly submitted the issue and stated the law correctly. Express instructions are not required. Authority express or implied is sufficient.

Appellant complains of the refusal of the court to give defendant's requested instructions No. 4 and No. 5. The instructions of the court, Nos. 11, 9, and 2, covered these requests fairly in so far as the requested instructions stated the law.

Appellant also complains of the failure of the court to give instruction No. 8, requested by defendant, as follows: "You are instructed that if you find from the evidence that the driver, Lindgren, secured defendant's truck without authority and direction of the defendant, but in express violation of his instructions, then defendant would not be liable in this case; you will then find for the defendant by your verdict." This instruction is given by the court in instructions 11, 9, and 2, except the words, "but in express violation of his instructions." There is no evidence in the record that Lindgren violated express instructions in going after the car. But the

court in his instructions told the jury to find for defendant if Lindgren went after the car without authority. Clearly, if Lindgren was told not to get the car, he would be acting without authority. The court properly refused the instruction.

Appellant complains that the trial court in instruction No. 11 stated that the mere fact of the detour in this case would not excuse the defendant. The deviation in this case under all the circumstances must appear to every reasonable mind slight or negligible. A variation of a couple of blocks in a city of congested traffic and varying conditions is not unreasonable. The defendant did not request the court to give an instruction submitting to the jury the question of whether the detour was slight or gross. In Berry, Automobiles 3d ed.) sec. 1086, it is said, quoting *Ritchie v. Waller,* 63 Conn. 155, 27 L. R. A. 161, 38 Am. St. Rep. 361, which has become a leading case: "In cases where the deviation is slight, and not unusual, the court may, and often will, as matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury."

It is generally held that slight deviation by the servant will not relieve the master from liability. Berry, Automobiles (3d ed.) sec. 1086; *Gibson v. Dupree,* 26 Colo. App. 324; *Ritchie v. Waller,* 63 Conn. 155;*Krzikowsky v. Sperring,* 107 Ill. App. 493; *Chicago Consolidated Bottling Co. v. McGinnis,* 51 Ill. App. 325; *Quinn v. Power,* 87 N. Y. 535, 41 Am. Rep. 392; *Pierce-Fordice Oil Ass'n v. Brading,* 212 S. W. (Tex. Civ. App.) 707; *Fisick v. Lorber,* 95 Misc. Rep. (N. Y.) 574; *Joel v. Morrison,* 6 Carr & P. (Eng.) *501; Babbitt, Motor Vehicles (2d ed.) sec. 884; *Jones v. Weigand,* 119 N. Y. Supp. 441; *Witte v. Mitchell-Lewis Motor Co.,* 244 Pa. St. 172; *Luckett v.*

Reighard, 248 Pa. St. 24; *Guthrie v. Holmes,* 272 Mo. 215.

We conclude that the instructions of the trial court are free from prejudicial error. Defendant's theory of the case was fairly submited to the jury. We are satisfied, after an examination of all the instructions given and those refused, that the jury were properly instructed upon the law of the case.

Defendant complains of the admission of the evidence concerning the alleged statements made by Mr. Liebers about Lindgren's employment. This evidence was admitted without objection. Where testimony is introduced without objection, error will not lie upon the ground that the testimony was improperly admitted. *Goken v. Dallugge,* 72 Neb. 22; *Olmstead v. City of Red Cloud,* 86 Neb. 528; *Wood v. City of Omaha,* 87 Neb. 213.

From a careful review of the entire proceedings in this case, we conclude that the judgment is right and ought to be affirmed, and it is so ordered.

AFFIRMED.

KLEIN MANUFACTURING COMPANY, APPELLANT, V. GLENDALE MORGAN, APPELLEE.

FILED JANUARY 13, 1922. No. 21915.

Master and Servant: SALES: COMMISSIONS. Where the agreement between the selling agent and his principal provides that commissions are earned and payable only in the event of payment of the purchase price by the persons to whom the agent may sell, the agent is not entitled to a commission if the buyer fails to pay.

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

Crane, Boucher & Sternberg, for appellant.

William M. Burton, contra.

Heard before MORRISSEY, C. J., ALDRICH and FLANSBURG, JJ., HOSTETLER and MORNING, District Judges.

HOSTETLER, District Judge.

The plaintiff in its petition alleges that, under and by virtue of a written contract of sales agency, it had advanced to defendant $526.38; that the commissions earned by him amounted to $62.01 only, and judgment was prayed for the difference, $464.37.

The defendant filed an answer and counterclaim. There were two causes of action alleged in the counter-claim. In the answer the defendant admits the execution of the contract, and that in pursuance of the terms of the contract he placed certain orders for plaintiff's goods, and admits that plaintiff had advanced to him the sum of $526.38. For further answer defendant denies that the commissions earned by him amounted to only $62.01, and denies that he was in any way indebted to the plaintiff.

Defendant in his first cause of action alleges that, by virtue of his contract of employment, he sold goods for plaintiff and earned commissions in the making of such sales to the amount of $551.07 over and above the sum advanced to him by plaintiff. For this sum defendant demands judgment.

For his second cause of action defendant charges fraud and misrepresentation in the making of the contract, and that the conditions of the territory were misrepresented to him, and that he was thereby compelled to sell goods for Platner Lumber Company, and that the reasonable value of his services for said Platner Lumber Company in selling such goods was the sum of $500.

The plaintiff for reply admits receiving the Kraus orders, but charges that it was compelled to take back part of the goods sold, and that for such goods defendant was not entitled to a commission. Plaintiff also admits the receipt of the Platner Lumber Company orders, but alleges that said company canceled said orders and refused to receive the goods. Plaintiff further denies generally the allegations of the answer and counterclaims not admitted.

At the trial the plaintiff admitted that the defendant

had earned the commissions claimed on the Kraus orders and on the mail orders. The amount of these orders was $526.38, and just equalled the sum of money plaintiff had advanced. These items, therefore, being conceded, need not be further considered in this opinion. This leaves for consideration in defendant's first cause of action only the Platner Lumber Company commissions. Plaintiff denies that defendant ever earned such commissions under the contract.

The case was tried to a jury, and at the conclusion of the evidence the trial judge stated that there was no dispute as to the facts, and accordingly he discharged the jury and rendered judgment. The trial court allowed the Platner Lumber Company commissions and rendered judgment therefor against the plaintiff, and plaintiff excepted and appeals to this court. The court found for plaintiff on defendant's second cause of action, and defendant excepted and appeals to this court.

To support his second cause of action, defendant offered in evidence exhibit 10, being a letter from plaintiff to defendant. Defendant contended that by said letter he was employed to sell metal crete for Platner Lumber Company. The offer was objected to and the trial judge sustained the objection. His ruling was correct. Nothing in exhibit 10 can be construed into an employment of the defendant by the plaintiff to sell metal crete for Platner Lumber Company at the expense of plaintiff.

Defendant further offered to prove that the measure of his damages, because of alleged misrepresentations by plaintiff at the time the contract was executed, was the reasonable value of his services in selling a quantity of metal crete for Platner Lumber Company. An objection to this offer was sustained. This ruling was in accordance with the law. Plaintiff had employed defendant to sell metal crete for it, and not for Platner Lumber Company. If defendant performed services for Platner Lumber Company, they should pay him. By no rule of law could the value of defendant's services in selling goods

for Platner Lumber Company, under the evidence in this case, become the measure of defendant's damages.

The findings and judgment of the court as to his disposition of defendant's second cause of action are approved.

We then have left for consideration only the Platner Lumber Company commissions. The undisputed evidence shows that the defendant procured two orders from Platner Lumber Company for metal crete; that there was written upon these orders, "No countermand accepted;" that these orders were sent to plaintiff by the defendant; that, before these goods were shipped, Platner Lumber Company wrote plaintiff as follows:

"Gentlemen: Since we gave your Mr. Morgan an order for metal crete we have felt that he might not be able to carry out his part of the contract, which caused us to place the order for the car with him, and that was that he agreed to market that part of the car during the summer which we were not able to ourselves dispose of, and before you allow the car to be shipped we would like to have your confirmation of this agreement and unless you are able to give it we will have to ask you to cancel the car."

In reply to this letter plaintiff wrote Platner Lumber Company, in which letter it answered the inquiry of defendant as follows:

"We try to dispose of as much as possible and keep a salesman in the territory and follow up every job possible, but we will not guarantee to dispose of one pound, as we consider this very unbusinesslike and we do not propose to go into any arrangement or make any shipments and afterwards have a controversy."

In reply to this letter Platner Lumber Company wrote plaintiff as follows:

"Gentlemen: We are in receipt of your letter of March 13th in regard to the car now ordered and seems that your understanding is not the same as Mr. Morgan's, and inasmuch as our experience with specialties

of this kind has not been very satisfactory, without a definite statement from the manufacturers, we will ask you to cancel the order outright."

There was considerable correspondence between plaintiff and defendant as to the Platner Lumber Company order. Plaintiff requested defendant to take the matter in dispute up with said company and adjust the same. Defendant replied in part:

"It makes no difference to me what they say. I know the circumstances of the order. If you had delivered the material when it was ordered you would have had the money and I would have had my commission. As it is, everybody loses. I wouldn't be bothered even calling on Platner."

The matter was never adjusted with Platner Lumber Company. It canceled the orders and refused to accept the goods. The goods were not shipped. Plaintiff is not shown to have been at fault for the cancelation. There is nothing in the agency contract which requires plaintiff to guarantee that it will sell for its customers goods left on hand at the close of the season. Plaintiff had the right to refuse to make such a guarantee to Platner Lumber Company. Platner Lumber Company's letter, exhibit 7, shows that it canceled the orders because plaintiff would not make the required guarantee.

Under this state of facts, what are the rights of the parties as measured by the agency contract? Both parties admit the contract and every part thereof. The federal and state constitutions prohibit legislation impairing the obligations of contracts. The freedom to enter into contracts is one of the highest privileges of American citizenship. The right to have a valid contract enforced according to its plain meaning is accorded to every citizen. The courts are not called upon to make contracts for litigants. The contract in this case is unambiguous. The intent of the parties is expressed in

clear language. The court must enforce the contract according to its terms.

In the first paragraph of the contract it is provided that the defendant shall receive a commission on the net amount of sales made by him, which shall be accepted and filled by the party of the first part and *paid for* by the purchaser. The second paragraph relates to the advancing of expense money by plaintiff to defendant. The third paragraph of the contract is in the following language: "Commissions shall not be considered earned until the amounts have been paid by the purchaser. No commission shall be paid on goods returned by a customer."

The contract plainly says that defendant shall be entitled to commissions on the net amount of sales made by him which shall be accepted and filled by plaintiff and paid for by the purchaser; that the commission should not be considered earned until the amounts had been paid by the purchaser, and that no commission should be paid on goods returned by a customer. Platner Lumber Company has never paid the purchase price for the goods ordered.

According to the law of this state, plaintiff could not maintain an action against Platner Lumber Company under the facts for the purchase price of the goods. *Backes v. Schlick*, 82 Neb. 289; *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623.

The agency contract did not require plaintiff to institute actions for damages against parties canceling their orders. It was to avoid just such expensive and uncertain proceedings that the provision, "no commission earned until purchase price of goods is paid by the purchaser," was placed in the contract.

In the case of *National Drill & Mfg. Co. v. Davis*, 29 Okla. 625, Clark and Skyles, Law of Agency, sec. 361, is quoted as follows: "Where the parties expressly agree that the agent's right to compensation shall depend upon certain contingencies or conditions precedent, an agent

cannot recover compensation for his services, unless all such contingencies have or have not happened, according to the agreement, or all conditions precedent prescribed by the contract have been performed or fulfilled."

It is also held by a large number of courts, as follows: "If the agreement between a selling agent and his principal provides that commissions are payable only in the event of payment of the purchase price by the persons to whom the agent may sell, the agent is of course not entitled to a commission if a buyer fails to pay." Note, Ann. Cas. 1915 B. 169. See *Hayner v. Trott,* 4 Kan. App. 679; *Westinghouse Co. v. Tilden,* 56 Neb. 129; *Stone v. Argersinger,* 53 N. Y. Supp. 63; *Aikins v. Thackara Mfg. Co.,* 15 Pa. Super. Ct. 250; *Thompson-Houston Electric Co. v. Berg,* 10 Tex. Civ. App. 200; *Blassingame v. Keating Implement & Machinery Co.,* 74 S. W. (Tex. Civ. App.) 344; *Park v. Mighell,* 3 Wash. 737.

Appellee has cited many cases, but necessarily in this class of cases each case must depend upon its own facts and contract. Some of the cases cited provide that the agent shall have a commission upon goods when sold. This is of course different than the contract in the case presented. The writer has carefully read and considered the cases, and finds no conflict in the law.

From the authorities cited, among which is the case of *Westinghouse Co. v. Tilden,* 56 Neb. 129, we conclude that the agency contract in this case does not, in view of the undisputed facts, entitle the defendant to recover commissions for the sale of the metal crete to Platner Lumber Company, and that the trial judge erred in allowing such commissions.

Since there will be no occasion for a new trial, the district court is directed to enter judgment after disallowing the Platner Lumber Company commissions.

REVERSED AND REMANDED.

FIRST STATE BANK, APPELLEE, V. JESSE INGRUM; CHAUNCEY SNYDER, APPELLANT.

FILED JANUARY 13, 1922. No. 21851.

1. **Process:** VENUE: SUMMONS TO ANOTHER COUNTY. A transitory action may be brought against two defendants jointly liable in any county in the state where one of the defendants may be served with summons, even though neither defendant is a resident of that county, and thereupon jurisdiction over the other defendant may be acquired by summons served upon him in the county of his residence.
2. ———: EXEMPTION FROM SERVICE. Where an action is commenced against two defendants to enforce a joint liability in a county in which neither defendant resides, and one of the defendants is served in that county and the other in the county of his residence, the latter cannot oust the court of jurisdiction over him by reason of the fact that the defendant who was served in the county where the suit is pending was at the time exempt from the service of summons because he was then in custody of the sheriff and had been brought into and was held in that county solely as a witness in certain criminal actions there pending, since such exemption was a personal privilege which the defendant so served could urge or not as he saw fit, and his codefendant could not claim the privilege for him.
3. **Appeal:** INSTRUCTIONS: REVIEW. "Error alleged in an instruction to the jury must be called to the attention of the trial court in the motion for a new trial before it will be considered by this court." *Stevenson v. Omaha Transfer Co.*, 87 Neb. 794.

APPEAL from the district court for Hooker county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

George W. Wertz, for appellant.

W. C. Heelan and *Horth & Ryan, contra.*

Heard before MORRISSEY, C. J., ALDRICH and FLANSBURG, JJ., HOSTETLER and MORNING, District Judges.

MORNING, District Judge.

The First State Bank of Whitman brought this action in the district court for Hooker county against Jesse Ingrum and Chauncey Snyder to recover damages for

fraud and conspiracy. There was a verdict and judgment against both defendants, and Snyder appeals to this court.

Appellant contends that the district court for Hooker county did not acquire jurisdiction over him by service of summons upon him in Colfax county, where he resided. The circumstances relative to the matter of service were not such as to enable Snyder to raise the jurisdictional question by special appearance and the matter was properly presented and preserved in his answer.

It appears that Snyder held a note for $3,000 against Ingrum, which was secured by a chattel mortgage upon 64 head of Ingrum's cattle. When said note matured Snyder called upon Ingrum for payment, and, the latter not then being able to pay, Snyder offered to reduce the indebtedness to $2,900 if Ingrum would borrow the money elsewhere and liquidate the obligation. Ingrum and Snyder called upon the plaintiff bank, and Ingrum borrowed from the bank $2,900 with which to pay Snyder's mortgage, and gave as security a chattel mortgage upon 92 head of cattle, including those described in the Snyder mortgage. The $2,900 thus borrowed was paid to Snyder in satisfaction of his note against Ingrum. When the bank's mortgage matured it was necessary for the bank to look to the security, and it then learned that Ingrum had included in the mortgage a large number of cattle which he did not own and which in fact had no real existence. The theory upon which the bank recovered against the defendants was that when Snyder called upon Ingrum for the collection of the $3,000 mortgage which the former held upon the latter's cattle, he learned that his security was inadequate because Ingrum did not have the number of cattle specified in the mortgage, and that, thereupon, the two defendants entered into a fraudulent conspiracy whereby they were to induce the bank to loan to Ingrum the funds to pay the Snyder mortgage by overstating the number of cattle which Ingrum actually had and by the execution of a mortgage by In-

grum upon a large number of cattle which he did not own, and that this conspiracy was effectually carried out and the loan from the bank procured thereby. Ingrum admitted the fraud and was the chief witness on behalf of plaintiff to prove the participation therein by Snyder. There is evidence in the record amply sufficient to justify the jury in finding that Snyder was a party to the fraud. In passing upon the jurisdictional question, therefore, the action must be viewed as one instituted and successfully maintained against the two defendants as joint tort-feasors. At the time of procuring the loan from the bank Ingrum resided with his wife upon a rented farm in Hooker county, but, having become implicated in other transactions of a criminal nature, he left said county to avoid arrest shortly thereafter, and did not again return for four or five months, when he was brought back by an officer to answer to a charge of cattle stealing, to which he pleaded guilty and was committed to the state penitentiary. Soon after he left Hooker county Ingrum's wife broke up housekeeping, sold the household goods and some other personal effects, started suit for divorce, and then went to the home of her father in Wyoming, where she has since resided.

While Ingrum was an inmate of the penitentiary he was taken to Hooker county in custody of the sheriff, at the request of the county attorney, to give testimony on behalf of the state in some criminal actions there pending, and while he was thus in custody in said county as a witness, and for no other purpose, this action was started, summons was served upon him in that county, and a summons for defendant Snyder was issued to the sheriff of Colfax county, where Snyder resided, and served upon the latter in that county. It is the contention of Snyder that neither he nor Ingrum resided in Hooker county at the time this suit was started, and that, since Ingrum, when served with summons in that county, was in the custody of the sheriff and being held in said county at the time as a witness, he was exempt from

service, and that service had upon Ingrum, under the circumstances, was not effective to authorize service upon Snyder in Colfax county.

It is conceded that this action is one falling within section 7620, Rev. St. 1913, which reads: "Every other action must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned."

The question whether or not Ingrum was a resident of Hooker county at the time he was served with summons is involved in doubt; but, as we do not consider it decisive of the jurisdictional question presented, we do not feel called upon to pass upon it, nor to decide whether, under the circumstances, the question was one for the court or for the jury. Actual service was had upon Ingrum in Hooker county. He was in a position, at the time, to claim exemption from such service had he seen fit to do so. He made no such claim, but, on the contrary, signed a document, immediately after the summons was served, whereby he entered his voluntary appearance in the action and this was at once filed with the clerk of the court. The exemption from service which he might have urged was a personal privilege which he alone could claim, and he had the right to waive it. 21 R. C. L. 1311, sec. 57; *Peters v. League,* 13 Md. 58; *Thornton v. American Writing Machine Co.,* 83 Ga. 288, 20 Am. St. Rep. 320; *Prentis v. Commonwealth,* 5 Rand. (Va.) 697, 16 Am. Dec. 782; *Massey v. Colville,* 16 Vroom (N. J.) 119, 46 Am. Rep. 754; *Thompson v. Michigan Mutual Benefit Ass'n,* 52 Mich. 522.

The action was rightly brought against Ingrum in Hooker county, and, being one to enforce a joint liability against the two defendants, it was proper to issue summons for Snyder to the sheriff of Colfax county and to serve the same upon him in that county. Rev. St. 1913, sec. 7627; *Ayres v. West,* 86 Neb. 297; *Wood v. Carter,* 67 Neb. 133.

The failure of Ingrum to object to the jurisdiction of

the court over him and his affirmative act of entering his voluntary appearance to the action constituted neither fraud nor collusion as against his codefendant Snyder. Ingrum owed no duty to Snyder to claim exemption from service of summons upon him in Hooker county, in order to oust the court of jurisdiction over the person to Snyder. It follows that the court had jurisdiction over both defendants.

The giving of instruction No. 12½ is here assigned as error, but this was not complained of in the motion for a new trial and it cannot be considered here. *Stevenson v. Omaha Transfer Co.*, 87 Neb. 794.

The judgment of the lower court is

AFFIRMED.

FRED F. SHIELDS COMPANY, APPELLANT, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLEE.

FILED JANUARY 13, 1922. No. 21916.

Carriers: CONVERSION. An electric motor was delivered to a carrier for shipment and a bill of lading issued by the carrier acknowledging that it was received in good condition. When it reached its destination it was found to be damaged. Whether the damage occurred before or after the carrier received the motor was in dispute. The consignee demanded the motor and offered to receipt for it, but the carrier declined to deliver it to consignee unless the latter would sign a receipt with a notation thereon that it was turned over to consignee in good condition except "old break." Consignee refused to sign such receipt. *Held*, that the refusal of the carrier to deliver the motor to consignee unless he would sign a receipt worded as above was unreasonable and constituted a conversion of the motor.

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

Vincent C. Hascall and *Montgomery, Hall & Young*, for appellant.

Wymer Dressler, Robert D. Neely and *Paul S. Topping, contra.*

Heard before MORRISSEY, C. J., FLANSBURG and ALDRICH, JJ., HOSTETLER and MORNING, District Judges.

MORNING, District Judge.

Action for conversion of an electric motor. On motion of defendant, at the close of plaintiff's evidence, the court discharged the jury and dismissed the action. Plaintiff appealed.

The question for decision is whether or not plaintiff's evidence was sufficient to take the case to the jury. Plaintiff's business predecessor and assignor shipped the motor in question to Cedar Rapids, Iowa, to be used in connection with some construction work at that point. It was found that the motor was not suitable for the electric current used at Cedar Rapids, and it was shipped back to the owner at Omaha over defendant's railway. When it was delivered to the defendant company at Cedar Rapids for such return shipment, defendant issued a bill of lading acknowledging that it was received in good condition. When the motor arrived at Omaha, the consignee called for it at defendant's freight depot and found that a marble top and some of the wiring were broken. A difference of opinion arose between consignee and defendant's freight agent as to whether the injury to the motor was old or of recent occurrence. Consignee demanded the motor and offered to receipt for it, but defendant's agent declined to permit him to take the motor unless he would sign a receipt for it with a notation thereon that it was in good condition except "old break." Consignee refused to sign a receipt with a notation thereon that the break was an "old break," and left the motor with defendant. As successor in business and by assignment from the consignee, plaintiff became the owner of the present cause of action and instituted this suit to recover from defendant the value of said motor, on the theory that the refusal to turn it over to the consignee, unless the consignee would sign a receipt

in the form indicated, constituted a conversion of the motor.

The delivery of the motor to the defendant at Cedar Rapids in good condition, as stated in the bill of lading, and its arrival in Omaha in bad condition made out a *prima facie* case against the carrier that the injury was caused by its negligence, and cast the burden upon defendant to show that the damage was the result of causes which would exempt the latter from liability. *Wabash R. Co. v. Sharpe,* 76 Neb., 424. In the event of a suit by the consignee against the carrier for damages resulting from injury to the motor, the presumption that the injury was the result of the carrier's negligence was a valuable right in favor of the consignee of which the carrier could not rightfully deprive him by insisting upon his signing a receipt so worded as to destroy, or materially weaken, it. Whether the injury to the motor was of recent origin or of long standing would have an important bearing upon the liability of the carrier in the event of a suit to recover damages for such injury. The age of the break was in dispute, and the refusal of the defendant to deliver the motor to the consignee without a receipt from the latter admitting that the injury complained of was an "old break" was unreasonable. In law, it amounted to a refusal to deliver the motor upon demand, and entitled plaintiff to recover it by replevin or to sue for its conversion and recover its value. *Dobbins v. Delaware, L. & W. R. Co.,* 163 N. Y. Supp. 849; *Loeffler v. Keokuk Northern Line Packet Co.,* 7 Mo. App. 185; *Christian v. First Div. St. P. & P. R. Co.,* 20 Minn. 21; *Shellenberg v. Fremont, E. & M. V. R. Co.,* 45 Neb. 487; *Moss v. Marks,* 70 Neb. 701.

The court having disposed of the case adversely to plaintiff upon plaintiff's evidence alone, we are under the necessity of assuming, for the purpose of disposing of this appeal, that the plaintiff's version of the transaction relating to the form of the receipt demanded is true. Assuming, as we must, that the receipt demanded was in

the form indicated in plaintiff's testimony, we feel impelled to hold that the trial court erred in taking the case from the jury and dismissing the action.

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

REVERSED.

W. T. RAWLEIGH COMPANY, APPELLANT, V. FRED BUNNING ET AL., APPELLEES.

FILED JANUARY 13, 1922. No. 21930.

1. **Guaranty:** CONSTRUCTION. The contract of a guarantor will be strictly construed, and will not be extended to cover any other subject or any other person.
2. **Principal and Agent:** CONTRACT: RATIFICATION: BURDEN OF PROOF. The burden of showing the ratification by a principal of an unauthorized act of his agent is upon the one alleging it.

APPEAL from the district court for Dundy county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

C. A. Ratcliffe and *P. W. Scott,* for appellant.

Lambe & Butler, Walter D. James and *Hines & Hines, contra.*

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., HOBART and PAINE, District Judges.

PAINE, District Judge.

This is an action brought by appellant to recover damages upon a contract of guaranty signed by the three defendants as guarantors, binding themselves to pay any balance then due or to become due upon a contract to sell medicines and supplies. The jury returned a verdict for the defendants. Plaintiff appeals.

The question is: Did the defendants by signing the guaranty for Lee Huggans insure the medicine company against the acts of his father, Sanford E. Huggans, who

had signed his son's name and conducted the business in his own behalf?

Sanford E. Huggans, an elderly gentleman, residing in Benkelman, Nebraska, requested permission to run a medicine wagon for the plaintiff in Dundy county, which application was refused on account of his age. To circumvent their objection, he signed up a contract in the name of his son and presented the same to these defendants, who thereupon signed the same as guarantors. He testified: "I wrote and told him (my son) I wrote to the Rawleigh company for a contract to sell their goods 'and they have turned me down on account of my age,' and I said, 'Lee, can I take out a contract in your name?' and he said, 'maybe they would not take me,' and I wrote them and they said, 'let your boy take it out;' and that is all the contract we had, he never had nothing more to do with it."

Lee Huggans never saw the contract, never signed a paper or an order, and the father testified that it was his own business, and not that of his son. After canvassing for some years and ordering more than $2,000 worth of goods, an indebtedness of $500 resulted, for which suit was brought against the three guarantors. They testified that they had supposed that Lee Huggans had signed his name to the contract and would conduct the business.

This case was first tried in the district court in February, 1918, and the court discharged the jury and dismissed the petition. Appeal was taken to this court upon the question of the change of name of the plaintiff corporation. An opinion was entered, and may be found in 104 Neb. 179, which reviews at length the facts in the case, and the same will not be repeated here.

The case upon retrial in the district court was submitted to a jury and a verdict returned for the defendants.

The principal objection of appellant is made to that part of instruction No. 3 reading as follows: "On the part of the defendants it is contended that the contract

of guaranty which they executed was intended to cover only goods sold and delivered to the said Lee Huggans, and not to any other person; and, further, that the said Lee Huggans did not order or receive any goods from plaintiff at any time after the date of signing said contract of guaranty. The burden of proof is upon the defendants to establish all the material allegations of said defense by a preponderance of the evidence. If you believe from the evidence in this case that the said Lee Huggans neither ordered nor received any of the goods involved in this action and that the defendants herein had no knowledge at the time of entering into said contract that said business was being or was to be conducted by the said Sanford E. Huggans, father of the said Lee Huggans, and had no knowledge of any arrangements between said Lee Huggans and his father by which said business was to be conducted by said father, but entered into said contract of guaranty believing that said contract had been personally executed by the said Lee Huggans and that said business was to be conducted by the said Lee Huggans, and that the defendants did not consent to or acquiesce in the conduct of said business by the said Sanford E. Huggans, then your verdict should be for the defendants."

This instruction states the law, for by the contract of suretyship is meant that the obligation of a surety must not be extended to any other subject or to any other person. 21 R. C. L. 975, sec. 28; *Curtin v. Atkinson,* 36 Neb. 110.

It is contended also that the father was simply the agent of the son, and that therefore the sureties were bound by the acts of such agent.

The extent of a surety's liability is strictly limited to that assumed by the terms of his contract. For instance, if responsible for one person only, he cannot be held for a default of a firm of which such person is a member. 32 Cyc. 109.

The burden of showing that Lee Huggans ratified the

acts of his father was upon the appellant. This would have required evidence showing that the son adopted the acts of his father with full knowledge of what had been done in his name and on his behalf. It would not suffice to show that the principal omitted to make inquiries or might have learned the facts by diligence. 2 C. J. 928, sec. 675.

The question of agency was fairly submitted to the jury, which found that Lee Huggans had never authorized his father to act as his agent.

The evidence sustains the verdict of the jury, and no errors of law are found in the instructions. Judgment of the district court is therefore

AFFIRMED.

EDWIN C. BOEHMER, APPELLANT, V. JOHANNA H. WELLENSIEK ET AL., APPELLEES.

FILED JANUARY 13, 1922. No. 21757.

Specific Performance. Where an administratrix of her husband's estate held title as trustee to city business property, and where she was owner of one-third thereof, the other two-thirds being owned by minor children of herself and her deceased husband, and where she contracted to sell the entire title to another, and where they both believed they had a right to so contract, and it was only after the contract was made that her disability to make the contract good was ascertained, and the contract contained a provision that if her title failed earnest money held by her should be returned, *held* that a court of equity will not grant specific performance at the prayer of the would-be purchaser for the widow's one-third title interest.

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

Boehmer & Boehmer, for appellant.

Pitzer, Cline & Tyler and *Fred C. Foster, contra.*

Heard before LETTON, DAY and DEAN, JJ., SEARS and WESTOVER, District Judges.

SEARS, District Judge.

One Colby owned a tract of real estate in the city of Lincoln, being the north 54 feet of lots 7, 8, and 9, block 89, on which was erected a building; it being a business property. Colby mortgaged the same to Fred W. Wellensiek. On default of the conditions of the mortgage Wellensiek instituted proceedings and a decree of foreclosure followed. At the sale Wellensiek bid in the property. Before confirmation Wellensiek died. Thereafter the widow, Johanna H. Wellensiek, was appointed administratrix and qualified as such. Suggestion was duly made of the death of Fred W. Wellensiek in the foreclosure proceeding and the same was revived in her name as administratrix. Thereupon, on the 30th day of October, 1915, the sale was confirmed and deed ordered made to the purchaser. Thereafter, on the 9th day of May, 1916, Johanna H. Wellensiek, as administratrix of the estate of Fred W. Wellensiek, deceased, made an assignment of the deceased's bid at the foreclosure sale to herself individually. This assignment being filed in the proceedings of the foreclosure suit, the sheriff executed and delivered the required deed to the premises to Johanna H. Wellensiek. During the month of August, following, in writing she contracted with Edwin C. Boehmer for the sale of said real estate, receiving a payment of $500 down, the remainder due to be paid according to stated terms. The contract contained the following clause: "If title is not good and merchantable, first party agrees to refund the sum of $500." The required abstract of title disclosed that Mrs. Wellensiek did not own the entire fee title, but that the legal effect of the deed to her was to vest the title in her as trustee for the estate of Fred W. Wellensiek, deceased, and that she herself was the owner of only an undivided one-third interest therein, and the other two-thirds belonged to two minor children of the said Fred W. and Johanna H. Wellensiek. Her rights and duties were then explained to her. Up to that time Johanna H. Wellensiek believed that she was the

owner of the property from the time of receiving the sheriff's deed in question. Upon realizing the legal status of the situation, she duly advised Boehmer of the same and offered to return the amount received from him. This offer Boehmer refused, and he brought this action, praying that her one-third interest in the property in question should be decreed to him upon his paying to her a proportionate share of the purchase price. It is agreed that all parties acted in good faith in making the contract of sale and purchase. On the trial of the case below the decision was against Boehmer generally, and his action was dismissed as being without right or equity, and from this decree Boehmer appeals to this court.

There are two questions that seem to present themselves as controlling the case: (1) What is the legal effect of the condition in the contract wherein was stated the duty to refund the $500 received by Mrs. Wellensiek upon failure of her title? (2) Would the interests of the minor defendants and heirs, that is, the children of Fred W. and Johanna H. Wellensiek, who own the other two-thirds interest in the said real estate, be prejudiced by decreeing specific performance according to the prayer of Boehmer? Both questions must be largely controlled by the settled rule that specific performance is not granted in courts of equity as a matter of right, but only where the chancery conscience is clearly satisfied in granting such relief.

First, as to the reserved clause or option to refund if title should fail. There is no reason why this clause should not be given the same force as any other provision of the contract in question. No misrepresentations were made; that is, in bad faith. Each side had the same access to the files and proceedings of the estate case of Fred W. Wellensiek, and of the foreclosure case, and each side is equally presumed to know the laws of the state. Having this situation in mind, the provision in question was placed in the contract. Did Johanna H.

Wellensiek's title fail according to the meaning of the term "good and merchantable," as found in the reservation? The title that was contracted with reference to was, in the purview of all, the entire title. Undoubtedly the contract provision in question has a meaning of such broadness that if, by reason of any such defect in the contractor's title being discovered, the title if tendered by her would not meet the terms of the requirement of entire title, then the contractor at least has an option to cancel the contract. There must be some mutuality. Boehmer could not be required to take a partial interest where he had contracted to take an entirety, and he is the one who has come into the court of equity.

As to the second point. The persons and the estates of minors are always under the watchful care and consideration of courts having jurisdiction over them. Here we have two children of tender years who together own two-thirds of the real estate involved, and the other one-third is owned by their mother. By virtue of her relation to the children and property she has the same control of the property that she has of the children. Where can the satisfactory argument appear that to oust the mother from her one-third interest and vest it in a stranger—who may the next day file a suit in partition or fail to work harmoniously with the other two-thirds interests—is a kindly watching out for and conserving of the estates of minors? Such suggested lucidity of sophistry as yet has not appeared in this case, either on printed page, or forum statement.

By reason of the conclusions reached, as indicated, the determination of the case by the trial judge is, in all things,

AFFIRMED.

WILLIAM J. HIGGINS, APPELLEE, V. GARFIELD COUNTY, APPELLANT.

FILED JANUARY 13, 1922. No. 21842.

1. **Counties: LIABILITY.** Section 4, ch. 7, Laws 1889, renders counties liable to individuals sustaining damages to their persons or property by reason of insufficiency or want of repairs of any highway or bridge which a county is obligated to keep in repair.

2. ———: ———: CONTRIBUTORY NEGLIGENCE. Evidence examined, and *held* that the plaintiff in attempting to cross a county bridge, part of a public highway in Garfield county, was not chargeable with such contributory negligence as would preclude a recovery for damages occasioned to an automobile truck by the collapse of the bridge.

3. ———: ———: EVIDENCE. Evidence examined, and *held* sufficient to sustain a judgment of the trial court assessing the plaintiff's damages in the sum of $275.

4. ———: ———: NOTICE. No actual notice to the county of the defective condition of the bridge was necessary. *Raasch v. Dodge County*, 43 Neb. 508; *Bethel v. Pawnee County*, 95 Neb. 203.

5. ———: ———. The liability of the county arises, not alone from the *constructing*, but as well from the *maintaining* of a bridge. Its existence is a continuing invitation, not only as to a mode of travel prevalent and usual in its inception, but also as to any mode of travel which may be devised and develop into common use during its existence. Therefore, *held* that although automobile traffic trucks were not in use in the county when the bridge was originally built, but that some had been in operation a year before the accident, and that six or seven were used by farmers in the vicinity of the bridge at the time of the accident, the county was nevertheless liable for damages to such traffic truck.

APPEAL from the district court for Garfield county: BAYARD H. PAINE, JUDGE. *Affirmed.*

E. M. White, for appellant.

Allen & Hronek and *Guy Laverty, contra.*

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., FITZGERALD and WAKELEY, District Judges.

WAKELEY, District Judge.

On November 5, 1919, Higgins filed against Garfield county a claim for $445 for damages to a traffic truck because of its falling through a bridge spanning Cedar river in said county. On December 3 he filed a supplemental claim in the sum of $290; $65 thereof being for additional repairs necessitated since the filing of his original claim, and $225 thereof for being deprived of the use of the truck. His total claim was $735. This was rejected by the county commissioners, and Higgins appealed to the district court. A jury was waived and the action tried by the Honorable Bayard H. Paine, who rendered a judgment for the plaintiff for $275. From this the county has appealed, urging that the judgment is not sustained by the evidence.

Appellee, Higgins, owned a cattle ranch in the northern part of Garfield county on which he fed cattle. He had purchased for $2,250 a new traffic truck used in the carrying of supplies to and from his ranch. The evidence discloses that Garfield county is sparsely settled; that there are few roads and bridges in it; that the bridge in question crosses Cedar river, making that locality accessible to a number of ranchers in the vicinity, and to a large gravel pit about one-half mile beyond the river.

It is stipulated that the bridge was built more than twelve years ago, and is part of a public highway, and had been repaired several times. One of the witnesses, Douhit, says the bridge, a wooden one, was in poor condition, and that the commissioners never inspected it; that it had been cobbled up and fixed so many times that it was hard to tell which end was south. On October 8, 1919, Herman Heldt, foreman of the Higgins ranch, crossed to the gravel pit with the truck, loaded thereon about two tons of gravel, a customary load, and attempted to recross the bridge in question. As he drove upon the bridge, he noticed, he says, "one plank bent in a little, broke like, gave in just a little, splintered, prob-

ably six inches, about the center of the south section; outside of that, the bridge looked as good as it ever did. Probably six inches was defective." His gravel weighed two tons; the gravel and truck weighed about 4,400 pounds, an average load. The bridge consisted of two spans, each 20 feet long and 14 wide; one 7-foot and one 10-foot approach. The top was of good planking, laid upon 2 by 12 stringers, 10 to each span, and about 16 inches apart. It was supported by three piers, one at each end, and one in the center to support the ends of the spans. The stringers composing the same rested upon these piers, overlapping the piers from two to four inches. These stringers were not bolted or strapped to the piers. They were held in place by rather small nails. They were toe-nailed in, as the witnesses say, with three or four small nails. The stringers were not bolted to each other. There were no iron shoes or straps to hold them to the piers. No other braces were used to support the bridge. McMullen, the road overseer, had occasion to replace a cap on the pier under the bridge where an old cap had rotted away. This was about six years before the accident. His recollection was that, at that time, the stringers lapped six inches over the cap. No sign was placed on the bridge to indicate its carrying capacity.

As stated, Heldt endeavored to cross the bridge with his truck. As he neared the center, he swerved out just far enough to miss the defect in the planking. When he got about half way across, he says he felt the hind end of the truck going down and jumped. This is all he knew until he saw the truck in the bottom of the river. The front part of the truck had caught upon and was held by the center pier of the bridge; the back end had dropped down into the river. The gravel, running down, broke out the end-gate and broke the plank down through the center. Examination disclosed the toe-nails with which the stringer had been fastened to the piers had loosened and come out; that, as they did

so, the stringers had slipped off, or fallen away from the center pier; that thereupon the entire south span of the bridge had collapsed and fallen into the river. When the span fell, all but two or three stringers at the north side gave way and fell with it. Plaintiff claims that the fall bent the rear axles of the truck, jammed the differential, disaligned the machinery, broke the end-gate, permitted the gravel to slip out, twisted and weakened the box, bent and weakened the cross-bar, and otherwise damaged the truck.

As stated, the court found in favor of the plaintiff and assessed his damages at $275. The county contends that the court erred for reasons which may be summarized as follows: That any damage occasioned was the result of the plaintiff's own negligence in attempting to cross the bridge, after he had ascertained it was in a defective or dangerous condition; that plaintiff used the truck after the accident without having it repaired or inspected by a competent mechanic; that the damage was caused by the unskilful and negligent manner in which the machine was operated, and the lack of timely repairs; that the actual damage was nominal; that the county officials had no notice, actual or constructive, that the bridge was not in a safe condition for any reasonable or ordinary use; that when the bridge was built no automobile trucks were in use in the vicinity and but few at the time of the trial in September, 1920; and, lastly, that, while the bridge is a part of a legally established county road, it is in fact used by very few people.

The present action is brought under the provisions of section 4, ch. 7, Laws 1889, which for the first time in the history of our jurisprudence made counties liable to individuals sustaining damages from defective roads or bridges.

Was the plaintiff guilty of such contributory negligence as precludes his recovery? When Heldt crossed the bridge, going over to the gravel pit, he noticed there was a plank cracked; as he expressed it, "broke like, or

splintered." He may have splintered it himself in crossing the bridge a day or two before. With this exception, he says the bridge looked perfectly safe to him, as good as it ever did or he would not have crossed it; that he had seen other people crossing the bridge with loads as large as his. The evidence shows that others, some with heavier trucks, had used the bridge. Concede that he had cracked the plank a day or two before, and that, as McMullen says, "Heldt told him he turned his truck a little to one side and 'straddled' the defective plank in order to avoid it." Would this crack in a single place in the floor warn one that it would be dangerous to cross the bridge with a truck? Did it point Heldt to any structural or fatal defect in the bridge itself? Did it warn him that, if he attempted to cross, it would collapse and plunge his truck into the river? We think such a deduction would be unwarranted, would be too harsh. There is not the slightest suggestion in the evidence, or in the briefs of counsel, that the defect in the plank had anything whatever to do with the collapse of the bridge. Whether a certain condition surrounding an object charges a man with negligence must to a great extent depend upon the use such person intends to make of such object. It might be negligence if a man, knowing the defect was there, drove a horse over the bridge, and the horse got his foot through the plank. Such a result would be the very thing that might have been anticipated. But that is not this case. Had the bridge been barricaded, and Heldt had nevertheless removed the barricade and attempted the crossing, and had sustained damage because of some structural defect or weakness in the bridge, we think he would be chargeable with negligence. So, again, if there had been on the bridge a sign, limiting its carrying capacity, for example, to 3,000 pounds, and Heldt had disregarded this, we think he would have been chargeable with negligence. Conditions such as these would have been fraught with a monitorial significance which no traveler could evade; would have

proclaimed danger of some sort in the crossing of the bridge; a defective plank did not.

Counsel for appellant in his brief calls our attention to *Clingan v. Dixon County*, 82 Neb. 808, *Johnson County v. Carmen*, 71 Neb. 682, and other cases in this court, holding that contributory negligence on the part of the plaintiff will defeat his action, even if the county be negligent. We agree to this. But, as stated, we do not think that the attempt to cross the bridge with the truck convicts the plaintiff of negligence. Concede, however, that Heldt, the driver, was negligent to some extent, in some degree. The cases above cited were decided prior to the passage of our comparative negligence act in 1913. Under this, the plaintiff's contributory negligence does not bar his recovery, when, weighing the negligence of the two parties, that of the plaintiff is slight as compared with that of the defendant. The case was tried to the court, who rendered judgment without specific findings. We assume, however, that if the court found Heldt chargeable with any negligence his recovery was reduced in proportion thereto, as prescribed by the statute. We feel fortified in this conclusion when we consider that the plaintiff sued for $735 and recovered $275.

It is true, as claimed by the defendant, that the truck was used by plaintiff after the accident, and before part of the repairs were made. The testimony is that some of the repairs necessitated delay, and were not made until six months after the accident; but it does appear that some repairs, a new differential, face wheel, spider wheel, new tires, and labor incident thereof, were made and furnished soon after the accident, and that these repairs themselves amount to as much as the judgment recovered.

It is claimed that the damages inflicted were nominal. New gears and tires, and new differential, and new endgate were necessitated; the left hind axle bent, the wheel "dished" or bent out, and the iron frame work of the machine bent or pulled in four inches. A. W. Tunnicliff, an automobile mechanic, called by the defense, examined

the machine and testified that, in his opinion, repairs necessitated could be made for $75 to $100. Schuyler, another mechanic, called by the defense, estimated them at between $50 and $75. There was a wide discrepancy between the witnesses for the respective parties, and it is evident the court rendered a judgment for what he thought was the actual damage sustained as reflected by the evidence. As this finding is supported by ample evidence, we do not think we should disturb it.

As to notice; no actual notice to the county was necessary. In *Raasch v. Dodge County,* 43 Neb. 508, the court said: "For an injury caused by an unsafe condition of a county bridge, a county is liable in damages, notwithstanding the fact that no notice of such condition had, previous to the occurrence of the accident, been given to any officer of the county concerned. * * * The provisions of section 4 of the act referred to expressly confers a right of action independently of whether or not the county authorities had been previously notified of the unsafe condition of the bridge which caused the accident." And in *Bethel v. Pawnee County,* 95 Neb. 203, the court approved as concise and accurate this instruction: "For an injury caused by an unsafe and defective condition of a county bridge, a county is liable for damages, notwithstanding the fact that no actual notice of such condition had, previous to the occurrence of the accident, been given to any officer of the county concerned, where the defects are of such a nature, or have existed for such a length of time that, by the exercise of ordinary diligence, they might have been discovered and repaired." See, also, *Hollingsworth v. Saunders County,* 36 Neb. 144. Tested by this rule, we think the county had ample notice of the defects in the bridge. The evidence discloses that the bridge had been built 12 years; "that it had undergone frequent repairs." Douhit said it had been "cobbled" so often it was difficult to say in what direction it stood; it was never in very good condition and never inspected by the commissioners. In

May, 1919, John Bushbaum, a farmer, driving a truck somewhat heavier than the plaintiff's, and intending to cross with a load of gravel, examined the board bottom and the stringers under the bridge and found their condition such that he concluded he could not safely cross and abandoned the attempt. We think these facts sufficient to impute knowledge to the county.

It is argued that when the bridge was built no automobile trucks were in use in the county, and even at the time of the trial but few were operated in the county; and it is argued, inferentially at least, that it would be unjust to hold the county liable under these circumstances. It is probably true that when the bridge was built, 13 years ago, these trucks were not in use in that locality. As to their use since then, it appears that some trucks were in use perhaps a year before the accident, and that at the time thereof, in April, 1919, some six or seven, according to Bushbaum, were owned and operated by farmers living in the vicinity of the bridge.

The liability of the county springs, not alone from the *constructing,* but also from the *maintaining* of the bridge. Its existence is, unless restricted in some way, a continuing invitation, not only as to a mode of travel prevalent and usual in its inception, but also as to any mode of travel which may be devised and develop into common use during its existence. It is said in *Seyfer v. Otoe County,* 66 Neb. 566: "In constructing and maintaining a bridge for public use, a municipality is not limited in its duty by the ordinary business use of the structure, but is required to provide for what may be fairly anticipated for the proper accomodation of the public at large in the various occupations which, *from time to time, may be pursued in the locality where it is situated.*"

So, also, in *Miles v. Richardson County,* 100 Neb. 294, decided 14 years later, the court said: "That the bridge was reasonably safe for travel with a team and wagon did not relieve the county of its duty to make it reasonably safe for the passage of cattle. * * * The re-

quirements of a bridge are that it shall be reasonably safe for such use as the public may make of it." And in this case, and also in *Kovarik v. Saline County,* 86 Neb. 440, the doctrine laid down in *Seyfer v. Otoe County, supra,* is reaffirmed in the identical words therein used.

For the reasons given, we think the judgment should be, and it is

AFFIRMED.

ARTHUR C. PHELPS ET AL., APPELLANTS, V. GEORGE W. SHUCK, APPELLEE.

FILED JANUARY 13, 1922. No. 21636.

1. **Sales:** FALSE REPRESENTATIONS: REMEDIES. A party induced to purchase property, by false representations respecting the character of property, to whom a written guaranty is given, covering the representations made, providing for the return of the property and of the consideration therefor in case the property does not prove as represented, upon discovery of the falsity of such representation, may elect to rescind the contract of purchase and recover back the purchase price paid, or he may sue on the written guaranty for damages for breach thereof. If he elects to rescind the contract and brings suit therefor, it is not an action on the guaranty.
2. **Action:** RESCISSION. A petition by two plaintiffs, which alleges that they were induced to purchase property of defendant by false representations made by the defendant respecting the property, and alleges that said representations were made by defendant both by parol and in writing, alleging that the written representations were made in an instrument which is copied in the petition, which instrument was addressed to one of the plaintiffs only, and contained the representation charged to be false and also a statement that the seller agreed to guarantee the property to have certain qualities, and, if not as represented by him, to take it back and refund all money paid therefor, which petition also alleged plaintiffs' election to rescind the purchase, and also alleged all other facts necessary in an action based on a rescission of a contract for purchase, states but one cause of action, *i. e.,* an action by both parties purchasing said property for rescission and return of the purchase price paid by them

therefor. It does not state a cause of action on the agreement to guarantee.

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

J. H. Agee and *F. H. Stubbs,* for appellants.

Frank J. Munday, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., GRAVES and WELCH, District Judges.

WELCH, District Judge.

The appellants filed in the court below their petition, in which they alleged that on April 14, 1916, they purchased from the defendant one stallion, which the defendant, for the purpose of inducing plaintiffs to purchase, fraudulently represented and stated to the plaintiffs to be nine years of age and no more. The petition further alleges that said representation as to the age of said stallion was made by the defendant both by parol and in writing, and that said written representation was in the following words and figures:

"Guide Rock, Nebr., April 14, 1916.

"Mr. A. C. Phelps, Superior, Nebr.

"Dear Sir: In consideration of your purchase from me today of my black stallion, age nine years, weight 2,150 lbs., called 'Prince,' I agree to guarantee the said stallion to be a good breeder, sound in all respects with the exception of a wind-puff on left hind leg, and I further agree in the event that the said stallion 'Prince' shall not prove as represented above, or in the event that he should be rejected for any cause by the state inspector of stallions, to take said stallion back, and refund any and all money you have paid for him, not exceeding $500 and interest. (Signed) Geo. W. Shuck."

The petition also alleged that plaintiffs had no knowledge or information as to the age of said stallion, and that they relied upon said representations, and were induced thereby to purchase said stallion and agree to pay

the defendant therefor the sum of $500 and that said stallion, instead of being nine years of age at the time of such sale, was twelve years of age, which fact was well known to the defendant, and that plaintiffs would not have bought said stallion from defendant if they had known its true age. The petition further alleged that plaintiffs first learned of the true age of said stallion about March 8, 1917, and that they immediately notified defendant thereof and of his said misrepresentation and of their intention to rescind said purchase; and on or about the 14th day of March, 1917, plaintiffs did elect for said reasons to rescind said contract of purchase, and so notified defendant, and demanded of defendant return of the purchase price paid for said stallion, but defendant refused to consent to rescission and refused to return to plaintiffs the consideration and purchase price of said stallion, and that plaintiffs offered to return said stallion to defendant, which offer the defendant refused. The petition also alleged that, as a part of the consideration for said horse, plaintiffs executed and delivered to defendant their promissory note for the sum of $400 and secured the same by a chattel mortgage, and that, as soon as the defendant was advised that plaintiffs had discovered the true age of said stallion and that plaintiffs desired to rescind said contract of purchase, the defendant immediately thereafter, and on or about the 15th day of March, 1917, and before said note was due, for the purpose of denying to plaintiffs the right to make their defense to said note, sold and assigned and delivered said note and chattel mortgage to the Citizens State Bank of Superior, Nebraska; that thereafter said Citizens State Bank sold said stallion under said chattel mortgage, at which sale there was realized the sum of $42, which was applied on said note of plaintiffs, and that plaintiffs have since said sale paid the balance on said note.

The defendant demurred to the above petition on the grounds: (1) That several causes of action are improperly joined. (2) That the petition does not state

facts sufficient to constitute a cause of action. The court below sustained the demurrer, and plaintiffs elected to stand on the petition, whereupon the court below rendered judgment of dismissal.

It is an elementary rule of law that a party induced to purchase property by false representations of the seller has the election to rescind such purchase on the discovery of the falsity of such representations, return the property, and recover back the consideration paid therefor, or he may retain the property and recover his damages sustained by reason of said false representations.

In order to work a rescission it is not necessary, in case of offer to return the property to the seller and notice to him of the election to rescind, that the property be actually tendered to him at the place of purchase, if upon such offer to return the property the seller refuses to accept the same. *Sherrill v. Coad,* 92 Neb. 406.

The petition alleged the purchase by both plaintiffs; the representation to plaintiffs that the stallion purchased was but nine years old; that plaintiffs were induced thereby to purchase said property for the consideration of $500; that at the time of such purchase said stallion was of the age of twelve years, which fact was known by appellee herein, and contained all the other allegations necessary to state a cause of action based upon the rescission of said contract of purchase. The fact that said representations as to the age of said stallion were included in a written statement signed by defendant addressed to one of the plaintiffs, in which defendant agreed to guarantee the said stallion to have certain qualities, and, in the event that it did not prove as represented, to take back said stallion and refund all money paid, which written statement is set forth in the petition, would not make the petition state a cause of action on said agreement to guarantee, for the reason that said petition shows the election of the party to whom said statement was addressed to rescind said contract of purchase on account of the alleged false representation

as to the age of said stallion, and to not sue on said agreement to guarantee. After such election and exercise of his option he could not sue on the contract. The petition shows that he has elected to join with his coplaintiff in an action based upon their recission of said contract for the purchase of said stallion, on account of the alleged false representations made by the defendant whereby they were induced to purchase said stallion.

The court below, therefore, erred in sustaining defendant's demurrer and dismissing this action. The judgment of the court below is therefor reversed and cause remanded.

REVERSED.

MAX KIRSHENBAUM ET AL., APPELLANTS, V. MASSACHUSETTS BONDING & INSURANCE COMPANY, APPELLEE.

FILED JANUARY 26, 1922. No. 21748.

1. **Case Followed.** The record examined, and on the main issue *held* to fall within the findings and judgment in *Kirshenbaum v. Massachusetts Bonding & Ins. Co.*, *ante* p. 368.
2. **Trial: DIRECTION OF VERDICT.** When at the close of all the testimony the proof relating to the disputed issues is so clear and conclusive that reasonable minds cannot reach different conclusions, it is not error for the trial court, on motion, to dismiss the jury and enter judgment in accordance with the evidence.

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

J. J. Friedman, for appellants.

Kennedy, Holland, DeLacy & McLaughlin and *Edward J. Svoboda, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., BUTTON and COLBY, District Judges.

MORRISSEY, C. J.

Plaintiffs brought suit against defendant on a policy of robbery insurance. At the conclusion of the evidence the court dismissed the jury and entered judgment for defendant. Plaintiffs appeal.

The suit is between the same parties, and the general issues presented are substantially the same as in *Kirshenbaum v. Massaccusetts Bonding & Ins. Co., ante,* p. 368, wherein the suit was on a policy of burglary insurance covering the same store and stock of goods covered by the policy here in suit. In the suit on the policy of burglary insurance, plaintiffs sought to recover for loss of goods taken from their store early on the evening of September 28, 1919, while in this suit plaintiffs allege a second breaking and entry of their store later in the evening of the same day. The circumstances surrounding the second breaking are substantially the same as those surrounding the original breaking and we do not deem it necessary again to review them at length. We adhere to the findings there made.

There is, however, presented a question of procedure. At the close of all the testimony, defendant requested the court to direct a verdict for defendant or to discharge the jury and enter findings and judgment for defendant. The court sustained the motion, dismissed the jury, and entered judgment for defendant.

In addition to the general complaint against the judgment, plaintiffs contend that the court erred in dismissing the jury and entering the judgment. As we understand this branch of the argument, plaintiffs would have the court follow the procedure which has so long prevailed in this state of directing the jury, through its foreman, to sign and return a verdict. In *Segear v. Westcott,* 83 Neb. 515, where each party moved for a directed verdict, the trial court dismissed the jury and rendered judgment. On review this court said: "We think that the mere fact that the court discharged the jury and thereupon rendered a judgment under the circumstances in this case is of no great moment. It was

irregular, but not prejudicial. Where a verdict is directed by the court, the action of the jury is ministerial in its nature. The rendition of the verdict is at most a mere form, for, if the jury should return a verdict contrary to the direction, it would be the duty of the court to immediately set the same aside."

In the instant case the jury were dismissed and judgment entered on motion of defendant alone, but the procedure followed is no more prejudicial to the interests of plaintiffs than it would have been had a form for a verdict been handed to the jury with directions from the court that it be signed by the foreman and returned by the jury as its verdict. The difference in procedure is a difference in form only and does not affect the substantial rights of the parties.

The record is found free from error, and the judgment is

AFFIRMED.

BERTHA POLENSKE, APPELLANT, V. ADOLPH POLENSKE, APPELLEE.

FILED JANUARY 26, 1922. No. 21491.

1. **Landlord and Tenant: LESSEE IN POSSESSION: CLAIM OF TITLE.** As a general rule, before a lessee may dispute his lessor's title and claim title in himself, he must yield possession of the leased premises.
2. **Decision Limited.** The proposition of law set forth in the fifth paragraph of the syllabus in *Stone v. Blanchard*, 87 Neb. 1, explained and limited.

APPEAL from the district court for Madison county: WILLIAM V. ALLEN, JUDGE. *Reversed.*

M. B. Foster, for appellant.

Willis E. Reed and *William L. Dowling, contra.*

Heard before LETTON, DAY and DEAN, JJ., CORCORAN and GOSS, District Judges.

LETTON, J.

Plaintiff began an action in forcible entry and detainer in the justice court against the defendant to recover possession of 160 acres of land. She complains that on or about March 8, 1917, she leased the premises to defendant for the term of one year, which period has elapsed, but the defendant unlawfully and forcibly retains possession. Defendant did not enter a plea of guilty or not guilty, but, instead, filed a somewhat lengthy answer setting up an oral contract with his father, who then owned the land, which was consented to by plaintiff, his mother, that if defendant would pay to his father during his lifetime, and after his death to his mother, the sum of $200 a year, or such further sums as might be necessary for their support, or that of his widow, in proportion to payments by the other children, he would devise the land to defendant. He pleads that he has carried out and is willing to carry out the requirements of the contract; that he went into possession of the land under this agreement 14 years ago; that he has made lasting and valuable improvements upon the premises; and that plaintiff carried out this agreement until 1918. He admits that he executed the written lease, but alleges it was made to satisfy plaintiff's caprice, and was not intended to discharge or satisfy the oral agreement. The county court found for the plaintiff and rendered judgment accordingly. Defendant appealed to the district court, where substantially the same answer was filed, and evidence was taken. At the conclusion of the evidence both parties moved for a directed verdict. The court discharged the jury and, after consideration, found: "That in good faith defendant, Adolph Polenske, at the commencement of this action, was holding said premises in such a manner that a question of title has been raised ousting this court in this proceeding of jurisdiction to proceed further in the case." The action was then dismissed at plaintiff's cost. Plaintiff appeals.

The evidence shows that the farm was the family home

of the father and mother of defendant; that during the father's lifetime he made arrangements with his children to take over separate tracts of land; each of the children was to pay the sum of $200 a year, or such sum as might be necessary for support to their parents, who then removed to Madison, Nebraska, where the father died in 1907; that defendant entered into possession of the premises in 1904. Defendant paid $200 a year until March, 1916, when his mother desired a greater income. He then signed a lease and agreed to pay, and did pay, $250 a year. In March 1917, a new lease was executed in which the rent was fixed at $400 for that year. At the expiration of the latter lease the plaintiff desired to raise the rent to $700 a year, when defendant refused to execute another lease, but offered to continue to pay $400. This action was brought after this refusal.

The father executed a will in which he attempted to distribute his property equally among all his children. By this will he left all his property to his wife for life; the will devised the remainder in separate tracts of his real estate to designated sons and daughters, charged with such money payments as would seem to equalize the distribution. The remainder in the land in controversy was devised to defendant, subject to a payment of $1,000 to one of his sisters. No mention is made in the will of any annual payments to be made, or of any interest in the land other than the remainder.

Several assignments of error are made, but the essence of plaintiff's contention is that the court erred in permitting the defendant to introduce evidence of title and right of possession in himself, without impeaching the lease for fraud, misrepresentation, mistake, or otherwise; and, further, that the lease operated as a complete estoppel against defendant to dispute his landlord's title.

The rule is that a tenant under a lease is estopped from disputing his landlord's title while still in possession of the leased premises, but that he may show that the lease was obtained by fraud, mistake, or duress, and

is therefore void. There is a well-recognized exception to the rule, under which the decision in the case of *Bowman v. Goodrich,* 94 Neb. 696, falls, that, where the landlord's title has been declared to be insufficient by the judgment or decree of a court, or his title has been lost by virtue of a sale under such judgment or decree, the tenant may attorn to the then owner of the paramount title, and may set up such title and attornment as a defense to the action by his lessor.

In *Stone v. Blanchard,* 87 Neb. 1, the fifth paragraph of the syllabus is as follows: "If title to real estate is sought to be recovered or drawn in question in an action of forcible entry and detainer, questions of estoppel affecting the right of defendant to assert such title, cannot be decided by the justice of the peace."

That case was not a controversy between a landlord and tenant. As applied to the issues and facts in that case the statement is correct, but the holding is too broad and should be limited to cases of forcible entry and detainer not involving the relation of landlord and tenant which are authorized by the statute, for otherwise a gross injustice might be perpetrated. For instance, one who leases land to another may have been in possession for years under a title, somewhat defective if questioned by a third party claiming an interest in the property, but good as against his tenant, and yet, if the tenant were not estopped to dispute his title and the lessor was compelled to bring an action in ejectment in order to oust him, it might be impossible for the lessor to maintain the action. In such an action he must recover on the strength of his own title, and not on account of defects in that of the occupant, and the lack of strict legal proof of heirship, or of the execution of a deed in his chain of title, might allow a wrongdoer to hold possession indefinitely.

If one who is already in possession accepts a lease from a third party, the presumption is that he is yielding the possession which he held under claim of right, and

taking possession and holding it thereafter under and by virtue of the lease.

The courts are divided upon the question whether, if the possession is not obtained by virtue of the lease, a tenant may question his landlord's title, but the majority hold that even in such cases the general rule applies. A collection of the cases may be found in a note to *Stevenson v. Rogers,* (103 Tex. 169) Ann. Cas. 1912D, 101. See, also, 16 R. C. L. 659, sec. 146.

Where it is clear that the lessee executed the lease, a justice of the peace may determine all questions as to whether the lessee is wrongfully holding over his term, either by expiration of the term by nonpayment of rent, or by any other breach of the contract which may render his possession unlawful. If the lessee asserts a *bona fide* claim of title, he may still litigate it in the proper forum after he has yielded possession to the lessor. He is not entitled to occupy the inconsistent position of being the owner of the land and at the same time the tenant of another owner.

Defendant complied with the terms of the leases which required payment of a different sum of money as rent from that which he had formerly paid, and it was only when rent was raised a third time that he refused to pay and asserted title. It is shown that he had made improvements on the land. Since he is the owner of the remainder any fixtures made a part of the realty eventually inure to his benefit. Such as are personal property he is entitled to remove. Furthermore, a court of equity is open to protect his rights, whatever they may be.

Under the admited facts, the justice had power to determine whether he was guilty of holding over his term. The judgment of the district court is

REVERSED.

EMIL DOLD, APPELLANT, V. ERSON MUNSOR ET AL., APPELLEES.

FILED JANUARY 26, 1922. No. 21906.

1. **Jury:** TRIAL BY JURY DENIED. In this an action to recover the possession of real estate, to cancel a mortgage thereon executed by defendant, and to quiet the title of plaintiff, in which action the defendant admits plaintiff's title, but prays for specific performance of an alleged contract of sale to defendant, and to quiet the title in him, plaintiff is not entitled to a trial by jury as a matter of right, and it was not error to refuse it.
2. **Evidence:** SECONDARY EVIDENCE. Where plaintiff denies that a written contract, which defendant testifies is in his possession, ever existed, or that he ever had such a paper, such a denial furnishes sufficient foundation for the introduction of secondary evidence of the contents of the paper, without the service of a notice to produce the paper, or the issuance and service of a subpœna *duces tecum*.
3. **Appeal:** TRIAL DE NOVO. Although the issues of fact in an equity case are required to be tried *de novo* upon appeal to this court, where the evidence is conflicting, this court will consider the fact that the trial court had the opportunity of seeing and hearing the witnesses, and will give consideration to this fact and to its findings in determining which witnesses are most worthy of belief.

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

Lamont L Stephens and *Clifford L. Rein,* for appellant.

Aaron Wall, J. S. Pedler and *R. H. Mathew, contra.*

Heard before LETTON, DAY and DEAN, JJ., BEGLEY and HOSTETLER, District Judges.

LETTON, J.

This action was brought to recover possession of a certain lot in the town of Ashton, to set aside a certain mortgage upon the premises executed by the defendant Munsor to Swenson Brothers Company, and to quiet

plaintiff's title as against the claims of Munsor and the mortgagee. Defendants admit that the legal title to the property is in the plaintiff, but the cross-petition of Munsor alleges that by an arrangement made in 1915, verbally, and afterwards merged into a written contract, Dold agreed to furnish money to buy a lot and erect a store building thereon for the use and benefit of Munsor, and that Munsor was to pay the cost of the lot, the building and other improvements, and to pay interest at the rate of 7 per cent. per annum of this amount, payable monthly, and that on January 1, 1921, provided $500 or more had then been paid on the purchase price, Dold was to execute a deed to the property to Munsor, and take back a mortgage to secure the unpaid balance of the purchase price and interest. It is alleged that the written contract was never delivered to Munsor, and that he paid $800 on the contract price, and made $400 worth of improvements on the property. He prays for an accounting, that he may have specific performance of the contract, and that his title be quieted.

The facts are somewhat peculiar. The reporter's note states that Munsor is an Armenian who speaks very broken English. Plaintiff's testimony is to the effect that he leased the building to Munsor at a monthly rental of 7 per cent. upon the cost price, which rent amounted to $15.20 a month at first, and $15.70 after additional improvements had been put upon the building, and that he paid rent until July, 1919, and has paid no rent since. The testimony of Munsor is that Dold offered to furnish the money to buy a lot and erect a building for his use as a store, to be paid for as alleged in the cross-petition.

Munsor and Ayoub, a clerk employed by him, a fellow Armenian or Assyrian, who seems to be much more accomplished in the use of English than Munsor, both testify that a contract was written out by Dold, brought to the store and left with them for a short time, and afterwards taken by Dold; that several payments were made on the principal, the receipt of which was in-

dorsed on the contract by Dold. Dold denies that any contract of sale either oral or written was ever made, and denies that any money was paid except as rent. A number of receipts in Dold's handwriting are in the record, which recite that they are "for interest on building." Munsor and Ayoub testify that Munsor asked for a copy of the contract, and that Dold said, "No, you don't need no copy, whatever you pay I will mark it on the back of this contract just the same as a receipt;" that, when the taxes were spoken of, Dold said that he would pay the taxes, and at the end of 5 years, when Munsor got the deed, they would figure up and settle the amount due, giving proper credits for all money paid. Ayoub testified that in July, 1919, Munsor was about to sell the property to one Gehring, but Dold refused to make a deed; that afterwards Dold offered to sell the building to Gehring, and that Munsor objected, saying it was his building, and the sale was not consummated on that account, and that after that Dold did not call for the interest, and no interest has since been paid. On rebuttal Dold denied any such conversations, and the agent with whom Munsor testified he had some negotiations for the purchase of the lot denied this, and said that all of his transactions as to the lot were with Dold.

The court decreed specific performance of the contract, gave Dold a first lien for the balance found due, and provided that in default of payment the contract be foreclosed, and the premises sold to pay this and the amount due the other cross-petitioner.

The evidence is in hopeless conflict. The store was broken into and the books in which Munsor testifies the cash payments were entered were stolen. It is impossible that all the testimony of Ayoub can be true, because it is, in part, self-contradictory. The written document which he produced, and upon which he testified he indorsed the payments made on the principal at the time they were made, bears internal evidence that the entries were not made at that time. The strongest evidence in

favor of Munsor is that furnished by the 23 receipts in the handwriting of Dold, which recite the payment of interest "on store building," or words of like effect, by Munsor. The receipts are in accordance with the terms of the alleged contract. It seems incredible that, if the relation between the parties was merely that of landlord and tenant, the receipts would not be for "rent," instead of for "interest." An attempt is made to explain this by saying that 7 per cent. upon the cost of the building and lot was to be the monthly rental; but, when considered in connection with other circumstances in the record, this is not a satisfactory explanation. The trial court had the witnesses before him, and was better able to judge of the truthfulness of their testimony than this court. Giving consideration to this, we have reached the same conclusion as to the facts which that court did.

Several errors are assigned that must be mentioned. The refusal of a jury trial is alleged as error. The petition clearly states a cause of action for equitable relief. It prays that the defendants be required to set up any claim or interest they may have in the premises; that said claim be decreed to be void; that the apparent lien of the Swenson Brothers Company mortgage be removed; that the mortgage be canceled; and that the title be quieted in the plaintiffs. Furthermore, defendants admit that plaintiff is the owner of the legal title, and that no money had been paid him since July, 1919. Under these admissions, plaintiff would have been entitled to a judgment on the pleadings, and there would be nothing for a court or jury to pass on, were it not for the equitable issues raised by the cross-petition. Plaintiff was not entitled to a jury trial.

It is assigned that the decree is not supported by sufficient evidence, the main contention in this respect being that the court admitted secondary evidence of the contents of the written contract, when no notice had been served upon plaintiff to produce it. The record shows that when the objection was first made it was sustained,

but that when it became clearly apparent to the court that plaintiff denied that any such contract had ever been in existence, that if it ever did exist it was in his custody and control, and that the service upon him of a formal notice to produce it would have been fruitless, the court properly permitted the witness to state its terms. In this there is no error. It has repeatedly been held that a person is excused from making a tender where a tender would be fruitless. The same principle applies to the giving of notice to produce a paper, to a party to the suit who testifies and contends that such a paper was never in existence. The law does not require a vain thing, and such a denial furnishes sufficient foundation for the introduction of secondary evidence of the contents of the alleged contract. *Mack v. Mack,* 94 Neb. 504; *Bickley v. Bickley,* 136 Ala. 548, 558; *Foster v. Pointer,* 9 Car. & P. (Eng.) 718; *Hamilton v. Rice,* 15 Tex. 382; *Augur Steele Axle & Gearing Co. v. Whittier,* 117 Mass. 451.

The judgment of the district court is

AFFIRMED.

RILEY SMITH, APPELLANT, V. RICE MCNULTY, APPELLEE.

FILED JANUARY 26, 1922. No. 21948.

1. **Intoxicating Liquors:** FORFEITURES: INCIDENT TO CONVICTION. "The forfeiture of an automobile under section 2, ch. 109, Laws 1919, is no part of the sentence imposed by the justice of the peace, but is an incident to the conviction of the owner or person in charge of the car." *Robinson Cadillac Motor Car Co. v. Ratekin,* 104 Neb. 369.

2. ———: COMPLAINT: SUFFICIENCY. A complaint which charges that a defendant unlawfully had in his possession, at a place other than his private residence, "within and being conveyed by a train of automobiles," describing them, "certain intoxicating liquor, namely, about 3,000 pints of whiskey," is sufficient to charge the defendant with the unlawful possession and transportation of the same.

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

Richard S. Horton, for appellant.

R. C. James, contra.

Heard before MORRISSEY, C. J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

LETTON, J.

Plaintiff was arrested and prosecuted, as shown by the docket of a justice of the peace of Richardson county, upon the charge that he and others named in the complaint, on the 28th day of April, 1919, "did then and there unlawfully have in their possession at a place other than their private residences, to wit, within and being conveyed by a train of automobiles, consisting of one Cadillac Roadster, No.———, one Cadillac, No.———, one Cadillac, No.———, and one Studebaker, No.———, certain intoxicating liquor, namely, about 3,000 pints of whiskey.

"Second count: And the complainant aforesaid, upon his oath aforesaid, further complaint makes and says that the automobiles described in the first count, were on the 28th day of April, 1919, in the county aforesaid, were, by the persons aforesaid, unlawfully engaged in and used for the transportation of intoxicating liquor."

The record recites: "The prisoners being before me in open court and all being arraigned on the charge set forth in the complaint entered plea of guilty. Wherefore the court do find the prisoners guilty as charged in the complaint.

"Wherefore the court finds said defendants guilty as charged and that the three automobiles containing said intoxicating liquor are a public nuisance. It is the judgment of the court that said defendants pay a fine each of $100 and costs taxed at $13.20 and stand committed until said judgment is satisfied. It is further ordered and adjudged by the court that the three automobiles be

sold at public sale as provided by law, and that the intoxicating liquor found in the possession of said defendants be destroyed."

The fines were paid and defendants discharged. Smith began this action against the sheriff to obtain possession of one of the seized automobiles.

The gist of the argument of the appellant is "that the appellant was not charged with the illegal transportation of intoxicating liquor, and that no judgment upon such a charge was entered against him;" that plaintiff pleaded guilty to the illegal possession of liquor and that such a plea is no basis for an order to sell the automobile, and that the order to sell is absolutely void. This argument is based upon a misapprehension of the record and of the statute. The first count charges that the liquor was unlawfully in the defendant's possession, and was "within and *being conveyed*" by a train of automobiles, etc.; and the second count charges that the automobiles were unlawfully engaged in and used for the transportation of intoxicating liquor.

In *Robinson Cadillac Motor Car Co. v. Ratekin*, 104 Neb. 369, 374, in considering section 2, ch. 109, Laws 1919, under which this prosecution was conducted, it is said: "Upon conviction of the owner or person in charge of the car his guilt is imputed to the vehicle, and under the act it is forfeited and ordered sold by the court." Paragraph 5 of the syllabus of this case is: "The forfeiture of an automobile under section 2, ch. 109, Laws 1919, is no part of the sentence imposed by the justice of the peace, but is an incident to the conviction of the owner or person in charge of the car." It is stipulated that at the time of the seizure, the plaintiff was the owner of and in possession of the property replevied.

Under the statute every automobile engaged in, or used, for the unlawful transportation of intoxicating liquor is declared a common nuisance, and it is provided, section 2, ch. 109, Laws 1919: "The vehicle and the liquor so seized shall not be taken from the possession of any officer

seizing and holding the same by writ of replevin or other proceedings. Final judgment or conviction in such criminal action shall be in all cases a bar to any suits for the recovery of any vehicle so taken," etc. Under this provision of the statute, the plaintiff has no standing in court for the recovery of the seized automobile.

The judgment of the district court is

AFFIRMED.

GIRARD H. WAY, APPELLEE, V. GEORGIA CASUALTY COMPANY, APPELLANT.

FILED JANUARY 26, 1922. No. 22442.

Appeal: FINDINGS: REVIEW. Findings of the district court in determining issues of fact in proceedings under the workmen's compensation law will not be disturbed on appeal unless clearly wrong.

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

Brogan, Ellick & Raymond and *Casper Y. Offutt,* for appellant.

H. N. Mattley, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

ROSE, J.

This is a proceeding under the workmen's compensation law. In a motorcycle accident plaintiff broke his right arm and his right leg and fractured his skull March 3, 1921. He claims he was at the time engaged in the service of his father, C. F. Way, in the capacity of an employee of the Elm Park Grocery, in Lincoln, at $25 a week. Defendant is charged with liability as an insurer. The claim was presented to the compensation commissioner and rejected. Plaintiff appealed to the district court, where he was awarded $645, including $100

for hospital expenses. He was also allowed $10 a week for 11 weeks. From this judgment defendant has appealed.

Two questions are presented by the appeal: The first is that the evidence is wholly insufficient to sustain a finding that plaintiff was an employee of his father within the meaning of the workmen's compensation law; the view of defendant being that plaintiff and his father were partners in the grocery business. The second point is that the evidence fails to show the injuries arose out of and in the course of the employment of plaintiff, who, as contended by defendant, was not on duty at the time of the accident. These propositions were clearly presented in the brief of defendant and were ably argued at the bar, but it is nevertheless the unanimous opinion that there is a reasonable view of the evidence in which it sustains the findings of the trial court on both issues of fact. The appeal, therefore, is controlled by the familiar rule that findings of the district court in determining issues of fact in proceedings under the workmen's compensation law will not be disturbed on appeal unless clearly wrong.

AFFIRMED.

MARTIN L. LYONS, APPELLEE, V. DONAHUE-RANDALL & COMPANY, APPELLANT.

FILED JANUARY 26, 1922. No. 21871.

1. **Commission Merchants:** CUSTOM AND USAGE. A commission merchant has the right to rely and act upon custom and usage in selling live stock consigned to him.
2. ———: ———: INSTRUCTIONS. *Held*, it was reversible error for the trial court to give instruction No. 12, disregarding the custom and usage of the defendant commission merchants.

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

Crofoot, Vinsonhaler, Fraser, Connolly & Stryker, for appellant.

Raymond T. Coffey and *F. J. Byrd, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

ALDRICH, J.

This is an action at law to recover damages from Donahue-Randall & Company of Omaha, commission merchants engaged in the selling of live stock for hire.

On the 31st of October, 1918, the plaintiff shipped to defendant 136 head of cattle for sale. They arrived in due course of time in fair condition and were accepted by the defendant as usual for sale. On or about November 1, 1918, the defendant firm notified the plaintiff that the cattle had been sold, but it was afterwards ascertained that this was a mistake and plaintiff was then notified. The cattle had not been sold. The plaintiff immediately notified Randall, a member of the defendant firm, that he wanted the cattle sold at once. It appears of record that the defendant had an offer of $7.75 a hundredweight before these cattle had opportunity to have any drink and feed whatever. This offer was respectfully refused.

It may be stated here that it is contrary to custom and general usage of the stock-yards to sell live stock without an opportunity to water and feed them.

This commission merchant into whose hands these cattle had been consigned, and in whose possession and care they were, received no proper offer, as he thought, and so called plaintiff on the telephone and notified him that the market had slumped, and that he could not afford to have these cattle sold on such a market, and that they ought to be sent over to Ralston to be fed up until such time as the market got better, to which the plaintiff replied that he should use his best judgment. But plaintiff also in course of this discussion insisted that the

cattle be sold, that it was not the first time that he had taken a loss and that it probably was not the last. The defendant went ahead, using his best judgment, as he supposed, and shipped the cattle to Ralston and ran up a bill of about $1,200 for the care and feed of these cattle. Later defendant had the cattle brought back to Omaha and sold them for considerably less than the original offer.

There is a square conflict between the testimony of the plaintiff and the defendant Randall on the important facts. In this it is evident that the jury believed the plaintiff and it is not for us to disturb that finding.

It does not anywhere appear in the record that defendant paid for two cattle for which it failed to account. This, of course, should be paid.

In our opinion there was reversible error in the court's instruction No. 12, given on its own motion. Among other things, it permitted the jury to assess damages "sustained by reason of the negligence or gross carelessness of defendant, if any, in failing to accept bids or sell said cattle on the market when received." The record shows there was no negligence in refusing to sell the cattle when received, that the offer refused was to buy the cattle before they had been fed and watered.

As we have before indicated, it is the custom and usage of the commission merchants to feed and water live stock before selling to offset to some extent the shrinkage caused by shipping. The defendant had the right to and should use its best judgment in making a sale and in refusing the offer made, and in so doing it acted according to the custom and usage of the business and exercised sound judgment. In view of this discussion, we are of the opinion that instruction No. 12, as given, was reversible error.

The cause is reversed and remanded.

REVERSED.

KATHERINE O'BRIEN, APPELLEE, V. PATRICK E. SULLIVAN, APPELLANT.

FILED JANUARY 26, 1922. No. 21856.

1. **Appeal:** INSTRUCTIONS. "Stating the issues to the jury by copying the pleadings in the instructions is a practice not to be commended, but, where it appears that such a course has not resulted in prejudice to the rights of the complaining party, it is not a sufficient ground for reversal." *Tobler v. Union Stock Yards Co.*, 85 Neb. 413, followed.
2. **Damages:** PERSONAL INJURIES: ORDER FOR PHYSICAL EXAMINATION. In an action for damages for personal injuries, it is proper for the trial court to order a physical examination of the injured party by competent physicians and surgeons, to ascertain the character and extent of the alleged injuries. In such case, the application for the examination must be timely made.
3. **Appeal:** DAMAGES: PHYSICAL EXAMINATION: DISCRETION OF COURT. Where a request for a physical examination of the injured party is made after the trial has commenced, it is within the sound discretion of the trial court whether such request be granted. In such case, the ruling of the court will not be disturbed unless, under all of the circumstances, there appears to be an abuse of such discretion.
4. **Evidence** examined, and *held* sufficient to support the judgment of the trial court.

APPEAL from the district court for Hayes county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

C. A. Ready, Lambe & Butler and *Walter D. James*, for appellant.

Scott & Scott, contra.

Heard before LETTON, DEAN and DAY, JJ., ALLEN and BEGLEY, District Judges.

DAY, J.

Plaintiff recovered a judgment against the defendant, who is her brother, for $1,500 damages for inflicting an assault and battery upon her. The defendant appeals.

Three grounds are urged for a reversal of the judgment.

It is first urged that the court erred in giving instruction No. 1, in which the claims made by the plaintiff as a basis for her action are set forth. The particular complaint made is that, in stating the issues on behalf of the plaintiff, the court practically copied the plaintiff's petition, and that the account of the affray was stated in such extravagant language as to be prejudicial to the defendant. The instruction states that the plaintiff alleges that the defendant "unlawfully, wilfully, maliciously and violently set upon the plaintiff and struck, beat, bruised and wounded her, thereby inflicting upon her great, severe and permanent injuries, and cut, bruised and wounded the plaintiff's nose, jaw, face, mouth, neck, arms, and chest, and loosened and broke and knocked out her teeth, broke two of her ribs, wrenched her arm, and bruised and injured her on and about the upper portion of her body." Following this description, the instruction further charges that from the effects of such treatment the plaintiff suffered great pain and mental anguish, and will continue to do so in the future. It is quite apparent that a number of superfluous adjectives are used in characterizing the nature of the assault, and perhaps some exaggeration has been used in describing the extent of the injuries inflicted. While this court has on a number of occasions looked with disfavor upon the practice of copying the pleadings in stating the issues to be determined by the jury, especially when they are long and involved and are liable to create confusion in the minds of the jury, yet, unless it appears that such instructions resulted in some prejudice to the rights of the complaining party, it will not be sufficient ground for reversal. *Tobler v. Union Stock Yards Co.*, 85 Neb. 413. The instruction was short and uninvolved, and free from objection except in the use of somewhat extravagant language. Considering the whole instruction in the light of the testimony, to which reference will be hereinafter made,

we do not regard it as such a violation of the rule requiring the issues to be stated in clear and simple language as to result in any prejudice to the defendant.

The next assignment of error is directed against the action of the court in overruling the defendant's motion that the plaintiff be required to submit to a physical examination by a competent physician for the purpose of ascertaining the character and extent of her injuries. It is now well settled by the weight of authority that trial courts have the inherent power to require the plaintiff, in an action to recover damages for personal injuries, to submit his or her person to a reasonable private physical examination by competent physicians and surgeons to ascertain the nature and extent of the alleged injuries. 14 R. C. L. 696, and cases cited. This court has spoken on the subject in *State v. Troup,* 98 Neb. 333, as follows:

"In an action for damages caused by injuries to the person, the trial courts have power to order an expert examination of the person of the party injured, when the circumstances of the trial make it necessary to do so and no substantial harm can result therefrom."

In the present case, however, the ruling of the trial court seems to have been based upon the fact that the application for a physical examination was not timely made. It appears that after the case was called for trial, and the impaneling of the jury commenced, a motion was made for an order for a physical examination of the plaintiff. The motion was overruled, "on account of the delay in the trial of the case that would result from a physical examination being had at this time, and no reason being shown for the delay in making said application." It is plain that whether the court should stop the progress of a trial for the purpose of ordering a physical examination, especially when no reason is shown why the application was not sooner made, is a matter which rests in the sound legal discretion of the trial court, and unless such discretion has been abused, the action of the court will not constitute reversible error. Under the

record in this case, we are not prepared to say that the ruling of the court on the motion was an abuse of discretion. If a personal examination is desired, the better practice is to make the application before the trial begins, and to have experts agreed upon by the parties or appointed by the court. *Stuart v. Havens,* 17 Neb. 211; *City of Chadron v. Glover,* 43 Neb. 732.

Lastly, it is urged that the evidence is not sufficient to support the judgment, and that the verdict was the result of passion and prejudice brought about in part at least by the extravagant statement of the issues. One of the physicians who examined and treated the plaintiff for her injuries testified that she had suffered a fractured rib, and discolored tissue, and that she breathed with difficulty. The plaintiff testified that the defendant struck her a number of times; that he broke two of her teeth out, and knocked two loose; that he beat her all over; that he broke her rib; that the bruises produced a lump which, the doctor said, would probably start a cancer; that he struck her on the nose, face, jaw, and under the ear, and that at the time of the trial, some two years after the affray, she was still having her nose treated. The defendant's theory was that the plaintiff was the aggressor. In giving his version of the encounter, the defendant stated that he never struck the plaintiff at all; "I had no occasion to; I put my open hand up and pushed her back; I was not even out of humor."

It will serve no good purpose to detail the evidence further. Suffice it to say that we are satisfied that the assault upon the plaintiff was entirely unjustifiable; that the evidence is sufficient to support the judgment; and that there is nothing in the record to warrant us in holding that the verdict was the result of passion and prejudice.

Finding no reversible error in the record, the judgment is

AFFIRMED.

E. W. POAST, APPELLEE, V. OMAHA MERCHANTS EXPRESS & TRANSFER COMPANY, APPELLANT.

FILED JANUARY 26, 1922. No. 22193.

1. **Master and Servant:** INJURIES TO SERVANT: COMPENSATION. Where an employee, working under the provisions of the workmen's compensation act, before the 1921 amendment became effective, sustains an injury resulting in temporary total disability, he is entitled to recover compensation under subdivision 1, sec. 3662, Rev. St. 1913, as amended by chapter 85, Laws 1917, during the period of total disability, not exceeding 300 weeks, and, in addition thereto, when it becomes ascertainable that the injury will result in a certain percentage of permanent partial loss of the use of the injured member, the employee is entitled to compensation for such loss under the provisions of subdivision 3 of said section 3662, Rev. St. 1913.
2. **Evidence** examined and *held* to sustain the judgment of the trial court.

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

Kennedy, Holland, DeLacy & McLaughlin, for appellant.

Bigelow, Peterson & LaViolette, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

DAY, J.

This action is based upon the provisions of the workmen's compensation act, sections 3642-3696, Rev. St. 1913, as amended by chapter 85, Laws 1917.

It appears that the plaintiff, while in the employ of the defendant, on January 31, 1919, sustained an injury resulting in a comminuted fracture of the tibia and fibula of the left leg just above the ankle joint. There is no question but that this injury arose out of, and in the course of, the plaintiff's employment. At the time the plaintiff was receiving a weekly wage of $24.40, and under the law was entitled to receive compensation at

the rate of $12 a week. Following the injury the plaintiff was taken to a hospital, where he remained, receiving needful medical attention, until February 21, 1919, when he was permitted to return to his home. About the middle of April he began walking with crutches, and a short time thereafter began walking with the use of a cane. On July 28, 1919, he had so far recovered as to resume work, and applied to the defendant, in whose employ he had been for 21 years, for employment, but was not able at that time to secure work with the defendant. He did, however, secure employment as a freight handler with a railroad company, and continued work in that capacity until October 21, 1919, when, singularly enough, he again sustained a fracture of his left leg at the same point as the prior injury. Following the injury of January 31, the defendant paid compensation to the plaintiff at the rate of $12 a week up to June 27, a period of 21 weeks, at which time it was the theory of the defendant that the plaintiff had entirely recovered, and that they were under no legal obligation to make further payments. After plaintiff had received the second injury, as above indicated, he filed with the compensation commissioner in December, 1919, a petition praying for compensation for permanent partial disability resulting from the injury sustained on January 31. Before the compensation commissioner the plaintiff was awarded an additional sum of $42.80, together with medical and hospital expenses. From the award of the compensation commissioner the plaintiff appealed. Upon the trial in the district court there was a finding and judgment that the plaintiff had suffered a loss of 35 per cent. of the normal use of his foot as a permanent partial disability; that under the law he was entitled to compensation for such permanent partial disability at the rate of $12 a week for 43 3-4 weeks, making an aggregate sum of $525, beginning June 27, 1919; and in addition he was awarded the sum of $7 hospital expenses. This sum of $525 was allowed in addition to the compensation paid by the de-

fendant for the period from January 31, 1919, to June 27, 1919, a period of 21 weeks. From this judgment the defendant appeals.

It is first urged by the defendant that the evidence is not sufficient to support the finding and judgment that the plaintiff suffered a permanent partial disability as a result of the injury of January 31, 1919. Upon this question the medical testimony was somewhat at variance. There was testimony which supported the plaintiff's theory that he had sustained a permanent partial disability in the use of his foot. One of the physicians gave it as his opinion that the plaintiff had lost 35 per cent. of the normal use of his foot; that the plaintiff in using his foot stood upon the outer edge of the foot, and was not able to stand squarely upon it; that the foot was out of alignment; and that the injury was permanent. Other physicians gave it as their opinion that the injury was not of a permanent character. There being testimony in the record which supports the judgment, the rule is well established that, where there is a conflict of evidence, the judgment will not be set aside unless it appears to be clearly wrong. Under the facts of this case we are not at liberty to disturb the judgment upon the ground that the evidence does not support it.

It is the main contention of the defendant that the total amount of plaintiff's recovery is limited to compensation for 43 3-4 weeks, and it is argued that, inasmuch as the defendant has heretofore paid to the plaintiff compensation for 21 weeks, during the period of his total disability, therefore it should be required to pay only for the additional period of 22¾ weeks. The question thus presented turns upon the meaning of section 3662, Rev. St. 1913, as amended by chapter 85, Laws 1917, which was the law in force at the time of the injury. That section of the statute establishes a schedule of compensation to be paid for injuries to employees resulting in disability, and is divided into several subdivisions. Subdivision 1 prescribes that there shall be paid to the injured employee

"for the first 300 weeks of total disability" 66 2/3 per cent. of the wages received at the time of the injury, not exceeding, however, $12 a week. This subdivision does not contemplate that compensation should be paid for a full period of 300 weeks, unless there is a total disability for that length of time. It is clearly the meaning of this subdivision that the payments should continue during the time of total disability. Subdivision 3 prescribes a schedule of compensation to be paid for the loss of various members and provides that the compensation so fixed "shall be exclusively as follows:" Then follows a number of short subparagraphs declaring what compensation shall be paid for the loss of various members, among them, "for the loss of a foot 66 2/3 *per centum* of daily wages during 125 weeks." Another subparagraph provides: "In all cases involving a permanent partial loss of the use or function of any of the members mentioned in subdivision 3 of section 3662, the compensation shall bear such relation to the amount named in said subdivision 3 of section 3662 as the disabilities bear to those produced by the injuries named therein." These several provisions of the act must be construed together, giving effect to each of them if possible to do so. Under subdivision 1 of section 3662, it appears that it was the manifest intention of the legislature that in all cases the injured employee is entitled to compensation for injuries resulting in a total disability. It is a matter of common knowledge that most of the industrial accidents result in total disability for some time at least. Where the employee, for instance, suffers a broken limb, it is certain that he will be totally disabled for an indefinite period. Whether such an injury will ultimately result in the total loss of the member, or whether it will result in a permanent partial loss of the use of the member, or whether a complete restoration to normalcy will be effected, cannot at the outset be foretold with any degree of certainty.

During this period of total disability and uncertainty of the ultimate outcome, the injured employee is entitled to compensation under the first subdivision of section 3662. When the time arrives when it becomes ascertainable that he will suffer a total loss of the use of the member, or a permanent partial loss of the use of the member, then the injured employee is entitled to compensation under the provisions of subdivision 3 of section 3662. That this must have been the intention of the legislature, as applied to this class of injuries, is, we think, made clear by a simple illustration: Suppose that an employee receives an injury to his foot of such a character that it is uncertain whether it will be necessary to amputate the member. In order to save the foot he is treated by physicians and surgeons for a period of one year, during which time he is under constant treatment, and totally incapacitated for work. During this period he is paid as for a total incapacity at the rate of $12 a week, aggregating $624. At the end of the year it develops that the efforts of the physicians and surgeons have been successful; the employee's foot has been saved from amputation, and he is left with a 10 per cent. permanent loss of the use of the foot, which, under the provisions of subdivision 3 of said section 3662, would entitle him to receive compensation for 12½ weeks, aggregating $150. It becomes apparent in the illustration given that, if the limit of the employee's recovery is $150, he has been overpaid, and would be owing his employer the difference between these two amounts, or $474. This was not the spirit of the law. A fair construction of the law would imply that where an employee sustains an injury resulting in temporary total disability, but of such a character that the extent of the disability cannot then be determined, the employee is entitled to receive compensation under subdivision 1 of section 3662 until such time as a cure is effected, or until it can be determined definitely what percentage of permanent partial loss the employee will suffer, when the provisions

of subdivision 3 of section 3662 apply. This we understand to be the purport of the decisions in *Hall v. Germantown State Bank,* 105 Neb. 709, and *Ulaski v. Morris & Co.,* 106 Neb. 782. There are some classes of injuries in which it may be determined at once that the injured party will lose the injured member. Many cases in which the first treatment calls for amputation arise. In such cases it is at once ascertainable that the ultimate result of the injury will be the loss of the member. In such cases it seems to be within the contemplation of the statute that the employee is limited in his recovery to the number of weeks prescribed in subdivision 3 of section 3662 for the loss of the member. The case of *Abel Construction Co. v. Goodman,* 105 Neb. 700, falls within this latter rule. In that case, as we understand it, the loss of the eye was complete at the time of the accident.

From the foregoing discussion, it follows that the judgment of the district court is right, and it is, therefore,

AFFIRMED.

JOHN FUTSCHER ET AL., APPELLEES, V. CITY OF RULO ET AL., APPELLANTS.

FILED JANUARY 26, 1922. No. 22371.

1. **Municipal Corporations: ASSESSMENTS: POWER TO LEVY: CONSTRUCTION.** The power delegated to a city to construct local improvements and levy special assessments for the payment thereof is to be strictly construed against the city, and every reasonable doubt as to the extent or limitation of such power is resolved against the city.

2. **———: EXPENDITURES FOR WATER-WORKS: CONSTRUCTION OF STATUTE.** *Held,* that section 5119, Rev. St. 1913, granting power to a city of the second class to make expenditures in the acquisition of a water-works system, by reason of the peculiar terms of the statute and by reason of the apparent underlying spirit of the act, leaves uncertain the matter of limitation of expenditures to

be paid by levy of special assessments, and that such doubt is resolved against the city and in favor of the taxpayer.

3. ———: ———: INJUNCTION. Where, under such statute, substantially all the property in the city has been included in one taxing district under a plan to construct a standpipe and water-mains and hydrants, and pay for the same through special assessments, at such cost as to bring the expenditures for the entire water system beyond an amount equal to 20 per cent. of the taxable property in the city, *held*, that the city, in so doing, exceeded the lawful limitation of taxation fixed by the statute, and that its action may be enjoined at the instance of the taxpayers.

4. ———: SPECIAL ASSESSMENTS: CONSTITUTIONAL LIMITATIONS. Special assessments may equal, but must not exceed, the benefit to the property taxed. The excess in the cost of a local improvement beyond the actual benefits which the property assessed receives cannot be charged against that property without taking from the owner a portion of his property without due process of law and without just compensation.

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

John Wiltse, for appellants.

Frank A. Hebenstreit and *J. E. Leyda, contra.*

Heard before MORRISSEY, C. J., ALDRICH and FLANSBURG, JJ., HOSTETLER and MORNING, District Judges.

FLANSBURG, J.

This was an action to enjoin the city of Rulo from entering into a contract for the purchase and installation of water-mains, fire hydrants and a standpipe, and from levying the cost thereof as a special assessment against the property in the district claimed to be especially benefited by such improvement. The trial court granted a permanent injunction, and the defendant has appealed.

The defendant city of Rulo is a city of the second class, and its authority to act in the matter involved is based upon certain provisions of section 5119, Rev. St. 1913.

This section of the statute was amended in 1917 (Laws 1917, ch. 103) and also in 1919, at the latter time by three separate and distinct acts, bearing no reference to one another (Laws 1919, chs. 46, 48, 52). It has been decided that chapter 46, Laws 1919, has superseded the other amendatory acts and is now the statute which is in effect. *Morgan v. City of Falls City*, 103 Neb. 795.

The section referred to covers several pages of the statute, and there are embodied therein, in an incoherent and strangely disarranged fashion, matters having to do with the taking over and control of private water-works systems; the construction and acquisition of water-works by the city, both for fire protection and for the use of water consumers; the publication of notices to bidders and the letting of contracts; the matter of borrowing money and issuing bonds and of meeting their payment through a general tax; the matter of charging the cost of construction of portions of the plant by special assessment to property benefited; the matter of holding elections by the voters to authorize the issuance of bonds; the matter of the extraterritorial power of the city to do certain acts incidental to the establishment and operation of a water system; the matter of fixing rates and charges for the use of water; the mattter of collecting and applying all income from rents and profits arising from the operation of such plants; and the matter of providing a water commissioner, defining his duties and salary, and fixing the method of his appointment and removal.

The provisions particularly involved here give the city the power by ordinance, "to provide for the purchase of steam engines or fire-extinguishing apparatus and for a supply of water for the purpose of fire protection and public use and for the use of the inhabitants of such cities and villages by the purchase, erection or construction of a system of water-works, water-mains or extension of any system of water-works now

or hereafter established or situated in whole or in part within such city or village," and, when authorized by a vote of the electors, to "borrow money or issue bonds for the purpose not exceeding twenty per cent. of the assessed value of the taxable property within said city or village according to the last preceding assessment thereof, for the purchase of steam engines or fire-extinguishing apparatus, and for the purchase, erection or construction and maintenance of such *water-works, mains, portion* or extension *of any system of water-works* or water supply," and to "levy and collect a general tax in the same manner as other municipal taxes may be levied and collected, to an amount sufficient to pay the interest and principal of said bonds heretofore or hereafter issued as the same mature, on all the property within such city or village as shown and valued upon the assessment rolls," and further provides that, "the expense of erecting, locating and constructing *reservoir* and *hydrants* for the purpose of *fire protection,* and the expense of constructing and laying *water-mains, pipes* or such parts thereof as may be just and lawful, may be assessed upon and collected from the property and real estate especially benefited thereby, if any, in such manner as may be provided for the making of special assessments for other public improvements in such cities, towns and villages." And by section 5120, it is further provided that such cities "owning their own system of water-works are hereby authorized and empowered to borrow money or issue bonds, not exceeding five *per centum* of the assessed value of the taxable property within said city or incorporated village according to the last preceding assessment, *in addition to the amount of indebtedness now authorized by law for water purposes,* for the purpose of extending, enlarging or improving its system of water-works as the needs of said city or incorporated village or its inhabitants may require; and levy and collect a general tax * * * in the same manner as other municipal taxes may be levied and col-

lected, to an amount sufficient to pay the interest and principal of said bonds as the same mature."

A special election was held in the city of Rulo, and by vote of the electors the city was authorized to expend not to exceed $13,000 for the purpose of constructing a water system, *exclusive of water-mains, hydrants,* and a *standpipe.* The assessed valuation of all the property in the city of Rulo was approximately $67,000, and the $13,000 authorized expenditure was, therefore, nearly 20 per cent. of such total assessed value. Upon receiving this authority from the electors, the city council proceeded to let a contract for the construction of pumps, buildings, filter-plants and other water-plant appurtenances, the cost of which, by the contract, was to be $11,995. This left the matter of a standpipe and water-mains entirely unprovided for. The city council, then, by unanimous vote, in order to provide for those portions which had been omitted, and which were essential to a complete water-works system, passed a resolution describing the entire city of Rulo as a special assessment district, setting forth a plan for the erection of a standpipe and the construction of water-mains and hydrants throughout the city, the estimated cost of all of which was $30,033.86, and which cost was proposed to be assessed against the property in the city, according to benefits. By the two methods, then, of general taxation and special assessment, the city proposed to expend some $42,000 for the construction of a water-plant, mains and reservoir, which is approximately 60 per cent. of the total assessed value of the taxable property in the city, when, if the city had pursued the one method alone of paying for the identical properties by general taxation, its expenditures would unquestionably have been limited to 20 per cent. of such assessed value.

By the provisions of the statute referred to the city is given authority to construct an entire water system, including pumps, reservoir and mains, and to pay for the same by general taxation. It is limited in that

authority to the extent that it may issue bonds to the amount of 20 per cent. of the taxable property in the city, and provide for the payment of these bonds through the assessment of a general tax. Counsel for the defendant contends that, though the city would be limited in its expenditures, should it undertake to proceed to establish an entire water system, including the plant and the mains, and pay for the same by general taxation, still the city has the right to build part of the plant and pay for the same by general taxation to the full limit of expenditures mentioned, and may then supplement the plant by providing a reservoir, mains and hydrants, to be paid for by special assessment, without regard to any limit of expenditures, and even though the tax should be confiscatory.

The pumps, standpipe, filter-plants and station are, in their nature, improvements of a general public character, conferring a like benefit over the city generally, and are only to a small degree, except, perhaps, under special circumstances, improvements of a local character which would confer special benefits upon any particular property in the city. The legislature could, had it seen fit, have provided that those particular portions of the water system should be constructed and paid for by general taxation, and could have provided a limit to the expenditures to be made for that purpose; and the legislature could have provided that the water-mains and such portions of the plant, which are constructed throughout the city and are strictly in the nature of local improvements, conferring special benefits upon one property or another, as might happen to be adjacent to such improvement, should be paid for by special assessments, without limitation as to the amount of such special assessments, except that they should not exceed in amount the value of the benefits conferred upon the property taxed. The provisions of the statute do not so segregate those two classes of property improvements. The provision for raising funds to provide a water sys-

tem by general taxation is not confined to the purchase and establishment of such portions of the plant only as are of general public benefit, but is so comprehensive as to allow the water-mains and the entire water system to be constructed and paid for by general taxation. On the other hand, the provision for special assessments is not confined to raising funds for the construction of those portions of the plant only—such as mains, pipes and hydrants—which are in their nature strictly local improvements, and which confer special benefits upon those particular properties in the immediate vicinity of those improvements, but the provision for special assessments also covers the construction of a reservoir which, like the pumping plant, is under ordinary circumstances of general public benefit to all property in the city, rather than of special benefit to certain particular properties. The two methods, then, of providing the water system, either by general tax or by special assessment, are not divided by the statute so that those portions of the plant, which are of a general public nature, shall be borne by general taxation, and those portions, which are of a local nature and confer special benefits, shall be borne by special assessment. In order to construct a reservoir and pay for the same by special assessment, the city has therefore found it necessary to include the entire property in the city in one district, so as to be able to distribute the tax generally over all the property in the city.

The distinction in principle underlying the levy of a general tax and the levy of special assessments is lost sight of when the improvement proposed is of such a character and of such general benefit to the entire city that all the property in the city must be included within a single taxation district, so as to make it possible that the special assessment may be made. *Village of Morgan Park v. Wiswall,* 155 Ill. 262; *Pomroy v. Board of Public Water-Works,* 55 Colo. 476; *Hughes v. City of Momence,* 164 Ill. 16; *O'Neil v. People,* 166 Ill. 561;

Village of Grand Ridge v. Hayes, 271 Ill. 431; *City of Springfield v. Springfield Consolidated R. Co.,* 296 Ill. 17; 28 Cyc. 1115.

If the legislature intended to prohibit the city from exceeding an expenditure equaling 20 per cent. of the taxable property in the city in the construction of hydrants, water-mains and a reservoir, when the cost was to be paid by general taxation, then, certainly, especially in view of the uncertainty found in the statute, it logically follows that the legislature may also have intended to prohibit any expenditure beyond that limit, when the cost of such improvements was to be paid by special assessment. In either event, it is the same character of public improvements to be constructed and the same property owners who are to be compelled to pay the tax. The purpose of the statute was to protect the taxpayer against excessive expenditure in the purchase by the city of a water system, and to preserve his property from a burden greater than 20 per cent. of its assessed value. It makes little difference to him whether the tax which he is called upon to pay is a general tax or a special assessment. The obvious purpose of the statute, to the end of giving him protection, would be thwarted by a holding that the city authorities might, by special assessment covering the entire property in the city, do what they were clearly prohibited from doing by a general tax. *Birdseye v. Village of Clyde,* 61 Ohio St. 27.

The power to construct and even to enlarge a waterworks system already constructed is, by the statute, very carefully safeguarded, when the cost is to be paid by general taxation, both by limit of expenditure and by a requirement that authority be first given by the electors at a special election, held for the purpose, and it is reasonable to assume that the legislature did not intend that those safeguards should be rendered nugatory by vesting the absolute power in the city council to purchase the same improvements and incur expenditures

beyond the given limit when it proposed to pay the cost thereof by levy of special assessments.

We recognize the rule that ordinarily a limitation upon the authority to levy a general tax does not limit nor concern the matter of taxing by special assessments, since, as we have said, taxation for local improvements is and must be limited to the value of the benefits conferred upon the property taxed. *Wickliffe v. City of Greenville,* 170 Ky. 528. But in practical operation such limitation as to special assessments, unless the property owner is alert to make objection, does not always protect him. It is, therefore, entirely feasible and the legislatures sometimes do fix a definite limit, aside from the limitations as to the value of the benefits, and make provision that special assessments shall not exceed, in any case, a certain proportionate value of the property. In this particular statute, the matter of acquiring a water-works system and the matter of limitation of expenditures, as well as the provisions for general taxation and special assessments, are so embodied in the same section of the statute as to give rise to some uncertainty and leave in doubt the real intention of the legislature. There is no specific provision that special assessments shall be in accordance with and not to exceed the benefits, but the wording is that so much of the expense "as may be just and lawful" may be levied against the property benefited. That is a phrase of ambignous meaning, in view of the previous evident intention to make a limitation of expenditures in the acquisition of a water-works system. Throughout the statute there is apparent an idea, on the part of the legislature, that expenditures for the purpose of the acquisition of a water-works system shall be limited and the property owner safeguarded. Even an expenditure for extensions equaling 5 per cent. of the assessed value of the property is not allowed to be incurred, under section 5120, Rev. St. 1913, except by consent of the electors by vote at special election, and it is declared

that the tax to cover that expenditure may be "in addition to the amount of indebtedness now authorized by law for water purposes."

It must be remembered in this connection that, when the city creates an improvement district and contracts for the construction of water-mains and a standpipe, it becomes primarily liable upon those contracts, the contracts become an obligation and result in an indebtedness of the city, even though the plan adopted is to levy special assessments in order to raise the funds to pay such indebtedness. *Moss v. City of Fairbury,* 66 Neb. 671.

It may be further pointed out that the statute does not affirmatively declare that district water bonds shall not be issued when the plan of procedure is by special assessment. If it is necessary and proper to provide for the issuance of bonds to cover a $13,000 expenditure, to be paid for by general taxation, it would seem as necessary to authorize the issuance of special assessment bonds to provide for an expenditure of $30,000, which is to be met by special assessment. When the right is given to a municipality to provide expensive public improvements, the right to borrow money and issue bonds, when found necessary to carry out the purposes of the statute, has been held to have been impliedly granted. *State v. Babcock,* 25 Neb. 278; *State v. Babcock,* 22 Neb. 614.

In fact, one of the methods of meeting the cost of "other public improvements"—paving and repaving—in cities of this class is by the issuance of special assessment bonds. The provision of the statute now under consideration, with regard to the levying of special assessments to cover the cost of water-works, recites that the same procedure shall be followed as is provided for making special assessments for "other public improvements" in such cities. It is to be noted that there is more than one method for making assessments for other public improvements. Assessments for

sidewalks, sewers and parking have a different plan of procedure than that provided for paving and repaving, and the reference in the statute now involved is not specific as to which of the particular methods must be followed. In the case of paving and repaving, district bonds are allowed. If the legislature intended that district bonds might be issued to cover the cost of expenditures, when they were to be paid by special assessment, then it seems inconsistent that it should prohibit bonds from being issued beyond the extent of $13,400, when they were to be paid by general taxation, and should allow bonds to the extent of over $30,000, when they were to be paid by special assessment.

Special assessments may equal, but must not exceed, the benefit to the property taxed. The excess in the cost of a local improvement beyond the actual benefits which the property assessed receives cannot be charged against that property without taking from the owner a portion of his property without due process of law and without just compensation. *Sayles v. Board of Public Works,* 222 Mass. 93. It is difficult to understand, though the record does not set out the facts, how a water system, established in the city of Rulo, would confer benefits to the extent of over 60 per cent. of the assessed value of the property there. Whatever excess in the cost of that plant would exceed the benefits accruing to the property, obviously, could not be charged against the property, but would be an expense which, if one which the city could legally assume, would have to be borne by general taxation. To that extent again the limit on the power of general taxation becomes involved.

The right delegated to a city to construct local improvements and levy special assessments for the payment thereof is strictly construed against the city, and every reasonable doubt as to the grant of power is resolved against such grant. *Missouri, K. & T. R. Co. v. City of Tulsa,* 45 Okla. 382; *Albers v. City of St. Louis,* 268 Mo. 349; 28 Cyc. 1106; *Hutchinson v. City of*

Omaha, 52 Neb. 345; *Oshkosh City R. Co. v. Winnebago County*, 89 Wis. 435.

There is a very serious doubt as to whether or not the legislature intended that the city should be limited in its expenditures in the acquisition of a water-works system to an amount not to exceed 20 per cent. of the assessed value of the property in the city, even when it proposed to raise the funds for such expenditures by special assessments, and it is our opinion that the doubt as to that matter should be resolved against the city.

For the reasons given, the judgment of the lower court is

AFFIRMED.

LA RUE BROGHAMER ET AL., APPELLANTS, V. CITY OF CHADRON ET AL., APPELLEES.

FILED JANUARY 26, 1922. No. 22421.

1. **Municipal Corporations:** MEETING OF BOARD OF EQUALIZATION: NOTICE: PRESUMPTION. In an attack upon the proceedings of a city council, acting as a board of equalization, when that part of the municipal records introduced in evidence shows that a notice of the meeting of the board was ordered published, and when the complete record of the proceedings is not introduced in evidence and no portion offered to show that such notice was not published, it will be presumed by the court that the notice was published and was in all respects regular.

2. ———: ———: PLAN OF ASSESSMENT. Where the council, as a board of equalization, adopted the zone plan for the apportionment of assessments, so that all property in the district within the zone nearer to the paving was assessed a higher per cent. of the tax, and the zone next farther removed a medium per cent., and so on, reducing the amount by zones until the property in the farthest zone was required to pay the least proportionate part, and when there was no evidence introduced or preserved by complaining property owners which would show that the assessment resulting was not in accordance with nor in excess of benefits, the court, in an error proceeding reviewing the action of the board of equalization, will presume that the plan adopted was a proper one.

3. ———: ———: ———: OBJECTIONS: REVIEW. Ordinarily the propriety of the plan of apportionment of the tax and the necessity of expenditure for those things which might, within the discretion of the board, have been considered by it essential and incidental parts of the main project will not be reviewed on error, where the complaining parties did not appear before, nor make objections to, the board, since the board is entitled to a fair opportunity while it is in session to avoid error and to meet such objections.

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

Allen G. Fisher, W. T. McMillan and *Thomas E. Dunbar,* for appellants.

J. B. Townsend, E. D. Crites and *F. A. Crites, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

FLANSBURG, J.

This was an error proceeding to the district court for Dawes county, taken from an order made by the city council of the city of Chadron, acting as a board of equalization, which order fixed special assessments totaling $281,203.93, to meet the cost of paving constructed in paving district No. 1 in that city. The district court affirmed the action of the board, and the plaintiffs have brought their appeal to this court.

Very many of the objections raised by the plaintiffs find no basis in the record. None of the plaintiffs ever appeared before the board of equalization. They presented no evidence and entered no objections. The only objection ever made was by their lodging an appeal in the district court, after the board had acted and after the assessments had been finally determined and the amounts thereof published. Furthermore, the transcript of the city council, pertaining to the matters in the paving district in question, is incomplete and purports, on its face, to be only extracts from such proceedings. In certain material respects, then, we do not have the com-

plete record of the proceedings upon which the council, as a board of equalization, based its findings and order.

The plaintiffs' first objection is that there was no notice given of the sitting of the board of equalization. The minutes of the council, produced in evidence, however, show that the clerk was ordered by the council to publish such a notice, and plaintiffs' attorneys in their brief admit the publication of such notice, but claim only that it was defective in substance. The notice actually published has not been produced, nor has it become a part of the record before us. In the absence of any showing we will presume that the notice was in all respects regular.

Plaintiffs further object that neither a proper method of equalization of assessments nor the method prescribed by the ordinance creating the district was followed, and that certain items of expenditure were unauthorized and were illegally included in the making of the assessments.

They contend that the original ordinance provided that the cost of the improvement should be levied according to the front-foot rule, and also that only such tracts of land or lots should be assessed as directly abutted upon the pavement. There is nothing in the original ordinance so indicating. On the other hand, it is provided that the cost of the improvement shall "be charged and assessed in the manner and to the extent as provided by law." When the council met as a board of equalization it had full authority to adopt whatsoever method it deemed wise and just as a plan for equalization. It devolved upon the plaintiffs to show that, by the plan adopted, injustice or discrimination resulted, or that the assessments so fixed were not in accordance with benefits, or that the properties were assessed to a greater amount than the benefits actually conferred. This proof the plaintiffs did not attempt to offer, and they have furnished evidence of no facts to serve as a basis for a finding that the assessments were not equitable and proper. The plan, however, which was followed in arriving at the amount

of the respective assessments, can be gathered from the record. In general, the paving district included property extending to a distance of 250 feet on either side of the proposed paving. Instead of assessing the cost of this paving at so much a square foot for all the property in the district, that property which was nearer to the paving was assessed a greater percentage of the cost than the property which was farther away. The same method was followed in fixing the assessment for the paving constructed on side streets. This was done by arranging the district into zones, so that all property within the zone nearer to the paving was assessed a higher per cent. of the tax; the next zone farther removed a medium per cent., and so on, reducing the amount by zones until the farthest zone was required to pay the least proportionate part. The plan is one quite ordinarily followed. Without any specific proof that it worked inequitably, or was not in accordance with nor in excess of benefits, we cannot say that the council has not acted fully within the scope of the discretion vested in it. On the other hand, the plan and method of procedure would, on its face, seem to be one which would ordinarily bring equitable results.

The plaintiffs contend that certain items of expenditure, made to cover the cost of drainage, grading, engineering and interest on borrowed money, were wrongfully and unlawfully included as part of the cost of construction of the pavements. It is the rule, however, that all expenses which are necessarily incident to the making of the authorized improvement may be included in the cost. 28 Cyc. 1153. The record shows the amount of these expenditures and that they were made for the purposes above enumerated, but it does not show the specific nature and the character of the things provided by that expense and their relation to the main improvement. It is apparent that some provision for drainage must be made; some amount of grading must be done; that engineering services are necessary in the construction of such

paving improvements; and that interest may have to be paid on money necessarily borrowed. Where the council may have had reasonable basis for believing that those things were necessary and incidental to the main project, the court is unable, without proof, to say that the council erred in its judgment, or that the matters and things done in the execution of the work were not incidental and essential to the construction of the pavements, and cannot say that the council, in its determination, acted outside of the authority conferred upon it by the statute in such special assessment proceedings.

Throughout the proceedings it appears that the council had jurisdiction. It is not contended that the ordinance creating the district was not duly enacted. The petition of property owners for the creation of the district was not necessary under the law as amended. Laws 1917, ch. 95, sec. 1 (4916). The board of equalization had jurisdiction, and no evidence was offered, either before that board, or in the district court, to show that the council, in making the expenditures for the matters above complained of, exceeded its authority, or went beyond the discretion vested in it in determining what was a necessary and incidental expense to the curbing and paving of the streets in the district.

Where the council has jurisdiction as a board of equalization, and the matters coming before it and upon which it acts involve the exercise of its discretionary powers, and where the property owners do not appear and object, nor in any way attempt to direct or assist the board to a true determination of the questions in which they are interested, it is too late for them, for the first time, to raise those questions upon an appeal or error proceedings in the district court. This is the rule followed with regard to proceedings before boards of equalization generally. *Reichenbach Land & Loan Co. v. Butler County,* 105 Neb. 209; *Brown v. Douglas County,* 98 Neb. 299; *State Bank v. Seward County,* 95 Neb. 665; *Nebraska Telephone Co. v. Hall County,* 75 Neb. 405, and the same

rule obtains with regard to the matter of proceedings for the levy of special assessments, conducted by a city council, sitting as a board of equalization. *Chicago, R. I. & P. R. Co. v. City of Centerville,* 172 Ia. 444.

The judgment of the district court is therefore

AFFIRMED.

FARMERS GRAIN & GENERAL SHIPPING ASSOCIATION, APPELLEE, V. ST. ELMO JORDAN, APPELLANT.

FILED JANUARY 26, 1922. No. 21862.

1. **Trial:** DIRECTION OF VERDICT. Where the plaintiff has clearly made out his case, and there is no evidence to the contrary, and the evidence is neither conflicting nor contradictory, and is not of such a nature as to warrant different conclusions by reasonable men, and but one rational conclusion could be drawn therefrom, it is the duty of the trial court to direct a verdictt for the plaintiff.
2. **Ruling** of trial court sustaining objection to cross-examination *held* proper.

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

Walter D. James, Bernard McNeny, James G. Thompson and *Lambe & Butler,* for appellant.

O. E. Shelburn and *Stewart, Perry & Stewart, contra.*

Heard before LETTON, DEAN and DAY, JJ., ALLEN and BEGLEY, District Judges.

BEGLEY, District Judge.

This is an action brought by appellee, hereinafter called plaintiff, to recover money alleged to have been converted by appellant, hereinafter called defendant, to his own use.

The plaintiff, in its petition, alleged that defendant was employed by the plaintiff as manager of its grain and coal business at Ragan, Nebraska, under a written con-

tract; that defendant had charge of the books and accounts of plaintiff, including the money in said business, and that defendant drew checks upon the account of the plaintiff to pay necessary bills; that defendant converted to his own use the sum of approximately $6,000. Defendant alleged in his answer that, pursuant to a general usage and custom known to plaintiff and its officers, and under the specific direction of plaintiff's board of directors, he used sums of money in the conduct and protection of plaintiff's business and within the scope of his employment; and also pleaded a general denial. In reply, plaintiff set up that the transactions referred to in defendant's answer were of a gambling nature, unauthorized by plaintiff, beyond the scope of authority of defendant as such manager, *ultra vires* and unlawful, and denied generally the allegations of the answer.

The plaintiff's evidence establishes that defendant entered the employ of plaintiff on or about January 8, 1919, under a written contract, by the terms of which defendant was to manage the Farmers Grain & General Shipping Association elevator at Ragan, Nebraska, under the direction of the board of directors, and to give his undivided time to the work at the elevator, and to receive as compensation the sum of $125 a month; that defendant had no other contract or authority from the officers or board of directors of the plaintiff company; that shortly after his employment defendant began a series of speculations in futures, or transactions of a gambling nature, upon the board of trade, in his own name; that he invested therein the sum of about $450 of his own funds; that on June 16, 1919, the defendant wrote a check upon the funds of the company for the sum of $200 and used the proceeds of the same to cover his losses in said gambling transactions; that, in order to deceive the officers of the plaintiff company, he entered upon the stub of the checkbook the words "oats purchased," while on the general books of the company he entered the amount as having been expended for

the purchase of corn; that thereupon he caused the account upon the board of trade to be transferred to the plaintiff's name; and on July 7, 1919, he drew another check, under like circumstances, for $100 and applied the proceeds of same to the same purpose; that thereafter, on August 16 and 28 he drew checks upon the company's funds for $450 and $750 respectively, and applied the proceeds thereof to the same purpose; that in drawing these checks he took the same from the back of the company's checkbook, where the officers would not be able to detect that checks had been used; that on November 1st, 4th, and 8th he wrote three checks upon the company's funds, aggregating $5,000, and applied the proceeds to the same purpose, and also tore these checks from a portion of the check book not in use; and that by this means he prevented the officers of the plaintiff company from discovering that he had converted plaintiff's money to his use until the auditor secured the original checks from the bank and presented his report; that in addition thereto he converted cash from the company's assets in the sum of $280.11, and also the balance due on a car of corn sold, in the sum of $131.69, making a total of $6,911.80 he converted to his own use without the knowledge and consent of the plaintiff; that the sum of $1,666.64 has been received back from the Updike Grain Company, leaving a balance due the plaintiff from the defendant by reason of said conversion in the sum of $5,245.16.

The defendant offered no testimony at the trial, and at the close of the testimony, on motion of the plaintiff, the court directed a verdict in favor of the plaintiff for the sum of $5,245.16, with interest thereon at the rate of 7 per cent. per annum from November 11, 1919, the date of the discovery of the conversion. From an order overruling a motion for a new trial, the defendant has appealed.

The defendant contends that the court erred in directing a verdict for the plaintiff. In *Knuffke v. Bar-*

tholomew, 106 Neb. 763, we hold: "All issuable facts which the evidence properly admitted on behalf of one party to an action tends to establish may be considered proved, where the other party offers no proof." In this case the plaintiff's issuable facts were established by the books of the plaintiff, the canceled checks, the evidence of the secretary of the company, and the expert accountant who examined the books, and we think they are clearly proved. The evidence is neither conflicting nor contradictory, and is not of such a nature as to warrant different conclusions by reasonable men. But one rational conclusion could be drawn therefrom, and the court properly directed a verdict for the plaintiff. *American Surety Co. v. Musselman,* 90 Neb. 58; *Jones v. Chicago, B. & Q. R. Co.,* 102 Neb. 853; *Farmers State Bank v. Butler,* 101 Neb. 635.

Defendant contends that the court erred in refusing to permit the expert accountant, on cross-examination, to testify concerning the general usage and custom among elevators in general, and this one in particular, regarding transactions known as "hedging." We have examined the evidence and conclude that the exclusion of this cross-examination was proper, as it was not touched upon in the direct examination, and the question of the usage and custom among elevators was raised by the answer and constituted an affirmative defense.

The judgment of the district court is, therefore,

AFFIRMED.

CHARLES T. ALTIS V. STATE OF NEBRASKA.

FILED JANUARY 26, 1922. No. 22076.

1. **Husband and Wife:** ABANDONMENT: ELEMENTS OF OFFENSE. To constitute an offense under the provisions of section 8614, Rev. St. 1913, whether as to wife, or child, or both, abandonment without good cause and failure or refusal to support are each material elements, each must exist without good cause, and be so charged in the information.

2. **Criminal Law: INSTRUCTIONS: OMISSION OF ELEMENT OF OFFENSE.** An instruction purporting in itself to be complete and to authorize either a conviction or acquittal, as the jury may find the facts therein stated, and which omits all reference to an element of the offense essential to a conviction, or to any other instruction covering such element, is erroneous.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

W. W. Towle and *George A. Adams,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Charles S. Reed, contra.*

Heard before LETTON, DEAN and DAY, JJ., BLACKLEDGE and TEWELL, District Judges.

BLACKLEDGE, District Judge.

Plaintiff in error was convicted in the district court for Lancaster county, upon a charge of having abandoned and failed to support his wife and children, and prosecutes error to this court.

The objection was urged at the trial and by motion in arrest of judgment, and is now presented to this court, that the information does not state facts sufficient to charge the plaintiff in error with an offense against the laws of this state, in that the element of want of good cause is omitted. The charging part of the information is as follows:

"That Charles T. Altis, late of the county aforesaid, on or about the 1st day of March, A. D. 1920, in the county of Lancaster, and the state of Nebraska, then and there being, did then and there unlawfully and feloniously abandon his lawful wife, Jennette M. Altis, and his three minor legitimate children, under the age of sixteen years, to wit, Cecil Altis, aged 10 years, Doris Altis, aged 6 years, and Imogene Altis, aged 4 years; and did then and there and thereafter wilfully and feloniously and without good cause neglect and refuse to provide

for his said wife and his said children, although he, the said Charles T. Altis, is a strong able-bodied man amply able to provide and furnish suitable support and maintenance for his said wife and his said children."

The cause is prosecuted under section 8614, Rev. St. 1913, the provisions of which have been at different times construed by this court. In *Cuthbertson v. State*, 72 Neb. 727, the court had under consideration an information charging desertion and failure to support in reference to the wife only, and therein the court held, and states in the syllabus of the case: "The information must clearly state that both the abandonment and the defendant's neglect or refusal to maintain or provide for his wife were without good cause." In *State v. Hoon*, 78 Neb. 618, the court considered an information charging abandonment and failure to support as to both wife and child. The language of the information is not set out in the opinion, but it clearly appears that the court there held that there were two elements constituting the offense: First, an abandonment of wife and child without reasonable cause; and, second, a refusal to provide. In this case, because the abandonment had taken place before the statute became in force, it was held that the prosecution could not be maintained. In *Goddard v. State*, 73 Neb. 739, the court, by Barnes, J., uses this language in the opinion: "Before the state can ask for a conviction under the statute in question, it must appear beyond a reasonable doubt that the defendant's neglect to provide for or support his wife and child, or children, must not only be wilful, but without good cause." It is therefore obvious that, although in the section of the statute under consideration, the words, "without good cause," occur but once, yet they have been construed by the court as qualifying both the element of abandonment and of failure to support, whether applied to wife or child. The rule, therefore, as announced in *Newby v. State*, 75 Neb. 33, is applicable. Therein it is said: "The rule is well settled that to charge a statutory offense the information must

contain a distinct allegation of each essential element of the crime as defined by the law creating it. In charging a statutory offense it is always necessary, and generally sufficient, to charge it in the language of the statute, or its equivalent. While the precise words of the statute need not be used, it is necessary that words equivalent in meaning be employed. 1 Bishop, Criminal Procedure (4th ed.) sec. 614; Maxwell, Criminal Procedure, 145; *Cuthbertson v. State,* 72 Neb. 727." Applying these rules to the information in the instant case, there being a total failure to allege therein, either as to the wife or children, that there was an abandonment without good cause, it is clear that the information is insufficient to charge the offense, and the objections of the plaintiff in error should have been sustained.

Exception was taken and complaint is now made to the giving of instruction No. 5, which instruction is as follows:

"You are instructed that if you believe from the evidence beyond a reasonable doubt, that the defendant both abandoned his said family and wilfully neglected or refused to support them at or about the time charged in the information, then you will find him guilty; otherwise, it will be your duty to acquit him."

This instruction in itself purports to be complete and to authorize either a conviction or an acquittal of the defendant accordingly as the jury may find the facts stated in the instruction. There is no reference to any other element of the offense, or to any other instruction in which another element is considered. It could not matter that the court in another instruction informed the jury that it was necessary for the state to establish that the defendant did wilfully neglect or refuse, without good cause, to provide for his family, or that in another instruction it quoted the language of the statute. These, at most, would only raise a conflict in the instructions and the jury would not know which they should follow. It is more than probable that, finding here a short, con-

cise statement which, in and of itself, authorizes either a conviction or an acquittal upon the facts therein stated, the jury would conclude that they did not need to look further, and that the element of good cause was not material to be considered in the case. Such an instruction has been held in *McAleer v. State,* 46 Neb. 116; *Bergeron v. State,* 53 Neb. 752, and *Goldsberry v. State,* 66 Neb. 312, to be erroneous, and its giving in this case was prejudicial error.

The judgment is therefore reversed and the cause remanded for further proceedings according to law.

REVERSED.

ROXINA CULLEN HANLEY, APPELLANT, V. FIREPROOF BUILDING COMPANY, APPELLEE.

FILED JANUARY 26, 1922. No. 21849.

1. **Municipal Corporations:** CARE OF SIDEWALKS. The law of this state imposes upon the various municipal corporations thereof the duty of at all times keeping their streets and sidewalks in a reasonably safe condition for travel by the public.
2. ———: ———: COMMON LAW RULE. Under the common law no duty devolved upon an abutting owner to keep the sidewalks adjacent to his property in a safe condition.
3. ———: ———: VIOLATION OF ORDINANCE: REMEDY. Where the provisions of an ordinance impose upon property owners the performance of a part of the duty of the municipality to the public and are for the benefit of the municipality as an organized government, and not for the benefit of the individuals comprising the public, a breach of such ordinance is remediable only at the instance of the municipal government, and no right of action accrues to an individual citizen especially injured thereby.

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

Crofoot, Vinsonhaler, Fraser, Connolly & Stryker, for appellant.

Kennedy, Holland, DeLacy & McLaughlin, contra.

Heard before LETTON, DEAN and ALDRICH, JJ., CLEMENTS (E. P.) and DILWORTH, District Judges.

CLEMENTS, District Judge.

This is an action brought by the appellant against the appellee to recover damages resulting from personal injury. The plaintiff in her amended petition alleges in substance that the defendant owned an apartment house at the northwest corner of Eighteenth and Dodge streets in the city of Omaha; that section 17 of Thomas' Revised Ordinances of Omaha made it the duty of owners of property to remove such ice and snow as may fall and accumulate upon sidewalks adjacent and contiguous to their property within six hours after the cessation of any storm or fall of snow; that prior to the 8th day of January, 1920, the defendant had constructed cement sidewalks along said building and parallel with said Dodge and Eighteenth streets; that the sidewalk adjoining this apartment house on Dodge street slopes sharply to the east; that on or about said 8th day of January, 1920, the plaintiff was a tenant of defendant and was living in said apartment; that prior to said day snow and ice had fallen and accumulated on this sidewalk; that small boys used said sidewalk and the ice and snow on the same for coasting; that such use made said sidewalk dangerous to pedestrians, all of which was known to defendant; that the defendant negligently and carelessly failed to remove said snow and ice as required by law; that on or about said 8th day of January, 1920, plaintiff left said apartment and went upon said sidewalk, and while on said sidewalk was violently run into and against by a sled used by a small boy coasting down said sidewalk, and she was thrown to the ground and injured. Then follows allegations as to the extent of plaintiff's injuries and damage, and prayer for judgment.

In view of the disposition of the case by the trial judge, it will be unnecessary to fully set out the allegations of defendant's answer. The defendant says, among other things, that the plaintiff cannot maintain an action

against it for the reason that her cause of action, if any, is against the city of Omaha, and that the amended petition does not state a cause of action, and demurs to each and every allegation therein contained. Trial was had to a jury November 20, 1920. At the close of plaintiff's evidence defendant moved the court to instruct a verdict for the defendant, and this was done. The cause was dismissed and judgment rendered for defendant. A motion for a new trial was overruled, and plaintiff brings the cause here on appeal.

An examination of the evidence introduced by the plaintiff discloses that it fairly substantiates the allegations of her petition. It follows that the correctness of the course taken by the trial judge depends upon whether or not the petition states a cause of action.

The defendant contends that the action of the trial judge was correct for two reasons: First, because one citizen of Omaha cannot maintain an action against another citizen for injuries received upon the sidewalks of the city, and which were occasioned or contributed to by the failure to remove snow and ice in compliance with the ordinance of said city; second, because the petition on its face discloses that the failure to remove the ice and snow was not the proximate cause of plaintiff's injury. We shall find it necessary to consider only the first of these reasons.

This precise question has never been before this court, but the following principles are well established: "The law of this state devolves upon the various municipal corporations thereof the duty of at all times keeping their streets and sidewalks in a reasonably safe condition for travel by the public, and no municipal corporation, by any act of its own, can devolve this duty on another so as to relieve itself from a liability resulting from its failure to perform such duty." *Davis v. City of Omaha,* 47 Neb. 836. See, also, *City of Omaha v. Jensen,* 35 Neb. 68; *City of Beatrice v. Reid,* 41 Neb. 214. Under the common law no duty devolved upon an abutting owner

to keep the sidewalks adjacent to his property in a safe condition for travel. 13 R. C. L. 415, sec. 341.

It is apparent from the foregoing that, if the plaintiff has a cause of action against the defendant by reason of the facts set out in her petition, it is by virtue of some statute, charter provision, or valid ordinance. The plaintiff in effect admits this and in her petition pleads section 17 of an ordinance of the city of Omaha, which is as follows:

"It shall be the duty of the occupant, as well as the duty of the owner, of any lot or land or real estate in the city of Omaha to clear the sidewalks contiguous thereto of all snow and ice within six hours after the cessation of any storm or fall of snow; provided, however, if such storm or fall of snow take place and occur in the night time, then and in that case the owner shall have until twelve o'clock noon next following to clear said sidewalks of said snow and ice; said snow and ice shall be removed into the traveled portion of the street and so spread over the surface of the street as not to interfere with public travel thereon, and no portion thereof shall be placed or spread within three feet of the curb line on said street."

The plaintiff in her brief has not favored us with a very clear statement of the theory by which she claims a right of action between individuals can accrue by virtue of this ordinance, and we confess that we have been unable to deduce this theory from the argument. It has been held in some jurisdictions, and has been earnestly argued by able jurists, that in a state with a Constitution like ours the legislature cannot constitutionally delegate to a city power to enact a law that would create a right of civil action between citizens *inter se*. The best exposition of this doctrine is found in the dissenting opinion of Judge Marshall in the case of *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 110, 145, 5 L. R. A. n. s. 186. In this opinion Judge Marshall has collected the holdings of the states that have adopted this rule. The weight

of authority seems to be, however, that municipalities by virtue of their police powers have authority to pass ordinances for the protection of lives and property and which relate primarily to the duty of those whose conduct they regulate, for the benefit of persons traveling the streets, who have a right to rely upon the observance of these ordinances, and that the violation of any statutory or valid municipal regulation, established for the benefit of private persons, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence brought by a person belonging to the protected class, if the other elements of actionable negligence occur. *Sluder v. St. Louis Transit Co.*, 189 Mo. 107; *Bott v. Pratt*, 33 Minn. 323. It must be noted, however, that the cases that support this rule carefully differentiate between such ordinances and ordinances where the duties enjoined are due to the municipality or to the public at large. As to this class of ordinances the authorities are almost, if not quite, unanimous that no cause of action arises to an individual against one who neglects to perform the duties enjoined. *Sluder v. St. Louis Transit Co., supra; Bott v. Pratt, supra; Jackson v. Kansas City, Ft. S. & M. R. Co.*, 157 Mo. 621, 80 Am. St. Rep. 650; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Philadelphia & R. R. Co. v. Ervin*, 89 Pa. St. 71, 33 Am. Rep. 726; *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603; *Kirby v. Boylston Market Ass'n*, 14 Gray (Mass.) 249, 74 Am. Dec. 682; *Hay v. City of Baraboo*, 127 Wis. 1; *Selleck v. Tallman*, 93 Wis. 246; *Toutloff v. City of Green Bay*, 91 Wis. 490; *Moore v. Gadsden*, 93 N. Y. 12; *Fielders v. North Jersey Street R. Co.*, 68 N. J. Law, 343; *City of Rochester v. Campbell*, 123 N. Y. 405; *City of Hartford v. Talcott*, 48 Conn. 525.

In *Fielders v. North Jersey Street R. Co., supra*, the court say: "We find running through the adjudicated cases a rule of construction almost universally adopted, that where the provisions of an ordinance are intended not for the benefit of protection of individuals compris-

ing the public, but for the benefit of the municipality as an organized government, and more particularly if they impose upon property owners the performance of a part of the duty of the municipality to the public, a legislative intent is indicated that a breach of such ordinance shall be remediable only at the instance of the municipal government or by enforcement of the penalty prescribed therein, and that there shall be no right of action to an individual citizen especially injured in consequence of such breach."

It remains for us to determine to which class of ordinances the one in question belongs. Was it passed by the city of Omaha to provide for the safety and protect the lives of persons traveling the streets, or was it passed by such city for the purpose of imposing upon property owners a part of the duty of the municipality to the public for the benefit, not primarily of the individuals comprising the public, but of the municipality itself. This question is easily answered. Keeping in mind that the fee of the streets and sidewalks is in the municipality, that the duty of keeping such streets and sidewalks in safe condition for travel rests primarily upon the municipality, that the accumulation of ice and snow on the sidewalks, while an inconvenience, is not necessarily a menace to the safety or life of pedestrians, that its removal from the miles of sidewalks usually found in a city is impracticable and almost impossible by ordinary governmental agencies, it seems clear that the duty of the lot owners to remove the snow and ice is imposed by the city as a means of carrying out its obligation to keep the sidewalks in condition for travel, and is owed to the general public in its corporate capacity, and not to the individuals composing such public.

This view is amply sustained by the authorities. In *Fielders v. North Jersey Street R. Co., supra,* the court, immediately following the quotation set out above, say: "The most conspicuous cases of this sort are those that deny liability to private suit for violation of the duty im-

posed by ordinance upon abutting property owners to maintain sidewalk, pavements, or to remove ice and snow from the walks"—citing *Moore v. Gadsden,* 93 N. Y. 12; *City of Rochester v. Campbell,* 123 N. Y. 405; *Kirby v. Boylston Market Ass'n,* 14 Gray (Mass.) 249; *City of Hartford v. Talcott,* 48 Conn. 525; *Flynn v. Canton Co.,* 40 Md. 312, and *Taylor v. Lake Shore & M. S. R. Co.,* 45 Mich. 74. In *Jackson v. Kansas City, Ft. S. & M. R. Co., supra,* many other cases holding the same rule are collected and reviewed.

The appellant has cited a number of cases to the effect that the landlord owes a duty to a tenant to keep walks and approaches to a building, constructed for the use of many tenants, in a safe condition. An examination of these cases shows that the walks and approaches involved were upon the private property of the landlord. They are therefore not in point and of no assistance in this case.

The appellant contends that the accumulation of ice and snow on the sidewalk in question constituted an "attractive nuisance," and he has cited authorities to this effect. We do not see how this changes the situation. If, as we have found, the defendant owed no duty to the plaintiff to remove the ice and snow, then he would owe her no duty to prevent the creation of an "attractive nuisance" by the accumulation of ice and snow, and, owing no duty to her, he cannot be made liable to her for the failure to perform a duty he owed to the municipality.

Both the appellant and the appellee have devoted the larger part of their briefs to the question of "proximate cause." They have ably and exhaustively argued this question and have cited many cases to support their views, but as we have found that appellant has no cause of action against appellee for the injuries complained of, and that her action, if any, must lie against the city of Omaha, it is not necessary at this time to determine what was the proximate cause of the injury.

The judgment of the trial court is

AFFIRMED.

BENJAMIN F. HENNING, APPELLEE, V. RAN STANFIELD ET AL., APPELLANTS.

FILED JANUARY 26, 1922. No. 21812.

Trial: DIRECTION OF VERDICT. Evidence examined, and *held* that the court properly instructed the jury to return a verdict in favor of the plaintiff.

APPEAL from the district court for Burt county: CHARLES A. GOSS, JUDGE. *Affirmed.*

J. A. Singhaus, for appellants.

W. M. Hopewell and *J. A. Miller, contra.*

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS (E. P.) and DILWORTH, District Judges.

DILWORTH, District Judge.

This is an action in replevin, brought by appellee, Benjamin F. Henning, against Ran Stanfield, sheriff of Burt county, Nebraska, and Harry Deaver, appellants, and John A. Singhaus, to recover possession of a threshing machine and various attachments.

At the conclusion of plaintiff's direct evidence in the trial court, John A. Singhaus moved that the action be dismissed as to him. This motion was sustained, and the action dismissed as to Singhaus, and proceeded against the other two defendants.

When both sides had rested, the plaintiff moved the court for an instructed verdict in his behalf. This motion the court sustained, and so instructed the jury. The only question before this court is as to whether the evidence warranted such action on the part of the trial court.

It appears from the evidence that appellant, Harry Deaver, in July, 1918, entered into a contract with the

Minneapolis Threshing Machine Company for the purchase of a threshing machine outfit for the sum of $1,655. The machine was to be delivered to him at Tekamah. He paid $300 cash on the purchase price, and gave his notes, secured by a chattel mortgage on the machine, for the balance. He was to and did, also, pay the freight, amounting to $98. The machine was delivered to Deaver as agreed. He took it out to his farm some miles in the country. The machine proved unsatisfactory and failed to perform the work as warranted. Whereupon Deaver notified the agent of said company of such fact, and asked that the machine be made to run satisfactorily. This the company failed to do. After waiting some time for the company to fix the machine, he wrote the agent of said company who had sold him the machine, stating that he did not want the machine, and that it was being held for them at his place, or that he would take it back to Tekamah for them. To this he received no response. Over a year later the company foreclosed the chattel mortgage, given it by Deaver to secure the notes given for the purchase of the machine. It had the machine hauled to Tekamah and advertised for sale under the mortgage. Deaver attempted to enjoin the sale, but was not successful. The machine was sold to appellee, Henning, for $800, payment being made by check, which was afterwards cashed.

Deaver then commenced an action against the company to recover the amount of cash paid by him on the machine, including the freight charges, amounting in all to $398. The machine was attached as the property of the company. Thereupon Henning commenced this action in replevin, and the machine was turned over to him upon his giving the proper bond, and was by him taken away.

It is insisted that Henning is not a *bona fide* purchaser; that he was the agent or servant of the company, and that the purchase of the machine was for the sole benefit of the company. The sole question, there-

fore, is as to whether the sale of said machine to appellee was *bona fide.*

We have carefully considered the evidence, and are satisfied that the trial court could not properly have done otherwise than instruct the jury to return a verdict in favor of the plaintiff. The evidence on the part of plaintiff, showing a *bona fide* purchase on his part, was clear and positive, while the evidence attempting to show otherwise could only be drawn by inference from circumstances proved, which were not inconsistent with the *bona fide* intention of the plaintiff in making the purchase, and which were not sufficient to constitute such a conflict of evidence as to demand a determination by a jury.

The evidence shows that the Sachse-Bunn Company, agricultural implement dealers at Sioux City, Iowa, were the agents who sold the machine to Deaver for the Minneapolis Threshing Machine Company, and conducted the proceedings for the foreclosure of the mortgage thereon. Appellee lived in Le Mars, Iowa, and was engaged in the work of repairing tractors. He did all that kind of work which was required by the Sachse-Bunn Company. At the same time he did similar work for others. He had an arrangement with the Sachse-Bunn Company that he could do his own work at their place of business. He was employed by that firm to go to Tekamah and assist in the sale of the machine to Deaver at that place, which he did in part. He went to Tekamah with one of that firm to attend the sale. He bid $800 for the machine, and, being the highest bidder, secured the machine. He gave his check in payment for same, which was afterwards cashed, and the machine was shipped to Le Mars, Iowa, in the car ordered by the Sachse-Bunn Company before the sale. They turned the car over to him, and also furnished him the necessary bonds required in the litigation herein. En route he diverted the car to Cherokee, Iowa, where the Sachse-Bunn Company had a branch house. The attorney for appellants discovered

the machine there, and he was solicited to buy the same by one of the agents in charge of the place of business. The machine was then offered as a second-hand one. It was stated that, when fixed up, the guarantee of the Minneapolis Threshing Machine Company would be back of it.

These are the circumstances which are relied upon to show that the appellee is not a *bona fide* purchaser. They are not sufficient. The inferences to be drawn from them are not irreconcilable and inconsistent with appellee being the actual *bona fide* purchaser of the machine, and do not present such a conflict of evidence that should be left to a jury to decide.

The trial court in ruling on the motion for an instructed verdict very fully and properly stated the situation, when it said:

"In this case there is no dispute whatever that Mr. Deaver bought a machine, and there is no dispute in the evidence that he bought a machine for a substantial sum of money with certain warranties which have not been fulfilled. He was dissatisfied with the machine after making payment of $300 on account of the machine, and $98 for freight, total $398. In testing the machine he found it would not meet the warranties and he was dissatisfied and he asked the concern who delivered it to him to put it in shape so it could be used. They made attempts to do that, but were unable so to do, and there is evidence tending to show that he turned it back to them; that is, tendered it back and offered to return it to Tekamah to the place where he got it, and left it subject to their orders at his place. Later the machine was brought into Tekamah and stood there for some time, and the company, evidently not being satisfied to accept tender of the machine back and cancel the indebtedness on it, foreclosed their mortgage on it. It was sold to the plaintiff in this case. Now, there is no doubt that, if the evidence in this case were such as in the case that was brought here by Mr. Deaver against the Minneapolis

Threshing Machine Company, he would be entitled to recover the amount that he had paid with interest, and it is unfortunate that he did not get his money before this sale was made so as to be saved all the trouble of this lawsuit and any subsequent trouble that might attain. But, be that as it may, the evidence in this case shows that this machine was sold under a foreclosure to the plaintiff in this case, and that he paid for it. I have allowed the defendant the very widest latitude, in fact, almost unprecedented latitude, in my experience in seeking to find evidence to upset the *bona fides* of that purchase, and we have gone right to the edge of error, if not beyond it, in allowing the defendant to produce evidence, or to lead to evidence of fraud or lack of good faith that would impeach the title of the plaintiff in this case to this machine, and the comments that went with it. He gave his check on the 7th day of November, the date of that sale. The evidence is undisputed that the check was paid through the bank, and there is no evidence here that in any way impugns the motive or intent of the plaintiff in this case. He stands in just as good a condition under the evidence in this case as the most honest man in this community would stand. Indeed, it is very unusual under the circumstances of this case for one away from home to be able to show such a clear bill of health as the plaintiff has shown in this case. His evidence was clear, unconfusing, and convincing, that he entered into this thing in good faith, and the evidence, having gone over the wide latitude that I have allowed Mr. Singhaus as representing his client to take in this case, fails to shake that in any particular in my judgment. I do not believe there is a question of fact in the minds of reasonable men to differ on in this case, that the evidence in this case does not show but what the plaintiff has a good title to this machine, and I am not sure but if I were to allow this case to go to the jury and they should find a verdict for the defendants in this case that it would be reversed by the supreme court, and I feel that there is

nothing left for me to do but to instruct this jury, as the law provides, where there is no question of fact upon which reasonable men can differ, to return a verdict for the plaintiff in this case."

We find no error in the proceedings in the district court, and the judgment is

AFFIRMED.

GEORGE DIRKS ET AL., APPELLEES, V. ENSIGN OMNIBUS & TRANSFER COMPANY, APPELLANT.

FILED JANUARY 26, 1922. No. 21859.

1. **Negligence:** INSTRUCTION. In an action involving the question of negligence on the part of the defendant, and contributory negligence on the part of the plaintiff, it is not error on the part of the court to instruct the jury as to the effect of defendant's violation of a statute or ordinance, and make no reference to the plaintiff in regard thereto, when the evidence fails to show any such violation on the part of the plaintiff.
2. **Master and Servant:** NEGLIGENCE OF CHAUFFEUR: EVIDENCE. In order to hold the owner of a car liable for the tortious acts of another driving or operating the same, it must be shown that the party driving or operating the car was at the time the servant or agent of the owner, and was driving or operating the car in the owner's service. The fact that the person operating or driving the car had been recently in the employ of the owner, that the car was being used in the manner and in the locality where the owner usually used the same, and for a purpose not inconsistent with the owner's business, is evidence of employment and service to be considered by the jury.
3. **Corporations:** ADMISSIONS OF AGENTS. Admissions made by the officer or agent of a private corporation, relative to any matter over which he has control or authority to decide and act upon, are binding upon the corporation

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

Max V. Beghtol, Carl E. Sanden and *Carlisle L. Jones,* for appellant.

Claude S. Wilson and *Albert S. Johnston, contra.*

Heard before LETTON, DAY and DEAN, JJ., DILWORTH, District Judge.

DILWORTH, District Judge.

Appellees are partners, doing business at Deshler, Nebraska, under the firm name of Deshler Motor Company. On February 20, 1920, at about 1 o'clock p. m., appellee Fred W. Lentz was driving a Dodge automobile eastward on A street in Lincoln, Nebraska. With him were three ladies and a child. A street runs east and west, and is intersected by Twentieth street running north and south. Lentz states, and it is not disputed, that he was driving along the south side of A street at about 12 or 14 miles an hour; that when he got within about 12 feet of Twentieth street he saw a Ford truck coming south along the east side of that street; that the truck was a car length or two south of the alley in the block between A and B streets; that he considered he had plenty of time to cross Twentieth street, and when he was almost to the center of the intersection he realized the rate of speed the truck was running, which was from 25 to 30 miles an hour; that all he could then do was to go ahead and try to get out of the way; that he started his car up, but had not proceeded a car length before the truck struck his car at about the middle, throwing it over on the curb at the southeast corner of the intersection; that the truck struck the Dodge head-on; and that there was plenty of room for the truck to have gone to the rear of the Dodge. The ladies in the car with Lentz gave the same account as to how the accident occurred. Lentz immediately after the collision asked the driver of the truck why he ran into him. The driver replied that the brakes on the truck were out of order and he could not stop it. Lentz says he examined the brakes on the truck and found that they were out of order, and would not work so as to hold the machine. Major Gross, a police officer, who came on the scene within 10 minutes after the accident, asked the driver of the truck how fast he

was going and why he did not stop. The driver replied that he was going 25 miles an hour, and that the brakes on the truck were out of order. The Dodge car was badly wrecked, and this action was started to recover for damages done the car, in the sum of $1,000.

The appellant filed an answer to the petition of the appellees, in which, after admitting that plaintiffs are partners and defendant is a corporation, denies each and every allegation of the petition. It also alleges further that "any damage or injury caused to the plaintiff by the collision referred to in plaintiff's petition was caused solely by the gross negligence of the plaintiff himself, and not by any negligence on the part of the defendant." Appellant introduced evidence of how the collision happened.

O. H. Lewis was called as a witness by the appellant. He testified that he was a salesman in the employ of the Marshall Oil Company, had driven a car about eight months, and on the day of the accident was driving his Ford car east on A street behind the Dodge car, and was about three-fourths of a block or a block away from the scene of the accident when it occurred. He corroborates Lentz as to the rate of speed the latter was driving until he got to about the width of the courtroom of the intersection with Twentieth street, when he saw appellee start his car up to between 20 and 25 miles an hour; that he also noticed the Ford truck at that time, and it was about the same distance north of the intersection as the Dodge was west thereof; that the speed of the truck was between 15 and 18 miles an hour; and that he saw the truck try to slow down and turn to the east and "sideswat" the other car.

There is a jog in Twentieth street at its intersection with A to such an extent that the east line of Twentieth street north of A street would be the west line of Twentieth street south of A. Appellant showed by its employees that the brakes were tested when the truck was dragged into the repair shop, and were found to

work all right. The jury in rendering its verdict, in favor of the appellees, determined that it was the negligence of the driver of the truck that caused the collision. From the evidence we do not see how the jury could have determined otherwise.

Appellant complains of instruction No. 8 given by the court on its own motion. While admitting that the instruction stated the law correctly, yet appellant insists that, in referring to the defendant (appellant) solely, it was prejudicial. The instruction complained of reads as follows:

"In determining whether the driver of the truck was guilty of negligence you may consider the provisions of the Nebraska statute regulating the use of motor vehicles on the streets of cities, which statute provides that no motor vehicle shall be operated within any city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person. In this connection you may also consider the provisions of the ordinances of the city of Lincoln relating to the use of streets and the operation of vehicles which have been introduced in evidence herein; and if you find, from a preponderance of the evidence, that the driver of the truck in question, at the time of the collision in question, was violating any of said provisions of the statute of the state of Nebraska or said ordinances of the city of Lincoln, then such violation will be evidence of negligence on his part from which you may find that he was guilty of negligence."

This instruction relates solely to the violation of the state law or city ordinance regulating motor vehicles by the driver thereof, and tells the jury that, if they find that the driver of the truck was at the time of the collision violating any such law, they could then find him guilty of negligence. The objection offered is that it is made to apply to the driver of the truck, and not to ap-

pellees. It is true that the instruction refers to the driver of the truck only, but it was proper under the facts as shown by the evidence. Whatever negligence the appellee Lentz may have been guilty of, it was not shown that it resulted from the violation of any state law or city ordinance. Therefore, such an instruction would not be applicable to appellees.

On the other hand, the undisputed evidence and the physical facts show that the driver of the truck was violating the ordinance of the city of Lincoln at the time. The ordinances of the city of Lincoln were introduced in evidence. They provide that the operator of a motor car approaching an intersection shall yield the right of way to any vehicle approaching from the right. This the driver of the truck did not do. The speed should not exceed 20 miles an hour. The driver of the truck admitted that he was going at least 25 miles an hour. Motor vehicles must use the right-hand side of the street. The fact that the Dodge car lay on its side at the southeast corner of the intersection shows clearly that the truck must have been coming along the left-hand side of Twentieth street. The evidence warranted the instruction as given. The record does not show that appellant asked to have it modified before given, or offered any instruction to cover the subject as he thought it should be. He is not in a position to now complain.

Appellant raises the question as to whether the driver of the truck was in its employ at the time, and was engaged in its business. These are questions of fact, to be determined as other questions of fact by the jury. It is conceded that the truck in question was owned by the appellant, and was being operated by the driver with its knowledge and consent. It is shown by the evidence offered by the appellant that the driver was an "extra man" employed by appellant by the hour. Appellant insists that at the particular time under consideration the driver was not in its employ, and was not engaged in its business, *i. e.*, baggage and passenger transfer.

In order to hold the owner of a machine liable for negligence of an employee driving or operating it, the burden is on the plaintiff to show that such person is the agent, servant or in the employ of such owner, and was at the time operating or driving the same in the service of the owner. Quite frequently this is very difficult, if not impossible, for the plaintiff to prove. The knowledge is often solely in the other party, or under such party's control, and can only be obtained from unwilling and unfriendly witnesses. This places the plaintiff in an unfair and unjust position. To obviate this, the courts of several states have announced the proper rule to be that, when the plaintiff has shown who was the owner of the car, that the driver was or very recently had been in the employ of such owner, and that at the time of the tortious act complained of the car was being driven or operated in the locality in which the owner used such car, and the use of the car at such time was consistent with the business engaged in by the owner of the same, then the burden is on the owner to show that the driver was not at the time in his employ, or was not engaged in driving or operating the car in his service. The case of *Long v. Nute,* 123 Mo. App. 204, cited by appellees in their brief, states the correct rule very clearly in these words:

"Where a servant, who is employed for the special purpose of operating an automobile for the master, is found operating it in the usual manner such machines are operated, the presumption naturally arises that he is running the machine in the master's service. If he is not so running it, this fact is peculiarly within the knowledge of the master, and the burden is on him to overthrow this presumption by evidence which the law presumes he is in possession of. It would be a hard rule, in such circumstances, to require the party complaining of the tortious acts of the servant to show by positive proof that the servant was serving the master and not himself, and the fact that the chauffeur made a detour from the

direct route from defendant's home to the fair grounds does not change the presumption or relieve the master's liability for injuries caused by careless driving."

The same rule is held by the court of Washington, in *Burger v. Taxicab Motor Co.,* 66 Wash. 676; and of Oregon in *West v. Kern,* 88 Or. 247, L. R. A. 1918D, 920; also by the courts of Georgia, Pennsylvania, Texas and Colorado.

As further evidence of the employment and services of the driver of the truck, appellee Lentz, Robert Kimball, husband of one of the ladies in the Dodge car at the time of the collision, and F. R. Elston, each testified to a conversation had with the president of appellant company, at its office, on the second day after the occurrence, regarding the same; that Terry, the president of appellant company, then stated that he considered one driver as much at fault as the other, and, when the speed of the truck was mentioned, he stated that the truck could not have been going 25 miles an hour because it had stopped at a house upon the hill to deliver a trunk, and therefore could not have picked up that much speed in so short a distance. Terry denies making any such statement or admission, and is supported by a number of employees of the company, who testified that they were present and heard no such statement made. They state, however, that the conversation took place on the afternoon of the collision. They are positive as to the time. On the other hand, appellee Lentz, Kimball and Elston are positive the conversation took place the second day after, and that they were there but once. Appellant's employees were so indefinite as to other parts of the conversation heard by them that it may be they were mistaken as to the date or the persons who were present.

Appellant insists that, even if Terry did make such admission or statement, the appellant company would not be bound by them, and that they should not be considered as evidence. We do not consider such to be the

rule. He was the president of the company, had charge of its affairs, and it was his duty as an officer of the company to investigate, consider and pass upon the matter under consideration, and decide as to the position of the company in relation thereto. Any statements that he might make in regard thereto would be binding upon the company. 22 C. J. 388.

Appellant called as a witness one Hampton, one of its employees, who at the time of the collision had charge of the drivers for the company and directed their movements. He testified that the name of the driver of the truck was Brown; that Brown was an extra man, one whom they hired by the hour when they needed additional drivers; that Brown had worked some that morning for the company; that at noon on the day of the accident Brown asked to borrow the truck to go on a personal errand to see about getting a job; that he let him have the truck for that purpose; that Brown did not take a trunk with him for delivery.

In this case there is a conflict of evidence as to the employment and service of the man Brown, who was not called as a witness. It was for the jury to decide. While we might not have come to the same conclusion as the jury, relative to the employment and service of Brown, yet there was evidence to support their finding, and we shall not disturb the same.

We find no error in the trial of this case, and the judgment of the district court is, therefore,

AFFIRMED.

ELIZABETH TIERNAN, APPELLANT, V. CHRISTOPHER TIERNAN, APPELLEE.

FILED JANUARY 26, 1922. No. 21985.

Husband and Wife: ANTENUPTIAL AGREEMENT. Parties contemplating marriage entered into an agreement, whereby their property rights after marriage were settled or attempted to be settled. Among other things, the agreement provided: "In consideration

of said marriage and covenants herein, the party of the first part gives to the party of the second part during her natural life, provided in event she survives the party of the first part, so long as she shall remain single and the widow of the party of the first part, the following described real estate." *Held*, that the true intent of the parties in making such agreement was that the woman should have maintenance during her life, and that such provision of the agreement gave her the right to possession of the real estate and the rents and profits arising therefrom, in the event she survived the man; such arrangement commencing at the time of his death and continuing as long as she lived as his widow.

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

H. R. Ankeny and *Cosgrave & Campbell*, for appellant.

Doyle, Halligan & Doyle, contra.

Heard before LETTON, DAY and DEAN, JJ., CLEMENTS (E. P.) and DILWORTH, District Judges.

DILWORTH, District Judge.

Appellant and appellee were married in 1915. Appellee was a man well along in years, while the appellant was middle-aged. He was quite wealthy and she was in very moderate circumstances. Before the marriage took place they entered into an agreement, wherein they settled their property rights when married. This agreement reads as follows:

"This agreement made this 9th day of April, A. D. 1915, by and between Christopher Tiernan of Lincoln, Nebraska, party of the first part, and Elizabeth Schulte of Lincoln, Nebraska, party of the second part, witnesseth:

"Said parties are engaged to be married and anticipate becoming husband and wife in the near future. Each of said parties is the owner of real estate and personal property. The party of the first part is the father of living children by former marriage.

"Now, therefore, in consideration of said con-

templated matrimony between said parties, and the payment of the sum of one dollar by each of said parties to the other, it is mutually convenanted and agreed by and between said parties; neither of said parties shall ever become liable for any debt contracted by the other party.

"Each of said parties hereby quitclaims, renounces and relinquishes all claim of interest, and all interest in the property, real, personal, or mixed, of the other, both as to the property in possession and that which may hereafter be acquired by either of said parties, and quitclaims, conveys and renounces all interest in the rents or profits of the property of the other, and will forever refrain from interference in the management of said property, and the collection of rents and profits thereof. The intention being to leave the separate property of each of the parties to this contract free from acquiring any interest therein by the other party, by reason of said marriage.

"Each party hereto shall sell and convey any real estate owned by him or her without the other joining in the conveyance.

"Each of said parties hereby releases, relinquishes, and conveys all right of inheritance of every nature and description in the property of the other, whether homestead, child's share, dower, courtesy, widow's settlement, and every other right which may or would result or be acquired by said marriage, but for this contract. The said parties each renounce the right to administer the estate of the other.

"In consideration of said marriage and covenants herein, the party of the first part gives to the party of the second part during her natural life, provided in event she survives the party of the first part, so long as she shall remain single and the widow of the party of the first part, the following described real estate, to wit: East one-half of lot nine (9) in block sixty-three (63) in Little's Addition to the city of Lincoln, Nebraska. At the death of the party of the second part, or in case she

survives party of the first part, and marries, said grant to her shall *ipso facto* terminate, and C. W. Tiernan, owner of the fee, subject to above grant shall instantly take full possession of said property.

"The said Elizabeth Schulte, party of the second part, in consideration of the above property for her, the covenants and agreements herein, does hereby release, convey, and quitclaim to said Christopher Tiernan, all interest I may acquire by virtue of said marriage in and to all his property, both real, personal, and mixed, now in his possession or that he may hereafter acquire, renouncing forever all claim in law or equity, all right of homestead, survivorship, all estate of inheritance, dower, child's part, widow's allowance, all rights which may be created by any future change in the law of inheritance, all rights under the present law of inheritance, whether in the state of Nebraska or elsewhere.

"Should said betrothal, when consummated in marriage, for any reason prove infelicitous, and a separation take place, which God forbid, the foregoing renunciation of all claim to the property of said Christopher Tiernan, shall likewise apply to such condition, and I here now renounce all right to alimony, maintenance, or separate support, and further forever renounce all right to any interest of any nature or description in or to the property of said Christopher Tiernan, under any and all vicissitudes which can or may arise.

"No possible future condition, whether foreseen or anticipated or not, shall ever be deemed an exception or waiver to this my renunciation of all and every right in or to any part of the property of said Christopher Tiernan, with which said marriage to him would or might clothe me, but for this agreement. I shall not inherit any property or money from him. No allowance shall be made from his estate to me.

"My right to administer his estate is renounced. These covenants are irrevocable."

The marriage was consummated, but ended unfort-

unately. Where the fault lies we are unable to say, for that part of the case is not before us.

After many disputes, and some litigation, between the parties, appellant commenced this action. She sets out three causes of action in her petition. The first asks for separate maintenance and support because of cruelty, abandonment and nonsupport on the part of appellee. The second cause of action sets out that paragraph of the agreement which reads: "In consideration of said marriage and covenants herein, the party of the first part gives to the party of the second part during her natural life, provided in event she survives the party of the first part, so long as she shall remain single and the widow of the party of the first part," and asserts that the same gave her a life interest in the property mentioned therein, commencing at the date of their marriage. The third cause of action is for an accounting of the rents and profits for said premises from the date of the marriage, and prays for judgment therefor in the sum of $15,000.

Appellee filed an answer, admitting the marriage of the parties, and denying all claims as to acts of cruelty, abandonment and failure to support, as set out in appellant's first cause of action; and pleads *res judicata* as to the second and third causes of action; also, that said contract or agreement herein referred to "was made for the purpose, in the event of the death of this defendant, of providing the income from said property for the plaintiff during the remainder of her life, or until she remarried, and not otherwise, and was so thoroughly understood and considered by the plaintiff and defendant." Further answering, the appellee states that appellant was guilty of extreme cruelty toward him, instances of which are cited, and that she had abandoned him. Appellee prays that the action be dismissed as to appellant's cause of action, and that he be granted an absolute divorce from her.

Appellant filed a reply, denying every allegation of the

answer, except that relating to the marriage, and of the entering into of the agreement set forth in the petition; and alleging that the construction of the agreement, as alleged by the answer to have been understood and considered by the parties, is without force and effect, for the reason that said provision is void and against public policy and in violation of the marriage contract, contravenes the purposes and objects of the marriage, and tends to induce a separation and divorce of the parties.

Trial was had and decree rendered in favor of appellant, granting her separate maintenance, and $125 a month alimony from May 1, 1920. Judgment was entered against appellee for $1,150, amount of the alimony unpaid to March 1, 1921. Such monthly payments were to continue during the joint lives of the parties. It was also decreed that the title to the east half of lot 9, of block 63, Little's addition to Lincoln, be confirmed and quieted in plaintiff for such period as she remains unmarried after the death of defendant, and that she recover the possession, rents and profits from the same after the date of the death of said defendant, and for so long a period as she remains unmarried; that she take nothing by her action for accounting; dismisses appellee's cross-petition for absolute divorce; and allows appellant $400 attorney's fees.

Appellant appeals from that part of the decree relating to the construction of the contract and accounting, but not from that part granting separate maintenance and alimony, and brings the case to this court upon the record alone, no bill of exceptions having been prepared or settled.

Appellee insists very strongly that the appeal in this instance should be dismissed, for the reason that full consideration cannot be given the subject matter without the evidence being before the court. There is considerable force in this position, and if we had not come to a conclusion affirming the decree of the trial court on its

merits, we would have given the objection raised by appellee more consideration.

The trial court gave proper construction to that part of the antenuptial agreement under consideration, reading as follows: "In consideration of such marriage and convenants herein, the party of the first part gives to the party of the second part during her natural life, provided in the event she survives the party of the first part, and so long as she shall remain single and the widow of the party of the first part."

Section 6195, Rev. St. 1913, provides that in every conveyance the true intention of the parties shall be carried out. In construing this agreement it devolves upon us to ascertain the intention of the parties in entering into it. To do this properly the conditions and circumstances surrounding the transaction should be considered. Appellee was a man possessed of considerable property, and was 78 years of age. Appellant had no means of her own to speak of; it being intimated in the argument, and not disputed, that at the time of this agreement she was doing menial work in order to support herself. On the one hand, we have an old man who needed care and attention and the comforts of a home; on the other, we find a woman who had no home and no means of support other than that derived from her daily work. They entered into this agreement, and it is evident from the face of the agreement, when considered with the conditions surrounding the parties, that the object and purpose of this paragraph under consideration was that appellant should be provided with maintenance during her entire life. Under this agreement she had a home with appellant as long as they remained husband and wife. During such time it was his duty to provide such a home for her and maintenance. At his death this contract steps in and takes the place of his obligation as a husband, and makes provision for the maintenance of appellant so long as she remains single. In the event of her remarriage, the duty of providing her with a home

and maintenance would fall upon the man she married. This agreement was legal in every way, and, as construed by the court, was one of great benefit to appellant. It provided maintenance for her as long as she lived.

The trial court properly construed this agreement, and the decree entered by it should be sustained. We find no error on the part of the trial court in the disposition of this case, and its action is therefore

AFFIRMED.

FRANK BRUCE, APPELLANT, V. GROVER C. ALBAUGH ET AL., APPELLEES.

FILED JANUARY 26, 1922. No. 21623.

1. **Deeds:** UNDUE INFLUENCE. The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. The affection, confidence and gratitude of a parent toward a child or grandchild, or other relatives, which inspires the gift, is a natural and lawful influence, and will not render it voidable unless this influence has been so used as to confuse the judgment and control the will of the donor.
2. ———: DELIVERY. "The delivery of an instrument is a question of fact to be determined by ascertaining the intention of the parties thereto." *Home Fire Ins. Co. v. Collins*, 61 Neb. 198.
3. ———: ———: ACCEPTANCE. The recording of a deed by the grantor is evidence both of delivery and acceptance, if the conveyance is beneficial to the grantee.

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

John C. Dort and *W. J. Davidson,* for appellant.

Barton & Barton, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., GRAVES and WELCH, District Judges.

GRAVES, District Judge.

This is an appeal from the finding and decree of the

district court for Pawnee county, dismissing the petition of the plaintiff and appellant and quieting title in Elmer L. Albaugh to the N.E.¼ of the N.W.¼, and in Grover C. Albaugh to the N.W.¼ of the N.W.¼, of section 1, township 1, range 12, in said county, in the state of Nebraska, and decreeing that the mortgage of Margaret Wishart Miller, executed by Grover C. Albaugh, was a first lien on the lands described therein.

The action was in the nature of a bill in equity instituted by plaintiff to set aside certain deeds of warranty executed by Margaret Lowrie on April 20, 1909, and duly recorded on April 22, 1909, conveying title to the respective parcels of land to said Elmer L. and Grover C. Albaugh, who were grandchildren of Mrs. Lowrie, the plaintiff being a son of Mrs. Lowrie by her first husband, The action was commenced in April, 1917, and based on alleged fraud and undue influence of one George W. Albaugh, a son-in-law, over said Margaret Lowrie, and that the deeds to said Elmer L. and Grover C. Albaugh were never delivered.

The evidence discloses that Margaret Lowrie, two sons by a former marriage, and her husband, came to Pawnee county and settled upon the north half of the north half of section 1, township 1, range 12, as a homestead, about the year 1867; that the plaintiff, Frank Bruce, and a brother two years older, then boys 13 and 15 years of age, respectively, lived with their parents and industriously improved and tilled said land; that, later, two daughters were born to Mr. and Mrs. Lowrie; that the elder of the Bruce boys died at the age of 22, unmarried; that the plaintiff married in about the year 1878, and rented the homestead, living with the family, and so continued to live until the year 1890, at which time George W. Albaugh married Janie Lowrie, and also moved in with the Lowrie family. Troubles arose between Mr. Bruce and Mr. Albaugh, resulting in Mr. Bruce renting a farm in the neighborhood, and a year or two later moving permanently to the state of Oklahoma.

Sometime in March, 1883, John Lowrie and his wife, Margaret Lowrie, separated, at which time John Lowrie conveyed the land in controversy, and the N.W.¼ of the N.E.¼ of said section 1 to his wife, Margaret, retaining the N.E.¼ of the N.E.¼ of said section 1. Afterwards Margaret Lowrie purchased the S.W.¼ of the N.E.¼ of said section 1. In June, 1903, Margaret Lowrie conveyed to George W. Albaugh the W.½ of the N.E.¼ of said section 1, for the consideration of $1,600, taking a mortgage back for the sum of $1,000, which mortgage was released of record January 16, 1906, and on the same date George W. Albaugh executed a mortgage to Margaret Lowrie on the N.W.¼ of the N.E.¼ of said section 1 for the sum of $500, which mortgage was released on March 5, 1907, and on the same day George W. Albaugh executed a mortgage to Margaret Lowrie, on the last above-described land, in the sum of $1,000, which was released on the 2d day of December, 1912.

To George W. Albaugh and wife, Janie, were born two sons, September 8, 1892, Grover C. Albaugh, and in April, 1903, Elmer L. Albaugh, and on the 22d day of May, 1903, Janie Albaugh died.

On March 14, 1916, Grover C. Albaugh, then unmarried, executed a mortgage to secure the sum of $1,500 to defendant, Margaret Wishart Miller, upon the N.W.¼ of the N.W.¼ of said section 1, which mortgage was duly recorded and is in full force and effect. It is stipulated that this mortgage was taken by Mrs. Miller without notice or knowledge of the claims of Frank Bruce on said lands.

Plaintiff alleges that the alleged fraud was not discovered until September 15, 1916. It will be observed that all of the mortgages executed by George W. Albaugh to Margaret Lowrie and released, as disclosed by the record, conveyed all or a part of the W.½ of the N.E.¼ of said section 1, and not the land in controversy, the title to which was retained by Margaret Lowrie until she executed the deeds in controversy on April 20, 1909. It

is stipulated by the parties to this suit that Margaret Lowrie had and held the contract with the commissioners for the care of the poor of Pawnee county from 1884 to and inclusive of the year 1912. The plaintiff, Frank Bruce, was born in about 1854, as he was 13 years of age when the family moved to the homestead, and evidently arrived at the age of 21 years in 1875, and worked without remuneration on the farm, for his mother, for three years, until his marriage in 1878, after which he rented the farm of his mother, paying as rent therefor "one-third of the grain and hay," as stated in his testimony, until the trouble with George W. Albaugh in 1890, at which time he testifies his mother told him, "I have rented the place to George Albaugh and I would have to go."

This case is tried *de novo,* and the writer has carefully read the testimony of all the witnesses. The record discloses that after October, 1890, George W. Albaugh and wife, Janie, continued to live with Margaret Lowrie up to the date of Janie Albaugh's death in May, 1903, and the defendant Grover C. Albaugh was born at the home of Mrs. Lowrie on September 8, 1892, and Elmer L. in April, 1903; their mother died May 22, 1903, and after that time George W. Albaugh and his two boys continued to operate the farm and live at the home of Margaret Lowrie. Mr. Albaugh married a second time in 1905 and continued to live with Mrs. Lowrie and the boys until his death on the 7th day of February, 1916. Mrs. Lowrie died in September following. Their relations were agreeable and harmonious except an episode related by the witness Ida Jones.

The witness for the plaintiff, John Marshall, referring to a conversation with George Albaugh with reference to improvements he was making, testified: "I said, 'George, I'd hate to be putting improvements here; when the old lady is gone, Bruce will come in.' " To which George Albaugh is supposed to have replied: "It will be damned little he will get out of it." Referring to a conversation

had with Margaret Lowrie, some two or three years after the death of her daughter Janie: "She told me she was going to deed one forty to Grover, the other forty to Elmer, and the thousand dollars she got from George should go to Frank; that would make it, she thought, as near equal as she could divide it." To the same effect is plaintiff's witness, Mary Storant, a county charge, who lived with Mrs. Lowrie from 1884 until her death in September, 1916, and she further testified that on two or three occasions in the latter years of her life she found Margaret Lowrie in her room crying, and when she asked her what the trouble was, she answered, "She could not tell me." The same witness, recalled by plaintiff, questioned by the court: "Q. Mrs. Storant, did you ever hear any quarrel between George Albaugh and Mrs. Lowrie? A. No. Q. Did you ever hear George use any rough or profane language toward Mrs. Lowrie, swear at her? A. Not when I was around. Q. Well, you never heard it, that is what I am getting at? A. No."

Many of the witnesses for the defense testified of hearing Margaret Lowrie at different times, before and after the execution of the deeds, say that she intended to deed "or had deeded the forty on which the buildings were located to Elmer, and the other forty to Grover." And all the witnesses, without exception, who testify on that subject, assert that Margaret Lowrie had a good active mind and alert, and conducted her own business without assistance or advice, and was not easily influenced. To the same effect was the witness, Arthur H. Pelton, cashier of the State Bank of Dubois, who had business relations with Margaret Lowrie many years. He said, on the date of the execution of the deeds in controversy, that she came to the private office of the bank alone, and told him what she desired to do with the land, and he made out the deeds, exhibits 8 and 9; she signed and acknowledged the deeds, and took them to the lobby of the bank, where she delivered them to George W.

Albaugh; that Mr. Albaugh delivered the deeds, with recording fees, to the witness, with directions to have them recorded; that in pursuance of such directions he had the instruments recorded, and, when returned from the recorder's office, placed the deeds with the private papers of George W. Albaugh, as directed.

In view of the fact that Margaret Lowrie, long before the deeds were executed, told John Marshall, Mary Storant, Ola Albaugh, and R. H. Church, that she intended to make the conveyances, and that during the seven years following the execution thereof, and before her death, she related the fact to witnesses Henry Hunzeker, Louis Kaiserman, and Carrie Albaugh, it leaves no room for doubt that delivery of the deeds, as above related by the witness Pelton, was in harmony with the purpose and intent of Mrs. Lowrie to convey the title to her grandsons.

"The delivery of an instrument is a question of fact to be determined by ascertaining the intention of the parties thereto." *Home Fire Ins. Co. v. Collins,* 61 Neb. 198.

The question of mental capacity is not in this case. The plaintiff testifies that his mother was managing her own business and was able to get around and look after it until the latter two years of her life.

The only remaining question is: Did George W. Albaugh have such influence with his mother-in-law as to cause her, contrary to her wish and will, to convey the property in question to his sons? There is no direct testimony that he ever tried so to do. The circumstances were favorable, as they lived together for about 25 years, and no doubt he was unfriendly toward plaintiff. There is disclosed a close confidential and friendly relationship between Mrs. Lowrie and her son-in-law. She had previously conveyed to him the other eighty for about one-third of its value. Her motive for so doing is not disclosed. The $1,000 which Mrs. Lowrie said she intended plaintiff should have, at the same time, and to the same persons she said she would deed these lands

to her grandsons, for some unexplained reason was not fulfilled. Whether she changed her mind or some other reason intervened is not disclosed. There is no evidence that Mrs. Lowrie had ever directed George W. Albaugh or any other person to make such payment or made provision therefor. Notwithstanding this omission, we are convinced that the natural love and affection for her two grandsons, whom she had mothered since the death of her daughter Janie, was the moving cause for the execution of the deeds, and clearly her purpose and desire.

"Where the evidence clearly discloses competency and perfect freedom on the part of a grantor in making a deed, the court will not be justified in setting it aside." *Hacker v. Hoover*, 89 Neb. 317. *Brugman v. Brugman*, 93 Neb. 408; 18 C. J. 240.

It follows that the decree of the district court is right and is

AFFIRMED.

CITY OF NEBRASKA CITY, APPELLANT, V. NEBRASKA CITY SPEED & FAIR ASSOCIATION ET AL., APPELLEES.

FILED JANUARY 26, 1922. No. 21472.

1. **Municipal Corporations:** GRANT OF USE OF PARKS. A city cannot by lease, estoppel, or otherwise, grant to any person or association the use and control of such part of its public park as to practically deprive the public continuously of its enjoyment, nor delegate the use and control thereof to private individuals or associations.

2. ———: ———. In providing for the use and control of its public parks, a city, by its proper officers, performs a governmental function, and is not acting in its proprietary or business capacity.

3. ———: ———: ESTOPPEL. A city may be estopped from denying the validity of a contract, irregularly made by it, with reference to matters concerning its business of a proprietary character, when it has received benefits from such contract, if it had

authority to make such contract in the first instance. But a city cannot be estopped from denying the validity of a contract which it had no authority to make.

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

W. F. Moran and *W. W. Wilson,* for appellant.

L. F. Jackson, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., GRAVES and WELCH, District Judges.

WELCH, District Judge.

This action is brought by appellant, plaintiff below, to recover from appellees the possession and control of 30 acres of one of the public parks of appellant, containing 46 acres in all.

The appellee claims the right to the possession and control of the land in controversy by virtue of a certain agreement, made on or about December 21, 1908, by the board of park commissioners of the city of Nebraska City with the Nebraska City Speed & Fair Association, and by the city council of the city of Nebraska City by resolution ratified and confirmed. This agreement provided that, in consideration of appellee, Nebraska City Speed & Fair Association, constructing and maintaining a race track in said park, the board of park commissioners, for themselves as such board and for said city, did grant to said appellee for a term of 25 years the grounds designated upon a plat attached thereto as a race track, also ground upon which the amphitheater or grandstand was to be erected by the city, together with all the grounds south of "Second corso" (which road the county commissioners proposed to vacate; the location of which road is not shown in the record herein). The appellee Nebraska City Speed & Fair Association, by the terms of said agreement, was to have exclusive use and control of said ground so granted to it, for its race track, except the infield in said race track; also such

use and control of land adjacent to such race track south of said "Second corso," to be used by appellee for barns, sheds, and corrals. And at all times said appellee was to have the exclusive control and supervision of said race track, buildings, and grounds. It was further provided in said agreement that said appellee should have the exclusive control of the entire tract of land comprising said park, during race-meetings, fairs, and expositions, given by it or under its control, and that it should have full power to charge admission and entry fees to such meetings; all receipts therefor to be the property of said appellee. It was also provided that the infield of said race track might be used for baseball, football and circuses, at the regular license price, and all other athletic amusements and sports might be held thereon, all of which were to be held at such times as might be consistent with the uses and purposes of said ground and buildings by said Nebraska City Speed & Fair Association, and upon reasonable rules and regulations to be made by said Nebraska City Speed & Fair Association and the board of park commissioners of said city. Said Nebraska City Speed & Fair Association, under the terms of said agreement, was also to have, during the time covered thereby, the use of a house then situated on said land, without charge, for occupation by its caretaker, and if not so used, and a revenue was derived therefrom, such revenue should go to the city. And it was further provided that at the expiration of said agreement said appellee should have the right to a renewal thereof. The appellee Tom Kastner claimed that he was in possession of said premises as caretaker and lessee of said Nebraska City Speed & Fair Association. Upon the execution of said agreement said Nebraska City Speed & Fair Association entered into possession of the land, the use and control of which was purported to be thus granted to it, built a race track thereon, fenced the same, and erected barns and sheds on land adjacent to said race track, expending in the aggregate therefor about

$11,000. Said city built an amphitheater, fenced the entire 46-acre tract, and, together with the board of county commissioners, built a foot-bridge across a ravine through which a creek flowed through said park. The Nebraska City Speed & Fair Association annually from 1909 to 1918, inclusive, held an annual race-meet of three days' duration, and at one time had an exhibit of stock on said grounds. No race-meet or other affairs have been held by said appellee since 1918, but it has continued in possession of the ground claimed by it, has pastured the same with sheep, goats, horses and cows, including in such pasturage a tract of about two acres at the northwest corner of the lands of said park lying south of Table creek, which was not included in the lands covered by said agreement. Appellee association, by its caretaker, has also, for the greater portion of the time during the two years preceding the commencement of this action, kept locked a certain gate to an entrance to said park opening upon said two acres, which two acres are covered with large trees and blue grass. The said gate is also the only entrance to said park to reach the race track therein, except one which would require the passage along and near said barns to reach said race track. Appellees have thereby kept the public from enjoying the use and benefit of said race track and the grounds of said park which are in controversy herein, and have kept the gates opening to said race track locked, and the appellee Kastner, as caretaker and lessee of said Nebraska City Speed & Fair Association, has demanded a part of the gate receipts from baseball games, desired to be held on the infield of said race track, and kept the gate to said park locked when ball teams desired to play therein. The appellee Nebraska City Speed & Fair Association has rented said grounds to the appellee Kastner for $120 to $150 a year, and said Kastner has sublet the house thereon to other parties, receiving one-half the rent paid by him, and no part of said rent has been paid to said city.

The only conclusion that can be drawn from the fore-

going facts, as to the object and purpose of said agreement, is that the same was for the purpose of giving to the Nebraska City Speed & Fair Association, at the expense of the taxpayers of said city, grounds upon which to build a race track for said speed association, and grounds for holding its race-meets, to which it charged an admission. The record shows that the city of Nebraska City voted bonds in the sum of $5,000 to procure funds for the purchase of said 46 acres, and also paid therefor the sum of $5,000 received by it from the sale of a tract of land which had some years prior thereto been purchased with the fund of $5,000 which had been placed in the hands of one W. E. Hill by certain individuals as trustee to be held and invested for park purposes in Nebraska City, and also $500 from other funds of the city, making the aggregate $10,500 paid by the said city in the purchase of the land for said park.

If a race track, for holding race-meets, is a proper improvement for a public park, it must be under the control of the park commissioners of the city. The city had the right to acquire the lands for a public park. When so acquired it must be used for a public park, and the public must be allowed access thereto, subject only to rules and regulations made by the board of park commissioners and ordinances of the city. Neither the park commissioners nor the city have authority to delegate to, or share with, appellees herein, or any person, the making of rules and regulations governing the control of its public park. Neither the park commissioners nor the city had the power to grant to appellee the exclusive use and control of said race track.

The appellee Nebraska City Speed & Fair Association contends that the city is estopped from denying that the said agreement with the city is valid, and from claiming that it is void for want of power in the city to grant to appellee the use of said premises, by reason of the fact that in pursuance of said agreement, with knowledge of said city, said appellee has made, and was permitted

by said city to make, the improvements in said park made by it and expend the sum therefor heretofore mentioned. It also claims, that by virtue of a proposition made to said city, whereby 24 acres of land purchased with the aforesaid trust fund of $5,000 was turned over to the city, and by it sold for $5,000, which sum was applied in the purchase of the land in controversy herein, the Nebraska City Speed & Fair Association was to have privileges in said park granted to it by said agreement. The proposition so submitted to the mayor and council of said city of Nebraska City was that the city of Nebraska City should purchase a tract of land in area of at least 40 acres, the title thereto to be in said Nebraska City, to be used for general park purposes, but especially to be devoted to athletics, driving park, stock show, and chautauqua purposes, and stated that at least the sum of $5,000 would be raised by the citizens of Nebraska City for putting the grounds so used in condition for a race track, baseball, football, and athletic field purposes, and also stated that said offer was made to the city with the earnest desire to secure to the city a public park that would bring to the parties offering the same facilities such as outlined therein, and that, "We impose no conditions in the acceptance; we want it to be the property of our city absolutely for all time for pleasure and profit of its people." This, in substance, was the proposition accepted by the city after which said bonds in the sum of $5,000 were voted and issued for the purchase of said tract of land. There is nothing in said proposition which suggests or requires that three-fifths or any part of the tract of land to be acquired by the city for such public park should be granted to said appellee in any manner whatever.

A city cannot be estopped from denying the validity of a contract which it has no power or authority to make. *Citizens Bank v. City of Spencer,* 126 Ia. 101.

Appellees contend that this rule does not apply where the city is not acting in its governmental capacity, but

is acting in a proprietary and business capacity, and that in making said contract the city was acting in its business capacity, and that therefore the rule of estoppel as to private individuals should apply to the city.

The authority to maintain and control a public park is essentially a part of the machinery of government by a city necessary to maintain the park for the benefit of the public. It follows as a natural deduction that the agencies employed in respect to the same are governmental in character. The act on the part of the park commissioners in granting to the Nebraska City Speed & Fair Association the greater part of said park was not an act of the city in its private or proprietary character. It was an act in its governmental capacity. The signing of the contract may have been an act in its business capacity. But the contract itself provided for governmental acts and control of the larger part of said park by the Nebraska City Speed & Fair Association. This court has held in *Caughlan v. City of Omaha,* 103 Neb. 726, that a city in maintaining a public park performs a governmental function, as distinguished from a proprietary or business enterprise. By that agreement with appellee the maintenance and control of at least three-fifths of the area of said park was purported to be granted and delegated to the Nebraska City Speed & Fair Association, to exercise the same as it saw fit. This was delegating to it a governmental function. "The legislative power vested in municipal bodies cannot be bartered away in such manner as to disable them from the performance of their public functions." *Wabash R. Co. v. Defiance,* 167 U. S. 88. *Milhau v. Sharp,* 27 N. Y. 611.

A municipality has no power to enter into contracts which curtail or prohibit an exercise of its legislative or administrative authority. *State v. Board of Park Commissioners,* 100 Minn. 150.

Maintenance of a park by a city for the sole benefit of the public, and not for profit or benefit of the mu-

nicipal corporation, is a governmental or public function. *Harper v. City of Topeka,* 92 Kan. 11.

The doctrine of estoppel could only be applied on account of benefits received by the public by reason of the act the validity of which is questioned. The only benefit to the public by reason of the construction of this race track and buildings, in said park by said appellee, when controlled as provided for by said agreement, is the entertainment provided for them, at the three days' annual race-meet held by appellee, for the enjoyment of which the public were required to pay an admission fee. The remainder of the year, and in fact at all times, the public were excluded from enjoying said race track for a driveway through said park, and from the use thereof in any manner. They were also excluded by the acts of appellee from the use of two acres of the land in controversy which was suitable, by reason of its trees and grass, for park purposes. The city had no power to contract for the construction of a race track in its public park for the exclusive use of the Nebraska City Speed & Fair Association. It might, however, contract for the construction of driveways in the park for the use of the public and the race track therein constructed might be used for such driveway.

The city had power to grant to appellee a license or concession to hold in said park race-meets, for short periods of time, for the entertainment of the public, the same as it might grant a concession for providing refreshments or any other amusement for the public. While affording such entertainment and for a reasonable time prior thereto, for the purpose of putting the race track in proper condition therefor, appellee might be given control of the race track. While the meet is in progress, and an admission fee charged, it might be given control, subject to reasonable rules and regulations made by the board of park commissioners, for the purpose of said entertainment, of the entire grounds. It might also, as such licensee, be given exclusive control of

the buildings, necessary for affording said entertainment, which it erected, during the entire time that it retained such license. At all times, when said race track was not so used for the purpose of a race-meet or preparation therefor, the same should be open to the public for use as a driveway, under such reasonable rules and regulations as might be made by the city park commissioners and the city ordinances. Appellee could not have the use of said race track for the training of horses, unless it be for such short time immediately preceding its race-meet as might be deemed proper therfor by the park commissioners. A city has no power to grant a concession in its public park or public property without reserving to its proper officers the power of supervision and control of the use of the park for the benefit of the public.

The said contract between appellant and said appellee Nebraska City Speed & Fair Association, so far as it grants to it the use and control of said race track and grounds, for the purpose of holding annual race-meets, may be valid as a license or concession for providing such an entertainment for the public. But it is invalid and void so far as it attempts to give to said Nebraska City Speed & Fair Association the use and control of said race track and grounds of said park during the times the same are not used for the purpose of providing such entertainment. When not so used the supervision, maintenance and control of the same must be in the city by its proper officers. Upon ceasing to conduct such entertainment or termination by the city of said concession, appellee Nebraska City Speed & Fair Association would have the right to remove all buildings in said park owned by it, provided such removal did not injure the premises for the use by the public as a park. The race track, however, should remain uninjured for a public driveway in said park. The said acts of appellee in assuming and exercising the exclusive use, management and control of all that portion of said park south of Table creek

was an ouster by it of the public and of the appellant therefrom. Appellant is entitled to recover the possession of said premises from appellees for use of the same by the public. The finding and judgment should have been for plaintiff.

The judgment of the court is therefore reversed and this cause remanded for further proceedings in accordance with the opinion herein.

REVERSED.

WILLIAM G. WEIR ET AL, APPELLANTS, V. SIMEON WOODRUFF ET AL., APPELLEES.

FILED FEBRUARY 16, 1922. No. 21888.

Judgment by Default. Where the defendants are in default in an action to quiet title to real estate, the allegations of the petition against them will be taken as true, and, if the petition states a cause of action, plaintiff is entitled to judgment without making proof of the allegations of the petition.

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

F. H. Stubbs, for appellants.

H. A. Brubaker, contra.

Heard before MORRISSEY, C. J., ALDRICH and FLANSBURG, JJ., HOSTETLER and MORNING, District Judges.

MORRISSEY, C. J.

This is an action to quiet title to real estate, based upon a claim of adverse possession for the full period required by law to vest the occupant and claimant with title by prescription. Service was had by publication. The court found that the service was regular in every respect; that the time for answer and appearance of each defendant "is long past, and that none of said defendants have answered or appeared herein, but that all are in default." A default was entered against each defendant.

Plaintiffs filed a motion praying for judgment on their petition. This motion was overruled and plaintiffs took an exception. "The court thereupon requests counsel for plaintiffs to proceed and introduce evidence in support of the allegations of the petition filed herein, but counsel for plaintiffs declines so to do and insists to the court that plaintiffs are entitled to a decree by default, in accordance with the prayer of the petition." Plaintiffs refused to offer or introduce any evidence, whereupon the court dismissed the action. From this ruling plaintiffs appeal.

The sole question presented is: Were the appellants entitled to a decree without offering evidence in support of the allegations of their petition? In support of their claim to a judgment on the pleadings, plaintiffs cite section 7702, Rev. St. 1913, and *Slater v. Skirving,* 51 Neb. 108. In *Slater v. Skirving, supra,* in a discussion of the subject, this court said: "While we are aware that in some quarters an impression prevails that on default it is necessary for the plaintiff to prove his cause of action, this impression is unfounded in law. If it were true, a failure to answer would operate as a general denial and a party answering would be in a worse plight than one in default. The necessity for proof on default arises only from the last provision of section 134 (of the Code; Rev. St. 1913, sec. 7702), that allegations of value or of amount of damages shall not be considered as true by failure to controvert them." And in the syllabus of that case the court held:

"Where a defendant is in default the allegations of the petition are to be taken as true against him, except allegations of value and amount of damage; and if the petition states a cause of action, the plaintiff is entitled to judgment without proof except as to the quantum of damages."

In a brief *amicus curiæ* our attention is directed to the fact that the author of *Slater v. Skirving, supra,* afterwards wrote the chapter on equity in 16 Cyc., and at page

495 thereof announces the general rule to be that on orders *pro confesso* the court may in its discretion require proof, and that proof is required as against infant defendants, and against nonresidents served constructively who do not appear. And we are urged to adopt the general equity rule laid down in 16 Cyc. 495; it being argued that the case of *Slater v. Skirving, supra,* was a law action, while this is a suit in equity. The answer to this argument is that distinctions between actions at law and suits in equity have been abolished. Rev. St. 1913, sec. 7560.

It being essential to the orderly adminstration of justice that the rules of procedure be fixed and stable, we adhere to the rule heretofore established and hold that it was error for the court to refuse to enter judgment in favor of plaintiffs upon their petition. The judgment is reversed and the cause remanded, with directions to enter judgment in accordance with this opinion.

REVERSED.

J. L. COX, APPELLANT, V. H. P. KEE, APPELLEE.

FILED FEBRUARY 16, 1922. No. 21963.

1. **Evidence** examined, and *held* sufficient to support the verdict.
2. **Attorney and Client:** ATTORNEY AS WITNESS. An attorney is a competent witness for his client, and he may properly testify to mere formal matters, such as to account for the possession of an exhibit, or the like. But if he testifies generally, it is unbecoming for him to examine witnesses, or to address the jury.
3. **Appeal:** WITNESSES: REVIEW. In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.

APPEAL from the district court for Antelope county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

O. J. Frost, Williams & Kryger, Lincoln Frost and *J. W. Kensinger,* for appellant.

Jackson & Rice and *Fred H. Free, contra.*

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., HOBART and PAINE, District Judges.

MORRISSEY, C. J.

February 28, 1916, defendant executed his promissory note for the sum of $3,786.80 payable March 1, 1917, with interest, payable to J. L. Cox and W. H. Cox. April 18, 1918, W. H. Cox died testate. Plaintiff's petition alleges the loss of the note after the same became due. Defendant's answer admits the execution and delivery of the note, but alleges that he paid the same on or about May 10, 1917, to W. H. Cox, one of the payees. The question of payment was thereby presented for the determination of the jury. From a verdict and judgment in favor of defendant, plaintiff appeals.

It is alleged that the verdict is not sustained by sufficient evidence. Under the circumstances the burden of proof was upon defendant. He testified in his own behalf and detailed the circumstances surrounding the alleged payments, and his testimony is corroborated in the main by disinterested witnesses. The weight to be given to the testimony of these witnesses was for the jury and we cannot disturb the verdict for lack of evidence to support it.

There is the further assignment that the court erred in refusing to permit one of plaintiff's counsel to testify generally as a witness in rebuttal unless he withdraw from the case as counsel. After defendant had rested, the attorney, who up to that period had actively conducted the trial for plaintiff, offered himself as a witness, whereupon the court stated that the attorney might testify generally as a witness, but, if so, he "must withdraw from the case as counsel, the plaintiff being represented by Mr. Williams of the firm of Williams & Kryger." Plaintiff excepted to the ruling, and to the language of the court. The court then stated that he had no "desire to influence the jury in the slightest de-

gree on the evidence, but this practice of lawyers swearing generally in cases is unprofessional and must stop in this court." Plaintiff excepted to this statement by the court.

The attorney appears to have been unwilling to accept the alternative offered by the court and without making any offer of testimony continued to conduct the trial. It is argued by appellant that there is no statute disqualifying an attorney as a witness; that no rule of law prohibits the attorney of a litigant from testifying; and that there are often cases in which it may be quite important, if not indispensable, that such testimony be admitted. In support of this contention appellant cites *In re Estate of Normand,* 88 Neb. 767, wherein it is said: "It sometimes happens that matters important to the litigation are peculiarly within the knowledge of the attorney conducting the litigation. When there is danger of a failure of justice for want of such evidence, the attorney is justifiable in becoming a witness. Such practice has been not uncommon in the trial courts of this state." We question whether the citation given fully sustains the point sought to be made by appellant. A careful study of the language used in *In re Estate of Normand, supra,* shows that the court meant to sanction the practice of attorneys testifying for their clients only when matters important to the litigation were peculiarly within the knowledge of the attorney and when without such evidence there was danger of a failure of justice. In that opinion it is also pointed out that the material part of the attorney's testimony was given in answer to questions propounded by the trial judge without objection by the other party.

We are cited to Jones on Evidence (2d ed.) sec. 754. However, section 754, 4 Jones, Commentaries on Evidence, gives a much fuller discussion of the subject than is found in the second edition. In the later edition it is said: "There is no rule of law which prohibits the attorney of a party prosecuting or defending in a civil

action from testifying at the call of his client. In some cases it may be unseemly, especially if counsel is in a position to comment on his testimony; and the practice has often been severely criticised by the courts. It is a matter which should appeal to the professional pride of an attorney and his sense of his true position and duty."

In *Stones v. Bacon,* 11 Jurist (Q. B. Eng.) pt. 1, p. 44, the writer of the opinion said: "I shall take the general ground, that, where an attorney acting as advocate, cross-examines witnesses and addresses the jury, it is not fit he should be heard as a witness."

While the general rule in this country may not go to the full extent of the English rule quoted, nevertheless, except as to mere formal matters, such as to account for the custody of an exhibit, or the like, it has long been regarded by the courts, and by the profession generally, as improper practice for an attorney to cross-examine witnesses, address the jury, and give evidence himself to contradict witnesses. *Frear v. Drinker,* 8 Pa. St. 520; *Alger v. Merritt,* 16 Ia. 121. It is a practice which as far as possible should be discountenanced by the courts and it ought not to be indulged in by counsel. Experience has shown, however, that it is sometimes indispensable to justice that an attorney give evidence for his client. In such cases the most ethical course for counsel to pursue is that suggested by the trial court, viz., that counsel step aside and leave other counsel to conduct the trial. This is especially true where, as in the instant case, other capable attorneys are associated and the interests of the litigant will not be jeopardized by the withdrawal of the attorney who offers himself as a witness.

There is an assignment relating to the ruling of the court on an objection to a question propounded to plaintiff. The objection was sustained and the witness was not permitted to answer. As in the case of the attorney who was offered as a witness, no offer of testimony was made, and we are not able to say whether the evidence

sought to be elicited was relevant or material, and, in the absence of such offer, the rulings of the trial court will not be reviewed. *Blondel v. Bolander,* 80 Neb. 531; *Nebraska Telephone Co. v. Joncs,* 60 Neb. 396.

The record is free from error, and the judgment is

AFFIRMED.

MAUD ROBINSON ET AL. V. STATE OF NEBRASKA.

FILED FEBRUARY 16, 1922. No. 22219.

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." *Sheppard v. State,* 104 Neb. 709.
2. **Larceny:** PROOF OF VALUE. The value of articles stolen from a stock of merchandise may be established by proof of the price at which they and other like articles are being offered and sold at the place where the articles were stolen.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Richard J. Organ, W. W. Towle and *Bruce Fullerton,* for plaintiff in error.

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

Heard before LETTON, DEAN and FLANSBURG, JJ., DAY and GOOD, District Judges.

LETTON, J.

Petitioners in error were convicted of the larceny of a large number of articles of merchandise upon two counts, the first charging that the goods therein described were the property of Rudge & Guenzel Company, a corporation, and the other charging the goods therein described were the property of Miller & Paine, a corporation. Motions to quash the information were overruled. A motion for

continuance and separate motions by each defendant to require the state to elect upon which count of the information it would rely for conviction were also overruled. The jury found the defendants guilty on both counts, and found the value of the property described in the first count to be $200, and the value of the property described in the second count to be $65.

Is the evidence sufficient? The testimony shows that the defendants were, on the day the theft occurred, seen in the stores of Miller & Paine and Rudge & Guenzel; that soon after they left the store a number of articles of merchandise were missed; that in the rooms occupied by the defendants at a hotel in the city the stolen property was found in their possession, the price marks and identification tags being removed from a number of articles. The merchandise was fully identified.

The complaint that the court erred in permitting a joinder of the two larcenies in the same information is not a ground for reversal. The acts of larceny were closely connected, in time, place and manner, and both defendants took part in them. The question of election rests largely in the discretion of the trial court, and, unless some prejudice has resulted from the ruling of the court, it will not be held that this discretion has been abused. Under the facts no prejudice occurred. *Korth v. State,* 46 Neb. 631; *Bartley v. State,* 53 Neb. 310; *Sheppard v. State,* 104 Neb. 709.

No error is shown as to the refusal of defendants' motion for a continuance. The court tried the question upon affidavits. These affidavits are not in the record, and it will be presumed that the evidence warranted the refusal.

The evidence was sufficient to establish the identity of the goods. As to the proof of value, there is no better way of showing the market value of any article than the price at which it and others of its class are being offered and sold on the market. This was shown by a number of witnesses. It is not the cost at the place of manu-

facture, or even at the place where the wholesaler conducts his business, which is very often at great distance from the place where offered for sale, which is the criterion, but it is the market value at the place where the articles were stolen. *Jensen v. Palatine Ins. Co.,* 81 Neb. 523; *Omaha Auction & Storage Co. v. Rogers,* 35 Neb. 61.

Complaint is made that certain instructions requested were refused, and that certain of those given failed to state material elements of the crime. When the instructions are taken as a whole, each material and essential element of the crime is specifically pointed out to the jury. There was no error in refusing to give those requested.

It said that instruction No. 14 (evidently meaning instruction No. 15) was erroneous because the forms of verdict submitted only admitted of the finding of both defendants guilty or not guilty. There is no evidence to show that the blank forms of verdicts prepared for the jury contained. No particular form of verdict was prepared or requested by the defendants, or either of them. There is nothing to show that the jury were prevented from returning a separate verdict against each defendant, if they found that one of them was guilty and the other not guilty, or that such a form was not furnished them. There is no merit in this assignment.

The evidence is clear and convincing that the accused committed the crime charged, and they were fairly tried and properly convicted.

AFFIRMED.

STATE, EX REL. PETER J. LONG ET AL., RELATORS, V. WILLIAM H. WESTOVER, DISTRICT JUDGE, RESPONDENT.

FILED FEBRUARY 16, 1922. No. 22543.

1. **Judgment: SUIT TO VACATE: VENUE.** A suit in equity to vacate and set aside a judgment of a district court on the ground that it was procured by perjury and other forms of fraud must

be brought in the court in which the judgment was rendered.

2. ———: ———: TRANSCRIPT. Under section 7996, Rev. St. 1913, the transcript of a judgment in the district court of another county is "in the same plight" as the original judgment. It is an incident thereto and can only be vacated and set aside for grounds inhering in the judgment, in a suit to set aside the judgment. This applies also to a suit to remove an apparent cloud upon the title to lands caused by the filing of such a transcript.

3. ———: RELIEF IN EQUITY. Equity acts *in personam*. Even though property is beyond the reach of the process of the court, and it can exert no power or control over it, it may, by a decree against a person over whom it had acquired jurisdiction, enforce action or nonaction with respect to such property, and while it cannot require another court of co-ordinate jurisdiction to set aside its judgment, alleged to have been procured by fraud, it may, if the facts justify it, restrain such persons from enforcing such a judgment and grant other adequate relief.

4. ———: ———: JURISDICTION. Such an action is of a transitory nature and the court may acquire jurisdiction over the parties either by service of summons or by their general appearance in the action.

5. Appearance: JURISDICTION. "An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not." *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 273.

Original proceeding in mandamus to compel respondent to modify an order of injunction. *Writ denied.*

Byron G. Burbank and *Thomas Lynch*, for relators.

Sullivan, Wright & Thummel and *Arthur F. Mullen, contra.*

Heard before MORRISSEY, C. J., DAY, DEAN, FLANSBURG, ALDRICH, LETTON and ROSE, JJ.

LETTON, J.

A judgment for $75,000 was obtained in the district court for Douglas county by certain parties, hereinafter

termed "the Longs," against other parties, hereinafter termed "the Krauses." A transcript of this judgment was filed in Sheridan county. Afterwards an action was brought by the Krauses in the district court for Sheridan county against the Longs, their attorneys, and the sheriff of the county, praying the court to vacate and set aside the judgment in the district court for Douglas county, to enjoin the Longs and any one claiming under them from proceeding to the collection of the judgment, and to quiet the title to their lands in that county against any claims under the judgment; it being alleged that the judgment was procured by perjury and other fraud on the part of the Longs. A temporary restraining order was issued and the cause set for hearing. The Longs brought an original proceeding in mandamus in this court against Honorable W. H. Westover, judge of the district court for Sheridan county, praying that this court issue a peremptory writ of mandamus directing the judge to set aside the restraining order on the ground of want of jurisdiction. The writ of mandamus was refused. The Longs then filed objections and exceptions in the district court for Sheridan county to the jurisdiction of that court over the subject-matter of the action, and over the persons of the defendants, no personal service having been had. These objections were overruled. The Krauses filed an amendment to their original petition, alleging their ignorance of the fraud and falsity of the testimony until after the Douglas county litigation was finally disposed of, such ignorance being without negligence on their part; that the Longs are and were nonresidents of the state; that the Krauses have no property in Douglas county; that the district court for Douglas county has no power to grant adequate relief in the premises; that they have no remedy at law save in the Sheridan county district court; and that the original cause of action arose in Sheridan county. The prayer to the petition was also amended by leave of court. The prayer is now as follows:

"That the transcript of judgment entered in the district court of Douglas county, Nebraska, in favor of said defendants, Peter J. Long and Anna Long, and against John H. Krause and Herman J. Krause, be vacated, set aside and held for naught; and that a temporary injunction issue enjoining the above named defendants, and each of them, and any and all persons claiming by, through or under them, or either of them, be enjoined from taking any steps or proceedings in Sheridan county toward the collection or enforcement, either by execution or otherwise, of the said judgment so transcripted, or making any claim or demand of any nature whatsoever by reason thereof, and that, upon a final hearing of said cause, said injunction be made permanent; that the title of plaintiffs' lands be quieted as against any claims by said defendants, or any of them, under said judgment, and that they have such other and further relief as may be just and equitable."

The defendants each excepted and objected to this amendment, "for the reason that said court has no jurisdiction or authority to entertain said motion or make said order." The matter of the special appearances was then taken up. The court overruled the objections to the jurisdiction of the court over the persons of the defendants, and over the subject-matter of the action. Plaintiffs demanded a default be taken, "whereupon the court stated that the plaintiffs were entitled to a default unless the defendants requested time to plead or move, and that such default would be entered unless defendants made such request; that thereupon the defendants severally ask 20 days leave to plead or move to the jurisdiction of the court, which is granted." A temporary order of injunction was then allowed, enjoining the collection of the judgment until the further order of the court, upon plaintiff executing an undertaking for $2,000, which was duly executed and approved. The Longs then brought this original proceeding in this court, praying for a peremptory writ of mandamus to direct Judge Westover to

modify this order of injunction so that the modified order shall enjoin the enforcement of the judgment in Sheridan county "until such a reasonable time as said judgment defendants in the exercise of due diligence, upon a proper showing, may litigate in the district court of Douglas county, their said pleas that said judgment was procured by perjury and other forms of fraud," and also directing said judge to proceed no further in the action, should the Krauses fail to commence litigation in Douglas county within a time limited in the modified order of injunction.

At the time the former application for a writ of mandamus was filed in this court, the object of the suit pending in Sheridan county was to vacate and set aside the judgment in Douglas county, to enjoin its enforcement generally, and to quiet the title to lands of the Krauses against any claims by defendants under the judgment. The court was of the opinion that Douglas county was the proper venue; that the district court for Sheridan county, being a court of co-ordinate jurisdiction with that of Douglas county, had no jurisdiction to vacate and set aside the judgment which was of record in the district court for Douglas county, but that proceedings to enforce the judgment in Sheridan county might properly be stayed while an action to set aside the judgment was pending in the district court for Douglas county.

When the case again came on for hearing in Sheridan county, the petition was amended so as to change the character of the proceeding. The object now is to set aside the transcript filed in Sheridan county; to restrain the holders of the judgment from enforcing the same in Sheridan county; and to quiet the title to plaintiffs' lands from all claims under the judgment, and for other equitable relief.

An action to set aside a judgment must be brought in the court which rendered the judgment, otherwise the records of one court would be under the control of other courts of co-ordinate jurisdiction. A judgment is a mat-

ter of record, and can only be changed, set aside or modified by the court by whose authority the record is made, or by the direction of a court of higher jurisdiction in proceedings to review the judgment. If this were not so, chaos would result. *Ryan v. Donley,* 69 Neb. 623, 630; *Trimble & Blackman v. Corey & Son,* 78 Neb. 639; *Carlson v. Ray,* 104 Neb. 18.

In a few cases in this state where objections were not raised, such decrees have been rendered, but these cases are not authority for such a practice. *Bankers Life Ins. Co. v. Robbins,* 53 Neb. 44; *Security Mutual Ins. Co. v. Ress,* 76 Neb. 141.

The transcript of a judgment is in the same plight. Section 7996, Rev. St. 1913, provides: "Such transcript shall at all times be affected and be in the same plight as the original judgment." We have held that a motion to revive a transcripted judgment of the district court must be made in the court where the judgment was rendered, and it is said: "The Nebraska statute upon which plaintiff relies authorizes an execution, but not a revivor. * * * It leaves the court of original jurisdiction in complete control of its own judgment. That court has power to renew the lien, to cancel it for any lawful reason, to make orders respecting parties, to direct satisfaction in case of payment; and to perform any other judicial act essential to the rights of any party to the suit. Orders made in the exercise of such power affect transcripts in other jurisdictions in the manner described in the proviso to section 429*a* of the Code. The jurisdiction of the court to which the judgment is transferred is not the same as that of the court rendering the judgment, unless made so by statute." *Case Threshing Machine Co. v. Edmisten,* 85 Neb. 272.

The prayer to quiet the title to lands is based upon the fact that the transcript is on file in Sheridan county. A judgment in Douglas county is not a lien on lands in Sheridan county unless a transcript of the same is on file in that county. The transcript is based upon and

is only an incident to the judgment. The title cannot be quieted against the cloud created by a transcript without setting it aside. Where the defect is in the transcript itself, for instance, if it fails to be a true exemplification of the record, or for any other reason not concerned with the judgment itself, this may be done by an action in the county where it is filed; but, if the alleged defect inheres in the judgment itself, it can only be done in the court which rendered the judgment. If the judgment should be vacated in that court, then a suit to quiet the title against the apparent lien can be maintained in Sheridan county.

Respondent has cited many cases to the effect that a court of equity may set aside judgments for fraud. In only one case cited has the transcript of a judgment been set aside in another court. That is the case of *Carlson v. Ray,* 104 Neb. 18, and the only ground for so doing was that there is no power in a county court acting as a justice of the peace to vacate its own judgment for fraud. The opinion recognizes the general rule to be as above stated, upon substantially the same grounds.

But another kind and form of relief is prayed for. An injunction against the enforcement of the judgment is sought against the holders thereof. This is an action *in personam* and is transitory in its nature. Such a suit requires jurisdiction of the person, either by proper service or by appearance. In the event the Krauses are successful, the record of the judgment in Douglas county will be unaffected by the decree, but the parties defendant will be restrained from enforcing it.

It is a maxim that equity acts *in personam.* Even though property is beyond the reach of the process of the court, and it can therefore exert no power or control over it, it may by a decree against a person over whom it has acquired jurisdiction enforce action or nonaction with respect to such property. It may compel specific performance of a contract to convey lands lying in another state, and it may restrain proceedings in the courts of

other states or countries. "Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ,* which he could do voluntarily, to give full effect to the decree against him." *Phelps v. McDonald,* 99 U. S. 298.

In *Marshall v. Holmes,* 141 U. S. 589, cited by respondent, it is said, speaking of the power of the court in a similar action: "While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud."

The objections made by defendants to the jurisdiction of the district court for Sheridan county are upon the grounds that none of the defendants was served with summons in the action, or found in Sheridan county, or resides therein, and that none of them appears in the action except for the purpose of excepting to the jurisdiction of the court over the subject-matter of the action, and the persons of each and all of the defendants.

Being a transitory action, the court has jurisdiction over the subject-matter and may exercise the same whenever it has obtained jurisdiction over the persons of the defendants. In *Perrine v. Knights Templar's & Masons' Life Indemnity Co.,* 71 Neb. 267, 273, it was held that, in a transitory action, "An appearance for the purpose of objecting to the jurisdiction of the court of the subject-matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the

court over the person of defendant, whether the defendant intended such waiver or not." This decision has been followed in *Brainard & Chamberlain v. Butler, Ryan & Co.*, 77 Neb. 515; *Summit Lumber Co. v. Cornell-Yale Co.*, 85 Neb. 468; *Lillie v. Modern Woodmen*, 89 Neb. 1; *Clark v. Bankers Accident Ins. Co.*, 96 Neb. 381; *Legan v. Smith*, 98 Neb. 7; *Barkhurst v. Nevins*, 106 Neb. 33.

The defendants not having confined their appearance to challenging the jurisdiction of the court over their persons, but having challenged the jurisdiction of the court over the subject-matter, and the challenge not being well founded with respect to the prayer for restraining the collection of the judgment, submitted themselves to the jurisdiction of the court for its judgment upon that question, and thus made a general appearance as to that part of the action in which the court had jurisdiction of the subject-matter.

A court of equity, when it has obtained jurisdiction of the persons, has full power to render full and adequate relief through them, even to the enforcement of action looking toward the satisfaction or cancelation of any paper fraudulently obtained or executed, or the satisfaction of judgments wrongfully obtained. *Jefferson v. Gregory*, 113 Va. 61; *Barnesley v. Powell*, 1 Ves., Sr. (Eng.) 284; *Loss v. Obry*, 22 N. J. Eq. 52; *Fall v. Fall*, 75 Neb. 120; 2 Story, Equity Jurisprudence (13th ed.) sec. 899, 900; *Cole v. Cunningham*, 133 U. S. 107.

The court having acquired jurisdiction, has power to enjoin the enforcement of the judgment, and afford other adequate relief within its power and jurisdiction, but it has no direct power to vacate the judgment or set aside the transcript until the judgment is disposed of. Nothing hereinbefore said is to be construed as expressing any opinion as to the issues of law or fact involved in the pending case in the district court for Sheridan county.

WRIT DENIED.

EVA THAMANN ET AL., APPELLANTS, V. JOHN MERRITT ET AL., APPELLEES.

FILED FEBRUARY 16, 1922. NO. 21808.

1. **Evidence**: SUFFICIENCY. In an action for damages resulting from an unlawful sale of intoxicating liquors, a preponderance of the evidence will sustain a recovery in favor of plaintiff, though the wrongful act may be punishable in a criminal court.
2. **Intoxicating Liquors**: UNLAWFUL SALES: CIRCUMSTANTIAL EVIDENCE. An unlawful sale of intoxicating liquors and defendant's connection therewith may be proved by circumstantial evidence alone, and proof that the consideration for the sale passed may be unnecessary.
3. ———: ———: PROOF. An unlawful sale of intoxicating liquors may be proved without evidence of the terms of a formal contract.
4. **Death**: CONTRIBUTING CAUSE: QUESTION FOR JURY. A contributing cause of death is a question for the jury, where there is sufficient evidence to sustain a verdict in favor of plaintiff on that issue.
5. **Inferences** from evidential facts are questions for the jury, where the evidence will sustain a verdict in favor of plaintiff.
6. **Appeal**: PRIMA FACIE CASE. Where defendant does not adduce any proof, all facts which the evidence on behalf of plaintiff tends to prove will be treated as established for the purposes of a *prima facie* case in plaintiff's favor.
7. **Intoxicating Liquors**: UNLAWFUL SALES: CIRCUMSTANTIAL EVIDENCE. In an action to recover damages for the wrongful act of defendant in selling intoxicating liquors, empty bottles and the labels thereon, having come from drug stores conducted by defendant, *held* admissible as circumstantial evidence of a sale, under the circumstances outlined in the opinion.
8. ———: ———: DAMAGES: RECOVERY. In an action to recover damages for the wrongful act of defendant in selling intoxicating liquors, there may be circumstances under which plaintiff may recover without proof that the person fatally injured was himself the purchaser.
9. ———: ———: ———: ———. Where the unlawful sale of intoxicating liquors contributes to the death of the person who consumed it, there may be a recovery for resulting damages

without proof that the wrongful act was the proximate cause of such death.

APPEAL from the district court for Douglas county: CHARLES A. GOSS, JUDGE. *Reversed.*

Murphy & Winters, for appellants.

Ray J. Abbott and *Isidor Ziegler, contra.*

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., FITZGERALD and WAKELEY, District Judges.

ROSE, J.

This is an action to recover from defendants damages in the sum of $10,000 for contributing to the death of John Thamann by unlawful sales of intoxicating liquors labeled "Essence of Wintergreen," a preparation containing 95 per cent. of alcohol—more than necessary for legitimate purposes—not containing drugs in sufficient quantities to make it unfit for use as a beverage and not being salable by defendants under any other exception to the statutory provisions forbidding the sale of intoxicating liquors. Laws 1917, ch. 187. Plaintiffs are the widow and the minor children of decedent. It is alleged that the sales were made by defendant Sherman & McConnell Drug Company, a corporation conducting drug stores at various places in Omaha under state licenses, and that defendant Charles R. Sherman is a bondsman of the seller. The conducting of drug stores in Omaha under state licenses and the suretyship of Sherman are admitted in an answer denying the wrongful acts imputed to defendants. After the proofs on behalf of plaintiffs had been adduced, the trial court directed a verdict in favor of defendants, the latter not having offered any evidence. From a judgment of dismissal, plaintiffs have appealed.

The only questions presented are raised by assignments that the trial court erred in sustaining objections to the introduction in evidence of empty bottles with the labels thereon and in directing a verdict in favor of de-

fendants. To justify the peremptory instruction, it is argued that there is no proof that Sherman & McConnell Drug Company sold the intoxicating liquors consumed by Thamann, and that the empty bottles and the labels are not evidence of that fact—an essential element of plaintiffs' case. These questions must be considered in the light of the following pertinent rules of law:

In an action for damages resulting from an unlawful sale of intoxicating liquors, a preponderance of the evidence will sustain a recovery in favor of plaintiff, though the wrongful act may be punishable in a criminal court.

An unlawful sale of intoxicating liquors and defendant's connection therewith may be proved by circumstantial evidence alone, and proof that the consideration passed may be unnecessary.

An unlawful sale of intoxicating liquors may be proved without evidence of the terms of a formal contract.

A contributing cause of death is a question for the jury, where there is sufficient evidence to sustain a verdict in favor of plaintiff on that issue.

Inferences from evidential facts are questions for the jury, where the evidence will sustain a verdict in favor of plaintiff.

These principles are well established. Were the bottles and the labels properly excluded? Means of identification had been blown in one of the bottles in the following form:

"Sherman & McConnell Drug Co., Omaha."

The label on the outside reads:

"Essence of Wintergreen. Sherman & McConnell Drug Co. Prescription Pharmacists. Cor. 19th and Farnam, Branch, Omaha, Neb."

There is evidence from which the following inferences may be drawn: Thamann was addicted to the use of intoxicating liquors. He received his wages as a laborer December 24, 1917, and went home with the bottle in his pocket. At different times that day he drank the contents mixed with water and sugar. He said he had pur-

chased alcohol. What he drank from the bottle was intoxicating. The next day he drank the contents of another bottle labeled thus:

"Essence of Wintergreen. Sherman & McConnell Drug Co. 24th and Farnam St. Branch. Omaha, Neb."

Vomiting followed as a result. The odor of these bottles when offered in evidence, and the labels thereon, were the same as when the intoxicating liquors were consumed. Thamann continued to drink "Essence of Wintergreen" and as a consequence died in convulsions December 31, 1917. The drinking December 24 and 25 contributed to his death.

There is also evidence tending to prove these facts: The empty bottles, with the labels and the odor unchanged, were taken to one of the drug stores conducted by the Sherman & McConnell Drug Company, and were shown to defendant Sherman, who examined them and said that they had come from his line of drug stores, and that they had contained 95 per cent. of alcohol and 5 per cent. of essence of wintergreen.

In addition, the following inferences may also be drawn from the proofs: Essence of wintergreen is used as a flavoring for beverages. It is soluable in 2 per cent. of alcohol. The bottles contained more alcohol than was necessary for legitimate purposes. The preparation did not contain drugs in sufficient quantities to make it unfit for use as a beverage. Furthermore, it is a fair inference that it was not salable by defendants under any other exception to the statutory provisions forbidding the sale of intoxicating liquors. Laws 1917, ch. 187.

Since defendants offered no proofs, all facts which the evidence on behalf of plaintiffs tends to prove are treated as established for the purposes of a *prima facie* case. Under all the evidential facts, were the bottles and the labels admissible as circumstantial evidence tending to show that defendants sold the intoxicating liquors labeled "Essence of Wintergreen" and consumed by Thamann? Defendants were engaged in the retail business of sell-

ing drugs. For that purpose they had procured a state license and had given a bond. The bottles had been intended for containers of drugs when sold by defendants at retail. Labels, in ordinary, general and well-understood use, indicate not only contents, but the name and the location of the retail sellers. Both the bottles and the labels are implements of defendants' retail business. As such they came from defendants' line of drug stores. Purchase from a druggist in labeled bottles is the usual method of procuring drugs. Retail druggists have a legitimate use for both alcohol and essence of wintergreen.

In the present instance the person who consumed the contents of the bottles, labeled in the manner shown, is dead and cannot testify. The druggists charged with the unlawful sales are defendants in the action for damages. Under the circumstances outlined, the bottles and the labels from defendants' line of drug stores, the first bottle having been taken home by Thamann after he had drawn his wages a few days before his death, tend, as circumstantial evidence, to throw some light on the issue of sales and were, therefore, admissible in evidence. *Curran v. Percival,* 21 Neb. 434; *Sullivan v. Conrad,* 79 Neb. 303.

Considering the evidence erroneously excluded, was there error in the peremptory instruction in favor of defendants? The weight of the evidence is a question for the jury. There may be a recovery by plaintiffs without proof that Thamann in person was himself the purchaser. There being proof that his drinking December 24 and 25, 1917, contributed to his death, evidence that it was the sole or the proximate cause thereof is not essential. Plaintiffs seem to have offered evidence making a *prima facto* case. It follows that the trial court erred in excluding the labeled bottles and in directing a verdict in favor of defendants. For these reasons, the judgment below is reversed and the cause remanded for further proceedings.

REVERSED.

STATE, EX REL. CITY OF LINCOLN, RELATOR, V. GEORGE W. MARSH, AUDITOR OF PUBLIC ACCOUNTS, RESPONDENT.

FILED FEBRUARY 16, 1922. No. 22590.

Municipal Corporations: BONDS: ELECTIONS: PRIMARY AND GENERAL. A state-wide primary election is a "general election" at which a majority vote is sufficient to carry a proposition to authorize the issuance of municipal bonds, within the meaning of the "Home Rule Charter" of the city of Lincoln, though the general city election is held on a different date and 60 per cent. of the vote on such a proposition is necessary to carry it at a special election.

Original proceeding in mandamus to compel respondent, as auditor of public accounts, to register bonds of relator. *Writ allowed.*

C. Petrus Peterson, Charles R. Wilke and *R. A. Boehmer,* for relator.

Clarence A. Davis, Attorney General, contra.

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., DICKSON and STAUFFER, District Judges.

ROSE, J.

The city of Lincoln, Nebraska, relator, invokes the original jurisdiction of the supreme court for a peremptory writ of mandamus to compel the auditor of public accounts, respondent, to register municipal bonds of relator in the sum of $200,000. The bonds are called "Light Bonds." They are dated January 1, 1922, and bear interest at the rate of 5 per cent. per annum, payable semi-annually. The proposition to authorize the issuance of the bonds was submitted to the electors of relator April 20, 1920. There were 4,622 votes for and 3,533 against the bonds. Under the charter of relator a majority may vote bonds at a general election, but 60 per cent. of the total vote on the proposition is necessary, if submitted at a special election. Respondent resists the allowance of the writ on the sole ground that the bond proposition was not submitted at a general election, and did not re-

ceive an affirmative vote of 60 per cent. at a special election.

Relator is governed by what is called a "Home Rule Charter." Thereunder provision is made for holding general city elections the first Tuesday in May in odd-numbered years. The charter provides that a proposition to authorize the issuance of utility bonds may be submitted either at "a general election" or "a special election called for that purpose." The 60 per cent. vote essential to a bond issue is required only at a special election. The question therefore is: Was the majority vote in favor of the bonds April 20, 1920, cast at "a general election," within the meaning of the city charter? That was the regular date on which the general state-wide primary election was held pursuant to statute. The polls were open in all voting precincts of relator and elsewhere in the state. The state-wide primary is part of the election system of Nebraska and is commonly understood to be a general election. The general law, operating automatically as to time, fixes the date of the state-wide primary without any other intervening cause. The public interest in the nomination of candidates for office is an inducement to the exercise of the elective franchise. The notice of the primary April 20, 1920, and of the bond proposition to be then submitted, was given alike to all voters of the city. This is clearly "a general election" within the meaning of the relator's charter. It is thus distinguished from "a special election" called by the city council for the purpose of submitting to the electors a proposition to authorize the issuance of municipal bonds, where an affirmative vote of 60 per cent. is required.

The conclusion is that respondent, though prompted by a sense of public duty in refusing to register the bonds, has misconstrued the "Home Rule Charter" of the city of Lincoln and has pleaded no defense to the application.

WRIT ALLOWED.

CYNTHIA A. CARSON, APPELLEE, V. HOWARD GREELEY ET AL., APPELLANTS.

FILED FEBRUARY 16, 1922. No. 21465.

1. **Judgment:** ACTION FOR RESCISSION: DISMISSAL WITHOUT PREJUDICE. When a suit is begun for the rescission of a contract on the ground of fraud, the plaintiff may dismiss her action without prejudice, and begin an action at law to recover damages for the perpetration of the fraud under facts which are not inconsistent with the facts in the former action, and no estoppel is worked thereby, where the plaintiff has acquired no benefit in the former action and no detriment has been caused to the defendant in such action.

2. **Election of Remedies:** MOTION TO DISMISS: PARTIES. In an action to rescind a contract on the ground of fraud, G. and his wife were made parties defendant. The action was subsequently dismissed without prejudice by plaintiff and an action at law to recover for the damages pleaded in the former action was subsequently commenced by her against G. and his son. A motion to dismiss the action on the ground that the former action was an election of remedies and was therefore a bar to the second action was overruled. *Held*, that the court did not err in overruling the motion on the ground, among others, that the parties in both actions were not the same.

3. **Limitation of Actions:** FRAUD: RESCISSION. A contract for an exchange of lands was entered into between plaintiff and defendants, the former a widow of 57 years and wholly inexperienced in business affairs. The jury found that defendants made false and fraudulent respresentations to her, which she believed and relied and acted upon, whereby she was defrauded. By their representations and conduct and their treatment of the plaintiff generally after the exchange was made she was lulled into a sense of security. Subsequently she discovered the fraud and, within the time after such discovery which is permitted by the statute of limitations, she began this action. *Held*, that the action was not barred.

4. **Appeal:** CONFLICTING EVIDENCE. When questions of fact are submitted to the jury without objection in respect of the theory on which the case appears to have been tried, the verdict will not be disturbed, even though the evidence conflicts, if there is sufficient evidence to support it.

5. ———: REVIEW. The record examined, and *held* that reversible error has not been shown.

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

J. A. Donohoe, H. A. Bryant and *Sullivan, Wright & Thummel,* for appellants.

William L. Dowling, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

DEAN, J.

Plaintiff began this action November 15, 1918, in Saunders county, to recover the alleged value of her equity in a 160-acre farm on which she formerly lived with her family in Stanton county and of which she alleges she was defrauded by defendants in the exchange of her farm for a 960-acre tract of land, in Holt county, owned by defendant Peter Greeley. Peter Greeley's son, Howard, who is co-defendant with his father in the present case, assisted his father in conducting the negotiations between the parties. Besides being defrauded of her farm plaintiff pleaded that defendants were indebted to her for the value of certain permanent improvements placed by her on the Holt county land, approximating $1,000 in value, while it was in her possession. Plaintiff recovered a verdict for $14,651.70. Subsequently, under the court's order, she filed a remittitur in the sum of $633.80. Judgment was thereupon rendered against defendants for $14,017.90, from which they appealed.

Defendants' answer denied all the material allegations of plaintiff respecting representations of fraud, deceit, and the like, and alleged that plaintiff by a former suit for rescission of the contract, which was dismissed without prejudice before this action was begun, had made her election as between inconsistent remedies and that she could not now maintain this action for damages growing out of the contract. They further alleged that plain-

tiff's action was barred by the statute of limitations, and further that she was estopped from maintaining her action by reason of her own negligence in failing to make timely inquiry and examination with respect to the quality of the 960-acre tract of which she complained in her petition.

The record discloses these material facts: A written contract for the exchange of the respective properties was made by the parties October 13, 1913. In the contract the value of Mrs. Carson's Stanton county farm was fixed at $14,400, less an incumbrance of $4,500, and Mr. Greeley's Holt county tract at $38,500. When the contract was executed plaintiff gave to defendant a mortgage for $28,600 on the Holt county land, drawing annual interest at the rate of 5 per cent. The mortgage was given to secure the payment to Peter Greeley of the remainder of the unpaid purchase price on the 960-acre tract over and above the agreed value of her interest in her Stanton county farm which she conveyed to Greeley. Shortly after the contract was executed the parties respectively went into possession of their newly acquired properties. In May, 1915, only $400 of the annual interest charge of $1,430 having been paid by Mrs. Carson, Mr. Greeley began an action to foreclose his mortgage. In the foreclosure suit Mrs. Carson filed a disclaimer of any interest in the land there involved and tendered a deed of conveyance to Greeley.

About a month after the foreclosure action was begun, namely, in June, 1915, plaintiff, who had been living on the Holt county tract with her family for a little more than a year, namely, from October, 1913, moved away and, June 15, 1915, she began an action in Stanton county for a rescission of the contract on the ground of fraud. In that suit she also tendered to Greeley a deed of conveyance of the Holt county land, and prayed that the contract, the deed to the Stanton county farm and the mortgage given by her on the Holt county land be declared null and void and that the title to the Stanton

county farm be quieted in her. In the Stanton county action, Mrs. Carson obtained an order restraining Greeley from proceeding with his foreclosure action in Holt county, to prevent a multiplicity of suits, as alleged, and to the end that all of the matters in dispute between them might be settled in one action. Issues were joined and the case remained, untried and undetermined, on the Stanton county docket until July 8, 1916, when her action was dismissed without prejudice. It may here be noted that, in her Stanton county suit, only Peter Greeley and his wife were named as parties defendant.

Subsequently, November 15, 1918, after the dismissal of the Stanton county suit, Mrs. Carson brought this action in Saunders county against Peter Greeley and his son, Howard, defendants herein. Mrs. Greeley was not made a party to this action.

In the present suit plaintiff alleged generally that defendants falsely and fraudulently represented to her that the 960-acre tract was all good tillable land, when in fact only about 200 acres could at all be farmed, and that they showed to her only the best of the land to induce her to make the trade; that the soil was good and had a subsoil of clay formation, and that it was not underlaid with gravel or sand, which was untrue; that for more than 20 years past it had produced an average of from 35 to 40 bushels of corn and oats to the acre and other grains in like proportion, which was a gross misstatement of fact; that the hay land produced a ton to the acre, when in fact it would not produce half a ton; that the land could easily be divided into quarter-section farms, each one a tillable farm in itself, which was impractical and impossible because it was mostly unproductive and unsuitable for farming purposes; that the farm was equipped with an irrigation project consisting of two artificial lakes, stocked with fish, and ditches capable of irrigating 100 acres, all of which was untrue, and when in fact not to exceed five acres could be irrigated; that there was a growing orchard of about 20 acres producing $2,000

worth of fruit a year, when in fact it did not contain 20 acres and the quantity of fruit produced in any year was almost negligible. Plaintiff charged that all and singular of the representations made by the defendants with respect to the desirability and the good quality of the Holt county tract of land, its productivity, and the like, were falsely and fraudulently made by them with the intent on their part and for the sole purpose of deceiving, cheating and defrauding her. She further pleaded that she relied upon all of the representations made by the defendants to her and believed that they were true and acted thereon.

The evidence introduced on the part of Mrs. Carson tends strongly to corroborate the material allegations of her petition. On the part of defendants the material testimony offered by Mrs. Carson was denied, and with respect to the value of the Holt county land evidence was introduced tending to prove that its value was much greater than that placed thereon by plaintiff. However, these questions of fact were decided by the jury adversely to defendants' contention and, we may here observe, there is evidence to support the verdict, so that the questions that remain for determination are questions of law solely.

Defendants argue that, nothwithstanding plaintiff's action to rescind was dismissed, without prejudice, before this action was begun, she is estopped from maintaining her present suit because she had already elected her remedy and could not now elect another. In support of their argument on the question of election of remedies defendants cite *First Nat. Bank v. McKinney*, 47 Neb. 149. That was an action brought for the rescission of a contract for the sale of a stock of goods while at the same time a law action was pending, and of course undetermined, which had been brought to recover the purchase price of the same goods. It was there held that the remedies, in equity and at law, were not concurrent. The *McKinney* case is not controlling here be-

cause plaintiff, in the present case, abandoned her action in equity before she began this action. On the question of election, in view of the facts and the law, we conclude that the argument of defendant is not tenable. We note, however, that the authorities are divided on this question.

On other grounds, too, defendants' argument is not tenable. In the present case the equity action did not change the status of the parties on the merits. The better and more reasonable rule is that no estoppel is worked where the plaintiff has acquired no benefit by bringing an action to rescind and no detriment has been caused to the other party thereby. 9 R. C. L. 960, sec. 7. Nor are the facts which are pleaded in the present case inconsistent with the facts pleaded in the former action.

In *Register v. Carmichael,* 169 Ala. 588, 34 L. R. A. n. s. 309, this rule is announced: "But an election, to be conclusive, must be efficacious to some extent at least. The mere bringing of a suit is not determinative of the right. The party against whom the estoppel is pleaded must have received some benefit under his election." The note to the *Register* case, beginning at page 309 (34 L. R. A.) collates the authorities for and against the rule there announced, and points out that the clear weight of authority, though there is some conflict in the decisions, seems to sustain the position taken by the court in that case.

Kehoe v. Patton, 21 R. I. 223, holds that the mere bringing of a suit in equity, without proceeding to a final decree, was not in itself an election of remedies.

In *Howe v. Martin,* 23 Okla. 561, it is said: "A person induced by false and fraudulent representations to purchase or exchange for property has three remedies. He may, first, upon discovery of the fraud, rescind the contract absolutely, and sue in an action at law, and recover the consideration parted with upon the fraudulent contract, and in such a case he must restore, or offer to restore, to the parties sued whatever he has received by

virtue of the contract; or, second, he may bring an action in equity to rescind the contract, and in such a case it is sufficient for plaintiff to restore, or make offer in his position to restore, everything of value which he has received under the contract; or, third, he may affirm the contract, retain that which he has received, and bring an action at law to recover the damages sustained by reason of his reliance upon the fraudulent representations."

In view of the record before us, and in view of the law, neither as a matter of justice nor as a matter of law should the fact alone that Mrs. Carson began an action in equity, which was subsequently dismissed under the facts herein discussed, deprive her of her legal remedy for damages which were occasioned by the fraud which she charges was prepetrated by the defendants. Mrs. Carson had more than one remedy, and the position which she took in the equity action which was subsequently dismissed did not estop her from later asserting the same and additional relevant facts, not inconsistent with the former action, against the same defendant and his agent who was made a co-defendant in the present case.

Defendants' argument that Mrs. Carson cannot maintain this action is not well founded for another reason. The parties defendant in the equity action, as hereinbefore pointed out, are not the same as the parties defendant in the present law action. *Estes v. Worthington,* 30 Fed. 465, is a suit where a plea averring the pendency of another suit was overruled because it was not shown that the second suit was "between all the same parties." To substantially the same effect is *Pullman Co. v. Hoyle,* 52 Tex. Civ. App. 534; 1 C. J. 53, sec. 59.

Clearly the equities, in the broadest sense, are with the plaintiff. When this suit was begun Peter Greeley had foreclosed the mortgage on the Holt county land, upon which Mrs. Carson had placed about $1,000 worth of improvements, as the proof shows, and bought it in for

about $3,500 less than the mortgage given to him by Mrs. Carson. He had also sold her Stanton county land to an alleged innocent purchaser. In fact, as charged by counsel, Greeley recovered all the land which he sold to Mrs. Carson, together with the improvements placed thereon by her, and he acquired and sold her Stanton county farm besides. So that, by virtue of her transactions with the Greeleys, it plainly appears that Mrs. Carson lost her Stanton county farm and, so far as the present record discloses, she and her family, a part of them minor dependents, were left penniless.

When the contract was entered into Mrs. Carson was 57 years of age. She had then been a widow about four years. Her family, residing with her at the time, consisted of four boys and two girls, the eldest, a youth named David, had just turned 21. Aside from working on his mother's farm David never had any business experience. The proof shows that he never bought nor sold a piece of land. Mrs. Carson and her children lived on the Stanton county farm for many years, all of her children having been born there. In passing it may be noted that defendants alleged generally in their answer that plaintiff relied on her own judgment and that of her son David when she made the trade.

David testified that he received a letter from a real estate man in Holt county inviting him to come and view the lands which he offered for sale, and, among them, on a printed slip in evidence, was listed the Peter Greeley tract. Pursuant to the agent's solicitation he went to Holt county and there he met Howard Greeley, who was the personal representative and agent of his father. While there Howard arranged with David to meet him, either at Pilger or Stanton and take him out to see his mother's farm with the view of making the trade. After two or more interviews with Mrs. Carson at her home, in which Peter Greeley, who came with his son on the final visit, took an actively effective part, the trade was made and the contract was executed.

Mrs. Carson testified that she knew nothing about farm lands or the quality of soils and that she so informed the Greeleys. She further testified that she believed and relied and acted upon the representations the defendants made to her with respect to the quality and value of the Holt county tract, its productivity, and the like, and that she so informed them. She also testified that in reliance thereon she entered into the contract. She testified, further, that Peter Greeley urged her to leave her Stanton county farm, apparently that he might come into its possession, and move up to the Holt county place, which she did, just as soon as the contract was signed. She said that he promised her that he would arrange to have his Holt county neighbors go with teams to the railroad town and move them over to the place. David testified that when Howard Greeley was at their home he, David, proposed that they should go to the bank at Pilger, where they transacted their business, and have the contract written there, but that Howard objected, saying that it would be better to go to some town or place where none of the parties were known because the Pilger bank might object to the trade and spoil the deal. They did not go to Pilger, but to Wisner.

It is in evidence that Peter Greeley, after Mrs. Carson moved upon the 960-acre tract, persuaded her into the belief that she had made a great bargain; that it could be divided into farms and she could in that way have a farm for each son; that he told her he had sold the land to her for less than it was worth, and that the farm was better than it looked. Without going more into detail, it sufficiently appears that the Greeleys, one or both, lulled Mrs. Carson into a sense of security, and that in reliance upon the assurances so made she continued to remain on the place.

Defendants' argument that the statute of limitations has barred the present action cannot be sustained. Section 7569, Rev. St. 1913, provides that a cause of action based on fraud shall not be deemed to have accrued until

the discovery of the fraud. There is proof that Mrs. Carson did not discover the fraud until after Peter Greeley began his foreclosure action, when she consulted eminent counsel, by whom she was informed that she had been swindled. The record shows that after she discovered the fraud she began her action before it was barred.

Defendants contend that Mrs. Carson was negligent in two respects, namely, that she did not make diligent inquiry with respect to the value of the land, and in that she did not have the land examined, at an earlier period, to determine the quality of the soil and the like. On these propositions no rule can be announced that will apply to all cases alike. On this point, in *Meyer v. Fishburn,* 65 Neb. 626, it is said: "An exception to that part of the rule requiring a return of the property arises where the party guilty of the fraud and undue influence, and as a part of the general wrongful design, has by advice or interference induced the other party to part with his property."

Sufficient has been said to show that neither Mrs. Carson nor her son David was versed in business affairs. And, besides, the record shows that David Carson was ill during the first and only continuous year that the family were on the place, and that he was confined to the house for a considerable portion of the time by a stroke of paralysis, and that in the meantime the farming operations were carried on by his little brothers and a hired man. In 2 Black, Rescission and Cancellation, sec. 543, it is said: "In contracts for the sale, exchange, or lease of real property, the tendency of the authorities is to allow the injured party a longer time in which to claim and exercise his right of rescission, after acquiring knowledge of the facts which justify it, than in the case of sales of personalty or ordinary contracts not involving land."

But, in any case, defendants cannot complain because it does not appear that they have been injured by

the delay. The court in *Chase v. Chase,* 20 R. I. 202, declared: "So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right." 6 Cyc. 300.

In *Allore v. Jewell,* 94 U. S. 506, at page 512, it is said: "The objection of the lapse of time—six years—before bringing the suit cannot avail the defendant. If during this time, from the death of witnesses or other causes, a full presentation of the facts of the case had become impossible, there might be force in the objection. But as there has been no change in this respect to the injury of the defendant, it does not lie in his mouth, after having, in the manner stated, obtained the property of the deceased, to complain that her heir did not sooner bring suit against him to compel its surrender."

With respect to a business transaction such as is involved here, it plainly appears that neither Mrs. Carson nor her son David had such understanding of business affairs as would enable them to cope with the defendants. The rule which is applicable to the facts before us is that the acts and contracts of persons who are infirm and without experience or business ability, and who are thereby liable to imposition, are void, if the nature of the acts and contracts of the opposing party justify the conclusion that the party alleged to have been subjected to the imposition has not exercised a deliberate judgment, but has been imposed upon, circumvented or overcome by cunning or artifice or undue influence. 1 Story, Equity Jurisprudence (13th ed.) sec. 238.

All disputed questions of fact with respect to the perpetration of the fraud, the time when Mrs. Carson made her discovery, and the like, under the theory on which

the case was tried, were submitted to and determined by the jury. It clearly appears that the case was tried without objection as a law action upon the theory that the value of Mrs. Carson's Stanton county land, of which she was deprived, should be the measure of damages, instead of the value of the 960-acre tract of land at the time it was acquired by Mrs. Carson and the time when she surrendered it. And this, no doubt, because Mr. Greeley had apparently put it out of his power to restore to her the Stanton county farm. We have examined the other assignments of alleged error which have been presented by defendants, but conclude that reversible error does not appear therein.

In the concluding part of their brief defendants frankly observe, with respect to the unfortunate plight in which Mrs. Carson found herself: "The jury were unable to get away from the fact that, * * * in the end, she had neither the farm she sold nor the ranch she bought." Defendants' observation is timely. In the fewest words possible it reflects the ultimate fact in the case and the theory upon which it was tried as well. As nearly as humanly possible, a measure of justice has been meted out by the jury, and it does not appear that any sound rule of law has been violated. It is proper to observe that, in a case where fraud is proved, it will not do for the court to pursue the shadow and refuse to take note of the substance. The district court wisely overruled the application for a new trial.

The judgment is

AFFIRMED.

Letton, J., took no part in this decision.

HARVEY H. EDWARDS, APPELLEE, V. HASTINGS DISTRIBUTING COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 16, 1922. No. 21958.

1. **Appeal:** BRIEFS. "On appeal, an assignment that there was error in admitting evidence may be disregarded, where appellant in his brief fails to point out the pages in the abstract or bill of exceptions where the challenged ruling may be found." *Mensinger v. Ainsworth Light & Power Co.*, 94 Neb. 465.

2. ———: CONFLICTING EVIDENCE. Where the evidence conflicts with respect to material matter, the verdict will not be set aside if there is sufficient evidence to support it.

3. **Sales:** RIGHT OF POSSESSION. "Where the time of payment is not fixed by the contract of sale, the law presumes a cash sale, and, while title may have passed to the buyer, he is not entitled to possession until the full purchase price has been paid or tendered." *Baker v. McDonald*, 74 Neb. 595.

4. ———: CONTRACT: RESCISSION. A contract for the sale of seven car-loads of potatoes did not fix the time of payment. The cars were severally shipped in instalments. Defendant paid for the first three cars as they separately arrived, but refused to pay for the fourth car on arrival. Thereupon plaintiff refused to make further shipments. *Held*, that, in view of the meaning placed upon the contract by the parties in respect of time of payment, plaintiff was clearly within his rights.

5. **Contracts:** CONSTRUCTION BY PARTIES. "The practical interpretation given their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and the courts will ordinarily enforce such construction." *Cady v. Travelers Ins. Co.*, 93 Neb. 634.

6. ———: ———. In the absence of fraud or mistake, the meaning placed upon a contract by the parties, which is silent in respect of the time of payment, is ordinarily conclusive of their respective rights.

7. **Appeal:** AFFIRMANCE. The assignments of alleged error examined, and *held* that reversible error does not appear.

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

W. M. Whelan and *Stiner & Boslaugh*, for appellants.

Crow & Larsen, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

DEAN, J.

Plaintiff sued and recovered a verdict and judgment for $989.79 under a contract for the sale of a quantity of potatoes to the defendant company, which was engaged in the produce business at Hastings. Defendant appealed.

October 16, 1919, plaintiff wired this offer to defendant: "Offer 5 cars very fine U. S. No. 1 Red Kings sacked, two fifty-five, delivered. May have one or two cars fancy No. 1 Whites. Not sure. This stock all comes from one man and will be graded and cleaned in nice shape. May have load Gering account car shortage."

Defendant wired this reply: "Take five cars Kings sacked your price. You have our confidence as a potato man."

Within a week after the exchange of the telegrams, but on different days, three cars of potatoes were shipped to defendant. The first car was paid by defendant's check. Plaintiff drew on defendant for the second and third cars, as delivered, and each draft was paid on arrival at destination. A few days thereafter a fourth car was shipped to defendant. The bill of lading was accompanied by a draft, but it was protested and returned unpaid. In about ten days another draft for the same car was returned unpaid and subsequently a third draft was dishonored. The suit followed.

Defendant pleaded that none of the four cars were of the variety of potatoes which were represented in the contract, and further pleaded that the potatoes were so decayed, unsound, frosted, and unmarketable that there was a loss of about $250 on the first and fourth cars because of such defects, and that because of plaintiff's failure to deliver the remaining three cars it lost $1,260 in profits.

Defendant assigns as error the refusal to admit certain evidence offered. But no reference is made in the brief to the pages or to the places in the record where such evidence may be found. Supreme court rule 12d (94 Neb. XI) provides that the assignments of alleged error which are mentioned in a brief without reference to the pages in the abstract or bill of exceptions where the challenged ruling may be found will be deemed to have been abandoned. *Mensinger v. Ainsworth Light & Power Co.*, 94 Neb. 465.

Defendant introduced evidence tending to support the allegations of its answer with respect to the four cars which were delivered. The evidence introduced by plaintiff was to the contrary. No good purpose would be served by taking up space to discuss the evidence in detail. It is sufficient to say that it relates to disputed questions of fact which were submitted to and decided by the jury. We find, however, there is sufficient evidence to support the verdict, so that it will not be disturbed unless errors of law are pointed out and discussed which require a reversal of the judgment.

It will be noted that there is nothing in the contract—the telegrams constituting the contract—which definitely fixed the time of payment. In such case the rule in this state is that, when the time of payment is not fixed, a cash payment is contemplated. In *Baker v. McDonald*, 74 Neb. 595, we said: "Where the time of payment is not fixed by the contract of sale, the law presumes a cash sale, and, while title may have passed to the buyer, he is not entitled to possession until the full purchase price has been paid or tendered." In *Behrends v. Beyschlag*, 50 Neb. 304, where the time of payment was not fixed, it was held that delivery and payment were to be concurrent acts.

In Williston, Sales, 805, sec. 467, it is said: "If it be granted that upon a true construction a contract is divisible, the obligations of the buyer and seller in regard to any one instalment are for the most part to be deter-

mined as if that instalment constituted the whole contract. Thus, if no time is fixed showing an intention inconsistent with concurrent performance, the seller will not be bound to deliver the instalment until the buyer pays the price, and, conversely, the buyer will not be bound to pay the price unless the seller delivers the goods."

There is no ambiguity in the terms of the contract. True, it is silent with respect to the time of payment, but that feature is not important in view of the interpretation of the contract by the parties themselves, three cars having been separately paid for upon delivery. The only reasonable inference to be drawn from the conduct of the parties, with respect to time of payment, is that both of them contemplated that each car should be paid for upon delivery. In *Cady v. Travelers Ins. Co.*, 93 Neb. 634, it is said: "The practical interpretation given their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and the courts will ordinarily enforce such construction."

Under the law and the facts before us, plaintiff was clearly within his rights. The conclusion is that reversible error has not been shown.

The judgment is

AFFIRMED.

C. M. DOLLARHIDE, APPELLEE, V. J. H. JAMES, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21860.

1. **Brokers:** CONTRACTS: SIGNATURES. "The requirement of said section (Rev. St. 1913, sec. 2628) that the contract be 'subscribed' by both parties is met where the signatures of the parties are placed thereon, for the purpose of authenticating and giving force and effect to the contract, whether they be placed at the bottom, the top, or in the body of the instrument." *Myers v. Moore*, 78 Neb. 448.

2. ———: SUBMISSION OF OFFER: ACCEPTANCE OPTIONAL. Where a broker, instead of procuring a person who is ready, able and willing to accept the terms the principal authorized him to offer at the time of his employment, procures one who makes a counter offer more or less at variance with that of his employer, the latter is at perfect liberty either to accept the proposed party upon the altered terms or to decline to do so. If he accepts, he is legally obligated to compensate the broker for the services rendered; but, if he refuses, he incurs no liability whatever, for, if he does not see fit to modify his original proposals, the broker can lay no claim to his commissions until he has furnished a purchaser who is ready, able and willing to accept the exact terms of his principal.

APPEAL from the district court for Greeley county: BAYARD H. PAINE, JUDGE. *Affirmed in part, and reversed in part.*

Lanigan & Lanigan, for appellant.

J. R. Swain, contra.

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., RAPER and STEWART, District Judges.

ALDRICH, J.

This is an action at law wherein the plaintiff, C. M. Dollarhide, sued the defendant, J. H. James, to recover the sum of $810 alleged to be due as commissions for the sale of three quarter-sections of land owned by defendant in Greeley county. Two causes of action were set out in the petition. The first cause of action was based on an alleged broker's contract, dated July 18, 1918, referring to the northwest quarter of section 3, township 13, range 10, west of the sixth P. M., in Greeley county, Nebraska, the prayer of which is for judgment in the sum of $225. In the second cause of action plaintiff based his claim on an alleged broker's contract describing the west one-half of section 23, township 17, range 10, west of the sixth P. M., in Greeley county, Nebraska, and asked for judgment in the sum of $585. The verdict was for plaintiff in the sum of $779.50 on both causes of

action. A motion for new trial was overruled, and defendant brings the case to this court on appeal.

Appellant claims that the contracts set out in plaintiff's two causes of action do not comply with section 2628, Rev. St. 1913, which provides that a contract for the sale of lands between the owner thereof and a broker or agent shall be void unless the contract is in writing and subscribed by the owner of the land and the broker or agent. The requirements of section 2628, Rev. St. 1913, have been discussed and the provisions construed in the case of *Myers v. Moore,* 78 Neb. 448. It was there held: "The requirement of said section that the contract be 'subscribed' by both parties is met where the signatures of the parties are placed thereon, for the purpose of authenticating and giving force and effect to the contract, whether they be placed at the bottom, the top, or in the body of the instrument." In the instant case the plaintiff signed his name at the top of the instrument, which began as follows: "Farm for sale by C. M. Dollarhide." This signature was undoubtedly placed there for the purpose of "authenticating and giving force and effect to the contract." The provisions and requirements of the statute in this regard have been complied with. See, also, *Berryman v. Childs,* 98 Neb. 450, and *Felthauser v. Greeble,* 100 Neb. 652.

As to the first cause of action, the defense was set up that defendant, prior to July 18, 1918, had negotiated with one John C. Peterson for the sale of the land described in the contract; that it was orally agreed between plaintiff and defendant that if plaintiff sold to any one except Peterson he would receive the regular commission; that plaintiff, in violation of the terms of the oral agreement, attempted to sell the land to Peterson, but that the sale was never consummated. Plaintiff claims he had the exclusive sale of the land described in the contract until March, 1919, and that Peterson was not excepted by any oral agreement. In this he is corroborated by disinterested witnesses. The testimony

of plaintiff and defendant is conflicting on the question of an exclusive contract. Defendant testified that the words "exclusive until March, 1919," were not in the instrument he signed. Plaintiff testified it was written in at the time of signing, and in this he is corroborated by the witness Campbell. Upon this condition of the record as to the first cause of action, we can do nothing but allow the judgment of the court below to stand. There was sufficient competent evidence to support the verdict, and the finding on this question of fact is conclusive.

In the second cause of action the principal issue presented for our consideration is whether the plaintiff sold the land involved according to the terms of his broker's contract. The contract shows that defendant listed 320 acres of land. The purchaser procured by plaintiff entered into a contract to buy the land excepting the railroad right of way and deducting the number of acres in the same from the purchase price. This was on different terms than those expressed in the broker's contract and constituted a counter offer which defendant was not under obligation to accept. In refusing the counter offer he incurred no liability to plaintiff for commission.

"Where a broker, instead of procuring a person who is ready, able and willing to accept the terms the principal authorized him to offer at the time of his employment, procures one who makes a counter offer more or less at variance with that of his employer, the latter is at perfect liberty either to accept the proposed party upon the altered terms or to decline to do so. If he accepts, he is legally obligated to compensate the broker for the services rendered; but, if he refuses, he incurs no liability whatever, for, if he does not see fit to modify his original proposals, the broker can lay no claim to his commissions until he procures a person who is ready, able and willing to accept the exact terms of his principal." 4 R. C. L. 313, sec. 52. See, also, 9 C. J. 625; *Lunney v. Healey*, 56 Neb. 313, 44 L. R. A. 593, and note, 616.

In view of the foregoing citations of authority and

discussion, the judgment of the district court is affirmed as to the first cause of action and reversed as to the second cause of action.

AFFIRMED IN PART, AND REVERSED IN PART.

PAUL WEGNER, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILROAD COMPANY: WALKER D. HINES, DIRECTOR GENERAL, APPELLANT.

FILED FEBRUARY 16, 1922. No. 22003.

1. **Carriers:** SHIPMENT OF LIVE STOCK: EQUIPMENT. "It is the duty of a common carrier to furnish safe and suitable cars to be used in shipping animals, and for failure to do so the carrier is liable, if damages result by reason of such failure." *Fuller v. Chicago & N. W. R. Co.*, 99 Neb. 611.
2. ———: ———: LIABILITY. In an action for negligent handling of property in bedding and caring for a shipment of animals, where the negligence is undisputed, the common carrier is liable for injuries sustained thereby to animals.
3. ———: ———: DUTIES. A railroad company engaged in the business of a common carrier is obliged in handling animals for transportation to furnish suitable bedding where it is necessary to bed a car to make it safe and suitable.
4. **Evidence** examined, and *held* sufficient to sustain the verdict of the jury.

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

Wymer Dressler, Robert D. Neely and *Paul S. Topping*, for appellant.

Murphy & Winters, contra.

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., RAPER and STEWART, District Judges.

ALDRICH, J.

This is an action at law to recover damages growing out of injury to a certain number of sheep in the sum of $422.77, which amount plaintiff claims to have lost by

death, crippling and injury in a certain consignment of sheep shipped from Bancroft, Nebraska, to Omaha in January, 1919. The plaintiff claims in his petition that through his agent he delivered to the defendant 834 head of sheep, well and in good condition to be transported from Bancroft to the stock-yards of South Omaha. The petition alleges that the defendant carelessly and negligently failed to transport these sheep to the Union Stock Yards and by reason of carelessly and negligently handling the stock 25 head were killed en route, 11 head became crippled, and 73 head became muddy and trampled up in the cars during transportation. For the dead animals the plaintiff claims he was damaged in the sum of $258.75, and for the crippled ones $85.85, and for the 73 head of muddy animals he alleges he was damaged in the sum of $53.10. The director general of railroads filed his answer claiming no liability for any damage which occurred to the animals. The defendant further answered, alleging by way of defense that if any of the sheep died or were crippled during transportation such deaths and crippling were due to the inherent weakness and disposition of the animals to injure themselves and to natural causes. The jury decided the case on the evidence and the instructions of the court for the plaintiff, and the defendant appeals therefrom.

It will be noted from the record that this is largely an issue of fact, and it will be noted as a proposition of law that it is incumbent upon the defendant to furnish suitable cars in good condition to be used in the transportation of animals to the market. If the defendant fails to do so, then he is liable for damages resulting by reason of such failure. This is the province of the jury to determine under proper instructions of the court. Purely on the facts the verdict of the jury was for the plaintiff. Then the question is, was the evidence sufficient? We hold as a matter of law that there was ample evidence to sustain the verdict of the jury.

We have examined the instructions of the court, and

on the law each one is substantially correct and there was no error of law as disclosed by the record. Then it follows that on the law and on the facts the jury are amply sustained. The jury finding for the plaintiff on this state of facts is correct.

A railway company engaged in the business of a common carrier is obliged to furnish reasonably safe and suitable cars for the transportation of sheep, and if the car is not in such condition then the common carrier is liable for whatever damage occurs. *Allen v. Chicago, B. & Q. R. Co.*, 82 Neb. 726; *Fuller v. Chicago & N. W. R. Co.*, 99 Neb. 611.

"In a law action, where the evidence upon any disputed question of fact is sufficient to sustain a finding either way, the finding of the trial court thereon will be sustained on appeal." *Holmvig v. Dakota County*, 90 Neb. 576.

It will be noted that the defendant furnished a double-decked car that was filled with mud, slush and manure to the depth of several inches and was not in any other way bedded. In this car there were 15 dead sheep. Their death, everything indicates, was caused by reason of the lack of diligence in properly preparing this car for shipment. For this negligence and carelessness the company was primarily liable for damages resulting from this condition of the car. In this condition, as we find it, the car was improperly equipped and furnished for the transportation of animals to market. The defendant is responsible for the injuries to these sheep sustained by reason of such car being out of condition. *Fuller v. Chicago & N. W. R. Co.*, 99 Neb. 611.

Thus it is plain what the weight of authority is in this situation. The instructions of the court being consistent with the facts disclosed by the various witnesses, there is nothing remaining for us to pass upon, and we therefore affirm the case.

AFFIRMED.

EDWARD E. RUZICKA, APPELLANT, V. W. O. SAYLOR ET AL., APPELLEES.

FILED FEBRUARY 16, 1922. No. 21772.

1. **Specific Performance.** Where a contract to convey real property contains a stipulation that "it is further agreed that in case either of the parties hereto shall fail to perform the stipulations of this contract, or any part of the same, he shall pay the other party to this contract the sum of $5,000 as damages for nonfulfilment of contract," specific performance will not be denied where the contract, construed as a whole, does not provide that damages may be paid in lieu of performance.
2. **Evidence** examined, and *held* to support the findings and decree of the trial court.

APPEAL from the district court for Merrick county: A. M. POST, JUDGE. *Affirmed.*

W. T. Thompson and *J. C. Martin,* for appellant.

Prince & Prince and *E. E. Ross, contra.*

Heard before LETTON, DEAN, ALDRICH and DAY, JJ., CLEMENTS (E. P.) and DILWORTH, District Judges.

DAY, J.

On July 25, 1919, the plaintiff, as purchaser, and the defendants, as vendors, entered into a contract of sale for a tract of land consisting of 227.25 acres in Merrick county, Nebraska, for the sum of $68,175. Five thousand dollars of the purchase price was paid at the time of the execution of the contract, and the remainder thereof was to be paid on or before March 1, 1920. By the terms of the contract the vendors were to furnish a good and sufficient abstract of title, deliver a warranty deed for the premises, and give possession, on or before March 1, 1920. On March 1, 1920, the date upon which the final payment was to be made, the plaintiff brought this action to cancel and annul the contract of sale, alleging that when the contract was made the defendants knew that the plaintiff was buying the land for the purpose of re-sale,

and that as an inducement for the purchase the defendants promised to aid and assist the plaintiff in selling the land before March 1, 1920, at a price in excess of $300 an acre; that in disregard of their promise the defendants repeatedly interfered with the sale of said lands by wrongfully and untruthfully stating to prospective purchasers who came to inspect the land that it was not worth the price the plaintiff had agreed to pay for it, and that better lands could be secured at a price of $175 an acre; that the defendants further interfered in the sale of the land by preventing the plaintiff's agents from going thereon and showing it to prospective purchasers; and that the acts of the defendants rendered it impossible for the plaintiff to sell the land and raise the money to complete the payment of the agreed purchase price. The plaintiff also alleged that the defendants had failed to furnish an abstract of title showing a good and merchantable title in themselves; that with the consent of the defendants the plaintiff had cultivated and planted grain on a part of said land in the fall of 1919; and that the defendants now refuse to allow the plaintiff to enter upon the land and harvest the crop. The petition prayed that the court take cognizance in equity of the matters alleged; that the contract be construed and the rights of the respective parties under it determined; and that the defendants be required to refund to the plaintiff the $5,000 paid upon the contract, with interest thereon, and damages.

The answer of the defendants denied each and every allegation of the petition, except defendants admitted the execution and delivery of the contract, the payment of the sum of $5,000 on the purchase price, and that the plaintiff had cultivated and planted small grain upon a part of the premises prior to March 1, 1920, through the tenant who was still in possession of the land. By cross-petition the defendants alleged the making and full performance on their part of the contract; that prior to the 1st day of March, 1920, they delivered to the plaintiff an ab-

stract of title to the premises for the purpose of enabling the plaintiff to examine the same; that the plaintiff received the abstract and has ever since retained the same, and has never at any time prior to the filing of his petition claimed any defects existing therein, or requested the defendants to make any corrections thereof. The defendants tendered into court for delivery to the plaintiff a warranty deed to the lands described, upon the payment by the plaintiff of the remainder of the purchase price due upon the contract. The defendants prayed specific performance of the contract, and that, in the event the plaintiff failed to pay the amount found due upon the contract, the plaintiff be foreclosed of any equity of redemption in the land under the contract; that the lands be sold according to law, and out of the proceeds thereof the defendants be paid the amount adjudged to be due them on the contract, and for judgment against the plaintiff for any deficiency which may remain after applying the proceeds of the sale upon the amount adjudged to be due. The reply denied the matters set out in the cross-petition.

By the judgment of the trial court the plaintiff's alleged cause of action was dismissed as being without equity. Upon the cross-petition the court found that the agreement between the parties was a contract of sale, and not a mere option to purchase at plaintiff's election; that the defendants held the legal title to the land in trust for the plaintiff as security for the unpaid purchase price upon the contract, to wit, $63,175, with interest at 7 per cent. from March 1, 1920; that plaintiff was in default in payment of that sum; and that the defendants had fully performed their part of the contract. Upon these findings a judgment of foreclosure was entered in the usual form in favor of the defendants for the amount above stated. From this judgment the plaintiff appeals.

Upon the issue of fraud raised by the pleadings in procuring the contract, we think it may well be doubted whether the allegations of the petition amount to more

than an unfulfilled promise on the part of the defendants. But, assuming that the allegations of the petition are sufficient, we think the testimony fails to establish actionable fraud. There is no testimony whatever that the plaintiff believed or relied upon the alleged promise of the defendants in entering into the contract. The position of the plaintiff that the defendants failed to furnish a good and sufficient abstract of title is not supported by the testimony. It is shown that on or about January 17, 1920, the defendants furnished the plaintiff an abstract of title to the land in question, which was returned to the defendants for certain corrections; that on or about February 2, 1920, the defendants, having made the corrections desired, again delivered the abstract to the plaintiff, and that the plaintiff has ever since retained the abstract, and has made no further objections to the title. We think the judgment of the trial court in dismissing the plaintiff's petition is fully sustained by the evidence.

The main question in the case, as we view it, arises upon the construction to be given to a clause in the contract, reading as follows: "It is mutually agreed that time is an essential element in this contract, and it is further agreed that in case either of the parties hereto shall fail to perform the stipulations of this contract, or any part of the same, he shall pay the other party to this contract the sum of $5,000 as damages for nonfulfilment of contract." It is earnestly insisted by the plaintiff that the stipulation for the payment of damages for the benefit of either of the parties to the contract in case of default was intended by the parties as the limit of liability, and that the contract should be construed as giving the plaintiff the right to either accept the deed and pay the purchase price, or to pay the stipulated sum as damages, and likewise giving to the defendants the election of executing the deed or paying the stipulated damages. There can be no doubt but that the contract is essentially one of bargain and sale of the land de-

scribed. It is, of course, competent for parties to enter into a contract by which the rights of the parties thereunder may be limited to an action for damages for breach thereof, and also to stipulate as to the amount of liquidated damages. The only question here is whether the parties intended by this clause of the contract to limit the remedy to an action at law for damages. In the absence of any stipulation to the contrary, in a contract for the sale of land, where there is a default, the party not in default has a choice of remedies. He may sue at law for damages, or bring an action in equity for specific performance. These remedies are open to him unless he has foreclosed such right by the terms of his contract. In actions at law brought on a contract containing a stipulation of forfeiture, for a specific sum in case of breach, the question often arises whether the sum named is a penalty, or liquidated damages, and whether the party seeking to recover is entitled to actual damages or the amount agreed upon by the parties. In such cases, if it appears that the amount agreed upon as liquidated damages is a fair estimate of the amount of damages which might reasonably be expected to follow a breach of the contract, the courts will enforce the amount of damages as agreed upon by the parties. In a court of equity, however, the question is whether, by the terms of the contract, the party in default has the election of one or two ways of fulfilling his contract. The contract in the case before us, as we view it, was not in the alternative, and the provision for the payments of damages in case of default did not defeat the right of either of the parties to resort to an action of specific performance. This precise question was before the court in *Kettering v. Eastlack,* 130 Ia. 498. In that case the contract contained a clause as follows:

"It is further agreed that if either party to this contract shall fail to perform it according to its terms and tenor, and the other party is ready to perform it according to the terms and tenor, then the party so failing

shall forfeit to the party who has not failed the sum of $500 as liquidated damages."

It will be observed that there is no substantial difference between the stipulation in the contract in that case and the provisions of the contract in the case at bar. In discussing the case, the Iowa court said:

"Counsel for appellant contend that, in view of this provision for liquidated damages, plaintiff is not entitled to specific performance, but is limited to his remedy at law. If the contract were in the alternative so that the defendants had the option of conveying or paying a stipulated sum by way of liquidated damages, then no doubt it would be improper for a court of equity to interfere (citing cases). But the mere fact that liquidated damages are provided for as a part of the contract does not convert it into an optional contract under which the obligor is entitled to relieve himself from the duty of specific performance by paying the liquidated damages. Where it is apparent that the intention was that the obligor convey and the provision for damages or penalty is simply a means of securing conveyance, the obligor cannot relieve himself from the duty to convey, which equity will enforce, by tendering payment of the penalty or damages (citing cases). It is plain in this case that the contract was to convey, and not primarily to pay damages. If the plaintiff had sought relief in an action at law, he no doubt would have been limited to the recovery of the damages stipulated, but there is nothing in the contract to indicate that plaintiff should be confined to his remedy at law, and denied his equitable right to enforce specific performance."

These views find support in the following cases: *Koch v. Streuter,* 218 Ill. 546, and note in same case, 2 L. R. A. n. s. 210; *Amanda Gold Mining Co. v. People's Mining Co.,* 28 Colo. 251; *Brown v. Norcross,* 59 N. J. Eq. 427; *Phœnix Ins. Co. v. Continental Ins. Co.,* 87 N. Y. 400; *Dooley v. Watson,* 67 Mass. 414; *La Prelle v. Brown,* 220 S. W. (Tex. Civ. App.) 151.

Of course, it is competent for the parties to contract that, upon the payment of a certain sum, the contract "is to become null and void," or "that the payment will be in full satisfaction of the contract," or similar words indicating the intention of the parties to be that the payment by the party in default is in lieu of all the rights of the other party under the contract. In such cases specific performance will not lie. This doctrine is illustrated in *Davis v. Isenstein,* 257 Ill. 260, 45 L. R. A. n. s. 52, and note; *Heckman's Estate,* 236 Pa. St. 193.

There is some conflict in the decisions of the various courts upon the question now under consideration. In a very recent case, *Dekowski v. Stachura,* 185 N. W. (Wis.) 549, the contract under consideration contained a stipulation very similar to the contract in the case at bar, and it was held that each party reserved the right to withdraw from the contract upon the payment of the sum stipulated, and that specific performance would not be decreed.

From what has been said, it follows that the judgment of the district court is right, and it is

AFFIRMED.

Dean, J., dissents.

STATE, EX REL. CITY OF MCCOOK, RELATOR, V. GEORGE W. MARSH, AUDITOR OF PUBLIC ACCOUNTS, RESPONDENT.

FILED FEBRUARY 16, 1922. No. 22455.

1. **Municipal Corporations:** PAVING CONTRACT: VALIDITY. Where a city engineer of a city of the second class acting under the provisions of section 5011, Rev. St. 1913, submits to the city council in writing an estimate of the cost of a paving improvement, based upon the unit plan, and also based upon the then existing freight rates upon the materials to be used, which estimate is supplemented by a verbal report to the city council that, if the freight rates on the materials to be used should be advanced, his estimate of the cost should be correspondingly increased, and where the city council enters into a contract with a person

to do such paving for the unit prices named in such estimate, which contract contains a stipulation that, if the freight rates upon the materials used should be advanced, the cost should be correspondingly increased, and, if lowered, correspondingly decreased, such contract is a compliance with section 5011, Rev. St. 1913, which requires that no contract shall be let for a price in excess of the engineer's estimate.

2. ———: ———: ESTIMATE BY ENGINEER. This section of the statute does not require that the engineer's estimate of the cost should be in writing; and where the engineer submits an estimate, partly in writing and partly by parol, the two parts will be considered together as constituting the complete estimate for the guidance of the city council.

3. ———: ———: LETTING CONTRACT. Such section of the statute does not require that the city council should, before letting a contract, advertise for bids and let the contract to the lowest responsible bidder upon competitive bidding.

4. ———: ———: ESTIMATE BY ENGINEER. The inhibition contained in this section of the statute upon the action of the city council is that the engineer's estimate of the cost must be made before the contract is let, and that no contract shall be entered into for a price in excess of the engineer's estimate.

5. **Obiter Dictum.** The case of *Fulton v. City of Lincoln*, 9 Neb. 358, in so far as it seems to announce a rule contrary to the views herein, is *obiter dictum*, and not binding as a precedent.

ORIGINAL proceeding in mandamus to compel respondent, as auditor of public accounts, to register bonds of relator. *Writ allowed.*

Stout, Rose, Wells & Martin and *John F. Cordeal*, for relator.

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

John P. Breen, amicus curiæ.

Heard before MORRISSEY, C.J., LETTON, DEAN, DAY and FLANSBURG, JJ.

DAY, J.

This is an original action in mandamus in this court brought by the state, on the relation of the city of

McCook, against George W. Marsh, Auditor of Public Accounts of the State of Nebraska, to compel him as such auditor to duly register certain "intersection paving bonds" issued by the relator city, aggregating the sum of $100,000; and also to compel him to register certain "district paving bonds of district No. 2" of said city, aggregating the sum of $203,000.

The refusal of the auditor to register the bonds was based upon two grounds: First, that the contract for the paving for which the bonds were issued was in violation of section 5011, Rev. St. 1913, in that the cost of the paving named in the contract was in excess of the engineer's estimate; and, second, that after the original contract was let the council by ordinance increased the width of the pavement to be laid upon certain streets and let the contract for the increased amount to the original contractor, without having first obtained an estimate of the cost from the city engineer, and without advertising for bids, and without letting the contract upon a competitive basis.

No question is raised as to the validity of the ordinances creating the improvement district, declaring the necessity of paving certain streets and alleys, and designating the width of the pavement to be laid thereon. By direction of the city council the city engineer prepared plans and specifications for the improvement in accordance with the ordinances, and made an estimate of the cost thereof which were adopted and approved by the city council, and the city clerk was ordered by the council to advertise for bids for the proposed improvement. The estimated cost of the improvement by the engineer was based upon the unit plan. For example, he submitted four different types of paving, estimating the cost of each of them at a certain amount per square yard. He also estimated that the excavating and grading would cost $1.25 per cubic yard, and in the same manner estimated the cost of curbing and guttering at a certain price per lineal foot. This

general idea of reducing the cost to the unit plan was carried out with respect to the other items entering into the work upon which bids were asked. He also made a calculation of the total amount of the work to be done, and reduced it to an aggregate sum. The proposal of J. C. Brodie & Company corresponded exactly with the unit cost of the several items as estimated by the city engineer. The proposal, however, stated that the bid was based upon the then existing freight rates on the materials used in the work, and that, if the freight rates were increased during the progress of the work, the bid should be correspondingly increased, and, if this were not done, the bidder would not enter into a contract with the city to perform the work. It appears that the engineer verbally reported to the council that the unit prices of his estimated cost were based upon the then existing freight rates, and, if the freight rates were increased, his estimate should be correspondingly increased. The city council thereupon entered into a contract with J. C. Brodie & Company to do the work, which contained a provision as follows: "It is hereby understood and agreed that any increase in freight rates over and above the rates in effect on the date of this proposal, that said unit prices will be increased proportionately and reduced likewise if there is any reduction in rates." The freight rates were in fact increased while the work was in progress, and on the material used in performing the contract amounted to $10,741.34. It appears, further, that, when the contractors were ready to commence the work and had taken possession of the streets for that purpose, certain property owners along the proposed improvement appeared before the city council and requested that the width of the pavement as to certain portions of the street be increased. As a result of this request the city council increased the width of the paving on several of the streets. The council did not cause a written estimate of the cost of this additional work to be made by the city engineer. He

did appear before the council, however, and stated that the estimated cost of the additional work would be ascertained by multiplying the number of square yards of additional pavement by the unit cost set forth in his original estimate. The contract for the original work contained a provision, as follows: "It is further understood and agreed that should the city desire to increase or decrease said quantities or amounts set forth in the schedule, the said lump sum will be increased or decreased at the rate stipulated." By agreement with the council and the contractor the additional pavement was laid by the contractor upon the basis of the unit price in the original estimate. The final estimate showed that the cost of the work was as follows: Intersections, to be charged to the city at large, $100,059.35; amount to be charged to private property, $271,202.67.

By resolution the city council adopted, approved, and accepted the work, and fixed a date for the sitting of the council as a board of equalization for the purpose of assessing special benefits or injuries sustained in consequence of the improvement. Thereafter proceedings were regularly taken, and upon due notice a hearing was held by the city council sitting as a board of equalization, at the conclusion of which a resolution was duly passed assessing the cost of the work, other than the cost of the intersections, to the property within the district, according to benefits. No appeal was taken from this action of the council, and the property owners would now be estopped to raise any question as to the validity of the assessment. The city council also provided that the cost of the intersections should be borne by the city at large. As before intimated, the total amount of the special assessments levied against the property within the district was $271,202.67, which, under the law, was payable in 20 instalments, the first instalment becoming delinquent in 50 days. Under the law, property owners had the right to pay the entire assessment within 50 days and thus escape the payment

of any interest. During the 50 days' period the property owners paid assessments aggregating the sum of $68,308.44, of which amount $61,255.81 was for payments in full of the entire assessments levied against the property, and $7,053.65 were payments on first instalments. By ordinances duly and regularly passed the council, acting under chapter 50, Laws 1919, authorized the issuance of $100,000 of intersecting paving bonds, and $203,000 of district paving bonds, the proceeds to be used in payment of the pavement in question. These bonds were issued, and are the ones presented to the auditor for registration.

The city of McCook is a city of the second class, and the proceedings of the city council in letting the contract for the paving were had under section 5011, Rev. St. 1913. The provisions of that section, in so far as they relate to the question now being considered, are as follows:

"Before the city council shall make any contract for building bridges or sidewalks, or for any work on the streets, or for any other work or improvement, an estimate of the cost thereof shall be made by the city engineer and submitted to the council, and no contract shall be entered into for any work or improvement for a price exceeding such estimate, and in advertising for bids for any such work the council shall cause the amount of such estimate to be published therewith."

The first question which deserves consideration is whether the contract which was entered into between the city and Brodie & Company was for a price in excess of the estimated cost made by the city engineer. It will be observed that there is nothing in the statute above quoted which requires the estimate of the engineer to be in writing. The requirements of the statute could be met by a written or a verbal estimate, or by a written estimate supplemented by a verbal statement, as was done in this case. It will be noted that the only inhibition upon the council's action is that, before letting any

contract for any work or improvement, an estimate of the cost thereof shall be submitted to the council by the engineer, and that no contract shall be let for a price exceeding such estimate. One of the purposes of requiring an estimate of the cost to be submitted to the council, and of limiting the power of the council to contract, is that the council may have competent expert advice upon the probable cost of the work and thus be protected from imposition. It appears that before the contract was let the city engineer made a verbal report to the council, in which he stated that the unit prices in his written estimate of the cost were based upon the then existing freight rates upon the materials to be used, and that, if the freight rates upon such materials were advanced, his estimate of the cost should be correspondingly increased. The council thereupon entered into the contract upon the basis of the unit cost of the several items, as estimated by the engineer, containing the provision hereinbefore quoted, to the general effect that, if the freight rates upon the materials used were advanced, the unit prices were to be correspondingly increased, and, if the freight rates were reduced, the prices were to be correspondingly lowered. In entering into the contract in this form, it seems to us to be clearly within the estimate of the cost as made by the city engineer. While it is true that the engineer did not, and in fact could not, reduce to dollars and cents the amount which should be added to his original estimate, occasioned by a possible increase in the freight rates, he gave the data from which the exact amount might be ascertained. At the time the contract was entered into business conditions were such that it was generally regarded that there would be an increase in freight rates, but no one could determine in advance what the increase would be. The power to fix the rates was in the hands of public officials. It has been held that, where the cost of an item of expense is fixed by another proceeding, no estimate of the cost is necessary. *Goodwillie v. City of Lakeview,* 137 Ill. 51. It

should be further borne in mind that the increase in the freight rates, if any, in no wise inured to the benefit of the contractor. The contract was reciprocal, and contained a provision that, in the event the present freight rates upon the materials used were decreased, the contract price was to be correspondingly decreased. In letting the contract in this form the council acted within the spirit of the law.

But it is argued that, in letting the contract containing provisions not embodied in the estimate which was published at the time bids were asked for on the work, other bidders were deprived of the right of fair competition. The argument assumes that it was necessary to advertise for bids, and also to let the contract to the lowest responsible bidder. There is nothing in the statute, however, pertaining to the government of cities of the second class which requires this to be done. We have statutory provisions affecting certain classes of cities and municipal corporations which require an advertisement for bids and the letting of contracts to the lowest responsible bidder, where the expenditure is over a given sum; but these provisions, however salutary they may be, cannot be construed as applying to cities of the second class. If section 5011, Rev. St. 1913, should be construed as requiring that resort must be had to competitive bidding in letting contracts for public work, then it is manifest that in every instance, however trivial the expenditure might be, resort must be had to that method in letting contracts, because there is no maximum amount named, as is usually the case, within which the council might contract without asking for bids. In passing, we may say that the provision of section 5011 we are now considering has been in force, unchanged in its language, for almost 50 years, and, generally speaking, has been found sufficient to meet the requirements of cities of this class. We are aware that in *Fulton v. City of Lincoln,* 9 Neb. 358, language is used in considering the statute which might be con-

strued as requiring contracts for public work to be let upon competitive bidding and to the lowest bidder. In determining the question before the court, it was unnecessary to say that "the mayor and council can only bind the city by a contract made with the lowest bidder therefor after publication of notice and fair competition." The clause above quoted is mere *obiter dictum,* and not binding as a precedent. The case was not even cited by respondent in his brief.

In the case of *Yarnold v. City of Lawrence,* 15 Kan. 126, the court had before it for construction a statute identical in substance and almost identical in terms with ours. In the course of the opinion prepared by Mr. Justice Brewer, it was said:

"That section provides that, prior to any contract, the city engineer shall make and submit to the council an estimate of the cost, and that in advertising for bids the amounts of such estimate shall be published. Counsel contend that the city is required to advertise for bids, and that, therefore, when the bids are received, she must let to the lowest bidder. We dissent from both premise and conclusion. The section does not declare that before any contract is let an advertisement shall be made for bids. It simply says that, 'in advertising for bids,' certain things shall be published. Requiring that, when an advertisement is made, certain things shall be published, is by no means equivalent to requiring that advertisements be made in all cases. We see no reason to doubt the right of the city, under that section, to make a valid contract without any advertisement. Nor does it necessarily follow from the fact of an advertisement for bids, that the contract must be let to the lowest bidder. There is a strong implication that such ought to be the result, but it is not the necessary legal conclusion. We think, therefore, that the contract in question must, under the law in force at the time it was made, be sustained."

With respect to the objection that the contract was

let to the original contractor for the additional work occasioned by widening the pavement on a portion of the streets, without an estimate, and without an advertisement for bids and an opportunity for competitive bidding, it would seem that what has been said is a sufficient answer to this objection. It must be borne in mind that the engineer's estimate was made upon the unit cost basis, and any additional work caused by the widening of the pavement upon certain of the streets would involve only an increase in the quantity of work to be done. It appears that the engineer told the council that the additional cost could be arrived at by multiplying the number of square yards of additional paving by the unit cost set forth in the original estimate. Besides this, the contract specially provided that the amount of the work might be increased or decreased at the election of the city.

Other reasons might be advanced upon which the bond issue should be sustained, but we deem it unnecessary to prolong this opinion by considering them. As before stated, the city has approved and accepted the work, the assessments have been made to pay for the same, and a considerable portion thereof has in fact been paid. None of the property owners have taken any appeal from the action of the city council sitting as a board of equalization, and they are now estopped from raising any question as to the validity of the contract. The liability has thus become fixed. The issuance of bonds is a mere substitution of the form of indebtedness which the city owes.

Under the facts as shown by this record, we are of the view that the action of the city council in letting the original contract, as well as the contract for the additional paving occasioned by the widening of the pavement on certain of the streets, was well within their power, and was a substantial compliance with the law in all respects, and that the issuance of bonds under the provisions of chapter 50, Laws 1919, for the purpose

of paying for the improvement was a proper exercise of its powers.

The bonds are entitled to registration.

WRIT OF MANDAMUS ALLOWED.

MAUD M. WISEMAN, APPELLEE, V. SUSIE GUERNSEY ET AL., APPELLANTS.

FILED FEBRUARY 16, 1922. No. 21898.

1. **Adoption**: RIGHT OF INHERITANCE. The only manner by which the right of inheritance can be conferred by an adopting parent upon a child is by a legal adoption, conducted in substantial compliance with all the essential requirements of the statute.
2. ———: ———: ORAL CONTRACT. Even where there is no legal adoption, an oral contract to adopt a child and make it an heir, when saved from the operation of the statute of frauds by part performance, may be enforced in equity by awarding to the child an equivalent of such inheritance.
3. ———: EVIDENCE. A contract to adopt a child and make him an heir can only be proved by the most clear, satisfactory, and convincing evidence.
4. ———: ———. Evidence examined, and *held* insufficient to show a contract to adopt and make the child an heir.
5. ———: DEED OF ADOPTION: CONSTRUCTION. Where the deed of adoption in a statutory adoption proceeding, under sections 796-801, ch. 57, Gen. St. 1873, confers a right of inheritance upon the child, adopted by that proceeding, but on condition that her inheritance shall not exclude from sharing in the estate another child, who has been taken into the home by the same parents, but by no legal adoption, and provides that the legally adopted child shall share equally with the other child all rights in the estate accruing to her, *held*, that there was an implied promise, on the part of the legally adopted child, arising from an acceptance of the statutory adoption, to carry out that condition, and that, after the adopting parent had died and the legally adopted child had become an heir to the estate to the exclusion of the other, upon her repudiation of the promise, in a suit claiming the entire title, she would be declared a trustee *ex maleficio* as to the property share which it was intended that the other child should take.

6. **Trusts:** IMPLIED AGREEMENT. Where a trust *ex maleficio* is based on a promise, the promise need not be expressly made, for actual cooperation or silent acquiescence may have the same effect.

7. ———: REPUDIATION: FRAUDULENT INTENT. Where the trust is repudiated, it is not necessary to show that the promise upon which it is based was fraudulently made, with no intention of carrying it out. A fraudulent intent, on the part of the promisor in making the promise, may be inferred from his repudiation and a refusal to perform.

8. **Limitation of Actions:** TRUSTS. Where a party comes into a court of equity asking affirmative equitable relief, he may be required to do equity with regard to the subject-matter of the action, and the statute of limitations is not available to him as a defense against the imposition of such requirements.

9. ———: ———. Where a party asserting title to property is proved to be a trustee *ex maleficio* for the adverse party to the suit, *held*, that the statute of limitations did not commence to run against the rights of the *cestui que trust* until the trustee repudiated the trust, since until that time the fraud had not become known.

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

John N. Dryden and *John A. Miller*, for appellants.

H. M. Sinclair and *W. D. Oldham, contra.*

Heard before MORRISSEY, C.J., ALDRICH and FLANSBURG, JJ., ALLEN and MORNING, District Judges.

FLANSBURG, J.

This action involves title to a farm in Buffalo county, Nebraska, constituting the estate of Anthony Shovel, deceased. The plaintiff, Maud M. Wiseman, the adopted daughter of Anthony Shovel, claims the entire estate, and brings this action to confirm and quiet the title as against any interest which might have been claimed by James Shovel, a child taken by the Shovel family and reared as a member of the family, but never legally adopted. The trial court entered a decree quieting the title in the plaintiff, and from this decision the

defendants, representatives of James Shovel, have appealed.

Anthony Shovel and his wife were early settlers in Buffalo county. They never had children of their own. In 1875 they took into the family a little waif, which they procured at an orphan's home in St. Joseph. The name of this child was Jim McManus and he was then eight years old. The child took the name of James Shovel, was always known by that name, and was generally reputed to be a child of the family. In 1882, when James was 15 years old, the Shovels, by statutory procedure, adopted a litle girl. She is now the plaintiff in this action. The adoption agreement, filed in the county court in that proceeding, contained these provisions:

"Whereas, the above named Anthony and Susan Shovel have in fact adopted James, the orphan child of Thomas and Mary McManus late of the state of Missouri, deceased, who was born on the fifth day of January, 1867, and have for seven years last past nursed and reared him under their name and as their child, and whereas, the said Anthony and Susan Shovel desire to bestow upon the said James equal right, privileges and immunities with children born in lawful wedlock, and whereas, there is some difficulty about the statutory adoption of the said James for the want of any parent or other person having lawful custody of said James, to sign the necessary relinquishment.

"Now, therefore, the adoption of the said Maud May and investing her with equal right, privileges and immunities as children born in lawful wedlock, shall not be taken or construed to invest her with any rights, or inheritance to the exclusion in whole or in part of the said James, but the said James shall always share equally with the said Maud May in any and all rights and privileges accruing to her by virtue of this adoption."

James was reared as a child of the family and remained upon the farm, performing all services allotted

to him, until he was about 23 years old. He was then married and one year later removed to a nearby farm and became a tenant there. Two children were born of this marriage, one in 1892 and one in 1893. In 1893 his wife died. He then returned to the Shovel home and remained there until 1900, when Anthony Shovel, the foster parent, died intestate. James lived 14 years after the death of Anthony Shovel, and in 1914 he died intestate, leaving the two children mentioned as his only heirs. These children are the defendants in this case. Since the death of Anthony Shovel neither had James Shovel during his lifetime, nor have the defendants ever, until the commencement of this suit, made claim of any right or interest in or to the property of the estate. Mrs. Susan Shovel, the widow, having a dower interest in the land and right of possession, on October 2, 1919, being then 83 years of age, made a deed conveying all her interest to the plaintiff, and a few days thereafter, some 19 years having elapsed since the death of Anthony Shovel, plaintiff filed this suit to quiet title as against any interest in the estate which the defendants, as representatives of James Shovel, might claim.

The defendants' claim of interest in the estate, raised in their answer, is based upon two theories:

(1) That the evidence is sufficient to show an agreement, on the part of the Shovels, to adopt James, and make him an heir, the performance of that agreement by James and the right, in his representatives, to a specific performance of that contract; and

(2) That the written agreement, made a part of the statutory adoption of Maud, was upon the express condition, contained therein, that James should share equally in whatever inheritance should be received by Maud, that such condition was necessarily assented to by Maud, and that her repudiation of the implied promise to carry out that condition and the expressed desires of the adopting parents results in her becoming a trustee

ex maleficio of the interest in the property which it was intended James should take.

It is admitted that there was never any statutory adoption of James. It must be conceded, therefore, that he never became an heir of the estate and has no right of inheritance. Heirship cannot be created by contract, but by law only. The right of inheritance could only have been conferred upon James by a legal adoption conducted in substantial accordance with all the essential requirements of the statute. 1 C. J. 1373, sec. 4.

It is claimed that the evidence in this case is sufficient to prove a contract to adopt James and to make him an heir; that this contract had been performed on his part, and that, even though he should not be entitled to inherit under the law, still a court of equity should consider that done which should have been done, and award to him an equivalent of such inheritance by way of decreeing a specific performance of the agreement. *Pemberton v. Heirs of Pemberton,* 76 Neb. 669; *Kofka v. Rosicky,* 41 Neb. 328; *Tuttle v. Winchell,* 104 Neb 750; 1 C. J. 1377, sec. 21.

We have carefully examined the evidence in the case and find little more to sustain such an agreement than that which is set out above. Every element of such a contract must be proved by the most clear, convincing, and satisfactory evidence. *Peterson v. Bauer,* 83 Neb. 405. The defendants contend that such an agreement is to be inferred from the statements by the Shovels that they had adopted James, which admissions had been made to certain persons who testified as witnesses in the case, and from their declaration in the articles of adoption of Maud, to the effect that they had, in fact, adopted James, and that they desired to bestow upon him the right of inheritance. The defendants claim that these facts, in connection with a showing that James was reared as a member of the family and took the family name and a relation in the family as if he had been adopted, are sufficient to prove, beyond question,

an agreement to adopt and to make James an heir. They rely upon the case of *Roberts v. Roberts,* 223 Fed. 775. The statutes in Missouri, however, are different from those which existed in Nebraska. In Missouri, the right of inheritance followed as a matter of course whenever a child was adopted. In Nebraska, a child, under the law of 1873, might have been adopted and yet, unless there was a specific agreement to that end, would not become an heir. Though the fact of adoption, when proved, would imply that there had been an agreement, either with the child, or with its natural parent or guardian, for adoption, since the matter of adoption requires an agreement and cannot be effected by actions on the part of the adopting parents alone, still such admitted fact of adoption would not necessarily imply, in this state at least, that the parties had agreed that the right of heirship was to be conferred. A declaration by the Shovels that they desired to bestow the right of heirship on James may have been no more than a mere avowal of their wishes and intentions. There is nothing in the record showing that such a declaration of intention is referable to any contract. *Overlander v. Ware,* 102 Neb. 216.

It seems clear to us that James neither had a right of inheritance in the estate of Anthony Shovel, nor had he any right of action for any breach of contract for adoption. His rights must depend entirely upon the written agreement entered into by the Shovels in the adoption proceedings of Maud.

The statutes governing this proceeding (Gen. St. 1873, ch. 57, secs. 796-801) did not provide that an adopted child should always receive rights of inheritance, but left that matter to the agreement of the parties. A person was granted the right of adopting a child "with such limitations and conditions as shall be agreed upon." The statute provided that a person could, by stipulation in his adoption statement, bestow upon the child rights of inheritance, and it was provided that the decree in

such case should be entered in accordance "with the conditions and stipulations of said statement." The child, it was declared, should then possess those rights and privileges as were agreeable to such stipulations. In such adoption proceeding, then, the adopting parent had a right to withhold all rights of inheritance or to bestow upon the child rights of inheritance with the limitations or conditions that he should desire to attach. Though a right of inheritance, conferred through contract by such adoption, would become a statutory right and be governed by the statutes on that subject, still its bestowal and the limitation of the right, or the conditions upon which it was granted, were left as a matter of contract between the parties to the proceedings.

In *Martin v. Long,* 53 Neb. 694, the contractual character of such proceeding is indicated, and in that case it was held that the parties could, by the adoption agreement, legally provide that the adopted child should receive, at her majority, from the adopting parents the sum of $500. The statute, as interpreted by this decision, contemplates the right of the parties to regulate and define and limit or supplement the rights of the child in the estate of the adopting parents. The written contract and statement of adoption, filed in the proceedings in the adoption of Maud, was a contract that has a statutory sanction.

The defendants contend that this contract created an express trust in favor of James; that it clearly provided that Maud was to share equally with James whatever she should inherit from the estate, and that such trust, being created by a contract which is given legal recognition by the statute, would be enforceable even though it might, in the absence of the statute, be held bad because of its testamentary character. The solution of that question would involve a determination as to how far parties to such adoption proceedings may fix and determine the rights of inheritance and property rights of others than the adopted child. Though

it may be, under the circumstances here, that the fixing of the rights of James was incidental to and inseparably connected with the limitation of the rights of Maud, and that such provisions come within the scope of the statute, we believe it unnecessary to pass upon that question, for reasons as subsequently appear.

The defendants contend that, in any event, the bestowal of the right of inheritance upon Maud was conditional and was offered and accepted only upon the implied agreement that the condition would be performed, and that, after having become, through the implied promise that the condition would be performed, entitled as an heir to an entire interest in the estate, she cannot now be allowed to repudiate the promise, and that her repudiation results in making her a trustee *ex maleficio,* to the extent of that interest in the property which it was intended should be conferred upon James.

Whether or not the written agreement was sufficient, as a contract, to create an express trust, in favor of James, which would be impressed upon the property received by Maud by inheritance, it is our opinion that, in any event, equity will recognize a constructive trust and enforce it. The intention of the parties, set forth in the written instrument, is clear. The adopting parents recited that they had desired and attempted to adopt James, but that their adoption was defective and that they were unable to legally adopt him. For that reason, it seemed they believed, he either had no legal right to inherit or that his right of inheritance was questionable. A right of inheritance they desired to bestow upon him, and they expressed their intention that he should inherit equally with Maud, and that her inheritance should never in any way cut down or affect his. The agreement even goes farther and states that James shall share equally with Maud in any and all rights and privileges accruing to her. The condition, which has now actually come about, is the very condition that the articles of agreement sought to guard against.

Maud has inherited the entire estate to the exclusion of James and has refused to allow him to share with her. The adopting parents recognized that, in making Maud their heir, it was probable that she would be legally entitled to inherit to the exclusion of James. The condition that she should share what she should inherit was inseparable from the adoption agreement, and it was evidently upon that condition only that the Shovels were willing to adopt her. In consenting to this adoption, she, and her parents in relinguishing her, accepted the agreement bestowing upon her the right of inheritance as well as the burdens and conditions which accompanied it. Their acquiescence in that condition is equivalent to an implied promise that the condition would be performed. Such a representation having been made, Maud cannot now be allowed to take an inheritance, procured by means of that representation, and then repudiate the obligation assumed by her. To allow her now to repudiate the trust would, in effect, work a fraud upon Anthony Shovel, her adopting parent.

A clear statement of the rule is found in 39 Cyc. 177: "Where a testator or ancestor makes known to his devisee, legatee, or heir his desire that his property be disposed of in a particular manner, and that he relies upon him to carry his desire into effect, and such devisee, legatee, or heir uses words or does acts calculated to cause, and which he knows do in fact cause, the testator or ancestor to believe that he fully assents thereto, and where in consequence thereof the testator or ancestor makes * * * a will or such particular disposition of his property in his lifetime as will carry out his desire, a constructive trust is created." It is that principle which is recognized in the decisions of our court in *Smullin v. Wharton,* 73 Neb. 667; *Schneringer v. Schneringer,* 81 Neb. 661; *Pollard v. McKenney,* 69 Neb. 742; *Crinkley v. Rogers,* 100 Neb. 647.

It is argued that such a rule has no application unless there is fraud in the inception of the transaction; that

is, unless the promise to carry out the request of the ancestor was fraudulently made and without any intention of carrying it out. In the cases just cited, however, such fraud was neither alleged nor proved, and in the case of *Pollard v. McKenney, supra,* where the promise was between persons who were in a confidential relation and the promise had been repudiated, the court declared that it was immaterial whether or not there had been, at the time of the promise, an actual present intention that the promise would not be carried out. Where there is a refusal to perform such a promise, as in this case, a fraudulent intent on the part of the promisor in making it may be inferred. *Winder v. Scholey,* 83 Ohio St. 204, 33 L. R. A. n. s. 995. And see note, 8 L. R. A. n. s. 703.

It is our conclusion that the plaintiff should be held as a trustee *ex maleficio* of the property inherited from Anthony Shovel, and that the obligation of her trust is to share such property with the children of James Shovel, so that they shall receive that share in the estate which the articles of agreement, entered into at the time of her adoption, prescribed should be shared with James.

Plaintiff pleads the statute of limitations as a bar to any claim of interest by the defendants to the property in question. The defendants, however, did not bring this action to establish a constructive trust in the property, but have set up such a trust in defense of the plaintiff's action. The plaintiff claims under the agreement in the articles of adoption by which she was made an heir of the estate. The defendants' answer asserts, by way of defense, that the plaintiff is a trustee *ex maleficio.* The effect of that defense is to define and limit that title interest which the plaintiff claims. The statute of limitations would not be available to the plaintiff to prevent such a defense. *Pinkham v. Pinkham,* 61 Neb. 336; *Bank of Alma v. Hamilton,* 85 Neb. 441; *Pettit v. Louis,* 88 Neb. 496.

Though 19 years have elapsed since the death of Anthony Shovel, it appears that Susan Shovel, his

widow, is still living and had become entitled to a dower interest and possessory rights in the property. During her lifetime there was no urgent reason why the matter of the interests of the plaintiff and the defendants should be settled. There is no suggestion that the plaintiff ever repudiated the trust or denied that James Shovel or his heirs were entitled to an interest in the estate, until the commencement of this suit. It was not until that time that the defendants became apprised of the fact that she was attempting to exclude them from the inheritance and that she did not intend to carry out the implied promise contained in the adoption agreement. It is not suggested that the defendants were aware of her attitude prior to that time, nor that they were guilty of any laches in failing to assert their rights. The statute of limitations does not begin to run against the rights of the beneficiaries of such a constructive trust until they are apprised of the fact that the trustee did not intend to carry out the provisions of the trust. In this case, they were not apprised of that fact until the trustee repudiated it. The statute of limitations, therefore, had not run against the claim of the defendants. *Hanson v. Hanson,* 78 Neb. 584; *Johnson v. Petersen,* 100 Neb. 225; *Winder v. Scholey, supra.*

For the reasons given, the judgment of the trial court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

ROBERT T. MEYER V. STATE OF NEBRASKA.

FILED FEBRUARY 16, 1922. No. 21924.

1. **Schools and School Districts: FOREIGN LANGUAGE LAW: POLICE POWER.** The statute (Laws 1919, ch. 249) prohibiting the teaching of foreign languages in schools to children before they have passed the eighth grade, *held,* a reasonable exercise of the police power of the state.

2. ———: ———: LEGISLATIVE POWERS. It is within the power of the legislature to say that the education of children in the primary grades shall not be conducted in a foreign language, and to go farther and prevent the teaching of a foreign language to children in the schools until they have become thoroughly grounded in English.

3. **Constitutional Law**: RELIGIOUS LIBERTY: PUBLIC WELFARE. Though every individual is at liberty to adopt and to follow, with entire freedom, whatsoever religious beliefs appeal to him, that does not mean that he will be protected in every act he does which is consistent with those beliefs, for when his acts become inimical to the public welfare of the state the law may probihit them, though they are acts done in pursuance of and in conformity with the religious scruples of that individual.

4. ———: ———: FOREIGN LANGUAGE LAW. Though the statute prohibits the teaching of a foreign language in a parochial school, even when that language is to be used later in religious worship, *held*, that such restriction does not unlawfully interfere with the right of religious freedom in the school, or the incidental right to freely give religious instruction as guaranteed by the Constitution.

5. **Schools and School Districts**: FOREIGN LANGUAGE LAW: VIOLATION: PAROCHIAL SCHOOLS. When, in a parochial school, a foreign language is taught from a book containing a religious text, the fact that the study of the language is mingled with the study of a religious subject does not afford the teacher protection as against the penalty imposed by the statute for the teaching of such language.

6. **Information**: SUFFICIENCY. When the offense is a statutory one and the statute sets forth what elements shall constitute the crime, it is sufficient in the information to describe the crime in the language of the statute.

7. **Schools and School Districts**: FOREIGN LANGUAGE LAW: APPLICATION. The statute prohibiting the teaching of foreign languages in the schools was intended to prohibit the teaching of such language whenever the pupils of the school should be assembled for the purpose of receiving instruction, and was not limited, in its aim, to those school hours only which should be set aside to the teaching of the common school branches.

8. **Evidence** examined, and *held* sufficient to support the verdict.

ERROR to the district court for Hamilton county: EDWARD E. GOOD, JUDGE. *Affirmed.*

Sandall & Wray and *Albert & Wagner,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., ALDRICH, DAY, DEAN, FLANSBURG and LETTON, JJ.

FLANSBURG, J.

In this action the defendant Meyer was charged with the violation of chapter 249, Laws 1919, commonly known as the Siman language law. He was found guilty and fined $25. From such judgment he has appealed to this court.

The law in question provides that no person, individual or as a teacher shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language, and provides that languages, other than the English language, shall not be taught in such schools until after the pupil has attained and successfully passed the eighth grade.

The evidence shows that the defendant was a teacher in a parochial school maintained by the Zion Evangelical Lutheran Congregation, and that between the hour of 1 and 1:30, on May 25, 1920, he taught the German language in this school to a 10-year-old boy, a pupil in the school, who had not passed the eighth grade. The text book used for such teaching was a book of biblical stories, written in the German language. The defendant argues that in teaching the German language in this book he was giving religious instruction according to the faith of the Zion Evangelical Lutheran Congregation. In regard to the purpose of the teaching, the pastor of the church testified:

"We have some members who had emigrated to this country when they were beyond school age and have not attended school over here, and they have learned enough to carry on their business transactions by means of the

English language, but still they have had their instruction in religion in the German language and cannot understand an English sermon as well as in German, and they cannot give their children religious instruction in the English as well as in the German; and in order to keep the parents and children in a religious way in contact with each other and not diminish the influence of the parents in the home—for instance, so that the children can take part in the devotional exercises of the parents at home, attend public worship with the parents and worship with them—for that reason we wanted to have the children learn so much German that they could be able to worship with their parents. That was the ultimate and only object we had in view in teaching German."

From this testimony it is clear that the reading from the text book was not, at least solely, a devotional exercise. It was not religious worship, nor was it, primarily, religious instruction in itself. The text book contained biblical stories, but the subject-matter of the text, used for the purpose of studying a language, does not alone control nor indicate the object of the study. The object was, as stated, "to have the children learn so much German that they could be able to worship with their parents."

Defendant argues, then, that the teaching of the German language from this book containing Bible stories served a double purpose, in that it both taught the children the German language and also familiarized them with the Bible stories, and that the teaching, so characterized, was religious instruction. It must be conceded, even under that argument, that two subjects were being taught—one the German language and one a religious text. If the law prohibited the teaching of the German language as a separate and distinct subject, then, certainly, the fact that such language was taught from a book containing religious matter could not act as a shield to the defendant. The teaching of the German

language, as a subject, would come within the direct prohibition of the law, regardless of what text might be used in the book from which the language was taught. It does not appear that the German language is a part of the religion of this church, nor that the services must, according to that particular faith, be rendered in German. It is true that in familiarizing the children with the German language they would become better able to fully understand the services of the church when conducted in German, but, so far as teaching the particular religious beliefs of the church to the children in the school was concerned, such religious teaching could, manifestly, be as fully and adequately done in the English as in the German language.

At this time we are not concerned, then, with the question of whether or not defendant had the right to conduct devotional exercises in the German language. Had that been the sole manner in which the German language was being used, it would have presented an entirely different question. It is not here a question as to the right to hold devotional exercises in the German language, regardless of what the pupils might incidentally attain in learning and familiarity with that language while in attendance upon such exercises, but it is a question of the direct and intentional teaching of the German language as a distinct subject.

The whole question resolves itself to this: Does the statute interfere with the right of religious freedom, by prohibiting the teaching of a foreign language, when that language is taught with the idea and purpose of later using it, at some other time or place or in the school itself, in religious worship?

The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of

foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state. *Pohl v. State,* 102 Ohio St. 474; *State v. Bartels,* 191 Ia. 1060.

It is suggested that the law is an unwarranted restriction, in that it applies to all citizens of the state and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school. That argument is not well taken, for it assumes that every citizen finds himself restrained by the statute. The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its education, therefore, from among the many that might be taught, is obviously necessary. The legislature no doubt had in mind the practical operation of the law. The law affects few citizens, except those of foreign lineage. Other citizens, in their selection of studies, except perhaps in rare instances, have never deemed it of importance to teach their children foreign languages before such children have reached the eighth grade. In the legislative mind, the salutary

effects of the statute no doubt outweighed the restriction upon the citizen generally, which, it appears, was a restriction of no real consequence.

Whether or not the policy of this law is correct is not for the court to say. That was a question exclusively for the legislature. The question for the court is whether the law is reasonable, and not capricious and arbitrary; whether it was enacted in the interests of the welfare of the state; whether it is a lawful exercise of the police power; in general, whether it is constitutional. If the policy of the law is wrong, the people of the state, through the legislature, or upon their own initiative, can change it.

A thorough knowledge of the German language as would be gained by young children by a course of study in the schools would no doubt, as pointed out in the testimony, make more convenient the matter of religious worship with their parents, whose knowledge of English was limited; but is such a reason sufficient to override the salutary effect and purpose of the statute? If a foreign language can be taught to children of tender years, for the purpose of allowing them to worship in that language, under the guise that such instruction is religious teaching, then the statute is a nullity. Writing, reading, geography, and a variety of other subjects, could as well be called religious subjects whenever the purpose was declared to be to use the knowledge, thus attained, as an aid in religious worship.

Though the statute prohibits the study of the German language and may, to an extent, limit the younger children from as freely engaging in religious services, conducted in the German language, as otherwise might be the case, we cannot say that such restriction is unwarranted. The law in no way attempts to restrict religious teachings, nor to mold beliefs, nor interfere with the entire freedom of religious worship.

Whenever the actions of individuals, even though in pursuance of religious beliefs—in this case the teaching

in the schools of the German language to children of tender years—are considered as not in harmony with the public welfare, then it is proper that those acts be curbed.

As said by Chief Justice Campbell in *In re Frazee,* 63 Mich. 396, 405: "We cannot accede to the suggestion that religious liberty includes the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system. There is no legal authority to constrain belief, but no one can lawfully stretch his own liberty of action so as to interfere with that of his neighbors, or violate peace and good order. The whole criminal law might be practically superseded if, under pretext of liberty of conscience, the commission of crime is made a religious dogma. It is a fundamental condition of all liberty, and necessary to civil society, that all men must exercise their rights in harmony, and must yield to such restrictions as are necessary to produce that result."

Though every individual is at liberty to adopt and follow with entire freedom whatsoever religious beliefs appeal to him, that does not mean that he will be protected in every act which he does which is consistent with those beliefs, for when his acts either disturb the public peace, or corrupt the public morals, or otherwise become inimical to the public welfare of the state, the law may prohibit them, though they are done in pursuance of and in conformity with the religious scruples of the offending individual. 12 C. J. 944, sec. 453; *McDowell v. Board of Education,* 172 N. Y. Supp. 590; *State v. Neitzel,* 69 Wash. 567, 43 L. R. A. n. s. 203; *Reynolds v. United States,* 98 U. S. 145; *People v. Ashley,* 172 N. Y. Supp. 282; *Smith v. People,* 51 Colo. 270, 36 L. R. A. n. s. 158; *Owens v. State,* 6 Okla. Cr. Rep. 110.

The statute, therefore, which prohibits the teaching of the German language in a parochial school, does not unlawfully interfere with the right of religious freedom in

the school, or the incidental right to freely give religious instruction, as guaranteed by the Constitution.

It is urged that the information does not sufficiently charge an offense under the statute. The information is framed in the language of the statute, but it does not set out that the teaching complained of was during regular school hours, nor that the school in which the teaching was done was a school which presented a course of study such as that prescribed by the compulsory education act. The contention that these allegations were necessary is based upon the interpretation of the statute by the holding in *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 101 Neb. 93. The allegation in the information that the school is a parochial school is alone an allegation which apprises of the fact that it is a school that does present or is legally required to present the course of study mentioned, for parochial schools expressly come within the compulsory education act. Had it been a fact that this school had failed to comply with that act, that would not have absolved it from the duty of recognizing and obeying the provisions of the language law.

As to the contention that the information should have specifically charged that the teaching took place during school hours, it is only necessary to answer that an allegation that the teaching was in school carries with it the necessary implication that such teaching must have been during school hours. In order that any teaching take place "in school," it must take place when the pupils are assembled and when the school is in session. Otherwise, such teaching would not have been "in school," within the generally accepted meaning of the term so used.

Neither the language law nor the compulsory school act mentions the phrase "regular school hours." Nor is there any direction in either of those statutes as to how many hours a day, or as to what time of day, school shall be in session. The language law declares that certain

subjects shall not be taught in school. Obviously, it was intended that such teachings should not take place whenever the pupils of the school should be assembled in the school for the purpose of receiving instruction. So far, then, as it may have been indicated in the former opinion in *Nebraska District of Evangelical Lutheran Synod v. McKelvie, supra,* that the law was aimed to apply only to those school hours which should be set apart for the teaching of the so-called common school branches, or set apart as "regular school hours," we believe that opinion should be modified.

When the offense is a statutory one, and the statute sets forth what elements shall constitute the crime, it is sufficient in an information to describe the crime in the language of the statute, as was done in this case. *Philbrick v. State,* 105 Neb. 120; *Goff v. State,* 89 Neb. 287; *Cordson v. State,* 77 Neb. 416.

Again, it is insisted that the evidence is insufficient to support the verdict, and that the proof is that the teaching complained of did not take place during school hours. It appears from the evidence that the defendant had been a teacher in this school some eight years, and that the afternoon hours for teaching, during all that period of time, had been from 1 to 4 o'clock. After the decision in the case of *Nebraska District of Evangelical Lutheran Synod v. McKelvie, supra,* in which it was said that the statute aimed only at the teaching of foreign languages during "regular school hours," the church authorities, by resolution, changed the afternoon school hours so that they covered the period of from 1:30 to 4 o'clock, instead of from 1 to 4. The morning hours remained the same. Pupils, however, as before, each day assembled at 1 o'clock in the afternoon and were taught German, in the manner we have described, until the hour of 1:30, at which time regular school was said to commence. The defendant testified that attendance by the pupils during that half-hour was not compulsory. However, the attendance for that period was full and regular. We do

not see that this, in reality, created any change in the "regular school hours." The court submitted for the jury's determination the question of whether or not the change of hours was a device to evade the law, and the question of whether the hour from 1 to 1:30 was a part of the teaching hours of the school. We think the instruction was properly given, and, in the light of the evidence, the only verdict which could have been expected was the one returned by the jury, finding the defendant guilty of the offense charged.

The judgment of the lower court is, therefore,

AFFIRMED.

LETTON, J., dissenting.

Without regard to the conclusion in the case, I dissent from the doctrine of the seventh paragraph of the syllabus and that portion of the opinion expressing the same view. This in effect overrules the very recent opinion of this court in *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93. The matter is of grave importance, since it involves the question as to the extent that a legislature may infringe upon the fundamental rights and liberty of a citizen protected by the state and federal Constitutions. I am unable to agree with the doctrine that the legislature may arbitrarily, through the exercise of the police power, interfere with the fundamental right of every American parent to control, in a degree not harmful to the state, the education of his child, and to teach it, in association with other children, any science or art, or any language which contributes to a larger life, or to a higher and broader culture.

Educators agree that the period of early childhood is the time that the ability to speak and understand a foreign or a classic language is the most easily acquired. Every parent has the fundamental right, after he has complied with all proper requirements by the state as to education, to give his child such further education in proper subjects as he desires and can afford. As was pointed out in *Nebraska District of Evangelical Lutheran Synod*

v. McKelvie, supra, the legitimate object of the statute has been accomplished when the basic and fundamental education of every child in the state has been acquired in the English language, instead of in the language of a foreign country.

The state has the right to manage and control in all particulars schools maintained by taxation; to place other schools under state supervision and to require the same general standards; but it has no right to prevent parents from bestowing upon their children a full measure of education in addition to the state required branches. Has it the right to prevent the study of music, of drawing, of handiwork in classes or private schools under the guise of police power? If not, it has no power to prevent the study of French, Spanish, Italian, or any other foreign or classic language, unless such study interferes with the education in the language of our country, prescribed by the statute.

In *State v. Ferguson,* 95 Neb. 63, 73, it is said in the opinion by Judge Fawcett: "The public school is one of the main bulwarks of our nation, and we would not knowingly do anything to undermine it; but we should be careful to avoid permitting our love for this noble institution to cause us to regard it as all in all and *destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children.*"

We have said that the legislature cannot, under the guise of police regulation, arbitrarily invade personal rights, and that "The test when such regulations are in question is whether they have some relation to the public health or public welfare, and whether *such is, in fact, the end sought to be obtained.*" *Smiley v. MacDonald* 42 Neb. 5; *In re Anderson,* 69 Neb. 686; *Union P. R. Co. v. State,* 88 Neb. 247; *State v. Withnell,* 91 Neb. 101.

Since the restriction cannot be supported on the ground of "public welfare," it is now sought to sustain it on the ground of "public health." The supposition that this re-

striction in the statute might have been inserted in the interest of the health of the child is evidently an afterthought. It was not suggested by counsel either in the briefs or at the hearing. It is patent, obvious, and a matter of common knowledge that this restriction was the result of crowd psychology; that it is a product of the passions engendered by the World War, which had not had time to cool. The idea that the legislature had in mind the protection of the child from over study, or lack of recreation, seems far-fetched, when it is realized that outside of city districts only 12 weeks school attendance in a year is required by the law, and that in city districts the hours of study for young children are carefully limited by the boards of education. The statute was construed and upheld (except as to the restriction now reinstated by the majority opinion) in the opinion in the *McKelvie* case written by me. It was there held (with that exception) to be a proper and salutary measure, upon substantially the same grounds as are now suggested in the majority opinion. The doctrine of *stare decisis* should be applied, and the former opinion adhered to.

Legislatures have not always respected personal rights. In *State v. Junkin,* 85 Neb. 1, this court was compelled to hold invalid a law restricting free speech in a public assembly. Resistance to the arbitrary power of kings was necessary in days gone by. It seems now to be necessary to resist encroachments by the legislature upon the liberty of the citizen protected by the Constitution.

MORRISSEY, C. J., concurs in this dissent.

WILSON B. SELLERS, APPELLEE, V. JENNIE JOHNSON, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21865.

Appeal: ASSIGNMENT OF ERRORS. Assignment of errors in the following language: "(1) The court erred in ordering confirmation of

the sale; (2) the decree is so indefinite and uncertain that therefrom cannot be determined the redemptor nor the rights of Jennie Sellers, now Johnson, in the property"—*held* to be insufficient under section 8192, Rev. St. 1913.

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

R. J. Greene and *H. C. Wilson,* for appellant.

J. C. McNerney, contra.

Heard before LETTON, DEAN and DAY, JJ., ALLEN and BEGLEY, District Judges.

ALLEN, District Judge.

From a meager and confused record, we gather the following facts: April 5, 1914, George W. Sellers entered into a contract to purchase lot 19, block 1, in the Lincoln Driving Park Company's second subdivision to the city of Lincoln, for the agreed sum of $1,500, $500 to be paid by the assumption of a mortgage thereon and $1,000 in $10 monthly payments without interest. The purchaser died April 13, 1917, and J. A. McGraw was appointed administrator of his estate. The plaintiff, Wilson B. Sellers, became the owner of the contract and brought this suit to foreclose it, making J. A. McGraw, Jennie Johnson, appellant, Fannie Sellers, Ossie Sellers, and Oddie Sellers defendants. The defendants Ossie Sellers and Oddie Sellers are the surviving sons of George W. Sellers, and Jennie Johnson and Fannie Sellers claim, respectively, to be his widow. The defendant Johnson married one Zachariah Johnson, who was made a defendant, but he was defaulted. The contract was foreclosed by a decree passed January 2, 1920, and an order of sale was issued October 4, 1920, and the property advertised and sold by the sheriff November 9, 1920, and a return thereof promptly made. The defendant Jennie Johnson filed objections to the confirmation of the sale, which were overruled, and from the order of confirmation entered November 27, 1920, she has appealed.

The following are the only errors assigned: "(1) The court erred in ordering confirmation of the sale; (2) the decree is so indefinite and uncertain that therefrom cannot be determined the redemptor nor the rights of Jennie Sellers, now Johnson, in the property."

The first assignment is not sufficiently specific, as it fails to point out in what particular the court erred in ordering a confirmation of the sale; and the second is not sufficiently specific because it fails to state the particular in which the decree is "indefinite and uncertain." Rev. St. 1913, sec. 8192; *Waxham v. Fink,* 86 Neb. 180; *Packard v. De Voe,* 94 Neb. 740; *Wilson v. Wilson,* 94 Neb. 192. The consensus of judicial opinion supports this conclusion.

In addition to this, if the decree was not satisfactory to the appellant, she should have applied to the district court to correct it before appealing. In fairness to the trial judge his attention should have been called to the alleged omission. The judgment of the district court is, therefore,

AFFIRMED.

L. W. GORTON, APPELLEE, V. C. H. GOODMAN, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21896.

Appeal: FAILURE TO ASSIGN ERRORS. Where the appellant fails to assign errors as provided by section 8192, Rev. St. 1913, and by rule 12 of this court, the judgment of the district court will be affirmed.

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

Lee Card, for appellant.

G. T. H. Babcock and *R. G. Easley, contra.*

Heard before LETTON, DEAN and DAY, JJ., ALLEN and BEGLEY, District Judges.

ALLEN, District Judge.

This is an appeal from a judgment of the district court for Dawes county entered on a directed verdict in favor of the plaintiff.

Section 8192, Rev. St. 1913, provides: "The supreme court shall by general rule provide for the filing of briefs in all cases appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous."

And rule 12 (94 Neb. XI) of this court provides: "The brief of appellant shall consist of the statement of the case and the propositions of law relied upon, with authorities supporting them. The statement of the case shall consist of: (a) The nature of the case; (b) the issues; (c) how the issues and case were decided, and (d) the errors relied upon for reversal, with a concise statement, in connection with each point presented, or separately, as will best present the error relied upon."

There is no assignment of errors, and no attempt is made to comply with the statute or with the rule of the court, and the judgment is, therefore,

AFFIRMED.

RIVERTON STATE BANK, APPELLEE, V. EDSON L. WALKER ET AL., APPELLANTS.

FILED FEBRUARY 16, 1922. No. 21901.

1. **Appeal:** MOTIONS FOR DIRECTION OF VERDICT: FINDINGS BY COURT: REVIEW. Where both parties, at the close of all the testimony, move for a directed verdict, the whole case is thereby submitted to the trial court, and its findings of fact take the place of a verdict of the jury, and should not be set aside unless, upon the whole record, it appears to be clearly wrong.

2. **Notes:** ACTION BY INDORSEE: GOOD FAITH: PROOF. In an action by a bank against the maker, upon a promissory note, when it is shown that the note for which the note in suit was

given in renewal was obtained by fraud practiced upon the maker, the bank, in order to recover, must prove that all the officers or agents of the bank who took part in negotiations for the purchase of the original note did so in good faith, without notice of any defense or infirmity in the note.

3. Evidence examined, and *held* not to sustain the verdict and judgment of the trial court.

APPEAL from the district court for Franklin county: WILLIAM A. DILWORTH, JUDGE. *Reversed.*

North & Donovan, for appellants.

Bernard McNeny and *A. H. Byrum, contra.*

Heard before LETTON, DEAN and DAY, JJ., ALLEN and BEGLEY, District Judges.

BEGLEY, District Judge.

This action was brought in the district court for Franklin county, upon a promissory note, executed by the defendants in the sum of $2,500. The defendants contend that there was no consideration for said note; that it was a renewal and given in payment of a note obtained from the defendants by the Missouri Valley Cattle Loan Company by fraud, and that said original note was purchased by said plaintiff bank with knowledge of such fraud in its inception, and that when same became due, defendants, without knowledge of the falsity of said representations or discovery of the fraud, signed the renewal note. The plaintiff in reply filed a general denial and further alleged that plaintiff purchased, in the regular course of business, and before it was due, and in good faith, and for valuable consideration, and without any notice of any infirmity in the note or defect in the title of the Missouri Valley Cattle Loan Company, a note given by the defendants to said Missouri Valley Cattle Loan Company in the sum of $2,500, and that thereafter, on the 6th day of February, 1920, the defendants paid said note by giving to plaintiff the note mentioned in plaintiff's petition, and the defendants

are, therefore, estopped from denying liability on the note sued upon. At the close of the testimony each party moved the court to direct a verdict in its favor. The court overruled the motion of the defendants and sustained the motion of the plaintiff, and the jury, under the direction of the court, returned a verdict for the plaintiff for the full amount of the note sued upon. Defendants have appealed.

The pleadings and the evidence of defendants in this case are identical with those in *Auld v. Walker,* **p. 676,** *post.* In that case we determined that the note in suit was a renewal note, and that fraud was proved in the inception of the original notes, and this phase of the case need not be further discussed.

Where both parties, at the close of all the testimony, move for a directed verdict, the whole case is thereby submitted to the trial court, and its findings of fact take the place of a verdict of the jury, and should not be set aside unless, upon the whole record, it appears to be clearly wrong. *Krecek v. Supreme Lodge,* **95 Neb.** 428. Therefore, the sole question presented is whether there is sufficient evidence to support the verdict and judgment.

The defendants having proved their defense of fraud in the inception of the note, the burden was then on the plaintiff to prove by a preponderance of the evidence that it was a holder in due course. To sustain this burden the plaintiff produced the president of the plaintiff bank and the president at the time of the purchase of the original note, who testified that the bank purchased the note for value, in the regular course of business, in good faith, and without notice of any infirmities in the note. They, however, admitted that the negotiations and transaction regarding the purchase of the note from the agent of the Missouri Valley Cattle Loan Company were conducted through N. R. Morrow, at that time cashier of the plaintiff bank, and that they had no knowledge of his statements or knowledge re-

garding the note. The defendants' evidence showed that before signing the original note they talked with Morrow, the cashier of the bank, and that he advised them to purchase the stock. There was further evidence that, prior to the purchase of the original note, Cohn and Anderson, stock salesmen for the Missouri Valley Cattle Loan Company, were very friendly with Morrow; that Morrow pointed out prospective purchasers for them, and on one occasion, while Cohn, Anderson and Morrow were in the bank consulting with reference to selling a Mrs. Smart stock in the company, one Eastwood, an officer of the bank, overhearing the conversation, secretly went to the home of Mrs. Smart and advised her not to invest her money in the stock; that after she had purchased stock and given her notes for same, through the intercession of Morrow with the Missouri Valley Cattle Loan Company, her notes were returned to her.

Morrow testified as a witness in the case, but was not asked and did not testify regarding his knowledge of infirmities in the note, nor did he deny the conversations alleged to have been had with the defendants. When it was shown by the defendants that the note was obtained by fraud practiced upon the defendants, the plaintiff, in order to recover, must prove that all the officers or agents of the bank who took part in the negotiations for the purchase of the note did so in good faith, without notice of any defenses or infirmities in the note. In this case the officers who had nothing to do with the transaction testified that they had no notice or knowledge of any defenses or infirmities in the note, but the cashier of the bank who purchased the paper, and who had conversations with the stock salesmen and with the defendants, and who in fact had exclusive charge of the transaction, very carefully refrained from going into the transaction at all, though he was a witness for the plaintiff bank.

Under this state of the record, we think the plaintiff

has not sustained the burden of proof as to being a holder in due course. Rev. St. 1913, secs. 5370, 5373, 5374, 5377; *Ostenberg v. Kavka*, 95 Neb. 314.

The trial court therefore erred in directing the jury to return a verdict for the plaintiff, and the judgment is therefore reversed.

REVERSED AND REMANDED.

J. W. AULD, APPELLEE, V. EDSON L. WALKER ET AL., APPELLANTS.

FILED FEBRUARY 16, 1922. No. 21902.

1. **Notes:** ACTION BY INDORSEE: GOOD FAITH: PROOF. In an action by an indorsee against the maker, upon a promissory note, when it is shown that it was obtained by fraud practiced upon the maker, the plaintiff, in order to recover, must allege and prove that he took the note in good faith in the ordinary course of business and paid value, without notice of any defense thereto or infirmity in the note.

2. **Appeal:** ISSUES. Where plaintiff and defendants have assumed that their pleadings presented a certain issue, and the trial and judgment proceed on such assumption, neither party can, for the first time on appeal, question the fact whether such issue was raised by the pleadings.

3. **Notes:** RENEWAL: DEFENSES. The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt. As between the original parties and as against transferees who are not *bona fide* purchasers for value, a renewal note is open to all defenses which might have been made against the original note.

4. ———: GOOD FAITH: QUESTION FOR JURY. Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser of a note is a question of fact for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom.

5. **Trial:** MOTION FOR DIRECTION OF VERDICT. Where defendant, at the close of plaintiff's testimony, moved for a directed verdict and same is overruled, and defendant thereafter submitted testimony, said motion, to be available, must be renewed at the close of the testimony.

APPEAL from the district court from Franklin county: WILLIAM A. DILWORTH, JUDGE. *Reversed.*

North & Donovan, for appellants.

Bernard McNeny and *A. H. Byrum, contra.*

Heard before LETTON, DEAN and DAY, JJ., ALLEN and BEGLEY, District Judges.

BEGLEY, District Judge.

This is an action upon a promissory note executed by the defendants in the sum of $5,000. The defendants contend that there was no consideration for said note; that it was given as a renewal of a note obtained from the defendants by the Missouri Valley Cattle Loan Company by fraud and false representations; that said original note was purchased by plaintiff with knowledge of such fraud in its inception; that, when same became due, defendants, without knowledge of the falsity of said representations or discovery of the fraud, signed the renewal note. The plaintiff in reply entered a general denial, and further alleged that sometime prior to the 5th day of February, 1920, the plaintiff purchased in the regular course of business, and without notice, and before it was due, and in good faith, and for a valuable consideration, and without any notice of any infirmity in the note or defect in the title of the Missouri Valley Cattle Loan Company, a note given by the defendants to said Missouri Valley Cattle Loan Company for the sum of $5,000; that thereafter on the 6th day of February, 1920, the defendants paid said note by giving to plaintiff the note mentioned in plaintiff's petition, and the defendants are, therefore, estopped from denying their liability on the note sued upon. At the close of the testimony plaintiff moved

the court to direct a verdict in favor of the plaintiff for the amount sued upon, "for the reason that the undisputed evidence shows that plaintiff was an innocent purchaser of the notes for which the note in suit was given in payment, and for the further reason that defendants are estopped by their conduct in making a defense to the note sued upon." The trial court sustained said motion, and verdict and judgment were entered for the full amount sued upon. Defendants have appealed.

Some reason for the court's ruling may be found in the following statement found in the record. "The Court: Now, gentlemen, I have this rule in mind, in regard to this class of cases. Where suit is brought upon a negotiable instrument, and it is shown by the holders of the instrument that they received it for a consideration, in due course of business, without any notice of any infirmities in the title or in the paper itself, before you can introduce any evidence showing that there was fraud in connection with the getting of the paper in the first place, you must show knowledge in the holder of the paper." This is not a correct statement of the law. The rule has often been announced in this court that where fraud in the inception of a note is pleaded as a defense, and supported by proof, in an action by an indorsee against the maker, the burden is on the plaintiff to show that he is a *bona fide* holder. *People's Trust & Savings Bank v. Rork*, 96 Neb. 415. The plaintiff should first have proved his ownership of the note set forth in the petition. The defendants should then prove that it was a renewal note, and that there was fraud in the inception of the original notes; then, in order to avoid this defense, plaintiff has the burden of establishing his innocence. *Farmers State Bank v. Butler*, 101 Neb. 635.

The testimony of the defendants establishes that defendant Walker purchased $10,000 worth of stock in the Missouri Valley Cattle Loan Company and executed several notes in payment therefor, with defendant Van-

syckle as surety, two of such notes being thereafter purchased by plaintiff and the bank of which he is president; that Walker was induced to purchase said stock by the representations of the agent of the Missouri Valley Cattle Loan Company that said company was earning 30 per cent. dividends at that time; that the stock was worth 100 cents on the dollar; that it would loan to its stockholders 10 times as much money as the value of their stock; that the company had already earned and paid a dividend; that the cost of promotion was not to exceed 15 per cent.; that defendant Vansyckle and one Mousel, friends of Walker, were directors in the company. All these representations were false, and, as a matter of evidence, the Missouri Valley Cattle Loan Company appears to have been a fraudulent stock promotion scheme in its inception and at the time of the trial was in the hands of a receiver.

After the purchase of his stock and the execution of the notes, defendants continued to receive circular reports from the company giving them details of its flourishing condition, its wise and careful management, the technical division of its various departments, and other matters which lulled them into a sense of security as to the safety of the investment. When the notes came due and the two notes purchased by the plaintiff and his bank were presented for renewal, defendants had no knowledge of the falsity of the representations made by the stock sales agent. The plaintiff called upon defendants and requested a renewal of the notes and a mortgage securing same, agreeing that if a mortgage were given upon Walker's lands plaintiff would make it in such a large amount as to "cover him up" against the other holders of the notes. No mortgage was given, but defendants executed the note herein sued upon in renewal of the two notes held by plaintiff and the bank. Some time thereafter defendants discovered the fraud in the inception of the notes, and offered to surrender their stock and demanded their notes back from the

Missouri Valley Cattle Loan Company.

Plaintiff admits that the evidence establishes fraud in the inception of the notes, but contends that this defense cannot be raised against the note in suit, because (1) the defense of fraud was not properly pleaded; (2) the note in suit was given in payment of the former notes, and the defendants are, therefore, estopped to deny any liability thereon.

The answer is open to criticism. The misrepresentations and fraud are pleaded only as a conclusion of law, without disclosing facts from which that conclusion may be drawn, but the court and counsel seem to have treated the answer as stating the issue of fraud. No objection was made to the introduction of evidence of fraud as not being within the issues. The plaintiff first assumed the burden of disproving fraud, and he, in his motion for a directed verdict, and the court, in his statement set out above, treated it as one of the issues being tried. The question seems to be raised for the first time on appeal. It is the rule of this court that, where both plaintiff and defendants have assumed that their pleadings presented a certain issue and the trial and judgment proceed upon the assumption that that issue was before the court, neither of the parties can question for the first time on appeal the fact as to whether or not such issue was raised by the pleadings. *Bothell v. Miller,* 87 Neb. 835; *Boyd v. Lincoln & N. W. R. Co.,* 89 Neb. 840.

Plaintiff next contends that defendants are estopped from setting up any defense against the original notes, because the giving of the new note was pleaded as a payment, and not as a renewal of the prior notes. The evidence is all to the effect that the note was a renewal note, and not given in payment of the prior notes. Plaintiff so testified, and he wrote the word "renewed" across the face of the original notes before delivery to defendants. The note in suit was received in the usual way in the renewal of the former obligation,

before learning of the fraud. The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt. 8 C. J. 443, sec. 656; *Davis v. Thomas,* 66 Neb. 26; *Exeter Nat. Bank v. Orchard,* 39 Neb. 485.

The next question is: Did the plaintiff sustain the burden of showing that he is a *bona fide* holder to such an extent as to be entitled to a directed verdict upon this ground? Since the trial court directed a verdict in favor of the plaintiff, it is necessary in reviewing that ruling to assume the existence of every material fact which the evidence in behalf of the defendants establishes or tends to prove and to give them the benefit of proper inference from such facts. The plaintiff was the only witness who testified regarding this phase of the case. He testified that he was president and in sole charge of the bank at Red Cloud, owning over 90 per cent. of the stock; that the note in suit was given in renewal of two other notes of $2,500 each, which were purchased by himself, one in his own name and one in the name of the bank; that he purchased said notes from one Cohn, stock salesman of the Missouri Valley Cattle Loan Company; that he knew at the time that Cohn was engaged in the stock selling business and selling stock in the Missouri Valley Cattle Loan Company; that he was not acquainted with him personally; that Cohn came into the bank, stating he had the notes for sale, that he purchased one for $2,450 cash and the other for $2,500 in Liberty bonds; that it took probably 15 minutes to complete the transaction; that he was not acquainted with the defendants at the time; that defendants lived at Riverton, in another county, and had never transacted business at his bank; that he did not know their signatures; that he had no other business with Cohn; that Cohn had written authority to indorse the notes, but that he did not know the

company officials' signatures, and knew nothing about the representations and statements testified to by the defendants; that before the purchase the revenue stamps were attached to the notes and were canceled by the plaintiff. The plaintiff made no effort to give in detail the facts or the conversation relating to the purchase of the notes from Cohn, and his recollection was not clear when challenged on cross-examination. After the notes became due, he admitted going to the defendants for renewal, and did not deny his statements as to "covering them up" against the other creditors in case he was protected on his note. We think from all the facts and circumstances submitted in evidence the case ought to have been submitted to the jury. Although lack of knowledge, suspicious circumstances, failure to make inquiry, and negligence will not in themselves establish bad faith in the plaintiff, such facts, where the burden is upon him to establish the innocent character of his purchase, and the only evidence offered was his own testimony, constitute evidence of bad faith sufficient to take the question to the jury. *Ostenberg v. Kavka*, 95 Neb. 314. This court in *Central Nat. Bank v. Ericson*, 92 Neb. 396, said:

"Reasons for this conclusion were recently stated by the supreme court of Iowa as follows: 'It is ordinarily to be expected in these cases, that the purchaser will testify to his good faith and want of notice, and that defendant is compelled to rely upon circumstantial evidence to rebut such showing. Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser is therefore a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the credibility of the

witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place, and manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase under inquiry, constitute a showing which the court cannot properly pass upon as a matter of law.' *Arnd v. Aylesworth,* 145 Ia. 185."

Plaintiff contends, however, that because defendants moved for a directed verdict at the close of the plaintiff's testimony said motion continued throughout the trial, and when the motion was made by the plaintiff at the close of the case it had the same effect as though both parties had moved for a directed verdict, and the only question to be determined here is whether the decision and judgment of the trial court are sustained by sufficient evidence. With this contention we cannot agree. Where the defendant moves for a directed verdict at the close of plaintiff's testimony and the motion is overruled, and the plaintiff and defendant continue the trial of the case, and the motion is not renewed by the defendant at the close of all the testimony, the parties are in the same position as though no motion had been made. *Wolf Co. v. Monarch Refrigerating* Co., 252 Ill. 491; *Madson v. Rutten,* 16 N. Dak. 281; *Bernheimer Bros. v. Becker,* 102 Md. 250; *Rogers v. Gladiator Gold Mining & Milling Co.,* 21 S. Dak. 412.

The trial court, therefore, erred in directing a verdict for the plaintiff, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

SAMUEL HAMMANG, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21699.

1. **Trial:** INSTRUCTIONS. A defense set forth in an answer, but not supported on the trial by evidence, should not be submitted to the jury.
2. ———: ———. An offer to confess judgment incorporated in an answer should not be referred to in the instructions.
3. **Damages.** Where live stock is injured or killed by a railroad company on its right of way by reason of its negligence, and is then taken possession of by the company and not unconditionally tendered by it to the owner, but sold, and the proceeds retained or converted to its use, the railroad company is liable for the full market value of the live stock prior to its injury.

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

Wymer Dressler, Robert D. Neely and *Paul S. Topping,* for appellant.

J. C. Cook and *John Gumb, Jr., contra.*

Heard before MORRISSEY, C.J., ALDRICH, FLANSBURG and ROSE, JJ., BROWN and ELDRED, District Judges.

BROWN, District Judge.

This is an appeal from the district court for Washington county, wherein the plaintiff recovered a judgment for $350 as damages for the alleged negligence of the defendant in killing one mule and injuring another on its right of way on April 14, 1916, which mules were the property of the plaintiff. The errors complained of by the defendant are that the trial court failed to incorporate in its second instruction, stating the issues, certain material defenses contained in its answer, and that the damages awarded are excessive.

An examination of the second instruction in connection with the defendant's answer discloses that the omissions to which the defendant takes exception relates to matter incorporated in the second subdivision of the third

paragraph of the answer and in the fourth paragraph thereof. The allegations in the third paragraph, reference to which was omitted, were that defendant had demanded that the plaintiff take the injured mule, that the plaintiff refused to do so, and that on November 24, 1916, it served a written notice on plaintiff that it would sell the mule unless he took it and relieved defendant of the care of it. The record discloses that in all of its dealings, both oral and written, with the plaintiff, the defendant denied responsibility for injury to the living mule and insisted that the plaintiff should accept the mule and relieve defendant from liability. The plaintiff offered to take the mule, but without releasing the defendant from liability for its injury. The defendant never made an unconditional tender of the mule to the plaintiff, in conformity with the allegations of its answer. The defendant not having introduced evidence to support the allegations in question, it is fundamental that it was not only proper, but its duty, for the court not to incorporate them in its instruction or submit them as a defense to the jury, and the defendant has no occasion for complaint.

The fourth paragraph of the defendant's answer consisted solely of an offer to confess judgment for a certain sum and costs in full settlement of all of the plaintiff's claims and demands. This also should not have been submitted to the jury in any form. Rev. St. 1913, sec. 7722.

The defendant does not contend that the two mules were not reasonably worth $350, the amount of the verdict. The defendant offered no evidence as to the value of the mules and the evidence introduced by the plaintiff is ample to sustain the verdict. The defendant's claim that the damages awarded are excessive, is based upon the contention that injury to live stock does not authorize the owner to refuse to accept it and to recover its full value from the railroad company, but that the owner's measure of damages is the difference between the market

value of the injured live stock before and after the injury. The defendant urges that, as the live mule after the injury and the hide of the dead mule both had some value, damages equaling the value of both mules prior to their injury must be clearly excessive. No authorities relating to the proper rule of damages in the case of negligent injury of live stock by a railroad company on its right of way have been cited by either party. However, it would seem that the principles of law applicable would be the same as in the case of damage to goods consigned to a common carrier for transportation, and both parties have presented the question on this hypothesis. Applying these principles, a sufficient answer to this contention is that the defendant never having made an unconditional tender of the live mule to the plaintiff, as has hereinbefore been noted, and the evidence disclosing that the mule that was killed, or its hide, was never tendered to the plaintiff, and the one mule having been killed and its hide and the live mule having been sold and the proceeds retained and, so far as the evidence shows, converted to its own use, the defendant is liable for the full value of the mules as for conversion. *Parsons v. United States Express Co.* 144 Ia. 745, and cases therein cited. Even if the defendant had unconditionally offered the injured mule and the hide of the dead mule or the proceeds from the sale of them to the plaintiff, and the plaintiff had wrongfully refused to accept them, still, applying the rule urged by the defendant, the damages awarded would not be excessive. Defendant in its brief contends that the injured mule and the hide were sold for their full market value. There is nothing in the record to raise any presumption to the contrary. They brought $55. Had the plaintiff accepted them before sale, his damages would, therefore, have been $55 less than the market value of the mules before their injury, and the equivalent of the $55 would have been his. As he refused to accept them and the defendant retained this sum and the jury

awarded the value of the mules before the injury to the plaintiff, the result was the same as it would have been had the plaintiff received the injured mule and the hide and sued for his damages. *Gulf, C. & S. F. R. Co. v. Pitts & Son,* 37 Tex. Civ. App. 212; *St. Louis, I. M. & S. R. Co. v. Cumbie,* 101 Ark. 172.

The record being free from error, the judgment is

AFFIRMED.

BANK OF BENSON, APPELLEE, V. GEORGE SWANSON, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21708.

1. **Petition:** CONSTRUCTION: ACTION ON OVERDRAFT. In an action to recover for an overdraft due to an error in crediting a deposit, the petition examined, and *held* not to allege that the item in question was deposited by defendant.
2. **Appeal:** DIRECTION OF VERDICT: PRESUMPTION. In a trial resulting in a directed verdict, the presumption that a court only considers competent evidence in reaching its conclusion applies.
3. ———: ———. Evidence examined, and *held* that any errors made in the admission thereof could not have prejudiced the defendant, and that the competent evidence introduced justified the direction of a verdict against defendant.

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

G. W. Shields, for appellant.

D. L. Johnston and *Ray J. Abbott, contra.*

Heard before MORRISSEY, C.J., ALDRICH, FLANSBURG and ROSE, JJ., BROWN and ELDRED, District Judges.

BROWN, District Judge.

The plaintiff bank sued the defendant in the district court for Douglas county to recover for an alleged overdraft of $222.95, and on a directed verdict recovered judgment for the full amount. The defendant has appealed,

and urges that, in the state of the pleadings, the trial court erred in admitting evidence to show that a certain deposit of $352.18 appearing in the defendant's account under date of July 22, 1918, had been credited thereto by mistake.

In its petition, after alleging its corporate capacity, and that the defendant became a depositor in its bank on August 24, 1917, the plaintiff alleges: "Thereafter on various and sundry dates he deposited with the plaintiff various sums of money to be credited to his said account down to the 19th day of August, 1918, and during said time drew numerous checks upon the plaintiff to be charged to his account; that all of the deposits made by the defendant were credited to his said account, and the checks by him drawn charged against the same, and said account thereby was overdrawn on the 7th day of November, 1918, in the sum of $222.95. A copy of which account is hereto attached and marked 'Exhibit A.'" Then follows an allegation that no part of said overdraft has been paid and a prayer for judgment. The defendant's answer to this petition "denies each and every allegation therein contained, except such as are hereinafter specifically and expressly admitted." The admissions following this general denial do not admit the correctness of the account as shown by "Exhibit A," or any specific portion of it.

The president of the plaintiff bank testified that when it was discovered that an error had been made in crediting the defendant's account on July 22, 1918, with a deposit of $352.18, a charge item was made against his account for an equal amount, which left an overdraft for the amount for which plaintiff brought suit. The defendant testified that he never drew a check on his account for the $352.18 charged to it, but he did not testify that he ever deposited with plaintiff such a sum.

The defendant contends that, "Exhibit A" being a part of the petition, the allegations thereof assert or

admit that the defendant had deposited the item of $352.18 in question. We do not so understand the language of the petition. It alleges "that all of the deposits made by the defendant were credited to his said account, and the checks by him drawn charged against the same." This falls far short of alleging that every item of deposit appearing in "Exhibit A" was made by the defendant. It simply asserts that the defendant received credit for every deposit that he actually made. But, even if the construction placed upon the petition by the defendant were correct, his answer denied all of the items, both credit and debit, in the account sued upon. This cast the burden upon the plaintiff to establish all of the items. No attempt was made on the trial by the plaintiff to prove that the defendant deposited the item of $352.18 in question, in fact most of its evidence was devoted to showing that the crediting of this item to the defendant's account was a mistake and how it occurred. As we have seen, the defendant offered no evidence to establish that he ever deposited this item. There being no evidence from any source to support the allegation that the defendant had deposited this item, even if the petition were to be construed as making such an allegation, the plaintiff's case as to it must have failed and the court have been forced to disregard it as an item to be credited to the defendant.

It is possible that the plaintiff went further than was necessary in offering evidence to prove its case and that the court erred in admitting certain of the evidence offered, but, if so, the defendant could not have been prejudiced. At the conclusion of the introduction of evidence by both parties, the court sustained plaintiff's motion for a directed verdict. There was ample competent and relevant evidence to justify the action of the court, and, under the familiar rule that a court will not be presumed to have given consideration to incompetent evidence, the admission of any such evidence

during the progress of the trial could not have prejudiced the defendant.

As no prejudicial error appears in the record and the judgment of the district court was right, it is

AFFIRMED.

CLARENCE C. PORTER V. STATE OF NEBRASKA.

FILED FEBRUARY 16, 1922. No. 22109.

1. **Rape:** IDENTIFICATION OF ACCUSED: EVIDENCE. Evidence as to the identification of the defendant examined, and *held* sufficient to sustain the verdict.
2. **Criminal Law:** ADMISSION OF EVIDENCE. The admission as rebuttal evidence of a portion of a letter written by the defendant's wife to him and found in his possession, admitted on her cross-examination to have been written by her, and not relating to any matter material to the issues in the case, *held* to be error.
3. **Rape:** CORROBORATION: INSTRUCTION. Instruction numbered 7 examined, and *held*, in view of the defendant's testimony, to be erroneous.
4. **Criminal Law:** ERROR WITHOUT PREJUDICE. An examination of the entire record disclosing that no substantial miscarriage of justice actually occurred, *held* that the judgment will not be reversed because of the errors committed. Laws 1921, ch. 157.

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

R. J. Craren, Richard S. Horton and *O. L. Jones,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Charles S. Reed, contra.*

Heard before MORRISSEY, C.J., ALDRICH, FLANSBURG and ROSE, JJ., BROWN and ELDRED, District Judges.

BROWN, District Judge.

Clarence C. Porter, alias Frank Taylor, was convicted in the district court for Douglas County on a charge

of statutory rape on a little girl 13 years old, and was sentenced to serve a term of 15 years in the penitentiary. He has prosecuted error to this court, and in his brief urges three reasons why the judgment of the district court should be reversed.

The first proposition urged is that the evidence is insufficient to identify the plaintiff in error, who will hereafter be designated herein as the defendant, as the man who committed the rape charged. The witnesses identifying the defendant consisted of the little girl who was raped and two ladies who were driving in an automobile and saw a man drive a car across in front of them to the wrong side of the street, stop, hold a conversation with a little girl, and drive off with her, on the evening, at the place, and about the time that the prosecuting witness said the defendant picked her up. The description of the manner in which this man was dressed and his appearance, as given by the two ladies, tallies substantially with the description as given by the little girl upon the stand and as given by her to two men immediately after the assault, who were also witnesses on behalf of the state. The description of the defendant's dress on the evening in question, given by himself and his witnesses, does not differ materially from that given by the witnesses of the state. The defendant and his witnesses admitted that on said evening he was driving a seven-passenger Jeffery touring car, that had divided seats in front, a dark body and light colored wheels, and that, about the hour the witnesses for the state testified to, he drove along the street and in the direction of the point where they testified they met him. The women's description of the car that they saw and the little girl's description of the one she testified she rode in corresponded with that of the car that it is admitted the defendant was driving. After the defendant was returned from Canada, whither he had fled, the two ladies and the little girl each separately, without suggestion or assistance, promptly, unhesitating-

ly and unequivocally identified the defendant among a group of seven men in a cell at the county jail. From a painstaking examination of the entire record in the case, we are satisfied that the identification of the defendant is as complete and satisfactory as could be expected under the circumstances that existed, and that the evidence is amply sufficient to sustain the jury's finding that the defendant was the man who committed the rape charged.

The defendant further urges that the trial court committed prejudicial error in admitting in evidence over his objection a portion of a letter found in his possession in Canada, which had been written to him by Adeline West, the woman with whom he was living as his wife at the time of the commission of the offense charged. Adeline West, who passed as the defendant's wife, testified on direct examination that the defendant left Omaha for his father's home in Canada. Then followed these interrogatories and answers:

"Q. Did he tell you why he was going there? A. Yes. Q. Why? A. We were not legally married—we have been living together as man and wife, and we knew there was detectives looking for us, and they asked for Adeline West and C. C. Porter. I was the one that was afraid. My divorce was to come up the 20th and I wanted my divorce. It was me that got the scare, it wasn't Clarence, and I asked him to go, and I was standing in the hotel there and a man came in and I thought he was a detective, and I thought, when he asked the clerk for Mrs. Porter, that the clerk would say, 'There she is,' and I told Clarence to go away on up to his father's until I got my divorce, and then I was to follow him up there and we were to be married right away. That is why Mr. Porter left for Canada."

On cross-examination the assistant county attorney had her identify a letter, and particularly the portion in question, which portion was read to her in the presence of the jury over the defendant's objection, as

having been written by her to the defendant as Frank Taylor, on August 7, 1920, twenty days after he had departed for Canada. On rebuttal the state offered in evidence that portion of the letter previously embodied in its cross-examination, and reading as follows:

"There is only one thing I don't want you to do, and that is get mixed up with any girl or woman for I am coming up on the first train after I sell the Jeffery and if you have been chasing around I will tell everybody why you had to leave the States."

To this offer the defendant duly objected. The objection was overruled and the portion of the letter offered admitted. We are unable to conceive upon what theory of law or rules of evidence the portion of the letter in question was admissible. Counsel for the state attempt to justify its admission on the theory that it was properly admissible for the purpose of impeaching the witness with respect to the direct testimony quoted above. The rule is, however, that even where a previous statement or writing is denied by a witness, if it is contradictory to the testimony of the witness, it can only be admitted when it relates to matters material to the issues in the case. *Tatum v. State,* 61 Neb. 229. The statement of a witness is deemed to be material if his answer "is of a nature that the cross-examining party would be allowed to give it in evidence." *Carter v. State,* 36 Neb. 481. Also, *Smith v. State,* 5 Neb. 181. In this case the witness admitted having written the letter. The letter was hearsay and could not have been introduced by the state to have established the guilt of the defendant. It was, therefore, clearly immaterial to the issues in the case and inadmissible for the purpose of impeachment.

The third contention of the defendant is that the court erred in giving instruction No. 7. This instruction, so far as material to our consideration, reads as follows: "You are instructed that where the accused has testified in the case and explicitly denies the accusa-

tion, if in your judgment you are of the opinion that the defendant in this instance has thus denied the accusation, there must be some testimony corroborating the prosecuting witness in order to warrant a conviction."

The portion to which exception is taken is the phrase, "if in your judgment you are of the opinion that the defendant in this instance has thus denied the accusation." It is true that the defendant did not, upon the witness-stand, make a categorical denial of having committed the offense charged. This fact probably led the learned trial judge inadvertently to incorporate this phrase in his instruction. The defendant had positively testified upon direct examination that he had never seen the prosecuting witness prior to her coming to the jail for the purpose of identifying him. This was tantamount to an explicit denial of the commission of the offense with which he stood charged. In the second instruction the jury were informed that the defendant had pleaded not guilty to the offense charged. No reasonable juror could have doubted that the court intended to instruct the jury in this seventh instruction that the defendant had denied his guilt of the offense charged, and that the necessity for corroboration of the prosecuting witness existed in this case.

The witnesses on behalf of the defendant consisted of himself, the woman with whom he was living as his wife, his brother-in-law, and a druggist who appears to have been a boon companion. Their evidence discloses that, at the time of the offense charged, the defendant was engaged in bootlegging, that he was living in a state of adultery with another man's wife, that on the evening in question he was drunk, and that he was absent from his companions at the time the rape was committed; and, although he testified he saw a number of persons during this time, no one of them appeared to bear witness to that fact. He fled to Canada either the second or the fourth day after the commission of the crime. The officer who brought him back testified

that on the way back the defendant told him, "I was drunk at the time," and stated, "If I did it, I don't remember anything about it," and later said, "When I heard and read about the case, I got out." As has hereinbefore been shown, the defendant and his car were positively identified, not only by the prosecuting witness, but by disinterested women whose character was in no way attacked.

After a very careful and thorough examination of the whole record, we are of the opinion that no substantial miscarriage of justice resulted from the erroneous admission of the portion of the letter written by Adeline West to the defendant, or from the inadvertent phrase incorporated in the seventh instruction, and that, by virtue of chapter 157, Laws 1921, the judgment of the district court should not, because of these errors, be set aside.

For the reasons hereinbefore set forth, the judgment of the district court is

AFFIRMED.

MICHAEL G. SHONSEY, APPELLEE, V. RAY S. CLAYTON, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21750.

1. **Contracts: TIME.** Time may be of the essence of a contract by an express provision to that effect, and, in the absence of waiver or estoppel, such provision will be enforced by the court.
2. **Judgment: TRANSCRIPT: LIEN.** A judgment creditor, by transcripting his judgment to the district court, does not obtain a lien upon real estate, which had been conveyed to a third party by the judgment debtor, by a duly recorded deed.
3. **Vendor and Purchaser: TITLE.** A title to be good or marketable must be free from reasonable doubt either in law or in fact.
4. ———: ———. It is not necessary that such a title be shown to be bad, nor is it enough even that the court may on the

whole consider it good, if there be doubt or uncertainty about it sufficient to form the basis of litigation.

5. ———: BONA FIDE PURCHASER. It is a well-settled general rule, in determining whether a purchaser had notice of outstanding equities so as to preclude him from being entitled to protection as a *bona fide* purchaser, that if there be circumstances which, in the exercise of common reason and prudence, ought to put a man upon particular inquiry, he will be presumed to have made that inquiry, and will be charged with notice of every fact which that inquiry would give him.

6. ———: CONTRACT: TIME: ELECTION. Though time is made of the essence of the contract, a default does not *ipso facto* terminate the contract, but only renders it voidable at the election of the party entitled to insist upon its performance.

7. ———: ———: BREACH: WAIVER. A purchaser who, instead of terminating the contract, acquiesces in the attempt of the vendor to perfect his title waives the right to insist upon strict performance of the contract, at least for the time reasonably necessary to complete the attempt, in contemplation of the parties.

8. **Specific Performance.** Where time is not of the essence of the contract, or where time being originally of the essence of the contract is waived, a vendor who is unable to make title at the time he should convey may have specific performance by tendering a good title at any time before decree, provided he acted in good faith and specific performance can be enforced without injustice to the vendee.

APPEAL from the district court for Merrick county: A. M. POST, JUDGE. *Reversed, with directions.*

Patterson & Patterson, Elmer E. Ross, and *W. T. Thompson,* for appellant.

H. M. Morse and *John C. Martin, contra.*

Heard before LETTON, DEAN and ALDRICH, JJ., CLEMENTS (E. P.) and DILWORTH, District Judges.

CLEMENTS, District Judge.

Plaintiff brought this action to recover the sum of $2,000, which he alleges he paid to the defendant under a contract for the purchase of certain real estate in

Merrick county, Nebraska, viz., the northeast quarter of section 30, township 15, range 4 west of the sixth P. M., and the further sum of $2,000, liquidated damages for an alleged breach of said contract. The breach alleged is that the defendant was unable to furnish a good marketable title on March 1, 1920, the day of settlement.

The defendant answered that his title was good and merchantable on said day; that the objections made to the title by the plaintiff were not valid, and that, in any event, the plaintiff, on the day of settlement, acquiesced in the defendant's proposal to cure the alleged defects, and thereby waived strict performance of the contract, as to furnishing a good title on that day; that the defendant within six days thereafter did cure such alleged defects, and was then and has ever since been ready, able and willing to perform said contract strictly in accordance with its terms, and prays for a specific performance of the contract.

The claim of the plaintiff for damages for breach of the contract seems to have been abandoned, for it is nowhere mentioned except in the allegations and prayer of plaintiff's petition. The case has apparently proceeded on the part of the plaintiff as an action for rescission and to recover back the money paid under the contract, and on the part of the defendant for specific performance of the contract.

The contract is set out in full in the pleadings, but the only provision we need to consider is the following: "The party of the first part is to furnish to the party of the second part, or assigns, a warranty deed and a good and sufficient abstract of title, showing a good title of record to the premises hereinafter described in the party of the first part on or before March 1, 1920. * * * It is mutually agreed that time is an essential element in this contract and it is further agreed that, in case either of the parties hereto shall fail to perform the stipulation of this contract or any part of the same,

the failing party shall pay to the other party to this contract the sum of $2,000 as damages for nonfulfilment of contract."

It will be seen that by express agreement of the parties, time is made an essential element of this contract, and it follows that if as contended by the plaintiff, the defendant, on March 1, 1920, could not furnish to the plaintiff a good title of record, and if the plaintiff did not, as contended by the defendant, waive this being done on that day, he was entitled to rescind and recover back his payment. "Parties to a contract for the sale of land may make time of its essence by a distinct provision to that effect in the contract." *Jewett v. Black,* 60 Neb. 173. Also, *Brown v. Ulrich,* 48 Neb. 409; *Morgan v. Bergen,* 3 Neb. 209; 39 Cyc. 1546, and cases cited under note 24; *Justice v. Button,* 89 Neb. 367.

There is no dispute as to the condition of the record title of this land on March 1, 1920, but there is a wide difference of opinion as to the legal effect of the facts shown by the record.

It is admitted that at one time this title was held by one George F. Krittenbrink, that on February 28, 1916, he conveyed the premises by warranty deed to C. W. Flesher and Jessie Flesher, and that said deed was duly filed for record and recorded in Merrick county on March 1, 1916; that on February 18, 1919, a judgment in the sum of $8,000 against said George F. Krittenbrink, and in favor of Mary F. Bergelt, was transcripted from the district court for Merrick county, and that thereafter on February 28, 1919, the defendant acquired title to the premises from C. W. and Jessie Flesher by warranty deed, which deed was duly filed for record and recorded in Merrick county March 3, 1919.

It was also admitted that on March 20, 1919, there was filed and recorded in the office of the county clerk of Merrick county an instrument purporting to be a notice of the pendency of a suit in Douglas county. This

instrument in substance says that on March 19, 1919, a suit was brought in the district court for Douglas county by Mary F. Bergelt and against George F. Krittenbrink, Caroline F. Krittenbrink, Ray S. Clayton and C. W. Flesher; that the plaintiff is the owner of the $8,000 judgment mentioned above; that the defendants, other than George F. Krittenbrink, hold in their possession and under their control property, both real and personal, of said George F. Krittenbrink for the purpose of hindering and delaying the plaintiff from collecting her said judgment, and that notice is given that Mary F. Bergelt claims that Ray S. Clayton, in whose name the northeast quarter of section 30, township 15 north, range 4 west, in Merrick county, is now held, is not the real owner thereof, but, in truth and in fact, the said Ray S. Clayton is holding said lands as the agent for George F. Krittenbrink, who is the real and true owner thereof, and prays that the defendants and each of them be required to transfer and turn all of said property to George F. Krittenbrink, and that it may be sold to satisfy said judgment and costs.

The judgment and this purported notice of *lis pendens* were both shown upon the abstract tendered to the plaintiff, and this fact constitutes the basis of the plaintiff's claim that the abstract did not show a good title of record in the defendant.

This claim, so far as it relates to the judgment, is easily disposed of. This judgment was filed in Merrick county long after the judgment debtor had transferred the land to another by warranty deed, and long after this deed had been properly recorded, and it could not affect the defendant's title or render it in any manner doubtful. It should not have appeared upon the abstract. *Whitfield v. Clark,* 97 Neb. 626.

The purported *lis pendens* presents another question. The defendant strenuously contends that the *lis pendens* shows on its face that the action in Douglas county is in the nature of a creditors' bill to set aside the title of

real property situate in Merrick county, and is not maintainable in Douglas county, and the Douglas county court having no jurisdiction, the notice of *lis pendens* is a nullity, and not subject to record, and not notice to any one.

We do not feel called upon to decide this question. It sufficiently appears that it is a question upon which legal minds may differ. The attorney who examined the abstract found and still contends that the Douglas county court had jurisdiction. The learned district judge, who tried the case below, was not satisfied that there was a want of jurisdiction. The writer personally is of the opinion that there was a want of jurisdiction, and that the record of the *lis pendens* imported no notice to one not acquainted with its contents. These conflicting opinions illustrate the wisdom of the rule that a title to be good or marketable must be free from reasonable doubt either in law or fact. 39 Cyc. 1452; 27 R. C. L. 490, sec. 208; *Turner v. McDonald*, 76 Cal. 177; *Townshend v. Goodfellow*, 40 Minn. 312; 39 Cyc. 1456, 1457, and cases there cited. We are satisfied that the claim of Mary F. Bergelt, as set out in the purported notice of *lis pendens*, raised such a doubt of the validity of the defendant's title as to render it unmarketable. We would arrive at the same conclusion if we were prepared to hold that the Douglas county court was without jurisdiction, and that the *lis pendens* was without validity and not subject to record. It was set out in the abstract and the plaintiff became fully acquainted with its contents. He acquired actual notice of the claim of Mary F. Bergelt and that she was attempting to establish this claim in Douglas county. He had every reason to expect that if she failed in Douglas county, by reason of want of jurisdiction in the court, an attempt would be made in Merrick county, and he knew that the knowledge that he had gained from the statements of the purported *lis pendens* would preclude him from defending against such an attempt as an innocent purchaser.

"It is a well-settled general rule, in determining whether a purchaser had notice of outstanding equities so as to preclude him from being entitled to protection as a *bona fide* purchaser, that if there be circumstances which, in the exercise of common reason and prudence, ought to put a man upon particular inquiry, he will be presumed to have made that inquiry, and will be charged with notice of every fact which that inquiry would give him." 27 R. C. L. 710, sec. 475. See *Galland v. Jackman,* 26 Cal. 79, 85 Am. Dec. 172; *Cooper v. Flesner,* 24 Okla. 47; *Barney v. Chamberlain,* 85 Neb. 785; *McParland v. Peters,* 87 Neb. 829. The recording acts have not abolished the equity rule as to actual and constructive notice. *Bourland v. County of Peoria,* 16 Ill. 543. We think the plaintiff was within his rights in refusing to accept the title as it was on March 1, 1920, and that his request for the cancelation of the *lis pendens* was justified by the facts.

After a careful examination of the evidence and all the surrounding circumstances in relation to the alleged waiver, we conclude that the testimony of the defendant, and his attorney, Mr. Ross, fairly outweighs that of the plaintiff and should be adopted as to the matters in dispute. The plaintiff practically concedes this, for he says in his brief: "We adopt the language of the learned judge, Honorable A. M. Post, set forth in his opinion filed in this cause in the district court for Merrick county, Nebraska." He then quotes from this opinion, and we find from its language that the learned trial judge adopted, as do we, "the version of the defendant and Mr. Ross as to matters in dispute."

The undisputed evidence and the evidence of the defendant and Mr. Ross as to matters in dispute establishes the following: The abstract in question was handed to the plaintiff about February 25, 1920, and by him turned over to his attorney for examination. This attorney wrote an opinion February 27, in which he called attention to the fact that the abstract showed the

filing of a *lis pendens* notice, and set out what this notice contained. The attorney makes the following recommendation: "In view of this *lis pendens,* I advise you not to accept the title at the present time. I can conceive of no way in which you can receive a good title to these premises at the present time, due to this condition." This opinion was not called to the attention of the defendant until the parties met at the office of Mr. Ross on March 1, 1920, for the purpose of closing up the deal, and no intimation was given the defendant until that time that the title was not acceptable to the plaintiff. On March 1, 1920, about 10:30 a. m., the parties met in the office of Mr. Ross, in Central City, for the purpose of closing up the deal. At this time the abstract and opinion of title were handed to the defendant, and by him turned over to Mr. Ross, his attorney, who examined the opinion and remarked that the only objection of consequence seemed to be the record of the *lis pendens.* The defendant then asked Mr. Ross to explain to the plaintiff about the *lis pendens.* Mr. Ross did this, stating what was set out in the *lis pendens* as to the Bergelt claim, and saying that the claim was untrue and that "we have checks to show we paid for it." Mr. Ross also told the plaintiff that he was satisfied that he could get Mr. Van Dorn (Mary F. Bergelt's attorney) to discharge this record. To this the plaintiff answered: "All I want is a clear title." Mr. Ross then said: "You are entitled to that, and we are willing to go any length to get it for you. We are willing to protect you in any way. Mr. Clayton will give you any kind of security you want that you will never have any trouble with this judgment, or rather with this litigation that is pending, and that the judgment will never become a lien against the property." To this the plaintiff answered: "What I want is to have the title clear before I make final settlement for the land." Mr. Ross then said: "I will call up Mr. Van-Dorn, if you say so, and find out if he will agree to release this *lis pendens* and discharge that action in the

district court for Douglas county, Nebraska, and if he will agree to do that you can depend on it, because I believe Mr. VanDorn is a man of his word, and we will know then what we can expect." To this the plaintiff replied: "That is all right." Mr. Ross, then, in the presence of the plaintiff, put in a telephone call for Mr. VanDorn. The parties waited in the office for some time, and, the call not then being answered, left the office together. Some time thereafter the plaintiff returned to Mr. Ross' office and asked if the call had been answered, and being told, "not yet," he again went away and apparently returned to his home at Clarks, Nebraska, for about 7 o'clock that evening the plaintiff called Mr. Ross over the telephone from Clarks and asked him if he had heard anything from Omaha. Mr. Ross said: "Yes; I got in touch with Mr. VanDorn late this afternoon; Mr. VanDorn is busy in court, and I told him what we wanted, and Mr. VanDorn said he would give us anything we wanted; he would do anything we asked him to do to fix up the title; that I had asked him to send out a discharge of the *lis pendens* and dismissal, secure the dismissal of the action of Bergelt against Krittenbrink, Clayton and others then pending in the district court for Douglas county, and send them out to me; that he said he would, and that he would try to get in touch with Mrs. Bergelt and get her to sign the papers personally; he said he was prepared to do that, and I says, I can absolutely depend on what Mr. VanDorn says, and these papers will be out here in a short time; he is busy in court and you can expect a little delay. That is the substance of the conversation I had." To this the plaintiff replied, "Have you talked to Jack (his attorney)? Did you tell Jack?" Mr. Ross answered, "No." Mr. Ross testified that to the best of his recollection the plaintiff then answered, "I will tell him." No further negotiations were had between the parties, but Mr. VanDorn did dismiss the Douglas county action and authorize a release of the *lis pendens* notice. The action was dismissed on

March 4, and the *lis pendens* canceled March 6, and these proceedings were made of record in Merrick county and duly shown on the abstract March 6, 1920.

The learned trial judge found that this state of facts did not constitute a waiver by the plaintiff of the provision in the contract that an abstract showing good record title should be furnished on March 1, 1920. We think in this he erred. A careful examination of the authorities convinces us that the following general rules may be deduced from them. Though time is made of the essence of the contract, a default does not *ipso facto* terminate the contract, but only renders it voidable at the election of the party entitled to insist upon its performance. 27 R. C. L., 452, sec. 166; 39 Cyc. 1345, and cases there cited; *Caldwell v. Smith,* 83 Neb. 567. A purchaser who instead of terminating the contract acquiesces in the attempt of the vendor to perfect his title waives the right to insist upon strict performance of the contract, at least for the time reasonably necessary to complete the attempt, in contemplation of the parties. 39 Cyc. 1535; *Garrison v. Newton,* 96 Wash. 284, 4 A. L. R. 804; *Hawes v. Swanzey,* 123 Ia. 51; *Bales v. Williamson,* 128 Ia. 127; *Stevenson v. Polk,* 71 Ia. 278. In view of these rules and the authorities generally, the conclusion is irresistible that, by acquiescing in the attempt of the defendant to perfect his title and by failing until after the attempt had proved successful to give notice of an intention to rescind, the plaintiff waived strict performance of the provision of the contract to tender on the day of settlement an abstract showing good title of record, and disabled himself from rescinding. It has not been shown that any injury or damage resulted to the plaintiff from the five days' delay in perfecting the title. Defendant at that time was ready, able and willing to perform the provisions of the contract. He brought the deed and abstract into court, and we think his cross-petition asking for specific performance should have been sus-

tained and an order for specific performance entered.

This court has adopted the general rule: "Where time is not of the essence of the contract, a vendor who is unable to make title at the time he should convey may have specific performance by tendering a good title at any time before decree, provided he has acted in good faith and specific performance can be enforced without injustice to the vendee." *Seaver v. Hall,* 50 Neb. 878. See *King v. Gsantner,* 23 Neb. 795. This rule is equally applicable to cases where time was originally of the essence of the contract but has been waived.

It appears from the contract that there were two mortgages upon the premises, which the plaintiff agreed to assume, but upon which the defendant was to pay all interest to March 1, 1920. It also appears that the plaintiff was to have possession on March 1, 1920. Upon a decree of specific performance the plaintiff would be entitled to the rents and profits of the land from March 1, 1920, less any interest on the mortgages and taxes paid by the defendant after that time, which he was not to pay under the terms of the contract. We are unable to adjust these equities, and therefore order that the decree of the district court be vacated and the cause remanded, with directions to permit the plaintiff to file a supplemental bill for an account of the rents and profits to be credited on the payment to be made by him, and to enter a decree accordingly for specific performance on the part of both the plaintiff and the defendant.

REVERSED.

C. W. HULL COMPANY, APPELLANT, V. CHARLES A. WESTERFIELD ET AL., APPELLEES.

FILED FEBRUARY 16, 1922. No. 21751.

1. **Contracts:** SUFFICIENCY. A contract by one party "to sell and ship" to another party, who agrees "to buy and receive," certain

Illinois coal, which specifies in general terms all the requirements or fixes approximately the number of car-loads of coal, the prices and dates of shipments, is not void for indefiniteness or ambiguity, provided such requirements can be reasonably estimated.

2. ———: ———. A contract for the sale of coal, which gives the buyer the option of having the shipments made either from the Shiloh mine or from the Trenton mine, is not void for lack of mutuality, as the seller has agreed to sell and ship and the buyer has agreed to buy and receive his requirements for the season from either mine.

3. ———: ———. A contract of sale which contains the provision that the buyer "is at liberty to buy other Illinois coal of similar quality, if able to do so at lower prices than those provided in this contract," is not unilateral, but is in the nature of a guaranty by the seller that the prices shall not go below those stated in the contract. The contingency depends, not on the will of the buyer, but on the decline of the market, which is beyond his control; this is an inducement for the buyer to make a seasonal contract and will be enforced.

4. ———: CONSTRUCTION BY PARTIES. The interpretation or construction given contracts by the parties to them, while engaged in their performance before any controversy has arisen, is one of the best indications of their true intent and meaning, and the courts should ordinarily enforce such construction. *Cady v. Travelers Ins. Co.*, 93 Neb. 634.

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

Brogan, Ellick & Raymond and *Harvey M. Johnson*, for appellant.

B. N. Robertson, Stewart, Perry & Stewart and *L. R. Sloecker, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., BUTTON and COLBY, District Judges.

COLBY, District Judge.

This was an action brought by appellant in the district court for Douglas county, in equity, to enjoin eight of the appellees, who were retail coal dealers, from prosecuting certain actions at law brought by each of them to re-

cover for the alleged breach by appellant of contracts for the sale and delivery of Illinois coal during the season of 1916-1917. A temporary injunction was granted. The defendants filed separate answers and cross-petitions, setting up their alleged contracts and damages for breach thereof. One Robert Bates, the ninth appellee, intervened for the same purpose.

The equitable grounds alleged by appellant were that appellant was unable to fully perform its contracts with said appellees by reason of transportation disturbances, and that a court of equity should determine the extent to which, under the circumstances, it should have furnished the coal under its contracts with its various customers. The district court entered judgment in favor of each of the defendants and of said Robert Bates, the intervener. The trial court found generally against appellant and in favor of the eight cross-petitioners and the intervener, Robert Bates. From said findings and judgments the plaintiff appeals to this court.

It appears that the only question for this court to consider is the correctness of the findings and judgments of the lower court in favor of said defendants and intervener.

Each of said nine appellees sets forth in their several cross-petitions the execution of a contract to sell and ship on the part of the C. W. Hull Company, and to buy and receive on the part of the several appellees, certain quantities of Illinois coal during the period thereinafter stated, each contract being substantially in the same form and containing the following essential provisions, omitting the names of the purchasers, the quantity of coal agreed to be sold and purchased, and the time of shipment:

"C. W. Hull Company of Omaha, Nebraska, agrees to sell and ship and——agrees to buy and receive:

"Quantity:—entire requirements of Illinois coal (except Franklin county coal) during the period hereinafter stated, the understanding being that he or they, is

or are, at liberty to buy other Illinois coal of similar quality, if able to do so at lower prices than those specified in this contract. (A description of the kind and prices of coal follows.)

"Shipments: As required upon reasonable notice.

"Time: From April—1916, to April 1, 1917."

Then follows a schedule of different grades and qualities of coal at different prices, at different dates. In some of the contracts special conditions, not affecting the questions herein, are written in as follows: "Neither of the parties hereto shall be liable for failure to carry out the provisions of this contract, if prevented by fire, strikes, contingencies of transportation or other causes beyond their control." In the blank space of the several contracts, after the word "quality" and before the words "entire requirements," each appellee had his contract filled out for the amount of coal required, respectively, as follows:

"C. A. Heck—approximately 20 cars."

"Smith Brothers—approximately 20 cars."

"Robert Bates—30 cars."

"George Van Buskirk—10 car-loads."

"Havelock Lumber & Coal Company—approximately 10 cars."

"Daykin Lumber Company—all of their."

"Farmers Elevator Company of Bagley, Iowa—8 to 10 cars."

"Farmers Elevator Company of Scranton, Iowa—10 to 15 cars."

"Charles A. Westerfield—two-thirds of."

The first contention of appellant is that the contract is invalid because the quantity which the company agrees to sell and ship and appellees agree to buy and receive is indefinite, and can be made definite only by the action of the buyers in so far as the contracts provide for furnishing to the appellees their entire requirements without definitely fixing the amount. It appears that the ad-

judicated cases are numerous in sustaining and enforcing contracts like those involved in this case.

In the actions of appellees Heck, Smith Brothers, Bates, Van Buskirk, Havelock Lumber & Coal Company, Farmers Elevator Company of Bagley, Iowa, and the Farmers Elevator Company of Scranton, Iowa, the number of cars is specially mentioned, four of them definitely fixed and in the others approximately in the contracts set out in the respective petitions. In the case of Daykin Lumber Company, the appellant was to sell and ship and the appellee to buy all of its requirements of Illinois coal, and in the case of Charles A. Westerfield two-thirds of his requirements of Illinois coal. The language appears to be sufficiently definite and the language used is not ambiguous or reasonably capable of two interpretations. The appellees were retail coal dealers and the arrangement was to purchase their season's supply of Illinois coal at definite prices, to be shipped upon reasonable notice, within certain limited time. The adjudicated cases are quite uniform in sustaining contracts of this character, and the reasoning in the deciding cases is enlightening and worthy of consideration.

In *Scott v. Stevenson Co.,* 130 Minn. 151, 160, the court, in discussing a contract where a retail merchant purchased his requirements of a certain kind of coats, used this language: "If the buyer has an established business whose requirements may be estimated approximately, the contract is not void either for uncertainty or want of mutuality, but is valid and may be enforced to the extent of the ordinary requirements of such business when carried on and conducted in the manner contemplated by the parties at the time of making such contract."

In the case of *Coal Blast Transportation Co. v. Kansas City Bolt & Nut Co.,* 114 Fed. 77, Judge Sanborn, in the opinion, said: "An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding and may be

enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer."

Appellant in its contract agreed "to sell and ship" and the purchaser agreed "to buy and receive" in case of appellee Daykin Lumber Company, its entire requirement, and of appellee Westerfield "two-thirds of" his entire requirement. This is much more definite, certain and fixed than in the cases cited.

The second contention on behalf of appellant is that, even where the number of cars is definitely stated in the contract, yet such contract provides that such shipment shall be made from either or both mines, Shiloh or Trenton, at the option of the purchaser, and that until this option is exercised there is no mutuality and a shipment can never be made, and that this feature makes such contract void and unenforceable.

It does not appear to us that this objection to the contract should be given any considerable weight. Because an option is given to the purchaser to purchase a certain kind of coal to be shipped from one mine or a certain kind of coal to be shipped from another mine, when the seller has agreed to ship and sell and the buyer has agreed to receive and buy his requirements or a certain amount of either kind, there does not seem to be any lack of mutuality. These are simply incidents of minor matters like the option to have the goods come over a particular line of railroad, and do not include any of the essentials of a lack of mutuality. The well-considered adjudicated cases from the courts of last resort seem to emphasize the fact that agreements of this character are binding and valid, are mutual, and not unilateral. They are not uncommon between manufacturer and wholesaler or between wholesaler and retailer.

In *Lima Locomotive & Machine Co. v. National Steel Castings Co.*, 155 Fed. 77, the United States circuit court of appeals upheld a contract of similar character.

The third contention of appellant is that each of these contracts is void because of a provision contained that the appellee "is at liberty to buy other Illinois coal of similar quality, if able to do so at lower prices than those provided in this contract." This provision of the contract is plainly in the nature of a guaranty by appellant that the prices of coal shall not go below those mentioned in the contract, and that, if they do, then the buyer is at liberty, unless the seller reduces his prices, to purchase elsewhere at the reduced prices. A large majority of the adjudicated cases hold that this provision does not make a contract unilateral or destroy its mutuality.

In 23 R. C. L. 1270, sec. 86, it is said: "But a provision authorizing one party to cancel the contract on the happening of a certain contingency not dependent purely on the will of such party will not have the effect of rendering the contract invalid for want of mutuality. * * * A provision authorizing the buyer to cancel the contract in case of a decline in the market price of the articles purchased and a refusal of the seller to meet such price does not affect the mutuality of the contract."

The contingency provided for does not depend on the will of the purchaser, but on the contingencies of the market. In *Semon Bache & Co. v. Coppes, Zook & Mutschler Co.*, 35 Ind. App. 351, where a contract contained a provision in substance that the prices of goods sold were guaranteed against decline, and in the event of receiving lower quotations the seller should have the privilege of meeting the same, or else that such contract could be canceled, the court held that the privilege of cancelation was not dependent on the buyer's wish, but on a decline of prices evidenced by the receipt of lower quotations and an election not to meet the decline, and the court, in rendering its opinion, say: "The privilege of cancelation by the appellant of portions of an order and the balance or unexecuted part of the contract was made dependent, not upon the mere wish of the appellant, but upon a further decline of prices, and the election of

the appellant not to meet the decline. Before the appellant could be thus released from further performance, it would be necessary that the appellant should have received lower quotations, a contingency which does not appear to have arisen, the prices having in fact advanced."

Also, in the case of the *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, a coal contract permitting the purchaser to cancel the contract in case it could buy at a lower price was held valid and binding.

This provision in the contracts under consideration in the instant case was simply a stipulation which was incorporated in the contract by appellant to induce appellees to enter into a seasonal contract, and assured them that if coal prices fell appellant would either meet such prices or appellees could buy elsewhere at lower prices. It is a very common agreement made between wholesalers and retailers, and, unless buyers could be protected in this manner, very few term contracts would be made and the retailer would be left to purchase from time to time according to his immediate needs.

In *Maccalum Printing Co. v. Graphite Compendius Co.*, 150 Mo. App. 383, a contract similar to the one in the case at bar was held by the court to be mutual and not to avoid the contract. A portion of the syllabus is as follows: "A contract employing a printer to print an advertising catalogue, which stipulates that, if the price of the printer be no higher than other responsible firms on 'succeeding issues' of the publication, the advertiser will give the work of publishing the 'succeeding issues' to the printer, * * * held to give the printer the right to be awarded the printing of two or more succeeding issues, where his bids for the work are as low as those of other responsible firms."

In *In re Wacker Co.*, 244 Fed. 483, a contract made between a canner of tomatoes and the purchaser contained the following clause: "Prices guaranteed against decline of the following reliable packs of stand-

ard tomatoes to date of shipment." And it was contended that this provision of the contract was uncertain, lacked mutuality, and was unenforceable and void. The court in its opinion say: "In many lines it is necessary, or at all events highly expedient, to contract for goods months before they are to be delivered. Under such circumstances the seller frequently guarantees to protect the buyer against a decline in the price of some leading producer or producers. Many millions of dollars of business are annually done under contracts containing such guarantees. There is nothing immoral in them nor are they contrary to public policy. Business men have use for them, and the courts should sustain them if legally possible."

The authorities cited by appellant regarding indefiniteness of the contract, the exercise of options, or the guaranty of prices, do not apply to the plain, understandable and definite provisions contained in the contracts under consideration. As we have seen, the contracts between the appellant seller and appellee buyers have all the legal requirements of definiteness, mutual consideration and binding obligation. They require the seller to sell and ship and the buyers to buy and receive a reasonably definite quantity of coal of a named kind, within a certain fixed time, and at a certain fixed price, and the seller, in effect, guarantees that the market will not decline, as an inducement for the buyer to make a seasonal contract. The appellees in this case agreed to purchase their requirements of Illinois coal from appellant, specifying particularly what those requirements were, giving the prices and times of delivery and shipment, and this was subject only to the conditional inducement made by the appellant that they might buy Illinois coal elsewhere during the term of the contract, if the same could be obtained at lower prices. This condition, as shown by the record, never arose, but on the contrary the prices of coal were higher, and this rise in prices, rather than the excuses

pleaded and not sustained by the evidence, would seem to be the real cause of the failure of appellant to comply with the terms of the several contracts on its part, and of its earnest contention that such contracts are too indefinite, lack mutuality, and contain conditions which are not enforceable.

The objections to the findings and judgments of the lower court urged in the argument and extensive brief of the appellant do not impress this court as being sufficient under the established principles of law for a reversal of the lower court, and a careful examination of the bill of exceptions and the whole record does not increase the weight of such objections or the cogency of the argument. The record in this case unquestionably shows that appellant never doubted the legality or suggested the illegality of the contracts or questioned appellant's liability to furnish the coal required thereunder to said appellees prior to the beginning of this litigation. Appellant's excuse for failure to deliver was always that it could not get the coal from the mines, due to car shortage. Both over the telephone and by letter appellant admitted that appellees were entitled to the coal called for in their contracts and that appellant would deliver the coal as soon as it could. In a letter to Smith Brothers, appellant says: "We admit that you are entitled to all the coal your contract calls for, and if there is any possible chance to get it we will deliver the coal." There is no question or doubt but that appellant by its acts and admissions during the term of the contract recognized the same as a valid, definite, understandable and mutually binding obligation. This was a practical interpretation of the contract by an interested party at a time when no litigation was pending and, under the law, should be considered binding on such party.

This court in *Cady v. Travelers Ins. Co.*, 93 Neb. 634, say: "The practical interpretation given their contracts by the parties to them while they are engaged in their

performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and the courts will ordinarily enforce such construction." To the same effect is *Fullerton v. United States Casualty Co.*, 184 Ia. 219, and *Daily v. Minnick*, 117 Ia. 563. The general rule of law is that, where a party, before trouble has begun, gives a reason for his decision and conduct touching anything in controversy, he is estopped after litigation has commenced from changing his ground and putting his conduct on another and different consideration.

In answer to the Daykin Lumber Company, under date of October 10, 1916, the appellant says: "You are undoubtedly aware cars are very scarce, but our people are doing everything they possibly can to fill our orders without delay. Your order is at the head of the list and will no doubt be shipped within a short time."

To the Havelock Lumber & Coal Company appellant wrote: "We have a great many orders on our books from dealers with whom we have contracts and we are determined to take care of this business before further orders are taken, regardless of the fact that there is an unprecedented demand at premium prices."

To C. A. Heck, under date of January 6, 1917, appellant wrote: "There will undoubtedly be some of this coal that we can divert to you and if you will let us know by return mail how many cars you can use between now and March 1st, we will endeavor to see that you get what is due on your contract."

In *Powers v. Bohuslav*, 84 Neb. 179, this court uses the following language: "It is a well-established principle of law that, where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot after litigation has begun change his ground and put his conduct upon another and different consideration. He is not permitted thus to mend his hold."

See, likewise, *First State Bank v. Stephens Bros.*, 74

Neb. 616; *Ballou v. Sherwood*, 32 Neb. 666; *Frenzer v. Dufrene*, 58 Neb. 432; *State v. Board of County Commissioners*, 60 Neb. 566; 21 C. J. 1222, sec. 226, and cases cited.

In an examination of appellant's original petition we find the following language: "The plaintiff alleges that it has, in that manner, complied with each and all its contracts with the said defendants in so far as it was able to do within the terms of its said written contracts." It thus appears that appellant, in addition to the admissions made before suit was begun, in its petition in this case admits these contracts and their validity, and pleads a substantial compliance therewith. Surely appellant should not now be allowed to defeat the rights of appellees on the ground that such contracts are void, invalid and unenforceable.

From the foregoing consideration of the law applicable to this case and the facts contained in the record, this court finds every reason for sustaining, and no reasonable ground for reversing, the proceedings of the trial court.

The several findings and judgments of the district court in favor of the respective appellees should be and hereby are

AFFIRMED.

DAN C. ARENDT, APPELLEE, V. NORTH AMERICAN LIFE INSURANCE COMPANY, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21773.

1. **Judgment:** JUDGMENT ON PLEADINGS. It is the duty of the court to render a judgment in favor of a party where from the pleadings such party is entitled thereto, although a verdict of the jury may have found in favor of the other party.
2. **Insurance:** CONTRACT: EXCEPTIONS. Where a policy of life insurance insured a person against death occurring in any part of the world and in any occupation or from any cause, except military or naval service in time of war, the company issuing

the same is liable, even though the insured, at his death, was in the military service in time of war, if his death was not incident to or caused by such military service.

3. ———: ———: ———. Where a life insurance policy provided that it shall be incontestable after one year, except for military or naval service in time of war, which service requires the written consent of the president of the insurance company and the payment of an extra premium not exceeding 3 per cent. of the face of the policy, but does not definitely fix such increased premium, and that without such consent the amount payable thereunder should be such a sum as the premiums paid would have purchased on the basis of such increased premiums, and the insured entered the military service without obtaining the consent required, such provision for reducing the amount of liability is void for uncertainty in not fixing the amount of extra premium.

4. ———: NOTICE. Where an insurance policy containing the above provision was issued, and the insured entered the military service in time of war without obtaining the consent required and no extra premium was fixed, but an agent of the company issuing the policy solicited and secured a change of the policy to term insurance and secured a premium on the basis of such change, with knowledge that the insured was engaged in military service in time of war, and the company made the change of policy and received the premium therefor, then the knowledge of the agent would be the knowledge of and binding upon the company.

5. **Principal and Agent:** NOTICE. Notice to the agent is notice to the principal, where such notice is received by the agent while acting within the scope of his authority.

6. **Insurance:** CONTRACT: CONSTRUCTION. Where the language of the policy of insurance is doubtful, or clauses therein are in seeming conflict, it is to be construed most strongly against the insurer, because such company has chosen the language of the policy.

7. ———: ———: INCREASED PREMIUMS: WAIVER. Where the insurance company does not fix the amount of increased premiums that are provided for in the policy, on account of military service, or make demand therefor or give the insured any notice of its intention to claim the same, but receives the amount of premiums fixed in the policy as payment in full, the company will be deemed to have waived all right to such increase, and the

policy, in case of death of insured, will not be reduced or forfeited in any amount.

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

W. W. Young and *Good & Good,* for appellant.

C. C. Flansburg, contra.

Heard before MORRISSEY, C.J., ROSE and ALDRICH, JJ., BUTTON and COLBY, District Judges.

COLBY, District Judge.

Dan C. Arendt, appellee, brought suit in the district court for Lancaster county against the North American Life Insurance Company, appellant, on a policy of life insurance.

The petition recites, in substance, that the defendant is a Nebraska life insurance company, formerly doing business as the German-American Life Insurance Company, and that on April 6, 1917, it issued its policy to one W. Cornell Arendt in the sum of $2,500, naming Dan C. Arendt, a brother of said insured, and appellee herein, as beneficiary; that in June, 1917, defendant amended its articles of incorporation by changing its name to North American Life Insurance Company; that, while said policy was in force, the insured, who was subject to military service under the selective draft act of the congress of the United States, was called on December 11, 1917, by the United States into military service, assigned to the branch of coast artillery, ordered into training at Fort Logan, Colorado, and remained there in training until September 16, 1918, when he was transferred to Camp Mills, Garden City, Long Island, U. S. A., preparatory to being sent overseas; that while said policy was in full force, and while the said insured was still in training at Camp Mills, he contracted pneumonia, from which he sickened and died on or about September 29, 1918; that up to the time of the death of said insured all premiums due on said policy had been paid and all

the conditions of said policy on the part of the insured had been duly performed.

The petition further alleges that on March 30, 1918, one C. E. Lowry, general agent of and in the employ of the defendant company, was informed by the father of plaintiff that the insured was in a training camp, as hereinbefore set forth, and he declined to pay the renewal premium, as requested by said agent, and that said agent then stated that the premium could be reduced by changing the form of the policy to term insurance, and that said policy, for its full face value, would continue in force on the payment of such reduced premium; and in reliance upon said statement the father of plaintiff, in order to continue the policy in force, paid the premium to said agent and delivered the policy of insurance to him, who, in turn, forwarded it and said premium to defendant, and that on April 3, 1918, defendant indorsed on said policy, "Policy changed to term insurance," which indorsement was signed by G. L. E. Klingbeil, president, and D. D. Hall, secretary, of said company, and was written under a general heading which provided, "No change of plan of policy will be recognized until indorsed on this policy by the company at the home office, and the signature of the president and secretary affixed to such indorsement;" that after such indorsement defendant returned said policy, together with a receipt for said premium paid.

The plaintiff's petition further states the facts required in an ordinary cause of action on the policy, and sets out the policy with certain other facts relied upon to show a waiver of the benefit of the war clause and military service contained in said policy. It is also alleged that $850 was paid to plaintiff on account of the policy, and prays judgment for $1,650, alleged to be the balance due on such policy, with interest, attorney's fees and costs.

The defendant company for answer to plaintiff's petition denies each and every allegation therein con-

tained, excepting such admissions as are admitted in the answer. The defendant admitted its incorporation, business, the issuance of a certain policy of insurance on the life of W. Cornell Arendt, payable to plaintiff, alleged that one George Arendt, father of insured, without authority and as a volunteer, converted said policy from the "twenty pay life plan" to the "term insurance plan," and paid the second annual premium, amounting to $32.73, but alleged it was unable to state whether the policy attached was a correct copy or not.

Paragraph 4 of the answer alleged that the policy did not insure the life of W. Cornell Arendt against military or naval service in time of war, which risk was especially excluded by a provision in said policy printed in bold type at the top of the third page as follows: "This policy insures the life of the insured against death occurring in any part of the world and in any occupation, or from any cause, except military or naval service in time of war, aerial ascensions, aviation, professsional automobile racing and suicide or self-destruction as provided by subdivisions 3, 7 and 8, of section 1, on page 2 of this policy."

The subdivision 3, set out in said answer, is as follows: "This policy shall be incontestable after one year from date of issue except for nonpayment of premiums, or for military or naval service in time of war, during the premium-paying period, which military or naval service requires the written consent of the president and the payment of an extra premium, not to exceed 3 per cent. of the face of the policy; otherwise, without such consent, the amount payable thereunder shall be such a sum as the premiums paid would have purchased on the basis of the increased premiums, which sum shall not be less than the full reserve for the policy. This policy and the application therefor, a copy of which is hereto attached, constitute the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not

warranties, and no such statements shall avoid this policy, or be used in the defense of a claim hereunder, unless contained in the written application and unless a copy of such application be indorsed upon or attached to the policy when issued."

The answer further alleges that on August 10, 1916, about eight months prior to the issuance of the policy, the board of directors of defendant company formally fixed the extra premium, required to be paid by the insured in addition to the regular premium, for military and naval service in time of war at 3 per cent. of the face of the policy, which sum was required to be paid in advance at the time of the application for engaging in such service, and that upon the condition that the written consent of the president of the defendant company first be obtained; that the insured never made application to the defendant company or any of its officers for permission to engage in the military or naval service, never obtained the consent of the president or paid any extra premium required, but when the second premium became due it was converted into term insurance.

The answer further alleges that in December, 1917, W. Cornell Arendt enlisted in time of war in the military service of the United States, and on December 11th of that year was ordered into training at Fort Logan, Colorado, and about 15 days previous to his death was ordered to New York for the purpose of going overseas for service in a combat division, and that while there, in the military service in time of war, about September 29, 1918, he died, and that after proofs were made defendant paid plaintiff the sum of $850 on April 28, 1918.

It was also alleged in the answer that said C. E. Lowry was only a special agent of defendant company at the time of the payment to him of the second annual premium and of the change to term insurance, and that his chief duties were soliciting applications and assisting agents in the field to write business and procuring new agents;

that he was not the renewal agent of the defendant company, and that the payment to him of said premium was not binding upon the defendant company; that plaintiff, Dan C. Arendt, was a special agent of defendant company and solicited the application of W. Cornell Arendt, the insured, and that as such agent he was familiar with all the conditions and provisions of said policy, and a counterclaim was made against plaintiff for $74.32 as a balance alleged to be due defendant company on account.

The plaintiff's reply to the answer and cross-petition denied every allegation of new matter therein contained.

The case was tried to a jury, which returned a general verdict in favor of defendant on plaintiff's claim and against defendant on its counterclaim. Judgment was reserved by the court, and on plaintiff's motion the court gave judgment for the plaintiff, *non obstante veredicto,* for the sum of $1,789, and costs of the action, including $350 as fees for plaintiff's attorneys. Defendant company filed a motion for a new trial, which was overruled, and this court is asked to set aside the judgment of the lower court for errors assigned.

The first proposition of law to be considered by this court is under what conditions can a judgment *"non obstante veredicto"* be rendered.

Section 8008, Rev. St. 1913, provides: "Where, upon the statement in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." This provision of the statute requires a careful examination of the pleadings, which must show from statements therein that one party is entitled by law to judgment in his favor, even though a verdict has been found by a jury against such party. The petition, answer and reply will be considered by the court, and the judgment, if allowed to stand, must be based upon and warranted by the allegations in such pleadings. It is necessary that the defendant's answer be

carefully read in connection with plaintiff's petition and reply, and a judgment is only authorized where the statements in these pleadings, under the law, disclose such right.

What were the real issues raised and what are the allegations of material facts contained in the pleadings upon which judgment must be based? Can the following questions be answered from the pleadings? Was W. Cornell Arendt, the insured, in the military service in time of war on the occasion of his death, within the meaning of the policy? No rate having been fixed after the issuance of the policy of insurance and no notice having been given the insured of the act of the board of directors eight months previous to the issuance of his policy fixing a rate of 3 per cent. additional for military service, was subdivision 3 of the policy affected thereby? As the policy provides that the sole contract between the parties is contained in the application and policy, is the language of subdivision 3 regarding military service, as written, so indefinite as to be void? Was the death of the insured caused by or the result of any military service in time of war? These statements must have been considered some of the facts at issue upon which the cause, under the court's instructions, was tried to the jury and a verdict rendered for the defendant. However, the main question before this court, involving some minor questions, is whether the district court should have rendered judgment for defendant company on the verdict, instead of entering judgment in favor of plaintiff on the pleadings notwithstanding such verdict.

It appears from an examination of the pleadings that W. Cornell Arendt, the insured, was in the military service in time of war within the meaning of the policy. It further appears that no notice was given to the insured personally of the act of the board of directors of defendant company, which took place eight months previous to the issuance of his policy, fixing a rate of 3 per cent. upon the face of the policy as additional

premium, and that the insured made no application for an extension of his insurance policy to cover military service in time of war; that the policy provided that the entire contract was contained in the application and policy, and that there was no demand made upon the insured for any increased premiums by reason of military service; and it further appears from the pleadings that the death of the insured was caused from pneumonia, and was not caused by or from any military service in time of war.

Do the pleadings show, when all the statements of fact contained therein are considered together, that the plaintiff is entitled to a recovery of the amount remaining unpaid on the insurance policy? The policy and application are set out in the petition. These, as has been stated, constitute the entire contract and there is no general denial that such was the policy issued by the defendant company. The allegation in defendant's answer that the defendant is unable to state whether the copy of the policy and the copy of the receipt are true copies of the originals is not such a denial. The petition pleads a change of the policy from a "twenty pay plan" to a "term insurance plan," and the indorsement thereof by defendant, signed by the proper officers; and the answer, in substance, while it alleges lack of authority in the agent, does not make a complete denial of the indorsement, but pleads its own construction of the clause relating to military or naval service in time of war.

It does not appear, and in fact it is not contended, that the policy became void by reason of the entrance of insured into the military service in time of war, but it merely provides that such service requires the consent of the president and the payment of an extra premium not to exceed 3 per cent. of the face of the policy. There is nothing in the policy or in the application fixing the amount of extra premium or requiring the insured to pay any certain additional amount. It may have been no amount, so far as the contract recites, but it

could not exceed 3 per cent. of the face of the policy. It would seem but fair and businesslike that, if the defendant company had insisted upon the collection of an additional premium, it should have fixed the same and given the insured or his beneficiary the option of continuing the policy in force, or having the same canceled. There is nothing to show in the undisputed statements contained in the pleadings that the insured had any personal knowledge or notice that the defendant company had fixed the amount of such increased premium or that it ever made any demand upon him whatever, and it can be fairly assumed that he had no such knowledge or notice.

The first and most important material fact to be considered is that regarding the cause of the insured's death and its bearing upon the liability contained in the defendant's contract with the insured.

The policy of insurance involved in this case is materially different regarding military service from those contained in some of the decisions cited by appellant, as a brief examination will show. The controlling clause in the policy in this case is that the defendant company insures "against death from any cause, except military or naval service in time of war." The question is not whether insured entered the military service in time of war, but whether his death was caused by, arose out of, or resulted from, such service. The authorities cited on behalf of appellant, as well as appellee, clearly make this distinction, and they will be considered and quoted at rather an unusual length for the purpose of clarifying this opinion.

In *Benham v. American Central Life Ins. Co.*, 140 Ark. 612, the policy exempted from death "while engaged in military or naval service in time of war, or in consequence of such service." The insured died of pneumonia while in camp, and the Arkansas supreme court, in construing this provision of the policy, used the following language:

"The words in the restricted clause now under consideration mean something more than death to the insured during the period of time he was in military service of the United States. The word 'engaged' denotes action. It means to take part in. To illustrate, a servant injured while in the operation of a train means that he must be injured while assisting or taking part in the operation of the train. An officer engaged in the discharge of the duties of his office is one performing the duties of his office. So here the words 'death while engaged in military service in time of war' mean death while doing, performing, or taking part in some military service in time of war; in other words, it must be death caused by performing some duty in the military service. That is to say, in order to exempt the company from liability, the death must have been caused while the insured was doing something connected with the military service, in contradistinction to death while in the service due to causes entirely or wholly unconnected with such service. This construction, we think, would be according to the natural and ordinary meaning of the words. By the use of the word 'engaged' it must have been intended that some activity in the service should have caused the death, in contradistinction to merely a period of time while the insured was in the service. This view is strengthened when we consider the words following: The words 'or in consequence of such service' relate to the word 'death.' So that death in 'consequence of such service' means death resulting from some act of the insured connected with the service, whether such death occurred during the period of such service or afterwards. * * * In the case at bar the insured died from influenza, and the record shows that the disease was prevalent throughout the United States, and that soldiers and civilians alike contracted it and died from it. The death of the insured, then, was in no sense caused by performing any military service, or in consequence of being engaged in military service."

In a later case from the same state, *Nutt v. Security Life Ins. Co.*, 142 Ark. 29, the court makes no distinction between the two cases, and there was also a dissenting opinion.

In the case of *Malone v. State Life Ins. Co.*, 202 Mo. App. 499, the insured was killed by a gunshot wound, and his officer stated that such death occurred while "in line of duty, a recruit, unassigned." The provision of the policy was: "If within five years from the date of this policy the insured shall engage in any military or naval service in time of war (death from submarine or aviation service, connected with actual warfare, as a part thereof, is a risk not covered by this policy), the liability of the company in event of the death of the insured while so engaged, or within six months thereafter, as a result of such service, will be limited." etc. The court said: "In order, therefore, for defendant to escape liability on this ground, it devolves on it to prove both (1) that the insured's death occurred while he was engaged in military service, and (2) that such death resulted from or was caused by such service. The proof of the first by no means proves the second."

In the case of *Kelly v. Fidelity Mutual Life Ins. Co.*, 169 Wis. 274, the policy provided that, if the insured engaged within two years from the date of the policy in military or naval service, "and shall die within two years of the date of this policy as a result, directly or indirectly, of engaging in such service or work, the liability of the company under this policy shall be limited to the return of the premiums paid." The court said: "A provision in a life insurance policy limiting the liability of the insurer to the return of premiums if the insured engaged in military service and died as a result thereof, directly or indirectly, does not limit liability for all deaths in the military service, but only for such as are due to some cause peculiar to the service, and the beneficiary can recover the full amount for the death of the insured in a motorcycle accident while he

was in the military service, far behind the firing lines."

In case of *Myli v. American Life Ins. Co.*, 43 N. Dak. 495, the facts were these: The insured enlisted in the United States navy, was sent to Dunwoody Institute in Minneapolis for training. The institute at the time was under the control of the United States naval department and furnished technical and other instruction to the enlisted man after the fashion of ordinary colleges. There were requirements as to drill and physical culture. After a brief illness while in training the insured died of influenza on October 7, 1918. The military clause was very similar to that in the instant case, and the court directed a verdict for the plaintiff. The following was a clause in such policy: "If, within five years from the date hereof, the death of the insured shall occur while engaged in military or naval service in time of war without previously having obtained from the company a permit therefor, the company's liability shall be limited to the cash premiums paid," etc. The court uses the following convincing language:

"It is contended that the effect of the provision is to automatically cancel the life insurance stipulation in the policy the moment the policy-holder becomes enlisted or inducted into the military or naval service without having previously obtained a permit therefor, and without complying with whatever provisions (not named in the policy) the company might wish to require concerning additional premiums. As against this contention the respondent asserts that it is the evident purpose of the stipulation to provide only against the consequences of extra hazard incident to actual service in connection with hostilities. * * * Reading the whole policy, we deem the intention of its various provisions with regard to the restrictions concerning military or naval service to be clear. * * * The important words in the clause relied upon and those which signify its correlation with the other provisions hereinbefore referred to are *'while engaged in military or naval service.'*

These words are descriptive of two forms of hazardous service that are not intended to be covered, and it is only while the insured is engaged in such service that the exemption is applicable. It is idle to say that because one's status is such that he must respond to orders from military or naval authority, he is in military or naval service within such a provision, when in fact there is nothing about his daily activities that suggests the least physical danger that would enhance an insurance risk.

"It would be highly unreasonable to assume that it was intended to exempt from liability on the mere ground of status. In the first place, if status were to be made the test, language should have been employed to make it apparent that it was to be the test. * * * In the late war we know that many men were inducted into the service and assigned to special duties for which they were fitted by training and which involved no hazard peculiar to military or naval service; also that many who were capable of receiving special technical training were assigned to institutions capable of giving that training, so that they might later on be better equipped for more highly specialized service in conducting actual hostile operations; and that, while receiving that training, they were not subjected to the hazards of war. There would be no reason for such persons to assume that by so enlisting they rendered themselves liable to pay extra premiums on life insurance policies of this sort, or, failing to do so, to lose the benefit of their insurance."

From a reading and careful consideration of that clause in the policy in the instant case, which insures "against death occurring in any part of the world, * * * or from any cause, except military or naval service in time of war," etc., it will be seen that there is a distinctive difference between a provision forfeiting the policy or reducing its amount by mere entrance into military or naval service and cases where the policy

contains a clause like the one under discussion. This will dispose of that provision of the policy, which is most controlling and paramount, and leave for consideration the extent, meaning and effect of subdivision 3.

That part of subdivision 3, of section 1, which will now be considered, is as follows: "This policy shall be incontestible after one year from date of issue except for nonpayment of premiums, or for military or naval service in time of war, during the premium-paying period, which military or naval service requires the written consent of the president and the payment of an extra premium, not to exceed 3 per cent. of the face of the policy; otherwise, without such consent, the amount payable thereunder shall be such a sum as the premiums paid would have purchased on the basis of the increased premiums, which sum shall not be less than the full reserve for the policy. This policy and the application therefor, a copy of which is hereto attached, constitute the entire contract between the parties hereto."

The military clause contained in the above subdivision 3 should be construed as a part of, and not in conflict with, the provision found in bold-faced type at the top of page 3 of the policy, which we have just discussed and given full consideration to, and which insures against death occurring from any cause except military or naval service in time of war, and its meaning must be subordinated to the plain interpretation of such main and controlling obligation of insurance liability. The military clause and subdivision 3 can hardly be construed as a prohibition against military service without the permission of the company, as it would seem applicable only to cases where death occurred caused by military service. The court must give some effect to the alternative provision contained therein, which reads: "Otherwise, without such consent, the amount payable thereunder shall be such a sum as the premiums paid would have purchased on the basis of the increased premiums," etc.

There was no express written consent of the company

given or indorsed upon the policy, nor was there any extra premium demanded or paid. Increased premiums were neither paid nor fixed so far as the insured had any personal knowledge or information. The policy provides that the premium shall not exceed 3 per cent. of the face of the policy; but, as there was no extra premium fixed in the policy and no application made, there would seem to be nothing for the insured to pay. The facts are, so far as the personal knowledge of the insured was concerned, that it was not fixed at all, and it would seem that, until it was definitely fixed and indorsed on the policy or the application of the insured, there could be no basis of calculation. To say that the premium shall not exceed 3 per cent. of the face of the policy does not fix it at 3 per cent. although this is the contention of appellant, when taken in connection with the allegation in the answer that it had been fixed by defendant company about two years before; so we must conclude that, so far as this policy is concerned, the liability of defendant company would not be lessened, even under the language of said subdivision 3 of the policy, as interpreted by appellant.

The appellant company has said that the policy and the application therefor, a copy of which is attached thereto, shall constitute the entire contract between the parties; so it would seem that whatever may have been done two years previous or what it might do after the issuance of said policy, but not mentioned therein, in regard to the fixing of the extra premium, without the knowledge or consent of the insured, would not bind either defendant or the insured, but would have no effect whatever. It is not alleged, as before stated, that any notice of this prior action of the board was given personally either to the insured or to the beneficiary, and in any event it is no part of the contract by the express terms of the policy itself contained in the latter part of subdivision 3 which we have quoted. It could only be

made a part of such policy by recital therein or by indorsement thereon.

Another phase of the statement of facts contained in the pleadings was discussed in the briefs and in the argument on the hearing of the case. That is as to the agency of C. E. Lowry. It is very persuasively contended by appellee that under the insurance code Lowry was the agent of the defendant company, so that any knowledge coming to him, while endeavoring to secure the payment of the premium or the change of the policy, would be within the scope of his employment. Lowry took the money for the second premium and turned it over to the company. He appeared to have had ostensible authority. He caused the indorsement to be made by procuring the officers, authorized so to do, to change the form of the policy from a "twenty payment life" to a "term policy." Section 3172, Rev. St. 1913, provides that, where a person performs acts of this character, he shall be deemed, to all intents and purposes, an agent of such company. The answer, however, says that Lowry was only a special agent of the company at the time of the payment and change of form of the policy, and invested with limited powers; that his chief duties were the soliciting of applications and assisting agents in the field to write business; and that therefore the payment made to him was not binding upon the company. The policy provides in regard to this change in the form and plan as follows: "After the first anniversary * * * of this policy the insured has the privilege of converting this policy to the term rate plan. This policy must be returned to the home office of the company, for proper indorsement of conversion, and all indebtedness against the policy paid in full." The answer does not state what other powers Agent Lowry had than to solicit applications and assist in writing business. It is merely denied that he had authority to take renewals; but it must be noted that it alleges also that he had authority to solicit new business, and, as the policy

would have expired by its limitations unless a new premium was paid, this might well be considered as soliciting new business, and as giving him authority to take the application for change of plan and to continue the term insurance for another year; and, if this is so, then any knowledge coming to him while endeavoring to secure the payment of such premium or change of the policy would be within the scope of his employment and would charge the defendant company with knowledge. If, as such agent he knew insured was in the military service, it is immaterial whether the officers of the company were formally notified of that fact or not. If this reasoning is correct, then the notice to and knowledge of Agent Lowry was notice to and knowledge of the defendant, and it became the duty of the company to notify the insured of any additional premiums it required, and if it did not do so, as such premium was for its benefit, it must be assumed that it was waived. It can hardly be contended that notice to the agent under these circumstances was not notice to the principal, and, when defendant company made the indorsement and changed the form of the policy, it had full knowledge of all these facts known to the agent, and, if anything additional was to be paid under the military service clause, it was the duty of the company to advise the insured, and its failure to do so would certainly constitute a waiver. It is not claimed, as before stated, that the insured had any personal knowledge, notice or information of any kind at any time of the act of the directors of defendant company in fixing a flat rate of 3 per cent. of the face of the policy for military service two years prior to the issuance of this policy, and the failure of the company to recite the flat rate of 3 per cent. in the policy would seem also to constitute a waiver.

In *Metropolitan Life Ins. Co. v. Willis,* 37 Ind. App. 48, the insured was insane and answered the questions in the application falsely; after the policy was issued, he was sent to the insane hospital. The agent went to

the wife to collect the premium; she asked him whether she should pay the premiums under the conditions, and, in substance, she was told to do so. The opinion on that part of the case is as follows: "Under these conditions appellant accepted nearly one hundred weekly payments. To avoid the force of these facts, appellant's counsel asserts that the agent who made the collections, with knowledge of the facts, could not bind the company, and hence no waiver is shown. * * * It being within the scope of his agency to collect premiums, it must be held that his knowledge was the knowledge of his principal, and hence, when he collected premiums, and paid them to appellant, with knowledge of the facts, such knowledge must be imputed to it."

Agent Lowry had actual knowledge of the military status of the insured when he transmitted the premium and policy to secure the indorsement which the defendant company and its officers subsequently made. Defendant had the right to fix an additional premium; but, until it did so and informed the other interested party of its action, both insured and beneficiary had the right to believe that the company relinquished any right thereto, especially when the policy was indorsed and delivered and the form changed, and the more so as the policy itself required all indebtedness to be paid to the company before any change in the form of the insurance could be had. If there had been any indebtedness at the time of such change in the form of the insurance because of an additional or military service premium, it was certainly the duty of the company, which had knowledge of such fact through its agent Lowry, to assert it before changing the form of the policy and returning it with receipt of full payment to the insured, and its failure to do so would seem to be a clear and unequivocal waiver.

Again, if the provision in regard to military service in time of war, as contained in subdivision 3, is of doubtful meaning and not in full harmony with the express provision contained in large type on page 2 of the policy

insuring against death, then it would seem, under the opinions in the well-considered adjudicated cases, that this doubt or conflict, if any, should be construed most strongly against the company, that forfeitures are not favored, and that before the defendant company can escape liability it must show that the liability claimed is by the terms of its contract specifically exempted. See *Springfield F. & M. Ins. Co v. McLimans & Coyle,* 28 Neb. 846; *Phenix Ins. Co. v. Holcombe,* 57 Neb. 622; *Hilmer v. Western Travelers Accident Ass'n,* 86 Neb. 285.

In *Springfield F. & M. Ins. Co. v. McLimans & Coyle, supra,* this court in its opinion said: "A policy of insurance is to be so construed, if possible, as to carry into effect the purpose for which the premium was paid and it was issued." If the contention of appellant is allowed, it means a reduction of the policy about two-thirds in amount; in other words, it means a forfeiture without assuming any additional hazard of a large portion of the rights of the beneficiary. The clause that the policy and the application shall constitute the entire contract between the parties was made in language chosen by the defendant company, and if there is any doubt or question as to the meaning of subdivision 3, when considered in connection with the material and governing provision as to insurance against death found on page 2 of the policy, it must be construed in favor of the insured, to carry out the purpose for which the policy was issued. As the application and the policy constitute the entire contract, such increased premium clause would certainly be not effective until notice and demand were made, and the pleadings show that no demand was made and no notice ever given. Again, as the increased premium was not fixed or determined, so far as this contract is concerned, there can be no basis of computation. The contract of insurance simply says that it shall not exceed 3 per cent. of the face of the policy. This is simply fix-

ing the maximum but no determination of the exact amount.

In *Woodmen Accident Ass'n v. Pratt,* 62 Neb. 673, the following language is used: "This court has frequently said that forfeiture clauses in contracts of the kind under consideration are not to be enforced literally except such construction be found necessary to conform to the obvious intention of the parties." By considering this rule with the terms of the policy and the application therefor in the instant case, which are the contract, the provision for an increased premium of not exceeding 3 per cent. of the face of the policy on the basis and computation prescribed by its terms is uncertain and indefinite, and surely not sufficient to avoid two-thirds of the amount of the insurance provided for in the policy.

There can be no question as to what weight should be given, under the authority of the best adjudicated cases, to the plain and obvious meaning of the provision in the policy, that the person was insured and intended to be insured against death, except death caused by military service in time of war, that is, a death that was incident to, caused by or especially connected with such military service, not against death which would come to a person in civil life, and not arising from any risks, dangers or hazards of war. It was a death caused by the acknowledged and well-known dangers inherent in military service in time of war that was intended to be guarded against. The insured, however, died from the same disease which attacks civilians, as well as soldiers and sailors, and which does not belong to war more than peace. We are deeply impressed with the idea that the obvious meaning of subdivision 3 is that, if the insurance was to be had against death from the diseases, accidents, exposures and dangers of military service in time of war, special application should be made therefor and increased premiums paid, and that the policy cannot be construed as meaning that, because a person enters the military or naval service in time of war, he will be required to pay an

additional premium and make a special application to be insured against the ordinary diseases, exposures and accidents of civil life.

From a consideration of the statements of fact in the pleadings and of the law applicable thereto, and after viewing the case from every angle, we are constrained to hold that the act of the court in rendering a judgment notwithstanding the verdict of the jury was justified by the pleadings, and that its judgment should be affirmed, including an additional attorney's fee of $200, to be taxed for the appeal.

AFFIRMED.

WILLIAM MOSIMAN ET AL., APPELLANTS, V. DAN H. WEBER, APPELLEE.

FILED FEBRUARY 16, 1922. No. 21774.

1. **Schools and School Districts:** ELECTION BOARD. At an election called for the consolidation of school districts, an election board appointed by the county superintendent with the consent and approval of the electors interested is at least a *de facto* board and its acts will be valid.
2. ———: JUDGES AND CLERKS OF ELECTION. The electors of a school district will not be disfranchised, in the absence of fraud, because the officer appointing the judges and clerks of election was not expressly authorized by law to make such appointments.
3. **Elections:** ILLEGAL VOTES. Illegal votes, to invalidate an election, must have been received and counted sufficient in number to change the result of such election; it is not enough to show that illegal votes were cast and counted by the election board.
4. ———: VALIDITY: INJUNCTION. Injunction is not the proper remedy to settle questions of the qualifications of election officers or whether legal votes have been rejected and illegal votes received sufficient to change the result of such election.

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

Kelligar, Ferneau & Gagnon, for appellants.

R. C. James and *Dort & Cain, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., BUTTON and COLBY, District Judges.

COLBY, District Judge.

This was an action brought in the district court for Richardson county by appellants in behalf of themselves and 72 other electors of a proposed consolidated school district, who are similarly situated and interested in the result of the action, as plaintiffs, against Dan H. Weber, as county superintendent of the public schools of Richardson county, defendant, to prevent him from calling an election of officers for said proposed consolidated district. From the findings and decree, adverse to plaintiffs, appeal is taken to this court.

Among other things, the amended petition, upon which the action was heard, alleges that the plaintiffs are resident electors within the proposed consolidated and high school district No. 6 of Richardson county, as redistricted by the two school electors appointed by the county board of said county, and who, with the defendant as county superintendent of said county, constituted a survey committee to redistrict said county into consolidated and high school districts; that said survey committee made a survey of the school districts of said county and filed its report with the board of county commissioners; that for the purpose of said school district consolidation said survey committee consolidated districts 54, 94 and 99, a portion of district 49 and a portion of district 53 into one proposed consolidated and high school district No. 6, and located the schoolhouse for said proposd district at the village of Preston, in said district; that on the 10th day of March, 1920, a petition was filed signed by 25 per cent. of the resident school electors of said proposed consolidated district, asking the county school superintendent to call an election in said proposed school district for the purpose of adopting and consolidating the same, and that on that day said county superintendent

prepared and caused to be posted a notice on the front doors of the schoolhouses in districts 54, 94, and 99, that an election for the purpose of consolidating said proposed district would be held at the schoolhouse in said school district 99 on March 31, 1920, at 1 o'clock p. m.; that no notice of said election was given to the school electors in districts 49 and 53, parts of which districts are sought to be consolidated with districts 54, 94, and 99, and for this reason and other reasons plaintiffs contend that said election is void.

Plaintiffs further charge in their petition that in violation of chapter 243, Laws 1919, M. C. McMahan, Charles Higenfeld, Ed Scheitel, William Zoeller, Jr., and William Mosiman unlawfully intruded themselves into the offices of judges and clerks of said election, listed the persons voting at said election, canvassed and made the returns of said election to the county clerk of said Richardson county, and that the duly elected, qualified and acting officers of district 99, where said election was held, were not permitted to conduct said election proceedings, and did not and were not permitted to list said voters, count the votes cast at said election, or canvass and return the result of said election to the county clerk, as is required by the provisions of the statute in such cases made and provided; that said five persons above named conducted said election, listed said voters, canvassed the result of said election, made return thereof to the county clerk, and excluded the regularly elected, qualified and acting officers of said school district 99 from their offices, and by such action rendered the proceedings of said election void and of no effect; that the result of said listing, voting, canvass and return of said election, as made by the said five persons named by the county superintendent constituting said election board, disclosed that there were 83 votes cast for and 78 votes cast against said consolidation.

Plaintiffs further allege in their petition that Fred Hahn and 14 others voted at said election, and their

votes were listed, canvassed and returned by said board in favor of the consolidation of said school district, and that each of them was an illegal voter at said election; that these illegal votes constituted and went to make up the apparent majority of 5 votes favoring said consolidation, although said 15 persons were not entitled to vote at said election, for the reason that none of them had any property assessed in his or her name within said proposed consolidated district, and did not have children of school age.

Plaintiffs further allege that on the return to the county clerk of said election the county clerk canvassed said returns and made report thereof to the county superintendent, as required by the provisions of the statute, and that said county superintendent has declared his intention to call an election in the proposed consolidated school district No. 6, assuming said election to have been valid, and will cause trustees to be elected to take and have charge of the affairs of the proposed new consolidated school district, unless restrained by the court, and will immediately call such an election and will install in office such newly elected trustees, who will take over and conduct the affairs of said proposed new consolidated school district No. 6.

The petition further alleges that the Great Nemaha river traverses the said proposed school district from east to west and the Big Muddy passes from north to south, thus separating the parts of said district, so that during the wet and muddy seasons of the year children living within the limits of said district will be unable to travel to school, or by reason of the condition of the roads and highways be unable to be transported from their homes to said schoolhouse, and will be deprived of their constitutional right to a free common school education.

Plaintiffs further allege in their petition that said act, chapter 243, Laws 1919, was enacted contrary to and in violation of the provisions of section 11, art III of

the Constitution, in that it was not read at large on three different days in each house of the legislature; and that said act is in violation of said section 11 of the Constitution, in that the amendments thereto were not printed before the vote was taken on the final passage of said act; that the amendments to said act were not concurred in by the senate; and, further, that the title of said act does not clearly express the subjects of the act, in that the act makes provision for the annual appropriation of money under certain conditions to schools, and the title does not indicate such legislation and does not express such annual appropriation of money.

Petitioners pray that the county superintendent be enjoined from calling an election for the selection of trustees of the new proposed consolidated school district No. 6 or from taking any further steps to put into effect and operation said consolidated school district as proposed by said defendant.

The answer, after admitting certain formal parts, denies each and every allegation contained in the petition, and charges that the plaintiffs have an adequate remedy at law.

The district court, upon hearing, found generally in favor of the defendant; a motion for a new trial was made by plaintiffs and overruled, and a judgment of dismissal entered by the court.

Appellants urge a reversal of the judgment of the lower court upon four grounds, which will be considered in their order.

The first ground for reversal urged by counsel for appellants is that the election board was illegally appointed, had no power to conduct the election, and therefore the election was void.

Section 5 of the consolidated school act, chapter 243, Laws 1919, regarding the election and the board in charge thereof, reads, in part, as follows: "And the voting shall be under the direction and in charge of the board of trustees of the local school district within

which such election is being held."

It will be noted that each rural school district has but three trustees under the law, while an election board, as ordinarily constituted, requires three judges and two clerks. In the instant case it appears that one of the three members of the board of school trustees of district 99, where the election was being held, had resigned, and another was postmaster and unable to serve, thus leaving but one of the trustees of said district to conduct said election and act as a member of the election board. This act does not expressly give the county superintendent authority to appoint the election board, in case of vacancies or failure to qualify, but inasmuch as he is in charge of all the procedure under the act up to and including the election of trustees in the consolidated districts, and no other person seems to be authorized to appoint such board, it might properly follow that he was the person to make such appointments, and especially so in case of the failure of the school district trustees to function. It appears that he acted upon this assumption and made the necessary appointments to organize an election board of five members, and the evidence discloses that the election was conducted without opposition or question from any of the voters by these persons so appointed and acting as the *de facto* board; that the plaintiffs all voted at the election; and also that the plaintiffs Mosiman, Scheitel and McMahan were appointed, qualified by taking the official oaths, and acted as members of this election board and performed the very acts which they now seek to discredit and have declared void.

Now, this election board was either a *de jure* board, lawfully appointed by the county superintendent from the electors or from the members of the boards of said school districts so consolidated, or it was a *de facto* board, acting under color of appointment and by the consent and sanction of the electors of said proposed district. In either event, it would seem that the con-

clusion should be the same, so far as it affects the authority of the election board and the validity of the election. From an examination of the record, it plainly appears that the members of this board were not in any sense interlopers, but were appointed by the county superintendent, took their official oaths, and assumed and performed their official duties faithfully and, as they believed, lawfully, and with the consent and approval of the electors present at the polls, and that such board was vested with at least colorable official title and authority and could and did act as a *de facto* board.

In 9 R. C. L. 1012, sec. 32, citing *Hughes v. Roberts,* 142 Ky. 142, Ann. Cas. 1912D, 149, it is said: "The holding of an election by persons who were not officers *de jure,* but who had colorable authority and who acted *de facto* in good faith, was not so grave an irregularity as to void the election."

In *Trustees Common School District v. Garvey,* 80 Ky. 159, cited in the above reference, an appointee of a school commissioner acted as judge of election. The school commissioner had no appointive power, but the election was upheld upon the theory that the appointee was a *de facto* officer acting by the common consent of the persons interested in the election.

In cases collated in 1 A. L. R. 1536-1544, it is stated generally that "an election will not be vitiated because of an irregularity in the appointment of an election officer." And in *Gilleland v. Schuyler,* 9 Kan. 569, cited in notes in 1 A. L. R. 1537, the statement is made that the acts of such officers cannot be questioned collaterally, as the persons acting as election officers at this election were *de facto* officers.

In *Choisser v. York,* 71 N. E. 940 (211 Ill. 56), the court declares the doctrine thus: "Where, on the failure of the regularly appointed judges to appear at the election, other persons take their places without being prop-

erly selected, but after taking the oath of office as judges, they are at least judges *de facto*."

It is also held in *Fidelity Trust & Safety Vault Co. v. Mayor & City Council of Morganfield*, 96 Ky. 563, that where the statute provided that certain elections should be held under supervision of officers appointed by the county, in the absence of fraud, the mere fact that the election was held by officers appointed by the city would not invalidate the election.

In 15 Cyc. 311, 312, and cases cited, the following language is used: "There is nothing better settled than that the acts of election officers *de facto* who are in under color of election or appointment are as valid as to third parties and the public as those of officers *de jure*. The doctrine that electors may be disfranchised because one or more of the judges or inspectors of election did not possess all the qualifications required by law finds no support in the decisions of any judicial tribunal."

It is clearly and conclusively disclosed by the record that there was no objection raised by the plaintiffs or any one else to the appointment and election of these officers, but that they acted as an election board with the sanction and approval of all persons interested. This situation is covered by the decision in *Collins v. Masden*, 74 S. W. 720 (25 Ky. Law Rep. 81), where it is said: "Where, on an election to change a common school district to a graded school district, the person appointed as clerk failed to act, on valid excuse, a person selected by the judge, with the consent of the voters present, to act in his stead was properly appointed clerk."

And in 20 C. J. 90, sec. 70, and citations, the following language is used: "The election returns should not be rejected for any irregularity in the appointment of the officers of election where it does not appear that the irregularity affected the result of the election."

An examination of the record in this case does not disclose any misconduct of the election officers or others or any disadvantage accruing to any person interested

by virtue of the conduct of such officers. There is no claim or charge of fraud as to any act by the officers *de facto* occurring at the polls or prior or subsequent to the election. The record discloses that the election was conducted without opposition or question by a board having colorable title and acting *de facto;* that, as before stated, all the plaintiffs named voted at the election, and that three of the plaintiffs, Mosiman, Scheitel, and McMahan, acted as members of such election board. The well-known principles of the general doctrine of estoppel would seem to apply with great force in this case. In any event, the election conducted by said board was not only not void, but under the facts the result of such election is binding in law.

The second ground urged for the reversal of the judgment of the lower court by counsel for appellants is that the consolidated school act, chapter 243, Laws 1919, is unconstitutional as depriving children of school privileges. In support of this contention appellants have attempted to show that it is impossible for young school children to attend under the conditions prescribed in the law because of the distance from the school and the hardships attendant upon the conditions of storm and weather, impassable roads, and otherwise, in the consolidation or division of the districts; that in wet and muddy seasons of the year, especially during the months of January, February, and March, the children living within the limits of said district will be unable either to travel in said district to school or because of the condition of the highways be unable to be transported from their homes to said schoolhouse.

It does not seem that the act should be construed to be unconstitutional for these reasons. The board of education is given express powers to provide for the transportation of rural pupils, and it must be assumed that such board will provide suitable transportation and will adopt reasonable rules and regulations in that behalf. The act would not be unconstitutional because considerable

trouble and hardship in furnishing transportation may be found. The kind of transportation, its sufficiency and convenience have properly been left to the reasonable discretion of the board of education.

The third ground urged for the reversal of the judgment of the lower court is that the law or act providing for the consolidation of school districts was not legally enacted. This contention is settled by the decision of this court in case of *State v. Cox,* 105 Neb. 75, which decision would also seem to completely dispose of the argument for reversal urged under the second ground.

The fourth ground urged by counsel for appellants for the reversal of the judgment of the lower court is that a sufficient number of illegal votes were cast at the election for the consolidation of the school districts to change the result. An examination of the record discloses the fact that there were not exceeding ten illegal votes cast at the election. However, there is no evidence whatever that any of these illegal votes were cast for the consolidation. It appears from the evidence that illegal votes were cast against the consolidation, but there is no witness who testified that any of the illegal votes cast were in favor of the consolidation of the school districts. Subdivision 5, sec. 2095, Rev. St. 1913, makes a contest available only "when illegal votes have been received or legal votes rejected at the polls sufficient to change the result." This plain language of the statute, when applied to the facts, would seem to settle the question of illegal voting and also dispose of the last ground for reversal relied upon or contended for in appellants' brief and argument.

It occurs to the writer of this opinion that the appellants had an adequate remedy at law, both for contesting the illegality of the election by reason of illegal votes and also for changing or reforming the boundaries of the proposed consolidated district, the former remedy being given under chapter 20, art. X, Rev. St. 1913, and the latter remedy being given by the act in question itself,

chapter 243, Laws 1919, which provides that, after filing of the report of the committee for the establishment of said district with the county board, 25 per cent. of the school electors may, within 40 days, file a written protest or appeal with the state superintendent of public instruction against the establishment of the boundaries and schoolhouse sites as fixed by the county committee, and that the state superintendent, on showing, may approve the boundaries established by the county committee or order a rearrangement thereof, as in his judgment may seem best. Injunction hardly seems to be the appropriate remedy to settle questions regarding the qualifications of election officers, whether *de jure* or *de facto,* or the question of whether a proposition submitted to the voters has been carried or not, or whether illegal votes have been received or legal votes rejected at such an elction sufficient to change the result.

The several grounds relied upon by appellants for the reversal of the judgment of the lower court are not sustained by this court.

The findings and judgment of the district court appear to have been based on the facts contained in the record, and are justified by the established principles of law, and are

AFFIRMED.

CHARLES A. WARNICK ET AL., APPELLEES, V. WILLIAM H. WARNICK, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21638.

1. **Witnesses:** COMPETENCY. Section 7894, Rev. St. 1913, excluding as incompetent, except as specified, the testimony of one having a direct legal interest in the result of a suit, does not apply where the transaction or conversation, concerning which the witness is called to testify, was not between the witness and the deceased person, but between the latter and a third party, in which the witness took no part.

2. ———: ———: ADMISSIBILITY OF EVIDENCE. Where a witness, having a legal interest in the result of an action, and therefore incompetent under section 7894, Rev. St. 1913, testifies to a conversation or transaction with a deceased person, and the adverse party, the representative of such deceased person, thereafter introduced in evidence documents relating to the same transaction, concerning which such witness testified, *held*, that, although the testimony of said witness may have been incompetent when received, it was made competent through the action of the representative of the deceased in introducing such documentary evidence.

3. **Evidence:** PLEADINGS. Where a party to a suit introduces in evidence the pleadings of an adversary without any reservation or limitation as to the purpose for which offered, all the statements in such documents, like other admissions, are to be taken together, what makes for the pleader, as well as what makes against him; and in such case, where the allegations of such pleadings are not rebutted or controverted by other evidence, such allegations will stand as admissions.

4. **Quieting Title:** SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* sufficient to sustain the decree of the district court quieting title in the plaintiffs to the property in controversy.

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

Good & Good, W. L. Kirkpatrick and *E. E. Stanton*, for appellant.

King, Bittner & Campbell and *Mills, Beebe & Mills, contra.*

Heard before MORRISSEY, C.J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ., BROWN and ELDRED, District Judges.

ELDRED, District Judge.

On January 15, 1919, one William P. Warnick died intestate in Polk county, Nebraska, leaving surviving him his widow, Elizabeth Warnick, and three children, Charles A. Warnick, Emma J. Warnick, and William H. Warnick. This suit was instituted in the district court for said county by Charles A. Warnick and Emma

J. Warnick, as plaintiffs, against William H. Warnick, Elizabeth Warnick, and Raymond Cox as administrator of the estate of William P. Warnick, deceased, as defendants, to establish a resulting trust in the property in the possession of William P. Warnick at the time of his death, and to quiet title in the plaintiffs, as tenants in common, to the real estate in controversy.

The plaintiffs' claim is based upon an oral contract, and in their petition it is alleged that on or about the 10th day of December, 1896, the said William P. Warnick was the owner of a certain designated farm, and was residing thereon with his family; said farm with improvements not exceeding in value $7,500; that he had personal property not to exceed in value $500; that said farm was incumbered by a mortgage of $600; that he was dependent upon his children to operate said farm and make a livelihood for the family, and greatly desired that the defendant William H. Warnick, the eldest son, stay with them, which he refused to do; that he became ill-behaved and ill-willed, and unfilial in character, and abusive in word and action, toward his father; that on or about said date he left home and ever since remained unrepentant and away from his parents, except for two or three brief visits prior to the death of his father; that, after said William H. Warnick had left home, plaintiffs' said parents became much worried about operating and keeping said farm and very solicitous that plaintiffs, their remaining children, should take care of them in their declining years, and stay with them as long as they or the survivor of them should live, and help them keep their property together, and, being much grieved over the unfilial conduct of their eldest son, they then entered into an oral contract with these plaintiffs, jointly, that if plaintiffs would remain with said parents and the survivor of them, as the case might be, and help at all times thereafter, to the best of their ability, to make the farm sustain the family, and ultimately take charge and

manage the same to their interests and for the common good of themselves and these plaintiffs, so that said parents, or the survivor of them, should not want for sustenance and filial care in their declining years, then all the property, both real and personal, that their father might have and leave at his death should then and upon that event become the common property of these plaintiffs (provided that, in case their mother survived him, these plaintiffs should continue to care for and provide for her in the same manner, including her last sickness and burial) and to the exclusion of their said unfilial son, the defendant William H. Warnick, from any share therein or thereto; that, to keep these plaintiffs steadfast and faithful in the performance of said contract on their part to be kept and performed, the said parents or either of them often repeated to plaintiffs their said promises and agreements and mentioned and spoke of the same, in plaintiffs' hearing, to others at many and different times that that was the arrangement between them and plaintiffs, and that they would fix it so that at the death of the father all their property would go to these plaintiffs, and their eldest son would get none of it. Plaintiffs, relying thereon, have truly and faithfully kept and performed said contract to the satisfaction of both of said parents and to the best of plaintiffs' ability in everything so required of them, fully and completely, up to the time of the death of the said William P. Warnick, their father.

The defendant Elizabeth Warnick filed an answer in which she admits in entirety all of the allegations of the plaintiffs' petition, and alleges that said action was brought by the plaintiffs with her consent and full knowledge, and to satisfy her wish and desire that the agreement between herself and husband and the plaintiffs may in equity and justice be fulfilled according to the terms thereof, which are exactly as pleaded in the plaintiffs' petition, and that the plaintiffs may be decreed to be the absolute owners of the property which

said William P. Warnick held in his name at the time of his death.

The appellant, William H. Warnick, by answer and cross-petition, denies the alleged contract and other material averments of the petition, avers that the alleged oral contract was void under the statute of frauds, and prays for partition of said real estate.

The decree was for the plaintiffs, and the defendant William H. Warnick appeals.

The appellant contends that the court erred in admitting the testimony of Elizabeth Warnick, the widow, and Mrs. Bert Warnick, wife of Charles A. Warnick, as to the making of the contract. It is probable that Elizabeth Warnick took part in some of the conversations concerning which she testified; but the record also shows that she took no part in many of the conversations as to which her testimony related. It also appears that the witness, Mrs. Charles A. Warnick, had no part in the conversation concerning which she testified. Although the witness may have a direct legal interest in the result of a suit, still he is a competent witness against the representative of a deceased person as to any conversation between the deceased and a third person, in which the witness took no part. *DeWulf v. DeWulf*, 104 Neb. 105; *McNea v. Moran*, 101 Neb. 476; *In re Estate of Powers*, 79 Neb. 680; *Kroh v. Heins*, 48 Neb. 691.

After the evidence just referred to was received, the appellant offered in evidence, without any reservation or limitation as to purpose, the plaintiffs' petition and the answer of the defendant Elizabeth Warnick. These documents set out the transactions concerning which the testimony of Elizabeth Warnick and Mrs. Charles A. Warnick, complained of, was offered. Section 7894, Rev. St. 1913, specially excepts from the provisions of that statute the testimony of such a witness where the adverse party shall have introduced a witness who has testified in regard to such transaction or conversation.

Whether the testimony of the witnesses was objectionable when offered or not, such testimony was made competent through the action of the appellant in introducing evidence of the same transaction after the testimony of such witnesses had been received. *Bangs v. Gray,* 60 Neb. 457; *Cline v. Dexter,* 72 Neb. 619.

On the part of the appellees it is contended that the petition and answer of Elizabeth Warnick having been offered in evidence by appellant without any reservation or limitation as to purpose for which offered, and that the appellant is bound by the allegations therein not rebutted or controverted by other evidence. The rule in such cases appears to be that, where a party to a suit introduces in evidence his adversary's pleadings without any reservations or limitations as to the purpose for which offered, all the statements in such documents, like other admissions, are to be taken together, what makes for the pleader, as well as what makes against him; and in such case, where the allegations of such pleadings are not rebutted or controverted by other evidence, such allegations will stand as admissions. *Portland Body Works v. McCullough Motor Supply Co.,* 119 N. E. (Ind. App.) 180; *Yates v. People,* 207 Ill. 316; *McCord v. Durant,* 134 Pa. St. 184; *Chicago & A. R. Co. v. Harrington,* 192 Ill. 9; *Baskett v. Jones,* 189 Ky. 391.

It appears from the evidence that for several years prior to arriving at the age of majority the appellant, William H. Warnick, was given to quarreling with his father, and that he was unfilial in his attitude. It is suggested in the appellant's brief that the disagreements were due to certain idiosyncrasies of temper and temperament of the father. So far as the record discloses, we believe the only fair conclusion is that the trouble was due to the fault of the appellant, and not of his father. He was not only unable to get along with his father, but with the other members of the family and with his wife, after marriage. This trouble with his father was carried to the extent of threatening and attempting personal

violence toward him, with different weapons, on several occasions. On leaving home the last time, about December, 1896, he had difficulty with his father over wages he claimed due him, which was settled through arbitration. From that time on until November, 1915, about 19 years, although in the same neighborhood, appellant never visited the parental home. About that time, appellant's wife having left him, he wrote his sister, the appellee Emma J. Warnick, indicating remorse and soliciting her to come and keep house for him for a time, which she did for several months. During that time the parents visited the daughter at appellant's home, and it is now argued that a reconciliation then took place. Trouble soon arose between the appellant and his sister, and she returned to her parents' home; and from that time until the father's death the attitude of the appellant toward his father remained practically the same as it had been for nearly 20 years previous. We are of the opinion that no reconciliation took place. The treatment by the appellant of his father shows a reason for the action of the deceased, and the probability that he would enter into such an agreement as is claimed by the appellees in this case.

At the time of the father's death the appellee Charles A. Warnick was about 35 years of age, and the appellee Emma J. Warnick 43 years of age, she having never married. Soon after the appellant left home in 1896, the father told his remaining children that, if they would stay at home and do what was right, when he was through with what he had, they should have it; that the appellant, William H. Warnick, should not get any of his property if he could help it. He made these statements and promises in the presence of Elizabeth Warnick, Mrs. Bert Warnick, prior to her marriage with Charles A. Warnick, and Charles Doremus. He made and repeated the statements many times. This evidence is corroborated by declarations of the deceased to various neighbors, that the appellant, his son, should

never have any of his property. The evidence further shows that Charles A. Warnick and Emma J. Warnick faithfully performed the conditions of the contract on their part. They have spent the best portions of their lives working for the interests of the estate. The value of their services is impossible of calculation, and, if the contract is not sustained, the appellees will be deprived of remuneration for the services they have performed. They both remained on the farm so long as the parents remained there, and until a few years prior to the father's death, performing such acts as are incidental to farm life, and as would naturally be within the contemplation of the parties at the time the contract was made, and at all times treated their parents with kindness and consideration. On the parents retiring from the farm the daughter accompanied them; she continued to devote her time, first to the care and attention of her her parents, and the remainder to dressmaking. The appellee Charles A. Warnick remained with his wife on the farm, looking after the property, although, during a part of the time at least, working the land, or a part of it, for a share of the crops. There is nothing in the arrangement after the removal of the parents from the farm inconsistent with the intent to carry out the original contract. A similar condition existed in *Moline v. Carlson,* 92 Neb. 419, and *Johnson v. Riseberg,* 90 Neb. 217, in which specific performance of a like contract was awarded. There was no evidence offered to contradict the testimony as to the making of the contract, and of the compliance with the contract on the part of the appellees; nor was any testimony offered to refute the evidence submitted by plaintiffs to show the reason that the deceased had for discriminating against the appellant. The appellant did not testify. All the evidence offered in support of plaintiffs' claim is practically uncontroverted.

We believe that the finding that the contract was made and the services were performed by appellees in

reliance on the contract is fully justified. The evidence of compliance is shown as fully as could be expected in a case of this character. There is nothing in the case to indicate that the plaintiffs performed the services under any other or different agreement than as claimed. The agreement was a reasonable one, and the appellees, plaintiffs, having fully performed their part of the contract, are entitled to have the agreement fulfilled.

The decree of the district court is

AFFIRMED.

MORRISSEY, C. J., dissents.

FLANSBURG, J., dissenting.

I am unable to agree with the opinion of the court in this case. The proof, according to our decisions in *Remaly v. Sweet*, 106 Neb. 327, *Overlander v. Ware*, 103 Neb. 375, and other cases, is entirely insufficient, in my opinion, to sustain the judgment.

William P. Warnick died intestate. He left three children. It is the contention that he made an oral contract with two of these children that they should, after his death, receive his estate, and that one child, William, should be excluded from any inheritance. It appears that William was a wayward son, and the testimony of several witnesses shows repeated statements by the father that he did not intend that William should receive any share in his property after his death. The oral contract is alleged to have been made when the children were young and minors, and, as set out in the opinion, purports to be nothing more than statements by the father that he was displeased with the actions of William, that he intended to disinherit him, and a promise that, if the other two children should remain at home and "do what was right," they should inherit the property. What they were required to do in order to "do what was right" is, by the alleged contract, indefinite and left entirely to conjecture. It was the natural duty of these children, and one which the parent could enforce, that they should remain at home and do what was right during their minor-

ity. The agreement did not specifically require that they should remain at home after they had reached their majority, nor, indeed, for any definite length of time. There is no specification of what acts should be required of these two children, even though they remained at home, in order that they should become entitled to inherit the property of their father, to the exclusion of William. Such a condition of proof as is presented here is, in my opinion, entirely insufficient to establish a clear, definite and enforceable contract and one unequivocal in its terms. No definite consideration is shown. The fact that the children remained on the premises after their majority is not referable to any agreement requiring them to do so, and cannot be held to be performance by them of any contractual stipulation. The fact that they remained at home, and may be considered to have done what was right, during their minority, being something that they were by law required to do, regardless of contract, constitutes no consideration. Had the two children always done what was right but left the place at their majority, is it to be supposed that their father would have wished to disinherit them? Had the father changed his mind after these two children had remained at home during their minority and after they had always done what was right during that time and at all times afterwards, it would not have been a fraud upon them, had he refused to give the property to them, to the exclusion of William, for they would not then have rendered to him anything which should not have been rendered in the absence of any such agreement. Not only is there a failure of proof of any definite contract, from which the specific obligations of the parties can be ascertained, but there is nothing to take this case, in any event, as I view it, from under the operation of the statute of frauds.

A mere declaration by a parent that he intends to disinherit a child, because the child has been disobedient, or because he has no love for the child, will not, in law, work a disinheritance. Neither could an inheritance of certain children be enlarged, at the expense of other heirs in the estate, by such a declaration. The contract which is claimed to have been proved does not go, to any substantial degree, farther than the mere making of such declaration.

It seems to me that the rule, established by the opinion in this case, goes far to leave the matter of the descent of property to the hazard of verbal testimony, and to undo the salutary purpose furnished by the statute, which requires that wills shall be in writing and shall be executed in the presence of disinterested witnesses.

JOHN L. DONELLAN, APPELLEE, V. OREGON LUMBER COMPANY, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21641.

Brokers: COMMISSIONS. The plaintiff, a lumber and box broker, undertook to sell box shooks on commission. He secured agreements, which were in the nature of options to the buyer, to purchase shooks in car-load lots at specified prices, the same to be manufactured and shipped on specifications being furnished and orders for shipment being given during the term of contract. *Held*, that plaintiff was only entitled to commission on cars actually ordered and shipped within the time limited; that to be entitled to any further commission he must have secured for the defendant a contract under which the defendant could have compelled acceptance of the additional cars of shooks, on which commission is claimed, or compelled the purchaser to respond in damages.

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

Sears, Horan & Sheppard, for appellant.

Matthew Gering, Kenneth S. Finlayson and *A. L. Tidd, contra.*

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., BROWN and ELDRED, District Judges.

ELDRED, District Judge.

The plaintiff, a lumber and box broker, brought this action against the defendant in the district court for Douglas county, to recover brokerage commissions on sales alleged to have been made on behalf of the defendant.

The plaintiff in his petition alleges that about June, 1916, the defendant orally employed the plaintiff to sell box shooks, and agreed to pay him a brokerage commission of 5 per cent. on net amount of sales made by him during such employment; that, pursuant to such contract, plaintiff on September 8, 1916, sold for the defendant to Morrell & Company 50 car-loads of box shooks at the total net price of $19,951.20; that plaintiff was entitled to a commission therefor of $997.56, and that there has been paid thereon only $179.61; that on or about September 23, 1916, plaintiff sold for the defendant to the Cudahy Packing Company 350 car-loads of box shooks at a total net price of $162,758.60; that plaintiff was entitled to a commission therefor of $8,137.93, and that there has been paid thereon only $2,855.28.

The defendant for answer alleges that plaintiff submitted to the defendant for its acceptance certain contracts for the furnishing of shooks for the period of one year from and after date of acceptance of contracts; that it agreed to pay the plaintiff on such of the orders as defendant could furnish through its own mills a commission of 5 per cent., and on all shipments furnished thereunder from other mills a commission of 3 per cent.; pleaded the established trade custom of the lumber business through brokers; that plaintiff submitted to the defendant an order from Morrell & Company for said company's requirements of box shooks for a period of

one year, and that the defendant obligated itself to pay plaintiff a commission of 5 per cent. on all shipments under said contract, of its own manufacture, and 3 per cent. on shipments procured by the defendant from other mills; that the defendant shipped Morrell & Company from its own mill 7 car-loads and paid plaintiff commission thereon at the rate of 5 per cent.; that it shipped all cars for which it received specifications and shipping directions during the period of contract; that plaintiff submitted to the defendant an order from the Cudahy Packing Company for said company's requirements of box shooks for the period of one year; that it obligated itself to pay plaintiff a commission of 5 per cent. on all shipments under said order, of its own manufacture, and 3 per cent. on all shipments from other mills; that defendant shipped Cudahy Packing Company from its own mills 53 car-loads of box shooks and paid plaintiff the commission due; that defendant also shipped from other mills 138 car-loads of shooks and paid plaintiff his commission thereon at the rate of 3 per cent.; that it was the duty of the Cudahy Packing Company and plaintiff to furnish specifications and shipping directions; that defendant shipped all cars for which specifications and shipping directions were sent within the time limit of the contract.

There was a verdict and judgment for plaintiff for $4,827.09, and the defendant appealed.

There are numerous assignments of error made by appellant in its brief, some going to the rulings on evidence, and others to the instructions given and refused. These assignments may be condensed into three questions, the determination of which will dispose of the case: (1) What contract was made between the plaintiff and the defendant? (2) What contract was made for the sale of shooks to Morrell & Company? (3) What contract was made for the sale of shooks to the Cudahy Packing Company?

Plaintiff's brokerage contract involves two disputed

contentions: That is, plaintiff claims he was to have a commission of 5 per cent. of the net amount of all cars ordered by the terms of the contract, whether shipped or not; and the defendant claims (a) that plaintiff was entitled to commission on cars ordered and shipped under the contract and within the time specified, that where no specifications or shipping directions were furnished during the time limit, and consequently shipments were not made, then there was no obligation to pay a commission; (b) that the commission was to be 5 per cent. on shooks furnished by defendant from its own mill, and 3 per cent. on shooks furnished through other companies.

The plaintiff in his petition claims that he was to be paid a commission on net amount of "all sales made by him." If the commission was on the "sale," and not merely the securing of an option—and that appears to be the theory on which the petition was drawn and is the only reasonable interpretation that can be put upon the contract—then the right to commission on any cars of shooks not actually ordered shipped during the time covered by contracts depends upon the contracts of Morrell & Company and Cudahy Packing Company. Before the plaintiff was entitled to a commission on any cars not shipped he must have secured for defendant a contract under which defendant could have compelled the acceptance of the additional cars of shooks on which plaintiff claims a commission, or have compelled the purchaser to respond in damages.

The transaction with Morrell & Company was conducted through correspondence. Prior to June 3, 1916, there appears to have been some negotiations between plaintiff, defendant, and Morrell & Company not shown by the record. June 3, 1916, the defendant wrote plaintiff as follows:

"We are handing you herewith contract made out in duplicate properly signed. We request that you check the same over, and we believe that you will find it to be in order and as you intended it, and we ask that you secure

the signature of John Morrell & Company at as early a date as possible, leaving with him one copy for his files and returning the other to us, and we trust that there will be no further delay in this matter, and that we shall receive the document properly executed with shipping instructions at an early date. If there is any part of the contract that is not clear or in line, we will thank you to take it up with us immediately, as we are desirous of knowing just when we shall commence shipment on this contract. We also mention in this letter that if the contract is properly executed by your customer and returned to us, that on all shipments during the life of this contract, a 5% brokerage on the net amount is to be paid to Mr. W. J. Foye of Omaha, Nebraska. This we believe is in line with your request as covered by the contract. If this commission is not to be made payable to Mr. Foye but to yourself, you will kindly advise us. In other words, if you secure this business you are entitled to the 5% brokerage on the net amount of the invoice, less the freight charges."

June 8, 1916, the plaintiff replied to the defendant:

"Am pleased to acknowledge receipt of your courteous favor of the 3d inst. with inclosure of your contract in duplicate for John Morrell & Co. I checked over all the sizes and prices as noted on the contract, and wish to advise that same are correct. As per my letter of the 2d inst., there are several of the export boxes the use of which are now discontinued, while there are five additional boxes, sizes of which I forwarded on the same date awaiting your quotations and which are to be added to the list of export boxes. I am pleased to advise that I will send you an order for the first car for Morrell & Co., within the next few days, and will have the contract properly executed after receiving the additional quotations, adding same to the contract upon instructions from you. Shipments are to commence immediately, and the bulk of their orders are during the winter season, which

should make more desirable business for you as it does not come during the rush season."

The contract was never signed by Morrell & Company, but the draft of contract as offered in evidence is for the term from June 1, 1916, to September 1, 1917, and for "such sawed and dressed western pine shooks as buyer may order for the period above mentioned."

September 4, 1916, Morrell & Company wrote plaintiff as follows:

"We are pleased to advise that we expect to draw about 90% of our box shooks from the Oregon Lumber Co., and as soon as we can get the matter of the few cars for immediate shipment which we will find it necessary to contract for closer to home, will mail you signed contract form. You will please arrange immediately to protect us on a minimum of 30 cars and a maximum of 50 cars at prices quoted, acknowledging receipt of this letter so that we will know that everything is understood between us."

On receipt of the foregoing letter plaintiff wrote the defendant:

"I am pleased to send you herewith copy of letter just received from John Morrell & Company, of Sioux Falls, S. D., also copy of my reply to them. Will allow their letter to me and my reply to act as contract until such time as they are able to forward me formal signed contract, which you will note from their letter should not be very long."

At the same time the plaintiff sent to John Morrell & Company the following letter:

"I am pleased to acknowledge receipt of your valued favor of the 4th inst., advising that you will order from the Oregon Lumber Company box shooks at prices previously quoted, with minimum of 30 cars, maximum 50 cars, and that you will shortly forward contract properly signed. Am pleased to advise that I have sent the Oregon Lumber Company copy of your letter, and that

same will act as contract until your formal signed contract is received."

On September 8, 1916, the defendant replied to plaintiff:

"We also note your letter to John Morrell & Company and their reply back to you, and we appreciate your having gotten this business in the shape you have, and we will protect you on this business and trust that we will be able to serve Morrell & Company in such a manner that it will merit their future business."

And on September 11, 1916, the plaintiff wrote the defendant:

"I am pleased to acknowledge receipt of your favor of the 8th inst., advising that you will protect me on the Morrell & Company contract."

The foregoing closed the transaction so far as any arrangements for a contract was made between the defendant and Morrell & Company. It also contains the only agreements with reference to the payment of commissions on this particular business. The letter of June 3, 1916, defendant to plaintiff, which is the letter with which draft of contract was inclosed, provides that on all shipments during the life of this contract a 5 per cent. brokerage on net amount is to be paid. Under the arrangement made, Morrell & Company ordered and defendant shipped seven cars of shooks, and plaintiff was paid a commission of 5 per cent. on all such shipments. Later, and after the expiration of term of contract, Morrell & Company, through plaintiff, ordered another car; but on their attention being called to the fact that contract had expired, it was agreed between defendant and Morrell & Company that car should be shipped, not under old contract, but was to be considered new business. Plaintiff concurred in that arrangement and was paid a commission on that car. Then, about the same time, plaintiff endeavored to negotiate another contract between the same parties for the ensuing year. The parties to the contract construed it as having expired at

the time the eighth car was ordered, that being a practical construction, and the only logical one, it should control in this case. The defendant shipped all the cars ordered by Morrell & Company, and as there was no contract secured by which Morrell & Company was bound to order any particular number of cars during the term of the contract, we conclude that the plaintiff is entitled to no further commission on account of any sales made to Morrell & Company. The jury should have been so instructed.

The plaintiff secured and submitted to the defendant a draft of contract from the Cudahy Packing Company, which provided that the defendant was—

"To manufacture and sell to the Cudahy Packing Company a minimum of 300, with maximum of 350, cars Oregon pine box shooks to be taken as needed at any of our branches, as per specifications to be furnished. * * * The Cudahy Packing Company, in consideration of the foregoing, hereafter agrees to order and receive from the Oregon Lumber Company, Oregon pine box shooks as above specified, until the above quantity is taken."

The defendant refused to accept the contract but objected to the provisions above quoted, and on September 30, 1916, wrote to the plaintiff:

"We are returning, herewith, memorandum of agreement as drawn up by the Cudahy Packing Company and would ask that same be corrected to read that this quantity of boxes to be ordered out within twelve months from date of acceptance of the same. Our understanding is that they are contracting for one year's supply but according to this they have an option on three hundred and fifty car-loads and there is no period stated when they are to be called for. We do not care to have the contract run for over a year, and it is further to be understood that any amount which has not been taken at time, contract is to be considered filled. We note they have made it a minimum of three hundred or a maximum of three hundred and fifty, while we understood from

their inquiry, that they had a minimum of two hundred and fifty with a maximum of three hundred, but if they insist we will take care of the three hundred and fifty, but want it understood that all is to be called for within twelve months. * * * Please have the Cudahy contract corrected as suggested above."

The plaintiff testified that after receiving that letter he made an effort to have the contract changed in compliance with defendant's request. October 6, 1916, plaintiff wired Cudahy Packing Company:

"Contract satisfactory in all particulars to Oregon Lumber excepting must cover only to end of nineteen seventeen. Will write you fully Saturday also advising car numbers of all shipments from Oregon Lumber and Multnomah am also tracing shipments returning contract for correction will reach you early Monday."

And on October 7, 1916, plaintiff wrote the Cudahy Packing Company:

"Referring to contract for box shooks for your So. Omaha and Sioux City plants which you placed with the Oregon Lumber Company through me, wish to advise that I am in receipt of a letter from the Oregon Lumber Company under date of Sep't 30th, in which they request that the contract be changed to read that the quantity of boxes ordered is to be taken out within twelve months from date of acceptance of the contract. They say they do not care to have the contract run indefinitely, and it is further to be understood that any amount not taken in that time, contract is to be considered filled."

On October 9, 1916, the Cudahy Packing Company wrote to the defendant:

"In connection with our contract Sept. 23d, for 350 cars of box shooks, to be taken as needed, it is understood that deliveries are not to commence until April, 1917, and to continue for a period of one year from that date, when contract will be considered completed."

The plaintiff, on October 10, 1916, wrote the defendant:

"Again referring to your favor of the 30th ult., re-

garding the Cudahy contract, I am returning same to you herewith, with letter of October 9th, in duplicate from their purchasing agent, which is to be made a part of contract, and contains the correction you requested."

And on August 16, 1918, the plaintiff wrote the Cudahy Packing Company:

"Please refer to contract I arranged between your company and the Oregon Lumber Company in 1917, covering 300 to 350 car-loads box shooks. The Oregon Lumber Company has advised that subsequent to my arranging the contract between your two companies, there has been mutual arrangements between your company and the Oregon Lumber Company to the effect that the contract would expire April 1, 1918, and that any specifications that were not in the hands of the Oregon Lumber Company before that date would not be binding on them under the contract. Will you kindly advise me fully regarding the above? I am interested in commissions covering the entire contract arranged, and any subsequent arrangements such as above, have not been concurred in by me or by any waiver from me of commissions in the premises. I am, therefore, anxious to learn the exact status of the matter in question, as my records show that shipments have been made covering only about half the number of cars covered by the contract."

On August 19, 1918, the Cudahy Packing Company replied to the plaintiff as follows:

"If you will refer to correspondence passed between us at the time this contract was made you will notice in your letter of October 7, where we had been requesting you to return the signed contract, you stated that the Oregon Lumber Company did not want to sign the contract for any quantity without a specified time in which to take delivery, but that they would be willing to make the contract for one year from the date of acceptance. We replied to this letter, under date of Oct. 9th to the effect that we understood deliveries were to commence April 1, 1917, and to continue for a period of one year,

when the contract would be considered completed."

The contract above quoted from, as modified and supplemented by the letters set out, is the contract secured by plaintiff for defendant from the Cudahy Packing Company. The plaintiff's right of recovery, for commission on any cars of shooks not ordered shipped within the life of the contract, depends upon the interpretation to be placed thereon.

This evidence shows that, when the contract was originally submitted to the defendant for its approval, it provided for a minimum and a maximum number of cars to be taken as needed by the Cudahy Packing Company, but specified no length of time within which they should be ordered. The defendant refused to accept the contract with those provisions, but insisted that the term of the contract should be limited to one year, and, further, that any amount not taken in that time, contract was to be considered filled. The Cudahy Packing Company agreed to this modification. The plaintiff in his letter of August 16, 1918, to the Cudahy Packing Company intimates that such modification was without his knowledge, and states that it was not concurred in by him; however, the modification was made through correspondence in which the plaintiff took an active part, as shown by the excerpts of letters above set forth. The plaintiff was instrumental in securing the Cudahy Packing Company to agree to the modification requested by the defendant. This contract as modified is the only contract shown to have been consummated between the defendant and the Cudahy Packing Company. The contract as finally agreed upon does not provide for any specific number of cars of shooks to be furnished, but merely that such cars as were ordered shipped during the term of the contract should be furnished. There was in fact no sale of any shooks under this final arrangement until there were specifications furnished and orders for the shipment given; it was merely an agreement in the nature of an option given to the Cudahy Packing Company to purchase shooks at specified prices

during the term of the contract. It appears from the correspondence passing between the plaintiff and the Cudahy Packing Company in August, 1918, that the Cudahy Packing Company as well as the defendant interpreted the contract as being fully performed at the end of the year, regardless of the number of cars furnished. That is the reasonable and practical construction. The defendant shipped all the cars ordered by the Cudahy Packing Company, and as there was no contract secured by which the Cudahy Packing Company was bound to accept any greater number of cars, we conclude that the plaintiff is not entitled to commission for the sale of any shooks in addition to the cars actually ordered and shipped. The jury should have been so instructed.

The plaintiff has been paid by the defendant commission at the rate of 5 per cent. on all cars of shooks furnished by the defendant to the Cudahy Packing Company from its own mills. It appears that there were a number of car-loads of shooks shipped on the Cudahy Packing Company order, under the contract, through mills other than the mills of the Oregon Lumber Company; the defendant has paid a commission of 3 per cent. on those cars, and plaintiff claims that he is entitled to an additional 2 per cent. commission on such cars. The original proposition made by plaintiff to defendant was to secure the orders for a commission of 5 per cent. In a subsequent letter he indicated that he would secure the business for a commission of 3 per cent., but the plaintiff now claims that the writing of 3 per cent. in that letter was a clerical error. The agreement regarding the commission was finally consummated at a meeting in plaintiff's office between plaintiff and one Eccles, the president of the defendant company. These parties both testified as to what was said at that time, but their testimony is in sharp conflict. The defendant, on making shipments under the contract, submitted to plaintiff or his assignee duplicate invoices of the shipments, indicating the place of origin. The plaintiff having assigned his interest

in the commission to one Foye, on a later date made up a tabulated statement showing the commissions on the different shipments, figuring the shipments from defendant's mills at Baker, Oregon, at 5 per cent., and from the other mills on a basis of 3 per cent. He made no complaint or objection direct to the defendant in regard to the amount of commissions allowed him, but claims to have mentioned the matter to the president of the company in a personal interview, and offers some explanations for his actions in failing to object to the 3 per cent. commission, and in making the tabulated statement above referred to. Whether the brokerage contract entitled plaintiff to a commission of 5 per cent. or 3 per cent. on such shipments was a question concerning which different minds might arrive at different conclusions and was properly submitted to the jury.

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

REVERSED.

CARL T. WAGNER, APPELLEE, V. UNION STOCK YARDS COMPANY: WALKER D. HINES, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21698.

1. **Continuance: JURISDICTION.** The municipal court has jurisdiction to try a case and enter judgment against defendant, notwithstanding the adjournment of the case for more than 90 days, where the adjournments were on the application of the defendant, or by consent of the parties.

2. ———: ———. Where, in an action pending in the municipal court, continuances were had beyond the period of 90 days by agreement of parties, and, on a date to which the case had been continued by agreement, the record shows, "This cause is continued indefinitely by agreement of the attorneys, to be taken up at such time as attorneys agree upon, or fixed by the court for trial," *held* that, under such stipulation, the court had jurisdiction to try the case and enter judgment on a date fixed by the court.

3. ———: ———. Where, in such case, the muncipal court on the date for which a case is set for trial is actually engaged in the trial of another case, and, for that reason, adjourns the case until the following day, jurisdiction is not lost.

4. **Evidence** examined, and *held* sufficient to sustain verdict.

5. **Railroads: COSTS: ATTORNEY'S FEES.** The taxing of an attorney's fee as a part of the costs under the provisions of section 6063, Rev. St. 1913, as amended by chapter 134, Laws 1919, not being a fine, penalty, or forfeiture, may be taxed as a part of the costs in an appropriate action against the director general of railroads.

6. **Parties.** On motion of plaintiff the name of James C. Davis, director general and agent, is substituted as defendant, instead of Walker D. Hines, director general of railroads.

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

Wymer Dressler, Robert D. Neely and *Paul S. Topping,* for appellant.

Arthur C. Pancoast, contra.

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., BROWN and ELDRED, District Judges.

ELDRED, District Judge.

This is an action brought in the municipal court of Omaha, Douglas county, Nebraska, to recover damages for the loss of one hog from a shipment of mixed live stock made by the plaintiff from Hooper, Nebraska, to South Omaha, Nebraska; the shipment being consigned to the Farmers Union Live Stock Commission Company. In the municipal court, judgment was rendered in favor of the plaintiff and against the defendant director general of railroads, and in favor of the defendant Union Stock Yards Company. The defendant director general of railroads appealed the case to the district court for Douglas county, where the judgment was again in favor of the plaintiff, and the defendant has brought the case here for review.

In the district court, the director general moved that

the action be dismissed, for the reason that the municipal court did not have jurisdiction at the time it rendered judgment therein. The overruling of this motion is the principal error urged.

The transcript shows that the plaintiff filed a bill of particulars in the municipal court June 17, 1919, and that summons was issued returnable June 24, 1919. After several previous adjournments the record shows:

"October 7, 1919, this cause is continued indefinitely by agreement of the attorneys, to be taken up at such time as attorneys agree upon, or fixed by the court for trial."

"December 10, 1919, set for trial December 17, 1919, at 1:30 p. m., by agreement of attorneys."

"December 17, 1919, at 2 p. m., the parties appeared and cause came on for trial. * * * The defendant moved court to dismiss action for reason that the evidence is not sufficient. Motion taken under advisement until December 18, 1919, at 9 a. m."

"December 18, 1919, at 9 a. m., the attorneys for the plaintiff and the defendants appeared and motion was overruled, and the cause continued to January 19, 1920, at 2 o'clock p. m., to take further testimony and for further trial, on the request of the plaintiff."

"January 19, 1920, at 2 o'clock p. m., the court being engaged in the trial of another case, * * * this cause is continued to January 20, 1920, at 2 p. m."

"January 20, 1920, at 2 p. m., this cause came on for further hearing of testimony * * * and for submitting to the court all the evidence and arguments of attorneys. The court took the case under advisement until January 22, 1920, at 2 p. m."

January 22, 1920, at 2 p. m., the judgment was rendered by the municipal court from which appeal was taken.

The municipal court did not lose jurisdiction to enter a judgment in this case, notwithstanding the adjournment of the case for more than 90 days, where such adjourn-

ments were on application of the defendant, or by consent of the parties. *Fischer v. Cooley,* 36 Neb. 626; *In re Estate of Green,* 102 Neb. 306.

It is apparent that all adjournments of the case, after the expiration of the ninety-day period, and prior to January 20, 1920, were made by the consent of both parties. It would also seem that the defendant participated in the proceedings had on January 20, as the record indicates that the case was submitted to the court on "the evidence and arguments of attorneys."

Where the record shows the jurisdiction of the municipal court has once attached, as in this case, the presumption that subsequent proceedings were regular will be indulged in until the contrary is shown. *Kuker v. Beindorff,* 63 Neb. 91; *In re Estate of Green,* 102 Neb. 306. The record indicating that the attorney for the defendant participated in the proceedings had on January 20, 1920, jurisdiction was not lost. Had the defendant not appeared on the date to which the case was adjourned, still, it appearing that the court was on the 19th day of January, 1920, actually engaged in the trial of another case, the adjournment of the case, for that reason, until the following day, would be authorized. *In re Estate of Green, supra.*

There is another reason why the court did not lose jurisdiction in this case. On October 7, 1919, the parties agreed in open court that the cause should be continued indefinitely to be taken up at such time as the attorneys agreed upon, "or fixed by the court for trial." If the parties did not specifically consent to the adjournment of the case to the date on which the trial was finally completed, it was at least a date "fixed by the court for trial." The defendant, having made such agreement, ought not now be heard to complain of the action of the court in pursuance thereof.

It is contended that the evidence was not sufficient to sustain the verdict; that it did not appear that the plaintiff was the owner of the hog that was lost; nor that it

was lost by the defendant. These were questions of fact, properly submitted to the jury. We have examined the record and conclude that the evidence was sufficient to sustain the verdict.

Some complaint is made of the rulings of the court in excluding testimony offered to show other shipments from the station at Hooper, on the date in question, to the same consignee at South Omaha, and the possibility of plaintiff's hog becoming intermingled with one of such shipments. Such evidence was immaterial under the issues in this case, and was properly excluded.

Finally, it is urged that the court had no authority to tax an attorney's fee as part of the costs; that the statutes of Nebraska relating to the taxation of attorney's fees does not apply to cases where the director general of railroads is defendant, on the theory that the taxation of such fee amounts to a fine, penalty or forfeiture. General order No. 50 is cited, which provides for the bringing of actions growing out of the possession, use, control or operation of the railroads against the director general, but that the order shall not apply to actions, suits or proceedings for the recovery of fines, penalties or forfeitures. That the taxation of attorney's fees under the provisions of section 6063, Rev. St. 1913, as amended by chapter 134, Laws 1919, is not a fine, penalty, or forfeiture, and that a reasonable attorney's fee may be properly taxed as part of the costs has been determined in *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151; *Marsh & Marsh v. Chicago & N. W. R. Co.*, 103 Neb. 654; *Smith v. Chicago, St. P., M. & O. R. Co.*, 99 Neb. 719. No satisfactory reason has been suggested why an attorney's fee should not be taxed as a part of the costs in this case against the defendant director general. An attorney's fee of $50 is allowed for plaintiff's attorney in this court.

Plaintiff has also presented a motion to substitute as defendant the name of James C. Davis, director general of railroads and as agent, under section 206 of the federal

transportation act of February 28, 1920 (41 U. S. St. at large, ch. 91, p. 461), instead of Walker D. Hines, director general of railroads. This motion is sustained.

The judgment is

AFFIRMED.

FLANSBURG, J., dissents.

ALLAN DYSON V. STATE OF NEBRASKA.

FILED FEBRUARY 16, 1922. No. 21929.

1. **Criminal Law**: EVIDENCE: SUFFICIENCY. "A conviction may rest upon the uncorroborated evidence of an accomplice when sufficient, in connection with the other evidence, to satisfy the jury beyond a reasonable doubt of the guilt of the accused." *Lawhead v. State*, 46 Neb. 607; *Hutter v. State*, 105 Neb. 601.
2. ———: REFUSAL OF INSTRUCTION. Where a proposition embodied in a requested instruction is covered by an instruction given by the court on its own motion, it is not error to refuse to give an instruction in the language requested by a party to a suit.
3. ———: TESTIMONY OF ACCOMPLICE: QUESTION FOR JURY. While the attention of the jury is properly directed to the importance of cautiously considering the testimony of an accomplice, the weight to be given such testimony, as in the case of other witnesses, is a matter exclusively for the determination of the jury.
4. **Evidence** examined, and *held* sufficient to sustain the verdict.

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

R. J. Greene, H. C. Wilson and *Richards & Carter*, for plaintiff in error.

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

Heard before MORRISSEY, C.J., ALDRICH, FLANSBURG and ROSE, JJ., BROWN and ELDRED, District Judges.

ELDRED, District Judge.

The plaintiff in error, hereinafter called the defendant, was convicted of the offense of burglary. The information charges that the offense was committed on the 1st day of November, 1920, in Morrill county, Nebraska, by breaking and entering a certain box car of the Chicago, Burlington & Quincy Railroad Company, with the intent to steal goods of the said company. It is not contended that the defendant personally or alone committed the act charged. The theory of the prosecution is that the accused was one of three parties who were present at the time of the alleged burglary, acting in pursuance of a common design, with the intent to commit the offense charged.

The principal reason urged for the reversal of the judgment is that the verdict is not sustained by sufficient evidence. The conviction, to a large extent, rests upon the testimony of one Orville Crain, who testified that he knew Allan Dyson (the defendant) and Morris Casey on or about November 1, 1920; that he recalled being over at the "Y" with Allan Dyson and Morris Casey at that time; that a car was broken into by Casey, about six caddies of tobacco were taken from the car by Casey and handed over to the witness; that Dyson was present at the time and all three went back to Bridgeport, went down the alley to Charlie West's place, where they left the tobacco; that he does not remember if the box car was sealed up, but thinks it was; all three were there together, but Dyson was down at the end of the car; the car was at Northport, on the line of the Burlington. The sheriff testified that he found the tobacco, claimed to have been stolen, in the store-room back of Charlie West's house. The other evidence offered was mostly in the nature of corroborative circumstances. Allan Dyson testified in his own behalf, and denied that he was present at the time of the alleged burglary, or that he in any manner participated in the offense.

The jury were properly instructed by the court that, before they could find the defendant guilty, they must find that the car was forcibly broken into and entered; that the defendant was personally present, acting with the person who actually used force, in pursuance of a common design, and with the intent to so participate in the act as to insure the success of a common enterprise. The court also fairly instructed the jury, both at the request of the defendant, and on its own motion, regarding the weight to be given the testimony of an accomplice.

It appears that the defendant was not the party who actually broke and entered the car in question; but if the jury were satisfied from the testimony and the surrounding circumstances disclosed by the evidence that the defendant was personally present, with the party actually doing the breaking and entering, at the time the alleged offense was committed, or stood guard while the act was being accomplished, and that his presence and acts at that time were in pursuance of a common design, and with the intent on his part to so participate therein as to insure the success of the enterprise, that was a sufficient participation to make him a party to the commission of the offense.

It is well established in this state that a conviction may rest upon the uncorroborated evidence of an accomplice, when sufficient, in connection with the other evidence, to satisfy the jury beyond a reasonable doubt of the guilt of the accused. *Hutter v. State,* 105 Neb. 601; *Lawhead v. State,* 46 Neb. 607.

The testimony was sufficient to carry the question to the jury, and it was for the jury to determine its weight. The jury and trial court had an opportunity of observing the witnesses while testifying, of which this court is deprived. The trial court approved of the verdict of the jury, and rendered judgment thereon. It is now urged that upon the whole case the evidence is insufficient to sustain a conviction. We have set out enough

of the testimony to indicate the character of the evidence. While the details as to the commission of the offense were not proved with that care that should be exercised by prosecuting officers in cases of this character, we conclude that the case is not so lacking in evidence on behalf of the state as to warrant interference by this court.

A number of errors are assigned with reference to the admission and rejection of testimony. We have examined each of such assignments and find no prejudicial error in the rulings.

Complaint is made of the refusal to give instruction No. 1, requested by the defendant, as to the presumption of innocence; it being urged that it was one approved by this court. While the instruction tendered may be an approved form, yet the trial court gave an instruction embodying in substance the proposition covered by the requested instruction. The court, having fully covered the proposition in its own instructions, did not err in refusing to give the instruction in the language requested by the defendant.

At the request of the defendant the jury were instructed:

"The fact that a person is an accomplice in a commission of a crime goes to his credibility as a witness, and an accomplice is not entitled to the full credit given to the other witnesses. You will receive such testimony with caution, closely scrutinize it in the light of all the other evidence in the case, and give to it such weight as you may think it is entitled to have."

The court also, on its own motion, gave the following instruction:

"The fact that the witness, Orville Crain, is shown by his testimony to be an accomplice does not make him incompetent as a witness; the turpitude of his conduct does not disqualify him to be a witness. The admission of an accomplice as a witness is said to be justified by the necessity in a case, and with the wisdom of the

practice you are not concerned. The degree of credit which ought to be given to the testimony of a witness who is an accomplice is a matter exclusively within your province to decide. Great caution in weighing such testimony is dictated by prudence and sound reason, and, under the law, you may, if you see fit, act upon the testimony of the accomplice, and, if satisfied beyond a reasonable doubt from it and all the other evidence in the case that the defendant is guilty, then you should so find."

The action of the court in giving the last instruction is criticised, and it is argued that, while the instruction requested by the defendant informed the jury that an accomplice was not entitled to the full credit given other witnesses, by the instruction given on the court's own motion the defendant's instruction was so qualified as to render it meaningless and inapplicable to the testimony of the witness Crain. We do not believe the instruction subject to the criticism made. The first sentence of the defendant's instruction, standing alone, would somewhat invade the province of the jury; but when construed with the latter part of the instruction it is not in conflict with the instruction given by the court on its own motion, which advises the jury that great caution should be used in weighing the testimony of an accomplice, but that the degree of credit which should be given the testimony of such a witness was a matter exclusively within the province of the jury. The rule embodied in the instruction is in accord with the former holdings of this court, and with the general rule. *Lamb v. State,* 40 Neb. 312; *State v. Sneff,* 22 Neb. 481; 16 C. J. 695, sec. 1422; Randall's Instruction to Juries, sec. 21.

Finding no prejudicial error in the record, the judgment appealed from is

AFFIRMED.

EUGENE D. SIMPSON, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21675.

1. **Release:** AVOIDANCE: MUTUAL MISTAKE. To avoid a written release of damages for personal injuries on ground of mutual mistake of the parties, the mistake must relate to a present or past fact or facts that are material to the contract of settlement, and not to an opinion as to the future conditions as to results of present known facts.
2. ———: ———: ———. A mistake as to the future development of a known injury is one of opinion, and not a mistake as to fact.
3. ———: BAR: UNKNOWN INJURIES. Where one who has sustained personal injuries and with his attention directed to the known injuries, which are trivial, contracts for the settlement of his damages with reference thereto, in ignorance of other and more serious injuries, both parties believing that the known injuries are the only ones sustained, then there is a mutual mistake, and a release executed under such mistake, although couched in general terms, will not bar an action for the more serious and unknown injuries.

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

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

Magney & Magney, contra.

Heard before LETTON, DEAN, DAY and ALDRICH, JJ., GOOD, District Judge.

GOOD, District Judge.

This is an appeal by the defendant from the district court for Douglas county, in an action wherein plaintiff recovered a judgment for $12,000, for personal injuries sustained while he was attempting to board one of defendant's cars at the intersection of Sixteenth and Farnam streets in the city of Omaha on the 4th day of February, 1918.

Plaintiff alleged that while in the act of boarding the car as a passenger, and when he had one foot on the step of the car and one hand grasping the hand-rail, the car was negligently, suddenly started, and threw him to the pavement on his hands, knees and stomach, and that in consequence he sustained a severe shock to his nervous system, causing a nervous break-down, melancholia, permanent mental impairment, and that he thereby became mentally incompetent and practically insane.

Defendant denied that plaintiff received any severe injury; denied any negligence; and alleged that plaintiff's ailment and condition from which he was suffering was due to causes other than the accident; and, in addition, set up a release, signed by the plaintiff on the 18th day of March, 1918, wherein and whereby the plaintiff, for a consideration of $50, then paid, released the defendant "from any and all cause or causes of action, costs, charges, claim or demand, of whatever name or nature, in any manner arising or to grow out of an accident occurring Monday, February 4, 1918, at Sixteenth and Farnam in the city of Omaha, Douglas county, Nebraska, whereby I received and sustained personal injury and damage to my clothing while boarding the rear end of an east-bound Farnam line closed motor car, and falling to the pavement."

Plaintiff in his reply admits the execution of the release, and the receipt of the $50, and alleges that at the time of its execution the only injuries of which he knew, or by the exercise of reasonable diligence could have known, consisted of a superficial injury to his knee, and the damage to his clothing, consisting of a tear across the knee of his trousers, and that the sum of $50 was a fair and adequate compensation for the damages he had sustained up to that time; that it was the intention of both parties to the settlement to fairly compensate plaintiff for all his injuries, but these injuries above recited were the only ones known to the parties, and the settlement and release had reference to those only, and that

the injuries for which he now seeks recovery had not then manifested themselves, and that said release was executed under a mutual mistake as to the nature and extent of the injuries, and that the release was never intended to cover any other injuries than those known at the time of signing the release, and mentioned therein, and no claims or causes of action were intended to be barred except those growing out of the then known injuries, and further alleges that no release from damages for the injuries from which he is now suffering, and for which he seeks a recovery in this action, has ever been executed, and that said release is therefore not a bar to this action.

Appellant argues that the evidence is insufficient to show that there was any mutual mistake at the time of making the settlement and execution of the release. There is no conflict in the evidence on this point, but the question is as to the deductions to be made therefrom and the legal effect thereof. The record discloses that appellee, who was a traveling salesman, and who was at the time of the accident on his way to St. Louis, continued his journey and went about his business as usual; that at the time of the accident he sustained a lacerated or skinned knee, a bruised hand and torn trousers; that for a few days he was stiff and lame. Appellee returned to Omaha in a few days, and notified appellant's claim agent that he had received an injury and damage to his clothing, and disclosed the nature and extent of his injuries, as he then supposed they were. Appellee continued his work as a salesman, and on March 18, 1918, some six weeks after the accident, he called on appellant's claim agent and asked for a settlement. At that time he believed, and stated, that he was all right, and had fully recovered. The only personal injuries then known to either party were the skinned knee, bruised hand, and shock incident thereto. These were the only ones discussed. The claim agent saw nothing to indicate that appellee was not fully recovered. There

was no talk of other possible unknown injuries, or of any future unfavorable conditions that might arise from the known injuries. The claim agent asked appellee what he thought he should receive to recompense him for the shock and suffering and the torn clothing, and appellee answered that he thought he ought to receive $50, and this amount was paid him, and the release executed. It was several weeks thereafter before appellee became aware that he had sustained other injuries than those known and talked of at the time of the settlement. He first noticed that he could not make out his statements and accounts, became confused and forgetful, and grew worse, and became emotional and depressed, and suffered from melancholia. The evidence shows that at the time of the trial, in April, 1920, appellee was mentally incompetent and without hope of recovery. The jury found the fall from the car was the cause of his present condition. Are these facts sufficient in the eyes of the law to constitute a mutual mistake?

There seems to be a very great confusion in the opinions of the various courts as to what is required to avoid a release for personal injuries on the ground of mutual mistake. What we believe to be the true rule is that the mistake must relate to either a present or past fact or facts that are material to the contract of settlement, and not to an opinion as to future conditions as the result of present known facts. A mistake as to the future development of a known injury is a matter of opinion, and is not one of fact, and is not such a mistake as will avoid a release; but, where the mistake is as to the extent of the injury due to unknown conditions or relates to injuries that were wholly unknown, then the release may be avoided, unless it further appears that the parties were contracting with respect to possible unknown injuries, and the releasor intended to relinquish all claims, whether known or unknown. In the latter case there would be no mutual mistake.

Where one who has sustained personal injuries, and with his attention directed to the known injuries, which are trivial in their nature, contracts for the settlement of his damages with reference thereto, in ignorance of other and more serious injuries, both parties at the time believing that the known injuries are all the injuries sustained, then there is a mutual mistake, and the release, although couched in general terms, should be held not to be a bar to an action for the more serious and unknown injuries. The views herein expressed find support in the following authorities:

23 R. C. L., 390, sec. 20; *McIsaac v. McMurray,* 77 N. H. 466, L. R. A. 1916B, 769, and note thereto, wherein many authorities are collected; *Dominicis v. United States Casualty Co.,* 116 N. Y. Supp. 975; *Shook v. Illinois C. R. Co.,* 115 Fed. 57; *Great N. R. Co. v. Fowler,* 136 Fed. 118; *Gold Hunter Mining & Smelting Co. v. Bowden,* 252 Fed. 388; *Reddington v. Blue & Raftery,* 168 Ia. 34; *Owens v. Norwood-White Coal Co.,* 188 Ia. 1092; 34 Cyc. 1058.

The record in this case fully justified the conclusion that the release was executed under a mutual mistake of the parties, and does not therefore bar plaintiff from recovery of damages for the injuries that were unknown to both parties at the time the release was executed.

Appellant insists that whether there was a mutual mistake in the execution of the release is one of equitable cognizance, and should have been submitted to and determined by the court, in advance of the jury trial, and that it was error to submit that question to the jury. The rule as contended for prevails in many jurisdictions, but the contrary practice has obtained in this jurisdiction, and has met the approval of this court in a number of cases. *Osborne v. Missouri, P. R. Co.,* 71 Neb. 180; *New Omaha Thompson-Houston Electric Light Co. v. Rombold,* 68 Neb. 54; *Perry v. Omaha Electric Light & Power Co.,* 99 Neb. 730.

Regardless of what the practice may be, we are un-

able to perceive that appellant was in any way prejudiced by the submission of the question to the jury. The court, in overruling the motion for new trial and entering judgment on the verdict, thereby approved the finding of the jury on that question, and made it the court's own, as much as if it had predetermined the question.

It is strenuously urged that the verdict is not supported by the evidence, in that it does not show that appellee's present physical and mental condition was caused by the fall from the street car. We have carefully examined the record, and while this court, had it been the trier of fact, might have reached a different finding, yet we find ample evidence to support the verdict in that respect, and we cannot say, as a matter of law, that the verdict is wrong. Under the oft-repeated rule laid down by this court, we decline to interfere with a verdict that is supported by evidence and is not clearly wrong.

There are other assignments of error not discussed in the brief, and we omit consideration of them. We find no prejudicial error in the record. The judgment of the district court is

AFFIRMED.

PAXTON & VIERLING IRON WORKS, APPELLANT, V. VILLAGE OF NAPONEE ET AL., APPELLEES.

FILED FEBRUARY 16, 1922. No. 21876.

1. **Quære.** Whether the members of a village board of trustees, who, when awarding a contract for the construction of a bridge, fail and neglect to take from the contractor a bond obligating him to pay for the material used in its construction, are personally liable to the materialman for damages if the contractor fails to pay for the material, *quaere.*

2. **Municipal Corporations: CONTRACTS: FAILURE TO PROCURE BOND: LIABILITY.** When members of a village board of trustees, in awarding a contract for the construction of a bridge, fail and

neglect to take from the contractor a bond obligating him to pay for the material used in its construction, as provided by section 3840, Rev. St. 1913, no cause of action for damages arises in favor of the materialman if he furnished the material with knowledge that no bond had been taken, nor if he furnished the material not relying upon the belief that such bond had been taken, nor unless it affirmatively appears that the contractor has failed to pay for the material.

3. Petition examined, *held* not to state a cause of action.

APPEAL from the district court for Franklin county: WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

George Losey and *Gerald M. Drew,* for appellant.

Bernard McNeny, contra.

Heard before LETTON, DEAN and FLANSBURG, JJ., DAY and GOOD, District Judges.

GOOD, District Judge.

Plaintiff brought this action against the village of Naponee and four individuals, who were, in 1916, trustees of said village, to recover damages for failure and neglect of the village board to exact a bond from one Ward, to whom it had awarded a contract for the construction of a foot-bridge in said village. To the petition a general demurrer was interposed and sustained. Plaintiff refused to further plead and judgment of dismissal was entered. Plaintiff appealed.

We are required to determine whether the petition states a cause of action. After the usual formal allegations as to the corporate character of plaintiff and defendant village, and official character of the other defendants, there are allegations which may be summarized as follows: September 1, 1916, defendants entered into a contract with Harvey T. Ward for the construction of a foot-bridge in and for the village of Naponee; that the contract required Ward to furnish and pay for all material necessary for the construction of the bridge; that it was the duty of defendants to exact from said

Ward a bond obligating him to pay for the material; that defendants failed and neglected to exact such bond; that plaintiff furnished to said Ward steel used in the construction of the bridge of the reasonable value of $423.98; that in June, 1920, in the county court of Douglas county, a judgment was entered against Ward for $535.25; that said judgment was transcribed to the district court for Franklin county, execution issued thereon and returned unsatisfied; that said judgment is unpaid and uncollectible; that, "By reason of the matters and things hereinbefore stated, and of the failure and neglect of the said defendants to take and require of said Harvey T. Ward (trading as the Lincoln Construction Company) a bond with good and sufficient sureties thereon, guaranteeing the faithful performance of said contract and the payment of all labor and material bills incurred in connection therewith, the said defendants, and each of them, are indebted to this plaintiff in the sum of $543.80, with interest thereon at the rate of 7 per cent. per annum from the 14th day of June, A.D. 1920." This is followed by prayer for judgment.

Section 3840, Rev. St. 1913, imposes on a village board the duty, before entering into a contract for the construction of a bridge, to take from the contractor a bond, with sureties in a sum not less than the contract price, conditioned for the payment of material which is actually used in performing the contract. Such bond shall be filed with, approved and kept by, the board, and may be sued on by any person entitled to the benefit of its protection.

Plaintiff insists that the failure of the village board to take the bond required by said section 3840 renders the village and members of the village board, as individuals, liable to the plaintiff in this action. Whether the failure of the village board to perform the duty imposed by the statute renders them personally liable in an action by a materialman is very doubtful, and is a question on which the authorities are in hopeless conflict.

The supreme court of Michigan holds that they are liable. *Owen v. Hill,* 67 Mich. 43; *Plummer v. Kennedy,* 72 Mich. 295; *Wells v. Board of Education,* 78 Mich. 260; *Staffon v. Lyon,* 104 Mich. 249; *Smith v. Hubbell,* 142 Mich. 637. The contrary rule has been established in the courts of Arkansas and South Dakota. *Blanchard v. Burns,* 110 Ark. 515, 49 L. R. A. n. s. 1199; *Plumbing Supply Co. v. Board of Education,* 32 S. Dak. 270.

In a number of states there are statutes similar to the one in this state, but with other provisions that impose a statutory liability upon officers or the municipality for a failure to perform the duty. In this state there is no personal liability imposed by the statute, and, if there be any, it arises from the application of the principles of the common law. It may well be doubted, where the statute imposes no liability, and the officers serve without compensation, and are not required to give official bonds, and where their duties are generally of a public nature, whether they are personally liable for a neglect of official duty. However, we find it unnecessary to determine that question in this case. If any liability did exist, either on the part of the village or of the persons who were trustees, it could arise only where the materialman had furnished material for the construction of the bridge, relying upon a bond for his protection, and where he had suffered damage by failure of the contractor to pay for the material furnished. The statute required the bond to be filed, and plaintiff knew, or by exercise of ordinary diligence could have known, that no bond had been taken and filed. Plaintiff was chargeable with notice that no bond had been taken, and had no right to impose liability on the village or the members of the village board. When it knew, or could by the exercise of ordinary care have known, that no bond was given, and voluntarily furnished the material, it will be presumed that it furnished the material solely upon the credit of the contractor. *Blanchard v. Burns, supra.* Plaintiff could not be damaged unless there was a failure

of the contractor to pay for the material. There is no allegation or its equivalent in the petition that the material has not been paid for. The averments regarding the entry of judgment against Ward fail to disclose in whose favor such judgment was entered. It is not disclosed who was plaintiff in that action. We might surmise that it was the plaintiff in this action, but surmise is not sufficient. Because there is no averment in the petition of nonpayment of the material, and because it is not alleged that plaintiff furnished the material relying upon the belief that a bond had been given and had no knowledge that no bond had been given, we hold that the petition failed to state a cause of action, and that the demurrer was properly sustained.

The judgment of the district court is

AFFIRMED.

JOHN F. MORRIS, APPELLEE, V. WALKER D. HINES, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21744.

1. **Master and Servant:** FEDERAL EMPLOYERS' LIABILITY ACT: DEFENSE OF CONTRIBUTORY NEGLIGENCE. The defense of contributory negligence is not available under the federal employers' liability act. Its only effect, where it exists, is to reduce the amount of damages.

2. ———: ———: FELLOW SERVANTS. The fellow servant doctrine is not available as a defense under the provisions of said act.

3. ———: ———: NEGLIGENCE. The act expressly makes the common carrier liable for the negligence of its officers, agents, or employees.

4. ———: ———: ASSUMPTION OF RISKS. There is no evidence in this case that plaintiff was injured because of the violation of any safety appliance statute; therefore the defense, assumption of risk, remains.

5. ———: ———: APPLIANCES. A master must exercise reasonable care to furnish a servant suitable and safe tools for the work.

6. ———: ———: DUTY OF MASTER. It is the duty of the master to warn and instruct as to defects and dangers of which he knows, or ought, in the exercise of reasonable care and diligence, to know, and of which the servant has no knowledge actual or constructive.

7. Instructions examined, and found not to be prejudicial to appellant.

8. Appeal: BILL OF EXCEPTIONS. Affidavits alleging misconduct of opposing counsel, in order to be considered by this court, must be incorporated in and made a part of the bill of exceptions.

9. ———: VERDICT. The verdict is sustained by sufficient evidence, except as to the amount thereof.

10. Damages: REMITTITUR. The evidence examined, and the verdict *held* to be excessive, and a new trial ordered unless a remittitur of $4,000 is filed, in which case the judgment for $8,000 will be affirmed.

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

J. A. C. Kennedy, Edward J. White and *Yale C. Holland,* for appellant.

Matthew Gering and *A. L. Tidd, contra.*

Heard before MORRISSEY, C.J., ALDRICH and FLANSBURG, JJ., HOSTETLER and MORNING, District Judges.

HOSTETLER, District Judge.

The plaintiff for his cause of action alleges that he was employed on January 10, 1919, as a section hand; that he was inexperienced in said work; that defendants knew this; that prior to January 22, 1919, the day he was injured, defendants furnished a fellow servant with a defective and imperfectly tempered spike maul; that the defective condition of said maul was known to defendants, or could have been known by the exercise of reasonable care; that said maul was rough, worn and chipped on the edge; that defendants knew the dangerous condition of said maul; that defendants did not warn or give him notice of such condition. Plaintiff alleges that the fellow servant to whom said defective

maul was furnished placed it between a spike and a rail and directed plaintiff to strike the maul for the purpose of straightening the spike; that plaintiff did so, and that a piece of steel from the defective maul flew into his right eye and destroyed the sight thereof. Plaintiff alleges that the fellow servant failed to warn him that the maul was defective.

Defendants admit the employment of the plaintiff as a section hand; allege that he was familiar with his duties and with the use and nature of spike mauls, and that he knew about the defective condition of the spike maul. The answer further admits that plaintiff got something in his eye that caused the loss of the sight thereof. For further answer defendants deny the allegations of the petition, and allege contributory negligence and assumption of risk.

Plaintiff for reply denies the allegations of the answer, except in so far as they admit the allegations of the petition.

Upon the issues joined trial was had, and the jury returned a verdict for plaintiff and against Walker D. Hines, director general, for $12,000. Upon this verdict judgment was rendered and motion for new trial overruled. Defendant Hines appeals to this court.

The plaintiff contends that this action is properly brought under the federal employers' liability act. 8 U. S. Comp. St. 1916, secs. 8657-8665.

The defendant in his brief says: "Both parties concede that the federal employers' liability act controls." The legal rights of the parties must be determined by this act. In so far as its provisions apply to the facts in this case, said act is as follows:

"Section 8657. Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any

of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

"Section 8659. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured * * * shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury * * * of such employee."

"Section 8660. In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to * * * any of its employes, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury * * * of such employee."

Defendant contends that the evidence is not sufficient to sustain the verdict and judgment. Defendant alleges that there was no evidence to justify the jury in finding that the chip which struck plaintiff in the eye came from the defective maul. Plaintiff testified that he struck the defective maul three times, and that when he made the third stroke he was struck in the eye by a chip which he thought came from the maul, that he did not strike any object other than the maul, that he could not hit the spike.

B. L. Coffman testified that he saw plaintiff hit the maul once, and that he then threw his hand to his eye.

Robert Earle testified that he heard Hinds tell plaintiff to strike the maul.

Defendant's witness, Guy O. Hinds, testified that plaintiff hit the east end of the maul, that is the end with the chips off; he hit it three times and then dropped his maul and threw his hand to his eye.

Dr. J. F. Kelly, the X-ray specialist, testified that he examined plaintiff's eye and that a piece of metal was located in the orbit above the eyeball.

The maul struck by plaintiff showed where several chips had been broken off. Were the jury justified in finding from this evidence that the chip that struck plaintiff in the eye came from the defective maul? There is no evidence that he struck any other object than the defective maul. It is certainly a reasonable conclusion that the chip came from the object he struck, particularly when said object disclosed places where chips had been broken off. It is unreasonable to believe that the chip came from some object he did not strike. The jury drew from the evidence the only reasonable conclusion the evidence would warrant—that the metal chip came from the defective maul. *Swaim v. Chicago, R. I. & P. R. Co.*, 187 Ia. 466, is an instructive case upon this subject. It is there said:

"Proximate cause is not always capable of direct proof. Indeed, more often than otherwise, it is a matter of deduction or natural inference from the circumstances appearing in evidence. It is no answer to the plaintiff's claim in this respect to say that fragments of rock will sometimes fly under the impact of a pick in perfect condition, and that it is, therefore, *possible* for plaintiff to have received the injury of which he complains, even if the pick had not been defective. Absolute certainty of proof is not required, and indeed is rarely obtainable. As it has been stated by this court, 'Proximate cause is probable cause; and the proximate consequence of a given act or omission, as distinguished from a remote

consequence, is one which succeeds naturally in the ordinary course of things.'"

Again, defendant alleges that the evidence is insufficient to warrant the jury in finding that the fellow servant, Guy O. Hinds, told plaintiff to hit the defective maul. Plaintiff testified that Hinds told him to hit the maul. He is corroborated by Coffman and Earle, who were in close proximity, who both testified that Hinds told plaintiff to hit the maul. Hinds denies this, and says he told plaintiff to hit the spike. Here were three witnesses against one. To say the least, the evidence was conflicting. The jury were fully justified in finding in favor of the plaintiff on this point.

Again, does the evidence show that the maul was defective? Defendant's witness Hinds testified: "Q. When you went to work where? A. On the section; when I first picked that maul out of the tool house, from the time I went to work it chipped off some. Q. Was the maul rough? A. It would have to be. Q. Well, was it? A. Yes, sir. Q. How long had it been rough and chipped before the accident, to your knowledge? A. A couple of weeks." This evidence clearly established the fact that the maul was chipped, and that Hinds, the fellow servant, knew it for at least two weeks before the accident. He said it chipped off when he used it. If it chipped off once or twice while he used it, he had notice and knew that it was liable to chip again, and it was clearly negligence on his part to direct plaintiff to strike the maul under the circumstances as he knew them to exist.

Plaintiff testifies that he had never observed the maul; that he did not know it was chipped or defective; that it was not in a position so he could see the chips when he struck the blow. No one testifies to the contrary. It was for the jury to say whether he acted as a reasonable man under the circumstances. If a carpenter stopped to examine the head of every nail before he drove it, he would be useless. If a section man stopped to examine every object he struck, he would lose his job.

But defendant contends that the maul was not defective. Defendant introduced witnesses who said it was a reasonably safe tool. Plaintiff also produced witnesses on this subject. Mr. Dodge, in charge of the tool room of the Burlington, testified: "Q. Mr. Dodge, looking at that maul, what would you say with reference to that being a reasonably safe tool to use, and a proper tool to be given to a man to use for the purpose for which it is intended? A. That tool should not be used at all, after it started to fly off to pieces like that. Q. Why? A. Simply because it is defective in the hardening of it. Q. What would you say about that being a defective or proper tool? A. It would be defective." On cross-examination he further testified that the maul should not be used at all, because when a maul like that starts to chip off, a chip might fly off when it strikes a spike or corner of rail. A section foreman should turn in a tool like that and have it redressed, overhauled, dressed off and retempered. Defendant's section foreman, Wilson, testified: "If a maul chips very early after we get it, I would say it was poorly tempered; if a maul of that kind was called to my attention, I would return it to Atchison."

The question was submitted to the jury and a finding on this point was rendered against the defendant's contention. The finding is sustained by sufficient evidence.

It also appears from the evidence that it was the custom of defendant's foreman, Mr. Wilson, to take charge of the tools at the end of each day's work and reissue them on the following day, hence they were constantly under his personal observation and inspection. He alone had the key to the tool house. It would seem to be unnecessary to call his attention to what was already in his possession and under his observation. In any event, it was for the jury to say whether, under all the evidence and circumstances, he had knowledge of the defective condition of the maul in question.

The evidence fairly shows that plaintiff was inex-

perienced; that he had been farming and doing ordinary labor; that he knew nothing about tempered mauls, and had never used the defective maul or noticed its condition until after the accident. Plaintiff and Otis Wilson, defendant's section foreman, both testify that plaintiff was not instructed in the way his work on the section should be carried on, nor was he given instructions as to the use of the tools. Defendant's witness Melburn testified that section men should be instructed in the use of the tools.

It is the duty of the master to warn and instruct his servants as to defects and dangers of which he knows, or ought, in the exercise of reasonable care and diligence, to know, and of which the servant has no knowledge actual or constructive. *Evans Laundry Co. v. Crawford,* 67 Neb. 153. "The duty of warning and instructing a servant is a primary duty of the master." 26 Cyc. 1167, and many cases cited.

From a careful review of the entire testimony we conclude that the evidence was conflicting, and that there was sufficient evidence to sustain a verdict finding for plaintiff and against defendant for the reasonable and just damages sustained by plaintiff.

Defendant excepts to instruction No. 3. He contends that the court withdrew from the consideration of the jury the question of whether defendant furnished plaintiff's fellow servant with a defective maul. The instruction does not justify the criticism. The instruction tells the jury that they must find from the evidence that defendant did furnish a defective maul to plaintiff's fellow servant before plaintiff could recover. Even if the court had assumed the maul to be defective, he would only have asserted a fact that was scarcely debatable. Other objections are made to instruction No. 3. Instruction No. 3 fairly states the proposition necessary to be proved by plaintiff, and is without prejudicial error to defendant.

Defendant excepts to instruction No. 10, and alleges

that it was error to permit the jury to speculate from whence the chip came. The trial court specifically told the jury that, if the chip did not come from the maul, to find for the defendant. That was sufficient.

Defendant alleges error because the trial court did not instruct the jury that, if Hinds told Morris to strike the spike and Morris struck the maul instead, the defendant would not be liable. In instruction No. 5 the trial court required the plaintiff to prove, as a condition of his recovery, that Hinds told plaintiff to strike the maul. That fairly meets defendant's objection. However, if defendant desired a more specific instruction he should have requested an instruction covering the point, which he did not do.

The instructions in this case as a whole were favorable to the defendant. The plaintiff was required to prove every proposition by a preponderance of the evidence. In instruction No. 6 the trial court instructed the jury: "If you find that he (plaintiff) did not exercise such ordinary care, and that his failure so to do contributed to the accident, then the plaintiff cannot recover and your verdict should be for the defendant." In other words, the defendant had the benefit of the defense of contributory negligence, when the statute (section 8659, *supra*) specifically provides that contributory negligence shall not be a defense, but shall be considered only in mitigation of damages. Contributory negligence does not bar an action under the federal employers' liability act, but only mitigates the damage. *Pittsburgh, C., C. & St. L. R. Co. v. Cole,* 260 Fed. 357; *Chicago, R. I. & P. R. Co. v. Ward,* 252 U. S. 18.

It is only when plaintiff's act is the sole cause, and defendant's act is no part of the causation, that defendant is free from liability under the act. *Delano v. Roberts,* 182 S. W. (Mo. App.) 771; *Grand Trunk W. R. Co. v. Lindsay,* 201 Fed. 836, 233 U. S. 42; *Pennsylvania Co. v. Cole,* 214 Fed. 948; *Louisville & N. R. Co. v.*

Haloway's Admr., 163 Ky. 125; *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114.

The act makes the company liable if the negligence of the company contributed to, that is to say, had a share in producing the injury. *New York, C. & St. L. R. Co. v. Niebel*, 214 Fed. 952; *Cincinnati, N. O. & T. P. R. Co. v. Hall*, 243 Fed. 76.

The act imposes on an employer liability for negligent acts of his servants performed within the course of their employment. The act (section 8657) abolishes the fellow-servant doctrine. *Carter v. Kansas City S. R. Co.*, 155 S. W. (Tex. Civ. App.) 638; *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248; *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146.

The negligence of the officers, agents or employees is the negligence of the defendant common carrier. Section 8657, *supra*.

The negligence of Guy O. Hinds in the case under consideration was the negligence of defendant. The act supersedes all other common-law and statutory liability on the part of common carriers to employees engaged in interstate commerce. *De Atley v. Chesapeake & O. R. Co.*, 201 Fed. 591.

The decisions of the supreme court of the United States are controlling in actions under this act. *McAdow v. Kansas City W. R. Co.*, 192 Mo. App. 540.

The decisions of the federal courts construing and applying the act will be followed by the state courts. *Montgomery v. Southern P. R. Co.*, 64 Or. 597.

In the case under consideration, there is no evidence that the defendant violated any statute enacted for the safety of employees, or that the violation of any such statute contributed to plaintiff's injury. The defense "assumption of risk" as at common law therefore remains in this case. Mr. Justice McKenna says in *Jacobs v. Southern R. Co.*, 241 U. S. 229: "The language of section 4 demonstrates its meaning. It provides that in any action brought by an employee he 'shall not be held

to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.'" It is clear, therefore, that the assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employees. In other cases, therefore, it is retained.

The trial court in instruction No. 7, and generally in his instructions, properly submitted the defense of assumption of risk to the jury. The evidence was conflicting and the verdict of the jury must stand; the court cannot usurp its functions.

Defendant cites many decisions upon the assumption of risk defense. Most of the cases arise where the servant himself had a defective tool and, knowing its defective and dangerous condition, continued to use it without protest. In such cases the servant clearly assumes the risk and cannot recover. But such is not the case we have under consideration. In this case plaintiff was not using the defective maul, and had no knowledge of its condition; other cases cited are determined upon the doctrine of contributory negligence. Space will not permit a discussion of each case cited. The instructions were not prejudicial to defendant.

Defendant complains that plaintiff's counsel was guilty of misconduct during the trial prejudicial to defendant. Affidavits alleging such misconduct are found in the transcript, but are not incorporated in or made a part of the bill of exceptions. These affidavits are the only evidence of such alleged misconduct. According to the repeated decisions of this court such affidavits cannot be considered. *Chicago, B. & Q. R. Co. v. Kellogg,* 54 Neb. 127; *Muchow v. Reid,* 57 Neb. 585; *Summers v. Simms,* 58 Neb. 579.

Complaint is also made that plaintiff's counsel was permitted to ask leading questions. If every case appealed to this court should be reversed where leading

questions were asked, there would only occasionally be a case affirmed. This subject is wisely left to the discretion of the trial judge, and unless an abuse of such discretion is shown this court will not interfere. We do not find in this case such an abuse of discretion as will justify a reversal of the case.

Defendant contends that the verdict of $12,000 is excessive. Many courts have held that the best attainable criterion of the reasonableness of the verdict of a jury is its conformity to the average amount awarded by juries in cases in which injuries of like nature and like extent have been sustained. *Louisville & N. R. Co. v. Fox,* 11 Bush. (Ky.) 495; *Lockwood v. Twenty-third Street R. Co.,* 15 Daly (N. Y.) 374; *Beach v. Bird & Wells Lumber Co.,* 135 Wis. 550; *Merchants & Miners Transportation Co. v. Corcoran,* 4 Ga. App. 654; *Deep Mining & Drainage Co. v. Fitzgerald,* 21 Colo. 533, 13 Am. Neg. Cases, 615; *Spahn v. Peoples R. Co.,* 3 Boyce (Del.) 302, 317; *Maloney v. Winston Bros. Co.,* 18 Idaho, 740, 47 L. R. A. n. s. 634; *Standard Oil Co. v. Tierney,* 92 Ky. 367, 14 L. R. A. 677, 36 Am. St. Rep. 595.

In 17 C. J. 1116, sec. 453, a large number of verdicts are listed which have been rendered and sustained in cases wherein the loss of an eye has been involved. We have taken 23 of these cases where verdicts were held not excessive, and we find an average verdict of about $6,500. We assent to the proposition that the verdict in this case is excessive. The plaintiff is an ordinary working man without any special trade or profession. He is now engaged in farming, and doing his own work. He is probably earning nearly as much money as when he worked on the section. He drives his own automobile without difficulty. He suffered no unusual physical pain as the result of this injury. Defendant paid all of his medical and hospital expenses. His other eye is not affected or seriously threatened. The eyeball is saved. His appearance is not marred. That he is blind in his right eye can only be observed upon the closest inspec-

tion. The damages must be compensatory only. Each case must depend upon its own particular facts. He is only entitled to the present value of the pecuniary loss he has and will in the future sustain.

We conclude that the verdict is excessive. It is therefore considered that the judgment of the district court be set aside and a new trial granted, unless the appellee enter a remittitur of the sum of $4,000 within 20 days from this date. If such remittitur is filed, the judgment to the extent of $8,000 will be affirmed.

AFFIRMED ON CONDITION.

H. E. LARSON V. STATE OF NEBRASKA.

FILED FEBRUARY 16, 1922. No. 22199.

1. **Embezzlement: NAME: VARIANCE.** In a prosecution upon a charge of embezzlement from a corporation, the fact that the name by which the corporation is designated in the information differs from the one assigned to it in its articles of incorporation is immaterial, if the corporation is the same and the corporate name set out in the information is the one under which it does business and by which it was known at the time of the alleged embezzlement.

2. ———: SUFFICIENCY OF EVIDENCE. The evidence in the record, *held* to be sufficient to sustain the verdict.

ERROR to the district court for Dixon county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. J. McCarthy and *P. F. Verzani,* for plaintiff in error.

Clarence A. Davis, Attorney General, Charles S. Reed and *C. A. Kingsbury, contra.*

Heard before MORRISSEY, C.J., FLANSBURG and ALDRICH, JJ., HOSTETLER and MORNING, District Judges.

MORNING, District Judge.

The defendant was convicted of the crime of embezzlement in the district court for Dixon county and was

sentenced to a term in the state penitentiary, and prosecutes error to this court.

The count of the information upon which the conviction was had charged that on the 21st day of June, 1919, in Dixon county, the defendant then and there being the agent of the Farmers Union Elevator Company, a corporation of Dixon county, Nebraska, did then and there, while acting as such agent and by virtue of such employment as agent of said Farmers Union Elevator Company, receive and take into his possession certain money and one certain bank check dated June 21, 1919, of the amount and value of $582.93, the property and money of the said Farmers Union Elevator Company and did then and there unlawfully, fraudulently and feloniously convert to his own use and did embezzle said property and money, without the assent of said Farmers Union Elevator Company, his principal and employer. At the close of the evidence for the prosecution defendant moved the court to instruct the jury to return a verdict of not guilty, which was overruled and this ruling is assigned as error. An examination of the record convinces us that the court did not err in overruling said motion. There was sufficient evidence introduced by the state to justify the submission of the question of defendant's guilt to the jury.

The chief contention of plaintiff in error is that the verdict is not sustained by the evidence. It is insisted that under the rule announced in *McAleer v. State*, 46 Neb. 116, it was necessary for the state to establish the corporate character of the Farmers Union Elevator Company, named in the information as the employer of the accused and as owner of the check and money alleged to have been embezzled, and that there was a want of evidence to show such corporate character. Formal proof of the incorporation of the Farmers Union Elevator Company was not made, but this was not necessary. The contract by which the defendant was employed was in writing, signed by defendant, and it

designates the employer as "The Farmers Union Elevator Co., a corporation of Dixon, Nebraska, party of the first part." This was placed in evidence, and it is not only an admission by the defendant that his employer was a corporation, but it was evidence that said employer was assuming to act as a corporation. The evidence shows that said company had 84 stockholders, a board of directors, a president, secretary and treasurer, and that meetings of the stockholders and directors were held and that it did business in the name of the Farmers Union Elevator Company. In *Braithwaite v. State*, 28 Neb. 832, the court cited with approval *Burke v. State*, 34 Ohio St. 79, wherein an instruction by the court to the effect that it was "sufficient to prove by reputation that there was, at the time when the crime is alleged to have been committed, a corporation known by that name," was approved. In the present case the defendant himself recognized, in the contract of employment signed by him, that his employer was in fact a corporation, and that it was doing business under the name by which it was designated in the information.

On cross-examination of J. J. Stanley, president of the Farmers Union Elevator Company, counsel for defense exhibited what purported to be the constitution and by-laws of the corporation, and developed the following testimony relative thereto: "Q. I will ask you to examine this little book, marked defendants exhibit 1, and state if it be the constitution and by-laws of the company concerning which you have been testifying and by which the defendant was employed? A. Yes, sir; I think it is. Q. As president you have seen such copies as these around the office? A. Yes, sir. Q. And this, you think, contains the constitution and by-laws of the association? A. Yes, sir." Defendant's counsel then offered and read in evidence article 1 of the document, as follows: "The name of this corporation shall be the Dixon Farmers Union Elevator Cooperative Association."

Defendant's counsel insists, in substance, that this

evidence shows that the corporation by which defendant was employed was the Dixon Farmers Union Elevator Cooperative Association, and not the Farmers Union Elevator Company, as alleged in the information, and that there is a fatal variance between the allegation of the information and the proof as to the name of the corporation, and that it also shows that there was no such corporation in Dixon county, by which defendant was employed, as that named in the information. Granting that the evidence referred to shows that the legal name of the corporation was the "Dixon Farmers Union Elevator Cooperative Association," does it prove anything other than that the corporation was, at the time, doing business under an assumed name somewhat shorter and slightly different from the one under which it was incorporated? If the evidence had shown that the corporation was doing business under the name of Dixon Farmers Union Elevator Cooperative Association, instead of the name set out in the information, no doubt the variance between the allegation of the information and the proof would have been fatal, but such was not the case. The evidence shows, without contradiction, that the name set out in the information was not only the one used in the written contract by which defendant was employed, but was also the name by which all of its business was transacted while defendant was employed by it. The above-quoted evidence of the president of the corporation shows that the two names refer to the same corporation, and it removes any possible doubt that the concern was a corporation. How it came about that the name under which it did business was different from the one mentioned in the above-quoted provision of the constitution and by-laws the record does not disclose, nor do we regard it as material. If the injured party is known as well by one name as another, he may be designated in an information by either. 14 R. C. L. 182, sec. 28; 22 Cyc. 348, 350; *State v. Glaze*, 9 Ala. 283; *Commonwealth v.*

Trainor, 123 Mass. 414; *State v. Davis,* 109 N. Car. 780; *Bell v. State,* 25 Tex. 574. And, since a corporation, as well as an individual, may have, or be known by, more than one name, we see no reason why the same rule should not apply where the injured party is alleged to be a corporation. 1 Clark & Marshall, Corporations (11th ed.) secs. 51, 52.

Defendant also insists that the evidence was not sufficient to prove that the check described in the count of the information upon which he was convicted was the property of the Farmers Union Elevator Company. John Curley went to the elevator of said corporation at Dixon, where defendant was in sole charge, and bought a quantity of corn, giving his check in the sum of $1,056.48 payable to the order of the Farmers Union Elevator Company in payment. Defendant had charge of the checking account of said corporation at Dixon, and his usual custom was to deposit moneys received by him for his employer in its bank account, which was in the name of the corporation. That course was not pursued, however, with the check for $1,056.48 above mentioned. He traded said check to one Roe for two other checks, one for $473.55 payable to the order of Farmers Union Elevator Company, which he deposited to the credit of said company, and one for $582.93 payable to his own order, which he deposited to his own credit and which was duly honored, and defendant received and retained the proceeds of it, and failed in any manner to account therefor to his employer. This last-mentioned check is the one described in the count of the information upon which he was convicted. Defendant was a witness in his own behalf. He claims that, while in charge of the elevator of said company at Dixon, at a salary of $125 a month, he purchased with his own funds certain corn from a man named Johnson; that he placed said corn in one of the bins in the company's elevator, and that said corn was a part of the corn sold to John Curley, and that $582.93 of the amount included in the check of

John Curley for $1,056.48 represented that portion of the corn which belonged to him. He explains the method of handling the large check thus: "Q. What did you do with exhibit 1 after it came into your possession after it was delivered to you by Mr. Curley? A. I traded it off for two checks. Q. You traded it? A. Yes, sir. Q. Who did you trade it to? A. George E. Roe, manager of Farmers Elevator at Carroll. * * * Q. And where did you and G. Elam Roe make the trade? A. At Dixon, Nebraska. Q. And you traded exhibit 1 (the check for $1.056.48) for exhibits 4 ($582.93) and 5 ($473.55)? A. I traded number 1 for 4 and 5. * * * Q. Instead of trading that check for two more checks, why didn't you deposit that money in the Dixon State Bank as you formerly had done? A. That check didn't belong to the Farmers Elevator, the full amount. Q. Why didn't you go to the bank and deposit it and have $582.93 credited to your account and $473.55 credited to the elevator account? * * * A. I don't know why I didn't. Q. Is that the only answer you can give? A. Yes, sir. Q. After receiving those checks, exhibits 4 and 5, what did you do with them? A. Deposited them in the Dixon State Bank. Q. $582.93 to your private account? A. Yes, sir. Q. And $473.55 to the elevator account? A. Yes, sir." Defendant further testified that Roe came to Dixon to make the trade of said checks with him; that defendant sent for him, and he came for that express purpose, and that he held the large check until Roe came. He was unable to give any very satisfactory information concerning the man from whom he purchased the corn which he claimed was his, except that his name was Johnson and that he seemed to be a farmer. Johnson was not called by him as a witness, defendant claiming that he had made inquiry, but could not find him. He claims to have paid Johnson over $600 for the corn, such payment being made in cash. The whole story told by defendant, in explanation of his theory that the check for $582.93 did not

belong to his employer, but was his own private property, was not calculated to convince a jury of its truth, and the jury were amply justified in not believing it. There is ample testimony in the record to support the contention of the state that the check for $582.93 was the property of the Farmers Union Elevator Company, and the verdict of the jury that defendant is guilty of embezzling it is well sustained by the evidence.

The record is free from error, and the judgment is

AFFIRMED.

SADIE L. HAYDEN, APPELLEE, V. LOUISE JOSEPHINE HAYDEN ET AL., APPELLANTS.

FILED FEBRUARY 16, 1922. No. 21989.

1. **Wills:** COMPETENT WITNESS. "The term 'competent witness,' as used in the statute relating to the execution of wills, means a person who, at the time of making the attestation, could legally testify in court to the facts which he attests by subscribing his name to the will. Rev. St. 1913, sec. 1290." *In re Estate of Wiese*, 98 Neb. 463.
2. ———: ———: SPOUSE. A spouse may be a competent subscribing witness to a will, when the consort is a devisee.
3. ———: ———: EXECUTOR. A person who is by the terms of a will named as executor is not, by such appointment, rendered incompetent as a subscribing witness to the will, if he be otherwise competent under the statute.

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

Kennedy, Holland, DeLacy & McLaughlin, for appellants.

Smith, Schall & Howell and *Sullivan, Wright & Thummel, contra.*

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., RAPER and STEWART, District Judges.

RAPER, District Judge.

Joseph Hayden died on the 28th day of May, 1920, and thereafter a petition was filed in the county court of Douglas county by Sadie L. Hayden asking for the probate of his will. Objections were filed to the probate by Louise Josephine Hayden and William Hayden. The will was admitted to probate in the county court, from which an appeal was taken to the district court, and the will was again admitted to probate. This is an appeal from that judgment.

Joseph Hayden, the testator, never married, and died in Omaha, leaving property in Douglas county and elsewhere. He left living two brothers, William Hayden (contestant) and James R. Hayden; two sisters, Sadie L. Hayden, proponent, and Mrs. Thomas Flynn. His brother, Lawrence, died prior to testator, leaving one child, Louise Josephine Hayden, one of the contestants. A brother, Edward, died before Joseph, leaving two daughters, Mary Hayden Storz and Ophelia Hayden. Mrs. Lucile H. Madden is a daughter of a deceased sister.

The will devises all of the estate to his sisters Sadie L. Hayden, and Mrs. Tessie Flynn and the niece, Mrs. Lucile H. Madden, equally, and appoints Sadie L. Hayden, Thomas Flynn and John W. Madden, executors. The will is witnessed by C. L. Vance, and by Thomas Flynn, who is the husband of Mrs. Tessie Flynn, one of the chief devisees, and he is also appointed executor.

The contestants allege several grounds in their objections, but the sole ground presented by the record is whether or not the will was correctly executed and witnessed, the main question being one of law as to whether or not the husband of one of the principal devisees is a competent attesting witness.

It is claimed by the appellants, and conceded by appellee, that at common law the spouse of a devisee was incompetent to attest a will, and the appellants insist that that rule of the common law has not been changed

by our statute, and is in force in our state, so it may be conceded that, unless our statutes have changed the common-law rule, the witness Flynn was incompetent. Our statute requires a will to be attested and subscribed in the presence of the testator by two or more competent witnesses. Now does our law make a person who is named as executor, and is the husband of a devisee in a will, a competent witness?

Section 7893, Rev. St. 1913, provides: "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared." There are five special exceptions noted in the statute, but none of these refers to or excepts witnesses to wills. The statute defining the competency of witnesses has, and was obviously intended to have, a far-reaching application. It has been in force since 1866, and has been the source of frequent application, directly and indirectly. In *Sorensen v. Sorensen,* 56 Neb. 729, this court announced that, "under our system of jurisprudence every person is *prima facie* a competent witness in all cases, both civil and criminal," and it was therein further held that the incompetency of one as a witness, or the incompetency of his evidence, must be found in express law, and not based on strict or technical construction, and it was stated in the opinion: "To disqualify a person from testifying by reason of incompetency, he must fall within some one or more of the exceptions expressly provided by statute."

In this connection as to construing exceptions to a general law, Mr. Justice Story in *United States v. Dickson,* 15 Pet. (U. S.) *141, *165, says:

"We are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting

clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reasons thereof."

The witness Flynn does not come within the scope of any of the five exceptions to section 7893, *supra*. That the legislature did not intend to leave in force the common-law rules as to the execution of wills is obvious from a reading of section 1293, Rev. St. 1913, which provides: "All beneficial devises, legacies and gifts whatsoever, made or given in any will, to a subscribing witness thereto shall be wholly void, unless there be two other competent subscribing witnesses to the same." The language "two other competent" witnesses implies that a devisee or one receiving a beneficial gift is competent; and the section does not say nor imply that the will is void, for the reason that one of the witnesses is a devisee or interested. The plain purport of the section is that a will so witnessed is valid. In the next section, 1294, a remedy is given the devisee who loses his legacy because of his having attested the will, by recovering his share as an heir, under certain restrictions, from the devisees and legatees named in the will. As well said in appellee's brief: "If interest renders the witness incompetent (in the case of only two witnesses) there would be neither 'devisees,' 'legatees,' nor 'will.' Such recovery is to be had 'in proportion to and *out of* the parts *devised or bequeathed* to them.' If the will itself is void, because of *interest* of one witness, it would be 'paradoxical' to provide for a remedy against devisees who are not devisees."

This court held in the case of *In re Estate of Wiese*, 98 Neb. 463, that the attestation of a will by two competent witnesses is a statutory requirement, and that a competent witness is one who at the time of attesting a will would be legally competent to testify in a court of justice to the facts which he attests by subscribing his

name to the will, and it was decided in that case that a devisee may be a competent subscribing witness to a will. In *Spier v. Spier,* 99 Neb. 853, it was held that a child under 14 years of age was a competent witness to a will, and in the opinion it is stated: "She was not required to have any other qualifications than those of an ordinary witness."

In *Kaufman v. Murray,* 182 Ind. 372, the Indiana court held, under a statute not dissimilar in principle from our own, that a wife (Mrs. Kaufman) was a competent witness to a will which gave a devise to her husband, and Morris, J., in the opinion says: "Section 3144 * * * provides that a witness beneficially interested may be compelled to testify when necessary. The statute deprives him however of taking any property of the decedent other than what he would have taken by the law of descent. The proper construction of this section has been considered by this court in the recent case of *Wiley v. Gordon,* 181 Ind. 252, and, under the doctrine there declared, Mrs. Kaufman, had she attested the will, would have been a competent witness, and it necessarily follows that, under such doctrine, the husband would not be excluded where the wife is the beneficiary." In a note to *Kaufman v. Murray,* Ann. Cas. 1917A, 833, the editor gives this rule: "Under statutes making husband or wife generally competent to testify in favor of each other, and where there is no special restriction with respect to wills, the husband or wife of a beneficiary under a will is a competent attesting witness to the will"—citing *White v. Bower,* 56 Colo. 575; *In re Hatfield's Will,* 21 Colo. App. 443; *Hawkins v. Hawkins,* 54 Ia. 443; *Bates v. Officer,* 70 Ia. 343; *In re Holt's Will,* 56 Minn. 33, 45 Am. St. Rep. 434, 22 L. R. A. 481; *Lippincott v. Wikoff,* 54 N. J. Eq. 107; *Gamble v. Butchee,* 87 Tex. 643.

In some states, Illinois (before 1911, when a new statute was passed), Massachusetts, Maine, New Hampshire, and others, where, as is said in *Hodgman v. Kittredge,* 67 N. H. 254, 68 Am. St. Rep. 661, "The

legislature has expressly excepted attesting witnesses from the operation of the statutes, removing various disabilities to testify, and left the question of their competency to be determined by the rules of the common law," it is held that under the common law a husband or wife is incompetent as an attesting witness when the spouse is a devisee.

Our statutes are plain, and, in view of their provisions and the decisions of other courts having similar provisions in their laws, there can be no other conclusion than that the witness Flynn was not incompetent to attest the will as a subscribing witness because his wife is a devisee.

Another question raised by the appellants is that, because the witness Flynn was named as executor, he was thereby rendered incompetent. The *Wiese* case, *supra,* determines that proposition, and it would seem that the conclusion reached above necessarily decides this question. However, other courts have held that the mere fact that a party is named as executor clearly does not affect his competency as an attesting witness. *Geraghty v. Kilroy,* 103 Minn. 286; *Stewart v. Harriman,* 56 N. H. 25, 22 Am. Rep. 408. Other cases might be cited, but it is deemed unnecessary.

Thomas Flynn is a competent witness, and the judgment of the district court admitting the will to probate is right, and is

AFFIRMED.

ARTHUR L. BOURQUIN, APPELLEE, V. ATLANTA STATE BANK ET AL., APPELLANTS.

FILED FEBRUARY 16, 1922. No. 22010.

1. **Principal and Agent:** ACTION AGAINST AGENT: MEASURE OF DAMAGES. In an action against an agent for damages alleged to have been caused by the agent's payment of a fund, contrary to the principal's direction but in line of his duty, the measure of recovery, generally, is the actual damages sustained.

2. ———: ———: ———. Where an agent was authorized by his principal to pay money to a certain person upon that person giving a bond for the fulfilment of a promise to give possession of real estate on a stated date, and the agent paid the money without exacting such bond, but taking other and inadequate purported security, such agent is not guilty of conversion of the fund, but is liable for the actual damages the principal has suffered by reason of the failure to follow the instructions of the principal.

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

J. G. Thompson and *James I. Rhea*, for appellants.

Hastings & Hastings, contra.

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., RAPER and STEWART, District Judges.

RAPER, District Judge.

Action in Phelps county district court, brought by appellee against appellant bank, for alleged conversion of $1,500. Trial to jury, with verdict and judgment for appellee, from which defendant bank and Louis R. Grace, intervener, appeal. Louis R. Grace had contracted to sell to plaintiff a half section of land in Perkins county, for the sum of $11,200, $2,000 of which had been paid and the remainder payable on March 1, 1919, when deed was to be delivered and possession of the farm given. On March 1, 1919, the defendant bank received this telegram:

"Pay L. R. Grace $7,700 on receipt of deed to north half of section 2, township 9, range 37, Perkins county, Nebraska, deed to run to Arthur L. Bourquin, draft following. (Signed) Madrid Exchange Bank."

The telegram had been sent by direction of plaintiff. On the same day plaintiff sent, and defendant received, another telegram:

"Pay L. R. Grace $1,500 when he furnishes bond for like amount for possession of the north half of section 2, township 9, range 38, Perkins county. In case of failure to give possession by March 15, 1919, he is to

refund $1,500. Draft following. (Signed) A. L. Bourquin."

About that date (probably the same day) plaintiff sent to Louis R. Grace the following message:

"I am wiring the money to your bank. Get your deed to-day before you start any proceedings. A. L. Bourquin."

This was sent subsequently to the telegrams to defendant bank. On the 1st of March plaintiff wrote and mailed a letter to defendant bank as follows:

"I am sending you draft on Neb. State Bank, Lincoln, Neb. for $9,200. In conformation our message 'Pay L. R. Grace $7,700 when he furnishes deed to N.½ of section 2, 9, 38, Perkins Co. Neb.' Also message 'Pay to L. R. Grace $1,500' making total of $9,200. I trust this will be satisfactory to you, and if there is any expense attached to this Mr. Grace should pay it. Mr. Grace promised to furnish a bond that he will furnish possession of these premises or refund the $1,500 damages.

"Very truly yours, A. L. Bourquin, Cashier."

The defendant bank received the draft for $9,200, paid the full amount to Louis R. Grace, and received Grace's deed to plaintiff. Instead of requiring a bond from Grace, as mentioned in the telegram and letter, the defendant accepted the contract between Grace and plaintiff, and on March 4, 1919, sent a letter as follows to plaintiff at Madrid, Neb.:

"Dear Sir: Received two messages one letter with draft inclosed for $9,200 for L. R. Grace. Grace to deliver deed to N.½ sec. 2-9-38. We inclose deed. L. R. Grace has deposited with us as surety for possession the agreement between he and you. Very Resp.

"M. A. Fulk, Cash."

The deed was inclosed in this letter. The deed was recorded April 3, 1919. The defendant bank received no response to this letter until May 19, 1919. It further appears that Grace had contracted to buy the land from one Grosenbaugh, and that the plaintiff had contracted

to sell the land after he had bought from Grace. A tenant, J. A. Watson, was in possession of the land, but there is no competent evidence to show by what right he held it, nor when his lease expired. The plaintiff was permitted, without proper qualification, to testify that the value of the possession of the land was $1,500, and that he had placed a check in escrow in a bank at Grant on March 1, and it is not disclosed that plaintiff had any agreement with Watson himself, nor does the evidence show the amount of the check deposited in escrow in the Grant bank, nor the conditions of the escrow, nor that Watson refused to remove from the land without the payment of some money, nor that Watson had any right to remain in possession of the land.

There are some other features of the evidence that it is not deemed necessary to give. The petition was framed upon the theory that, the defendant having paid out the $1,500 without taking the required bond from Grace for possession of the land, the defendant was guilty of conversion, and the court submitted the cause to the jury upon an instruction that, if they found that defendant violated the instructions and paid the money to Grace without procuring the required bond, the plaintiff would be entitled to the full sum of $1,500 and interest, and the jury so found and returned verdict for $1,500 with interest from March 15, 1919, at 7 per cent., a total of $1,685.50.

In this we think there was error. The plaintiff, if successful, was entitled only to recover his actual damages. If the defendant violated the instructions, it was liable for the actual damages. It is often difficult to distinguish between cases where there is a conversion, and where the facts show only a right of action for damages, but in this case it is plain that the measure of damages is the loss, if any, actually sustained by reason of the defendant's conduct. See 31 Cyc. 1453, 1454.

In *Minneapolis Trust Co. v. Mather,* 181 N. Y. 205, it is said: "It is equally clear that the rule of damages

as for conversion is not applicable to all cases where a principal may sustain loss through the negligence or disobedience of his agent (cases cited). The law upon this subject is well summed up by Bronson, J., in *McMorris v. Simpson,* 21 Wend. (N. Y.) 610, 613, as follows:

"'The most usual remedies of a principal against his agent are the action of assumpsit and a special action on the case; but there can be no doubt that trover will sometimes be an appropriate remedy. The action may be maintained whenever the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tort-feasor. But there must be some act on the part of the agent. A mere omission of duty is not enough, although the property may be lost in consequence of his neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers. There must, I think, be an entire departure from his authority before this action for a conversion of the goods can be maintained.'" In the same case the court quotes with approval from Mecham, Agency, sec. 476: "So where an agent was authorized to deliver goods on receiving sufficient security, but delivered them on inadequate security, it was held that trover would not lie."

It is obvious, that in this case the proof does not sustain the allegation of conversion. Plaintiff's counsel deemed it necessary to offer proof of the value of the tenant's possession, which of itself indicates that they did not rely upon their claim of conversion. The plaintiff should allege and on trial prove the actual damage, if any.

The defendant in its answer alleges that plaintiff

ratified its act in paying the money to Grace. The proof offered on this was that, on March 4, the defendant wrote a letter to plaintiff inclosing his deed, and telling him that defendant had received the agreement for the sale of the land as security for the fulfilment of the promise to give possession, and that plaintiff did not respond to that letter until May 19. We cannot say, as a matter of law, that this delay in objecting to defendant's acts, of itself, constitutes ratification; however, if the delay caused any change in the bank's situation or prevented the bank from protecting itself, if objection had been promptly made, such delay may have created an estoppel, but no estoppel is pleaded.

Louis R. Grace intervened and filed an answer, to which the court sustained a demurrer. One of the defenses pleaded is that the intervener did not authorize plaintiff, or any one else, to negotiate for the possession of the premises, and that no action was ever commenced or prosecuted for obtaining such possession, and that if plaintiff paid $1,500 for such possession it was a voluntary payment. In view of the undisputed evidence that plaintiff, by his instructions to the bank, gave the intervener until March 15 to transfer the possession, it seems questionable, unless some special cause or urgency be shown, that the plaintiff should have the right arbitrarily to fix an amount on March 1, as the value of the possession, without some notice to the intervener of the fact (if it be a fact) that the tenant claimed and had the right to hold over for the next year. Louis R. Grace had such an interest in the result of the relief sought as entitled him to intervene, and to offer proof as to the rights of the tenant, and any other fact that might result in defeating plaintiff's claim, or in reducing the damages.

We do not express any opinion as to the ultimate rights of the parties, nor discuss the effect of the evidence, other than as above pointed out, because the case must be reversed for the reasons above given, and in another trial the

rights of the parties can be adjudicated according to the allegations and proof.

The cause is reversed and remanded, with permission to the parties to file amended pleadings in accordance with the views herein, and trial had on the new pleadings.

REVERSED.

GEORGE TROXCIL, APPELLEE, V. MORRIS & COMPANY, APPELLANT.

FILED FEBRUARY 16, 1922. No. 22221.

1. **Appeal:** CONFLICTING EVIDENCE. "A finding of the district court on an issue of fact in a compensation case will 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." *Simon v. Cathroe Co.*, 106 Neb. 535.
2. **Master and Servant:** COMPENSATION AWARD: COMMUTATION. The spirit and intention of the compensation act is to safeguard a compensation award. Commutation to a lump-sum payment should be approved by the courts only for strong and urgent reasons.

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

James C. Kinsler, for appellant.

Bigelow, Peterson & LaViolette, contra.

Heard before MORRISSEY, C.J., ROSE and ALDRICH, JJ., RAPER and STEWART, District Judges.

STEWART, District Judge.

This is a claim under the workmen's compensation act. On September 11, 1919, George Troxcil was about 21 years of age, and an employee of Morris & Company as a laborer in appellant's packing house. While in the performance of his duty, he fell and his head was caught between a gate-bar and the cage of a descending elevator. The company voluntarily paid compensation at the rate of $15 a week for 19 weeks, ending

January 16, 1920, on which date appellee had returned to work. In February, following, a claim for compensation was filed, and later an award was made by the compensation commissioner, and, upon appeal, by the district court, of $6 a week for 281 weeks, and thereafter at the rate of $4.50 a week during claimant's life. Over appellant's objection, the award was ordered commuted to a lump sum. Morris & Company appeal.

Appellee contends that his injuries were total and permanent within the meaning of the workmen's compensation act, rendering it necessary for him to fit himself by education for mental rather than physical labor, and making it proper for the court to order commutation to a lump-sum payment.

Appellant insists that disability ceased at the close of the appellee's healing period, on January 16, 1920, when he was able to and did return to work at higher wages; also that the court was without power, in the absence of an agreement between the parties, to order commutation.

The district court in its decree found, among other things: "The court further finds that said injury resulted in permanent disability, entitling the plaintiff to compensation under subdivision 1 of section 3662 at the rate of $6 a week, during the first 281 weeks, after January 16, 1920, and $4.50 a week for the remainder of his life."

The order overruling the motion for a new trial recites: "That a special finding is made that the plaintiff has suffered, by reason of his injury to his jaws and head, a 15 per cent. depletion, and it is the 15 per cent. depletion on which the court bases the decision in this case, concluding therefrom that it has by reason of that per cent. unfitted him for the work he was engaged in at the time he received his said injuries to the full extent normal to him in his then employment."

There was evidence at the trial tending to show that, as a result of the accident, the appellee suffered a frac-

ture of the upper jaw, of one prominent bone below the eye, and the nasal bone, part of which was removed, leaving the nose permanently disfigured; that two teeth were knocked out and two others broken; that the lateral, or side to side motion of the lower jaw, was entirely and permanently lost, thereby limiting his ability to masticate his food, resulting in permanent impairment of the functions of digestion and nutrition about 30 per cent.; that, since the accident, he frequently suffers from headache and stomach trouble, and that he is physically debilitated about 25 per cent.

About four months after the injury appellee was given three different light jobs by appellant, at the same relative pay he formerly received, and continued to work for about five months, when he was assigned to hard work. Four days later he quit because he could not stand the work, and to become a street car conductor at increased wages for longer hours, and to work seven days a week. He continued as a street car conductor for the following year until date of trial. It also appears in the testimony that during the time he worked for the street car company, because of relaxed energy, on about five occasions he arrived too late to make his trip, and on about as many occasions he was absent from duty because of illness, in the aggregate of about 20 days. Practically all the conflicting evidence was between expert witnesses in their respective opinions of the conditions of appellee's health, and the effect of his injuries upon his earning capacity and physical ability to labor.

We are satisfied, except as to the matter of commutation, that this case comes within a well-established rule of law of this state: "A finding of the district court on an issue of fact in a compensation case will 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." *Simon v. Cathroe Co.*, 106 Neb. 535, and cases cited.

In its decree the trial court, so far as it is pertinent to quote, found as follows: "The court further finds that the nature of plaintiff's injury requires a change in vocation to one making less demands upon his physical strength, and for that purpose that the payments to be made, should be commuted to one lump sum in the method provided by law."

The above finding seems to have been based mainly, if not entirely, upon the opinions of the medical expert witnesses that the appellee's condition required a change of vocation. Neither the appellee nor his wife testified upon the subject. The record shows he reached the eighth grade in school, and that his career has always been that of a farmer or laborer. No emergency is shown, and it is purely problematical whether he would be helped or hurt by getting immediate possession of his money.

The spirit and intention of the compensation act is to safeguard a compensation award. Commutation to a lump-sum payment should be approved by the courts only for strong and urgent reasons.

In *Perry v. Huffman Automobile Co.*, 104 Neb. 214, this court said: "The workmen's compensation act does not contemplate the payment of large sums of money to improvident employees or dependents who may lose it and become a charge on the public, but as a general rule requires employers to pay injured employees compensation in small periodical payments at short intervals."

The evidence being ample to sustain the judgment, issues of fact determined will not be disturbed, except as to the manner of making payments.

The judgment of the district court is modified to require weekly payments instead of awarding a lump sum, and, as modified, is affirmed.

AFFIRMED AS MODIFIED.

GOTLIEB P. OLIVERIUS, APPELLEE, V. ROBERT G. WICKS, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21848.

1. **Pleading:** ADMISSIONS: INSTRUCTION. In an action for assault and battery, the plaintiff alleged that "the defendant unlawfully made an assault upon the plaintiff, and him, the said plaintiff, did then and there beat, wound, and ill-treat," etc. The answer alleged that "the plaintiff assaulted the defendant, and whatever injuries he received was by reason of the necessary defense made by the defendant, and was received while the defendant was lawfully defending himself from said assault, * * * and that he used only such force in repelling the assault as was apparently necessary," etc. *Held*, that the court did not err in instructing the jury that the answer of the defendant admitted the assault as charged.
2. **Evidence:** WITNESS: IMPEACHMENT. Where a witness, called as a medical expert, testified, both upon direct and cross-examination, that there was no history in the medical profession of appendicitis being caused by a blow, and his attention was called to a work proved to be a standard medical authority, with which he said he was not familiar, but which stated that a blow, or traumatism, was probably capable of acting as a causative agent of appendicitis, *held* that the court did not err in admitting in rebuttal the extract in question, it being received, not as substantive proof of the fact whose probability it asserted, but for the purpose of impeaching or discrediting the witness by showing he was mistaken in his statement.
3. **Damages:** REMITTITUR. Plaintiff testified that he had expended $491.50 for medical and surgical services and charges for hospital attendance. There was no evidence of any kind showing that the disbursements represented the fair or reasonable value of the services rendered. *Held* error to permit the jury to consider these charges as an element of plaintiff's damages, but plaintiff is permitted to remit the amount thereof from the judgment.
4. **Assault and Battery:** VERDICT. Form of verdict examined, and *held* not subject to the objection that it included interest.

APPEAL from the district court for Garfield county: BAYARD H. PAINE, JUDGE. *Affirmed on condition.*

Prince & Prince and *E. M. White,* for appellant.

Guy Laverty and *Davis & Davis, contra.*

Heard before MORRISSEY, C.J., ALDRICH and ROSE, JJ., FITZGERALD and WAKELEY, District Judges.

WAKELEY, District Judge.

Oliverius recovered a judgment against Wicks for $4,045.07 damages for an assault and battery. Wicks appeals. Appellee in his original petition prayed for judgment for $2,108. In a supplemental petition, setting forth injuries which had developed since the commencement of the action, appellee demanded judgment for the total amount of $7,937.80.

The first error assigned, asking the reversal of the judgment, is that the court erred in one of its instructions, viz., No. 5, the part thereof of which complaint is made being as follows: "You are further instructed upon the question of the burden of proof that the defendant, Robert G. Wicks, in his answer, as set out in instruction No. 2, admits the assault as charged against him, and seeks to justify this assault by a plea that the same was made in self-defense, * * * The burden is upon the defendant and it is for him to prove that defense by a preponderance of the evidence, as hereinabove set out."

The particular portion of the instruction which appellant claims is erroneous is that which states that the defendant, Robert G. Wicks, "admits the assault as charged against him." Whether Wicks admitted the assault as charged depends, of course, upon the pleadings, to which, therefore, reference is made.

The plaintiff in his original and supplemental petition averred: "That on the 14th day of June, 1918, the defendant unlawfully made an assault upon the plaintiff, and him, the said plaintiff, did then and there beat, wound, and ill-treat," etc. The answer alleged: "That on the 14th day of June, 1918, the plaintiff assaulted

the defendant, and whatever injuries he received was by reason of the necessary defense made by the defendant, and was received while the defendant was lawfully defending himself from said assault; that prior to the assault above set forth, the plaintiff had abused the defendant and attempted to provoke an assault, and had threatened to assault and beat the defendant, which threats had been prior to the assault aforesaid communicated to the defendant; that at the time of said assault, the defendant was lawfully upon the public street of the city of Burwell: and that he used only such force in repelling the assault as was apparently necessary, considering the violence of the assault and the threats which the plaintiff had before said assault made." These allegations were followed by a general denial. Plaintiff's reply was a general denial as to all allegations of the answer except such as admitted the truth of plaintiff's petition.

The question therefore is: Was the court right in giving the instruction that he did? That is, did the answer of the defendant admit the assault charged in the petition? We think it did. In the first place, it is pertinent to observe that it is the law of this state that, in civil actions for assault and battery, no evidence tending in any way to justify the assault and battery is admissible under a general denial. *Barr v. Post,* 56 Neb. 698; *Mangold v. Oft,* 63 Neb. 397. What is the effect when, as here, the defendant justifies the assault by pleading self-defense? In 5 C. J. 657, secs. 84, 85, in a discussion of the nature and effect of pleas in actions of this character, it is said: "A legal plea of justification must admit the battery as alleged." And again: "A plea of *son assault demesne* (as is the plea here) admits the offense charged but seeks to avoid it on the ground of self-defense."

In *Le Fevre v. Crossan,* 3 Boyce (Del.) 376, which was an action such as this, for assault and battery, the court said: "It is a principle of pleading that every

justification pleaded must, expressly or tacitly, confess the act which it is intended to justify. And usually one may not plead in avoidance of a fact which the plea does not admit, for it is of the essence of such a plea to confess the truth of the allegation which it proposes to answer and avoid"—citing Gould, Pleading, sec. 111.

So in *Pleasants v. Heard,* 15 Ark. 405, it is said: "The plea of *son assault demesne* is a special plea of justification. It confesses the battery alleged, but avoids and justifies it on the grounds of self-defense."

In *Watson v. Hastings,* 1 *Pennewill* (Del.) 47, it is said: "The plea of *son assault demesne* only admits the assault and trespass."

And in *Smith v. Wickard,* 42 Ind. App. 508, the court say: "By a plea of *son assault demesne* the defendant justifies an assault and battery, by asserting that the plaintiff committed an assault upon him, and that he merely defended himself."

In the light of these authorities, we think it must be held that the plea of justification, viz., self-defense, interposed by Wicks necessarily admitted the assault and battery. Throughout his evidence Wicks admitted beating the plaintiff, but endeavored to prove that the plaintiff was the aggressor.

The second point raised by appellant relates to the admission in evidence of an excerpt from a standard medical work, "Warbassey on Surgical Treatment," its reception coming about in the following way: As before stated, the plaintiff filed a supplemental petition. This set forth that some six months after the original injuries had been inflicted upon appellee complications and developments ensued, not apparent or existing at the time when the original petition was filed, which subsequently developed into appendicitis, necessitating the removal of the appellee to hospitals in Omaha, and an operation for appendicitis at considerable expense to the plaintiff, and attended with great pain, and long-

continued suffering, and extreme nervousness, existing at the time of the trial.

The record discloses that appellant inflicted upon appellee grievous injuries, knocking him down with "something hard," striking him a second time, rendering appellee unconscious, and, when he regained consciousness, appellant was on top of him in the gutter, still pounding him and threatening to kill him; that he begged for mercy, and was heard to say, "Oh, don't!" or, "Oh, Bob!" that appellant finally got off appellee, who then went home groaning and moaning; he couldn't walk very good; his garments were torn and covered with blood; his face cut to the bone in two or three places, and his lip cut through; that two of his ribs were broken; that he could not sleep thereafter; that he was often dizzy; his limbs were numb; that because of the injuries to the abdominal region he went to Omaha; was in the Nicholas Senn Hospital for seven or eight weeks in 1919; and after returning home was compelled to return to Omaha in April, 1920, and receive further medical and surgical treatment at the Wise Memorial Hospital. In February, 1919, Dr. Condon at the Nicholas Senn Hospital operated upon him for chronic appendicitis and removed his appendix.

The contention of appellee was that the appendicitis was the result of traumatism, that is, of a blow or blows inflicted in the fight by appellant upon appellee. The contention of the appellant was that appendicitis could not be caused by traumatism, or a blow. Physicians and surgeons were called by each side to maintain its position. Dr. Smith, who attended appellee during his entire illness, testified that, in his opinion, the cause of the appendicitis was traumatism or a blow received in the appendical region at the time of the assault. He further stated that, following the injuries to appellee and prior to his operation for appendicitis, trouble developed with appellee's abdomen; that he had climatic peritonitis, which was a condition of the peritoneum,

evidenced by pain, blowing gas from the bowels, and a great deal of tenderness all over the abdomen, usually located in the center over the appendix, and appellee complained of this very much at certain times, and it kept on until the witness advised him to go to a hospital for an operation for appendicitis.

Dr. Condon, of the Nicholas Senn Hospital, who performed the operation for appellee's appendicitis, testified that, in his opinion, the beating of the appellee on June 14, 1918, and the bruises inflicted upon him at that time over the region of the appendix, was the causative factor of the appendicitis.

Dr. Britt attended and examined appellee once following his injuries, and was called out of the regular order, as a medical expert, on behalf of the appellant He testified on his direct examination that, so far as recognized by the medical profession, and by medical authorities, within his knowledge, appendicitis was never caused by a blow; that there had been no history of direct appendicitis from external violence. Upon his cross-examination he testified that he could not conceive of appendicitis being caused by a blow; that it might be possible, but that there was no history of such a case. "Q. There is no history of such a case? Then you mean by that, that if this plaintiff had appendicitis some six or seven months after the injury and was operated on in January or February, after the injury in June, 1918, that such appendicitis could not have been caused by the injury? A. I think not. Q. It is your opinion that it could not have been? A. It is my opinion it could not have been. Q. Have you based that opinion on the fact that you say that appendicitis is not caused that way? A. We have no history of appendicitis in that way; might possibly be, but I doubt it." The witness further stated that he was acquainted with a medical work, "Anders on the Practice of Medicine," that he had read the work, that he knew what Anders assigned as causes of appendicitis, and that in this connection

Anders stated as follows: "It is not uncommon for excessive or uncommon exertion or a traumatism, or jarring of the body, as in jumping, to act as a favoring cause." Although the witness also stated that the "traumatism" to which Anders referred was a traumatism of a different nature from that supposed to be in issue in the case at bar. The witness was then asked whether he was acquainted with "Warbassey on Surgical Treatment," a modern work published in 1919, and answered that he was not. This work was later identified by Dr. Smith, as a standard medical authority, and the following excerpt therefrom offered and received in evidence: "Traumatism to the appendical region should be avoided, as this is probably capable of acting as a causative agent."

So that the question is: Was the admission of this extract in evidence under the conditions surrounding its reception erroneous? Under the decision in *Van Skike v. Potter,* 53 Neb. 28, we must, of course, consider it settled in this state that medical books cannot be received as independent evidence of matters stated in them. But the question here is: Was the reception of this excerpt under the circumstances erroneous? We do not think so. Dr. Britt was called in behalf of the defendant as a medical expert. He had upon direct examination stated that, so far as recognized by the medical profession, appendicitis was never caused by a blow; that there had been no history of direct appendicitis from external violence. Then, upon cross-examination, as above noted, he went somewhat out of his way to reiterate his statement that medical history furnished no example of appendicitis arising from a blow. His attention was directed to Warbassey's book, with which he stated he was not familiar. This being the situation, and the book having been identified by Dr. Smith as a standard medical authority, the paragraph in question was admitted upon rebuttal.

It was not in any sense admitted as independent evi-

dence to prove substantively the matter therein recorded, but to discredit or disprove the statements reiterated by Dr. Britt that in the medical profession there had been no history of appendicitis as the result of a blow. It was, we think, competent, as in the nature of impeaching testimony, and to show the jury that Dr. Britt was mistaken in his positive assertions. We think this the logic of *Van Skike v. Potter, supra,* where the court say (p. 41): "They (medical books) were not offered for the purpose of fortifying an opinion which had been expressed by an expert upon the witness-stand, and whose opinion was predicated upon the text book offered, *nor were they offered for the purpose of showing that they contradicted the opinion expressed by such expert.* But they were offered as independent evidence to sustain the plaintiff's contention." Dr. Britt's assertion had been, there was no recorded history of such a case; the book showed there was, and we think it was competent, as is strongly intimated in the language just quoted.

Pinney v. Cahill, 48 Mich. 584, was an action for damages against the defendant, whose ill-usage and neglect, it was claimed, caused the death of the plaintiff's horse. Graves, C.J., in rendering the opinion of the court said:

"The plaintiff produced a witness who swore that he was a veterinary surgeon of twenty-five years' standing, and his opinion as an expert being called for he swore that in his opinion the horse died from being overfed when too hot, which would produce colic. On cross-examination, he said that colic was caused by overdriving and feeding when the animal is too warm; that all works of good authority spoke of it, and that the 'Modern Horse Doctor, by Dr. Dodd,' was a work of that kind. The defendant then offered to show from this work of Dr. Dodd, where the author treats of colic, the passage following: 'In nine cases out of ten colic is the result of impaired digestive organs; the food

runs into fermentation and evolves carbonic acid gas.' This evidence was offered to discredit this expert in connection with his cross-examination. The plaintiff objected to its introduction, but the court admitted it.

"The rule is acknowledged in this state that medical books are not admissible as a substantive medium of proof of the facts they set forth. But the matter in question was not adduced with any such view. The witness assumed to be a person versed in veterinary science; to be familiar with the best books which treat of it and, among others, with the work of Dodd. He professed himself qualified to give an opinion to the jury from the witness-stand on the ailment of the plaintiff's horse and its cause, and the drift of his answer was to connect the defendant with that ailment. He borrowed credit for the accuracy of his statement by referring his learning to the books before mentioned and by implying that he echoed the standard authorities like Dodd. Under the circumstances it was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness and enable the jury to see that the book did not contain what he ascribed to it. The final purpose was to disparage the opinion of the witness and hinder the jury from being imposed on by a false light. The case is a clear exception to the rule which forbids the reading of books of inductive science as affirmative evidence of the facts treated of."

City of Ripon v. Bittel, 30 Wis. 614, was an action for damages for injuries sustained by reason of a defective sidewalk. It was objected that the court erred in admitting in evidence certain treatises on surgery which were offered by the attorneys for the plaintiff. The court said: "The record does not inform us what the purpose or object of the offer of the treatises was. Counsel suggests that it may have been to expose or discredit the medical witnesses, examined as experts, who, founding their opinions upon the same treatises, recognized as standard authority, had testified that the books

laid down such and such particular propositions or theories, or such and such particular conclusions, when in truth and in fact the books did not do so and the witnesses were mistaken. Counsel asks if, under such circumstances, the books would not be admissible as in the nature of impeaching evidence, or to show that the experts were in error. We cannot say that the admission would be improper, and so must overrule the objection."

It is also contended the judgment should be reversed because the court in instruction No. 10 permitted the jury to consider, as an element of damages, medical and surgical services and hospital bills which the plaintiff had paid or become liable for. The record discloses no evidence touching the fair and reasonable value of the physicians' services, or of the value of the board, attendance, etc., furnished by the Nicholas Senn and Wise Memorial Hospitals, in which appellee was for a long time following his injuries, and in one of which, the Nicholas Senn, the operation for appendicitis was performed. These expenses aggregated, according to appellee, $491.50. He testified entirely from memory and with some uncertainty. He produced no receipted bills. No physician testified as to the value of services rendered by him. No one connected with either hospital testified as to the amount paid by appellee, or as to the reasonable value of its services to or attendance upon him; the only evidence as to these disbursements being that appellee paid the Nicholas Senn Hospital $175, and the Wise Memorial Hospital $109, for the privileges of the same. Service such as these are of a peculiar kind, and we do not think the jury could, without the aid of testimony, have formed a reliable opinion as to their value. The case at bar, therefore, does not fall within the category of those pressed upon us by counsel for appellee, where the testimony disclosed the nature, extent and details of the services rendered, the number of physician's visits, etc., constituting a basis upon which the court has in some cases permitted the jury to assess a

value. The judgment, however, should not be reversed for this error, if appellee is willing to submit to a remittitur in the sum of $491.50.

The final error assigned is that the jury included interest in its verdict. The verdict was: "We, the jury duly impaneled and sworn in the above entitled cause, do find for the plaintiff, Gotlieb Oliverius, and fix his damages at $4,075.70, with interest included, J. H. Webb, Foreman." When we bear in mind that this particular form of verdict was given by the court along with his instruction No. 16 as a form approved by him, in the event the jury found for the plaintiff, we agree with counsel that this simply meant the plaintiff was to have judgment for the amount found due (to be inserted in the space left blank), and that nothing was to be added for interest to that time.

If, therefore, the appellee shall, within 20 days from this date, file in this court a remittitur for $491.50 from the judgment recovered, then said judgment shall be, and, in that event, is affirmed. If said remittitur be not so filed, then said judgment shall be reversed and the cause remanded for a new trial.

AFFIRMED ON CONDITION.

BAUER & JOHNSON COMPANY, APPELLEE, V. NATIONAL ROOFING COMPANY, APPELLANT.

FILED FEBRUARY 16, 1922. No. 21610.

1. **Negligence**: PROXIMATE CAUSE: QUESTIONS FOR JURY. Where, under the evidence, the facts and circumstances attending an accident are such that different minds may reasonably differ, as to whether or not an act or omission, under such conditions, constitutes negligence, and as to whether the negligence, if found, is the proximate cause of the accident, the questions of negligence and proximate cause are for the jury.

2. ———: INSTRUCTIONS. In a case where contributory negligence is pleaded and there is evidence sufficient to submit that question to the jury it is error to instruct the jury that, if they

find that negligence on the part of the defendant was the proximate cause of the accident complained of, their verdict should be for the plaintiff, without in the same instruction telling the jury under what conditions contributory negligence by the plaintiff would defeat a recovery by plaintiff.

3. ———: COMPARATIVE NEGLIGENCE: DAMAGES. "If, on the trial of an action 'brought to recover damages for injuries to a person or to his property caused by the negligence of another,' plaintiff is found to be guilty of negligence directly contributing to the injury complained of, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which, under the circumstances, amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff, however slight, will defeat a recovery. And even when plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of damage sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained. Rev. St. 1913 sec. 7892." *Morrison v. Scotts Bluff County*, 104 Neb. 254.

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

Nolan & Woodland, for appellant.

Kennedy, Holland, DeLacy & McLaughlin, contra.

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., GRAVES and WELCH, District Judges.

WELCH, District Judge.

Plaintiff, Bauer & Johnson Company, recovered a judgment against the defendant, National Roofing Company, in the sum of $2,500, for damages to one of plaintiff's motor trucks on November 26, 1918. Defendant appealed.

Plaintiff alleges the damages to have been caused by reason of negligence on the part of appellant in leaving a block of wood in the roadway of Eleventh street

viaduct, in the city of Omaha, which roadway defendant was then resurfacing with asphalt. The truck in question weighed about three and one-half tons and at the time of the accident it was loaded with four tons of asphalt in semi-liquid form. The viaduct is about four blocks long, extending north and south and is level for about the first 200 feet from the south, then slopes downward to the north end. Appellant had, at the time of the accident, put on one coat of asphalt for the entire length of the viaduct and was then engaged in putting on another coat. Appellant had employed of plaintiff two motor trucks, owned by plaintiff, with their drivers, who were employed by plaintiff, to haul the asphalt to the place where it was being spread on the viaduct. The spreading of the second coat of asphalt was commenced at the north end of the viaduct. At the time of the accident it was necessary for the motor trucks to enter upon the viaduct and back down the same at and from the south end thereof, so as to avoid running over the freshly spread asphalt of the second coat, and plaintiff's drivers were directed by appellant so to do. The asphalt, on reaching the place where it was to be spread, was there dumped from the trucks, they having rear dumps. The roadway of the viaduct was but 20 feet wide. This was not wide enough to permit the trucks to be turned around on the viaduct; hence, they were backed to the place where the load was to be dumped. The viaduct was closed to travel by vehicles, other than those in the employ of appellant. On each side of the viaduct and as a part thereof was a sidewalk for pedestrians. This sidewalk was from seven to nine inches higher than the roadway and formed a curb for the roadway, and on the top of this curb extending along it was a strip of iron, called in the testimony the "angle iron" of the curb. At the outer edge of the sidewalk there was an iron railing three or four feet high. Along the sides of the viaduct at intervals of about 100 feet were openings or drains

for carrying the water therefrom. The appellant, in doing its work, removed or chipped off around these drains parts of the creosote blocks of wood with which the roadway was paved. Part of these blocks so removed were piled on the sidewalk, and plaintiff alleged that some were allowed to remain on the roadway along which the trucks backed with their loads of asphalt. About 2 o'clock p. m. the day of the accident, while one of plaintiff's trucks was being backed down the viaduct with a load of asphalt, plaintiff claims it was necessary to turn the truck toward the east of the center of the viaduct in order to pass a tar kettle or fire pot with handles of heating irons extending therefrom, which stood on the west side of the viaduct in the roadway and was used for heating the irons with which appellant's men spread the asphalt. Plaintiff claims that on turning the forward wheel of the truck for that purpose its right front wheel struck one of these creosote blocks that defendant had left in the roadway, and that the block (which the evidence shows was about 3 1/8 inches by 3 1/4 inches by 2 inches with a slope on one side) got under the right front wheel; wedged thereunder, and skidded along diagonally the direction the car was traveling, holding the front wheels in a position which caused the rear end of the truck to continue in a diagonal direction toward the east side of the viaduct. Plaintiff also claims that this block made it impossible for the driver to straighten the wheels so as to change the course of the truck, and that the driver of the truck put on its brake; that its brakes were in good condition, but that the surface of the roadway was slippery, and that by reason of said block being under the wheel, the slope of the road, and its slippery condition, the truck was caused to slide in a northeasterly direction to the side of the roadway and struck the iron flange of the right hind wheel of the truck on the curb, and thereupon the iron flange of said wheel mounted the curb and slid on the iron on top of the curb. The iron flange of this

wheel projected about three-fourths of an inch beyond the rubber tire of the wheel. Plaintiff claims that about the time the flange of the wheel struck the curb the front wheel of the truck passed over said block of wood, the left front wheel of the truck had reached about two feet from the curb, but the truck continued to slide to the northeast for about six or eight feet, and after riding the curb on its flange that distance the wheel passed entirely over the curb onto the sidewalk of the viaduct, which gave way, and the truck fell some 50 feet to the ground and was thereby ruined. The truck was a left-hand drive and its driver was on its left side looking northward out of the east side of the cab. He testifies that he did not see the block which he says became wedged under his right front wheel when turning to pass the heating pot. As the truck went through and over the sidewalk the driver jumped therefrom, landing on the viaduct. The appellant denied that it left any creosote blocks in the roadway of the viaduct; denied that the accident was caused by the wheel of the truck striking a block in the roadway; denied that it was guilty of any negligence, and alleged in its answer that any injury to the truck was due to and caused by the negligence of the plaintiff and its employee operating the truck.

The evidence introduced by plaintiff tends to show that the accident occurred in the manner claimed by it. The driver of the truck and several other witnesses testified that the truck was backing along near the center of the roadway, at about 2½ miles an hour; that on approaching a heating pot on the west side of the roadway and about 6 to 12 feet therefrom, as the truck was turning to pass said heating pot, there was a sudden jerk and change in the course of the truck, and it continued northeasterly, striking the curb, the flange of the right wheel riding it a short distance, the wheel then passing over the curb onto the sidewalk, and the truck then falling to the ground. At least three of the witnesses

testify that within a few minutes after the accident they found the creosote block of wood, introduced in evidence, in the roadway at the end of a diagonal mark extending the direction the truck had taken, at the place where there is testimony that the truck was deflected from its course to pass the fire pot. The driver of the truck testifies that he felt something under the right wheel of the truck as he was turning to pass the fire pot, and that he could not straighten the wheel of the truck. All, but one, of the witnesses of the defendant, testifying as to the course of the truck, said that the truck was backing near the center of the roadway, and that it suddenly took a northeastern course, mounted the curb and run along with its right hind wheel on the sidewalk for a distance of about 50 feet, and then fell. Witnesses in the employ of the defendant testified that there was no change in the condition of the roadway, as to blocks thereon, from the time the truck was running thereon until after the time it was claimed by plaintiff the creosote block in evidence was picked up. One witness for the defendant testifies that the truck was coming down along the east side of the viaduct with its wheels about 3 or 4 inches from the east curb for about 100 feet, and came to a point of the junction of two pieces of the angle iron on the curb, then jumped the curb and ran with one wheel on the sidewalk for some distance, and then fell. Witnesses for the defendant also testified that their fire pot was some distance north of the place where the truck fell, and witnesses for plaintiff testified that it was about six feet south of where the truck struck the curb.

The question whether the creosote block was on the pavement, was struck by the wheel of the truck and caused the truck to pass over the curb and fall from the viaduct, was, therefore, a question to be determined by the jury. Appellant argues and claims that, as a matter of law, the leaving of the block of wood in evidence on the roadway of the viaduct is not negligence.

It cites authorities to support this contention. Such a block of wood in the roadway where a deflection in the course of a vehicle striking it would not tend to cause injury to the vehicle, as where there is no bridge, viaduct, or embankment, for the vehicle to fall over in case of a deflection in its course which could not be stopped, would not be negligence. It might not be negligence if the block was immovable so that a wheel striking it would pass over it and not be held in a deflected course by the block. Among the authorities cited by appellant is *Briglia v. City of St. Paul,* 134 Minn. 97, in which the negligence claimed was failure to provide protection from vehicles falling over a bluff, along which a roadway 26 feet wide, in good condition, ran, with a gutter and walk which afforded protection against any ordinary deviation from the traveled road. The appellant quotes from the opinion:

"Deceased did not suffer from any causal or ordinary deviation from the roadway, nor do we think there was any danger of her doing so. The course of the car was extraordinary. Stopping on a slight grade about 100 feet from the bluff edge, it commenced to back, and it backed nearly straight and over the precipice. We think the city should not be required to anticipate such unusual occurrences or to guard against them."

The extraordinary course of the car in that case was not caused by failure to have proper protection from falling over the bluff. The course of the truck in this case was also extraordinary, and, if the plaintiff's evidence is true, its extraordinary course was caused by the loose block of wood lying in the roadway. Moreover, appellant employed of plaintiff the use of the motor truck and its driver to carry asphalt over this roadway to the place where directed by appellant and in the manner it directed. Appellant had exclusive charge of the roadway of the viaduct. It was appellant's duty to keep the place for travel by the truck in a reasonably safe condition and free from obstacles which might

cause a deflection in the course of the truck. The plaintiff's driver had a right to assume that it was so kept.

Other authorities cited by appellant are cases in which the claimed defect in the roadway and sidewalk was not movable, nor the roadway or sidewalk at a place where the defect complained of would cause a vehicle to be damaged by falling off a bridge, viaduct or embankment. It would serve no purpose to analyze each case cited separately. The leaving of a block of wood the size of the one in evidence on the roadway might not be negligence under some circumstances, but under other circumstances different minds might reasonably differ as to whether or not there was negligence therein. We must take the facts and circumstances in evidence in this case, and if different persons may reasonably reach different conclusions as to whether or not it was negligence in leaving such block of wood on the roadway under those facts and circumstances, it is a question for the jury to determine. "Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting, and where different minds might reasonably draw different conclusions as to these questions from the facts established." *City of Omaha v. Houlihan*, 72 Neb. 326.

Appellant also contends that it was physically impossible for the accident to have happened in the manner claimed by plaintiff. It claims that if the fire kettle was six feet south of the break in the curb where the wheel first struck it, and that the driver of the truck began to turn around the kettle when the rear end of the truck was within four or five feet of it, on such facts his wheel would strike the curb at almost right angles. There is no testimony that the driver of the truck turned to go around the fire kettle. All the testimony on that point is that he turned to the east to pass it. All the testimony as to the direction taken by the truck is that

it was 30 degrees off center. This would not be near the right angle of 90 degrees. The testimony is also that the right wheel of the truck ran on the curb or on the sidewalk for from 30 to 53 feet before it fell. If it struck the curb at nearly a right angle it would not have run northward that distance before falling from the viaduct.

Appellant also contends that the damage to the truck was not the natural and probable cause of leaving the block of wood in evidence on the viaduct, and ought not to have been foreseen by the defendant, and that therefore the negligence, if any, of the defendant was not, as a matter of law, the proximate cause of the damage complained of. The appellant had employed plaintiff's truck and driver to haul the asphalt, which the evidence shows is a semi-fluid with a tendency to flow to the rear end of the truck when it is backing down a slope, and render it harder to stop the truck. A motor truck is more liable to be deflected from its course and to have its wheels blocked and held so that the truck cannot be guided in its course, than a vehicle with wheels of greater diameter. There was testimony that the roadway was slippery on account of the first coat of asphalt thereon. These facts, together with the further facts that a loose block of wood was lying on such slippery roadway on a viaduct 50 feet above the ground traveled by motor trucks backing downward with loads of liquid asphalt, if such facts are found to be true, together with all the other facts and circumstances attending the course of the truck, found from the evidence by the jury, are all facts for the jury to consider, and to be considered, in determining whether or not it was negligence to leave said block in the roadway, and also in determining whether or not the appellant ought to have foreseen that the block of wood in the roadway, under such circumstances and conditions, might cause the truck to be deflected, so as to cause it to run off the roadway and fall from the viaduct. Different minds might reach

different conclusions reasonably from these facts and circumstances. Whether or not the leaving of such block of wood on the roadway was the proximate cause of the truck falling from the viaduct is, therefore, under the rule stated in *City of Omaha v. Houlihan, supra,* a question for the jury.

Appellant asks that the judgment be reversed for the following reasons: "(1) That it was physically impossible for the accident to happen in the way the plaintiff claimed, or in any way that would have involved negligence on the part of the defendant; (2) that the leaving of this piece of wood on the viaduct, if it was so left, was not, as a matter of law, a negligent act; (3) and, even though negligent, it was not actionable negligence, for the accident that was claimed to have resulted therefrom was not the natural and probable consequence thereof and ought not, as a matter of law, to have been foreseen by the defendant." We have already covered these points and determined that each is groundless.

Appellant also claims that the court erred in giving instructions Nos. 3, 10, and 12, and in refusing to give instruction No. 5, requested by the defendant.

The appellant claims error because neither in instruction No. 3, nor elsewhere, were the jury told that, if they find negligence on the part of the defendant was the proximate cause of the accident, they should find for the plaintiff, unless they find that negligence of the plaintiff contributed thereto. It also claims error because the jury were not instructed that, if they found that the negligence of the plaintiff, or its driver, caused the accident in question, they should find for the defendant.

To so instruct the jury in either case would be to ignore, and be contrary to, our contributory negligence statute, in a case where contributory negligence is pleaded and there is evidence tending to show the same. The negligence of plaintiff might be contributory merely

and not gross. Appellant was entitled to have all the issues raised by the pleadings, of which there was evidence tending to establish, submitted to the jury by proper instructions. Instruction No. 5, requested by the defendant, directed the jury to find for the defendant if it found that the truck struck the block in question and as a result thereof was damaged as claimed, and that such damage was the probable and natural consequence of the wheel striking the block, and further found that such damage should have been foreseen by the defendant, if they also found that the driver of the truck in the exercise of reasonable care saw, or should have seen, the block in time to have avoided it, or, having struck the block, could, in the exercise of reasonable care, have stopped the truck before it reached the point where it fell over the viaduct. This instruction should not have been given. Both of the acts of the driver of the truck, which would cause a finding for the defendant thereunder, might under the circumstances and the evidence be contributory negligence, and, if so, the instruction would be contrary to our comparative negligence statute. In addtion to this, there was no evidence tending to establish that the driver could have seen the block of wood in the roadway. The uncontradicted evidence shows that the driver was necessarily on the left-hand side of the truck and necessarily looking backwards therefrom while the block struck, if it was struck, was on the right-hand side of the truck. In addition to this, neither the refusal to give instruction No. 5, requested by defendant, nor the refusal to give any other instruction requested by defendant, is assigned as error in defendant's motion for new trial. "This court will not review the action of a district court in giving or refusing instructions unless such action of the court be specifically assigned in the motion for new trial and as a ground thereof." *Phœnix Ins. Co. v. King,* 52 Neb. 562; *Graham v. Frazier,* 49 Neb. 90; *Pennington County Bank v. Bauman,* 81 Neb. 782. Appellant, how-

ever, contends that, although its motion for a directed verdict and its requested instructions might not be in proper form, they called the court's attention to the question of negligence on the part of plaintiff, and that therefore the court should have instructed thereon, citing in support thereof *Strubble v. Village of DeWitt*, 81 Neb. 504, and *Sorenson v. Townsend*, 77 Neb. 499. The first of these cases simply holds that it is error to refuse an instruction which correctly states the law on the issues presented by the pleadings and the evidence unless the points are fairly covered by other instructions. In the opinion it is stated that, if the court regards the requested instructions as defective in form, it should have treated them as requests for instructions on the points designated, and have properly instructed the jury on the points requested. If, in this case, the court should have treated the instructions requested and refused as requests for instructions on the points designated therein, the failure of the court to so instruct on these points, not being assigned as error in the motion for new trial, cannot be reviewed by this court. The second case last above mentioned as cited by appellant simply holds that a party is entitled to have his theory submitted to the jury if the evidence tends to establish it, and that an instruction given by the court on its own motion contrary to such theory was erroneous. No instruction was requested in that case. Appellant also contends that the jury should have been instructed that negligence of the driver of the truck would be imputed to the plaintiff.

Instruction No. 1 given by the court tells the jury that the plaintiff through its driver was backing the truck down the roadway. This tells them that such act of the driver of the truck was the act of the plaintiff. If a more specific instruction on this point was desired, defendant should have requested the same. The instructions nowhere tend to mislead the jury into the belief that the acts of the driver were not acts of plaintiff. "Though an instruction may not be so specific as it

should be, if it is not misleading, it is not cause for reversal, where the complaining party made no request for a more specific instruction." *Webb v. Omaha & S. I. R. Co.,* 101 Neb. 596. Also, *Larsen v. Savidge,* 103 Neb. 79.

The only question remaining to be considered is, was the jury properly instructed upon the law applicable to the questions involved in the issues raised by the pleadings and supported by the evidence. "A court is bound to instruct the jury, whether requested or not, upon the material issues of the case." *Kyd v. Cook,* 56 Neb. 71. Also *Figg v. Donahoo,* 4 Neb. (Unof.) 661.

Instruction No. 3, given by the court on its own motion, after instructing the jury that the burden of proof was on the plaintiff to establish by a preponderance of the evidence all of its material allegations not admitted to be true by the answer of the defendant, is as follows: "Therefore, before the plaintiff can recover in this action it must be established by a preponderance of the evidence: First—That negligence on the part of the defendant was the proximate cause of the accident complained of. Second—The damages, if any, sustained by the plaintiff as a result thereof. If the plaintiff has established both of the foregoing propositions by a preponderance of the evidence, then your verdict should be for the plaintiff. If, however, the plaintiff has failed to establish by a preponderance of the evidence that negligence on the part of the defendant National Roofing Company was the proximate cause of the truck being thrown from the viaduct to the railroad tracks below, then the plaintiff cannot recover, and your verdict should be for the defendant."

The affirmative defense set out in appellant's answer that the damage was caused by negligence of the plaintiff, unless it be treated as a plea of contributory negligence, would be simply a denial that the alleged negligence of defendant caused the damage, and there would be no error in this instruction. The appellee contends

that the answer does not allege contributory negligence, but alleges only facts or conclusions showing that the accident was not caused by negligence of the defendant. "A general allegation of negligence is good as against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant." *Omaha & R. V. R. Co. v. Wright,* 49 Neb. 456. "A general averment that the defendant was negligent, without setting out the negligent acts or omissions, is sufficient, unless the pleading be attacked by motion." *Union P. R. Co. v. Vincent,* 58 Neb. 171. Also, *Burnham v. Chicago, B. & Q. R. Co.,* 87 Neb. 696.

By a parity of reasoning, a general averment in an answer charging that negligence on the part of the plaintiff caused the accident is good, unless assailed by motion to make more definite and certain. There was evidence tending to show that the truck could have been stopped by proper care on the part of the driver. If it could have been so stopped, a failure so to do would be negligence chargeable to the plaintiff, and, if the jury found that negligence of the defendant was the proximate cause of the accident, it also might find that such negligence by the plaintiff was contributory negligence. This court has held: "Where the facts in evidence tend to show both negligence and contributory negligence, the duty to make the comparison required by the statute rests with the jury, unless the evidence as to negligence is legally insufficient, or contributory negligence is so clearly shown that it would be the duty of the trial court to set aside a verdict in favor of the plaintiff. Ordinarily, wherever there is room for difference of opinion upon these questions, they must be submitted to the jury." *Disher v. Chicago, R. I. & P. R. Co.,* 93 Neb. 224; *McCarthy v. Village of Ravenna,* 99 Neb. 674. In the *Disher* case it was also held: "A court is entitled to direct a verdict where the lack of evidence of negligence, or the undisputed evi-

dence as to more than slight contributory negligence in comparison with that of defendant, is so clear that reasonable minds cannot differ as to its legal effect; but in all other such cases the issues must be left to the jury." In this case it was for the jury to determine from all the evidence, taking into consideration that tending to show that the truck was backing down a slope which was slippery, with a load of asphalt with a tendency to slide backward in the truck which made it difficult to stop the truck with its brake, whether or not failure to stop was contributory negligence. It was also for the jury, if it so found, to make the comparison required by the statute. Reasonable minds might differ on those questions.

The court treated the answer as pleading contributory negligence and instructed the jury thereon. The court, having so treated it, should properly instruct the jury on that issue on its own motion. Prior to our statute on comparative negligence, it would have been error, in a case where contributory negligence was pleaded and there was evidence tending to establish it, for the court to fail to instruct that, if they found plaintiff guilty of contributory negligence, they should find for the defendant.

Under our present comparative negligence statute the jury should clearly be instructed, where the evidence in a case tends to show negligence on the part of the plaintiff, from which the jury is permitted to determine whether the same was the proximate cause of the injury complained of or simply contributory thereto, that if it finds plaintiff guilty of contributory negligence it should find for the defendant, unless it also finds that the contributory negligence of the plaintiff is slight and the negligence of the defendant is gross in comparison.

By instruction No. 3, hereinbefore quoted, the jury were told that if plaintiff had established by a preponderance of the evidence that negligence on the part of the defendant was the proximate cause of the accident

complained of, and the damages sustained by plaintiff as a result thereof, they should find for plaintiff. This instruction nowhere referred to the issue of contributory negligence by plaintiff. It ignores that issue.

An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, unless the omitted facts are conclusively established. In *Standard Distilling & Distributing Co. v. Harris*, 75 Neb. 480, it is said:

"Where such instruction is complete in itself, the error therein is not cured by the giving of other instructions which correctly state the law or the facts essential to a recovery by such party."

The only instruction given by the court concerning contributory negligence (except No. 12, which defines the same) was instruction No. 10. It was as follows: "If plaintiff was guilty of contributory negligence contributing to the injury or damage complained of, that fact will not bar a recovery, if the contributory negligence of the plaintiff was slight and the negligence of defendant was gross in comparison, but in such case the contributory negligence of plaintiff will be considered by you in mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff." This instruction correctly states the provisions of our statute. It does not tell the jury that they should find for the defendant unless they find the plaintiff guilty of contributory negligence, unless they also find such negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison. Nowhere in the instructions are the jury instructed to find for the defendant in such case. If the jury could infer from instruction No. 10 that it should find for the defendant if it found plaintiff guilty of contributory negligence, unless they also found that its contributory negligence was slight and the negligence of the de-

fendant was gross in comparison, such fact or inference would not cure the error in instruction No. 3. *Standard Distilling & Distributing Co. v. Harris, supra; Burlingim v. Baders,* 45 Neb. 673; *Beck v. State,* 51 Neb. 106; *Bergeron v. State,* 53 Neb. 752; *Knapp v. Chicago, K. & N. R. Co.,* 57 Neb. 195.

From instruction No. 10 the jury might infer that by instruction No. 3 it had been instructed to find for plaintiff if it found that negligence of defendant was the cause of the accident, because contributory negligence of the plaintiff would not bar its recovery if that contributory negligence was slight and the negligence of defendant gross in comparison.

For these errors in instructions of the court, the judgment of the district court should be, and is, reversed and this cause remanded for a new trial.

REVERSED.

OTTO ROSE, APPELLANT, V. AUGUST H. VOSBURG, APPELLEE.

FILED MARCH 1, 1922. No. 21995.

Habeas Corpus. When on a habeas corpus proceeding the return to the writ shows relator to be in the custody of the officer against whom it is directed, and no fact appears which warrants a further restraint of respondent, it is the duty of the court to order his discharge.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed, with directions.*

John M. Berger and *Gray & Brumbaugh,* for appellant.

Abel V. Shotwell and *Henry J. Beal, contra.*

Heard before MORRISSEY, C.J., ROSE and ALDRICH, JJ., RAPER and STEWART, District Judges.

MORRISSEY, C. J.

Relator brought habeas corpus proceedings in the district court for Douglas county, alleging that he was un-

lawfully restrained of his liberty by August H. Vosburg, chief probation officer for that county. By way of answer and return it is alleged by the probation officer: "That he now has the said Otto Rose in custody, and that his authority for holding the said Otto Rose is an order and sentence entered by the Honorable Willis G. Sears, judge of the juvenile division, district court, Douglas county, Nebraska, made on the 21st day of February, 1921, and entered in docket No. 11, page 148, which is in words and figures as follows: 'Defendant in court on apprehension under capias; judgment and sentence of court is commitment to State Industrial School at Kearney, and there committed' until 21 years of age, or otherwise disposed of according to law.

" 'The court further finds that since the 5th day of October, 1920, that said Otto Rose has absented and secreted himself from this court until the present time.' "

The court denied the relief prayed. Petitioner appeals and alleges that the court erred, because it affirmatively appears from the answer and return that appellant had not been charged with the commission of any crime or offense whatsoever.

Section 9263, Rev. St. 1913, provides that on proceedings in habeas corpus the person who makes the return, if he has the relator in his custody, or power, or under restraint, "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."

No copy of any complaint charging relator with the violation of any law is set out in the return, nor does the return show that the court found plaintiff guilty of any crime, or that his age, conduct or condition of life brought him within the class of persons subject to commitment to the industrial school. Indeed, the return fails to contain any allegation, or disclose any fact, which warrants respondent in restraining relator of his liberty. It has been held from time immemorial that,

where a party is unlawfully restrained of his liberty the writ of habeas corpus is his appropriate remedy. The judgment is reversed and the cause remanded, with directions to discharge relator.

REVERSED.

ANNA COHEN, APPELLANT, V. R. V. CLARK, APPELLEE.

FILED MARCH 1, 1922. No. 22384.

Infants: COMMITMENT TO INDUSTRIAL SCHOOL. In committing a boy to the industrial school, the juvenile court cannot fix a definite term of detention, since that is fixed by law, and any limitation written into the warrant of commitment will be treated as surplusage.

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

John M. Berger, Fred A. Nye and *M. H. Worlock,* for appellant.

H. M. Sinclair, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

MORRISSEY, C. J.

This is an appeal from a judgment of the district court for Buffalo county in a habeas corpus proceeding wherein relator alleged that he was unlawfully restrained of his liberty by respondent, R. V. Clark, superintendent of the state industrial school for boys. The return of respondent shows that he is holding relator under a warrant of commitment issued out of the juvenile court for Douglas county. The warrant correctly gave the date of birth and age of relator. And so much thereof as is material here is in the following form: "We therefore command you that you forthwith receive said child and to its care, nurture and education give strict attention *until Feb. 12, 1919,* or such time as you are relieved by law or the order

of our said court." The writ was denied.

Relator's case is based upon that portion of the warrant of commitment which appears to terminate the period of commitment on February 12, 1919.

It appears from the transcript of the proceedings had in the committing court that relator was informed against under the provisions of sections 1244-1264, Rev. St. 1913, relating to juvenile courts. This transcript shows that several orders have been entered and many experiments made in an effort to bring relator under proper control and start him on the straight and narrow path. From time to time his care and custody has been given to relatives, and to associations engaged in the care and education of wayward children, but his record is one of incorrigibility. His present detention is due to his lapse after having been paroled from the industrial school.

No question is raised as to the validity of the proceedings on which the commitment rests.

Section 1252, Rev. St. 1913, being part of the juvenile act, provides that, in the case of a delinquent, neglected or dependent boy, if under the age of 16 years, the court may order his commitment to the industrial school. Section 1259 of the same act provides that, in all commitments thereto, the acts in reference to that institution shall govern. We turn, therefore, to the acts relating to the industrial school and find that section 7379 thereof (Rev. St. 1913) provides: "Each boy committed to the school * * * shall remain there until he arrives at the age of twenty-one years unless sooner paroled or legally discharged."

Respondent insists that, the statute having fixed and determined the term of commitment, so much of the order as undertakes to limit the term is mere surplusage.

In *Leiby v. State,* 79 Neb. 485, it is said: "In committing a boy to the industrial school, the county court should not fix a definite and determinate sentence, because the law fixes the time when the accused shall be released, and it is sufficient in that regard if the warrant

of commitment contains a statement of his residence and age."

It follows that it was neither necessary nor proper for the committing court to fix a limit to the term of detention. Having made the necessary findings and order of commitment, the court was without power to fix the term of its duration. The statute determines the term of commitment.

The judgment of the district court is

AFFIRMED.

JOHN I. PIERCE, APPELLEE, V. CARL J. MILLER, APPELLANT.

FILED MARCH 1, 1922. No. 21889.

1. **Evidence:** MARKET VALUE. The market price of grain cannot be established by a quotation from a weekly newspaper, where the publisher has obtained his only knowledge of such price from a dealer in the vicinity.
2. ———: MARKET REPORTS. "Market reports in journals, such as the commercial world relies upon, are competent evidence of the state of the market." *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712.
3. ———: BURDEN OF PROOF. Where a party affirmatively pleads the existence of a fact material to the issue, he thereby assumes the burden of proving such fact.
4. **Trial:** INSTRUCTIONS: BURDEN OF PROOF. The court gave this instruction in part: "If the defendant (plaintiff) had 1,350 bushels of seed that was marketable, suitable and fit for seeding and planting purposes, he had the right, under his contract, to deliver it to the defendant, or so much thereof as was marketable, fit and suitable for seeding and planting purposes. Before the defendant is entitled to recover herein he must show by a fair preponderance of the evidence that the seed delivered on April 11, 1918, was unmarketable, unfit and unsuitable for seeding and planting purposes, but also he must show by a preponderance of the evidence that all of plaintiff's seed was unmarketable and unfit for seeding and planting purposes, and that by reason of said fact the plaintiff was unable to comply with his part of said contract." *Held*, the instruction is erroneous, plaintiff having assumed the burden of proof by having

pleaded ability, readiness and willingness to deliver the seed in question to defendant.

5. **Sales**: ACTION FOR DAMAGES: BURDEN OF PROOF. Where plaintiff sold 1,350 bushels of cane seed to defendant and a part of it was spoiled while in plaintiff's possession, the burden is on plaintiff to show by a preponderance of the evidence that he had on hand and ready to deliver to defendant, on the date when it was alleged defendant violated the contract, marketable cane seed reasonably approximating the amount which he contracted to deliver.

6. ———: CONTRACT: CONSTRUCTION. Where plaintiff contracted to deliver about 1,350 bushels of Black Amber cane seed, the use of the word "about," without any other explanation in the contract, will require the delivery of the specific quantity within a reasonable limit, the quantity expressed, though qualified by the word "about," being material and controlling, subject to reasonable variation.

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

John F. Cordeal, for appellant.

Stewart, Perry & Stewart and *C. W. Meeker, contra.*

Heard before LETTON, DEAN and DAY, JJ., ALLEN and BEGLEY, District Judges.

DEAN, J.

Plaintiff sued to recover damages for an alleged breach of a written contract which purports to obligate plaintiff to sell and defendant to buy a quantity of cane seed at a price therein stipulated. The case was tried twice. On the second trial plaintiff recovered a verdict and judgment for $3,095.82, and defendant appealed.

The contract reads: "Purchase of Cane Seed. Jan. 22, 1918. I agree to and do sell to C. J. Miller, about 1,350 bus. of Black Amber cane, price in consideration to be and is $4.50 per bus. $100 cash is paid on this contract which is hereby acknowledged. Seed to be delivered at Stratton within 30 days, on or before Feb. 22, 1918. Balance of payment to be made when seed is delivered. C. J. Miller, buyer, J. I. Pierce."

Plaintiff and defendant are farmers. But in the fall and winter defendant engaged in the business of buying amber cane seed for shipment to seed houses. The seed in question was raised on plaintiff's farm, about six miles distant from Stratton. When threshed, in the fall or winter, it was hauled by plaintiff's boys from the threshing machine and shoveled by them into five bins on their father's farm. It appears that some of the seed was wet when it was threshed and that later snow blew into some of it.

Plaintiff testified that some time in February defendant sent word that he wanted him to bring in a load of seed to fill out a car which he was loading for shipment at the time, and that he refused. The reason he gave for his refusal was that "it blowed so, it would be impossible to take it in the wagon that day. Q. That was the reason you did not take it? A. That was the reason I did not take it; it blowed so." Elsewhere in the record it appears that defendant had one or more loads of unsacked cane seed brought in from the country the same day. This was done by resorting to the usual expedient which is practiced among farmers and grain-men of protecting seed or grain from the wind by fastening horse blankets or canvas over the top of the wagon-box.

April 11, 1918, plaintiff hauled two wagon-loads of cane seed to Stratton, consisting of 152.20 bushels, which he says defendant accepted. He further testified that on the same day defendant repudiated the contract and told him he would accept no more of the seed. Defendant's evidence and plaintiff's admissions clearly show that both loads had been wet and had heated and were considerably damaged. Respecting the condition of the two loads plaintiff testified: "It was really damp, and it was not damp; some of it was damp, and some of it was not; by the window hole, where the snow blowed in it was damp, and commenced to warm up."

Two farmers testified that they examined one of plain-

tiff's loads at the car, and that the seed was hot and musty, and that its germinating quality was thereby greatly impaired, if not destroyed. The substance of the evidence of two other farmers, besides defendant, was to the effect that cane seed which was heated and caked would not germinate and was valueless.

The main witnesses upon whom plaintiff relied to establish his case, besides himself, were his two sons, Alva and Charles, and his stepson, Robert Woods. The record shows that the testimony of the latter differs on material points from the evidence given by him at the former trial. Plaintiff's son Alva testified that he and his brother Charles hauled the two loads in question to town, and when they drove up to the car which was being loaded by defendant it was about three-fourths full. He said that when they got their load almost all shoveled into the car defendant, who up to that time had been inside the car shoveling the seed back, told his father that the seed which they had thrown into the car was damp. He further testified that when defendant found the other load was also damp he said it would have to be put into another bin. Alva also testified that the load which was put into the bin was damp and that the load which they put in the car was in about the same condition. He admitted that defendant told his father that the load which was shoveled into the car was not only damp, but that it "was not up to quality." Charles Pierce, the other son, admitted that "both loads were a little warm."

There is a dispute as to whether plaintiff or defendant got the bin into which the second load of damaged grain was shoveled. Defendant's uncontradicted evidence is that it spoiled in the bin and was thrown away, but by whom he did not know. Plaintiff testified that defendant told him to bring in the damaged seed, but this was denied by defendant.

Defendant's first assignment of error has to do with plaintiff's proof respecting the market value of the seed

at Stratton April 11, 1918. The Stratton Weekly News of that date, over defendant's objection, was received in evidence. Its local market column quoted cane seed at $3 a hundred pounds. The publisher testified that he printed the quotations just as he received them from the elevator, sometimes obtaining his information from one elevator at Stratton and sometimes from another. He had no knowledge about the price, at the time of the trial, except as he obtained it from his newspaper, nor did he know whether any cane seed was bought by the elevators at Stratton on that date, nor did he know from which elevator he obtained his information. He said he always got the price quotations in the afternoon of Thursday of each week just before the newspaper forms were locked.

In *Fahey v. Updike Elevator Co.*, 102 Neb. 249, it is pointed out that prices of grain on the open market are properly shown by authentic publications or trade bulletins which are adopted by grain dealers generally as standards. In *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712, it is said: "Market reports in journals, such as the commercial world relies upon, are competent evidence of the state of the market." The market reports offered by plaintiff were purely hearsay and come within the inhibition of the rule which provides that newspapers containing quotations, obtained as they were in the present case, are not admissible in evidence. 10 R. C. L. 1167, sec. 367. The evidence of the editor did not purport to relate to transactions which were actually consummated in good faith and in the usual course of business. In 22 C. J. 188, sec. 152, it is said: "The usual records of sales or the conditions of markets, such as newspaper market reports, or prices current, are generally deemed competent evidence of market value, especially when accredited by the party against whom they are offered, provided the quotations are shown to represent transactions actually consummated or proposed in good faith, and to have been obtained from authoritative or reliable sources in the usual course of business." To substantially

the same effect is the recent case of *Doherty v. Harris*, 230 Mass. 341.

Clearly the publication in question, measured by the standard to which reference is herein made, was not competent evidence. It was not a trade bulletin, nor was it a periodical accepted by grain dealers generally as a standard for the purpose of fixing the price of grain and of seeds. We conclude that defendant's assignments of error must be sustained. However, the record is not without competent evidence of the value of cane seed in Stratton, April 11, 1918. Defendant and a local dealer, who was disinterested, and who had both bought cane seed that day, testified that the market value was then $5.80 a hundred pounds.

Defendant complains of that part of instruction No. 6 which placed the burden upon him of establishing the fact "that at the time and place of the delivery by plaintiff of a portion of the seed all of his seed had become heated, was unmarketable and unfit and unsuitable for seeding and planting purposes."

We do not think the instruction follows the recognized rule. It is elementary that in no case can the burden of proof shift from the party having to establish the affirmative of an issue which properly falls upon him who has the affirmative of the issue as determined by the pleadings. 35 Cyc. 586, 589.

Plaintiff assumed the burden by pleading that "he was possessed of much more cane seed than was necessary to fulfil this contract of 1,350 bushels to defendant, and was at all times from the making, signing and executing of said contract prepared, ready, willing, anxious and able to fulfil said contract and deliver to said defendant said cane seed as per his agreement in said written contract."

Instruction No. 7 is complained of by defendant. The instruction reads in part: "If the defendant (plaintiff) had 1,350 bushels of seed that was marketable, suitable and fit for seeding and planting purposes, he had the

right, under his contract, to deliver it to the defendant, or so much thereof as was marketable, fit and suitable for seeding and planting purposes. Before the defendant is entitled to recover herein he must show by a fair preponderance of the evidence that the seed delivered on April 11, 1918, was unmarketable, unfit and unsuitable for seeding and planting purposes, but also he must show by a preponderance of the evidence that all of plaintiff's seed was unmarketable and unfit for seeding and planting purposes, and that by reason of said fact the plaintiff was unable to comply with his part of said contract."

The instruction is erroneous, in that by it the jury were informed generally that plaintiff had the right to deliver the 1,350 bushels of seed, "or so much thereof as was marketable, fit and suitable for seeding and planting purposes." The instruction does not correctly state the rule as it should be applied to the facts. The rule is well stated in 23 R. C. L. 1353, sec. 177: "The word 'about' as used in estimating the quantity to be delivered is given practically the same effect as the phrase 'more or less;' its use is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, weight or measure. And it has been held that the delivery and receipt of 4,634 tons of coal, under a contract for the delivery and acceptance of 'about 5,000 tons,' does not so complete the contract as to entitle the buyer for that reason to refuse a tender of the remaining 366 tons. Likewise it has been held that a contract calling for the delivery in instalments of 'about 1,000 tons' per month is not fulfilled by the delivery of 400 tons in one month and 885 tons in another."

23 R. C. L. 1352, sec. 176, points out that the use of the phrase "more or less" in a contract for the sale of personal property "is an absolute contract for a specific quantity within a reasonable limit; the quantity expressed, though qualified by the phrase 'more or less,'

being still material and controlling, subject to reasonable variation."

The latter part of instruction No. 7 repeats the erroneous feature which we have discussed in instruction No. 6 and need not therefore be further noticed.

Defendant tendered certain instructions which were refused. But, in view of what we have said with respect to the law governing the case, we do not think it necessary to extend this opinion by further discussion. For the errors pointed out, we conclude that the judgment of the district court must be reversed and the cause remanded for further proceedings not inconsistent with the views expressed in this opinion.

REVERSED AND REMANDED.

DEMOULIN LOAN & INVESTMENT COMPANY, APPELLANT, V. SAMUEL L. MCLAIN ET AL.: J. L. KENNARD, APPELLEE.

FILED MARCH 1, 1922. No. 21905.

Judicial Sales: DUTY OF OFFICER. "An officer selling property on execution or under a decree in equity has no authority to sell on credit or to accept in payment of the bid anything other than lawful money, unless otherwise expressly authorized by the terms of the decree or the law in force governing such sale." *Hooper v. Castetter*, 45 Neb. 67.

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

G. T. H. Babcock, for appellant.

E. D. Crites and *F. A. Crites, contra.*

Heard before LETTON, DEAN and DAY, JJ., ALLEN and BEGLEY, District Judges.

DEAN, J.

Plaintiff, a loan broker, began this foreclosure suit July 18, 1918, to recover on eight real estate first mortgage interest coupons. December 2, 1918, a judgment

was rendered in plaintiff's favor for $133.10. The coupons were a part of four separate interest coupon notes given by Samuel L. McLain to secure the payment of four certain loans made by plaintiff to McLain, for three of their customers, and were secured by four separate mortgages on four separate quarter sections of land then owned by McLain. The principal sum of the mortgages aggregated $2,800. Subsequently McLain sold the land to Nicholas Ress subject to the mortgages above referred to. The land was sold at sheriff's sale under the decree and was bid in by plaintiff for approximately $575 subject to the mortgages. The court held that plaintiff was entitled to the amount of its decree only but that all over that sum, less interest and court costs, should be paid to J. L. Kennard, an intervening defendant whose relation to the suit is hereinafter more fully detailed. From the judgment so rendered plaintiff appealed.

June 15, 1918, Nicholas Ress and his wife executed a second mortgage on the land in suit to William R. Hennig to secure a loan in the principal sum of $8,500, due in five years, drawing annual interest at the rate of 6 per cent. January 28, 1919, Kennard purchased the second lien note and mortgage of $8,500 from Hennig and was thereafter its holder and owner. Samuel L. McLain, Nicholas Ress and Jane Ress, his wife, were the only persons who were made parties defendant in this suit.

Four causes of action were pleaded by plaintiff in his petition, based on the eight interest coupons given by McLain. The coupons, in pairs of two each, represent the interest which had accrued on the mortgages on each of the respective four quarter sections of land.

December 2, 1918, defendants McLain and Ress having made no appearence, and their default was entered and, as we have seen, a decree was rendered in plaintiff's favor for $133.10 on the eight interest coupons. In due course the lands were advertised and sold under the decree and bid in by plaintiff for $575, subject to the mortgages, as

hereinbefore noted. March 10, 1919, the sale was confirmed and the sheriff was ordered to make a deed to plaintiff pursuant to law. The surplus over the amount of the decree and court costs approximated $400, but plaintiff did not pay this sum into court.

About two weeks after the purchase of the second lien note and mortgage of $8,500, namely, February 15, 1919, J. L. Kennard purchased from Ress the equity of redemption in the land in suit, and also the proceeds of the sale of the lands, in excess of such sum as should be required to pay the amount of plaintiff's decree herein.

Plaintiff having refused to pay the surplus into court, Kennard, some time in the latter part of 1920, intervened and pleaded his interest in the land, his purchase of the second lien mortgage and all of the interest of Ress in the land and the like, and prayed that plaintiff be required to pay into court the amount of its bid, namely, $575, and that the surplus which remained, above the payment of the decree, interest and costs, should be paid to him.

Plaintiff's contention is that the surplus, over the amount of the decree obtained by it, and which the decree directed should be paid into court, could be satisfied by a surrender of unpaid interest coupons held by it, which were not referred to nor declared on in the petition, and which, of course, are no part of the sum on which the decree is based. Under the law this cannot be done, unless the decree so directs.

The affidavit of plaintiff's secretary was admitted in evidence, over defendant's exception, and is a part of the bill of exceptions. After describing the coupons sued on, the affidavit refers to interest coupons held by it, which were not pleaded in its petition nor incorporated in the decree, and avers that plaintiff "is entitled to have all of said interest coupon notes and interest due and unpaid on said mortgages credited to the account of the bid made by its attorney," and that it is "entitled to any and all surplus money accruing from said bid." The statements

in the affidavit disclose plaintiff's theory of the case.

Section 8263, Rev. St. 1913, provides: "The proceeds of every sale made under a decree in equity shall be applied to the discharge of the debt adjudged by such court to be due, and of the costs awarded, and if there be any surplus, it shall be brought into court for the use of the defendant, or of the persons entitled thereto, subject to the order of the court."

Hooper v. Castetter, 45 Neb. 67, is a case involving a real estate mortgage foreclosure. It was there held that the officer making the sale is conclusively presumed to have made the sale for cash, unless the decree directs otherwise. It was further held: "An officer selling property on execution or under a decree in equity has no authority to sell on credit or to accept in payment of the bid anything other than lawful money, unless otherwise expressly authorized by the terms of the decree or the law in force governing such sale."

Counsel cites no authority in support of the assignment of alleged error upon which plaintiff depends, and we know of none. We adhere to the rule announced in the *Castetter* case. The judgment is

AFFIRMED.

ARAH L. HUNGERFORD, APPELLANT, V. GEORGE WRIGHT ET AL., APPELLEES.

FILED MARCH 1, 1922. No. 21908.

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

J. E. Porter, for appellant.

Earl McDowell, contra.

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

ALDRICH, J.

This is an action at law brought to recover excessive payments advanced by appellant to appellees on a written contract whereby appellees undertook to do certain mason work and plastering for appellant, and for moneys expended by appellant in having the contract work completed, after the defendants had abandoned the work before completion. By their answer and cross-petition appellees set up certain claims against the appellant. Verdict and judgment were in favor of appellees.

The issues presented are substantially the same as were presented in *Hungerford v. Messler,* p. 862, *post,* and we reach the same conclusion as we have announced therein.

Judgment of the district court is

AFFIRMED.

ARAH L. HUNGERFORD, APPELLANT, V. CHARLES O. MESSLER ET AL., APPELLEES.

FILED MARCH 1, 1922. No. 21909.

1. **Appeal:** CONFLICTING EVIDENCE. Where the issue is one purely of fact, the verdict of the jury rendered upon conflicting evidence will not be disturbed unless clearly wrong.
2. **Instructions** given, when considered as a whole, *held* free from error.

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

J. E. Porter, for appellant.

Earl McDowell, contra.

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

ALDRICH, J.

This is an action at law brought to recover excessive

payments advanced by appellant to appellees on a written contract, which is admitted by both parties hereto, whereby appellees undertook to do certain work in the construction of houses and other buildings, and for moneys expended by appellant in having the contract work completed after appellees had abandoned it. The appellees filed an answer and cross-petition, setting up that appellees did certain extra work, and that appellant failed to perform his part of the contract, and claimed damages therefor. Verdict and judgment were for appellees in the sum of $35 on their cross-petition.

There are no complicated propositions of law. The principal question is one of fact, and the jury have passed upon the sufficiency of the same and the relation of these facts to the respective parties.

Appellant cites the legal proposition: "Where damages are susceptible of actual computation, the amount thereof should not be left to conjecture." *Paxton & Gallagher v. Vadbonker,* 1 Neb. (Unof.) 776. This citation is correct and states the law, but it is not controlling under the facts. The jury have passed upon the facts, and we will not disturb their finding.

Another proposition is: "An instruction in which it is attempted to include all the elements of the issues necessary to a finding for one of the parties to a suit and from which is omitted a material element is erroneous." *Levy v. Cunningham,* 56 Neb. 348. The disputed questions of fact were submitted to the jury. The evidence is sufficient to support the finding, and under the established rule the verdict will not be disturbed. The jury obviously considered the debits and credits to this transaction and made the proper allowance under the facts.

There is nothing remaining for us to consider and on the record we must affirm the judgment.

AFFIRMED.

WALTER R. COLLEY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MARCH 1, 1922. No. 21978.

1. **Carriers:** CONVERSION. Conversion is an unauthorized act of dominion or ownership, exercised by one person over the personal property of another. Negligence of a railway company, however extreme, and the consequent loss of goods, in its hands for transportation, is not alone sufficient to constitute conversion. The act alleged to be a conversion must be positive and tortious.
2. ———: ———. Where a railway company makes a positive refusal to deliver goods to a consignee, entitled to their possession, except upon a condition which has no legal foundation and which does not rest upon reasonable grounds or contentions, its declared refusal to deliver would obviate the necessity of the consignee making any express and formal demand for the goods, and such wrongful detention of and dominion over the goods by the railway company would constitute conversion.
3. ———: ———: DAMAGES. Where, after such conversion, the consignee accepts a return of the goods, but they are returned to him in a damaged condition, he is entitled to recover damages to cover the depreciation in their value.
4. **Railroads:** FEDERAL CONTROL: RIGHT OF ACTION. Where the cause of action against the railway company accrued prior to the time that the United States government, through its director general, took control of the railroads, the fact that the director general took control and received possession of the goods which had been converted would not affect the plaintiff's right of action in conversion against the railway company.

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

Wymer Dressler, Robert D. Neely and *Paul S. Topping*, for appellant.

Wilmer B. Comstock, contra.

Heard before LETTON, DEAN and FLANSBURG, JJ., DAY (L. B.) and GOOD, District Judges.

FLANSBURG, J.

This is an action for damages growing out of the

transportation of household goods and furniture by the Chicago & Northwestern Railway Company. The plaintiff in his original petition claimed that the railway company had converted the property shipped, and sued for the full value. No allegations of fact were set out at the time of the first trial sufficient to sustain the charge of conversion, but the petition only went so far as to show negligence on the part of the railway company and a temporary loss of the goods. Shortly after the suit was commenced, the goods were found. Judgment was rendered for the plaintiff on the first trial for their full value, on the theory that the railway company, in negligently losing track of the goods and being unable to deliver them, had converted them. This court reversed that judgment, upon the unpublished opinion of the supreme court commission (case No. 20791), and held that negligence and loss of goods was not a sufficient affirmative misappropriation of the goods, or exercise of claim or control over them by the railway company as would constitute a conversion, and held that recovery against the railway company on the cause of action alleged in the petition should be limited to the damages actually sustained through the delay and temporary loss in shipment.

At the second trial a supplemental petition was filed, in which it was alleged that, after finding the goods, the railway company refused to deliver them to the plaintiff, and the proof in support of that allegation is that the railway company's agent demanded the payment of storage charges covering the period that the goods had been in storage during the time that the railway company was unable to inform the plaintiff as to their whereabouts. The exaction of this charge was wrongful, and the trial court on the second trial submitted the case to the jury apparently upon the theory that those acts, supported by the allegations of the plaintiff's petition, constituted a conversion of the goods.

It is argued by the defendant that our holding in the

former opinion, being the law of the case, has determined the matter of the conversion adversely to the plaintiff, and that the trial court was in error in allowing the plaintiff to pursue that theory further, and in submitting the case to the jury as one for conversion. We believe the defendant's position is untenable. In the former opinion it will be noted that the matter as to a conversion by the railway company's refusal to deliver the goods, except upon payment of the wrongful charges, was eliminated from the case, for the reason that the acts constituting such conversion were not set up in the plaintiff's petition, the circumstances having transpired since its filing, and no amended or supplemental petition had been filed covering those facts. There was at the first trial an attempt to supplement the cause of action, which had been set out in the petition, by allegations of new matter in the reply, but this was done over the objection of the defendant, and it was held in the former opinion that the plaintiff could not, over objection, avail himself of a cause of action thus pleaded, and that the evidence upon those issues was properly objected to during the trial.

The defendant introduced, without objection, the bill of exceptions of the evidence presented at the former trial. The record, however, shows that only a portion of this evidence was read to the jury, and that was done by the plaintiff. The testimony read was that of the station agent of the defendant railway company, where he testified that, after the shipment of the goods to Lincoln, he had offered them to the plaintiff, but had refused to deliver them unless the plaintiff should pay the storage charges to cover the period that the goods were lost and in the warehouse at Detroit. The plaintiff also testified that he could not procure delivery of the goods from the defendant's agent, except upon the payment of those unlawful charges.

Where a railway company refuses to deliver goods except upon a condition which has no legal foundation and does

not rest upon reasonable grounds or contentions, its declared refusal to deliver the goods would obviate the necessity of any express or formal demand for the goods by the owner, and such wrongful detention of and dominion over the goods by the railway company would constitute a conversion. *Shields Co. v. Chicago & N. W. R. Co., ante* p. 472; *Sutton v. Great N. R. Co.,* 99 Minn. 376; *Loeffler v. Keokuk Northern Line Packet Co.,* 7 Mo. App. 185.

As appears from the facts fully set forth in the former opinion, the plaintiff's goods were shipped to Detroit in February, 1917. Plaintiff followed them to Detroit, but, through the negligence of the railway company's agents, was informed that the goods had not arrived and that the company had no trace of them. He then went to Kansas City and while there was also unable to get any information as to the whereabouts of his goods. He returned to Lincoln and requested of the defendant railway company's agent that the goods be reshipped to Lincoln. In pursuance of that order, the goods were shipped from Detroit and arrived in Lincoln in July, 1917, after which time, it is alleged, defendant company wrongfully refused to deliver the goods to the plaintiff except upon payment of the unlawful storage charges. The goods were from that time retained in possession of the defendant until, on December 28, 1917, the United States government, through its director general, took charge of the defendant's entire transportation system. The goods from then on remained in possession of the director general, and he, after the decision of the case on the former appeal, delivered to the plaintiff the goods in controversy, some time in February, 1920. The goods at that time were in a considerably damaged condition.

Objection was made at the trial that the suit should have been brought against the director general, since the damage to the goods would be presumed to have taken place during the possession by the last holder.

Treating the action, however, as one for conversion, the cause of action accrued at the time the company made its wrongful exaction of charges in 1917 and refused to make delivery except upon the condition that these charges be paid. Since the cause of action accrued prior to the time the director general took possession, it would not be affected by the fact of the federal control. The action for conversion could proceed against the railway company the same as if the director general had never taken possession. *Bolton v. Hines,* 143 Ark. 607; *McGregor v. Great N. R. Co.,* 42 N. Dak. 269; *El Paso & S. W. R. Co. v. Havens,* 216 S. W. (Tex. Civ. App.) 444.

The defendant railway company, having converted the goods of the plaintiff, became liable to the plaintiff for their value. Plaintiff, having accepted a return of the goods in their damaged condition, would be entitled to the difference between the value of the goods in their original condition and the value of them in their damaged condition. 38 Cyc. 2090. Acceptance of a return of the goods would mitigate the damages. Plaintiff's testimony shows that the value of the goods, when they were delivered to the defendant railway company in 1917, was $788, and when they were returned to him, except for certain items, mention of which is made later, they were considerably damaged. The top of the piano was off; the piano wires were rusted; the household goods were mildewed and appeared to have been water-soaked; the sewing machine and iron beds had become rusted; and other damage was shown. The testimony in behalf of plaintiff was that the reasonable value of the goods, except for the particular articles above mentioned, was only $65. As to the items mentioned, of the value of $90, there is no competent proof as to the amount of damage done to them. The jury in reaching its verdict evidently did not take into consideration the value of these goods. The verdict, in the amount

of $724, is, according to the plaintiff's testimony, excessive to the extent of $90.

Defendant makes further contention that the verdict is excessive for the reason that in amount it exceeded the declared value of the goods, as set forth in the bill of lading, and that the limitation of recovery, based thereon, in the bill of lading is valid and binding. However, that matter was not pleaded by the defendant, nor is it in any way raised by the pleadings. It is therefore not a defense of which the defendant company can now avail itself.

It is therefore ordered that, if the plaintiff file a remittitur in this court in the amount of $90 within 20 days after the entry hereof, the judgment of the lower court will be affirmed; otherwise, the judgment will be reversed and the cause remanded for another trial.

AFFIRMED ON CONDITION.

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Injunction.

Petition to enjoin enforcement of building ordinance *held* demurrable. *Dailey Estate v. City of Lincoln*..... 151

Insurance. See PRINCIPAL AND AGENT, 1-6.

1. Construction against forfeiture will be given if the terms of the policy permit it. *Rathbun v. Globe Indemnity Co*.. 18
2. In construing an insurance policy, courts will ignore an inconsistent provision to avoid a forfeiture. *Rathbun v. Globe Indemnity Co*..... 18
3. Assured *held* to be totally and continuously unable to transact business from date of accident in contemplation of language of policy. *Rathbun v. Globe Indemnity Co*.... 18
4. Attorney's fees reduced to 10 per cent. of recovery. *Rathbun v. Globe Indemnity Co*..... 18
5. A life insurance risk is not assumed until the minds of the applicant and the insurer meet. *Muhlbach v. Omaha Life Ins. Co*..... 206
6. Facts *held* not to constitute a present binding contract of life insurance before issuance of a policy. *Muhlbach v. Omaha Life Ins. Co*..... 206
7. A decree of divorce will not prevent the wife from taking

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as a beneficiary of her husband during the six months after its entry. *Sovereign Camp, W. O. W., v. Billings*.. 218

8. Change of beneficiary *held* complete, although insured died before the home office received the certificate bearing indorsement of the change. *Goodrich v. Grand Lodge, B. of R. T.* 250

9. The issuance of a certificate in favor of a person not within a specified class is *ultra vires*. *Stribling v. Fraternal Aid Union*..... 363

10. "Riot or civil commotion" as used in a policy of burglary insurance defined. *Kirshenbaum v. Massachusetts Bonding & Ins. Co*..... 368

11. Ambiguous language in policy will be construed most strongly against the insurer. *Arendt v. North American Life Ins. Co*..... 716

12. Where the insurer did not fix the amount of increased premium for military service, nor notify insured, the amount of the policy will not be reduced in case of death of insured. *Arendt v. North American Life Ins. Co*..... 716

13. Exemption from liability for death in military or naval service in time of war *held* not applicable where the death of one in such service was not incident to the service. *Arendt v. North American Life Ins. Co*..... 716

14. Provision reducing the amount of liability when in military service *held* void for uncertainty in not fixing the amount of extra premium. *Arendt v. North American Life Ins. Co.* 716

15. Knowledge of agent that insured was engaged in military service in time of war *held* binding on the insurer. *Arendt v. North American Life Ins. Co*..... 716

Intoxicating Liquors. See EVIDENCE, 19, 20.

1. Instruction that, if the jury found that defendants furnished deceased intoxicating liquors contributing to his death by accident, they should find for plaintiffs, *held* proper. *Janesovsky v. Rathman*..... 165

2. Forfeiture of an automobile under sec. 2, ch. 109, Laws 1919, is no part of the sentence, but is an incident to conviction. *Smith v. McNulty*..... 505

3. Complaint *held* sufficient to charge unlawful possession and transportation of liquor. *Smith v. McNulty*..... 505

4. In an action for death from wrongful sale of intoxicating liquors, there may be a recovery without proof that dece-

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dent purchased the liquor. *Thamann v. Merritt*..... 602

5. There may be recovery for damages from unlawful sale of intoxicating liquors without proof that the wrongful act was the proximate cause of death. *Thamann v. Merritt* 602
6. An unlawful sale of intoxicating liquors may be proved without evidence of the terms of a formal contract. *Thamann v. Merritt*..... 602
7. An unlawful sale of intoxicating liquors and defendant's connection therewith may be proved by circumstantial evidence. *Thamann v. Merritt*..... 602

Judgment. See APPEAL AND ERROR, 20-25.

1. Constructive service where defendant is dead confers no jurisdiction. *Walter v. Union Real Estate Co*..... 144
2. Plea of *res judicata* cannot be sustained where either the issues or the parties are not the same. *Coon v. O'Brien* 427
3. Where defendant defaults, the allegations of the petition are taken as true, and plaintiff is entitled to judgment without making proof. *Weir v. Woodruff*..... 585
4. A suit to vacate a judgment for fraud in its procurement must be brought in the court where rendered. *State v. Westover* 593
5. A transcript of a judgment can be vacated only by a suit to set aside the judgment, and this applies to removal of a cloud on title to lands caused by filing of the transcript. *State v. Westover*..... 593
6. A court of equity may restrain parties from enforcing a judgment of another court procured by fraud. *State v. Westover* 593
7. A suit to restrain parties from enforcing a judgment is transitory, and jurisdiction may be acquired by service of summons or by general appearance. *State v. Westover*.... 593
8. Plaintiff may dismiss without prejudice a suit for rescission and begin an action for damages, where he acquired no benefit from the former action. *Carson v. Greeley*.... 609
9. A transcript of a judgment does not become a lien on land conveyed prior to date of transcript. *Shonsey v. Clayton* 695
10. The court should render judgment for the party entitled thereto on the pleadings, notwithstanding the verdict. *Arendt v. North American Life Ins. Co*..... 716

Judicial Sales.

An officer selling property on execution or under a decree has no authority to sell on credit or to accept in payment anything other than lawful money, unless expressly authorized by the decree or the law governing the sale. *DeMoulin Loan & Investment Co. v. McLain* 858

Jury.

1. Peremptory challenges are not to be exercised until the jurors have been passed for cause. *Mathes v. State* 212
2. Procedure designated in sections 8137-8139, Rev. St. 1913, *held* not to apply to calling of a grand or petit jury after commencement of the term. *Pinn v. State* 417
3. District courts may call a grand jury during a term of court, whenever public business requires. *Pinn v. State* 417
4. Where defendant admitted plaintiff's title, and the only issue was one for specific performance, plaintiff was not entitled to a jury trial. *Dold v. Munsor* 501

Landlord and Tenant.

1. Tenant *held* entitled to maintain action for entire crop. *Hurley v. Manchester* 299
2. The rule of *caveat emptor* applies to leases. *Lowe v. Payne* 378
3. A lessor is not liable to his lessee for defects which are plainly discernible. *Lowe v. Payne* 378
4. A lessor is not liable to his lessee for the closing of the leased premises by a municipality. *Lowe v. Payne* 378
5. The lessee may introduce in evidence the original lease in the lessor's possession or a photostat copy, and may show that alterations were made after the lease was signed. *Eckermann v. McDonough* 450
6. A lessee must yield possession before he may dispute his lessor's title. *Polenske v. Polenske* 496

Larceny.

The value of articles of merchandise stolen may be established by proof of the price at which they and like articles are sold at the place where the articles were stolen. *Robinson v. State* 591

Limitation of Actions.

1. The statute does not commence to run against an incompe-

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tent's right to redeem until his mental powers are restored. *Walter v. Union Real Estate Co* 144

2. An action to enforce a statutory liability, which is not penal, may be brought within four years. *Bourne v. Baer* 255
3. An action to enforce a penalty against stockholders must be brought within one year. *Bourne v. Baer* 255
4. Action for damages for fraud in exchange of lands *held* not barred by limitations. *Carson v. Greeley* 609
5. One who asks equitable relief must do equity, and cannot invoke the statute of limitations as a defense. *Wiseman v. Guernsey* 647
6. Limitations will not run in favor of a trustee *ex maleficio* until he repudiates the trust. *Wiseman v. Guernsey* 647

Mandamus.

Mandamus should not be granted where relator does not establish a clear legal right. *State v. Colby* 372

Marriage.

1. In an action for breach of promise to marry, evidence as to defendant's statements as to his financial condition is admissible. *Higgins v. Doty* 442
2. In an action for breach of promise to marry, instruction that the jury might consider defendant's property and financial standing *held* not erroneous. *Higgins v. Doty* .. 442

Master and Servant.

1. Hauling a car with a broken coupler *held* a violation of the federal safety appliance act. *Sweat v. Hines* 1
2. In an action for death of a railroad employee, evidence as to scope of employment *held* to present a question for the jury, and to sustain a finding for plaintiff thereon. *Sweat v. Hines* 1
3. Railroad employee *held* not to assume risk of defective coupler. *Sweat v. Hines* 1
4. Ascertainment of damages in a state court under the federal employers' liability act is controlled by the rule fixed by the federal court. *Sweat v. Hines* 1
   Sheean v. Hines 36
5. In an action for death under the federal employers' liability act, damages *held* grossly excessive. *Sweat v. Hines* 1
   Sheean v. Hines 36

Master and Servant—*Continued.*

6. Assumption of risk *held* a question for the jury. *Sheean v. Hines* 36
7. Where the evidence is conflicting as to negligence in maintaining a railroad track and as to proximate cause of an accident, the questions should be submitted to the jury. *Sheean v. Hines* 36
8. Evidence *held* to sustain verdict for plaintiff. *Sheean v. Hines* 36
9. The master is liable for torts of a servant acting within the scope of his employment. *Malcolm v. Evangelical Lutheran Hospital Ass'n* 101
10. Employer *held* not liable for an assault upon a discharged employee by a foreman. *Zaitz v. Drake-Williams-Mount Co.* 262
11. A finding on conflicting evidence as to the manner of an injury is conclusive. *Urak v. Morris & Co* 411
12. One injured in a personal altercation between employees held not within the workmen's compensation act. *Urak v. Morris & Co* 411
13. Master *held* liable for negligence of employee in driving an automobile. *Ryne v. Liebers Farm Equipment Co* 454
14. Agent *held* not entitled to commission on goods sold, but not paid for. *Klein Mfg. Co. v. Morgan* 461
15. Findings of the district court in a compensation case are conclusive. *Way v. Georgia Casualty Co* 508
16. Allowance of compensation for temporary total disability and for permanent partial loss sustained. *Poast v. Omaha Merchants Express & Transfer Co* 516
17. Evidence *held* to show inferentially that the driver of an automobile was the servant of the owner. *Dirks v. Ensign Omnibus & Transfer Co* 556
18. Evidence *held* to sustain finding of negligence. *Morris v. Hines* 788
19. Contributory negligence is not a defense under the federal employers' liability act; its only effect being to reduce the amount of damages. *Morris v. Hines* 788
20. The fellow-servant doctrine is not a defense under the federal act. *Morris v. Hines* 788
21. A common carrier is liable under the federal act for negligence of its officers, agents, or employees. *Morris v. Hines* 788

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22. Assumption of risk is a defense under the federal act. *Morris v. Hines* 788
23. A master must exercise reasonable care to furnish suitable and safe tools. *Morris v. Hines* 788
24. The master must give warning of defects and dangers. *Morris v. Hines* 788
25. Commutation of compensation award disapproved. *Troxcil v. Morris & Co* 817

Municipal Corporations. See ESTOPPEL, 2.

1. An applicant accepting a building permit under an ordinance cannot plead that the ordinance was void. *Dailey Estate v. City of Lincoln* 151
2. Building ordinance *held* to be uniform and not to grant arbitrary powers. *Dailey Estate v. City of Lincoln* 151
3. Sec. 5147, Rev. St. 1913, so far as it relates to recording the reading of city ordinances by the clerk, *held* to be directory. *Hull v. City of Humboldt* 326
4. Where the council's minutes show that an ordinance was adopted, but the record is silent as to reading of the ordinance, the presumption is that it was properly enacted. *Hull v. City of Humboldt* 326
5. Where the record does not affirmatively show that an ordinance was not read the third time before passage, it will be presumed that it was duly read. *Hull v. City of Humboldt* 326
6. Sec. 5113, Rev. St. 1913, providing for notice to property owners in a paving district, construed to require notice so as to allow reasonable time to prepare for the hearing. *Hull v. City of Humboldt* 326
7. Evidence *held* insufficient to sustain conviction of driving an automobile while intoxicated. *Needham v. State* 389
8. Every doubt as to extent of power to construct local improvements and levy special assessments must be resolved against the city. *Futscher v. City of Rulo* 521
9. Doubt as to limitation of expenditures for water-works will be resolved against the city. *Futscher v. City of Rulo* 521
10. A city of the second class may be enjoined from contracting for water-works at a cost of more than 20 per cent. of the city's taxable property. *Futscher v. City of Rulo* 521

Municipal Corporations—*Continued.*

11. Special assessments in excess of actual benefits are unconstitutional. *Futscher v. City of Rulo* 521
12. Where the municipal records show that notice of meeting of the board of equalization was ordered published, it will be presumed that notice was published. *Broghamer v. City of Chadron* 532
13. The zone plan of assessment will be presumed proper, where there was no showing that it was not in accordance with nor in excess of benefits. *Broghamer v. City of Chadron* 532
14. The propriety of the plan of assessment and the necessity of expenditures will not be reviewed, where the parties did not appear before the board of equalization. *Broghamer v. City of Chadron* 532
15. Municipal corporations must keep streets and sidewalks in a reasonably safe condition for public travel. *Hanley v. Fireproof Building Co* 544
16. Under the common law no duty devolved upon an abutting owner to keep sidewalks adjacent to his property in a safe condition. *Hanley v. Fireproof Building Co* 544
17. A breach by a property owner of an ordinance requiring the keeping of sidewalks adjacent to his property in a safe condition is remediable only by the municipality. *Hanley v. Fireproof Building Co* 544
18. A city cannot grant the use of a public park to the exclusion of the public. *City of Nebraska City v. Nebraska City Speed & Fair Ass'n* 576
19. Providing for the use and control of public parks of a city is a governmental function. *City of Nebraska City v. Nebraska City Speed & Fair Ass'n* 576
20. A state-wide primary election *held* a "general election," at which a majority vote will authorize the issuance of bonds of the city of Lincoln. *State v. Marsh* 607
21. Paving contract *held* not in excess of engineer's estimate. *State v. Marsh* 637
22. A city engineer's estimate of the cost of paving may be partly in writing and partly oral. *State v. Marsh* 637
23. Contract for paving need not be let upon competitive bidding. *State v. Marsh* 637
24. Contract for paving cannot be let for a price in excess of the engineer's estimate. *State v. Marsh* 637

Municipal Corporations—*Concluded.*

25. Village trustees *held* not liable to a materialman for failure to exact a bond from a contractor, where the materialman knew that no bond had been exacted. *Paxton & Vierling Iron Works v. Village of Naponee* 784

26. Petition by materialman for failure of village trustee to exact a bond from a contractor *held* not to state a cause of action. *Paxton & Vierling Iron Works v. Village of Naponee* 784

Negligence.

1. Evidence *held* insufficient to sustain verdict for injuries by automobile. *Criss v. Baright* 277

2. An instruction that failure to comply with the law as to lights and speed of automobiles, in itself, constitutes negligence, *held* erroneous. *Taylor v. Koukal* 409

3. Contributory negligence is a question for the jury. *Kroger v. Gordon Fireproof Warehouse & Van Co* 439

4. Instructions as to burden of proof *held* sufficient. *Kroger v. Gordon Fireproof Warehouse & Van Co* 439

5. An instruction relating to defendant's violation of a statute, without referring to plaintiff, *held* proper, in view of the evidence. *Dirks v. Ensign Omnibus & Transfer Co* .. 556

6. Questions of negligence and proximate cause are for the jury. *Bauer & Johnson Co. v. National Roofing Co* 831

7. Instruction on negligence, omitting reference to contributory negligence, *held* error. *Bauer & Johnson Co. v. National Roofing Co* 831

8. Comparative negligence rule stated. *Bauer & Johnson Co. v. National Roofing Co* 831

Parties.

Substitution of director general of railroads' successor as a party *held* proper. *Wagner v. Union Stock Yards Co* 769

Partnership.

An agreement between the owner of a threshing machine and another for threshing *held* not a partnership. *Gillispie v. Bohling* 357

Perjury.

1. Pleadings in the case in which perjury is charged, *held* admissible for the purpose of showing whether the alleged false testimony was material. *Pinn v. State* 417

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2. Evidence *held* to sustain conviction. *Pinn v. State*..... 417

Physicians and Surgeons.

Verdict for malpractice sustained. *Knepher v. McKenney Dentists* 106

Pleading.

Instruction that answer admitted assault as charged *held* proper. *Oliverius v. Wicks*..... 821

Principal and Agent.

1. Evidence *held* not to show that insurer had knowledge that its agents were guaranteeing premium notes on its behalf. *German American State Bank v. Mutual Benefit, H. & A. Ass'n* 124
2. Insurance agents *held* not authorized to bind the company by a guaranty of premium notes. *German American State Bank v. Mutual Benefit, H. & A. Ass'n*..... 124
3. False representations of soliciting insurance agents as to guaranty of premium notes *held* actionable. *German American State Bank v. Mutual Benefit, H. & A. Ass'n*..... 124
4. To effect estoppel by ratification the principal must have choice of ratification or rejection of the transaction. *German American State Bank v. Mutual Benefit, H. & A. Ass'n.* 124
5. In order that ratification will result from retention of fruits of an agent's unauthorized acts, the principal must be able to return what he has received. *German American State Bank v. Mutual Benefit, H. & A. Ass'n*..... 124
6. The burden of showing ratification is on the one alleging it. *Rawleigh Co. v. Bunning*..... 475
7. Notice to the agent acting within the scope of his authority is notice to the principal. *Arendt v. North American Life Ins. Co*..... 716
8. An agent who pays a fund contrary to the principal's direction is liable for actual damages sustained. *Bourquin v. Atlanta State Bank*..... 811
9. An agent who fails to exact a bond as requested by his principal, but takes other inadequate security, is not guilty of conversion, but is liable for actual damages. *Bourquin v. Atlanta State Bank*..... 811

Process.

1. Notice of *lis pendens* confers no jurisdiction. *Walter v. Union Real Estate Co* 144
2. One defendant cannot claim privilege of exemption from service of summons for codefendant. *First State Bank v. Ingrum* 468
3. A transitory action may be brought against two defendants jointly liable in any county where one of them may be served with summons, and summons may be issued to another county. *First State Bank v. Ingrum* 468

Quieting Title.

Evidence *held* to sustain decree quieting title in plaintiffs. *Warnick v. Warnick* 747

Railroads. See CARRIERS.

1. A consignee of goods is an invitee, and the carrier must exercise ordinary care not to injure him. *Wilson v. Union P. R. Co* 111
2. That a consignee has placed himself in a place of danger does not excuse an injury preventable by the exercise of ordinary care. *Wilson v. Union P. R. Co* 111
3. An engineer may assume that a person in danger will avoid injury. *Wilson v. Union P. R. Co* 111
4. Evidence *held* to require that question of negligence, under doctrine of "the last clear chance," should have been submitted to the jury. *Wilson v. Union P. R. Co* 111
5. An attorney's fee may be taxed as costs against the director general of railroads. *Wagner v. Union Stock Yards Co* 769
6. The fact that the federal director general took possession of converted goods would not affect the consignee's right of action in conversion against the carrier. *Colley v. Chicago & N. W. R. Co* 864

Rape.

1. In a prosecution for rape, the prosecutrix need not be corroborated as to the particular act. *Darwin v. State* 177
2. Evidence as to identification of accused *held* sufficient. *Porter v. State* 690
3. Instruction as to corroborative evidence *held* erroneous. *Porter v. State* 690

Release.

1. A mutual mistake, to avoid a release, must relate to present

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or past facts, and not to an opinion as to future results of known facts. *Simpson v. Omaha & C. B. Street R. Co*.... 779

2. A mistake as to future development of a known injury is one of opinion, and not of fact. *Simpson v. Omaha & C. B. Street R. Co*..... 779

3. Release *held* not to bar action for unknown injuries. *Simpson v. Omaha & C. B. Street R. Co*..... 779

Remainders.

Remaindermen may sue to quiet title before termination of life estate. *Davis v. Davis*..... 70

Revivor.

An action for damages from negligence causing death may be revived. *Levin v. Muser*..... 230

Sales.

1. Where a buyer refuses to pay instalments due on a contract because of a claim for damages for breach of another contract, the buyer's default is a breach of the former contract, entitling the seller to rescind and to recover damages. *Spiegal & Son v. Alpirn*..... 233

2. A party induced to purchase property by false representations may rescind, or sue for damages for breach of contract. *Phelps v. Shuck*..... 490

3. An action for purchase money after rescission is not an action on guaranty. *Phelps v. Shuck*..... 490

4. A cash sale is presumed where no time of payment is fixed, and the buyer is not entitled to possession until the price is paid or tendered. *Edwards v. Hastings Distributing Co*.. 621

5. The buyer's refusal to pay for goods delivered *held* to relieve seller from making further shipments. *Edwards v. Hastings Distributing Co*..... 621

6. In an action for breach of contract of sale of seed, the burden is on plaintiff to show that he had approximately the amount contracted for ready to deliver at the time of the breach. *Pierce v. Miller*..... 851

7. The word "about" in a contract for sale of seed requires delivery of the specified quantity within a reasonable limit. *Pierce v. Miller*..... 851

Schools and School Districts.

1. The legislature may provide that education of children in

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the primary grades shall not be conducted in a foreign language. *Meyer v. State*..... 657

2. The statute prohibiting the teaching of foreign languages to children in certain grades *held* a reasonable exercise of police power. *Meyer v. State*..... 657
3. That a foreign language is taught from a book containing a religious text does not protect the teacher from the penalty imposed by statute for teaching such language. *Meyer v. State*..... 657
4. The statute prohibiting teaching of foreign languages in schools *held* to prohibit such teaching whenever pupils are assembled for instruction, and not to be limited to school hours. *Meyer v. State*..... 657
5. Evidence *held* to sustain conviction of unlawful teaching of foreign languages. *Meyer v. State*..... 657
6. An election board appointed by the county superintendent with the approval of the electors is a *de facto* board and its acts are valid. *Mosiman v. Weber*..... 737
7. Electors of a school district will not be disfranchised because the officer appointing the judges and clerks of election was not expressly authorized. *Mosiman v. Weber*..... 737

Specific Performance. See ADOPTION, 2.

1. To enforce an oral agreement to convey land, the proof against a decedent must be clear and convincing. *McEntarffer v. Payne*..... 169
2. Evidence *held* to show an oral contract of marriage, and not a contract to devise. *Mallett v. Grunke*..... 173
3. Specific performance of a widow's one-third interest in land denied, where grantor was under disability as to remaining two-thirds. *Boehmer v. Wellensick*..... 478
4. Specific performance will not be denied where the contract does not provide that specified damages may be paid in lieu of performance. *Ruzicka v. Saylor*..... 631
5. A vendor who in good faith endeavors to perfect title may have specific performance by tendering a good title at any time before judgment in action by purchaser. *Shonsey v. Clayton*..... 695

Statute of Frauds.

1. An oral agreement to furnish money to buy and sell land

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and to share profits and losses is not within the statute. *Greusel v. Payne* 84

2. A contract in consideration of marriage is within the statute. *Mallett v. Grunke* 173
3. A cash sale of stock on an oral agreement to repurchase *held* not within the statute. *Stratbucker v. Bankers Realty Investment Co* 194
4. A motion for direction of verdict because the contract was within the statute *held* properly overruled. *Hurley v. Manchester* 299

Statutes.

1. The act providing for an election to relocate a county seat *held* constitutional as to title and subject. *Murray v. Nelson* 52
2. An act dealing with but a single subject *held* valid, though the title is apparently dual. *Murray v. Nelson* 52
3. Ch. 169, Laws 1917, providing for county seat election, *held* not amendatory, but an independent act. *Murray v. Nelson* 52
4. A liability created by statute which is not measured by the damage caused is a penalty. *Bourne v. Baer* 255
5. Statute relating to grand juries *held* reenacted by adoption of the revision of the statutes. *Pinn v. State* 417

Taxation.

An action to redeem from a void tax foreclosure sale is triable to the court. *Walter v. Union Real Estate Co* 144

Trial. See APPEAL AND ERROR.

1. It is error to direct a verdict where different minds might draw different conclusions from the testimony. *Schwerin v. Andersen* 138
2. Verdict *held* not objectionable as a quotient verdict. *Janesovsky v. Rathman* 165
3. Instruction disregarding theory of spontaneous combustion upheld, in view of the evidence. *Eckman Chemical Co. v. Chicago & N. W. R. Co* 268
4. Where reasonable minds cannot differ as to conclusions from the evidence, the trial court may enter judgment on the evidence. *Kirshenbaum v. Massachusetts Bonding & Ins. Co* 368

Trial—*Concluded.*

5. Where the evidence is conclusive, the court may dismiss the jury and enter judgment. *Kirshenbaum v. Massachusetts Bonding & Ins. Co* 494
6. Where the evidence is not conflicting, direction of verdict is proper. *Farmers Grain & General Shipping Ass'n v. Jordan* 537
7. Cause of death is a question for the jury. *Thamann v. Merritt* 602
8. Inferences from evidential facts are for the jury, where the evidence will sustain a verdict for plaintiff. *Thamann v. Merritt* 602
9. A motion for a directed verdict at the close of plaintiff's testimony, being overruled, must be renewed at the close of all the testimony. *Auld v. Walker* 676
10. A defense unsupported by evidence should not be submitted to the jury. *Hammang v. Chicago & N. W. R. Co* 684
11. An offer to confess judgment in an answer should not be referred to in the instructions. *Hammang v. Chicago & N. W. R. Co* 684
12. Instructions *held* not to assume that a tool was defective. *Morris v. Hines* 788
13. An instruction placing the burden of proof on defendant to show that seed he purchased was unmarketable *held* erroneous. *Pierce v. Miller* 851

Trover.

1. Conversion defined. *Colley v. Chicago & N. W. R. Co* 864
2. Refusal to deliver goods except on payment of unlawful storage charges obviates necessity of making demand, and their detention constitutes conversion. *Colley v. Chicago & N. W. R. Co* 864

Trusts.

1. One holding title to land purchased by himself and associate must account as trustee for profits. *Greusel v. Payne* 84
2. Equity may decree termination of a fulfilled trust. *Majerus v. Neary* 348
3. Fraudulent intent in making a promise to carry out a trust may be inferred from refusal to perform. *Wiseman v. Guernsey* 647
4. Where a trust *ex maleficio* is based on a promise, the promise need not be expressly made. *Wiseman v. Guernsey* .. 647

Vendor and Purchaser.

1. A purchaser must assert his rights within a reasonable time; and what constitutes reasonable time rests in the discretion of the court. *Kesterson v. Marsh* 202
2. Evidence *held* to show abandonment of contract. *Kesterson v. Marsh* 202
3. Acceptance of offer to sell land must conform strictly to terms of offer. *Smith v. Bertrand* 301
4. The loss by fire of a building on land sold, before delivery of possession, falls on the purchaser. *McGinley v. Forrest* 309
5. An option without consideration may be withdrawn before acceptance, but an option upon a consideration cannot be withdrawn before the specified time. *Von Knuth v. Ryan* .. 351
6. Acceptance of offer constitutes a contract. *Von Knuth v. Ryan* 351
7. An option may be revoked without consent of the holder. *Von Knuth v. Ryan* 351
8. Notice to holder of option of a sale to a third person constitutes revocation. *Von Knuth v. Ryan* 351
9. An option indeterminate as to time is terminable upon reasonable notice. *Von Knuth v. Ryan* 351
10. Evidence *held* to sustain decree for defendants. *Ruzicka v. Saylor* 631
11. A purchaser acquiescing in the vendor's effort to perfect title waives the right to insist on strict performance. *Shonsey v. Clayton* 695
12. A good title must be free from reasonable doubt. *Shonsey v. Clayton* 695
13. A title subject to litigation is not a good title. *Shonsey v. Clayton* 695
14. Where circumstances are such as to put a purchaser upon particular inquiry, he will be charged with notice of every fact which that inquiry would give him. *Shonsey v. Clayton* 695
15. Though time is of the essence of a contract, a default does not terminate it, but only renders it voidable. *Shonsey v. Clayton* 695

Venue. See JUDGMENT, 4.

Waters.

1. The owner of land traversed by an irrigation ditch is

Waters—*Concluded.*

entitled to water for irrigation. *Dundy County Irrigation Co. v. Morris* 64

2. The owner of an irrigation system must deliver water legally appropriated at rates fixed by the railway commission. *Dundy County Irrigation Co. v. Morris* 64

3. Evidence *held* not to show that defendant had an interest in plaintiff's irrigation ditch. *Dundy County Irrigation Co. v. Morris* 64

Wills.

1. In construing a will, the inference of a vested remainder is stronger than that of a contingent remainder. *Davis v. Davis* 70

2. Devise construed as a vested remainder to children living at death of testator. *Davis v. Davis* 70

3. The term "issue of his body" *held* to mean lineal descendants. *Wilkins v. Rowan* 180

4. A devise *held* to create an estate in remainder. *Wilkins v. Rowan* 180

5. A devise *held* to create a vested estate in remainder, subject to let in afterborn issue. *Wilkins v. Rowan* 180

6. A vested estate in remainder *held* defeasible. *Wilkins v. Rowan* 180

7. The term "competent witness," as used in sec. 1290, Rev. St. 1913, means one who can legally testify to the facts to which he attests. *Hayden v. Hayden* 806

8. An executor is a competent subscribing witness. *Hayden v. Hayden* 806

9. A spouse may be a competent subscribing witness to a will, when the consort is a devisee. *Hayden v. Hayden* 806

Witnesses.

1. Only such communications are privileged as are necessary to enable a physician to discharge his professional duties. *Koskovich v. Rodestock* 116

2. Whether disclosures to a physician are privileged is a judicial question. *Koskovich v. Rodestock* 116

3. In an action for assault, plaintiff's statements to physician *held* not privileged. *Koskovich v. Rodestock* 116

4. The husband is incompetent to testify in the wife's suit

Witnesses—*Concluded.*

for specific performance of parol contract with a decedent. *McEntarffer v. Payne* 169

5. Representative of deceased defined. *McEntarffer v. Payne* 169
6. A witness on trial for perjury may be impeached by showing that his reputation for truth and veracity in the community where he resides is bad. *Pinn v. State* 417
7. Sustaining of objection to new matter on cross-examination *held* proper. *Farmers Grain & General Shipping Ass'n v. Jordan* 537
8. Witness *held* competent to testify as to transactions between deceased and a third party. *Warnick v. Warnick* ... 747
9. Introduction of documentary evidence by representatives of deceased *held* to render evidence of interested witness competent. *Warnick v. Warnick* 747