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JESS CAIN, APPELLANT, V. IRA MILLER, SHERIFF, APPELLEE.

FILED DECEMBER 30, 1922. No. 22468.

1. **Divorce:** TEMPORARY ALIMONY. An order for the payment of temporary alimony for the support of a wife possesses different characteristics from an ordinary debt. It is designed to secure the performance of a legal duty in which the public has an interest. It may be modified or set aside upon a proper showing by the court which rendered it, as the circumstances may warrant.

2. ———: ———: CONSTITUTIONAL LAW. An order to pay temporary alimony is not a mere debt, and the provision of the Constitution that "no person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud," does not apply to a wilful and contumacious refusal to obey an order of the court to pay temporary alimony.

3. ———: ———: REMEDIES. The first section of chapter 40, Laws 1883 (Comp. St. 1922, sec. 1534), when considered in connection with section 2 of the act (Comp. St. 1922, sec. 1535), to the effect that "the remedy given by this act shall be held to be cumulative and in no respect to take away or abridge any subsisting remedy or power of the court for the enforcement of such judgments and orders," *held* not to take away the then subsisting powers of courts of chancery to enforce obedience to their orders in divorce cases by contempt proceedings.

4. ———: ———: POWERS OF DISTRICT COURTS. It was formerly the practice in England that decrees of the ecclesiastical courts in divorce actions, such courts being of limited powers, were enforced by the chancery courts. When the whole subject of divorce and alimony was committed by statute to the district court of this state, possessing full equity powers, such courts were invested with the same power to enforce their decree in divorce cases as the chancery courts of England had.

5. ———: ———: CONTEMPT: PENALTY. It is the duty of a husband to support his wife. When, in an action for divorce, a husband has been ordered by the court to pay temporary alimony for the support of his wife during the pendency of the suit, and the husband, being of sufficient ability to pay the same, wilfully and contumaciously refuses to pay, having no just or reasonable ground for his failure or refusal, such refusal constitutes contempt of court, and such order may be enforced by imprisonment until the amount ordered is paid.

6. ———: ———: ———. Imprisonment is a serious and dras-

tic remedy. No one should be committed to jail for refusal to pay temporary alimony unless it is clear that the refusal is wilful and contumacious. If the defaulting husband has in good faith no means or ability to procure means wherewith to pay the alimony, does not wilfully refuse to obey the order of the court, and has just or reasonable cause for his failure to do so, he may purge himself of the contempt by so showing, and in such case would be entitled to his discharge.

7. **Courts:** OVERRULING FORMER DECISIONS. While the court is reluctant to interfere with former decisions, yet where they have not become a rule of property, and pertain merely to a question of practice, and the court did not have the aid of counsel to present both sides of the question before the basic decision was made, we will not hesitate to adopt the proper practice and set aside the erroneous decisions.

8. **Cases Overruled.** *Segear v. Segear*, 23 Neb. 306, and *Leeder v. State*, 55 Neb. 133, examined and overruled.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, FREDERICK E. SHEPHERD, WILLIAM M. MORNING and ELLIOTT J. CLEMENTS, JUDGES. *Affirmed.*

W. W. Towle and *Francis V. Robinson*, for appellant.

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

C. C. Flansburg, amicus curiæ.

Heard before MORRISSEY, C. J., LETTON, DAY, ROSE and ALDRICH, JJ., REDICK, District Judge.

LETTON, J.

Relator was confined in the county jail of Lancaster county under a commitment for contempt on account of his failure to comply with an order of the district court to pay temporary alimony, suit money and attorney's fees for the benefit of his wife, who had begun an action for divorce against him. He applied to the district court for a writ of habeas corpus to discharge him from custody. The writ was denied, and from the order denying the writ he appeals.

The sole question presented is: Did the district court possess jurisdiction to punish, by contempt proceedings,

the refusal of relator to obey the order? If the case at bar falls within the principles of *Segear v. Segear,* 23 Neb. 306, and *Leeder v. State,* 55 Neb. 133, and if we adhere to the views expressed in those cases, then the relator is entitled to his discharge.

In *Segear v. Segear,* 23 Neb. 306, an order to pay temporary alimony had been made. Defendant failed to comply with this order, and was cited to appear and show cause why he should not be dealt with for contempt. He appeared and alleged he had no property or other means of complying with the order of the court. After the granting of a divorce to the wife, it appearing that defendant had neglected to pay the allowance of alimony, amounting to $225, the court ordered that he be committed to jail until he pay, or satisfactorily secure the payment of, that sum and costs, on which a *capias ad satisfaciendum* issued and he was committed to jail. On error proceedings to this court, he was discharged. In the opinion by Cobb, J., section 1 of the amendatory statute of 1883 (Laws 1883, ch. 40) was quoted. It provides: "All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by execution and proceedings in aid thereof, or other action or process, as other judgments." It was said: "The provisions of this section establish the character of an order for the payment of alimony with that of a judgment at law, and limits the enforcement and collection to the same means." It was also said that the commitment for contempt was not a lawful remedy, nor was the nonpayment of the judgment "wilful disobedience" to the order of the court. It may be noted that there was no appearance in this court for defendant in error, so that the court was not aided by the argument of counsel, or the production of authorities presenting the contrary view.

In *Leeder v. State,* 55 Neb. 133, the respondent had

been ordered, in 1888, to pay the sum of $500 as permanent alimony in a divorce action. An execution at that time issued upon the judgment and returned, no property found. In 1898, no other execution having been issued in the meantime, and no motion or pleading being filed, an order was issued that defendant show cause why he had not complied with the order of the court for the payment of the $500. He appeared and promised to pay $100 in three days. He failed to make this payment, and was attached for contempt in not complying with the order of the court. He answered that he was without means and pleaded his exemptions. The court adjudged him guilty of contempt, and ordered him to pay a fine of $200 and costs, and stand committed to jail until the fine and costs were paid. Upon error proceedings, this court, by Norval, J., said: "Section 20 of our Bill of Rights declares: 'No person shall be imprisoned for debt in any civil action on mesne or final process, unless in case of fraud.' Manifestly a decree for permanent alimony is a debt, within the meaning of the above provision of the Constitution. (Const., art. I, sec. 20.)" It was further stated: "The defendant could no more be adjudged guilty of contempt, and fined and imprisoned for failing to pay the $100 than he could be punished as for contempt for a refusal to pay his grocery bill, or to pay an ordinary judgment." *Segear v. Segear,* 23 Neb. 306, and *Nygren v. Nygren,* 42 Neb 408, are cited to support these views.

Nygren v. Nygren, 42 Neb. 408, merely decides that under the amended statute a decree for alimony became a lien upon the real estate of the husband. The question presented now was not involved.

In *Fussell v. State,* 102 Neb. 117, which was a prosecution under chapter 186, Laws 1915 (which provides, in substance, that when a husband, against whom a decree for alimony for the support of his children shall have been rendered, shall, without good cause, refuse to pay the amounts provided, he shall be guilty of a misdemeanor)

it was held that the act was evidently passed by the legislature for the express purpose of giving the district court power to enforce orders and decrees in divorce cases, and that the court would ordinarily have such power by a contempt proceeding; but, this court having held in the *Segear* and *Leeder* cases that a decree for alimony is not so enforceable, the legislature passed the act now under consideration. It was also held that this statute did not provide for imprisonment for debt.

From this review it is evident that the view that orders for the payment of alimony are debts like ordinary judgments rests primarily upon a decision in which no appearance was made by counsel to maintain the other view.

Are these decisions sound? After it had been held in *Swansen v. Swansen,* 12 Neb. 210, that, as the statute then stood, a decree for alimony did not constitute a lien on real estate, the legislature passed the amendatory act of 1883. The first section of this act, as we have seen, provides that judgments and orders in divorce cases, shall be liens upon property as in other actions, and may in the same manner be enforced and collected by execution, or other process as in other judgments. Section 2, which is not mentioned in the *Segear* or *Leeder* opinions, but which is relied upon as justifying the imprisonment of the relator, so far as material here, is as follows: "The remedy given by this act shall be held to be cumulative and in no respect to take away or abridge any subsisting remedy or power of the court for the enforcement of such judgments and orders." Laws, 1883, ch. 40, sec. 2. What remedy or power of the court for the enforcement of judgments and orders then subsisted? In a consideration of the power of divorce courts in this country, Mr. Bishop says: "That, though our ancestors did not bring with them the English ecclesiastical courts, they brought the law which in England those courts administered, so far as applicable to our situation and circumstances. It had no practical force with us while

there was no tribunal to administer it. But on the establishment of a tribunal—as by authorizing a common-law or equity court to grant divorces for adultery or cruelty—such law occupied the same relation to the subject as any other branch of the common law to its subject." 1 Bishop, Marriage, Divorce and Separation, sec. 123. And, also, in section 126: "If we should deny the doctrine of law in abeyance, and even hold that the marriage and divorce law of the English ecclesiastical courts did not become common law in the American colonies on their settlement from England, still, when the statute of a state authorizes divorce for a cause named, it carries with it by interpretation the further provision that it shall be enforced after the English rules and methods, so far as adapted to our circumstances and the common practice of the particular court, and not in conflict with any statutory terms." He illustrates this by the doctrines of connivance, condonation and recrimination, which are not to be found in the statutes, and yet are applicable as defenses in a divorce suit. *Petrie v. People,* 40 Ill. 334; *Barber v. Barber,* 62 U. S. 582. This court has taken the same view. *Cizek v. Cizek,* 69 Neb. 800; *Cizek v. Cizek,* 76 Neb. 797; *Wharton v. Jackson,* 107 Neb. 288.

A few courts refuse to allow the remedy by contempt proceedings for wilful refusal to pay alimony. The reasons given are that, since the legislature has provided a remedy by execution, the ancient power of courts of chancery to enforce their orders by attachment of the person has been abolished; or, that such an order for the payment of alimony is a mere debt, and that imprisonment for debt is abolished by the Constitution. The courts of Missouri assign both reasons. The first reason is assigned in *McMakin v. McMakin,* 68 Mo. App. 57, and *In re Kinsolving,* 135 Mo. App. 631. *Coughlin v. Ehlert,* 39 Mo. 285, giving the second reason, and holding that therefore one refusing to obey an order for the payment of alimony may not be imprisoned, is based

upon *Roberts v. Stoner,* 18 Mo. 481, which was not a divorce and alimony case. In *Aspinwall v. Aspinwall,* 53 N. J. Eq. 684, construing a statute of the state, the first reason is assigned; also in *Gane v. Gane,* 45 N. Y. Super. Ct. 355. The second reason is given in *Marsh v. Marsh,* 162 Ind. 210.

Some courts, while denying the remedy by contempt for refusal to pay permanent alimony, allow it to be used where there had been a wilful and unreasonable refusal to pay temporary alimony. In Michigan it is held that an order for the payment of temporary alimony not being recoverable by execution, an attachment for contempt will lie. It is said: "The statutes have done away with the barbarous rules which made process of contempt the usual remedy for the enforcement of equitable rights." But it is also said: "The nature and purpose of allowances to carry on litigation would not allow them to depend for enforcement upon executions. Unless they can be enforced in some other way, they may be practically defeated." *Haines v. Haines,* 35 Mich. 138. See *North v. North,* 39 Mich. 67; *Carnahan v. Carnahan,* 143 Mich. 390. The same rule is followed in Connecticut, *Lyon v. Lyon,* 21 Conn. 185; and in Iowa in *Bailey v. Bailey,* 69 Ia. 77; *Groves' Appeal,* 68 Pa. St. 143. Other cases hold such remedy may be availed of to enforce payment of either kind of alimony. *Park v. Park,* 80 N. Y. 156; *Murray v. Murray,* 84 Ala. 363; *State v. King,* 49 La. Ann. 1503; *In re Fanning,* 40 Minn. 4; *Dwelly v. Dwelly,* 46 Me. 377; *Pain v. Pain,* 80 N. Car. 322; *Blake v. People,* 80 Ill, 11; *Tolman v. Leonard,* 6 App. D. C. 224; *Morton v. Morton,* 4 Cush. (Mass.) 518; *Slade v. Slade,* 106 Mass. 499; *Bronk v. State,* 43 Fla. 461; *Brinkley v. Brinkley,* 47 N. Y. 40; *Ex parte Davis,* 101 Tex. 607; *Pinckard v. Pinckard,* 23 Ga. 286; *Carlton v. Carlton,* 44 Ga. 216; *Staples v. Staples,* 87 Wis. 592; *Galland v. Galland,* 44 Cal. 475; *Smith v. Smith,* 81 W. Va. 761.

A judgment, order or decree for the payment of tem-

porary alimony possesses different characteristics from an ordinary debt. Before it is made the court has decided that it is the duty of the defendant in the case to support his wife, and that he has the power to do so. It is designed to secure the performance of a legal duty in which the public has an interest. It may be modified or set aside upon a proper showing by the court which rendered it, as circumstances may warrant. *Audubon v. Shufeldt,* 181 U. S. 575; *Petrie v. People,* 40 Ill. 334; *Wightman v. Wightman,* 45 Ill. 167; *Stonehill v. Stonehill,* 146 Ind. 445; *Lyon v. Lyon,* 21 Conn. 185; *State v. Cook,* 66 Ohio St. 566; *Barclay v. Barclay,* 184 Ill. 375.

We conclude, therefore, that the order to relator to pay temporary alimony is not a mere debt, and that the provision of the Constitution that "no person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud" (Const., art. I, sec. 20), does not apply to the wilful refusal to obey such an order of the court.

As to the other contention: The holding that contempt proceedings may not be availed of because an execution can issue may be correct under the statute of some states, but in this state the act of 1883, by the second section, expressly provides that the remedy by execution and lien provided for by the first section shall be cumulative and shall not take away or abridge any subsisting power of the court for the enforcement of such judgments and orders. We have seen that the remedy by contempt proceedings for the nonpayment of temporary alimony is almost unanimously held to be one of the inherent powers of the court in divorce proceedings.

We are reluctant to interfere with former decisions, but where they have not become a rule of property, and pertain merely to a question of practice, and the court did not have the invaluable aid of counsel to present both sides of the question before the basic decision was made, we should not hesitate to adopt the proper practice and

set aside the erroneous decisions. The rule of *stare decisis* is not so binding in mere matters of practice as in those of substantive law.

Despite the ideas of some would-be social reformers, it is still the legal duty of every husband to support his wife, and until this duty has been removed by the legislature it should be enforced. When a failure to discharge this duty has been made to appear before a court of competent jurisdiction, and an order *pendente lite* has been made that he fulfil this obligation, a wilful, definite and contumacious disobedience of the order by a hale and hearty man, able to earn a living, or with other means, *without just or reasonable cause,* does in fact constitute a contempt of court, and may be punishable as such. To commit to jail is a harsh and drastic remedy. Of course, if the refusal is not wilful, if the defaulting husband has in good faith no means wherewith to pay the alimony, and does not wilfully refuse to obey the order of the court and has just or reasonable cause for his failure to comply, he may purge himself of the contempt by so showing.

We feel justified in taking the position occupied by the majority of courts in this country upon the proposition, in overruling *Segear v. Segear,* and *Leeder v. State, supra,* and in holding that the relator, having been lawfully committed for contempt in wilfully disobeying the order of the court, is not entitled to discharge by a writ of habeas corpus.

AFFIRMED.

IN RE ESTATE OF LAURA V. KANE.
MAE M. HOLCOMB, APPELLEE, V. FRED A. KANE ET AL., APPELLANTS.

FILED DECEMBER 30, 1922. No. 22162.

1. **Witnesses:** COMPETENCY: PROPONENT OF LOST WILL. In a proceeding to establish and probate a lost will, the proponent who is a devisee or an heir at law is not disqualified by the follow-

ing statutory provisions to testify to conversations between himself and testatrix, a deceased person, in regard to the execution and the contents of the lost will: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." Comp. St. 1922, sec. 8836.

2. **Appeal:** FINDINGS BY COURT. Where the district court acts in the place of a jury in determining an issue of fact on conflicting evidence sufficient to support a judgment in favor of either party, the finding on that issue will not be reversed on appeal unless clearly wrong.

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

L. L. Raymond and *Morrow & Morrow,* for appellants.

Mothersead & York, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, FLANSBURG and DAY, JJ., SHEPHERD, District Judge.

ROSE, J.

This proceeding was begun in the county court of Scotts Bluff county to probate what is alleged to be the lost will of Laura V. Kane, deceased. The lost instrument offered for probate was dated January, 1914. Testatrix, a widow, died January 11, 1919, seised of 80 acres of land in Scotts Bluff county. Three children survive and all are over 30 years of age. They are Dorothy Cordelia Leek and Mae M. Holcomb, married daughters, and Fred A. Kane, son. According to the lost will the mother devised 50 acres of her land to Mae and the remaining 30 acres in equal shares to Dorothy and Fred. Mae is proponent and Fred and Dorothy are contestants. By objection and answer the execution of the purported lost will is denied. It is also alleged by contestants that the will offered for probate, if executed, was intentionally revoked or destroyed by their mother. The county court dismissed the proceeding, and proponent appealed to the

district court, where there was a trial without a jury, resulting in a decree establishing and probating the lost will. Contestants have appealed.

The principal question presented is the competency of testimony by Mae and her husband. They were permitted, over the objections of contestants, to testify to conversations between themselves and Laura V. Kane in regard to the execution and contents of her will. If there is a will, Mae, the proponent, is a devisee. If there is no will, she is an heir at law. It is strenuously argued that the district court, in overruling the objections, disregarded the statutory rule declaring:

"No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." Comp. St. 1922, sec. 8836.

This statute does not disqualify Mae, though she is the proponent and a devisee, or an heir at law, as a witness in the contest of the will or destroy her testimony as to conversations between her and her mother. The question is not an open one in this state. The rule and the reasons on which it is based have been stated in several opinions. The proceeding to probate a will and the contest thereof do not diminish or increase the estate. The issue to be determined is the making of the will. Who succeeds to the property rights of decedent? In *McCoy v. Conrad,* 64 Neb. 150, the principle was announced in the following language:

"In a contested proceeding for the probate of a will, the heirs at law of the alleged testator are not disqualified by the statute as witnesses to transactions and conversations with the deceased."

This rule may apply to devisees and to proponents. In a later discussion it was said:

"The heir is not in all litigation concerning the estate of the deceased the representative of the deceased within

the meaning of our statute. It is only when he stands in place of the deceased so as to uphold a right that the deceased had at the time of his death that he may be said to represent the deceased. When the right of the deceased at the time of his death is not in controversy, but the question is to whom does that right descend, the heir, although a party to the litigation, does not in that action represent the deceased within the meaning of the statute." *Sorensen v. Sorensen,* 68 Neb. 509.

The doctrine has since been recognized as settled law in the case of *In re Estate of Wiese,* 98 Neb. 463, where it is said that in a will contest there is no "representative of a deceased person." While the courts in different jurisdictions are not in harmony on this question, the weight of authority and the better reasoning seem to support the doctrine announced in the former decisions of this court. See note in 51 L. R. A. n. s. 189, under the case of *Whitehead v. Kirk.*

Some confusion has apparently arisen from the following language used in the opinion in *McCoy v. Conrad,* 64 Neb. 150:

"After the will of a decedent has been established, the devisees and legatees are properly regarded as within the protection of the statute, but, so long as they are merely the proponents of a contested alleged will of the deceased, their interests are as clearly adverse to those of the heirs at law or other acknowledged representatives of the decedent as are those of other litigants seeking to recover against his estate on account of any other transaction had with him in his lifetime. In such litigation the plaintiffs or proponents, being named as devisees or legatees, as the case may be, are assailing the estate with the view of the appropriation of it, or of a part of it, to their own uses. Any such assailants are, therefore, clearly excluded by the statute, and so, of course, is an executor in the proposed will."

The last sentence in the excerpt is invoked by contestants to disqualify as a witness the proponent, a devisee, and her husband. No such an inference can be drawn from the opinion as a whole. The principle of law announced and the reasoning in the context show that proponent, a devisee, and her husband are not disqualified in the present contest to testify to conversations with testatrix in regard to the execution and the contents of the lost will. In overruling the objections, therefore, the trial court did not err.

It is also argued that the evidence is insufficient to sustain the findings of the district court. The sufficiency of evidence is not in doubt, when that of proponent and her husband is considered. The making, witnessing and publishing of the will in January, 1914, at the village of Chambers, in Holt county, are clearly shown. The devises in specific terms are also proved. There was testimony on both sides of the issue as to whether testatrix destroyed or revoked the will, but the trial court decided that issue in favor of proponent on evidence to support a finding either way. The findings have the force of a jury's verdict. There is no reason for disturbing those findings, and it follows that the judgment is

AFFIRMED.

DEWEY SWEEDLAND V. STATE OF NEBRASKA.

FILED DECEMBER 30, 1922. No. 22866.

1. **Larceny: LANDLORD AND TENANT: DIVISION OF CROPS.** Under a lease entitling the tenant to two-thirds of a crop of wheat and the landlord to one-third, the dividing of the wheat as threshed and the storing of the share of the landlord for him in a separate bin in a granary on the premises may constitute payment of the rent to that extent and, as to the landlord's share thus stored, may terminate the relation of landlord and tenant and bailor and bailee, though the tenant thereafter has the right to remain in possession of the leased land during the rest of an unexpired term.

2. ———: SUFFICIENCY OF EVIDENCE. Evidence outlined in opinion *held* sufficient to sustain the conviction of a tenant for the larceny of wheat raised on the leased land and stored thereon for the landlord as his share of the crop.

3. ———: EVIDENCE: HARMLESS ERROR. In a prosecution for larceny, the failure to qualify a witness who testifies to the market price of wheat charged to have been stolen is not a reversible error, where the state and defendant stipulate in open court such price and the jury base their finding of value thereon.

4. Criminal Law: EVIDENCE: CONFESSIONS. In a criminal prosecution, confessions of guilt, though made to a sheriff, are admissible in evidence, if voluntarily made without threats or inducements.

5. ———: NONPREJUDICIAL ERRORS. Errors in the trial of a criminal case do not require the reversal of a conviction, if they in no wise prejudice defendant.

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

Bruckman & Paulson, for plaintiff in error.

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

Heard before MORRISSEY, C. J., ROSE and FLANSBURG, JJ., REDICK and SHEPHERD, District Judges.

ROSE, J.

In a prosecution by the state in the district court for Kearney county, Dewey Sweedland, defendant, was convicted of the larceny of wheat valued at $22.88, the property of Anna K. Jensen Homark. For that misdemeanor he was sentenced to pay a fine of $100. As plaintiff in error, he presents for review the record of his conviction.

It is first argued that the wheat was not the subject of larceny by defendant because, as he views the record, he was lawfully in possession of it as tenant and bailee November 28, 1921, the date of the offense charged in the information. He was not convicted of larceny in the capacity of tenant or bailee, each of which is a separate statutory offense. He denies the taking of lessor's

wheat and argues that all incriminating evidence applies either to larceny by bailee or to larceny by tenant. From Anna K. Jensen Homark he had leased the farm on which the wheat was raised and his lease did not expire until March 1, 1922. The grain was on the leased farm November 28, 1921, and his conclusion of law is that he was then in rightful possession as tenant and bailee and therefore not guilty of larceny. According to the lease defendant was entitled to two-thirds of the crop and lessor to one-third. The wheat was divided as it was threshed. The portion belonging to lessor was stored for her on the premises in the west bin of the granary and defendant's share was stored for him in the east bin. There is evidence tending to prove that defendant, after the division, hauled away his own share in a wagon; that when he made his last trip to the east bin he emptied it, getting part of a load only, and that he backed his wagon to the west bin and took therefrom wheat enough to make a full load. Witnesses testified to having seen him in the act of taking wheat from the west bin. There is proof of admissions by him that he did so.

Were the jury justified in finding defendant guilty of larceny as distinguished from larceny by bailee and larceny by tenant? Courts and text-writers often find it difficult to determine when the bailment or tenancy ends, where the bailee or tenant retains a limited custody of the property after the original bailment or tenancy has partially or wholly served its purpose. Distinctions are sometimes made between possession created by the relation of bailor and bailee or of landlord and tenant and mere temporary, unavoidable custody after the original contract has been partially or wholly performed. In the instant case the proof of larceny seems plain. Until the respective shares of the wheat were separated, defendant had possession of the crop for the purpose of raising it and procuring his share. The division of the crop and the storage of lessor's portion for her in the

west bin amounted to payment of the rent to that extent and she had the right of immediate removal. Defendant thus lost the complete possession and control which he legally had before the crop was divided. There was no new contract giving the tenant exclusive possession of the landlord's wheat in the west bin and the law did not imply a new bailment for such a possession. As to the tenant's original possession the tenancy and bailment had served their purpose in respect to the wheat in the west bin. There the landlord's right of possession was complete. To that right such temporary, unavoidable custody as the tenant had was a mere incident and was in a sense the custody of the landlord. She had the right of entry for the purpose of taking her property. Defendant had no right to touch the wheat in the west bin for the purpose of removing any part of it. Any duty which he had in respect to it after the shares were separated was not the duty of a bailee or tenant as those relations were originally created. When he entered the west bin and took his landlord's wheat, he committed a criminal trespass. As to that particular wheat the bailment and the tenancy had previously served their purpose and had been terminated by the acts of the parties. The conclusion is that the wheat in the west bin was the subject of larceny by defendant when he removed part of it.

It is also contended that the evidence is insufficient to sustain the conviction. In this connection it is argued that shrinkage will account for the estimated difference between the quantity of wheat stored in the west bin and the number of bushels found to have been removed therefrom by lessor. Evidence of the quantity taken and of the price sustains the finding of the jury on the issue of value. Shrinkage does not account for the difference between the quantity of wheat stored for lessor and the amount removed by her. All elements of the larceny charged are sufficiently shown.

Complaint is made because a witness who failed to

state he knew the market value of wheat November 28, 1921, was permitted to testify it was 92 cents a bushel a week or 10 days later. Defendant was not thus prejudiced. Later in the trial the state and defendant stipulated that the market value of wheat on the date mentioned was 88 cents a bushel and the record indicates that the jury estimated the value of the stolen property on that basis.

Testimony by the sheriff that defendant confessed his guilt is also criticised as erroneously admitted. The point is without merit. The evidence shows that defendant voluntarily made his incriminating statements and that to procure them no threats were made or inducements offered.

There are other assignments of error, but no substantial ground for reversing the judgment has been presented.

AFFIRMED.

EUGENE PURCHASE V. STATE OF NEBRASKA.

FILED DECEMBER 30, 1922. No. 22790.

1. Commerce: TAXATION. "Interstate commerce cannot be taxed at all by a state, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." *Robbins v. Shelby County Taxing District*, 120 U. S. 489.

2. ———: REGULATION. "The power granted to congress, to regulate commerce among the states, being exclusive when the subjects are national in their character, or admit only of one uniform system of regulation, the failure of congress to exercise that power in any case is an expression of its will that the subject shall be left free from restrictions or impositions upon it by the several states." *Robbins v. Shelby County Taxing District*, 120 U. S. 489.

3. ———; REGULATION: POWERS OF STATES. "A state may enact laws which in practice operate to affect commerce among the states—as by providing in the legitimate exercise of its police power and general jurisdiction, for the security and comfort

of persons and the protection of property; by establishing and regulating channels for commercial facilities; by the passage of inspection laws and laws to restrict the sale of articles injurious to health and morals; by the imposition of taxes upon avocations within its borders not interfering with foreign or interstate commerce or employment, or with business exercised under authority of the Constitution of the United States." *Robbins v. Shelby County Taxing District*, 120 U. S. 489.

4. ———: INTERSTATE COMMERCE. To take orders for goods in one state which are to be shipped from another state is an incident of interstate commerce and comes exclusively under federal control and is therefore not subject to the burden of state legislation.

5. ———: OBNOXIOUS RULINGS: RELIEF. In all that relates solely and peculiarly to the actual regulation of interstate commerce, the congress, and not the courts, must be applied to for relief from a rule of law which may to some appear to be obnoxious, or to obtain relief by affirmative legislation as the need of the exigency may require.

ERROR to the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Reversed and dismissed.*

Crofoot, Fraser, Connolly & Stryker, for plaintiff in error.

Holmes, Chambers & Mann, contra.

Heard before MORRISSEY, C.J., LETTON, ALDRICH, DEAN and DAY, JJ., REDICK and SHEPHERD, District Judges.

DEAN, J.

Eugene Purchase, defendant, is the agent of the Grand Union Tea Company, a New Jersey corporation, which has its general headquarters in New York city and conducts a branch house at Omaha. In October, 1921, as an employee of the manager of the Omaha branch, and as agent of the tea company, defendant took orders in Louisville from each of three or more residents of the village for five packages of coffee, each containing five pounds, which he delivered about two weeks thereafter, at which time he accepted from each of the purchasers $2 in payment therefor. For effecting the sales and the

deliveries so made, without first having paid a prescribed occupation tax, defendant, upon complaint being filed, was fined $10 by the police magistrate, which upon appeal was affirmed by the district court.

Defendant's contention is that the transaction herein complained of constituted interstate commerce, and that his arrest and the fine imposed were therefore violative of the federal Constitution relating to that subject. To have the proceedings reviewed, a petition in error has been filed in this court.

The municipal ordinance in question contains this among other provisions: "Retail sellers of goods and merchandise and peddlers not having a permanent place of business in this village, whether said goods and merchandise are sold by sample or by taking orders or otherwise, per day, two ($2) dollars, this not to include commercial travelers, selling to dealers only." The penalty for a violation of the ordinance is a fine of not less than $5 nor more than $100.

In addition to the preceding statement of facts, the stipulation on which the case was tried, sets forth that defendant, as agent of the company, traveled in an automobile furnished by the company when taking the orders and also in transporting the five-pound coffee orders from Omaha to Louisville; that the purchasers were not engaged in the retail business at Louisville at any time herein mentioned, nor was defendant at the time a commercial traveler selling goods to dealers in Louisville; that the tea company is a seller of goods prepared and manufactured by Jones Brothers Company, a New York corporation; that the goods when manufactured are packed and marked with the label of the Grand Union Tea Company and delivered to it at the factory, from which place they are forwarded by the tea company for sale and distribution to various parts of the United States; that the tea company sells a small part of its merchandise at retail in its Omaha store; that the principal part of its business in Nebraska is done through

solicitors who go regularly from place to place on fixed routes soliciting and taking orders for future delivery; that the orders for each of the five-pound packages of coffee were delivered by defendant personally to the Grand Union Tea Company's Omaha store, where they were accepted and approved by the manager, and such five-pound packages were filled from larger fifty-pound cartons or containers of bulk coffee which had been shipped from Brooklyn, New York, a distributing point of the tea company, and consigned to itself at Omaha; that the five-pound coffee packages were delivered to defendant, who in turn delivered them to the Louisville customers, from whom he collected the purchase price; that for his services defendant was allowed a certain percentage of the original price as a commission; that he did not sell the coffee at retail from his said automobile in any other manner than by taking orders for future delivery; that in the event said five-pound coffee orders had not been accepted by the Louisville customers they would have been returned to the Omaha store and placed in stock for sale over the counter; that the "fifty-pound cartons of bulk coffee which were broken to fill the five-pound orders of said Louisville, Nebraska, customers after they had been delivered by the carrier to the Omaha store were shipped to and addressed to Grand Union Tea Company, Omaha, Nebraska, and were not consigned at Brooklyn, New York, the distributing point of said Grand Union Tea Company, to said defendant nor to said Louisville, Nebraska, customers;" that the five-pound coffee packages were the property of the company, charged to the account of its Omaha branch, until actually delivered to the Louisville customers; that all cards, memoranda or information concerning the Louisville customers belong to the Grand Union Tea Company; that the Omaha store does not keep a stock of goods on hand with which to fill all orders taken by its solicitors.

The stipulation in part, and more particularly that part which follows, we are informed by the brief of de-

fendant, is adapted almost verbatim from the opinion in *Grand Union Tea Company v. Evans,* 216 Fed. 791, and reads: "The Omaha store does not keep a stock of goods on hand with which to fill all orders taken by its solicitors, but experience has shown the manager thereof about how many orders will come in each day and each week in the usual course of trade, and in order to fill the continually recurring orders he will anticipate by a few days only the procurement of goods sufficient to fill such orders by ordering them from a distributing point of the Grand Union Tea Company at Brooklyn, state of New York. All goods are ordered from Brooklyn, in the state of New York, in no greater amount than is necessary to fill the recurring orders received in the usual course of trade, and so as to match orders which are being taken when the goods to fill them are in transit, the goods do not arrive at the store in Omaha until after the orders from the customers have actually been taken and probably one-half thereof actually received by the Omaha store manager, and that all of the merchandise involved in this action was outside the state of Nebraska at the time the orders were taken and were later filled from those goods. Coffee is usually received in bulk in fifty-pound packing cases, cartons or parcels, which are unpacked in the Omaha store and kept separate and apart from the goods held for local sales. Said five-pound coffee orders in controversy received personally from defendant, and accepted and approved by the manager of the Omaha store, were filled from said fifty-pound cartons by the employees of the Omaha store. At the time said five-pound coffee orders from said Louisville, Nebraska, customers in controversy were received from said defendant and accepted and approved by the manager of the Omaha branch of said Grand Union Tea Company at Omaha, Nebraska, on or about October 14, 1921, until on or about October 28, 1921, when said orders were filled, there was over 25 pounds of coffee on hand in said Omaha, Nebraska, warehouse, but same was intended for

and used to fill orders for other customers. Said orders were filled from broken original packages in five-pound lots to suit the orders of the several Louisville, Nebraska, purchasers previously taken. Said fifty-pound cartons of coffee from which said orders were filled had heretofore been brought into the state of Nebraska in interstate commerce. Said five-pound packages of coffee delivered to Mrs. John Davis, Mrs. Clara Grassman, Mrs. Emily Benedict, and others, in said village on October 28, 1921, by defendant were not in the same form and condition as when received by the manager of the Grand Union Tea Company at Omaha, Nebraska. The original orders taken from said Louisville, Nebraska, customers were never transmitted to the distributing point of the Grand Union Tea Company at Brooklyn, New York."

In support of the argument, counsel for the village cite *In re Agnew*, 89 Neb. 306, and contend that under that decision the judgment of the district court must be affirmed. The argument is not persuasive. In the *Agnew* case the original packages of goods included in the foreign shipment were broken by the consignee upon arrival, and the contents, in smaller units, which consisted of many small five cent packages of crackers, were displayed and offered for sale in this state by Agnew at his place of business "in his regular retail trade, singly or in numbers to suit his customers." We there held that the goods, when so submitted to the trade in the usual course of business, became a part of the commerce of the state and were, of course, as such, subject to the police power under the pure food law. *In re Page*, 89 Neb. 299, is a companion case which is substantially to the same effect. Neither case is in point.

The present case presents a different state of facts. The stipulation, *inter alia*, specifically discloses "that all of the merchandise involved in this action was outside of Nebraska at the time the orders were taken and were later filled from those goods."

In *Caldwell v. North Carolina,* 187 U. S. 622, it was held that a transaction, such as the one under discussion, is not deprived of its interstate character, even though the articles were sent from another state to the vendor's agent, for delivery to the purchaser, instead of being sent directly to the purchaser. It is there said that if the vendor had sent the articles by express it would not have subjected the transaction to state taxation, and the fact that they were sent as freight and received by an agent who made the delivery to the purchaser did not change the interstate character of the transaction. It is to be remembered, too, that in the case before us the goods were shipped by the company to itself at Omaha, and that the title did not pass to the respective purchasers until the goods were actually delivered to them by defendant at Louisville. *Caldwell v. North Carolina,* 187 U. S. 622.

True, the five-pound coffee packages were made up from coffee taken out of the fifty-pound cartons or containers, but that was a mere incident, a detail in the transaction, as shown by adjudicated cases herein cited, which does not affect interstate character and is therefore not controlling. In *Grand Union Tea Co. v. Evans,* 216 Fed. 791, hereinbefore cited, the fundamental principle is emphasized, namely, that the fact of taking orders in one state for goods to be shipped from another state constitutes interstate commerce, "exclusively under federal control and not subject to the burden of state legislation." The writer goes on to say that the general principles involved have so often been announced by the supreme court of the United States as "to cause them to be elementary. *Browning v. City of Waycross,* 233 U. S. 16, decided April 6, 1914. The sole question, therefore, in any given case, is whether the manner in which the business is carried on comes within the rules laid down." *Crenshaw v. State,* 227 U. S. 389; *Stewart v. People,* 232 U. S. 665; *Mt. Holly Springs Borough v. Wilt,* 43 Pa. Co. Ct. 566.

Robbins v. Shelby County Taxing District, 120 U. S. 489, is a leading case. Mr. Justice Bradley wrote the opinion for the court, and among other things, said: "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." Certain principles were then elaborately discussed as having been established by the decisions of the court. Among these was that the federal Constitution having given to congress the power to regulate commerce among the several states, that power is necessarily exclusive in matters pertaining to subjects which are national in their character, and that even though congress, in view of its exclusive jurisdiction, may fail to make express regulations, its silence shall be taken to indicate that its will is that the subject shall be left free from any restrictions or impositions by the states. An exception is noted, however, in the *Robbins* case as to matters of local concern only, and which may "incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community." The opinion concludes: "In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by congress, is so firmly established that it is unnecessary to enlarge further upon the subject."

In *Brennan v. Titusville,* 153 U. S. 289, at page 302, it is said: "It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the state; but we think it must be

considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of congress, and that the silence of congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

Jewel Tea Co. v. Lee's Summit, 189 Fed. 280, is strikingly in point. Complainant owned a Chicago store and employed an agent who went from house to house in defendant city soliciting orders for tea, coffee, and other like articles. The orders were reported by mail to the Chicago house by the agent, but he did not give the names of the prospective purchasers, merely stating in his report that a certain number of purchasers would each take a pound or more of tea or coffee or other articles as the case might be. Upon receipt of the orders the articles were each put up in cartons or packages corresponding to the orders, and the separate packages so wrapped were all placed in a large box and shipped to Kansas City, where the required number were taken out and reshipped to the agent at the defendant city, who delivered the goods, collected the price, and took new orders for the next delivery. After a hearing on the merits the defendant city was enjoined from enforcing an ordinance requiring a license of $1 a day for selling merchandise from wagons. The following excerpt taken from the *Jewel Tea Co.* case may perhaps be of interest to those having in charge the administration of municipal affairs:

"Ordinances, as well as statutes, like this, are in all instances artfully drawn, and their fairness and equality insisted upon. But courts do not observe mere words or phrasing, but look to the substance, effect, and meaning, and, when those are ascertained, enforce the rights of the parties. The ordinance in question is clearly one to compel the people, in the interest of local merchants and middlemen, to buy their necessities from them; and be-

cause of such influences, the officers first adopt, and then seek to enforce, such regulations, so as to eliminate outside venders of merchandise, including the necessary articles of food for every family table. The stale argument that the local resident, who votes, and who pays the taxes, and otherwise maintains the town, and bears the local burdens, should be given these privileges as against the outsider and nonresident, is in all such cases strongly urged. The tax of $1 per day is not intended as a measure to raise revenue, but is intended to be, as it will be, if enforced, a measure to prohibit all kinds of competition by outsiders. There is nothing new in all this. It was done by New York and Rhode Island before we had a government. It was the central thought for the creation of our government; and because of such interference the commerce clause was put in our national Constitution, giving to congress, and it alone, the power to regulate commerce between the states."

In dealing with the facts before us we have looked to the substantial rights of the parties, as they were created by the federal Constitution, and have applied the law, as interpreted by the federal courts, to the substance of the transaction. To be sure the fifty-pound cartons of coffee were broken upon arrival at Omaha and the five-pound packages were made therefrom. In the *Grand Union Tea Company* case the same thing was done. But neither in that case nor in the present case has the spirit of the law been violated, but its real meaning and its true intent has been applied.

The sum of the whole matter is that, in all that relates solely and peculiarly to the actual regulation of interstate commerce, the congress, and not the courts, must be applied to for relief from a rule of law which may to some appear to be obnoxious, or to obtain relief by affirmative legislation as the need of the exigency may require.

It clearly appears that the defendant was wrongfully arrested and that the fine was unlawfully imposed. An

examination of the record leads us to conclude that the ordinance imposes a burden upon interstate commerce and is therefore unconstitutional and void.

It follows that the judgment of the district court must be and it hereby is reversed, with directions that the action be dismissed.

REVERSED AND DISMISSED.

CARL LANNING V. STATE OF NEBRASKA.

FILED DECEMBER 30, 1922. No. 22793.

Rape. Defendant was convicted of committing a rape upon the person of a female child under the age of 18 years, to wit, of the age of 16 years, and not previously unchaste. *Held*, that there is sufficient evidence to support the verdict and that the record is without reversible error.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Jean B. Cain and *F. A. Hebenstreit,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., ALDRICH, DAY and DEAN, JJ., REDICK and SHEPHERD, District Judges.

DEAN, J.

Carl Lanning, defendant, was indicted by a grand jury in and for Richardson county, October 21, 1921, and by that body charged with having forcibly committed a rape upon the person of Viva Nichols, a female child under the age of 18 years, to wit, of the age of 16 years, and not previously unchaste. When the case was tried in the district court the jury found the defendant guilty. Thereupon the court sentenced him to the state reformatory for men for a period of three years. Defendant prosecutes error.

The statute under which the prosecution is laid reads: "Whoever shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will; or if any male person, of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of eighteen years, with her consent, unless such female child so known and abused is over fifteen years of age and previously unchaste, shall be deemed guilty of a rape, and shall be imprisoned in the penitentiary not more than twenty nor less than three years." Comp. St. 1922, sec. 9551.

On the date of the alleged offense, namely, June 8, 1921, the prosecutrix was a month and a day past the age of sixteen years. The defendant then lacked three months of being twenty. On the evening of that day defendant called at the home of the family where the prosecutrix was employed as a domestic and she accepted his invitation to go buggy-riding with him. After they had ridden about a mile she discovered that a young man named John Rutz, who was about defendant's age, was standing on the back of the buggy, and when he found that his presence was discovered by her he got into the buggy and rode with them. Shortly afterward, upon her request, defendant told her that he would return with her to her home. Instead of taking her home as he promised, defendant permitted Rutz, who was driving, to pass the intersection where they should have turned off. This was done, on the pretext of Rutz, that they might go to the home of a neighbor girl, whom he named, and have her accompany them in their drive. Instead of doing so they came up to a schoolhouse, and Rutz, who did most of the talking at the time, proposed that they all get out, but she refused. The buggy was then driven, according to prosecutrix' evidence, to a lonely spot on the bank of a creek having its slope bordered with timber and underbrush. No houses were anywhere near. At this point the buggy was stopped and both of the young

men jumped out. Rutz tied the horses to a tree. She remained in the buggy, but the defendant told her she had to get out. She refused. After more solicitation on his part, and her continued refusal, defendant jerked the buggy cushion out from under her, and throwing it down beside the buggy he seized her by the hand and, dragging her violently out of the buggy over the wheels to the ground, he threw her down on the cushion, where he committed the offense for which he was indicted. She said that she resisted to the extent of her ability but that he overpowered her. As soon as defendant accomplished his purpose Rutz in a like manner violated her person.

Immediately thereafter defendant and Rutz promised to take her home, and again upon their promise she got in the buggy, but instead they drove to a vacant church house. It was now about 10:30 or 11 o'clock in the nighttime. They stopped and told her she had to get out. She again refused. The two young men then, each grabbing a hand, forcibly pulled her out of the buggy and took her into the church, where the defendant and Rutz, in the order named, again repeated the same offense. She testified that Rutz, apparently on account of her resistance, became very angry and applied to her a vile and abusive epithet, and at the same time drawing a knife from his pocket, and, accompanied by additional threats, slightly wounded one of her legs. All of this was done in the presence and hearing of defendant. It may here be added that all of the assaults and the offenses which were perpetrated by defendant and Rutz on the night in question, upon the person of the prosecutrix, were committed in the presence of each other. Upon their return to the home of her employer, between half past 12 and 1 o'clock in the morning, she told both of her assailants that she was going to tell about their conduct, to which Rutz, in the presence and hearing of defendant, replied: "You better not, you will never be able to tell anything else."

Besides the evidence of the prosecutrix, a disinterested

witness testified that Carl admitted his guilt to him and at the same time, with a vile epithet, he dared the witness to tell it. Another witness testified that he heard defendant say to Rutz: "Have you heard anything of the deal we pulled off with Pete (the childhood nickname of the prosecutrix)?" and that Carl, with an oath, said: "No and we won't, she is afraid to tell it." Another witness, a married woman living in the neighborhood, overheard defendant admit his guilt and at the time he dared his hearer to tell it. It may here be noted that the prosecutrix told her father and mother about the occurrence about a month after it happened.

Defendant did not testify. Consequently he did not deny the act of sexual intercourse, but for his defense he relies mainly upon the contention that the prosecutrix was unchaste at the time of the commission of the alledged offense. He maintains that under section 9551, Comp. St. 1922, the court should have instructed the jury to return a verdict in his favor. To establish the plea of unchastity defendant introduced the testimony of several young men of about his own age. They testified that they had illicit relations with the prosecutrix more than three years before the time of the trial then in progress. One or two testified to illicit relations with her as having occurred but a few days before June 8, 1921, one of them being, as we have seen, John Rutz, hereinbefore mentioned, who is now under bond to make an appearance in court. Each of them related their respective stories in detail. The jury heard their evidence and that of the prosecutrix who, upon a searching cross-examination, denied their every allegation. She further testified that she had never had sexual intercourse with any male person until the night of June 8, 1921. Evidently the jury believed her and disbelieved her accusers. Where, as in the present case, there is sufficient evidence to support the verdict it is elementary that we will not hold that the jurors, as triers of fact, are not justified in their deliberate conclusion.

There is evidence in the record tending to prove that the general reputation of the prosecutrix for chastity in the community where she resided from her infancy was good. Aside from the testimony of the young men, not a voice was raised to contradict the evidence of the witnesses produced by the prosecution on this point.

The stories of the young men, in their attempts to traduce the reputation of the prosecutrix, are improbable in the highest degree. Their grossly sordid recitals, with respect to the illicit relations which they maintained they had, and which they said they had seen others have with the prosecutrix, are unprintable and almost quite beyond belief. It is evident that the jury so considered them when they retired for consideration of their verdict.

Other assignments of alleged error are made with respect to the information and with respect to some of the instructions. Upon examination we do not find that the defendant has been prejudiced in his substantial rights upon the merits in the respects noted by counsel.

The conclusion is that there is sufficient evidence to support the verdict. The judgment of the district court must be and it hereby is

AFFIRMED.

MORRISSEY, C. J., dissenting.

I dissent from the conclusion reached by the majority. This cause was tried and submitted on the theory, not that defendant was guilty of having carnal intercourse with the prosecuting witness by force, but with her consent, and the testimony mentioned in the majority opinion which indicates that force and violence were used is based solely upon the testimony, in chief, of the complaining witness. On cross-examination she testified freely and frankly that she offered no resistance. Her statement in regard to the assault upon her with a knife by one of the party is also fully discredited by her own testimony, given on cross-examination. The trial court evidently took the view that no force was used and instructed the jury on that theory. I shall not set out the scandalous

story contained in the bill of exceptions, but, to my mind, the testimony shows conclusively that prior to the time set out in the indictment prosecutrix was unchaste and that the evidence is insufficient to support the finding of the jury.

THOMAS W. G. COX, APPELLANT, V. W. T. YOUNG, JR., APPELLEE.

FILED DECEMBER 30, 1922. No. 22161.

1. **Mortgages:** INTENT. "Whether a deed absolute on its face is a sale or a mortgage depends upon the intention of the parties, and such intention is to be gathered from their declarations and conduct, as well as from the papers which they subscribed." *Sanders v. Ayres*, 63 Neb. 271.
2. ———: DEED AS SECURITY: PAROL EVIDENCE. "Where it is sought to vary the effect of a deed of conveyance by parol testimony so as to declare it to be a mortgage, the evidence must be clear, convincing, and satisfactory in its nature in order to warrant a court to grant the relief prayed." *O'Hanlon v. Barry*, 87 Neb. 522.
3. **Evidence** examined, and *held* that the transaction is an absolute sale, and not one of security.

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

L. L. Raymond, for appellant.

Mothersead & York and *Rodman & Rodman, contra.*

Heard before MORRISSEY, C.J., ROSE, DAY and FLANSBURG, JJ., SHEPHERD, District Judge.

DAY, J.

By this action Thomas W. G. Cox, the plaintiff, seeks to have a certain deed executed by himself and wife to the defendant declared to be a mortgage, and that he be permitted to redeem therefrom. The defendant denied that the deed was intended to be a mortgage, and by way

of cross-petition prayed that the title to the land described be quieted and confirmed in him as against the claim of the plaintiff. The trial resulted in a judgment denying the plaintiff's claim and dismissing his cause of action, and also quieting and confirming the defendant's title to the land. From this judgment the plaintiff appeals.

The plaintiff's brief contains no formal assignments of error or points of law relied upon for a reversal of the judgment, but it is quite apparent from the argument that he contends that the judgment is contrary to the evidence. The record shows that on September 2, 1919, the plaintiff purchased from one Erskine a tract of land in Banner county, consisting of 865 acres, for an agreed price of $61,362.89. He paid thereon in cash $21,587.89, and agreed to pay a further sum of $6,000 on March, 1, 1920, and also assume a mortgage then upon the land for $33,775. A warranty deed was executed, in which the plaintiff was named as grantee, and the deed, together with the contract of purchase, was placed in escrow in the bank at Kimball to be delivered to the grantee upon the payment of $6,000 on March, 1, 1920. As the day for making this payment approached, it became apparent to the plaintiff that he would experience difficulty in meeting the payment. Sources from which he expected money failed, and he was unable to borrow the amount necessary to make the payment at the bank, although he made application at several places for such a loan. Under these circumstances the plaintiff and defendant entered into negotiations which, according to defendant's testimony, terminated by the defendant purchasing the land. The defendant paid to the plaintiff a sum sufficient to meet the $6,000 due on the purchase price of the land; also an amount necessary to pay the lease rent on a school section leased by the plaintiff, and also to pay interest on the $33,775 mortgage, and the taxes on the land, in all aggregating the sum of $7,676.90. At that time the plaintiff and defendant went to the bank

where the deed was held in escrow; paid the $6,000 together with the interest upon the loan, and the deed was delivered to the plaintiff. Thereupon the plaintiff and his wife executed and delivered to the defendant a deed to the land, and also assigned to the defendant the school land lease. At the same time, in furtherance of the agreement between the parties, the defendant executed a contract agreeing to sell back the land to the plaintiff at any time prior to October 1, 1920, upon the payment of $11,000. The agreement also provided that the plaintiff was to have possession of the land for the year, and to receive the rents and profits which, according to the testimony, amounted to $2,000, and would have been more but for a hail storm which destroyed a part of the crop.

The plaintiff's testimony sustains his theory that the advances of $7,676.90, by the defendant were a loan; that plaintiff agreed to pay in redemption of the property $11,000. The plaintiff now claims that the contract was usurious; that the deed and the assignment of the lease were given only as security for the loan, and prays that he be permitted to redeem the land on payment of the amounts advanced by the defendant, with interest.

The only witness as to the main features of the contract were the plaintiff and the defendant, and their testimony is in direct contradiction. According to the plaintiff's version, the transaction was a loan; while, according to the defendant's testimony, it was an out and out sale with a contract to repurchase.

The rule of law governing this case is announced in *Snoke v. Beach*, 105 Neb. 127, wherein it is said: "Whether a deed absolute on its face is a sale or a mortgage depends upon the intention of the parties, and such intention is to be gathered from the declarations and conduct of the parties, as well as from the papers which they subscribe * * * The rule is also established in this state that, where it is sought to vary the effect of a deed absolute on its face by parol testimony so as to declare

it to be a mortgage, the evidence must be clear, convincing, and satisfactory before a court is warranted in adjudging it to be a mortgage." These propositions find support in *Sanders v. Ayres,* 63 Neb. 271, *Kemp v. Small,* 32 Neb. 318, and *O'Hanlon v. Barry,* 87 Neb. 522.

From an examination of the entire record, we are led to conclude that the plaintiff failed to establish his case by clear, convincing, and satisfactory proof, which the law requires.

The judgment of the district court is, therefore,

AFFIRMED.

ALPHONSE LAMMERS, APPELLANT, V. HANS CARSTENSEN, APPELLEE.

FILED DECEMBER 30, 1922. No. 22166.

1. **Negligence**: QUESTION FOR JURY. Evidence set out in the record *held* sufficient to submit to the jury the question as to whether the defendant was negligent.
2. **Appeal**: AFFIRMANCE. Where there is substantial evidence supporting the verdict of a jury, the judgment will not be disturbed unless upon the whole evidence it appears that the verdict is clearly wrong.

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

H. E. Burkett, for appellant.

A. R. Davis and *Frank P. Voter, contra.*

Heard before MORRISSEY, C. J., ROSE, DAY and FLANSBURG, JJ., SHEPHERD, District Judge.

DAY, J.

Alphonse Lammers, the plaintiff, brought this action against the defendant, Hans Carstensen, to recover damages to the plaintiff's automobile, alleged to have been caused by the negligence of the defendant, which resulted

in a collision between the automobiles of the respective parties. The trial resulted in a verdict and judgment for the defendant. Plaintiff appeals.

The errors relied upon for a reversal of the case are: That the verdict is against the testimony; that it was rendered in disregard of the court's instructions; and that the court erred in failing to give an instruction asked by the plaintiff.

The record shows that on the afternoon of June 20, 1920, Miss Jessie Rees had possession of the plaintiff's Buick automobile as bailee, and was driving the car on a trip from Hartington, Nebraska, to Wayne, Nebraska. Besides herself, three other persons were in the car. The highway over which she was driving ran past the defendant's residence, on a farm about two miles southeast of the town of Laurel. At and near the place of the collision the roadway was graded up to a width of about 24 feet, had a hard, smooth surface, and was in splendid condition. As the plaintiff's car was being driven south along this highway at a rapid rate of speed, the defendant drove his car, a Dort, from his premises, approaching the highway from the west. There was a row of trees along the north side of the defendant's private driveway, leading to the public highway, and also a row of trees on the west side of the public highway. The low branches and heavy foliage of these trees obstructed the view toward the north of a person in a car coming out of the private driveway, until the west side of the roadway was reached. The same obstruction also prevented a driver of a car approaching from the north from seeing an automobile coming out of the private driveway. Just as the front wheels of the defendant's car entered upon the west side of the roadway, defendant saw the plaintiff's car approaching on the west side of the roadway about 150 feet distant, traveling at a high speed. In describing the situation, he says the car was coming in a cloud of dust at 40 to 50 miles an hour. Miss Rees, the driver of plaintiff's car, testified that she was driving

between 25 and 30 miles an hour. Defendant was driving, according to his estimate, between 3 and 4 miles an hour, and, according to plaintiff's testimony, from 7 to 8 miles an hour. Confronted by this sudden emergency, the defendant concluded that he did not have time to cross the roadway far enough to permit plaintiff's car to pass in his rear, and therefore immediately stopped his car, which left his car standing crosswise of the roadway, the rear wheels being about 2 feet east of the west line of the roadway. Miss Rees, acting on the assumption that the defendant would drive on across the road, steered her car to the right, intending to pass in the rear of the defendant's car. A bank along the west side of the roadway at that precise point prevented Miss Rees from turning further to the right than she did. She also applied the brake in an endeavor to stop. In this situation the plaintiff's car collided with the rear end of defendant's car with such force as to turn plaintiff's car completely over twice, leaving it standing right side up on a little bank at the side of the road about 50 feet from the point of collision. The plaintiff's car was badly damaged, and defendant's car suffered but little injury.

Under the facts, as shown by the record, we are of the opinion that whether the defendant was negligent in stopping his car as he did was a question for the jury to determine. A sudden emergency was presented by the situation, in which all the parties were placed in a position of peril, and quick determination and quick action was required. If the plaintiff's car was moving at the rate of speed estimated by some of the witnesses, or if the distance from the scene of the accident was as given by one of the witnesses, approximately 2 seconds elapsed between the time the approaching car could have been seen and the impact. Taking any view of the testimony, it is plain that but 3 or 4 seconds intervened between the time the plaintiff's car could have been seen and the collision.

Users of the highway are required to exercise reason-

able care. What is reasonable care must in each case be determined by its own peculiar facts and circumstances. As we view the testimony and the circumstances, the case was peculiarly one within the province of the jury.

The rule is well established that, where there is substantial evidence supporting the verdict of a jury, the judgment will not be disturbed unless upon the whole evidence it appears that the verdict is clearly wrong.

The instructions given by the court fully and fairly submitted the questions presented by the record to the jury. The verdict, as we view it, is responsive to the evidence and not contrary to the instructions.

The instruction asked for by plaintiff, the refusal of which is assigned as error, was equivalent to an instructed verdict in his favor, and was properly refused.

Upon an examination of the record we find no error. The judgment of the district court is, therefore,

AFFIRMED.

NELLIE ELLIOTT, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED DECEMBER 30, 1922. No. 22174.

1. **Municipal Corporations**: PENSIONS: LINE OF DUTY. The contracting of a disease (in this case pneumonia) in the line of duty, resulting in death, is within the meaning of section 2517, Rev. St. 1913, which provides for a pension to the widow or minor children of a deceased fireman in a paid fire department of a city of the metropolitan or first class, whose "death is caused by or is the result of *injuries* received while in the line of duty."

2. ———: ———: ———. Evidence examined, and *held* sufficient to submit to the jury the question whether the contracting of pneumonia by the deceased occurred while in the line of duty as a fireman, and whether his death was the result of such a disease.

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

Dana B. Van Dusen and *John F. Moriarty,* for appellant.

Kennedy, Holland, De Lacy & McLaughlin, contra.

Heard before MORRISSEY, C. J., ALDRICH, DAY and FLANSBURG, JJ., REDICK, District Judge.

DAY, J.

Action by Nellie Elliott against the city of Omaha to recover $150 claimed to be due her as a pension, as the widow of Harold B. Elliott, deceased, who at the time of his death was a member of the paid fire department of defendant city, and who, it is alleged, died as the result of injuries received while in the line of his duty as such fireman. The trial resulted in a verdict and judgment for the plaintiff. Defendant appeals.

The plaintiff's action is based upon section 2517, Rev. St. 1913, which provides: "In case of the death of any fireman in a paid fire department in any city of the metropolitan, or first class, while in the line of duty, or death is caused by or is the result of injuries received while in the line of duty, then the same rate of pension as herein provided for in the next preceding section shall be paid to the widow or minor children of such deceased fireman, as provided in such section." The preceding section mentioned in section 2517, in so far as it relates to the present inquiry, provides, in substance, for a pension to retiring firemen of at least 50 per cent. of the amount of salary such retiring fireman was receiving at the time he retired, but in no case shall the amount of the pension be less than $50 a month; that, upon the death of any such retired fireman, the same rate of pension as herein provided shall be paid to the widow of such deceased fireman, during such time as she shall remain the widow of such deceased fireman.

The record shows that Harold B. Elliott was a member of the paid fire department of defendant city from November 18, 1908, until November 12, 1918, the time of his

death; that his salary was $100 a month; that the plaintiff is his widow, and is still unmarried; and that the deceased died of pneumonia. The real issue presented is whether the words, "injuries received while in the line of duty," in the section of the statute above quoted, are broad enough to include disease contracted while in the line of duty, and the further question whether the facts in this case are sufficient to show that the disease was contracted in the line of duty.

It will be noted that the statute provides for a recovery when "death is caused by or is the result of injuries received while in the line of duty." The word "injury," in ordinary usage, is one of very broad significance, and includes any hurtful or damaging effect which may be suffered by any one. Standing alone, it has no more application to a hurt or damage arising from violence than to any other injurious influence. That a disease is a hurt or damage to the physical system seems too plain to require argument. The work of a fireman is of great importance to the community, and the public welfare demands that he be encouraged in the performance of his dangerous occupation. It is difficult to see why the dependents of a fireman, named in the statute, should not be recompensed for his death resulting from disease contracted in the line of duty, the same as dependents of a fireman who is injured in the line of duty by a falling wall and dies from such injury. These and other considerations lead us to believe that the word "injuries," as used in this statute, was intended to be broad enough to include the contracting of disease.

Cases arising under compensation acts are not very helpful to the present discussion, because in most, if not all, of them compensation is allowed only for injuries by accident, arising out of and in the course of the employment. It will be readily conceded that the phrase, "injuries received while in the line of duty," has a

much broader meaning than the language generally used in compensation acts.

In *State v. Trustees,* 138 Wis. 133, the court had before it for construction a statute essentially like our own. There, as here, the statute provided for a pension for the family of a policeman who should die as the result of injuries received while in the line of duty. It was held that the contracting of a disease in the line of duty (in that case, as in this, pneumonia) was an injury within the meaning of the act. These considerations and others lead us to conclude that the phrase, "injuries received while in the line of duty," does not alone mean that a fireman must suffer an accident or some violent physical injury, but includes any hurtful effect which a fireman may receive in the line of his duty, and includes diseases contracted in the line of his duty.

The defendant earnestly insists that there is an utter failure on the part of the plaintiff to show that the pneumonia which was the cause of deceased's death was contracted by him while in the line of his duty, or that there was any causal connection between his death and the employment. The record shows that deceased was a member of the paid fire department of defendant city; that he was on duty during the night of November 1, Friday night, and drove to a fire. That on Saturday, the 2d, he was detailed to assist in making an inspection of buildings in the business district, which required him to go upon every floor of the buildings, to inspect the wires, floors, windows leading to fire escapes, and in general to make a thorough examination of the buildings. This involved considerable walking, and the going from one building to another. As to whether he climbed the stairway in doing this work or used elevators is not shown. He reported for duty soon after 8:30 o'clock in the morning for this assignment dressed in regulation uniform. He wore a heavy blue coat, and a heavy double-breasted wool shirt, and a cap. The work of inspection commenced soon after 8:30 a. m. and was concluded a

little after 12 o'clock. When he left home in the morning he was feeling all right. What he did between 12 and 2:30 o'clock is not shown. When he arrived home shortly after 2 p. m., he was perspiring; his underclothing was wet with perspiration; he was feeling bad; had chills and fever and aches; and complained that he had been chilling all the afternoon. He ate no lunch; changed his wet underclothing for dry; and reported back for duty at 5:30 in the afternoon. On Sunday he came home; felt awfully bad; moped around all day; complained of aches and pains and chills and fever. On Sunday night he reported for duty at the fire station; was taken quite sick, and was put to bed. On Monday he came home in the morning hardly able to walk; was immediately put to bed; a physician came in about a half hour; and at that time deceased had double pneumonia, a temperature of 106, was delirious, and never got out of bed again. He died on the 12th of November. Without objection, the following evidence was received: "Q. As soon as he got back from the inspection, did he make any complaint then? A. Yes; he did. Q. What complaint did he make? A. Well, that he had been overheated and had chills and fever. You know when you feel bad how you complain; I cannot remember just the words he used. Q. Did he say he had chills and fever before he came home? A. He said he had been chilling all the afternoon. * * * Q. And then Monday morning he came home; in other words, after he got these chills and fever, while making this inspection he kept getting worse and worse? A. Yes; that is the way it was."

From this testimony especially when supplemented by the expert medical testimony, we are of the opinion that the jury could very properly say that the chills and fever, and the subsequent pneumonia, was contracted by the deceased while in the line of duty, and that his death was the result thereof.

The instructions of the court were as favorable to the defendant's interest as it could well ask, and there was no error in giving them.

From what has been said, it follows that the judgment of the district court is right, and it is

AFFIRMED.

ELMER J. FREY V. STATE OF NEBRASKA

FILED DECEMBER 30, 1922. No. 22444.

1. **Criminal Law**: INDORSEMENT OF WITNESSES DURING TRIAL. Under section 10087, Comp. St. 1922, the court may in its discretion permit the names of additional witnesses to be indorsed upon the information after the trial has begun, and where the name of a witness has been indorsed on the information before trial, but omitted from the copy of the information served on the defendant, and objection is made to such witness testifying on that ground, it is not error for the court to permit such witness to testify, where the defendant makes no showing of prejudice, or does not ask for a continuance or postponement of the trial.
2. ———: JUDGMENT OF INFERIOR COURTS: ADMISSIBILITY. Before a judgment of a court of limited jurisdiction is admissible to prove the fact of the judgment, the record must be sufficiently complete to show that the court had jurisdiction of the subject-matter, as well as of the parties.
3. ———: ———: ———. Where it is sought to show a previous conviction of a defendant before a village police magistrate whose territorial jurisdiction is limited to the corporate limits of such village and for three miles beyond such corporate limits, and where the entire record offered consists only of the minutes of the magistrate on his docket, as follows: "State v. Elmer Frey. 7-3-19. Defendant appears in court, pleads guilty to unlawfully having intoxicating liquor, fine $100 and costs $2.50. Paid by check. Paid fine School Dis. No. 1. Above fines to date, July 7, 1919, $160. H. S. Smith, Police Magistrate"—such record is not sufficiently complete to show that the court had jurisdiction of the subject-matter.

ERROR to the district court for Thurston county: ANSON A. WELCH, JUDGE. *Remanded, with directons.*

A. R. Oleson, for plaintiff in error.

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

Heard before MORRISSEY, C.J., LETTON, DEAN, ALDRICH and DAY, JJ., SHEPHERD, District Judge.

DAY, J.

Elmer J. Frey, the defendant, was convicted upon the third count of an information which charged him with unlawfully selling intoxicating liquor on June 19, 1921, in Thurston county, Nebraska. In addition to this charge the information by appropriate language averred that the defendant had theretofore been twice convicted for violating the liquor laws of the state—once on July 3, 1919, in Thurston county, and again on March 9, 1920, in Dakota county. The jury found the defendant guilty as charged in the third count of the information, and added, "and find that the same is a third offense." Upon this verdict defendant was sentenced to the penitentiary for a period of six months. To review this judgment he has brought error to this court.

Numerous errors are assigned and argued in defendant's brief, some of which need not be noted because they pertain to rulings of the court in reference to counts in the information upon which the defendant was not convicted, and errors, if any, pertaining to such matters would be without prejudice.

It is first urged that the court erred in overruling the defendant's motion to quash the information. In support of this contention it is pointed out that the complaint upon which the defendant was given a preliminary hearing before the examining magistrate charged the defendant with three distinct offenses for violating the liquor laws of the state; that in binding the defendant over to the district court the magistrate found that there was probable cause to believe that the defendant "committed the offense charged in said complaint." From

this it is argued that there is no way to determine which offense charged in the complaint there was probable cause to believe the defendant committed. We are of the view, however, after considering the entire record, that the defendant's construction placed upon the magistrate's order is too narrow. Fairly construed, we think it means that there was probable cause to believe that the defendant committed each offense charged in the complaint. There was no error, therefore, in overruling the motion to quash the information.

It is next urged that the court erred in permitting the witness Harold Goodrich to testify on behalf of the state, because his name was not indorsed on the copy of the information served upon the defendant. The record shows that, when objection was made by defendant's counsel to the witness Goodrich testifying, the trial judge asked that the information be handed to him, and announced that an examination of the information showed that the witness' name was indorsed on the information, and thereupon overruled the defendant's objection. No explanation is made as to how the discrepancy between the original and the copy arose. The defendant made no showing that he would be prejudiced in any wise by the testimony of the witness, nor did he ask for a continuance or a postponement of the trial.

In *Sheppard v. State,* 104 Neb. 709, it was held that under chapter 164, Laws 1915 (Comp. St. 1922, sec. 10087), the court in its discretion may permit the names of additional witnesses to be indorsed upon the information after the trial has begun, and that such action cannot be availed of as error where defendant makes no showing of prejudice, nor asks for a continuance or postponement of the trial. The same doctrine is announced in *Kemplin v. State,* 90 Neb. 655, and *Samuels v. State,* 101 Neb. 383. On the request of the county attorney in the case at bar the trial court granted permission to indorse the name of the witness upon the copy of the

information. In view of the holding in the cases just cited, it would seem to logically follow that the court in its discretion could permit a witness to testify, whose name was indorsed upon the information, but had been omitted from the copy served on the defendant. In such case, where an objection is made to such witness testifying on the ground that his name was not indorsed upon the copy of the information, it is proper for the court to permit the witness to testify, where the defendant makes no showing of prejudice, or does not ask for a continuance or postponement of the trial.

The serious question presented by the record, however, is whether there was sufficient competent evidence of two prior convictions of the defendant for violating the liquor laws of the state, and thus subject him to the penalties of a felony as prescribed by our statute upon conviction of a third or more offenses for violating the liquor laws of the state. A prior conviction of the defendant in Dakota county was shown by a certified copy of the record of the county court, in which appears the complaint, the arraignment of the defendant thereon, his plea of guilty, and the judgment of the court upon the plea, which appears to be regular in every respect. The trial court very properly ruled that this record was sufficient to show a prior conviction of the defendant, and submitted only to the jury the question of the identity of the defendant as being the same person named in the record of the judgment. His identity was shown beyond question and not denied, so that it would have been within the province of the court to have given a peremptory instruction that this record and the testimony as to the defendant's identity were sufficient to show one prior conviction.

To further sustain the averment in the information of a prior second conviction the state, over the objection of the defendant, introduced the minutes as found in the docket of the police magistrate of the village of

Pender, in Thurston county. The minutes had not been extended in a formal judgment, and were in words and figures, as follows: "State v. Elmer Frey. 7-3-19. Defendant appears in court, pleads guilty to unlawfully having intoxicating liquor, fine $100 and costs $2.50. Paid by check. Paid fine School Dis. No. 1. Above fines to date July 7, 1919, $160. H. S. Smith, Police Magistrate." The trial court ruled that the record as thus made was sufficient proof of a former conviction, and submitted to the jury only the question of the identity of the defendant as being the person named in the minutes of the police magistrate. The sufficiency of the entries of the police magistrate to constitute a valid judgment is assailed by the defendant upon a number of grounds, the principal objection being that the record fails to show that the police magistrate had jurisdiction of the subject-matter. With respect to this objection, we think the rule is well established that, in order to render a judgment of a court of limited jurisdiction admissible, the record must be sufficiently complete to show that the court had jurisdiction of the subject-matter, and of the parties. 22 C. J. 816, sec. 930. Does the record show jurisdiction of the subject-matter? Section 4401, Comp. St. 1922, in so far as it applies to the question now under consideration, provides in substance that the territorial extent of jurisdiction of police magistrates in cities and villages is confined to the corporate limits of such city or village in which he is elected, and three miles beyond such corporate limits. Also the police magistrate is given jurisdiction over all offenses against the ordinances of such city or village, and all misdemeanors under the laws of the state where the fine which may be imposed does not exceed $100 or the imprisonment three months. The offense of unlawfully having possession of intoxicating liquors is a misdemeanor under the law of the state, and, as such, is cognizable by a police magistrate, if the offense is committed within the

territorial jurisdiction of such magistrate. So far as the record before us is concerned, there is nothing in it to indicate where the offense was committed. Under the provisions of the statute above referred to, it is clear that the police magistrate would have no jurisdiction if the offense were committed outside of his territorial jurisdiction. No presumption can be indulged in to aid the jurisdiction of an inferior court. In *Donald v. McKinnon,* 17 Fla. 746, it was held that a simple transcript of a judgment entry does not prove a judgment in a collateral proceeding, and that before it is admissible enough should appear to show jurisdiction. In *Benn v. Borst,* 5 Wend. (N. Y.) 292, it is said: "A certificate of a justice's judgment, to be competent evidence on the trial of a cause, must show on its face that the justice rendering the judgment had jurisdiction as well of the person as of the subject-matter of the suit." In *State v. Goetz,* 65 Kan. 125, it was held that a justice of the peace has no jurisdiction to try or sentence one for an offense without a complaint in writing having been filed before him charging such offense, and that the voluntary appearance of one before a justice of the peace and his plea of guilty to an offense without a written complaint, conferred no jurisdiction upon the justice to render a judgment. To the same effect are *Bigham v. State,* 59 Miss. 529, and *Wilson v. State,* 16 Tex. 246. Additional authorities supporting this general proposition can readily be found. Whether the docket entries of the magistrate were sufficient to show a judgment is a proposition which we do not consider necessary to pass upon. The failure of the record to affirmatively show jurisdictional facts rendered such entries incompetent to establish a prior conviction. From what has been said, it follows that the trial court erred in receiving the minutes of the police magistrate's record as proof of a prior conviction for violating the liquor laws of the state.

Our statute (Comp. St. 1922, sec. 3288) provides a

cumulative penalty for the first, second, and third, or more, offenses for a violation of the provisions of the chapter devoted to the liquor laws of the state, the first and second offenses being misdemeanors, and the third a felony. The verdict of the jury finding the defendant guilty upon the third count of the information is clearly established by competent evidence, and, as before stated, there was undisputed competent proof of a prior conviction of the defendant in Dakota county. The finding of the jury that this was a third offense is in the nature of a special finding, and does not in our view affect the general finding of the defendant's guilt. As the proof of a first or second offense goes only to the degree of punishment which may be imposed, we see no reason for remanding the case for a new trial, as it is apparent that the record of the police magistrate in Thurston county cannot now be corrected to meet the objections pointed out against its competency as proof of a conviction.

Objections are made to the instructions of the court, which have been considered, and in our opinion they are not prejudicial.

The defendant's guilt having been established by the verdict of the jury, and one prior conviction by undisputed testimony being shown, the case is remanded to the district court, with directions to enter judgment as upon a conviction for a second offense for violating the liquor laws of the state.

REMANDED, WITH DIRECTIONS.

CARL J. NOSKY, APPELLEE, V. FARMERS UNION COOPERATIVE ASSOCIATION, APPELLANT.

FILED DECEMBER 30, 1922. No. 22966.

1. **Jury: WORKMEN'S COMPENSATION ACT: CONSTITUTIONALITY.** Chapter 28 (secs. 3024-3084), Comp. St. 1922, commonly known as the workmen's compensation act, which provides that in cases

arising under part II thereof the court shall have authority to hear and determine the cause as a suit in equity, is not unconstitutional because not allowing a jury trial, since the parties by accepting the provisions of part II thereby waive a trial by jury.

2. **Master and Servant**: WORKMEN'S COMPENSATION ACT: WILFUL NEGLIGENCE: TRIAL BY JURY. Section 3024, Comp. St. 1922, which provides that the question of whether the injury was the result of the wilful negligence of the employee is a question of fact to be submitted to the jury, applies only to cases arising under part I of the compensation act, and has no application to cases arising under part II.

3. ———: ———: ELECTION. Where the evidence is silent as to an election between part I and part II of the compensation act, and the case is tried on the theory that the parties were under part II, it will be presumed that the parties were acting under part II of the act.

4. ———: ———: CASUAL EMPLOYMENT. Evidence examined, and *held* sufficient to sustain the finding and judgment of the trial court that the employment was not casual.

5. ———: COMPENSATION AWARD: EXPENSES: PROOF. Where the evidence shows that certain hospital and nurse expenses have been incurred by the injured employee, a *prima facie* case is made out, and, in the absence of any showing that the expenses so incurred were unreasonable, such proof will be held to be sufficient.

6. **Evidence** examined, and *held* sufficient to sustain the findings and judgment of the trial court.

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

W. F. Moran, for appellant.

Andrew P. Moran, contra.

Heard before MORRISSEY, C. J., ROSE, DAY and FLANSBURG, JJ., SHEPHERD, District Judge.

DAY, J.

This is a proceeding under the workmen's compensation act. The plaintiff, Carl J. Nosky, filed a petition before the compensation commissioner against the de-

fendant, for an award for injuries sustained on June 2, 1921, which arose, as he claimed, out of and in the course of his employment. The compensation commissioner found in favor of the plaintiff, and awarded him compensation at the rate of $15 a week from June 2, 1921, until disability ceased. An appeal was taken from this award to the district court, where upon trial the plaintiff obtained judgment entitling him to recover compensation at the rate of $15 a week from June 2, 1921, together with medical, hospital and nurse expenses in the sum of $186.66, and a penalty of $78.75 for failure to pay the award, and an attorney's fee of $75. From this judgment, the defendant has appealed.

The main error complained of by the defendant is the ruling of the court denying a jury trial. At the time the case was called for trial the defendant requested a jury to pass upon the questions of fact. This request was overruled. In this connection, it is first urged that the ruling of the court in denying a jury trial was in violation of section 6, art. I of our Constitution, which provides that "the right of trial by jury shall remain inviolate." Defendant has not aided us by the citation of any authority in support of his proposition, except to cite the constitutional provision. An examination of the authorities has convinced us that the great weight of authority sustains the rule that, where the employer and the employee have the right to elect whether they shall come under the provisions of the compensation act, and where the act provides for a trial without the intervention of a jury, an election to come within the provisions of the act is a waiver of the right to a jury trial. *Hunter v. Colfax Consolidated Coal Co.*, 175 Ia. 245; *Hawkins v. Bleakley*, 220 Fed. 378; *Greene v. Caldwell*, 170 Ky. 571. That it is competent for parties litigant to waive a jury trial is well recognized, and in practice is a matter of almost daily occurrence. The provisions of part II of the workmen's compensation act, which contemplates a speedy trial without a jury, are not forced

upon the employer nor the employee. They may avoid its provisions entirely by taking the steps prescribed therein. By affirmatively electing to come within its provisions, or by failing to take the steps to obviate its provisions, the employer and employee are under the provisions of part II of the act, and may be said thereby to have waived the right of a trial by jury.

Defendant also argues that section 3024, Comp. St. 1922, which is a part of the workmen's compensation act, specially provides that the question whether an injury was the result of the wilful negligence of the employee is a question of fact to be submitted to the jury, and, therefore, the court erred in denying a jury trial. An examination of the whole act, however, clearly discloses that this section applies only to the provisions of part I of the act, and has no application to part II. The provisions of part I apply to those cases only where the employer or the employee has taken the necessary steps to relieve himself of the provisions of part II. Section 3035, Comp. St. 1922, provides, in substance, that all contracts of employment made after the taking effect of the act shall be presumed to have been made with reference and subject to the provisions of part II, unless otherwise expressly stated in the contract, or unless a written or printed notice has been given by either party to the other that he does not accept the provisions of part II. The form and manner of giving the notice is also set forth in this section. There is no claim that either the plaintiff or the defendant took any steps to bring themselves within the provisions of part I of the act, and, hence, by the provisions of the act their respective rights must be determined by the provisions of part II thereof.

Section 3060, Comp. St. 1922, provides, in substance, for a hearing before the compensation commissioner; that if either party is dissatisfied with the award of the compensation commissioner the matter may be submitted to the district court of the county which would have jurisdiction of a civil action between the parties, "which court

shall have authority to hear and determine the cause as in equity, and enter final judgment therein determining all questions of law and fact in accordance with the provisions of this article." Without mentioning further provisions of the act, it seems clear that the legislature contemplated that cases falling under the provisions of part II should be tried by the court without a jury.

It is next urged that the defendant never employed the plaintiff to work for it. This contention, however, is not borne out by the testimony. It affirmatively appears that the plaintiff was employed by one Schlosser, an employee of the defendant, who testified that the company gave him authority to hire the plaintiff, and he did so. This is not denied.

It is further urged that the employment, if any, was casual, and therefore not within the protection of the workmen's compensation act. It appears, however, that the plaintiff was employed to work during the absence of Mr. Schlosser on his vacation; and, while no definite period was fixed as to the duration of the employment, this fact alone would not, as we view it, render the employment casual within the meaning of the compensation act. The term "casual," as used in the compensation act, is defined in *Bridger v. Lincoln Feed & Fuel Co.*, 105 Neb. 222. Under the rule there announced we think the evidence sufficient to sustain the finding and judgment of the trial court that the employment was not casual.

It is further contended that the plaintiff's injuries were caused by his own wilful negligence, which, if true, under the terms of the compensation act, would prevent a recovery. It appears that for the convenience of the employees of the defendant's elevator, a device known as a manlift was installed, which operated by means of a counterbalanced weight and a rope, by which a person standing on the manlift would with slight exertion pull himself to the top. When the manlift was on the lower floor, and not in use, it was necessary to fasten it to prevent the weight from raising it to the top. This was done

by means of a pin. In some manner the manlift was left unfastened at the bottom and was carried to the top of the elevator shaft with such force as to break the cable and allow the weight to drop to the bottom. The manlift, however, in some manner became wedged or fastened and could not be disengaged from the lower floor. The plaintiff thereupon climbed a ladder to the manlift, and, according to his testimony, not knowing that the weight had been broken loose from the manlift, stepped upon it, when it fell to the bottom of the shaft with such force as to injure the plaintiff's spine. While there may be some circumstances in evidence which would tend to show that the plaintiff knew that the weight had broken loose from the manlift, the testimony as a whole would amply justify the findings of the trial court that the injury was not the result of the plaintiff's wilful negligence. It has been repeatedly held in this class of cases that the findings of the trial court, when supported by competent evidence, will not be set aside unless clearly wrong. *Simon v. Cathroe Co.*, 106 Neb. 535, and cases there cited.

Lastly, it is urged that the evidence does not support the judgment, particularly with reference to the allowance of the hospital and nurse expenses. With respect to these items, the plaintiff's evidence does not go beyond the point that they were incurred by him, and defendant does not show that they were unreasonable or unjust charges. Considering the somewhat informal manner in which cases of this character are tried, we are inclined to hold that the proof offered was insufficient to make out a *prima facie* case, and, in the absence of any attempt to show that the expenses so incurred were unreasonable or exorbitant, it will be held to be sufficient.

An attorney's fee of $50 is allowed to plaintiff's counsel for services in this court.

No prejudicial error appearing in the record, the judgment of the district court is

AFFIRMED.

JOHN GASPER, APPELLANT, V. SECURITY STATE BANK ET AL., APPELLEES.

FILED DECEMBER 30, 1922. No. 22165.

1. **Bills and Notes:** DELIVERY OF CHECK: PRESUMPTION. By our negotiable instruments law (Comp. St. 1922, sec. 4627), where it appears that the maker of a check has surrendered possession of it, a valid and intentional delivery of the check will be presumed, until the contrary is shown.
2. ———: ———: PLEADING. An allegation in a petition that the maker of a check delivered the check to a certain person, requesting him to deliver it to the payee, and that such person did not deliver it to the payee, does not affirmatively show that there has been no legal delivery of the check necessary to complete its execution, where the petition does not disclose the relation of such person to the parties to the check, or does not show whether or not the maker had surrendered complete control over it.
3. ———: ———: ASSIGNMENT OF FUND. A delivery of a check by the maker does not constitute an assignment of the fund in the drawee bank's hands, covered by the check, until there has been an acceptance of the check by the bank.
4. ———: CHECKS: ACCEPTANCE. Under our negotiable instruments law (Comp. St. 1922, sec. 4742), requiring acceptances to be in writing, an unauthorized payment of a check by the drawee bank on a forged indorsement will not constitute an acceptance.
5. ———: ———: ———: CERTIFICATION. Where a check is procured to be certified by the drawee bank by a person other than the maker, legal holder or payee thereof, and without the knowledge, consent or ratification of any of them, such certification will not constitute an acceptance, nor work an assignment of the bank's funds held to the maker's account.
6. ———: ———: CERTIFICATION: PLEADING. An allegation in a petition that the certification was made "at the request of some person other than" the maker, legal holder or payee is not broad enough to negative the fact that it was done with their knowledge and consent.

APPEAL from the district court for Douglas county: L. B. DAY, JUDGE. *Affirmed.*

William M. Burton, for appellant.

James E. Bednar, Morsman, Maxwell & Haggart, Brogan, Ellick & Raymond, John O. Yeiser and *Ernest A. Conaway, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY and FLANSBURG, JJ., REDICK, District Judge.

FLANSBURG, J.

This was an action by plaintiff, maker of a check, to recover from the Security State Bank, the drawee of the check, the amount of the deposit covered by the check, the plaintiff claiming that the check had not been fully executed because of a want of delivery to the payee, and that a third party had received payment on the check from defendant bank upon the forged indorsement of the payee's name. The defendant demurred to the plaintiff's petition, and the plaintiff having elected to stand upon the petition, the trial court entered a judgment on the pleadings in favor of the defendant. The plaintiff appeals.

Two causes of action are set forth in the petition, but, as both are determined by the identical state of facts, it is necessary to discuss one of them only.

By the first cause of action the plaintiff sets forth that on June 1, 1920, he signed a check, drawn on the defendant Security State Bank, for $500, payable to one W. R. McGrew, and that on the same day he "delivered said check to defendant Ernest A. Conaway, with the request that said Ernest A. Conaway deliver the same to said W. R. McGrew, payee," but that said Conaway did not deliver the check to W. R. McGrew, but, on the contrary and without authority of McGrew, indorsed McGrew's name upon the check and obtained the money thereon. The check, afterwards, having passed through the hands of several holders, was finally paid by the defendant Security State Bank. The petition further states that on the same day with the execution of the check, June 1,

1920, "at the request of some person other than himself (the plaintiff), the payee or *bona fide* holder, and before the said check had been indorsed by any persons, the defendant Security State Bank certified the check as follows, to wit: 'Certified June 1, 1920, J. S. Kramolisch, Teller. Good when property indorsed, June 1, 1920, Security State Bank, J. S. Kramolisch, Paying Teller.'"

Mr. Conaway has filed a brief in the case, arguing, as justification for his indorsing the name of Mr. McGrew and procuring the proceeds of the check, that he was a successor in trust of Mr. McGrew and made the indorsement as such successor, but no such allegations of fact are set forth in the petition, and we therefore cannot consider them.

The plaintiff contends that the allegations of his petition affirmatively show that there never was a legal delivery of the check, since it is set forth that the plaintiff, after signing the check, delivered it to Conaway, with the request that Conaway deliver it to McGrew, that Conaway did not carry out the order, and that McGrew never, in fact, received the check nor its proceeds.

The fact of delivery resolves itself very largely into a question of intention. The petition does not disclose what relation Mr. Conaway sustained to any of the parties to the check. It may have been that he was an agent or employee of the plaintiff and a person over whom the plaintiff had control, and that the delivery to him was not an intentional and final parting with the control over the check, such as would constitute a delivery in law to McGrew. *Barry v. Mutual Life Ins. Co.*, 211 Mass. 306; 8 C. J. 209, sec. 338. On the other hand, it may have been that Mr. Conaway had been sent to the plaintiff by Mr. McGrew for the purpose of receiving the check, or it may have been that he was a third person, acting as a known intermediary between the parties, and that the delivery to him was a surrender of the possession of the check by the plaintiff, with the intention of making a total and complete legal delivery of it. *Palmer v. Mc-*

Farlane, 78 Neb. 788; *Richardson v. Lincoln,* 5 Met. (Mass.) 201; *In re Estate of Rule,* 178 Ia. 184; *Lawrence v. Scurry,* 187 Ia. 1055; *Crosier v. Crosier,* 215 Mass. 535; *Dunlap v. Marnell,* 95 Neb. 535; 8 C. J. 209, sec. 338; 8 C. J. 203, sec. 334. Facts which would show that Mr. Conaway's relation was such that a delivery of possession to him would not constitute a legal delivery to McGrew should have been disclosed by the petition if the plaintiff desired to show affirmatively that there was not a complete execution of the check for want of legal delivery. The negotiable instruments law (Comp. St. 1922, sec. 4627) provides that, "where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed, until the contrary is proved." As against the demurrer, therefore, the legal delivery of the check, on the facts set forth in the petition, will be presumed.

The plaintiff contends, however, that the delivery of the check, standing alone, does not, without an acceptance of it in some form by the bank, work an assignment of the fund, and that, until there is a proper acceptance, the plaintiff is entitled to recover the fund from the bank. Comp. St. 1922, sec. 4799.

We believe it is the rule, and it seems to be conceded by defendant's counsel, that the drawee bank cannot change the contract of the parties to a check, or affect their liabilities, without the knowledge and consent of some party to the check, either the maker, holder or payee, and that, where a check is certified at the instance of a person having no authority from any one of these, the certification will not constitute an acceptance so as to change the relation of the parties and work an assignment of the bank's funds (*State Bank of Chicago v. Mid-City Trust & Savings Bank,* 295 Ill. 599, 12 A. L. R. 989); nor, under the negotiable instruments law, requiring an acceptance to be in writing (Comp. St. 1922, sec. 4742), will the unauthorized payment by the bank on a forged indorsement constitute an acceptance

(*Southern Trust Co. v. American Bank of Commerce & Trust Co.*, 148 Ark. 283, 14 A. L. R. 761, and see cases in note, 14 A. L. R. 766).

It is the defendant's contention that the petition does not sufficiently allege that the certifcation was made without any authorization on the part of the maker, payee or *bona fide* holder.

The allegation in the petition, as set out above, goes only to the extent of declaring that the defendant bank certified the check "*at the request* of some person other than" the payee, maker or *bona fide* holder. This allegation has reference only to the person who actually presented the check and made the request for its certification. It does not affirmatively allege that this was done without the knowledge or consent or authorization of the maker, holder or payee. The plaintiff has elected to stand upon the strict wording of his petition. Its allegations are to be construed strictly against him. The court can indulge in no presumptions in his favor which do not, as a matter of law, spring from the facts pleaded. Those things which are material and which are omitted will not be presumed to exist. *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb. 523; *Cheney v. Dunlap*, 27 Neb. 401; *Burlington & M. R. R. Co. v. York County*, 7 Neb. 487. Where a defendant in a suit on a promissory note denies that he executed the note, it is held that he must go further and deny that the instrument was signed or executed by his authority. 8 C. J. 928, sec. 1212. The same principle of pleading applies here. Where the plaintiff strictly limits his denial of facts, he is in no position to contend that his denial was broader than his statement.

The petition, we believe, was vulnerable to the demurrer, for the reason that it does not affirmatively disclose either an absence of delivery or an absence of an acceptance of the check by the Security State Bank.

The judgment of the lower court is therefore

AFFIRMED.

RICHARD C. HARRIS, APPELLANT, V. CENTRAL POWER COMPANY, APPELLEE.

FILED DECEMBER 30, 1922. No. 22173.

1. **Electricity**: TELEPHONE COMPANY: USE OF STREETS: CARE REQUIRED. Where an electric company secures telephone poles, which it has a right to place in the streets, with guy wires, it is required to use reasonable care to so erect and maintain such wires as not to endanger public travel or the safety of individuals, having in view the probable use of the highway by the public.

2. ———: ———: ———. Where an ordinance requires telephone poles to be placed within or adjacent to the curb line of the street, the fact that the curb line and property line of an alley are the same, and that to place the poles adjacent to the curb line would cause cross-arms, ordinarily used on telephone poles, to extend over private property, is no justification for the company to set its poles out in the paving two and one-half feet from the curb line, for the company may either construct its cross-arms to extend from one side of the pole only, or procure from private owners the right or permission for the overhang of cross-arms over their property.

3. ———: ———: ———: EVIDENCE. The testimony of experts on electric pole and wire construction, that the poles and wires in the instant case were erected according to the method generally approved by electrical engineers, does not conclude the question of whether or not the placing of the guy wires in the alley, at the place and under the conditions in question, was a dangerous obstruction to public travel, negligently maintained, that being a matter within the range of common knowledge.

4. ———: ———: ———: NEGLIGENCE: QUESTION FOR JURY. Where a company anchored an uncovered guy wire, which supported a terminal pole carrying five wires, out in the paving of a 20-foot alley, and two and one-half feet from the outer edge of such paving, *held*, that the question of whether or not the company was negligent in so doing was for the jury.

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

Sinclair & McDermott, for appellant.

Pratt & Hamer, contra.

Heard before MORRISSEY, C. J., ROSE, DAY and FLANSBURG, JJ., SHEPHERD, District Judge.

FLANSBURG, J.

This was an action to recover from the defendant Central Power Company damages arising from personal injuries resulting to the plaintiff from collision with a guy wire maintained by the defendant company in a public alley in the city of Kearney. The trial court found that there was no showing of negligence on the part of the defendant company and directed a verdict in its favor. From a judgment on this verdict the plaintiff appeals.

The only question presented is whether or not the evidence, construed most favorably to the plaintiff, is sufficient to have presented an issue for the jury on the question of whether or not the guy wire, as located, furnished an unnecessarily dangerous obstruction to public travel; in other words, whether or not the plaintiff had proved any negligence on the part of the company in maintaining the wire at the place and under the conditions shown.

The alley runs north and south and is 20 feet wide. Entering the alley from the south there are business buildings on the right-hand side, many of them having doors opening upon the alley. On the left-hand side is a lumber yard and a fence running along it next to the alley. The fence is a foot from the edge of the paving. A row of telephone poles extends along the left-hand side of the alley. They are placed in the paving. From the center of these poles it is two feet and eight or ten inches to the outside edge of the paving. One of these poles is about 100 feet north from the south entrance of the paving, and this pole has attached to it the guy wire in question, which extends south and is anchored in the paving two and one-half feet from the left-hand edge thereof. The place where it is anchored is about 60 feet south from the pole, to which it is at-

tached, and perhaps some 40 or 50 feet north of the south entrance to the alley. The plaintiff was engaged in running a bakery, and the building in which he conducted his business was located so that it had a rear entrance upon this alley. The accident happened on Sunday. The regular delivery boy was not on duty, and the plaintiff had gone to the train in a Ford delivery wagon to get some merchandise, and, upon his return, entered the alley from the south. He had made the trip through the alley only a few times before. There is testimony to show that at this time, when he entered the alley, he was going somewhere from five to eight miles an hour. As he started up the alley a child came running from a building on the right-hand side and across the path of the plaintiff's car. Plaintiff testified that the child was about five feet in front of him, and that he quickly turned the car to the left, toward the guy wire, which was then 12 feet in front of him, but which he could not at that time see, so as to pass around the child, and before he had opportunity to turn the car back to the right again the hub of the left-hand wheel ran upon the wire, and the delivery wagon was tilted up and turned over, thereby causing the personal injuries to the plaintiff upon which this suit is based.

By the ordinances of the city, authorizing companies to place their poles in the streets and alleys of the city, it was provided that such poles and wire shall be so erected "as to in no manner interfere with the public use of the streets, alleys and sidewalks of said city," and the franchise ordinance, under which the defendant company was authorized to maintain its poles and wires in the highways, provided that all poles should be placed "within or adjacent to the curb line of the street and in such manner as to not unnecessarily impede public travel, or unnecessarily interfere with the rights of adjacent owners or occupants."

The defendant introduced testimony of men experienced in telephone construction, who testified, from their

expert knowledge on the subject, that the guy wire in question was necessary to support the pole to which it was attached, since the pole was the terminus of five electric wires, and that a guy wire was necessary to relieve the strain of the pull of these wires upon the pole. They testified that the cross-arm on these poles was some six feet in length, and that it was necessary to place the pole out in the paving of the alley at a distance from the property line of the alley so that the cross-arm would not encroach upon or extend over private property. They testified, further, that it was necessary that the guy wire be in the same plane, or in a direct line with the electric wires attached to the poles, and, as the poles were some two and a half feet from the edge of the property line of the alley, that the guy wire must also be placed at the same distance from the alley line. Their testimony was to the effect that sometimes, where there is heavy traffic, a short pole is set so as to lean in the direction of and follow the guy wire, for the purpose of protecting the wire, and that also, in other instances, the guy wire is housed or boxed so as to protect people from coming in contact with it and receiving electric shock. Though it may be there is no testimony to refute the fact that the telephone poles and wires were constructed according to the method generally approved by electrical engineers, still that does not conclude the question as to whether or not the placing of the guy wire in the alley, at the place and under the conditions in question, was negligence so far as it might unnecessarily interfere with or be an obstruction to the use of the alley by the public. The question of whether or not a wire so located interfered with the public use of the alley, or was dangerous to public travel thereon, or whether it was negligence on the part of the company to maintain the wire, as was done in this case, is a matter within the range of common knowledge and not a matter to be determined by experts alone.

It seems to be argued that the necessity of placing the

poles away from the property line and out in the paved portion of the alley is a complete justification for the location of the guy wire.

The franchise ordinance contemplated that poles should be placed along the curb line. Where the curb line and the property line of the alley were one, it does not follow that the company had the right to place its poles and guy wires out in the paving at whatever convenient distance it found necessary in order that the cross-arms which it should use, in such lengths as it should judge proper, should not extend over private property. There was nothing to compel the company to so place its cross-arms as to extend over private property, even though it should place its poles at the edge of the alley. The engineers did not testify that the arms could not be made to extend from one side of the pole alone, a manner of construction not uncommon, though they did testify that to attach the five wires directly to the poles, one above the other, without the use of arms or brackets, would make it dangerous to men on the poles when working with the electric wires. There were no buildings to interfere with the overhang of cross-arms on these poles, nor would the encroachment actually interfere with the use of adjacent property by the owners. The right to such encroachment the company had the ability to procure, if it should have found it necessary.

It is manifest that the location of a pole in the paved portions of a street, being so easily seen, would not create the same danger to people using the street as would a bare wire located in the same place, for a wire is not, under all circumstances, an obvious obstruction. The placing of wires in the street must be done with reference to the possible use of the street by the people traveling thereon, and the company maintaining guy wires in the street must use ordinary care to see that no unnecessary danger is created thereby. In a number of cases it has been held that the placing of guy wires within the limits of the street, even though the wires

are placed outside of the paving or sidewalks, and at a place where people are not accustomed to travel, may be negligence on the part of the company, where the wires are not guarded or casings placed around them so as to make the obstruction obvious to view; and, where a person using the street in the night-time, and under circumstances where he could not see the wire, was injured, the company has been held liable. *Canyon Power Co. v. Gober,* 192 S. W. (Tex. Civ. App.) 802; *Cumberland Telephone & Telegraph Co. v. Lawrence,* 271 Fed. 89; *Nessen v. City of New Orleans,* 134 La. 455; *Lafayette Telephone Co. v. Cunningham,* 63 Ind. App. 136; *Raines v. East Tennessee Telephone Co.,* 150 Ky. 670; *Poumeroule v. Postal Telegraph Cable Co.,* 167 Mo. App. 533.

In the instant case the guy wire was located in the traveled portion of the street. The plaintiff was required to act quickly in an emergency. What, to a quick glance, might appear to be an open way upon a paving laid out and intended for travel, was, in fact, a path dangerously obstructed by a slanting wire. The paving of the alley presented to him a place 20 feet wide in which to operate his car. He was only some 12 feet from the wire as he attempted to turn out for the child. He testified that he could not see the wire, and the companion who was in the car with him testified that he did not see the wire and did not know what had caused the car to turn over until after the accident had happened. The plaintiff did not remember that he attempted to stop the car. Not having seen the wire, he would not have been called upon to do so. Had the wire been so open to view as to present a dangerous obstruction at a glance, the plaintiff, if traveling at the rate of speed testified to, should have been able to stop. We cannot say, under these circumstances, that as a matter of law the defendant was guilty of no negligence in maintaining the wire anchored in the paving and over two feet from the edge thereof, in such close proximity to where it knew vehicles must pass, and

without, at least, some guard or boxing which would at once have made apparent the existence of the obstruction.

A case somewhat similar to the one here is that of *Louisville Home Telephone Co. v. Gasper,* 123 Ky. 128, 9 L. R. A. n. s. 548, where a truck in the day-time ran onto an unguarded guy wire, placed in an alley 18 inches from the side fence, and it was held that the question of whether or not the maintenance of the unguarded wire, an obstruction not easily discernible, was negligence on the part of the defendant was a question for the jury. See, also, *Unglaub v. Farmers Mutual Telephone Co.,* 39 S. Dak. 355.

We believe that, under the facts as above related, the question of whether or not there was negligence on the part of the company in maintaining an uncovered guy wire, anchored in the paved way of the alley and two and one-half feet from the outside edge of the paving, cannot be determined as a matter of law, but was an issue for determination by the jury.

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

REVERSED.

STANLEY NAVRACEL, APPELLANT, V. CUDAHY PACKING COMPANY, APPELLEE.

FILED DECEMBER 30, 1922. No. 22198.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: ACTION FOR LAMAGES. An employee, who comes within the provisions of the workmen's compensation act and has not affirmatively rejected it in the maner specified by such act, is held to have surrendered any action for damages that might otherwise have accrued to him under the factory act (Comp. St. 1922, secs. 7690, 7699), by reason of having been injured through machinery which was left unguarded by the employer, in violation of the factory act.

2. ———: ———: WILFUL NEGLIGENCE. Under the provisions of the workmen's compensation law, the fact that the employer may be found to be guilty of wilful negligence does not affect the question of the compensation which the employee may recover under the act, nor does it take the case from under the operation of the act.

3. ———: ———: ELECTION. Where the employee is a minor, 19 years of age, being of an age where he is legally permitted to work, and where the terms of the compensation law cover his case, he will be held to have elected to come under the act, where he does not reject it, and the remedies afforded him by the compensation law will be exclusive of those statutory and common-law remedies which he would have had, had he rejected it.

APPEAL from the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

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

Sears, Horan & Sears, contra.

Heard before MORRISSEY, C. J., ROSE and FLANSBURG, JJ., REDICK and SHEPHERD, District Judges.

FLANSBURG, J.

This was an action by the plaintiff, an employee of the defendant Cudahy Packing Company, to recover damages for personal injuries sustained as the result of the alleged negligence of the defendant company in failing to guard certain machinery housed in its plant. It is not questioned but that the accident arose out of and in the course of the plaintiff's employment. The defense was that the plaintiff, as an employee who had not formally rejected the compensation law, came within its provisions, and that its remedies were exclusive as against any suit for damages against the employer, based on negligence for failure to comply with the factory act. The trial court entered judgment in favor of the defendant, and the plaintiff brings this appeal.

By the provisions of the factory act (Comp. St. 1922, secs. 7690, 7699), every person operating a plant where machinery is used is required to provide guards or

screens to protect employees from injury from shafting, gearing, etc., and any such person violating the provisions of the act is made "liable in damages to any person injured, as a result thereof." The factory act was originally enacted in 1911 (Laws 1911, ch. 67) and has been carried upon the statute books since, having been finally revised and amended in 1919. The workmen's compensation law was originally enacted in 1913. Laws 1913, ch. 198.

It is the plaintiff's contention that the factory act gives a specific right to damages, not affected by the compensation law; that the two acts are not inconsistent, but, if found to be inconsistent, the factory act, by the amendments and reenactment in 1919, was intended by the legislature, to the extent of the provisions embodied in the act, to work an implied repeal of provisions in the compensation law inconsistent therewith.

The two laws are not inconsistent, though they could not, obviously, be applied at the same time to a given case. Either the factory act or the compensation law must govern. The compensation law is not a compulsory law but is elective. It was enacted at a time when questions were being raised against compulsory compensation laws, that to require the employer to pay compensation for accidents happening to his employees where he was not at fault was taking his property without due process of law. Some of the courts sustained these objections to compulsory compensation acts and held, on that ground, that they were unconstitutional. *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 34 L. R. A. n. s. 162. The elective law was based upon another theory. It erected a statutory contract between all employers and employees, falling within its terms, who should not affirmatively, in a specified manner, reject the provisions of the act. By a failure to act the parties were presumed to have elected to come within the act and to have contracted with reference to it. The obligations, then, of the employer towards the employee,

under the compensation law, are in a sense contractual.

That the compensation law was intended to govern exclusively the matter of compensation for injuries received by employees in the employment covered by the act is shown by its express terms. It provides that by the election of the parties to come under the act they shall be held to have surrendered their rights "to any other method, form or amount of compensation or determination thereof than" that which is provided by the workmen's compensation schedule of awards. Comp. St. 1922, sec. 3034.

A case involving a very similar question to the one presented here is *Hilsinger v. Zimmerman Steel Co.*, 193 Ia. 708. That was a case where a general statute gave to a parent the express right to recover damages for injury to his minor son growing out of the negligence of such son's employer. The question was whether or not the compensation act affected the parent's rights under the general law. The court said: "The argument for the appellant is that the workmen's compensation act did not in terms repeal section 3471, and that its terms are not so repugnant to section 3471 that a repeal by implication should be found. To our minds, the question involved is not so much whether section 3471 has been repealed by implication, but whether the field of its application has been circumscribed or reduced by the operation of the compensation act. Assuming that the purpose of the compensation act was to cover the entire field of liability for industrial injury, section 3471 could still be operative outside of that field." The court in that case held that the minor employee, 18 years of age, came under the provisions of the compensation act, since he had not expressly rejected it, and that the remedies provided by that act were exclusive of any remedy to the parent under the general statute for damages.

So it can be said here: The factory act is still operative, unaffected by the compensation law, as to all employees who do not come within the provisions of the

compensation law, either where the parties reject the compensation act, or where the employment or the accident was one which was not covered by the compensation act. Compensation statutes of this character have generally been held to be exclusive of all other remedies, by reason of a surrender of those remedies by the parties coming under the act. *Shade v. Ash Grove Lime & Portland Cement Co.*, 92 Kan. 146; *Menter Co. v. Brock*, 147 Minn. 407; C. J., Workmen's Compensation Acts, sec. 156.

Plaintiff argues that the failure to guard machinery, in violation of the factory act, is wilful negligence on the part of the employer, and claims, where injury results from such conduct, that the occurrence does not constitute an accident, within the meaning of the compensation law. In the case of *McCarthy v. Village of Ravenna*, 99 Neb. 674, such a violation was held to constitute gross negligence.

The plaintiff lays particular stress upon the decision in *Adams v. Iten Biscuit Co.*, 63 Okla. 52, where the court, in passing upon the general constitutionality of a workmen's compensation law, declared. "A wilful or intentional injury, whether inflicted by the employer or employee, could not be considered accidental and therefore is not covered by the act." The facts in that case, however, did not show anything but ordinary negligence on the part of the employer, so that the statement of the court was only general, not being applied to any particular state of facts. There is a distinction between an employer causing a wilful or intentional injury, and being guilty of wilful or gross negligence, which negligence results in an injury, and we take it that the court, in making the general statement, had in mind that distinction. An employer could not, of course, be protected by the provisions of the compensation act where he intentionally inflicts an injury upon an employee. Such an injury could hardly be said to be one which would be incidental to the employment, or one which would arise from the operation of the employer's business.

Some of the compensation laws have a provision whereby an employer is made to pay an additional award where the injury is the result of his wilful or gross negligence. See note, Ann. Cas. 1916A, 787. In one of those cases (*Sciola's Case,* 236 Mass. 407) a violation of a safety appliance law by an employer has been held not to constitute "wilful misconduct," within the meaning of the compensation act in that state. However that may be here, it is unnecessary to decide that question in this case, for, under the Nebraska law, there is no provision awarding a different amount of compensation to an employee who is injured through the wilful or gross negligence of the employer than the award allowed him in the case of any other accidental injury.

It is argued, since the plaintiff in this case was a minor, being of the age of 19 years, and since an employee is brought under the provisions of the compensation law in a manner which is contractual, that the minor's contract, being a voidable one only, is not binding upon him, and that he may elect at any time whether to be bound by the provisions of the law or to resort to other statutory or common-law remedies outside of the compensation law. In one case *Moore v. Hoyt,* 116 Atl. (N. H.) 29, such has been held to be true. That question, however, must be controlled largely by the particular terms of the Nebraska statute. That the statute was intended to cover minor employees, who are legally permitted to work, is shown by its provisions. By the statute (Comp. St. 1922, sec. 3038) the term "employee" is defined to cover: "Every person in the service of an employer, including minors who are legally permitted to work under the laws of the state." And section 3055, Comp. St. 1922, provides, in case of an injury to a minor, when any right or privilege accrues to him under the act, he may institute a proceeding through his guardian or next friend.

Where a minor is employed who is under the age at which minors are legally allowed to be employed under

the statutes, the contract of employment is in direct violation of law, and the minor cannot be presumed and held, by such a contract of employment, to have submitted himself to the provisions of the compensation act. *New Albany Box & Basket Co. v. Davidson,* 189 Ind. 57, and cases therein cited. But where the minor is above that age and is of an age where he is legally permitted to work, and where by the provisions of the law it is shown that he was intended to be bound by the provisions of the act where he does not reject it, it is held, in the absence of any rejection of the act by him in compliance with the provisions thereof, that he comes within it, and that the remedies afforded him by it are exclusive of those statutory and common-law remedies which he is presumed to have surrendered. *Young v. Sterling Leather Works,* 91 N. J. Law, 289; *Gilbert v. Wire Goods Co.,* 233 Mass. 570; *Hartman v. Unexcelled Mfg. Co.,* 93 N. J. Law, 418.

Our conclusion is that the plaintiff in this case not only came within the provisions of the workmen's compensation law and that he was bound thereby, but that the remedies afforded him under that law were exclusive of his right to bring an action for damages based upon the provisions of the factory act.

The judgment of the trial court is therefore

AFFIRMED.

The following opinion on motion for rehearing was filed May 26, 1923. *Rehearing denied.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, DAY and GOOD, JJ., BUTTON, District Judge.

LETTON, J.

The question involved being of much importance, argument was allowed, and has been had, upon a motion for rehearing. The former opinion is reported, *ante,* p. 506.

We have reexamined the question and are confirmed in the views expressed therein. In some states special provisions are made in the compensation laws for such cases, but here the legislature has left room for such remedial legislation, the need of which was not foreseen.

In England, where the injury was caused by the personal negligence or wilful act of the employer, or some person for whose default the employer is liable, the employee may, at his option, either claim compensation or sue for damages, and if within the time limited in the compensation law the employee bring an action to recover damages, and it is determined that the employer is not liable in such action, but that he would have been liable to pay the compensation, the action shall be dismissed, but the court may proceed to assess such compensation, and may deduct therefrom the costs caused by the plaintiff suing for damages. Eng. St., 6 Edw. VII, ch. 58; Workmen's Compensation Appeals (Eng.) 1912, 1913, pp. 29, 34. In Illinois the statute expressly provides: "When the injury to the employee was caused by the intentional omission of the employer to comply with statutory safety regulations, nothing in this act shall affect the civil liability of the employer." Ann. St. Ill. 1913, sec. 5451. In Wisconsin and other states increased compensation is provided for. Cases having a bearing on the question involved are: *Knoll v. Shaler,* 192 N. W. (Wis.) 399; *Smith v. Western States Portland Cement Co.,* 94 Kan. 501; *Helme v. Great Western Milling Co.,* 43 Cal. App. 416; *Patten v. Aluminum Castings Co.,* 105 Ohio St. 1; *Toledo Cooker Co. v. Sniegowski,* 105 Ohio St. 161.

By failing to signify his election not to come under the provisions of the compensation act, the employee surrenders his right "to any other method, form or amount of compensation, or *determination thereof,* than as provided in part II of this article." Comp. St. 1922, sec. 3034.

The reenactment of the factory act, slightly changed,,

in 1919, in the compilation of the Civil Administrative Code, did not evidence any intention to narrow the compensation act. It would probably be wise to enact that an employer who is guilty of a wilful or negligent violation of a specific provision for the safety of his workmen prescribed by statute should be liable to an action for damages for such negligence, and that the injured employee should have his election whether he would sue, or rely on his right to compensation; but, as the law now stands, we adhere to the opinion that the only right of recovery is under the provisions of the workmen's compensation act.

Motion for rehearing

OVERRULED.

CHARLES MARKIEWICZ V. STATE OF NEBRASKA.

FILED DECEMBER 30, 1922. No. 22681.

1. **Criminal Law**: INTERPRETER. In a prosecution for murder, where it is suggested to the court that the defendant did not understand the English language and desired an interpreter to interpret to him the evidence of the various witnesses as it was introduced and the things said and done at the trial, and where the court appointed an interpreter for that declared purpose, who was admittedly competent, *held*, that there was no affirmative duty on the part of the court to watch over and require the interpreter to translate to the defendant all that was being said.
2. ———: ———. Where the defendant, furnished with such an interpreter, makes a showing after conviction that the interpreter did not interpret to him the testimony of the witnesses, and that he did not understand what transpired during the trial, and where he has had a fair opportunity, as he does have when such interpreter is furnished, to apprise himself as to the course of the testimony, so as to enable him, through his attorney, to properly cross-examine and reply to the witnesses, and where the witnesses are called and testify in his presence, it cannot be said that he has not been legally confronted by such witnesses, as is required by the Constitu-

tion of this state, from the mere fact that he has failed to understand them.

3. ———: WITNESSES: FEDERAL GUARANTY. The guaranty found in the federal Constitution, that persons accused of crime shall be confronted by the witnesses against them, applies to prosecutions in the federal courts only, and not to those in the state courts.

4. ———: INSTRUCTIONS: FALSUS IN UNO, FALSUS IN OMNIBUS. Where the condition of the testimony is such as to justify and require the giving of an instruction, based upon the maxim "*Falsus in uno, falsus in omnibus*," the court should give it. Such an instruction is, however, not required in all cases, but only where, from the evidence, the jury may be justified in believing that a witness has wilfully and corruptly testified to a falsehood, and, further, where the same witness has testified as to some other material issue in the case than that upon which he is directly impeached.

5. ———: ———: DUTY OF COMPLAINANT. Where a defendant predicates error on the refusal of the court to give such an instruction, it is incumbent upon him to specifically point out that there is such a peculiar condition in the record as to warrant the instruction, and to designate to what material testimony he believes the maxim should have been applied.

6. ———: CAUTIONARY INSTRUCTION. An instruction, warning the jury to exercise greater care in weighing the testimony of police officers and detectives, is not rendered erroneous where the court adds: "This does not mean, by any means, however, that such officers should necessarily be disbelieved, but only that in weighing their testimony such caution as above described should be observed."

7. ———: INSTRUCTIONS. Other instructions examined, and *held* to be free from prejudicial error.

8. **Evidence** examined, and *held* sufficient to support the verdict of murder in the first degree.

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

Jamieson, O'Sullivan & Southard and *Irvin Stalmaster*, for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, DEAN and FLANSBURG, JJ., REDICK and SHEPHERD, District Judges.

FLANSBURG, J.

The defendant was convicted of murder in the first degree and sentenced to life-imprisonment. He interposed the plea of self-defense. It is his contention that the evidence shows the killing took place upon a sudden quarrel, and does not, in any event, justify a conviction of any greater offense than manslaughter.

The defendant was a Polander, having been born in Poland, Russia, and could speak very little in the English language. On December 17, 1921, he went to the barber shop of deceased, in Omaha. The deceased offered to sell him a drink. Defendant stated that he had a 20-dollar bill only. This the deceased offered to change for him. The defendant took a drink of whisky, for which it was agreed he should pay 50 cents. The deceased took the bill, but refused to return any change, saying that the defendant could take the balance out in drinks. After a time both parties left the barber shop. The deceased went to a soft-drink parlor a few doors away. The defendant, some 15 or 20 minutes later, entered the soft-drink parlor. There is evidence to show that just before entering he drew an automatic revolver, and that as he entered the door with the revolver in his hand he said, "I kill," and mumbled something further which the witness could not understand. There were a number of people in the soft-drink parlor, most of them Russians, and who could not converse well in the Polish language. The defendant was a foreigner among them. When he entered the room the deceased was standing about halfway back toward the further end of the room, the room being about 60 feet in length, and was eating a sandwich at the counter. He was unarmed. There is evidence to show that when the defendant approached within some eight or ten feet of the deceased he said something about wanting his money and immediately began

firing. Three shots were fired in the room. Two of the bullets thus fired were found lodged in the wall, beyond where the deceased was at that time standing, and each of them struck at a height of about seven feet from the floor. As the first of the three shots was fired the deceased doubled up, throwing both hands to his stomach, and then turned and ran towards the back door. He was followed by defendant some four or five feet distant behind him. Back of the building these two were heard scuffling, but there is no eye-witness, other than the defendant, as to what took place there. Four more shots were fired during that time. Shortly afterwards the defendant appeared in the doorway, being pushed by the deceased, who was holding the right hand of the defendant, which hand held the revolver. The revolver, a 25-caliber automatic, was taken from the defendant and a box of cartridges was found upon his person. The deceased was helped into the room and placed upon the floor, where he soon expired. It was found that he had been struck by four bullets; one, as if shot partly from the front, entered deceased's abdomen a little left of the navel, and took a downward course, lodging in the groin; another entered his left side about midway between the hip and the shoulder and a little towards his back, this passed through his body, penetrating the stomach and liver; another, as if shot from a position to the left of the deceased, passed through his left arm and grazed, but did not enter, his body; and still another struck him near the left cheek-bone and came out near his left ear. The defendant, after the shooting, was made to sit in a chair. He said, "That man is no good." He was later taken to the police station, where, it is said, he was asked why he had killed the deceased, and he shrugged his shoulders and answered: "What for he took my $20."

The defendant's testimony was that he carried the revolver because he was afraid to leave it at home where his children might get it. He related the altercation with the deceased at the barber shop, much as described

by the state's witnesses, but his testimony is that, when he entered the soft-drink parlor and approached the deceased and asked for his money, the deceased struck and began fighting him, and that during that struggle defendant loaded his revolver and shot into the floor and then into the ceiling, not attempting to hit the deceased, that he followed the deceased through the back door of the building where the struggle continued, the deceased continuing to strike him and he shooting in self-defense, all the time fearing that the deceased was about to take his life. There is a conflict of testimony as to whether the defendant appeared to have received any bruises during the struggle. Some of the state's witnesses said that his face was bleeding when he reentered the room after the struggle, and that his clothes were torn, and his eye bruised, as if he had been struck there. Other witnesses denied these facts.

The jury believed the testimony of the state's witnesses as to the nature and character of the attack made by the defendant, and, without further detailing the testimony, except as above outlined, though we have carefully examined it, we feel that there can be no question but that the evidence is sufficient to support the conviction of murder in the first degree. The testimony on behalf of the state shows a quarrel, a separation of the parties, and an interval of some 15 or 20 minutes, in which the defendant was thinking over his grievance. There is enough to show a deliberate, premeditated determination, actuated by the spirit of revenge, on the part of the defendant, to take the law into his own hands, and, should the deceased continue to wrong him in refusing to return the money, to take the deceased's life.

The defendant did not speak or understand the English language, and assigns as a ground of error that the testimony of the various witnesses, as it was introduced, was not interpreted to him, nor the statements of court and counsel explained to him during the progress of the trial, and that his trial was, therefore, conducted in violation

of the Constitution of the United States and of the state of Nebraska, in that he was not legally confronted with the witnesses against him.

At the commencement of the trial suggestion was made that the defendant did not understand the English language, and that he should be furnished an interpreter to interpret the evidence as given and to explain the things said and done during the proceeding. The court thereupon appointed an interpreter, who was admittedly competent, and who was the person selected by the defendant himself. This interpreter sat throughout the trial at the side of the defendant. After conviction the defendant, in support of a motion for a new trial, presented an affidavit, setting forth that he did not understand the testimony of the witnesses, nor the various steps taken and things done during the trial, and that the interpreter had not interpreted nor explained any of these things to him. While the defendant was upon the witness-stand himself, however, the interpreter did serve, and translated all questions put and answers given.

There is no provision either in the Constitution or statutes of this state, which expressly provides that the court shall see to it that all testimony given in a criminal trial shall be interpreted to the accused in language that he understands. Though it is the duty and province of a court to see that a witness comprehends all questions asked, in order that such questions may be answered understandingly, and must provide an interpreter for that purpose where, in the court's discretion, one is necessary, that rule does not satisfy the *quære* of whether or not the court is required to furnish an interpreter to interpret to the defendant all of the testimony of the various witnesses as it is given during the trial. *Livar v. State*, 26 Tex. App. 115.

The defendant bases his claim, that the court was bound to see that all the testimony was interpreted to him as it was introduced, entirely upon those provisions in the state and federal Constitutions which declare that

the defendant in a criminal case shall have the right to be confronted with the witnesses against him. The guaranty found in the federal Constitution, that persons accused of crime shall be confronted by the witnesses against them, applies to prosecutions in the federal courts only, and not to those in the state courts. *West v. Louisiana,* 194 U. S. 258; 16 C. J. 836, sec. 2112.

The defendant argues that he is not confronted with the witnesses in the legal sense of that term, where he is not made to understand their testimony as it is given. In *Mattox v. United States,* 156 U. S. 237, it is said: "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Though the court must accord the defendant full opportunity to obtain all the benefit of this constitutional right and, to that end, to understand the testimony of the witnesses against him, so that a proper cross-examination may be had, we know of no affirmative duty devolving on the court to see that the defendant does have interpreted to him everything that is said and done, as it occurs, during the progress of the trial. The court in this case surely performed its full duty of preserving to the defendant his rights in that regard by appointing the interpreter selected by the defendant, an interpreter who was admittedly competent, and who was appointed for the declared purpose of interpreting and explaining to the defendant all of the things said and done during the trial. The defendant and his attorney were furnished the means by which the defendant could be fully apprised

with knowledge of the proceedings and the course of the testimony, and it was for them to determine how far they should avail themselves of the services of the interpreter furnished. The defendant having been actually confronted by the witnesses face to face as they gave their testimony, and having been given the means and a fair opportunity to understand what they said, and of preparing himself, through his attorney, to have the witnesses properly cross-examined, certainly has been denied no constitutional right, from the mere fact that the court did not, as the evidence was introduced, watch over and require the interpreter to constantly translate to the defendant all that was being said. See *Ralph v. State,* 124 Ga. 81, 2 L. R. A. n. s. 509; *Regina v. Yscuado,* 6 Cox's Crim. Law (Eng.) 386.

Error is predicated on the refusal of the trial court to give an instruction tendered by the defendant, based upon the maxim *"Falsus in uno, falsus in omnibus."* The form of the instruction tendered is not questioned. It advised the jury that, should they believe from the evidence that any witness in the case had wilfully testified falsely as to any material facts in the case, then they were at liberty to disregard all of the testimony of any such witness, save such testimony as they might find corroborated by the testimony of other credible witnesses.

Where the condition of the testimony is such as to require the giving of such an instruction, it has been held that the refusal of the court to give it, when properly tendered, is reversible error. *Barber v. State,* 75 Neb. 543; *Titterington v. State,* 75 Neb. 153. And see 16 C. J. 1017, sec. 2442. The evidence to which the instruction was particularly applicable in the cases just cited is not discussed in the opinions. It is only stated there that there was a serious conflict in the testimony as between certain witnesses. We do not believe in every case, where there is merely a conflict of testimony, that the court is required to give the instruction in question. In most of

the decisions, where the refusal to give the instruction has been held reversible error, there was certain direct evidence to show that some witness had wilfully and corruptly testified, either by contradictory statements made by himself while on the witness-stand, or where his testimony was impeached by other witnesses who testified to the making of such contradictory statements made by him elsewhere. *Reynolds v. State,* 196 Ala. 586; *Plummer v. State,* 111 Ga. 839; *Owens v. State,* 80 Miss. 499; *State v. Dwire,* 25 Mo. 553. Of course, in many cases the conflict between the testimony of certain witnesses is alone sufficient to show that one of the witnesses has wilfully sworn to a falsehood.

Where the defendant bases error on the refusal to give such an instruction, he must, by his bill of exceptions, show that the peculiar condition of the testimony required the giving of it. *State v. Allen,* 111 La. 154.

Where the testimony is such as to show that a particular witness has wilfully and corruptly testified falsely to certain particular matters, and has also given testimony on certain other material issues in the case, upon which he has not likewise been directly impeached, it is plain that such an instruction would be of particular benefit to the opposing party. It is obvious, however, that such an instruction would not be applicable to every case where there is a conflict between the testimony of a witness on one side, and the testimony of a witness on the other, for, though there be evidence to show that a certain witness has testified falsely on a particular issue, still, if his testimony is confined to that issue and he has not testified to other material facts in the case, upon which he is not, to the same degree, directly contradicted or impeached, then, should the jury disbelieve him as to the testimony which he has given, they would not be called upon to disregard his testimony on some other issues, for there would be no such testimony in the record to disregard. In the absence of such a peculiar condition of the testimony, requiring the giving of the instruction, it

would, if given, be of no additional aid to the jury or benefit to the accused, where the jury is given the full and general instruction covering their right and power to weigh testimony, and to act as sole judges of the credibility of witnesses. Such a general instruction was given in this case.

In *Milton v. Holtzman,* 216 S. W. (Mo. App.) 828, the Missouri court has gone so far as to lay down the rule that, in any case, "Such instruction is 'nothing more than an affirmative declaration of the power possessed by the jury in determining the credibility of witnesses.' *State v. Barnes,* 274 Mo. 625. And it may well be presumed that a jury will not hesitate to exercise that power, if the circumstances warrant it, without being specifically told that they may do so." See, also, *Thompson v. Portland Hotel Co.,* 209 Mo. App. 476; *State v. Barnes,* 274 Mo. 625; *State v. Banks,* 40 La. Ann. 736; *State v. McDevitt,* 69 Ia. 549.

It is true that there was a direct and serious conflict in the testimony in this case between that of the defendant and that offered by the state's witnesses relating to the main issues in controversy. It is manifest from a reading of the record that either the defendant or the state's witnesses testified to a falsehood, but, viewing the testimony of the state's witnesses alone, there is little substantial contradiction among them. The defendant's counsel, let us emphasize, does not point out in his brief any particular testimony on the part of any of the state's witnesses to which he wishes to apply the maxim. In oral argument he did mention the testimony of the 15-year-old boy, who testified that he saw the defendant, about 100 feet from the soft-drink parlor, after having left the barber shop, go up the street in the direction of the defendant's home, and that he saw him return in about 10 minutes. This boy also was the witness who testified that the defendant drew his gun from his pocket just before entering the soft-drink parlor. No witness corroborates the boy in either of these particulars, and

the defendant contradicts him in both. Counsel argues that the boy's story that the defendant went home and returned is unbelievable, for the defendant's home was 17 blocks away and defendant could not have made the trip in the time specified by the boy. The boy, however, could easily have been mistaken as to the lapse of time, and, moreover, he did not attempt to testify as to where the defendant had gone, simply that he went up the street and later returned. There is nothing to show that the boy purposely testified to a falsehood, unless the jury should believe the defendant's statements made in contradiction to him, and, if the jury did so believe them, the boy's testimony would have been disbelieved in one particular as much as the other, the matter resting entirely upon the general question of the credibility of the two respective witnesses. Defendant's counsel, aside from what has just been mentioned, does not point out that any particular witness testified falsely, and that there was evidence to show that his testimony was wilfully and corruptly given upon that issue, and that such witness also gave testimony upon some other material issue in the case than that upon which he was impeached and which might have been disregarded by the jury under the instruction asked for. We therefore do not see but that the general instruction given by the court, advising the jurors as to their power to weigh the testimony and determine the credibility of the witnesses, adequately covered the requirements of the case.

The court gave a cautionary instruction to the jury, warning them to exercise a greater care in weighing the testimony of police officers and detectives because of the natual and unavoidable tendency of such persons to procure and remember only such testimony as would be against the defendant. The defendant complains of this instruction for the reason that the court added: "This does not mean, by any means, however, that such officers should necessarily be disbelieved, but only that in weighing their testimony such caution as above described

should be observed." The instruction, as we view it, is entirely proper. The instruction is only intended to be cautionary, and the additional clause only makes that the more clear. To hold the converse of what was added to be true would be to utterly destroy and set at naught that particular kind of testimony.

Defendant assigns error on the ground of the refusal of the court to give an instruction tendered by him covering the matter of self-defense. By other instructions given by the court, that defense was fairly and adequately covered. It is claimed, however, that the instruction given by the court was not proper as not being based upon any reasonable theory of the evidence actually adduced at the trial, and was inconsistent. The instruction was as follows:

"Even though you should believe from the evidence that the deceased kept some money of defendant to which the defendant was entitled, as claimed by him, yet should you further believe from the evidence beyond a reasonable doubt that thereafter the defendant sought out the deceased and shot and killed him at a time and under circumstances when the defendant had no reasonable apprehension of immediate and impending serious injury to himself, and did so from a spirit of retaliation or revenge for the purpose of punishing the deceased for the alleged wrong done him in keeping his money, then the defendant cannot avail himself of the law of self-defense and you should not acquit him on that ground no matter how great the danger or imminent the peril to which defendant may have believed himself to have been exposed during the affray."

There was certainly a sufficient basis for the instruction in the evidence, and, in view of the evidence on behalf of the state upon which the instruction is premised, the final clause could only have referred to the affray which followed the defendant's initial attack. In view of other instructions on the law of self-defense and the condition of the evidence, the instruction could not have

been misleading, though not as clearly worded as it might have been.

A life sentence is perhaps a severe penalty in this case. The defendant, a poor laboring man, was subjected to the greatest provocation. The little money that he had was being wrongfully withheld by the deceased, whether or not with the intent of depriving him of it, at least for the purpose of tantalizing and enraging him. The defendant's mind became obsessed with the idea as evidenced by his demand: "Give me the rest of that back; I got childs and my woman was killed and I have to work for my childs." But the penalty is the minimum for the offense of which he was found guilty, and the court is without authority to reduce it.

The judgment of the lower court is therefore

AFFIRMED.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT, V. MRS. PEDER JOHNSON, APPELLEE.

FILED DECEMBER 30, 1922. No. 23094.

1. **Evidence:** CAUSE OF DEATH: PROOF. In a case under the workmen's compensation law, brought to recover compensation for the death of plaintiff's intestate, the medical certificate of death, which is made out by the physician last in attendance, in the manner prescribed by section 8233, Comp. St. 1922, is incompetent when offered as proof of the cause of death as shown by recitals contained therein.

2. **Master and Servant:** COMPENSATION: CAUSE OF DEATH: BURDEN OF PROOF. In order that plaintiff recover under the workmen's compensation law for accidental death of an employee, the burden of proof is upon her to show with reasonable certainty that the death was proximately caused by the alleged injury.

3. ———: CAUSE OF DEATH: PROOF. Where an employee, 67 years old, was struck by an automobile and sustained an injury to his head and to his arm and side, the nature and extent of which injuries are not clearly disclosed by the evidence, and where it is shown he was never able to work after the accident

and was troubled with headache and dizzy spells, and about three years after the accident afflicted with insanity, and where such person survives the injuries for three years and approximately two months and then dies, *held*, where no medical testimony was introduced to show the cause of his death, and no showing of the manner of his death or of the symptoms or conditions which especially manifested themselves at the time of his death, that the evidence was insufficient to show by inference alone, arising from the facts proved, that the death was the result of those injuries.

APPEAL from the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Reversed.*

John L. Webster and *R. B. Hasselquist,* for appellant.

Gray & Brumbaugh, contra.

Heard before MORRISSEY, C. J., ROSE, DAY and FLANSBURG, JJ., SHEPHERD, District Judge.

FLANSBURG, J.

This was an action to recover compensation under the workmen's compensation law. It was based upon the claim that the plaintiff's husband, an employee of the defendant company, sustained injuries in an accident occurring to him in the course of and growing out of his employment, of which injuries he died. The trial court awarded compensation to the plaintiff, and the defendant appeals.

Defendant contends that the evidence is insufficient to show that death resulted from the injuries complained of.

Plaintiff's intestate, Peder Johnson, had been in the service of the defendant street railway company for a long number of years. At the time of the accident he was 67 years old, and, although in good health, he had the appearance of age, was small, thin and stooped. The company had continued him in service as a night watchman. It was at that time building a new car barn, some of the material of which occupied portions of the street, and Mr. Johnson was given the duty of watching this

property at night and of placing lanterns in the streets to warn against danger. At about 6:30 in the evening of December 6, 1918, Mr. Johnson, while upon the street adjacent to the defendant's properties, which it was his duty to guard, was struck by an automobile. He received an injury to the upper part of his head, the extent and location of which are not exactly shown; it does appear that some stitches were taken; his side and his arm were also hurt, but the nature of these injuries is also not described. He was helped to his home and, with assistance, was able to walk. When he arrived home he was seated in a chair. He complained that his head hurt him. Twelve days later a numbness developed in his right arm and right leg and he lost the power to move them. He was then taken to a hospital where he remained for 15 days. The paralysis of his right arm and leg later became better, though there was never a complete recovery. He was able to walk and, in visiting the neighbors, it is shown, he at one time fell in ascending the steps to their house. After the accident the plaintiff's testimony is that he was "very nervous," and that he continued to have headaches and dizzy spells. In October, 1921, almost three years after the accident, an insanity complaint was filed against him by his wife, and he was taken to the county hospital for a while and later again removed to his home. On February 3, 1922, three years and approximately two months after the accident, he died.

Though it appears that he had medical attention immediately after the accident and was attended by physicians throughout this period of time until his death, and that he had an attending physician, Dr. John Simpson, at the time of his death, no one of these physicians was called to testify, either as to the extent, nature or kind of injuries sustained; or as to the cause of the temporary paralysis or insanity, and there is no testimony as to the cause of his death. It is not shown how or in what manner he died, nor what were the symptoms which

especially manifested themselves at that time nor for a time previous, nor whether or not there was any apparent immediate cause of death. He died at the age of 70 years. The defendant company paid compensation for disability throughout the entire period from December 6, 1918, until the date of the death of Mr. Johnson. It takes the position here that plaintiff has not shown that death resulted from the injuries complained of.

In this case the burden was upon the plaintiff to show with reasonable certainty that death was proximately caused by the injury. This proof must be by substantive evidence, leading either to the direct conclusion or legitimate inference that such was the fact. It is the plaintiff's contention, since the injuries are disclosed and since disability is shown to have continued from the time of the injury until death occurred, that nothing more need be proved, and that an inference arises that death was the result of that injury.

The defendant, on the other hand, introduced, over objection, the medical certificate of death, made out in accordance with the provisions of our statute (Comp. St. 1922, sec. 8233) by the deceased's physician last in attendance, which certificate by the statute is required to disclose the cause of death and must be filed before a burial permit can be issued. And by this certificate the defendant attempted to show by the recitals therein that the cause of death was one entirely distinct and apart from the injuries. Such a certificate, however, though filed publicly with the registrar, is not a public record entitled to be introduced as independent evidence in such a case as this. It is filled out by the attending phyisician in an *ex parte* manner, without a hearing and without the right of parties interested to cross-examine. In a controversy betwen individuals, where the cause of death is a material issue, such certificate has no direct evidentiary value on that issue, and its recitals must be disregarded by this court. *Louisville R. Co. v. Raymond's Admr.*, 135 Ky. 738, 27 L. R. A. n. s. 176; *Buffalo*

Loan, Trust & Safe-Deposit Co. v. Knights Templar & M. M. Aid Ass'n, 9 N. Y. Supp. 346; *Davis v. Supreme Lodge, K. of H.*, 165 N. Y. 159; 17 C. J. 1306, sec. 169.

Can we, then, without any further evidence as to the cause of the death of plaintiff's intestate, by inference assume that death resulted from the injuries sustained three years and two months previously? Where an injury is sustained and death immediately results, an inference that the injury was the cause of death may arise without anything further to show it, but as the period of time increases between the time of injury and the date of death that inference must necessarily weaken according to the length of time which ensues. The plaintiff's intestate survived the injuries for three years and two months. It is certain that if his death was the result of the injuries complained of his attending physician could have testified to that fact. If the injuries caused the death, why did not death come within the time ordinarily ensuing after injuries of such a sufficient character? As the plaintiff's intestate had survived the injuries for over three years, then what should cause his death at that time, rather than earlier? Was his insanity, which came almost three years after the accident, the result of these injuries? He was a man who had lived out the average expectancy of life. Was his death caused by his injuries or by the ills which human flesh is heir to and which appear in more abundance at the age of 70? Without something more in the record than we find, we cannot say. The evidence here does not give that assurance for decision which should support the judgment of a court. The plaintiff must not merely ask the court to guess that the original injury was the cause of death, nor merely that it is probable it was, but she must either prove it by evidence or by legitimate inference to be drawn from the facts which are actually made to appear.

Without any testimony other than what we have outlined above, we do not believe that the plaintiff's case can be sustained. The burden was upon the plaintiff to

remove the case beyond the realm of speculation and conjecture before she could be allowed to recover. The evidence is insufficient to support the judgment.

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

REVERSED.

F. T. JOHNSON, APPELLEE, V. JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS, APPELLANT.

FILED DECEMBER 30, 1922. No. 22155.

1. **Carriers:** SHIPMENT OF LIVE STOCK: LOSSES: BURDEN OF PROOF. Where live stock, unaccompanied by a caretaker, is received by a carrier in good condition and when they arrive at destination a number of the animals are dead, the burden of proof is upon the carrier to show that the loss resulted from some cause which would exempt it from liability.

2. ———: ———: IMPROPER EQUIPMENT: CONTRIBUTORY NEGLIGENCE. It is the duty of a carrier to furnish proper cars for shipment of live stock, and when an improper car is furnished, unless in exceptional cases, the shipper is not guilty of contributory negligence in loading his stock in the car so furnished.

3. ———: LOSS OF LIVE STOCK: INSTRUCTIONS: NEGLIGENCE. Where, in an action for damages for loss of live stock, contributory negligence of plaintiff is pleaded and evidence is received tending to support the allegation, it is the duty of the court, upon its own motion, to instruct the jury on the law of contributory and comparative negligence, and it is error to refuse a request of defendant thereon.

4. ———: ———: ———: MEASURE OF DAMAGES. It is error to instruct the jury that the measure of damages in such case is the value of the animals as stated in the contract of shipment; the measure is the fair market value of the stock lost at the time and place where they should have been delivered, less any amount received for the carcasses.

5. **Appeal:** WITNESSES: COMPETENCY: MARKET VALUE. The question of the competency of a witness to testify as to the market value of personal property rests largely in the discretion of the court, and an affirmative ruling thereon, where abuse of discre-

tion is not shown, will not be reviewed upon appeal, when the objecting party fails to request the privilege of cross-examination of the witness before the answer is received.

APPEAL from the district court for Franklin county: WILLIAM A. DILWORTH, JUDGE. ***Reversed.***

John F. Cordeal, Elmer E. Whitted and *John L. Rice,* for appellant.

W. H. Miller and *Relihan, Relihan & Reed, contra.*

Heard before MORRISSEY, C. J., ALDRICH, LETTON and DEAN, JJ., REDICK, District Judge.

REDICK, District Judge.

Plaintiff brings this action to recover damages sustained to a shipment of 55 hogs which he delivered to defendant at Riverton, Nebraska, in good order, and of which 23 were dead upon arrival at Kansas City, the death of which hogs he alleges was due to the negligence of defendant carrier. Defendant answers, admitting the shipment, denying all allegations of negligence, and alleging that if any of said hogs died in transit their death was caused by the natural propensities, viciousness, and inherent weakness of the animals, the weather conditions then prevailing, and the negligence of the plaintiff. These allegations are denied in the reply. Plaintiff claimed damages in the sum of $1,246.83, and the trial to the court and jury resulted in a verdict for the plaintiff for $1,132.73, and the defendant brings the case here on appeal. A large number of errors are assigned and all have been considered, but we will discuss only such assignments as seem to require attention.

Objection is made that the court in the statement of the case omitted to mention the general denial of negligence contained in the answer. This was probably an oversight; but, as the case was tried all the way through upon the questions covered by such denial, the error was not prejudicial.

Objection is made to instructions Nos. 2, 3, and 4:

"No. 2. If plaintiff has convinced you that all of said animals were in good healthy condition when delivered to the defendant at Riverton for transportation to Kansas City, then the burden is upon the defendant to convince you by a preponderance of the evidence that the death of said animals resulted from the natural propensities, weakness, viciousness or characteristics of said animals, and not from any negligence or fault on the part of the defendant or defendant's agents, or by reason of something that the defendant could not prevent by the exercise of ordinary care and prudence, or that it resulted from some neglect or fault of the plaintiff or his agents.

"No. 3. The evidence in this case shows that the defendant received this car-load of hogs at Riverton, Nebraska, for transportation to Kansas City, Missouri, and that upon arrival at destination 23 of said animals were dead.

"If you believe from the evidence that said shipment was delivered to the defendant in good condition, then the defendant must show and explain the cause or reason of the loss or damage occurring to said shipment during the transportation.

"No. 4. You are instructed that, where it is shown by the evidence that live stock is delivered to a railroad company for transportation in good condition and is delivered at destination in a damaged condition, or a portion of it is lost or destroyed, then it devolves upon the railroad company to show that said loss or damage was not the result of any negligence on the part of the railroad company, but was due to the fault of the shipper or some act of God, or to the inherent propensities or natural character."

Defendant's first objection is that, on account of the repetition contained in the instructions as to the burden of proof, too much stress was given to that feature of the case. It would have been better had the various matters covered by the three instructions been included in

the first one so that repetition in the respect complained of would be avoided, but we cannot see that defendant was prejudiced as claimed.

Defendant further objected that the instructions do not state the proper rule governing the burden of proof in this class of cases, it being argued that, when evidence is produced by defendant sufficient to sustain a finding that the loss was brought about by causes for which the carrier is not responsible, the presumption fails, and cites *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151, which case so holds; but there was nothing in the evidence in that case which connected the death of the animals from disease with any neglect of the defendant. It was shown that the animals died from arthritis and other natural causes which from their very nature could not be traced to negligence of the carrier, while in the case under review the death of the animals is shown to have resulted from over-heating resulting in congestion of the lungs. The claim of the plaintiff is, and there is evidence tending to show, that the overheating was caused by the character of car furnished by the defendant, and failure of the defendant to take proper care of the shipment in transit. Whether the overheating resulted from natural causes, the kind of car furnished by defendant, lack of care in transit, or negligent overloading by plaintiff were questions of fact for the jury. Moreover, the instruction complained of is substantially within the law as laid down in that case by Flansburg, J., as follows: "Where it appears that live stock, unaccompanied by a caretaker, is received by a railroad company in good condition and delivered later to the consignee in a damaged condition, a *prima facie* case is made against the railroad company, and the burden is upon it to show that such damage resulted from some cause which would exempt it from liability"—citing *Church v. Chicago, B. & Q. R. Co.*, 81 Neb. 615, and *Chicago, B. & Q. R. Co. v. Slattery*, 76 Neb. 721. These cases declare the law of this state that, where stock is

not accompanied by a caretaker and loss or damage in transit is shown, the burden of proof is upon the defendant to show that the loss was occasioned by a cause for which it is not responsible.

Objection is made to instruction No. 5 in the following words: "You are instructed it was the duty of the defendant to furnish a proper car for the transportation of said animals, and that if defendant failed so to do, and the shipper was compelled to accept said car for said shipment and the defendant accepted said shipment in said car, then the defendant is estopped from claiming that said car was not proper for transporting said animals."

It appears from the evidence that plaintiff requested that he be furnished a car for a shipment of hogs and the agent of defendant notified him that the car was ready, and plaintiff, with the assistance of his neighbors, thereupon loaded 11 wagon-loads of hogs and drove them about 11 miles to the railroad stock-yards, and, when shown the car furnished by defendant, objected that it was a horse car and was boarded tight half way down, only the lower half being slatted. He was informed by the agent that, if he wanted a different car, he would have to wait until he could get one, but no other car was immediately available and the time when one might be obtained was uncertain, so the plaintiff loaded the car to which he had objected, and defendant now claims that by so doing plaintiff was guilty of contributory negligence, and that the court should have submitted that question to the jury. We are unable to sustain this contention. It was the duty of the defendant to furnish a proper car for the shipment of hogs (*Chicago, B. & Q. R. Co. v. Williams,* 61 Neb. 608; *Allen v. Chicago, B. & Q. R. Co.,* 82 Neb. 726; we do not decide whether or not the car in question was a proper car), and defendant, having notified the plaintiff the car was ready, cannot put the burden upon plaintiff of either refusing that car or waiting an indefinite time for another one after having

brought his shipment to the railroad as above detailed. Defendant cites quite a number of cases, the majority of which we have examined, and especially the three upon which defendant principally relies are clearly distinguishable from the case at bar. In *Otrich v. St. Louis, I. M. & S. R. Co.*, 154 Mo. App. 420, the plaintiff had a choice, and he selected the car in question in place of another one offered by defendant's agent. In *Coupland v. Housatonic R. Co.*, 61 Conn. 531, the plaintiff was offered a special box-car at a higher rate than the one he selected, and it was held that under those circumstances he assumed the risks incident to the use of the car he selected. In *Gilleland & Dillingham v. Louisville & N. R. Co.*, 119 Ga. 789, the plaintiff accompanied the stock as caretaker, and it was held that plaintiff having affirmed the contract with knowledge that the car to which he objected was being used for the transportation of his stock, and as his only claim for injuries to the stock in transit arose from omission of precautions which, under the contract, devolved upon the plaintiff, the court held it was not error to direct a verdict for the defendant.

Instructions 7 and 9 are as follows:

"No. 7. You are further instructed that, if the plaintiff overloaded said car, and the defendant discovered said fact and had opportunity to remove said condition in time to prevent loss or damage to such shipment and failed to do so, the defendant is liable for all damages resulting from failure to remedy such conditions."

"No. 9. You are instructed that, if you find from the evidence in this case that the plaintiff is entitled to recover, you should return a verdict for such an amount as will compensate him for all damages sustained, not exceeding the amount prayed for in his petition; and in arriving at such amount you will be governed by the value of the animals set forth in the contract for transportation, to wit, $60 per animal, less any amount received by him for the carcasses."

Defendant urges two objections to these instructions: (1) That they withdraw the questions of contributory and comparative negligence from the jury; and (2) that they state an improper measure of damages. We think both of these objections are well taken. Contributory negligence of plaintiff was pleaded, and the evidence was conflicting upon the question whether or not plaintiff had overloaded the car and thereby contributed to causing the animals to become overheated, making it a question for the jury. The jury should have been instructed by the court on its own motion upon the law of contributory and comparative negligence, which it entirely failed to do. The only reference to this defense is contained in the last 15 words of instruction No. 2, above quoted; but the jury were not told what to do in case they found all or part of the damage "resulted from some neglect or fault of the plaintiff." *Hunt v. Chicago, B. & Q. R. Co.*, 95 Neb. 746. Defendant's request (No. 3) on this point should have been given.

Instruction No. 9 is not only erroneous for the reasons just stated, but because it submitted an incorrect rule of damages; the measure in these cases is the reasonable market value of the hogs lost at the time and place where they should have been delivered. *Hunt v. Chicago, B. & Q. R. Co., supra.* Whatever may have been the federal rule in interstate shipments (in which class this belongs) prior to the Cummings amendment of March 4, 1915, (38 U. S. St. at Large, ch. 176, p. 1196), the rule is now as above stated. *Chicago, M. & St. P. R. Co. v. McCaull-Densimore Co.*, 253 U. S. 97. It happens in this case that the amount of damages computed by the correct rules does not differ substantially from the amount of the verdict, and the error might be disregarded but for the error in failing to instruct upon contributory and comparative negligence.

It is claimed the court erred in permitting plaintiff to testify as to the fair market value of the hogs at Kansas City. The record is as follows: "Q. Now, Mr.

Johnson, do you know the reasonable value of those hogs at Kansas City on the 13th day of March, 1918? Defendant objects for the reason that the witness has not shown himself qualified to answer. Objection overruled. Exception. A. I do. Q. You may state what it was. Defendant objects as incompetent, irrelevant and immaterial, and no foundation laid. A. $16.65 per 100."

The objection to the first question was properly overruled, because a man is always the best qualified person to state what he knows; and objection to the second question was also properly overruled, because the question being one of fact, not an opinion, and witness being a stock shipper who is presumed to have some knowledge on the subject of the market value of hogs, and having testified that he did know the foundation was sufficiently laid *prima facie*. If defendant desired to test his means of knowledge before receiving the answer, he should have requested the privilege of cross-examining the witness on that point, which doubtless would have been permitted, with the result in this case the answer would have been excluded, as the subsequent cross-examination so clearly showed the evidence incompetent that the court would have stricken it out upon motion (defendant counsel's statement that this was done at page 18 of the record is inaccurate). Evidence of plaintiff as to number of dead hogs and their proceeds should have been excluded, as he had no personal knowledge on that subject.

Instruction No. 7 is erroneous in placing upon defendant the absolute duty to remedy the condition of overloading. The evidence on this point is conflicting, and it could not be known in advance whether damage would result. Under these circumstances we think the defendant was chargeable with ordinary care in transportation, taking the car as it found it.

One of the questions of fact was whether or not the hogs should have been drenched while in transit. Witness Duncan testified on cross-examination that he did not

drench them; he should have been permitted on redirect to explain why he did not; the evidence was conflicting as to the necessity or propriety of drenching at that time of year.

There being no question of unreasonable delay in transportation, instruction No. 11 should have been omitted.

Whether the plaintiff negligently overloaded the car, and, if so, whether such negligence contributed to the loss and in what degree, were questions for the jury, which, if found against the plaintiff, would entitle defendant to a verdict, or a reduction of damages, and it follows that, for error of the court in failing to instruct the jury on contributory and comparative negligence, the judgment must be reversed.

REVERSED AND REMANDED.

HENRY LEE, APPELLANT, V. FORD EYERLY ET AL., APPELLEES.

FILED DECEMBER 30, 1922. No. 22164.

Highways: ESTABLISHMENT: EASEMENT. Where a public road has been attempted to be established by proceedings under the statute and opened and traveled by the public for more than ten years, the public thereby acquires an easement therein, and the court will not examine the original proceedings for the laying out of the road and determine whether or not they were valid. *City of Beatrice v. Black*, 28 Neb. 263, and *Lydick v. State*, 61 Neb. 309, followed and approved.

APPEAL from the district court for Valley county. BAYARD H. PAINE and EDWIN P. CLEMENTS, JUDGES. *Affirmed.*

Davis & Davis, for appellant.

Munn & Norman and *Bert M. Hardenbrook, contra.*

Heard before MORRISSEY, C. J., FLANSBURG, ALDRICH and DAY, JJ., REDICK, District Judge.

REDICK, District Judge.

This is an action to enjoin the road overseer and board of supervisors of road district No. 15 in Valley county from destroying gates and fences which the plaintiff had erected across a traveled road of said county, on the ground that said road had never been legally established as a public highway. The plaintiff, just prior to the commencement of the suit, had obstructed the road, and the defendants had torn them down, and this had occurred several times, resulting in the suit for the purpose of determining the rights of the parties, the plaintiff claiming that the *locus in quo* had never been legally laid out and established as a public highway, and the defendants that it had been so laid out and that it had been used by the public generally for a period of ten years after the county commissioners had taken steps under the statute to establish it as a highway. The case was tried before two judges in the district court, resulting in a denial of the injunction and a finding and decree for the defendants, and plaintiff appeals.

The facts as established by the evidence are substantially as follows: The road in question had been traveled more or less by the public from 1884 until August, 1887, when a petition was filed with the board of county commissioners to open and establish the same as a public highway, and pursuant to such petition a commissoner was appointed, under the statute, for the purpose of viewing the road and determining its necessity, who filed his report in affirmation October 15, 1887, that he had caused the road to be surveyed and presented a report of such survey and the field notes and plat thereof, and on January 16, 1888, the matter of the petition was considered by the board and the petition granted as prayed for, with the notation on the record of "no objections or claims for damages filed." The road continued to be traveled by the public generally from that time forward to the present with no substantial interruptions, although it appears from the evidence that obstructions

were placed across the road in the form of gates at the north and south line of plaintiff's land in 1912, but the same were left open except at times during the winter when they were closed for the purpose of confining stock, but these obstructions did not seriously interfere with the public travel until shortly before the commencement of this action, when it was sought by plaintiff to permanently close the road. The road did not follow a straight line, but angled off in an irregular course conforming to the topography of the country, its northern terminus being a mile west of its beginning, being about three and one-half miles long. It pursued a rather irregular course through the northwest quarter of section 13, the land of the plaintiff, which he purchased about 1906. The major portion of the road passed through a rough country and along the course of what is referred to as a valley or cañon; the sides of the cañon in many places were quite precipitous and characterized by one witness as consisting of "cat steps." The ground on either side of the road had not been cultivated to any extent until about 1902, although it appears that furrows had been plowed along the road on the top of the bank of the cañon prior to 1900, and at that time fences were built on the south of plaintiff's land up to the east side of the road, but were not continued to the west until about 1912. The land to the east of the road is good farming land, while that to the west is somewhat hilly and broken; some of the land on either side of the road had been taken up and cultivated at an early date, but the evidence does not establish that it was cultivated up to the line of the road or with any reference thereto; neither is it shown that any portion of the territory occupied by the road has ever been cultivated or plowed, except by the public authorities who did some work upon the road as early as 1890, and the adjoining farmers worked out their poll tax on this road. Whether or not the territory through which the road passed would come within the classification of "wild land" or "cultivated land" is a close question,

which we do not deem it necessary to decide. Plaintiff, Mr. Lee, in answer to the question, "You knew they were traveling through there?" testified, "I thought there was a road there until we was told there wasn't any road there"—the opinion having been imparted by an attorney who probably based his judgment upon defects in the proceedings of 1887 for the establishment of a road.

We think the evidence establishes two propositions: First, that in 1887 the proper county authorities attempted to lay out and establish the road in question as a public highway; and, second, that the road was established, substantially along the course of the survey, and has been opened and traveled by the general public continuously for a period of ten years and up to the present time.

If the case of *Lydick v. State,* 61 Neb. 309, is the law in this jurisdiction, it rules this case. The first syllabus is as follows:

"Where a public road has been established by proceedings under the statute and opened and traveled by the public for more than ten years, the public thereby acquires an easement therein, and the court will not examine the original proceedings for the laying out of the road and determine whether or not they were valid."

That case followed *City of Beatrice v. Black,* 28 Neb. 263, and has been cited with approval in *Close v. Swanson,* 64 Neb. 389, and *Kime v. Cass County,* 71 Neb. 677. In *Close v. Swanson, supra,* the court distinguished the *Lydick* case, citing the syllabus above quoted, and said:

"Of the correctness of the rule established by that case, and the decisions cited in support thereof, we have no doubt; but in the case at bar the county board stopped short of making any order concerning, laying out, or establishing the road in question. Hence the road involved in this controversy does not come within the rule announced in that case. If an order, however irregular, had been made by the county board, laying out

or establishing the road in controversy, the rule in *Lydick v. State* would govern."

The proceedings of the commissioners stopped with the survey, and the plaintiff built his fence in accordance with the survey, and the public travel was along the line of the survey, and it was sought by the commissioners to open the road across the plaintiff's land some two rods south of the line of the road as surveyed, on a claim that a quarter section corner used as the basis of the survey and long established as a government monument was incorrect.

In *Kime v. Cass County, supra,* the court said (page 678): "We do not find in the record any order of the board establishing the road as recommended by the commissioner, but the road appears to have been opened some time in the year 1872 and used more or less from that date down to 1879 or 1880." And on page 679: "The district court found that no damages were awarded to Kime for the land taken for this road, and we think the evidence amply sustains that finding. There is no record of the appointment of any appraisers to assess the damages, and no record of damages having been paid. In fact, no evidence of any kind appears relating to the appraisement or payment of damages. If this road had been opened and used by the public as a highway for ten years or more, then the regularity and validity of the proceedings in establishing the same would not be examined. (Citing the *Lydick* case.) The public, however, ceased to use the premises as a road not later than 1879, and from that time up to April, 1900, the owner of the land has been in exclusive possession."

It therefore appears that the county was defeated in that case for the reason that the public had only used the road for about seven years, and, the proceedings of the commissioner being legally insufficient, no highway was established. It seems clear from these cases that the existence of a highway may be established in two ways: First, by showing a strict compliance with the

statutes providing for the establishment of public roads; and, second, by imperfect proceedings under those statutes followed by an opening of road and continued public use thereof as a highway for ten years following said proceedings. Other ways, of course, exist, such as adverse possession for the statutory period, which in the case of wild prairie land must be with the knowledge of the owner, or dedication. The principles governing the solution of the question as applied to the three methods are somewhat different; as to the first, the only question is the legality of the proceedings; as to the second, the only question is the continued user by the public for ten years; and, as to the third, the public authorities must bring themselves within the principles governing title by adverse possession as between private owners. While it is said in *Peterson v. Fisher,* 71 Neb. 238: "It may be that the defective proceedings may be considered by the court as defining the extent of the prescriptive right claimed, but not as a basis of the same"—we do not think that the learned justice by that language intended to suggest that the proceedings by reason of their defects had no relation to the nature of the subsequent public use, and that, therefore, in every such case, the public was required to bring its case within the principles governing a contest between individuals. After the decisions in the four cases above cited, two of which resulted in victories for the public and two for the landowners, and in 1909, the legislature passed an act (Laws 1909, ch. 113) which was amended in 1917:

"All roads within this state which have been laid out in pursuance of any law in this state, and which have not been vacated in pursuance of law, and all roads located and opened by the county board of any county and traveled for more than ten years, are hereby declared to be 'public roads,' and no such road or any part thereof shall be vacated or changed without the consent of the majority of the voters living within two miles of

the road and not living in a village or city." Laws 1917, ch. 58.

This statute would seem to have been enacted in view of the many existing disputes over the existence of public roads, and to have classified them as above suggested, first, roads laid out in strict pursuance of law, and, second, roads located and opened by the county commissioners and traveled for more than ten years, and constitutes a legislative recognition of the correctness of the principles laid down in the *Lydick* and *Black* cases. But plaintiff relies most strenuously upon the case of *Peterson v. Fisher, supra,* and contends that the *Lydick* case is thereby disapproved. To this we are unable to agree. The case of *City of Beatrice v. Black, supra,* which was followed in the *Lydick* case, was cited and distinguished, but not disapproved, in the *Peterson* case, and the court said:

"The question in this (*Peterson*) case is, whether the presumption arising from the long lapse of time since the attempted proceedings to lay out a highway, a portion of which is in dispute, is conclusive against the owner of premises over which the public has only occasionally traveled a portion of the disputed highway." And at page 241 the court said: "The evidence in this case shows that, while both east and west of the line between sections 11 and 14 the road was freely traveled by the public, yet it further shows that the main line * * * was diverted to the north, thence westward across section 11, thence southward after having passed over said section to a continuation of the original line running east and west. The plaintiff testifies that he had a gate at the east line of said section, and that a few persons came through the gate, passed along between the sections, thence southward to his house, but there is no evidence that any public work was ever done upon, or that the public in general ever traveled on, the line between sections 11 and 14, and there is no evidence of travel between these sections for as long a period as ten years.

This being the case, no prescriptive right was acquired by the public as against the owners of the land in said sections, and, since the plaintiff in this case never recognized any right of the public to pass over his premises, it is apparent that, unless the original proceedings were valid, no public highway exists over the land of the plaintiff at the place in dispute"—citing three Nebraska cases.

It will thus be seen that no public user of the highway was shown in pursuance of the defective proceedings. Our attention has not been called to any case where a good faith attempt has been made to establish a highway by the county commissioners and followed by continued use by the public as a highway for a period of ten years, in which it is held that the highway was not established, and we have been able to find none. The existence of the highway has been denied only in cases where it was shown that no proceedings whatever had been taken and a failure to show adverse possession, or where defective proceedings were shown and a failure to show public user for ten years; whereas, as in this case, proceedings, though defective, were taken and followed by use by the public generally for a period of ten years, the existence of the road has been uniformly declared. We conclude that the judgment of the district court is right, and the same is

AFFIRMED.

WILLIAM N. EDGAR, APPELLEE, V. JOHN F. ANTHES, APPELLANT.

FILED DECEMBER 30, 1922. No. 22175.

1. **Evidence** examined, and *held* sufficient to support the verdict.
2. **Appearance.** A defense of fraud in obtaining jurisdiction of the person of the defendant is waived by such defendant filing a cross-petition asking affirmative relief. *Linton v. Heye*, 69 Neb. 450.

3. **Damages.** An unambiguous provision for $500, "as damages for nonfulfilment of contract" for conveyance of land, will be held to be for liquidated damages, rather than a penalty, when the sum named is not disproportionate to the probable damages, and because of the difficulty of accurately ascertaining the damages in such case.

APPEAL from the district court for Frontier county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Ambrose C. Epperson, Charles H. Epperson, Jr., and *D. B. Massie,* for appellant.

Lamb & Butler and *Walter D. James, contra.*

Heard before MORRISSEY, C. J., ALDRICH, LETTON and DEAN, JJ., REDICK, District Judge.

REDICK, District Judge.

Action brought to recover $500 paid upon a contract for purchase of real estate and $500 as liquidated damages for failure of vendor to comply with the contract. The evidence supports the finding of the jury for the plaintiff, and only two other questions are presented for review. The defendant alleged in his answer that he had been inveigled into the jurisdiction of the county court of Frontier county by fraud, and that such court had no jurisdiction over his person, his residence being in Clay county, and offered evidence in support of such allegation. Whatever merit there may have been in this defense, it was clearly waived by defendant filing a cross-petition asking affirmative relief, as he thereby submitted his person to the jurisdiction. *Linton v. Heye,* 69 Neb. 450, and cases cited therein.

The second question arises from the following provision of the contract of sale:

"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, the failing party shall pay to the other party of this con-

tract the sum of five hundred and no/100 dollars as damages for nonfulfilment of contract."

Plaintiff contends that the sum named, $500, is liquidated damages, and defendant that it is merely a penalty.

The contract is free from ambiguity, and says, in so many words, that the sum mentioned shall be paid "as damages for nonfulfilment of contract," so there is no room for construction. *Lorius v. Abbott,* 49 Neb. 214. The intention is plainly expressed; and, if the contract as made is not against conscience or the policy of the law, it must be given effect according to the natural import of the words used. The cases are in considerable conflict, but are in substantial agreement upon the proposition that, when the damages are difficult or uncertain of ascertainment, the parties may liquidate them by contract. It is said: "The actual damages arising from the breach of a contract for the purchase of real estate have been frequently held to be of such an uncertain and unacertainable nature as to warrant the construction that a sum named to be paid on breach is liquidated damages and not a penalty." 17 C. J. 956, sec. 254. "It is in fact well settled that a contract for the transfer of land is of the kind of agreements open to a stipulation for liquidated damages." *Madler v. Silverstone* (55 Wash. 159), 34 L. R. A. n. s., note on page 8. And in the opinion it was held that in a contract for exchange of lands a stipulation for liquidated damages would be upheld, since "the damages suffered for the breach of the agreement are uncertain in their nature," and "the sum stipulated is not so disproportionate to the probable damages suffered as to appear unconscionable." The note in L. R. A., *supra,* contains a valuable discussion of the question. In the present case the price of the 800-acre farm was $32,000. In the absence of the provision quoted, the measure of damages would be the difference between that sum and its value in excess thereof. The writer recently tried a case where the damages to a city lot on account of taking a 14-foot strip off the front of it were estimated at $12,-

000 by plaintiff's witnesses and $2,500 by witnesses for the city—all qualified as experts; this illustrates the uncertainty surrounding such questions, and justifies a reasonable agreement by the parties in advance of breach. The sum of $500 is a reasonable amount, not in excess of the probable damages, considering the contract price and the subject-matter of the contract. As suggested by counsel for appellee in his brief: "If the witnesses should vary as much as $1 an acre in their testimony as to the value of this land, it would amount to $300 more than the parties provided should be paid upon default." The amount stated in the contract must be construed as liquidated damages. The cases from this state, *Gillilan v. Rollins*, 41 Neb. 540, and *Brennan v. Clark*, 29 Neb. 385, cited by appellant, are not in conflict with the views here expressed.

Judgment

AFFIRMED.

DAVID THOMAS, APPELLEE, V. STEPHEN JARECKI, APPELLANT.

FILED DECEMBER 30, 1922. No. 22188.

1. **Trial:** QUESTION FOR THE JURY. Where the state of the record is such that a verdict of the jury either way would be supported by sufficient evidence, the case should be submitted to the jury.
2. **Evidence:** EXCHANGE OF LANDS: RES GESTÆ. Where on an exchange of lands a real estate agent, with the full knowledge of both parties, acts for both, conversations between him and either party upon the subject of the trade are admissible as a part of the *res gestæ*.
3. **Brokers:** KNOWLEDGE OF BROKER. In such case, in the absence of fraud, knowledge of the agent of facts connected with the transaction is the knowledge of the principals.

APPEAL from the district court for Platte county: A. M. POST, JUDGE. *Reversed.*

Reeder & Lightner and *McElfresh & Walker,* for appellant.

Albert & Wagner, contra.

Heard before LETTON, ROSE, DAY and DEAN, JJ., REDICK, District Judge.

REDICK, District Judge.

The parties exchanged farms. Plaintiff sues to recover for a deficiency of 6 acres in the farm received by him, and defendant counterclaims for a deficiency of eight acres in the farm deeded by plaintiff. Misrepresentations as to the acreage are charged on both sides. One of the principal questions litigated was whether the respective sales were by the acre or by the farm; others were as to the fact of false representations, the reliance thereon, and whether or not they constituted the inducement for the trade. Trial to court and jury, and, after all evidence was in, the court instructed the jury to return a verdict for plaintiff; verdict was returned for plaintiff on the counterclaim, and for plaintiff for $928 on his claim; judgment on the verdict and defendant appeals.

A careful perusal of the record shows that the evidence warrants the drawing of different inferences and is therefore conflicting. It is too well settled in this state to require citation of authorities that, where the state of the record is such that a verdict of the jury either way would be supported by sufficient evidence, the question is for the jury. On the plaintiff's case there were at least three questions of fact which the jury should have been permitted to pass upon: (1) Whether the sale was by the acre or in gross; if the latter, then, (2) whether the deficiency in acreage was so great as to amount to a fraud; (3) whether plaintiff relied upon the recitals in the contract and deed as to the acreage and was thereby induced to make the trade. On the first question we think, on the record before us, a finding of a sale

by the acre would not be supported; but, upon the other two, reasonable minds might very well differ as to the proper inferences to be drawn from the testimony and the circumstances surrounding the transaction. The court erred in directing a verdict for plaintiff on his cause of action.

The defendant's counterclaim even more clearly presented questions for the jury: (1) Whether the representation was substantially false; (2) whether defendant relied upon its literal truth and was thereby induced to make the trade. Whether or not certain statements and representations were in fact made may be so clearly established as to justify the court in many instances in directing the finding of the jury on that point; but the questions of a party's reliance upon the representations, and to what extent, if at all, they induced him to enter into the contract, are of a much more complicated nature, depending for their proper solution upon a consideration of all the facts and circumstances shown in the evidence, and are seldom for the court. The counterclaim in this case should have been submitted to the jury.

Error is assigned upon the ruling of the court excluding evidence by appellant to the effect that he objected to the statement of 240 acres in the deed in a conversation with Byrnes when Thomas was not shown to be present. Byrnes was acting as agent for both parties with their full knowledge and consent, and conversations with Byrnes by either party were competent as part of the *res gestæ,* and for the purpose of showing actual knowledge of a material fact by either party, or constructive notice thereof, by reason of the agency. Mechem, Agency (1st ed.) sec. 67; *Pine Mountain Iron & Coal Co. v. Bailey,* 94 Fed. 258; 2 C. J. 872, sec. 552. The evidence should have been received.

For errors in not submitting the claims of the respective parties to the jury, the judgment is

REVERSED.

DRAINAGE DISTRICT NO. 2, DAKOTA COUNTY, APPELLANT, V. HENRY W. O'NEILL ET AL., APPELLEES.

FILED DECEMBER 30, 1922. No. 22194.

1. **Action:** DEMURRER: MISJOINDER. A demurrer for misjoinder of causes of action is properly sustained where the suit is brought on four distinct bonds, signed by different sureties, and where several judgments are prayed.
2. **Injunction:** CONDITIONAL DISSOLUTION: BREACH OF BOND. Where the pleadings in an injunction suit are not in the record by exhibit or allegation, so that the issues may be known, and the final order dissolving the injunction and dismissing the case was upon conditions thereafter to be complied with by defendants, and until compliance the injunction was to remain in force, *held*, not a sufficient decision that injunction ought not to have been granted in the first instance, to show a breach of the injunction bond.
3. **Appeal:** SUPERSEDEAS BOND: DAMAGES. Attorney's fees and cost of briefs are not proper elements of damages in an action upon a supersedeas bond given on a writ of error from this court to the supreme court of the United States, the same being governed by federal decisions, which disallow such items. *Tullock v. Mulvane*, 184 U. S. 497.

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

R. E. Evans, F. E. Gill and *Burkett, Wilson, Brown & Wilson*, for appellant.

Alfred Pizey, Jepson & Struble and *Sidney T. Frum, contra.*

Heard before MORRISSEY, C. J., FLANSBURG and ROSE, JJ., REDICK and SHEPHERD, District Judges.

REDICK, District Judge.

This is an action brought upon four separate and distinct bonds given in an injunction action brought against the drainage district by Henry W. O'Neill, Cornelius K. Heffernan, and Elizabeth Leahy, to enjoin the construction of an irrigation ditch across the lands of the plaintiff. The bonds are briefly described as follows: One

for $1,000 given upon the issuance of a temporary injunction and conditioned for the payment of all damages sustained by the defendant in case it should finally be determined that the injunction ought not to have been granted; one for $4,000, an additional bond required of plaintiffs containing the same condition; a supersedeas and appeal bond combined, given for the purpose of an appeal to this court, in the sum of $5,000, and containing the usual conditions; and a supersedeas bond in the sum of $2,000 for the purpose of prosecuting error to the supreme court of the United States, the conditions of which do not appear, and a copy of such bond not being in the record. Each of said bonds are signed by O'Neill and Heffernan as principals, and the first one by George A. Blessing and Barney Gribble as sureties, the second and third ones by Edward Mullally as surety, and the fourth one by Patrick Heenan as surety. The petition sets out by way of exhibit the final decree of the district court for Dakota county dissolving the temporary injunction and dismissing the case as to the plaintiffs O'Neill and Heffernan, and sustaining it as to plaintiff Elizabeth Leahy, and seeks to recover various sums for attorney's fees and expenses incurred in the defense of said injunction suit, the different items being allocated to the several bonds, and judgment asked upon each bond for the total amount referable thereto and against the respective parties signing each of said bonds. The petition contains no allegation that it had been finally determined that the injunction ought not to have been granted, other than as may be inferred from the language of the decree attached as an exhibit, to which reference will later be made. The petition does not set out the pleadings in the injunction suit, and we are therefore unable to determine the precise issues presented for decision. It is, however, alleged: "The sole purpose and object of said action being to enjoin and prevent the construction of the aforesaid drainage ditch and system." The appeals to this court and the supreme court

of the United States resulted in an affirmance of the judgment of the district court for Dakota county.

To the petition in this case the defendants O'Neill, Heffernan and Heenan, and the administrators of Blessing and Gribble, after certain motions had been disposed of, filed demurrers to the petition, only two grounds of which need be considered: First, that several causes of action were improperly joined in the petition; and, second, that the petition did not state facts sufficient to constitute a cause of action. The defendant Mullally makes no appearance, and we are unable to determine from the record whether or not he was served. The several demurrers were sustained generally by the district court, but whether upon one or both of the above grounds does not appear, and, plaintiff declining to plead further, the action was dismissed, and plaintiff appeals.

The demurrers on the ground of misjoinder were properly sustained. Section 8602, Comp. St. 1922, requires that all causes of action united in one petition must affect all the parties to the action; and it is perfectly clear that Blessing and Gribble were only affected by the cause of action on the first bond, they not having signed any other; Mullally was only affected by the second and third bonds, which he signed, and Heenan only by the fourth bond, the only one he signed. It is quite probable that these different defendants might have different defenses to the action upon the bonds which they signed respectively, and the code does not provide for separate judgments in different amounts against various defendants in this class of cases. See *Raapke & Katz Co. v. Schmoller & Mueller Piano Co.*, 82 Neb. 716; *Radcliffe v. Lavery*, 100 Neb. 31. Upon the sustaining of the demurrer for this ground, upon application of plaintiff, separate actions might have been docketed under section 8613, Comp. St. 1922, but no such request was made. However, as the judgment of the lower court may have gone upon the general ground, we will proceed to dispose of that question.

It is first contended by appellees that it nowhere appears in the petition that the damages set forth accrued in connection only with the defeat of the injunction; but, so far as the allegations go, they would appear to include the entire defense of the action. Of course, the recovery upon the bond is limited to damages accruing through efforts to defeat the injunction, and not the main case. *Trester v. Pike,* 60 Neb. 510. But the appellant contends that the allegation of the petition above quoted, to the effect that the sole object of the suit was to obtain an injunction, etc., is sufficient to entitle them to recover all the damages alleged. We are unable to accept this view, for the reason that it appears to us this is a mere conclusion of law reached by the pleader from an examination of the petition in the original action, and is not admitted by the demurrer. The original petition should have been attached as an exhibit, or such essential facts pleaded from which it could be determined what was the purpose of the action. *First Nat. Bank of Harvard v. Hockett,* 2 Neb. (Unof.) 512.

Appellees further contend with reference to the injunction bond that it had never been finally decided that the temporary injunction ought not to have been granted. We think this contention sound. In the early part of the decree appears the following with reference to the motion to dissolve the temporary injunction: "And the court being fully advised in the premises doth sustain said motion and said injunction is hereby vacated, dissolved and set aside except as to the land owned by the plaintiff Elizabeth Leahy;" and, again, "doth find upon the issue joined generally in favor of the defendants and against the plaintiffs, except as hereinafter expressly found in favor of the plaintiff, Elizabeth Leahy; to which findings the plaintiffs each separately except." But later on in the decree we find the following: "It is, therefore, considered, adjudged and decreed by the court that, when the defendants shall have paid the county judge or secured proper acquittance from the

plaintiffs, Henry W. O'Neill and Cornelius K. Heffernan, the amounts fixed by the awards made by said board of appraisers as due to said plaintiffs, Henry W. O'Neill and Cornelius K. Heffernan, respectively, the temporary injunction heretofore allowed and issued be and the same hereby is dissolved and this action dismissed; that as to the plaintiff, Elizabeth Leahy, said injunction shall be and remain in full force until," etc. It does not appear anywhere in the record that the condition upon which the injunction was to be dissolved has been complied with. and the decree is very far from deciding that the injunction was improperly issued in the first instance. The fact that the injunction was continued until the performance of certain conditions furnishes a strong inference that it was properly granted. If there was no good reason for allowing the injunction, why keep it in force until defendants comply with certain conditions? Here again we are in the dark for want of information as to the allegations of the petition for an injunction. We conclude, so far as the injunction bonds are concerned, that the demurrer was properly sustained on the second ground thereof.

What has been said sufficiently disposes of the questions presented as to all of the bonds, viewed as injunction bonds, but two of them also contain conditions appropriate to supersedeas or appeal bonds, and it remains to consider whether any cause of action is stated upon them in that character. So far as the third bond is concerned, in the penal sum of $5,000, $200 was to cover costs that might be adjudged against the appellee in that suit, but there is no allegation in the petition relative to this feature of the bond. The same statement is true with reference to the bond numbered four; so the only question with reference to that bond is whether the allegations of damage include items properly constituting elements of damage under the conditions of the bond. The bond is not set out, but it may be assumed that the condition was in the language of the statute, "if he

failed to make his plea good, shall answer all damages and costs." We are of the opinion that the allegations of damage do not represent proper items. They are (1) attorney's fees and expenses; (2) cost of briefs; (3) for meetings and work had by the board of supervisors costing $413.30. As to the first two items, the bond having been in a proceeding in the federal court and in compliance with a statute of the United States, the construction, effect and liability upon the bond is controlled by the federal decisions, as was expressly held in *Tullock v. Mulvane,* 184 U. S. 497, which also distinctly holds that upon bonds of this character attorney's fees are not recoverable as damages, and we think that other expenses connected with the prosecution of the suit, such as cost of briefs, fall within the same principle. The other allegation of damage connected with the fourth bond is not set out with sufficient clearness to warrant the court in affirming that it constitutes a proper item.

It is suggested by appellees that the fact that the injunction was made permanent as to the plaintiff Leahy is sufficient of itself to negative the proposition that the injunction was wrongfully obtained, but we think that sufficient appears in the record to show that the facts of her claim with reference to her individual lands were of such a different character from those connected with the other plaintiffs' cause of action, so far as we are able to conjecture them from the record, that this proposition cannot be sustained.

One other question should be noticed. The action is brought against the administrators, respectively, of the estates of Blessing and Gribble, who died pending the injunction suit, and the point is made that they are not subject to a suit in their representative capacity for the recovery of money only. The point is well taken. Comp. St. 1922, sec. 1374.

It results from the above considerations that the decree of the district court must be affirmed.

AFFIRMED.

WALTER BAKER V. STATE OF NEBRASKA.

FILED DECEMBER 30, 1922. No. 22729.

1. **Criminal Law:** INFORMATION: ELECTION. Whether the attorney for the state shall be required to elect between different counts of the information is a matter resting in the sound discretion of the court, for an abuse of which only may error be assigned.
2. **Forgery:** STATUTES: REPEAL BY IMPLICATION. Chapter 296, Laws 1921, commonly known as the fraudulent check act, did not repeal by implication the statute of forgeries as applied to checks.
3. **Criminal Law:** INSTRUCTIONS: ALIBI. Where all the evidence presented by defendant refers to the one defense of alibi, an instruction beginning, "You are instructed that the defense in this case is what is known as an 'alibi,'" is not prejudicially erroneous.
4. ———: ———: REASONABLE DOUBT. A definition of reasonable doubt, in an instruction, requiring it to be a doubt for which the jury can give a reason, is erroneous, but in this case *held* not prejudicial.

ERROR to the district court for Adams county: WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

J. E. Willits, for plaintiff in error.

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

Heard before MORRISSEY, C. J., FLANSBURG, ALDRICH, LETTON and DAY, JJ., REDICK, District Judge.

REDICK, District Judge.

This is a prosecution for forgery, wherein the defendant was charged with forging and uttering four different checks at different times in separate counts, but the fourth count was dismissed, and defendant was tried and convicted on the three remaining. Some 45 errors are complained of, many of which are hypercritical and absolutely without merit. We have examined the record and the briefs with great care and find only the following questions in the record which require consideration.

1. After the evidence of the state had been received, the defendant moved to require the county attorney to elect upon which count in the information he would rely for a conviction, and the overruling of this motion is alleged as error. The cases of *Korth v. State,* 46 Neb. 631, *Bartley v. State,* 53 Neb. 310, and *Sheppard v. State,* 104 Neb. 709, hold that whether or not the state shall be required to elect between different counts of an information is a matter resting in the sound discretion of the trial court, "the determining question in each case being whether defendant has been embarassed or confounded in his defense." It does not appear in this case that the defendant suffered any embarrassment by reason of the refusal of the court to require an election, and, therefore, no abuse of discretion on the part of the court is shown. Plaintiff in error cites a number of cases to the point that, "when evidence has been introduced tending directly to the proof of one act and for the purpose of securing a conviction from it, an election is regarded as made of that act." But where those cases sustain the proposition, as some of them do, they were for prosecutions charging only one crime, *e. g.,* adultery, or sale of intoxicating liquors, and it was held that under such a charge, the state having introduced evidence of one act, it had elected to rely thereon, and could not be permitted to introduce evidence of other acts of the same character. They are not applicable here; the defendant in this case was sentenced as only upon one count.

2. The subject of the several forgeries being checks upon banks, it is claimed that they do not constitute forgeries, but merely offenses, under the fraudulent check act of 1921, chapter 296, Laws 1921, and that the latter act repealed by implication the forgery statute so far as checks were concerned. The fraudulent check act merely made it an offense to issue a check or order for the payment of money, upon any bank, knowing that the maker had no sufficient funds in or credit with such bank for the payment of such check in full. This was a new and

distinct offense and many of the elements of the crime of forgery are not included therein. While there may be many cases in which it may be proper to prosecute either for forgery or issuing a fraudulent check, there are no cases in which only the elements of the latter crime are present which would warrant a prosecution for forgery; there is, therefore, no such repugnancy between the two statutes as to bring about a repeal by implication.

3. An affidavit sworn to before the county attorney by defendant while in jail, in which he stated that his true name was Walter Baker, and that he never went by the name of Charles R. Smith, or Clifford R. Smith, or Charles M. Smith, or Charles M. Whyte, was received in evidence over objection of defendant, that no proper foundation had been laid, and it was incompetent, irrelevant and immaterial. There was no direct evidence that the statement was made voluntarily, though, of course, he was under no obligation to make the affidavit, but he was under arrest at the time. However, defendant pleaded under that name without any suggestion that it was not his true name—the record shows that he signed an affidavit for process in that name and gave that name to the sheriff when he was arrested, which evidence was received without objection. Under these circumstances any error in receiving the affidavit was without prejudice.

4. Instruction No. 10 is criticized. It begins: "You are instructed that the defense in this case is what is known as an 'alibi.'" Defendant claims that thereby he was limited to that one defense. An alibi necessarily, from its very nature, denies every other fact charged, and it would have been better to have said "one of the defenses is an alibi," or words to that effect; but the statement was *literally* true; defendant produced no evidence on any other subject; he did not offer himself as a witness, nor call his wife in support of the alibi, although all his witnesses put them together at the places they claimed

to have seen him. Under this state of the record, we do not think the instruction erroneous; but, if so, it was clearly without prejudice. Other objections to this instruction are without merit.

5. Instruction No. 12 is as follows: "The jury are instructed that any defendant is presumed to be innocent until he has by sufficient proof been proved to be guilty, and it is the duty of the jury to give to the defendant the full benefit of this presumption and acquit him, unless the jury, from the evidence, believe that he has been proved guilty in manner and form as charged in the complaint, beyond a reasonable doubt."

It is urged that by this instruction defendant was deprived of the benefit of the presumption *as evidence.* While the instruction would be clearer if it were stated that the presumption was matter of evidence in favor of the defendant, the jury were told that it was their duty "to give to the defendant the full benefit of this presumption," etc., and we do not think it was prejudicial error. *Bartley v. State*, 53 Neb. 310; *Garrison v. People,* 6 Neb. 274.

6. Instruction No. 13 reads: "You are instructed that a reasonable doubt is what the word implies—a doubt founded in reason; a doubt for which you can give a reason; a doubt growing out of the testimony in the case, or lack of testimony; a doubt which would cause you to hesitate in the ordinary affairs of life. It is not a flimsy, fanciful, fictitious doubt which you could raise about anything and everything. It means a reasonable doubt. If, when all is said and done, you have such a doubt about the guilt of the accused, it is your duty to acquit him."

The objection goes to the phrase, "a doubt for which you can give a reason." That an instruction which requires that the jury be able to give a reason for the doubt which they may have is erroneous is decided in *Cowan v. State,* 22 Neb. 519, *Carr v. State,* 23 Neb. 749, and *Childs v. State,* 34 Neb. 236; and in the first of those

cases the error was held to be calculated to mislead; in the other two the question of prejudice was not referred to. Since those decisions, in 1921, the legislature passed an act, the material provisions of which are as follows:

"No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Comp. St. 1922, sec. 10186.

This statute was passed in response to a quite general demand that the strict rules of the common law through which the prisoner in many instances escaped or the prosecution was unreasonably delayed, by reversals upon merely technical grounds, should be modified, and power given to the courts to disregard errors and imperfections in the proceedings, when it appears from the record that the substantial rights of defendant have not suffered thereby. We think, under this statute, it is the duty of this court, in every case where error is shown, to determine this question of prejudice before reversing the judgment. A careful perusal of the record convinces us that the result would not have been different if a technically correct instruction had been given; and, indeed, taking the objectionable words in connection with the context and reading the entire instruction together, they appear to be absolutely harmless.

The evidence convicts the defendant of the crime charged beyond peradventure of a doubt, and we would not be justified in reversing the judgment under these circumstances.

AFFIRMED.

MARIE VASKO, APPELLANT, V. EDWARD W. HERMANSKY ET AL., APPELLEES.

FILED DECEMBER 30, 1922. No. 22153.

1. **Bills and Notes:** FAILURE OF CONSIDERATION. In a case where the consideration of the notes sued upon was the assignment of a lease which the payee of said notes did not make, and was unable to make, the consideration of the notes failed, and no recovery can be had thereon.

2. **Appeal:** CONFLICTING EVIDENCE. When the evidence upon the question in issue is substantially conflicting, the verdict of the jury will not be disturbed as unsupported, unless upon the whole record it is clearly wrong. *Held*, in this case, that the evidence adduced was sufficient to sustain the decision of the trial court.

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

B. N. Robertson, for appellant.

Gray & Brumbaugh and *John M. Macfarland, contra.*

Heard before MORRISSEY, C. J., DAY, FLANSBURG and ROSE, JJ., SHEPHERD, District Judge.

SHEPHERD, District Judge.

This is an action on certain promissory notes for $1,000. The defense was on plea of general denial, fraud and failure of consideration. Upon the conclusion of the trial, the cause was submitted to the court, which found for the defendant. Only two assignments of error are presented: The evidence is not sufficient to sustain the judgment; the judgment is contrary to law. The appellant was the plaintiff below, and the appellee the defendant. They will be called plaintiff and defendant, as there.

It seems that Joseph Vasko, Senior, and Joseph Vasko, Junior, held a lease from Rome Miller on the Millard Hotel, which they were in danger of forfeiting because a car-load of beer had been found there. With the consent of Miller, who feared that his hotel might be con-

demned, they assigned said lease to one John Chadek, the son-in-law of Joseph Vasko, Senior, who agreed to run it properly. Shortly afterward, while retaining their possession apparently as before, Joseph Vasko, Junior, entered into a contract with Edward W. Hermansky to operate the hotel as partners, and Vasko, Senior, made and delivered to the latter a bill of sale of his half interest in the business, including lease, two cash registers, an adding machine, two match machines, a stamp machine, a lot of silverware, and all stationery, coal, provisions and other things on hand. The consideration for this bill of sale was $1,000 in cash, which was paid down by Hermansky, and the three notes in suit, which were then executed and delivered. These three notes were soon after indorsed and delivered by said Vasko, Senior, to his wife, the plaintiff, Marie Vasko. A provision of the described bill of sale was as follows: "And it is further agreed that the second party (Hermansky) will release the first party (Vasko) from a certain lease to Mr. Rome Miller on the said above hotel building and certain contents." When Hermansky applied to have the lease made over to him, he found that it had been transferred to the said Chadek, and that Rome Miller would not permit it to be assigned to him, and would not recognize him as in any respect a lessee.

The plaintiff concedes the general application of the rule, so often declared by this court, that it will not upon review disturb the finding of fact of a jury or of the trial court, unless the same is obviously and unquestionably wrong; but his contention is that, because of the quoted provision of the bill of sale, and because of the transfer to the defendant of certain particular property which the plaintiff had a right to convey, *i. e.*, the cash registers, the stamp machine, the two match machines, the adding machine, the silverware, stationery, coal and provisions, the decision of the district court was necessarily wrong and must so be adjudged as a matter of law.

The evidence was sufficient to establish that the plain-

tiff was not an innocent purchaser and *bona fide* holder of the notes in suit. And it was also sufficient to establish that Rome Miller and his agent and attorney, Macfarland, absolutely refused to permit the transfer of the lease to Hermansky. We must take these two questions as properly decided in favor of the defendant by the judgment of the lower court, though it was the contention of the plaintiff that, upon the interview in regard to obtaining the said transfer of said lease, Miller was willing to approve the same, provided that Vasko, Senior, was not released. There was conflicting evidence upon this point, and, following said well-known rule, this court will not disturb the finding of the trial court. We must also find upon the same ground that Joseph Vasko, Senior, had no interest in the described lease to convey, for two reasons: First, because he had transferred the same to his son-in-law, Chadek; and, secondly, because by the terms of the lease no transfer of his interest could be made without the consent of the lessor, Rome Miller, which the latter refused to give. This being the case, and considering the matter in the light of the surrounding circumstances and in connection with the situation of the parties and what they did in the transaction, we are inclined to construe the quoted language of the lease as no more than an agreement on the part of the defendant to stand between Miller and said Joseph Vasko, Senior, and hold the latter harmless from further liability on the lease. Such being our interpretation, the law cited by the plaintiff may be conceded without reversal of the judgment.

A more serious point is the contention of the plaintiff that the defendant received some consideration apart from the lease in the articles conveyed to him as above enumerated. By the terms of the above mentioned bill of sale Vasko, Senior, was conveying to him, not only his half interest in the lease, but his half interest in said enumerated articles. It is not clear from the record what disposition was made of said personal property. So far

as can be ascertained, it remained in the hotel where it was at the time that the bill of sale was made, and it continued to be used in the conduct of the hotel, as then and before. Nor does it appear that it was ever removed therefrom or that the defendant ever reduced it to his manual possession. It is true that, following the execution of said bill of sale, the hotel was operated under the name of Vasko & Hermansky, Hermansky being represented in its management by a John F. Kroupa who worked along with Joseph Vasko, Junior, in looking after the same. Hermansky was occupied with the conduct of his own drug business in one of the storerooms of the building, and seems to have let things drift along until about two months after the execution of the said bill of sale, when matters came to a climax by the refusal of Miller to permit the assignment of the lease. Then, not being able to obtain said assignment, he called the deal off and demanded the return of his notes.

Not only does he testify that he could not get an assignment of the lease, but he also swears positively that he never received any consideration whatever for the notes or for the $1,000 in cash which he paid at the time that he executed the same. In any event, it is quite certain that the value of a one-half interest in the enumerated articles of personal property was well within the $1,000 which he paid. Considering these facts and circumstances, we cannot say that the district court was not justified in finding from the evidence that the entire consideration of the notes was the transfer of the lease in question, and that, not receiving the agreed assignment of the lease, the consideration of the notes failed *in toto*.

If the consideration of a note fails, no recovery can be had upon said note by the payee thereof or by his indorsee, unless such indorsee be an innocent and *bona fide* holder. *Warder, Bushnell & Glessner Co. v. Myers*, 70 Neb. 15; *Johnson v. Chilson*, 29 Neb. 301; *Newton Wagon Co. v. Diers*, 10 Neb. 284.

There was sufficient evidence from which the trial court might properly find, as it evidently did, in favor of the defendant on all the points raised. And where there is sufficient evidence to sustain the verdict of the trial court, this court will not undertake to reverse its judgment, unless the same is manifestly wrong.

AFFIRMED.

DAN EGAN, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED DECEMBER 30, 1922. No. 22176.

1. **Carriers:** INJURY TO LIVE STOCK: BURDEN OF PROOF. "In an action to recover damages from a carrier for injury sustained by live stock in transit, which are accompanied by the owner or his agents, the burden is on the owner to show that the loss complained of was occasioned by the carrier's negligence." *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166; *Starr v. Chicago, B. & Q. R. Co.*, 103 Neb. 645.
2. **Parties:** MISJOINDER. The transporting railroad company may not properly be joined with the director general of railroads in an action against the latter for injury to stock or property in transit; and whenever in the course of the proceedings the question of such improper joinder is raised, the court should recognize its lack of jurisdiction and sustain the motion of the railroad company to dismiss it from said action.

APPEAL from the district court for Grant county: BAYARD H. PAINE, JUDGE. *Reversed.*

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

Daniel F. Osgood, contra.

Heard before MORRISSEY, C. J., DAY, FLANSBURG and ROSE, JJ., SHEPHERD, District Judge.

SHEPHERD, District Judge.

A car of stock was shipped by the plaintiff from Hyannis to South Omaha on or about the 2d day of

November, 1919, the shipper sending a caretaker along to look after the said stock. The caretaker last saw the cattle at or near Seward, Nebraska, when they were standing up and apparently in good condition. When the shipment was unloaded at Omaha, two of the cows were found to be cripples and had to be removed from the car and disposed of as such, to the plaintiff's damage in the sum of $106.70. The action is upon the assumption that the railroad company must be presumed liable for all injuries to stock in transportation, except those arising from the act of God, or the public enemy, or from the natural propensities of the animals. The answer of the company was that a caretaker was in charge, and that, such being the case, said presumption does not obtain, and that unless the injuries relied upon are proved to have resulted from the negligence of the company the owner cannot recover. The contention of the plaintiff in reply was that the act of 1915, requiring railroad companies to transport caretakers with shipments of stock upon the consideration charged for such shipments, disposes of the defense so pleaded by said company.

The determining question seems to be whether or not the enactment of the legislature, Laws 1915, ch. 106, sec. 1, is of such force as to change the rule relieving the company of the burden of the described presumption in those cases where the shipper sends a caretaker with the stock. And the argument of the plaintiff seems to be that, before the said enactment was passed, the carrying of a caretaker by the company was a sufficient consideration from company to shipper to make valid an agreement between the parties that, by sending his caretaker along without extra expense to him to care for his stock, the shipper released the company from the burden of such presumption, and took upon himself the burden of proving that any injury happening to the stock in transit was chargeable to the negligence of the company.

We cannot see how the statute has any such effect, and the previous decisions of this court relieving the company from any such presumption where a caretaker was in charge have been upon an entirely different theory. This theory is well set out in *Starr v. Chicago, B. & Q. R. Co.*, 103 Neb. 645:

"The common-law rule, making the carrier an insurer of goods in its hands for transportation, arose from the practical impossibility of shippers proving how the goods were lost. Frauds and collusions were easily practiced but hard to prove. The shipper parted entirely with his possession and control, and the carrier could pretend a robbery or accident which had not happened. In course of time the original rule was modified in certain particulars. Not only were losses occasioned by the act of God or public enemy excepted, but certain losses due to the natural propensities of the animal being shipped were also excepted. When, by agreement of the parties, the animals shipped were attended by a caretaker, this furnished another ground for an exception to the original rule, because in such case it might be more the duty of the caretaker to anticipate and prevent the particular injury than it would be the duty of the carrier. Accordingly, the common-law rule, as applied to such a case, appears to be as announced by this court in *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166, as follows: 'In an action to recover damages from a carrier for injury sustained by live stock in transit, which are accompanied by the owner or his agents, the burden is on the owner to show that the loss complained of was occasioned by the carrier's negligence.' "

We think that this case rules the case at bar, and that, since the plaintiff sent his caretaker along, the defendant company was relieved from the burden of the common-law presumption. No evidence is introduced by the plaintiff tending to show that the company was in any wise negligent in transporting the stock in question. It is true that when the stock was loaded it was

in good condition, but without the presumption under consideration the plaintiff has nothing upon which to base a recovery.

There is some evidence that when the train arrived at Omaha the caretaker, along with other caretakers accompanying other shipments of stock, was told to get off and to go ahead to the viaduct. But there is no evidence whatever that he was denied the privilege of accompanying his stock to the stock-yards, and, in any event, the question of being prevented from doing his duty efficiently as a caretaker is not in any wise raised by the pleadings. Such being the fact, the judgment of this court must be in favor of the defendant. There was error in the decision of the trial court, and its judgment must be reversed and the action dismissed.

The cross-appellee, the Chicago, Burlington & Quincy Railroad Company, contends that it was improperly joined with the director general of railroads. This contention is manifestly sound; and when its objection was raised it should have been sustained. Perhaps that objection should have been presented to the court at the outset, and not after the case had been appealed, but wherever the objection is jurisdictional and the court finds that it is without jurisdiction to hold a case, or a party thereto, it is the manifest duty of the court to take notice of it and to act accordingly. That the railroad company cannot be joined in the same action with the director general of railroads is well settled. *Hines v. Dahn,* 267 Fed. 105; *Missouri P. R. Co. v. Ault,* 256 U. S. 554. On this account alone, the Chicago, Burlington & Quincy Railroad Company should be, and is, dismissed.

It is doubtful that shippers get any good from the act of the legislature permitting them to send a caretaker with their shipments of live stock without extra charge. This is certainly so unless the caretaker is of exceptional efficiency, and ready and able to do a thorough-going job of looking after the stock while in transit, something that is often of no small difficulty. Where

the caretaker accompanies the stock, the railroad company will not be subject to the presumption that injury to said stock occurred by its negligence; and, if relief from the condition which now obtains is to be had at all, it should be had at the hands of the legislature and by legislative enactment which shall squarely rest the common-law liability upon the carrier.

REVERSED AND REMANDED.

FLOYD C. ROBERSON, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 30, 1922. No. 22195.

1. **Master and Servant:** INJURY TO EMPLOYEE: RIGHT OF RECOVERY. Neither the federal employers' liability act of 1908 (U. S. Comp. St. 1918, sec. 8661), nor section 6055, Rev. St. 1913, destroys the contract of the Burlington voluntary relief department, though both of them affect such contract to the extent that the acceptance of relief benefits by an injured member of such department shall not preclude him from bringing an action against the Chicago, Burlington & Quincy Railroad Company for his damages, the terms and conditions of said contract notwithstanding.
2. ———: ———: ———: RELIEF BENEFITS. A Chicago, Burlington & Quincy Railroad Company employee who is a member of the company's voluntary relief department, and who has been injured in interstate commerce, cannot recover relief benefits, contrary to the provisions of his contract with such department, after he has sued for, recovered and collected a judgment against the company for his damages resulting from such injury.

APPEAL from the district court for Webster county: WILLIAM A. DILWORTH, JUDGE. *Reversed and dismissed.*

E. E. Whitted, P. E. Boslaugh and *J. L. Rice,* for appellant.

Bernard McNeny, contra.

Heard before MORRISSEY, C. J., DAY, FLANSBURG and LETTON, JJ., SHEPHERD, District Judge.

SHEPHERD, District Judge.

The parties will be designated plaintiff and defendant as in the court below. Plaintiff was injured in 1915 while employed as a brakeman in interstate commerce by the defendant company. He took Burlington relief benefits, being a member of the relief department, for about a year; and he then brought suit for his damages sustained by reason of his injury, and recovered a judgment for $5,000, which the company paid in full. The present action is to recover the remainder of his relief benefits. The company defended on the following grounds: That he was not disabled during the time for which he claims benefits; that, if he was under disability during such time, he is barred of a right to recover such benefits under the law and the relief department regulations, because (1) he brought a damage suit and recovered and collected; because (2) he removed to other states without the medical examiner's written approval; because (3), his alleged disability is a sickness disability following accident, etc.; and because (4) he failed to appeal to the advisory committee of the department from the decision of the superintendent denying his right to further benefits. There are express provisions in the regulations of the Burlington voluntary relief department which by their terms, and according to the evidence adduced, completely sustain these defenses, if they are legally binding and operative. The case was tried to the court without the intervention of a jury, and the court found in favor of the plaintiff and gave him judgment against the defendant in the full amount claimed. Upon this appeal the defendant duly raises the above enumerated contentions and assigns the adverse ruling of the district court on each of the same as error.

On the first of these contentions no time need be taken. The trial court found upon sufficient evidence that the plaintiff was under disability during the time

for which he claimed benefits, and its judgment in that behalf must stand.

But the provisions of plaintiff's contract for relief benefits specifically state that, if he brings suit for damages, he shall forego such benefits. A clause of his signed application for membership in the Burlington relief department is in these words: "I also agree, * * * further, if any suit shall be brought against said company * * * for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable and all obligations of said relief department and of said company created by my membership in said relief fund shall thereupon be forfeited without any declaration or other act by said relief department or said company."

It is not necessary to review Burlington litigation in Nebraska. Suffice it to say that this court has consistently held the contract of the relief department good, and that the injured employee must forego his relief and take his damages or take his relief and forego his damages. The cases will be found collected and discussed in *Clinton v. Chicago, B. & Q. R. Co.*, 60 Neb. 692; *Oyster v. Burlington Relief Dept. of C., B. & Q. R. Co.*, 65 Neb. 789; *Chicago, B. & Q. R. Co. v. Bigley*, 1 Neb. (Unof.) 225; *Walters v. Chicago, B. & Q. R. Co.*, 74 Neb. 551; *Chicago, B. & Q. R. Co. v. Healy*, 76 Neb. 786; *Koeller v. Chicago, B. & Q. R. Co.*, 88 Neb. 712. It so held from the beginning down to the *Koeller* case, though some exception was made in the above cited *Healy* case because of the penalty feature involved, and again in a case or two where it was considered that a widow administratrix who had accepted benefits did not do so for the children of the deceased to such an extent as to deprive them of their separate right to an action for damages. In no case has it held that benefits could be had from the company after damages had been sued for, recovered and collected.

In the *Koeller* case, *supra*, such recovery and collec-

tion had been had and the action was for some $1,900 of relief benefits. Reversing the judgment below, the supreme court reaffirmed the doctrine of its prior decisions and denied benefits to the plaintiff.

However, the contention of the appellee is that the federal employers' liability act of 1908, and more particularly section 5 of said act, changes the situation and justifies his recovery of benefits, even though he has collected damages. The section referred to is as follows:

"That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void; provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." U. S. Comp. St. 1918, sec. 8661.

This law applies because the injury in question arose in interstate commerce, as heretofore stated. It clearly appears from the language employed that the Burlington relief contract with the plaintiff could not operate to preclude the latter from a resort to his action for damages. But that seems to be the extent of its effect on said contract if common and ordinary meaning is given to the words used. "To exempt itself from any liability created by this act" is the expression of congress. And the liability so created was the liability to respond in damages for injury suffered. The act limits the contract in that respect alone. The contract shall "to that extent be void." If congress had intended to provide also that the contract should be ineffectual to exempt the carrier from the payment of benefits when damages had been recovered and collected, it would have said so.

True it is that Minnesota, in *Wise v. Chicago, B. & Q.*

R. Co., 133 Minn. 434, held in accordance with appellee's contention. But, as pointed out in the brief of the appellant, the decision in that case proceeds upon the authority of two other cases, one of which, *Philadelphia, B. & W. R. Co. v. Schubert,* 224 U. S. 603, was to the effect simply that an acceptance of benefits would not, under said act, preclude the injured employee from bringing an action for damages; and the other of which, *Rodell v. Relief Dept. of C., B. & Q. R. Co.,* 118 Minn. 449, held that the giving of the release required by the relief regulations to be given by one who accepts full benefits could not be enforced, as it would be opposed to said section 5 of the federal act. The first of these cases is not at all valuable as affording a basis for the *Wise* decision, while the support of the latter is but frail and uncertain.

For two reasons, it seems to us, the Pennsylvania doctrine in *Getkin v. Pennsylvania R. Co.,* 259 Pa. St. 150, is to be preferred and followed: First, because it is sound from the viewpoint of simple and direct reasoning; and, secondly, because it is in consonance with the trend of Nebraska opinion. The facts were practically identical with those in the instant case. The court in dealing with the act said:

"But the only liability created by the act is for damages to persons suffering injury while employed by a common carrier engaged in interstate commerce. Any regulation, therefore, which enables a carrier to exempt itself from a claim for damages for injury received under the conditions mentioned is void. If the plaintiff had received payment of the benefit certificate prior to bringing suit for damages, the stipulation in the contract of membership in the relief fund could not have been permitted to defeat the right to recover damages. It is provided, however, in the act of congress, that, in such action for damages brought against a common carrier, the carrier may set off therein any sum it has contributed or paid to any insurance, relief benefits, or indemnity that may have been paid to the injured employee or the person

entitled thereto on account of the injury or death for which said action was brought. It is, therefore, apparent that, by the act in question, congress did not intend that there should be both payment of benefits and a recovery of damages for the injury, at least in so far as payment for both was to be made by the same defendant. In the matter of payment here, counsel for appellant seek to distinguish between the defendant company and the beneficial association, which is merely a department or bureau of the defendant company. But the benefits are demanded from the company, and the suit to compel their payment is against it. If plaintiff is right in seeking to hold the company responsible for the payment of the benefits, it is difficult to see why it should not be credited with their payment when made. However, that question is not important here, as there is no attempt by defendant to set off any sum against the amount to which the plaintiff was entitled as damages. Defendant is merely standing upon the terms of the contract under which the benefit certificate was issued.

"The present suit is not an action for damages for injuries sustained. As has already been stated, such an action was actually brought and tried in another forum, and this plaintiff, as administratrix of her husband, did in that action recover for her benefit and that of her children, if any, damages in the sum of $7,161. So that no question of exemption or release from the payment of damages, by reason of the acceptance of benefits, can arise in this case, and there is no occasion to invoke in that respect the provision of the act of congress. The present claim is based entirely upon the contract of membership in the relief association, and that contract contains a clear stipulation that the recovery of a judgment in a suit for damages on account of injury or death of a member shall preclude any claim upon the relief fund for benefits on account of such injury or death. The relief fund provides protection for its members in case of sickness or accidental injury where there may be no legal

liability upon the part of the defendant company. And where there is such liability, the beneficiary has the option of accepting the sum payable under the terms of the benefit certificate, or of instituting legal proceedings, with the possibility of recovering a much larger sum, as did the plaintiff in the present case. But, under the terms of the contract, the funds of the beneficial association are not to be depleted by the payment of benefits in a case where damages are recovered for the injury or death of a member. As such a recovery was had in the present case, we think the court below was fully justified in overruling the motion for judgment for want of a sufficient affidavit of defense."

That the decision above quoted from at such great length is consonant with the trend of Nebraska opinion is patent. We have before adverted to the fact that the decisions of this court have always tended to sustain the contract and to respect elections thereunder. It is not now disposed to void it or hold it for naught, except as it is expressly voided and held for naught by legislative act. Such is the view of the Pennsylvania opinion. Moreover, at the time that the *Koeller* opinion, *supra,* was handed down, the relief contract in question was subject to a state legislative enactment passed in 1907, which was of practically the same effect as the federal statute which we have been considering:

"No contract of employment, insurance, relief benefit or indemnity for injury or death entered into by or on behalf of any employees, nor the acceptance of any such insurance, relief benefit or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee; provided, however, upon the trial of such action against any common carrier the defendant may set off any sum it has contributed toward any such insurance, relief benefit or indemnity that may have been paid to the injured employee, or, in case

of his death, to his personal representative." Rev. St. 1913, sec. 6055.

This was the "recent legislation" which the late Justice Sedgwick had in mind in his concurring opinion in the *Koeller* case. He wrote as follows:

"It may be said that there is some reason for contracting on the part of the employee, that all damages that he has suffered on account of the injury having been paid by the company and received by him, the relief benefit provided for in the contract shall be considered to be thereby satisfied. This seems to be the idea of the recent legislation which provides that in case relief benefits have been paid and received by the employee that fact shall not be a bar to an action for damages suffered, but such payments of relief benefits shall be considered as part payment of the damages suffered and may be offset in a suit to recover such damages. The force of our former decisions, from which we have refused to depart without action by the legislature, and in which it has been held that full payment and receipt of all damages will satisfy all claims upon the relief fund, has been much strengthened by the fact that the legislature, with full knowledge of these prior holdings, and while legislating upon the general subject, has refused to change the rule established by this court. Comp. St. 1909, ch. 21, secs. 4, 5. This rule, then, still remains and has application to this case, in which the plaintiff has recovered judgment for damages suffered by reason of the injury, and has received full payment from the company."

Nebraska and Pennsylvania are thus seen to have looked at the question from the same viewpoint and to have arrived at similar conclusions. The present claim is founded upon contract for relief benefits between the employee, appellee, and the company, appellant, which contract contains the plain proviso that bringing suit and recovering and collecting damages for his injury shall preclude him from relief benefits. This contract

stands unaffected by the act of congress invoked. He was not entitled to the recovery of benefits awarded by the judgment of the district court, and such judgment must be reversed and the action dismissed at the costs of the appellee. So holding, it will not be necessary to extend this opinion by a discussion of the other questions presented in the briefs.

REVERSED AND DISMISSED.

RILEY SMITH V. STATE OF NEBRASKA.

FILED DECEMBER 30, 1922. No. 22764.

1. **Criminal Law**: VERDICT: CONFLICTING EVIDENCE. Where the evidence is conflicting, the verdict and judgment of the trial court will not be disturbed if it appears from an examination of the record that such evidence is sufficient to sustain the same. *Held*, in this case, that the evidence was sufficient to sustain the verdict.
2. ———: REFUSAL OF CONTINUANCE. Wide discretion is vested in the trial court on application for continuance filed on the eve of trial. No reversal should be had in this court for the refusal of a trial court to grant a continuance upon application of a defendant, unless there has been an abuse of sound legal discretion on its part. *Dilley v. State*, 97 Neb. 853.
3. ———: ASSISTING COUNSEL. Assisting counsel may be appointed in a felony case at the instance of the county attorney and under the direction of the court.
4. **Robbery**: STATUTE: CONSTITUTIONALITY. Section 9622, Comp. St. 1922, is not unconstitutional, and makes a felony of entering a bank in a building and doing violence therein with intent to steal, take or carry away any of its money or property.
5. **Information**: SURPLUSAGE. "Where words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential averments therein, they may be treated as surplusage, and be entirely rejected." *Hase v. State*, 74 Neb. 493.
6. **Robbery**: INFORMATION. Under section 9622, Comp. St. 1922, the actual taking of any money or property is not of the essence of the charge. The felony created by the statute lies in the violence of or against the bank, coupled with the intent to steal,

take or carry away. Consequently, the information need not contain an averment that there was money or property in the bank.

ERROR to the district court for Saunders county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Jamieson, O'Sullivan & Southard and *John H. Barry,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., DEAN, FLANSBURG, LETTON and ROSE, JJ., SHEPHERD, District Judge.

SHEPHERD, District Judge.

Riley Smith was convicted in the district court for the fifth judicial district of entering a bank and intimidating its employees with intent to steal, etc. His conviction was upon the identification of the bank's cashier and of a young lady bookkeeper, coupled with circumstantial evidence tending to connect defendant with the crime. And while some of the members of the court might question, were the case before them as finders of the facts, that the proof of his guilt was beyond reasonable doubt, the majority of them agree that it is sufficient to sustain the verdict of the jury upon review. It remains to consider whether there is otherwise reversible error in the record.

Error is assigned because the trial court refused to give the defendant a continuance on account of his alleged inability to procure the attendance of Mr. and Mrs. Brown as witnesses in his behalf. The showing which he files in this connection is by no means frivolous. It states that these persons were with him at a farm house nearly ten miles away at the time that the bank was robbed. Their testimony would thus tend to establish a complete alibi. The showing also sets forth that, according to the state's theory, the said Brown was supposed to be defendant's partner in the hold-up (there

were two gunmen together in the bank), and that confrontation by him upon trial would greatly assist the defendant in his defense. Taking the defendant's undisputed affidavit for it, Brown and his wife were undoubtedly material witnesses. Yet on the alibi, which was a matter of chief defense, their testimony would have been merely cumulative. Defendant had, as it was, some six witnesses who testified to practically the same state of facts which he would have attempted to prove by them. One of the essential averments of a showing for continuance is that the thing to be testified to by the absent witness cannot be proved by the testimony of any other witness. A showing that cumulative evidence can be had by the delay requested is not ordinarily enough to compel a continuance.

It is apparent, too, when the record is read, that the notion that the state's theory was that Brown, rather than Boyd or some one else, was the second gunman in the robbery was more fancied than real. And it is also probable that the chances of identification or nonidentification upon confrontation would have been about equal. However, conceding that Brown was most necessary as a witness for the defendant, the failure to have him present at the trial must be charged to the defendant's own fault. It affirmatively appears in his affidavit that he told him that the trial would not occur until fall, and allowed him, if he did not encourage him, to drop out of sight. Nor does it appear that he made the proper effort to find him and have him present. The trial judge did not abuse his discretion in overruling the motion. No reversal should be had in this court for the refusal of a trial court to grant a continuance upon application of a defendant, unless there has been an abuse of sound legal discretion on its part. *Dilley v. State,* 97 Neb. 853.

Complaint is made because attorney B. F. Good was appointed to assist in the prosecution. Section 4916, Comp. St. 1922, provides that assisting counsel may be

appointed in a felony case at the instance of the county attorney and under the direction of the court. The practice has had recognition and approval in this court. *Goldsberry v. State*, 92 Neb. 211; *Bush v. State*, 62 Neb. 128. The appointment was upon the application of the county attorney and upon the order of the court. It seems to have been duly made. Much space has been consumed in the briefs upon the right of the attorney general to appoint counsel and to take a hand in prosecutions here and there over the state, the defendant contending that the department of justice act (Laws 1919, ch. 205), under which the latter assumed to act (the attorney general also appointed Mr. Good), is unconstitutional as creating a new executive department. An interesting question is thus raised, though it would seem, as the state argues, that no more is attempted in the act than to enlarge the powers of the attorney general without in the least creating a new department. But it is unnecessary to decide or to discuss this, as we are all of the opinion that the court had ample power to appoint under the law as it was before the enactment of 1919.

Error is assigned because the information was drawn in the disjunctive, and because the law under which the prosecution proceeded is what counsel for the defense terms "confusion's masterpiece," and of no effect. The act is certainly a bunglesome piece of English. It is as follows:

"That whoever enters any building occupied as a bank, depository or trust company and by violence or by putting in fear any person or persons in charge of or connected with said bank, depository or trust company with intent to take, steal or carry away any of the money, goods, chattels or other property belonging to or in the care, custody or control of said bank, depository or trust company shall be deemed guilty of a felony and on conviction thereof shall be confined in the state peni-

tentiary not less than ten nor more than twenty-five years." Comp. St. 1922, sec. 9622.

Ill drawn as the statute is, its meaning may thus far be deduced with certainty, *i. e.*, he who enters a bank and does violence, with intent to steal, take or carry away any money or property belonging to it or under its care or control, shall be deemed guilty of a felony. Plainly also it includes as guilty of a felony the person who enters a bank and puts in fear any person in charge thereof or therewith connected, with such intent.

We are admonished by the statute not to find cause for reversal because of any matter of pleading or procedure, unless a substantial miscarriage of justice has occurred. Section 10186, Comp. St. 1922, reads in part: "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

If we consider the title of the act in question in connection with the foregoing, it will be seen that the subject of the legislation is sufficiently expressed therein. The wording of the title is: "An act to define the crime of robbery or violence of any bank, depository or trust company; and to provide punishment therefor and to declare an emergency." We so hold.

The information is vigorously attacked because its allegations are in the disjunctive. In this particular it follows the language of the act, section 9622, Comp. St. 1922, verbatim. Our court has frequently approved the practice of drawing the information in the words of the statute, and in this case no surprise or disadvantage to the defendant was occasioned thereby, and no miscarriage of justice can have resulted therefrom. Our provision as to pleading, section 10074, Comp. St. 1922, is as fol-

lows: "No indictment shall be deemed invalid, nor shall the trial, judgment or other proceeding be stayed, arrested or in any manner affected, * * * for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged; nor for want of the averment of any matter not necessary to be proved; nor for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

In this case it does not appear that the defendant was prosecuted for more than the one crime, and where the use of the disjunctive does not result in a prosecution for distinct or separate crimes the objection that the allegation was in the disjunctive cannot be successfully urged upon review. This seems clear from the language of the statute above quoted. But independently of this, the alternative charge in the words, "or by putting in fear," may be regarded as surplusage or as redundant, and the information still stands as charging the felony provided by the statute. The defendant entered the bank and did violence or acted with violence with intent to steal, etc. This view is supported by the case of *Hase v. State,* 74 Neb. 493, in which the court said in the syllabus: "Where words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential averments therein, they may be treated as surplusage, and be entirely rejected."

These considerations apply to the assignment of error of the defendant that the information was subject to the vice of duplicity. We hold that there was no reversible error on this account. We must also hold against the defendant upon his contention that it is not averred in the information that there was any money or property in the bank to be stolen, taken or carried away. This was not necessary. In this case the robbers secured and carried away some $1,700. But the actual securing of any money or property is not of the essence of the

charge. The felony created by the statute lies in the violence of or against the bank and in the intent to steal, take or carry away.

The records in this case have been carefully read and thoroughly considered, and it does not appear that the trial court was guilty of any abuse of discretion in overruling the motion for a new trial, or in refusing the defendant further time in which to obtain a showing as to newly discovered evidence. The newly discovered evidence would have been somewhat in the nature of cumulative evidence, inasmuch as its object was to show that the cashier of the bank and the bookkeeper of the bank were not able to identify the defendant. The testimony of Mr. John M. Berger, attorney, was to this effect, and there were other circumstances which made the matter a question for the jury upon conflicting evidence. The showing was not sufficient to require the court as a matter of law to extend the time, and the court's action in overruling the motion, as it did, was not reversible error.

We are of opinion that the judgment of the trial court ought to be, and it hereby is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1923

FRANK H. CUNNINGHAM, APPELLANT, V. WALTER H. SCOTT ET AL., APPELLEES.

FILED JANUARY 16, 1923. No. 22189.

1. **Evidence:** QUANTITY. In replevin for wheat in a bin, proof of the quantity taken under the writ as shown by the testimony of disinterested witnesses who measured it and by the actual weights when weighed at elevators is not overthrown by the mere opinion of defendants who base their estimate of quantity on truck loads and the number of bushels in each without accurate knowledge or admissible data.
2. **Appeal:** REVERSAL. Where the evidence shows that a finding of fact on a material issue is clearly wrong, it may be set aside on appeal.
3. ———: SECONDARY EVIDENCE. Where memoranda consisting of many items are used by a witness to refresh his memory in testifying on a material issue, the failure, on motion, to strike out the testimony thus adduced may amount to prejudicial error, if it is based on a book of original entries in possession of the witness and available but not produced.
4. ———: REFUSAL OF INSTRUCTIONS. The failure, upon request, to submit to the jury a material issue of fact conforming to plaintiff's theory of the case as shown by the pleadings and the proofs may constitute error requiring the reversal of a judgment in favor of defendant.

APPEAL from the district court for Kimball county: WILLIAM A. DILWORTH, JUDGE. *Reversed.*

Halligan, Beatty & Halligan and *W. J. Ballard,* for appellant.

Rodman & Rodman and *O. A. Torgerson, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN and DAY, JJ., REDICK, District Judge.

ROSE, J.

Frank H. Cunningham, plaintiff, began this action October 15, 1920, to replevy from Walter H. Scott and Glenn F. Scott, defendants, 5,000 bushels of winter wheat in bins on section 14, township 12 north, range 57, Kimball county. Plaintiff claimed title under a bill of sale dated October 25, 1919, in which defendants were described as "first parties" and plaintiff as "second party." The expressed consideration in the bill of sale was $9,400. The description of the wheat sold and the terms of delivery were as follows:

"An undivided three-fourths interest in 343 acres of winter wheat now planted and growing on section fourteen (14) in township twelve (12) north, range fifty-seven (57), Kimball county, Nebraska, the said three-fourths interest to be delivered into the elevator in Kimball, Nebraska, by said first parties, without any expense to said second party. First parties also to stand all expenses in harvesting and threshing."

The appraisers selected by the sheriff to assess the value of the property to be taken by him for plaintiff under the writ of replevin found the amount of wheat in the bins to be 3,200 bushels, valued at $1.35 a bushel; total, $4,320. The answer of defendants was a general denial. Plaintiff sold the replevied wheat and consequently could not return it to defendants in the event of an adverse verdict. The jury found that he was not entitled to the possession of the replevied wheat when he began his suit and that the damages sustained by defendants were $6,986.25. From a judgment against him for that sum he has appealed.

The insufficiency of the evidence to sustain the verdict, rulings on objections to testimony and the failure

to properly instruct the jury are assigned as grounds for a reversal.

The verdict, considered in the light of the record, seems to indicate the jury found that plaintiff, without the title or the right of possession, took from defendants under the writ of replevin 4,657.5 bushels valued at $1.50 a bushel or $6,986.25. While plaintiff began his suit to replevy 5,000 bushels, he is not bound by his preliminary estimate unless he took that quantity. The appraisers, acting in an official capacity under oath, found the number of bushels in the bins to be 3,200. Is the evidence sufficient to sustain a finding that plaintiff took 4,657.5 bushels or the equivalent of $6,986.25—the amount of damages found by the jury?

The testimony on behalf of plaintiff that the number of bushels replevied was approximately 3,200 is direct and positive. The two appraisers who made measurements and calculations for the purposes of the writ of replevin testified as witnesses. They were disinterested. They measured the bins and found the cubical contents by mathematical calculations. Based on a bushel of wheat weighing 60 pounds and occupying 1.2 cubic feet, the quantity of wheat taken under the writ of replevin was in round numbers 3,200 bushels, according to the testimony of these disinterested witnesses. In addition there is evidence that the wheat replevied tested 61 pounds to the bushel, that it was weighed for delivery at the elevators, and that the quantity by measurement did not differ materially from the quantity by actual weight, when the difference between 60 pounds to the bushel by measure and 61 pounds to the bushel by weight is considered. In attempting to refute proof that the number of bushels replevied, according to measure and weight, was approximately 3,200, defendants, without definite knowledge or admissible data, testified that plaintiff hauled away 53 truck-loads, averaging, as estimated or guessed, 100 bushels to the load, or 5,300

bushels in all. There is evidence that some of the truckloads of wheat hauled from the premises by both plaintiff and defendants varied from 55 to 80 bushels. Conceding, but not deciding, that the testimony to disprove the results of actual measures and weights was properly admitted, there is no other competent evidence that plaintiff replevied more than approximately 3,200 bushels. On the issue of quantity plaintiff adduced the better evidence. It amounted almost to a demonstration. In absence of fraud or mistake, actual measurements and weights cannot be disproved by mere estimates or guesses of interested witnesses without accurate knowledge or admissible data. In the amount of damages the verdict is against the clear weight of the evidence. The testimony is insufficient to sustain a finding that plaintiff replevied 4,657.5 bushels of wheat, or any greater quantity, or that defendants sustained damages to the extent of $6,986.25. For this reason the verdict is clearly wrong and should have been set aside and a new trial granted.

There was also error in rulings on evidence. Without a proper foundation defendants, while testifying as witnesses, were permitted to make use of memoranda prepared by them to show the number of bushels of wheat taken from various tracts of land and stored in the bins and the number of bushels removed therefrom before the writ of replevin was executed. Defendants testified that they made these memoranda from a book in their possession which was shown to be available as evidence. The book was not produced and plaintiff was deprived of the opportunity to inspect the entries therein and to cross-examine defendants in regard to the items on which the memoranda were based. On the face of the record the overruling of a motion to strike this testimony from the record was a prejudicial error.

The trial court also erred in failing, upon request, to submit to the jury one of the issues involved in plaintiff's theory of the case. There was evidence tending to

show that defendants failed to deliver to plaintiffs all grain purchased by him, or three-fourths of the crop described in the bill of sale, or that defendants had mixed in the bins some of their own wheat with that belonging to plaintiff. There was a reasonable basis in the evidence for computing the quantity to which plaintiff was entitled, if any, on this theory, and his right to recover it or its equivalent in wheat or any portion of it, if stored by defendants in the bins, should have been submitted to the jury by a proper instruction.

For the errors pointed out, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

RAY A. LOWER V. STATE OF NEBRASKA.

FILED JANUARY 16, 1923. No. 22542.

1. **Criminal Law: "ACTIONS."** The word "actions" as used in the general saving clause act, section 3097, Comp. St. 1922, includes both civil and criminal proceedings.
2. ———: **REPEALS: PRESUMPTION.** It will not be presumed that the legislature, in the repeal of a criminal statute, intended thereby, either directly or indirectly, to cause the dismissal of prosecutions, pending and undetermined, against persons charged with the commission of criminal offenses.
3. ———: ———: **PARDONS: PRESUMPTION.** It will not be presumed that the legislature intended to bestow a legislative pardon, by the repeal of a criminal statute, upon persons found guilty of a felony, but, who perhaps by some mishap or by some error in the proceedings, have not yet been lawfully sentenced.
4. ———: **EMBEZZLEMENT: VERDICT.** When a defendant is charged with embezzling money under section 8658, Rev. St. 1913, or under section 8047, Comp. St. 1922, it is not necessary for the jury to fix in the verdict the value of the money embezzled. Courts will take judicial notice of the worth of United States money.
5. ———: **ASSISTING COUNSEL.** The county attorney requested the court to appoint counsel to assist in the trial of a case charging a felony. Pursuant to such request the court appointed two as-

sistant attorneys general for that purpose. *Held,* that such appointment was without error.

6. **Embezzlement:** EVIDENCE. The evidence examined, and *held* that the verdict is amply supported thereby.

ERROR to the district court for Saunders county: EDWARD E. GOOD, JUDGE. *Affirmed.*

Jamieson, O'Sullivan & Southard, for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, ALDRICH and DEAN, JJ., REDICK, District Judge.

DEAN, J.

An information was filed in Saunders county against Ray A. Lower, defendant, which charged him with embezzling a large sum of money from the Valparaiso State Bank while he was its cashier. The information, as filed, contained 22 counts. When the state rested counts 1 to 15, both inclusive, were dismissed on defendant's motion. On one of the remaining 7 counts, which charged the embezzlement of $2,000, defendant was acquitted. On the remaining 6 counts, which charged a total embezzlement of $17,360, he was found guilty. Thereupon he was sentenced to serve a term of not less than 1 nor more than 7 years in the penitentiary on each of the six counts, it being a part of the judgment that the sentence "shall run consecutively and not concurrently." Defendant prosecutes error.

When the information was filed, May 17, 1920, under section 8658, Rev. St. 1913, that section was in full force and effect. The section follows:

"Every president, director, cashier, teller, clerk or agent of any banking company, who shall embezzle, abstract or wilfully misapply any of the moneys, funds or credits of such company or shall, without authority

from the directors, issue or put in circulation any of the notes of such company or shall, without such authority, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond or draft, bill of exchange, mortgage, judgment or decree, or shall make any false entry on any book, report or statement of the company, with an intent in either case to injure or defraud such company or to injure or defraud any other company, body corporate or politic or any other individual person or to deceive any officer or agent appointed to inspect the affairs of any banking company in the state, shall be confined in the penitentiary not less than one year nor more than ten years."

Subsequently, and while this action was pending and undetermined in the district court, the legislature of 1921 enacted chapter 297, Laws 1921, with an emergency clause, which was approved, February 25, 1921, by the governor. Section 6 of the act, now section 8047, Comp. St. 1922, has to do with substantially the same subject-matter, but it is without a saving clause.

From this defendant's counsel contend that section 8658, Rev. St. 1913, which authorized this prosecution, is by implication repealed by the later act, namely, section 8047, Comp. St. 1922, and that the later act, being without a saving clause, the court was without authority to sentence defendant. The contention is that section 8658 was not in effect when defendant was tried, the result being, as defendant argues, that the verdict and judgment are void and of no effect.

The attorney general does not concede defendant's argument, but contends that the 1921 act, namely, section 8047, Comp. St. 1922, is in form and substance practically the same as the act which it repeals, the argument in brief being that the simultaneous repeal and reenactment of a statute, in terms or substance the same as the original act, is a mere reaffirmance of such act and not a repeal.

Defendant says the argument is not sound and contends that the two sections are essentially and materially different in their provisions. However, we do not find it necessary to decide that question in view of the provisions of section 3097, Comp. St. 1922, cited by the attorney general, commonly known as the "general saving clause act." The act reads:

"Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

In *Caha v. United States,* 152 U. S. 211, it is said in an opinion by Mr. Justice Brewer that the word "actions" may include both civil and criminal proceedings.

The same question that is before us arose in Michigan where a criminal statute was repealed, as in the present case, without an express saving clause. But that state has a general saving clause statute similar to ours, and, as in our statute, the word "actions" is used without any qualifying words. The court there held that if the legislature did not intend that the word "actions" should be used in its broad sense, so as to include both civil and criminal actions, it would have used other restrictive expressions, such as "civil actions" or "actions for damages," and that, having failed to do so, it plainly appeared that it was the legislative intention to include both civil and criminal actions within the purview of the statute. *In re Adler,* 171 Mich. 263.

The word "actions," in a legal sense, has been defined as "a judicial proceeding for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Webster's New International Dictionary.

It will, of course, be presumed that the legislature knew that section 3097 was and had been a part of the substantive law of the state almost 50 years when the

1921 act was adopted. It goes without saying that, if it had not been for the general saving clause statute, the legislature would in all probability have incorporated such a clause in the new act when the section in question was repealed.

It is unthinkable that the lawmakers should have intended, either directly or indirectly, to cause the dismissal of prosecutions against persons charged with the commission of a crime, but who had not yet been brought to trial. Nor is it conceivable that it was the legislative intention to bestow a legislative pardon upon persons found guilty of a criminal offense, but who, perhaps by some error in the proceedings or other mishap, had not yet been lawfully sentenced. We are convinced, upon reason and authority, that the saving clause act in question continued the act in force under which the information was drawn and that the court was clothed with power to impose the sentence upon defendant of which he complains.

Defendant complains because the jury did not state in the verdict the value of the money that was embezzled. It is not required to fix the value under the embezzlement statute under which defendant was prosecuted. This has been said to be unnecessary except under a statute which provides that one who embezzles money or property of another is guilty of larceny, and this on the ground that in larceny a finding of value is required. 9 R. C. L. 1299, sec. 46. Courts will take judicial notice of the worth of United States money.

It is true that in a case where the defendant is charged with obtaining property under false pretenses the value of the property falsely obtained must, of course, upon conviction, be declared in the verdict. *Hennig v. State*, 102 Neb. 271. But that is not the situation here.

Reed v. State, 66 Neb. 184, is a case where the jury in its verdict found the defendants guilty "of larceny from the person to the amount of $275." The verdict was held

sufficient. The court observed: "It is not necessary for a jury in any case to fix the value or worth of a dollar; judges, as well as other people, know what it is." In *Bartley v. State,* 53 Neb. 310, the terse observation is made that courts will take judicial notice of the value of a dollar. In the present case the verdict is sufficient in form and substance.

Counsel contend that a charge with respect to the venue has been omitted from each of the six counts on which defendant was found guilty and that the court in its instructions "supplied the venue."

The objection is hypercritical. The first count charged the offense as having been committed by defendant in Saunders county, Nebraska. Counts 1 to 15, inclusive, were dismissed by the court, as hereinbefore noted, after the state had rested, and then on defendant's motion. Counts 16 to 22, inclusive, each, in apt terms, relates back to the first count and separately charges that "the county attorney further information makes that Ray A. Lower (on a date named), in said county, was the cashier of the Valparaiso State Bank; * * * that while said Ray A. Lower was cashier as aforesaid, to wit, on the day and year above set forth, he then and there fraudulently, unlawfully and feloniously certain money the property of said bank (naming the amount) in his possession as such cashier did then and there convert to his own use and embezzle with intent to injure and defraud," etc. The venue was properly charged and with commendable brevity. The objections that the information failed to state an offense and that it did not properly charge the venue are without merit.

Defendant contends that the verdict is not supported by the evidence, but the record shows that this assignment is clearly without support. Complaint is also made because the county attorney was assisted by two of the assistant attorneys general. The request for assistance was made by the county attorney and the ap-

pointment was made by the court. The objection was properly overruled. *Blair v. State,* 72 Neb. 501; *Goldsberry v. State,* 92 Neb. 211.

Complaint is made with respect to the court's refusal to give certain instructions offered by defendant and with respect to those given, and also in respect to evidence submitted and evidence refused. An examination of these, and also the other assignments of alleged error which are preferred by defendant, does not disclose that he has been denied any of his substantial rights.

We have examined all of defendant's assignments of alleged error presented in his brief of 361 pages. It is not only impractical but it would serve no good or useful purpose to discuss all of them. It is obvious that to do so would require more space than should be allotted to this opinion.

Finding no reversible error, the judgment is

AFFIRMED.

CHARLES BILLINGS V. STATE OF NEBRASKA.

FILED JANUARY 16 1923. No. 22990.

1. **Criminal Law:** EVIDENCE UNLAWFULLY OBTAINED: ADMISSIBILITY. Where articles or information are offered in evidence, which are pertinent to the issue, the court will not exclude them because they may have been obtained in an irregular or illegal manner.
2. ———: ———: ———. Where an officer acting under a search warrant seizes property beyond the scope and terms of the writ, such act under certain circumstances is a violation of section 7, art. I of our Constitution, but the mere fact that the constitutional right of search and seizure has been violated does not militate against receiving in evidence, against the party from whose possession they were obtained, the articles so seized and the information so procured.
3. **Searches and Seizures:** APPLICATION OF FEDERAL PROVISION. The fourth amendment to the Constitution of the United States relating to searches and seizures only applies to the federal government and its agencies.
4. **Courts:** STATE CONSTITUTION: EFFECT OF FEDERAL DECISIONS. De-

cisions of the supreme court of the United States construing the fourth amendment to the federal Constitution are not controlling or necessarily binding on this court in the construction of section 7, art. I of our Constitution.

5. Instructions examined, and *held* to correctly submit the issues to the jury.

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

J. F. Boyd, for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, DAY and FLANSBURG, JJ., SHEPHERD, District Judge.

DAY, J.

Charles Billings, hereinafter designated defendant, was convicted upon an information charging him with unlawfully having in his possession a still or equipment for the manufacture of intoxicating liquors, and also for unlawfully having in his possession ten gallons of mash to be used in the manufacture of intoxicating liquors. He was adjudged to pay a fine of $500 and costs, and to be imprisoned in the county jail for a period of 30 days. To review this judgment he has brought the record of his conviction to this court.

The defendant contends that the trial court erred in overruling his motion, made before the commencement of the trial, for a return to him of all articles seized by the sheriff under a search warrant, and also to suppress the evidence thus secured, for the reason that the articles seized and the information obtained were beyond the scope of the search warrant, both as to the articles to be seized and the place to be searched. Defendant also contends that it was error for the court, over his objection, to permit the articles so seized to be introduced in evidnce, and also to permit the officers to testify concerning

information obtained by them in the execution of the writ.

The record shows that the county judge of Antelope county upon a proper affidavit issued and delivered to the sheriff of said county a search warrant commanding him to search the "residence and buildings" of the defendant for intoxicating liquor, the residence and buildings being described as situate on a specifically described quarter section of land. While the sheriff was executing the writ, his attention was attracted to some suspicious circumstances which he proceeded to follow up, and out in the field some distance from the residence and buildings he discovered a still fully set up and equipped, which was concealed by being covered over with hay. He also found on the premises concealed in the same manner a quantity of rye mash. The sheriff took possession of these articles under the writ, and also arrested the defendant. Thereupon the sheriff filed a complaint upon which this information is based against the defendant, charging him with the unlawful possession of a still and mash for the manufacture of intoxicating liquors.

It is argued by the defendant's counsel that, in view of the fact that the articles seized by the sheriff were not specifically described in the search warrant, and that the place where they were found was not the place designated to be searched, therefore the articles themselves as well as the information gained by the sheriff were illegally obtained, and that in allowing such evidence to be received upon the trial the fourth amendment to the Constitution of the United States, as well as section 7, art. I of our own Constitution, was violated.

The provisions of the federal and state constitutions above referred to are in identical language, and are as follows: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by

oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

We first consider the question presented in the light of our own Constitution. Assuming for the purpose of this decision that the sheriff in seizing the still and mash exceeded the authority which the search warrant gave him, does it follow that the articles so obtained and the information gathered cannot be introduced in evidence? The great weight of authority as announced by the state courts, our own included, seems to favor the doctrine that evidence which is pertinent to the issue being tried is admissible without regard to the manner in which it was obtained. Involuntary confessions, however, rest upon a different footing. This court for a period of more than 45 years has steadily adhered to this doctrine. In *Geiger v. State,* 6 Neb. 545, an objection was made to the receiving in evidence of a letter from the defendant to his wife, which had been procured by the state. Notwithstanding a section of our statute which renders the husband and wife incompetent to testify concerning any communication made by one to the other during the marriage, the court held that, where papers or letters are offered in evidence in the trial of a case which are pertinent to the issue, they should be admitted, and the court will not take notice how they were obtained, nor will it form a collateral issue to determine that question. In *Russell v. State,* 66 Neb. 497, a pair of old shoes worn by the defendant at the time he was arrested was taken from the jail in his absence and without his consent and received in evidence, and it was held not to be a violation of his constitutional right to be secure against unreasonable searches and seizures. In *Younger v. State,* 80 Neb. 201, shoes which had been forcibly taken from the defendant were offered and received in evidence over his objection, and it was held that, where articles are offered in evidence which are pertinent to the issue, the court will not exclude them on account of the manner in

which they were obtained. In *Nixon v. State,* 92 Neb. 115, the action was a prosecution for violating the liquor laws of this state. It was held that it was not error to permit the state to introduce a federal liquor license issued to the defendant which was obtained from the defendant by stealth.

Among the many well-reasoned decisions upon the precise point in issue, we quote from the case of *People v. Mayen,* 188 Cal. 237. In that case articles were taken under an invalid search warrant. The trial court denied a return of the articles to the defendant, and they were afterwards received in evidence. In disposing of the case, the court said:

"Without at all minimizing the gravity of such offense, or the sacredness of the right of every citizen to be secure in his person, home, and property from any unlawful invasion by the state, it does not follow that the subsequent detention and introduction in evidence of the property thus wrongfully taken constituted error on the trial of the appellant. The trespass committed in the wrongful seizure of these personal effects by unauthorized officers, and the subsequent use of the same in evidence on the part of the prosecution, were in legal effect entirely distinct transactions with no necessary or inherent relation to each other. * * * No authority, so far as we have been able to discover, has suggested that the subsequent use of articles so taken as evidence is in itself any part of the unlawful invasion of such constitutional guaranty. The search and seizure are complete when the goods are taken and removed from the premises. Whether the trespasser converts them to his own use, destroys them, or uses them as evidence, or voluntarily returns them to the possession of the owner, he has already completed the offense against the Constitution when he makes the search and seizure, and it is this invasion of the rights of privacy and the sacredness of a man's domicile with which the Constitution is concerned. The Consti-

tution and the laws of the land are not solicitous to aid persons charged with crime in their efforts to conceal or sequester evidence of their iniquity. From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transom light. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment. Thus it is that almost from time immemorial courts engaged in the trial of a criminal prosecution have accepted competent and relevant evidence without question, and have refused to collaterally investigate the source or manner of its procurement, leaving the parties aggrieved to whatever direct remedies the law provides to punish the trespasser, or recover the possession of goods wrongfully taken. * * * The fallacy of the doctrine contended for by appellant is in assuming that the constitutional rights of the defendant are violated by using his private papers as evidence against him, whereas it was the invasion of his premises and the taking of his goods that constituted the offenses irrespective of what was taken or what use was made of it; and the law having declared that the articles taken are competent and admissible evidence, notwithstanding the unlawful search and seizure, how can the circumstance that the court erred in an independent proceeding for the return of the property on defendant's demand add anything to or detract from the violation of defendant's constitutional rights in the unlawful search and seizure?"

In *Commonwealth v. Tibbetts,* 157 Mass. 519, it was said: "Evidence which is pertinent to the issue is admissible although it may have been procured in an irregular or even an illegal manner. A trespasser may

testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, and perhaps criminally; but his testimony is not thereby rendered incompetent."

We cite a few of the many cases supporting this general doctrine: *Gindrat v. People,* 138 Ill. 103; *State v. Pomeroy,* 130 Mo. 489; *State v. Griswold,* 67 Conn. 290; *State v. Flynn,* 36 N. H. 64; *State v. Madison,* 23 S. Dak. 584. The same rule is announced in *Adams v. New York,* 192 U. S. 585.

Some of the decisions sustaining the general doctrine, especially with reference to the seizure of liquor, are based upon the idea that there was no property right in the individual in intoxicating liquors, and hence taking the property illegally was no invasion of constitutional rights. *City of Sioux Falls v. Walser,* 187 N. W. (S Dak.) 821; *United States v. Fenton,* 268 Fed. 221. Other cases hold that the seizure of intoxicating liquor illegally held is not unreasonable.

The only doubt which has been cast upon the correctness of this rule is based upon the decisions of the United States supreme court in *Boyd v. United States,* 116 U. S. 616, *Weeks v. United States,* 232 U. S. 383, and *Silverthorne v. United States,* 251 U. S. 385. Without attempting a general analysis of these cases, we think it may be conceded that the general conclusion is that, where the federal government or its agents has obtained possession of the property of a defendant through an unlawful search and seizure, and where the defendant has made a timely application for a return to him of the property so seized, which demand has been denied, it is error for the court to permit such property to be used against him upon the trial, as it violates the fourth and fifth amendments to the federal Constitution.

The rule is well settled that the fourth amendment to the federal Constitution relating to searches and seizures

only applies to the federal government and its agencies, and has no application to the officers of state governments or to individuals. The decisions of the supreme court of the United States in construing the federal Constitution are of course supreme; but, as to those provisions of the Constitution of the United States which go no further in their application than to the officers and agencies of the government, such decisions are not binding upon the state courts. *Weeks v. United States,* 232 U. S. 383; *Gindrat v. People,* 138 Ill. 103; *People v. Mayen,* 188 Cal. 237; 12 C. J. 744, sec. 161.

In view of the fact that our own decisions are in harmony with the great weight of authority, and that the rule announced has been enforced for so many years, we are not disposed to depart from it.

It is suggested that the sheriff was rightfully upon the premises, and that the taking of the property under the circumstances disclosed by the record was not illegal. In the view we have taken, it seems unnecessary to pass upon that phase of the case.

The defendant also complains of certain instructions of the court as being misleading. An examination of the instructions, considered as a whole, clearly shows that the case was fairly submitted to the jury for its consideration.

Upon an examination of the entire record, no error is found, and the judgment is, therefore,

AFFIRMED.

BESSIE PESTER, APPELLANT, V. JOSEPH HOLMES ET AL., APPELLEES.

FILED JANUARY 16, 1923. No. 22203.

1. **Highways:** TOWNSHIPS: LIABILITY. "A township organized under the township organization act in this state is not liable to persons injured by reason of defects in the public highways within the limits of such township." *Wilson v. Ulysses Township,* 72 Neb. 807.

2. ———: ———: ———. The exemption of the township from liability extends to its officers, agents and servants in the prosecution of work upon the highway.

3. **Negligence:** LIABILITY. A liability for negligence presupposes the existence of a duty from a breach of which injury results.

4. **Master and Servant:** LIABILITY OF SERVANT. A servant is not liable to a third person for negligence of the master in failing to perform a duty placed by law upon the master; but only for his own negligence in failing to perform a duty owing by the servant to such third person.

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

Davis & Davis, for appellant.

Bert M. Hardenbrook, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and FLANSBURG, JJ., REDICK and SHEPHERD, District Judges.

REDICK, District Judge.

This action is brought by the plaintiff against the defendants to recover damages resulting from a defect in a highway within Yale township, in Valley county. The petition alleged that on October 29, 1919, the defendants dug a ditch across the highway and left it unguarded by proper barriers or lights, and that plaintiff, on the night of that day, while riding in an automobile driven by her fiancé, her husband at the time of the trial, was seriously injured by the car being precipitated into the ditch without fault of plaintiff or the driver. The answer denied that the petition stated a cause of action; denied all charges of negligence; and alleged that Valley county was under township organization; that Yale township was a regularly organized township; that at the regular annual meeting of the township in 1919 the road overseer was directed to repair the highway at the place of the accident by taking out an old culvert and replacing it with a larger one; that the defendants were commanded by the overseer to assist in the work under the

direction of the overseer; that sufficient barriers were erected; and that the accident was caused by the negligence of the driver of the car. The reply was a general denial.

The evidence establishes the fact that the defendants took out the old culvert and dug the ditch across the road; that plaintiff suffered severe injuries by the car running into the excavation; and all the allegations of the answer except the erection of barriers and negligence of the driver, as to which matters different inferences may arise.

In view of the conclusion at which we have arrived, it may be conceded that plaintiff received her injuries as alleged, and that defendants were guilty of negligence in failing to put up proper barriers or give warning of the ditch across the road, if any duty rested upon them in that regard. This postulate contains the key to the solution of the question whether defendants are liable.

The road overseer was one Robert E. Woody. Section 2929, Rev. St. 1913, authorized him to command the services of men and teams to perform work on any road or culvert in his district as he may direct, at going wages, and provided penalties for their refusal. The defendants were called under this authority and performed the work, as far as completed at the time of the accident, under the direction of the overseer. Let us inquire now what were the relations of the parties in connection with the work and their duties and obligations to the public and private persons:

1. The township duty was to keep the highway in repair. This was a public duty—a governmental duty for the negligent performance of which it was in no way responsible to private individuals, including the plaintiff. *Wilson v. Ulysses Township,* 72 Neb. 807.

2. The road overseer, being an officer of the township and acting under its authority, stood in the shoes of the township and was not liable for negligence in the performance of the work. *McConnell v. Dewey,* 5 Neb. 385;

Wilson v. Spencer, 91 Neb. 169; *Gibson v. Sioux County,* 183 Ia. 1006.

3. The defendants were servants of the road overseer, hired and paid to do the work. Upon what theory can they be held for negligence in doing the work, or failing to take proper steps to protect the public? They were not doing anything wrongful; they were in the prosecution of a lawful work under the direction of the township. The excavation in the highway, being made under lawful authority, was not a nuisance. If the overseer had dug the excavation himself and left it unguarded, neither he nor the township would have been liable to the plaintiff. Why, then, should the agents and servants of the township a little lower down in the scale be liable? We think, as said in *Packard v. Voltz,* 94 Ia. 277:

"It must certainly be an anomalous doctrine that would exempt the corporation itself from liability for the doing of a lawful act in a negligent manner, upon the ground of its compulsory agency in behalf of the public welfare, and at the same time affix a liability upon its agent for precisely the same acts done under express authority. We think an instance of such liability is not to be found. It must be a reason for the rule of exemption, on the part of a political corporation, that its agency is a public necessity, and it seems to us that the same law that would give it exemption from liability * * * would protect from liability the servant through whom, only, the corporation can discharge its duty to the public."

See, also, *Gibson v. Sioux County, supra.*

However, it is said that the action is against the defendants for their personal negligence in failing to put up barriers or warnings; but to characterize any act or omission as negligent presupposes the existence of a duty to do or not to omit to do the act in question. *Cohen v. Tradesmen's Nat. Bank,* 262 Pa. St. 76. We may concede, *arguendo,* that it was the duty of the road overseer

to put up sufficient barriers or warnings, but we have shown that he incurred no liability for a negligent failure to do so, and that the exemption extended to his agents, as they were all acting in a public capacity.

But how does the case stand if we consider the overseer and his servants purely as private individuals? The overseer then is a contractor and defendants are his employees. As between them, where is the primary duty to put up warnings? Clearly upon the contractor. *Jessup v. Sloneker,* 142 Pa. St. 527. He may, of course, delegate the performance of that duty to a servant, and in such case both might be liable; but the servant is not responsible for the nonperformance of a duty which the law puts upon the master. *Hill v. Caverly,* 7 N. H. 215; *Floyt v. Shenango Furnace Co.,* 186 Fed. 539. The doctrine *respondeat superior* has no application *e converso.*

It seems clear, therefore, that the servant cannot be held, at least, unless he has been specially charged with the duty by the master, which doctrine in this case finds support neither in the allegation nor the proof. A servant is liable for an injury produced by an affirmative misfeasance (*Sullivan v. Dunham,* 35 App. Div. (N. Y.) 342), but not for mere neglect; the remedy in that case being against the master alone (*Scheller v. Silbermintz,* 50 Misc. Rep. (N. Y.) 175). It is not intended to provoke any discussion as to liability for acts of misfeasance and nonfeasance. It was stated in *Ellis v. Southern R. Co.,* 72 S. Car. 465: "The true rule deducible from the authorities is that the servant is personally liable to third persons when his wrongful act is the direct and proximate cause of the injury, whether such wrongful act be one of nonfeasance or misfeasance." But here this digging of the ditch was lawful. What we do hold is that every liability for negligence must arise out of the neglect of some duty resting upon the party to be charged toward the claimant. The duty is the mother of the obligation, and as we have shown that the duty to erect barriers or give proper warning of the excavation rested

upon the master, the obstruction being a lawful one, the servants, who had and were given no control over the project, but merely dug the ditch under the master's direction, were not liable for failure of the master to give warning. *Jessup v. Sloneker, supra.*

As the judgment of the lower court is the only one which could properly be rendered, the other questions discussed in the briefs will not be considered.

AFFIRMED.

PERRY ANTHONY V. STATE OF NEBRASKA.

FILED FEBRUARY 15, 1923. No. 22837.

1. **False Pretenses:** INDICTMENT. In an indictment charging defendant with obtaining a note by false pretenses with intent to cheat or defraud the maker of the note, the causal connection between the false pretenses and the obtaining of the note is an element of the statutory offense and must be positively and explicity stated. Comp. St. 1922, sec. 10074.
2. **Criminal Law:** INDICTMENT. In a criminal prosecution it is a substantial right of defendant to have all elements of the crime for which he is prosecuted stated in the indictment, and a failure in this respect may be a ground for reversing his conviction, this right not being defeated by the statute providing that convictions shall not be reversed for defects in the indictment, if they do not "tend to the prejudice of the substantial rights of the defendant upon the merits." Comp. St. 1922, sec. 10074.

ERROR to the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Reversed.*

Doyle & Halligan, for plaintiff in error.

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

Heard before MORRISSEY, C. J., ROSE, DEAN, DAY and FLANSBURG, JJ., SHEPHERD, District Judge.

PER CURIAM.

In the district court for Lancaster county Perry

Anthony, defendant, was prosecuted under the statute declaring:

"Whoever by false pretense or pretenses shall obtain from any other person, corporation, association, or partnership, any money, goods, merchandise, credit or effects whatsoever with intent to cheat or defraud such person, corporation, association, or partnership of the same, or shall sell, lease or transfer any void or pretended patent right or certificate of stock in a pretended corporation and take the promissory note or other valuable thing of such purchaser, or shall fraudulently make and transfer any bill, bond, deed of sale, benefit or grant or other conveyance to defraud his creditors of their just demands, or shall obtain the signature or indorsement of any person to any promissory note, bank draft, bill of exchange, or any other instrument in writing, fraudulently or by mispresentation, if the value of the property or promissory note or written instrument or credit, fraudulently obtained or conveyed as aforesaid, shall be thirty-five dollars, or upwards, shall be imprisoned in the penitenitary not more than five years nor less than one year; but if the value of the property be less than thirty-five dollars, the person so offending shall be fined in any sum not exceeding one hundred dollars or be imprisoned in the jail of the county not exceeding thirty days and be liable to the party injured in the amount of damage sustained." Comp. St. 1922, sec. 9892.

The indictment consisted of ten counts, but defendant was answerable only under the fifth, which follows:

"And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the state of Nebraska, do further present that Perry Anthony and Jacob C. Liesveld on or about the 22d day of November, 1919, in the county of Lancaster and state of Nebraska, then and there being, did then and there intending unlawfully and fraudulently to cheat and defraud Julia Nahley falsely, knowingly, designedly, un-

lawfully and feloniously, pretend, state and represent to the said Julia Nahley that they were the agents of and for the Lincoln Auto & Tractor School of Lincoln, Nebraska, a corporation, organized and existing under the laws of the state of Nebraska, and that they were employed by said Lincoln Auto & Tractor School to sell the common stock of said corporation; that said common stock of said corporation which they then and there offered for sale to the said Julia Nahley was treasury stock of said Lincoln Auto & Tractor School and that said Lincoln Auto & Tractor School had been and was selling said common stock of said corporation for $210 per share, and that said common stock was of the fair and reasonable market value of $210 per share, and that the said common stock of the said Lincoln Auto & Tractor School had paid thirty per cent. dividends for and during the preceding year; that both said defendants owned the same kind of stock of the aforesaid company that they were then and there offering for sale to the said Julia Nahley, and that they and each of them had paid $210 per share for said common stock; that relying upon said false statements, pretenses and representations of the said Perry Anthony and Jacob C. Liesveld made as aforesaid, the said Julia Nahley did then and there purchase, take and receive from the said Perry Anthony and Jacob C. Liesveld thirty (30) shares of the common stock of the Lincoln Auto & Tractor School of Lincoln, Nebraska, a corporation, and did then and there execute and deliver to the said Perry Anthony and Jacob C. Liesveld her negotiable promissory note in the sum of $6,300, of the value of $6,300, signed by herself or order and by herself then and there indorsed with her signature; that said statements, representations and pretenses so made by the said Perry Anthony and Jacob C. Liesveld were wholly false; and the said Perry Anthony and Jacob C. Liesveld were not then and there the agents of and for the Lincoln Auto & Tractor School of Lincoln, Nebraska, a corporation, employed by it to

sell the common stock of said corporation; that the common stock of said corporation which the said defendants were then offering for sale to the said Julia Nahley was not treasury stock of said corporation; that the said common stock of the Lincoln Auto & Tractor School had not been sold and was not being sold by said corporation for $210 per share and that said common stock was not of the fair and reasonable market value of $210 per share, and that the said common stock of said corporation had not paid thirty per cent. dividends for and during the preceding year; that neither of said defendants owned common stock of said company for which they had paid $210 per share, all of which was well known to the said Perry Anthony and Jacob C. Liesveld who then and there made said false and fraudulent statements, representations and pretenses with the intent to cheat and defraud the said Julia Nahley, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Nebraska."

Upon a verdict of guilty, defendant was sentenced to serve in the penitentary a term of not less than one nor more than five years. As plaintiff in error he challenges his conviction as prejudicially erroneous.

It is argued that the indictment is fatally defective because it fails to charge positively and explicitly, as required by the criminal law, that defendant obtained the note as a result of the false pretenses pleaded and with the intent to cheat or defraud Julia Nahley. In a prosecution under this statute the law has been announced as follows:

"Such indictment or information must charge explicitly all that is essential to constitute the offense. It cannot be aided by intendment, nor by way of recital or inference, but must positively and explicitly state what the accused is called upon to answer." *Moline v. State,* 67 Neb. 164.

While it seems to be unnecessarily recited in the present indictment that Julia Nahley, relying upon the false pretenses charged, purchased from defendant the stock described, it is not positively and explicitly stated that the note was obtained as a result of the false pretenses. The obtaining of Julia Nahley's signature to the note by false pretenses does not appear to be the offense for which defendant was prosecuted. Perhaps what was meant to be charged was the obtaining of the note by false pretenses with the intent on the part of defendant to cheat or defraud Julia Nahley. False pretenses, the obtaining of something valuable as a result of the false pretenses and the intent to cheat or defraud the person wronged are all elements of the statutory offense. The causal connection between the false pretenses and the obtaining of something valuable cannot be ignored in criminal prosecutions, because it is an element of the unlawful act condemned by the statute. Courts generally have thus viewed the legislation from the time of its enactment. The intent to cheat or defraud and the obtaining of something valuable as a result of the false pretenses are generally understood to be elements of the statutory offense. 25 C. J. 631, sec. 62; *Schleisinger v. State,* 11 Ohio St. 669; *Enders v. People,* 20 Mich. 233; *Roberts v. State,* 85 Ark. 435; *Connor v. State,* 29 Fla. 455. The causal connection between the false pretenses and the obtaining of something valuable, being an element of the statutory offense, must be positively and explicitly stated in the indictment. *Moline v. State,* 67 Neb. 164. This element, as applied to the obtaining of the note, does not thus appear in the indictment in the present case. To avoid the consequence of the error, the state invokes the statute providing that convictions shall not be reversed for defects in the indictment, if they do not "tend to the prejudice of the substantial rights of the defendant upon the merits." Comp. St. 1922, sec. 10074. This statute was not intended to deprive accused of a substantial right, to his

prejudice. Under our system of criminal law it is a substantial right of accused to have all elements of the offense for which he is prosecuted stated in the indictment or information. Oral charges or elements of a crime disclosed for the first time by the evidence during the trial are not measures of the substantial rights of a defendant in a criminal prosecution. The defect was called to the attention of the county attorney and the district court by a demurrer before the county and the defendant were put to the expense of a trial. The demurrer should have been sustained. The error is fundamental. It deprived defendant of a substantial right asserted at every stage of the prosecution. For this reason the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

WILLARD V. MATHEWS v. STATE OF NEBRASKA.

FILED FEBRUARY 15, 1923. No. 23012.

ERROR to the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

McCarty & Hager, for plaintiff in error.

Clarence A. Davis, Attorney General, W. C. Dorsey and *Jackson B. Chase, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, DAY and FLANSBURG, JJ., SHEPHERD, District Judge.

PER CURIAM.

While he was president of the Pioneer State Bank of Omaha, defendant was indicted by the grand jury in Douglas county and by that body charged with embezzling $300,000 belonging to the bank. The first count of the indictment charged defendant with the embezzlement of $200,000; the second count charged the embezzlement of $75,000; and the third count charged the

embezzlement of $25,000. February 20, 1922, defendant pleaded guilty to the embezzlement of $200,000 as charged in the first count. The two remaining counts, on motion of the attorney general, were dismissed. The pronouncement of judgment, and sentence of defendant, under his plea of guilty, were postponed by agreement until March 6, 1922. On that date he was sentenced to serve a term in the penitentiary of not less than one year nor more than ten years. Pursuant to the sentence defendant is now serving the term imposed by the court.

About five months after entering his plea of guilty, namely, August 8, 1922, defendant filed in this court a petition in error, alleging that the court erred in refusing to sustain his motion to quash the first count of the indictment which was filed by him in the district court October 26, 1921.

The principal ground of the motion to quash, to which our attention is now directed, is that the law under which defendant was indicted and sentenced, namely, section 8658, Rev. St. 1913, was repealed without a saving clause February 25, 1921, by the adoption of chapter 297, Laws 1921, and more particularly section 6 of that chapter, now section 8047, Comp. St. 1922.

The question presented by defendant was considered by us and disposed of, adversely to his contention here, in *Lower v. State, ante,* p. 590. The present case is controlled by our decision in that case. The petition in error is therefore denied, and the judgment of the trial court is

AFFIRMED.

JOHN O'HARA, APPELLEE, V. JAMES C. DAVIS, APPELLANT.

FILED FEBRUARY 15, 1923. No. 23057.

1. **Appeal:** LAW OF THE CASE. There being no substantial difference in the evidence upon the second trial of this case from that set forth in the opinion at the former hearing, the conclusion of the court that the evidence was sufficient to sustain a judgment has become the law of the case, and is adhered to.
2. **Appearance:** JURISDICTION. An action for damages against the director general of railroads under the federal employers' liability act is both local and transitory under general order No. 18-A, and the district courts of this state have jurisdiction over the subject-matter of such an action. Where the director general specially appears to object to the jurisdiction of the court over his person, and at the same time challenges the jurisdiction of the court over the subject-matter of the controversy, as to which the motion is not well founded, this is a voluntary appearance equivalent to the service of summons, and gives the court jurisdiction over the person of such officer.
3. **Damages.** A verdict for $46.840.11 for an injury resulting in the loss of the sight of both eyes *held,* under the facts in this case, to be excessive, and a recovery of $37,500 is allowed.

APPEAL from the district court for Douglas county: L. B. DAY, JUDGE. *Affirmed on condition.*

N. H. Loomis, C. A. Magaw and *Edson Rich,* for appellant.

John O. Yeiser and *J. C. Travis, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN and FLANSBURG, JJ., SHEPHERD, District Judge.

PER CURIAM.

This case is here for the second time. At the first trial evidence was taken and both parties rested. A motion of defendant to direct a verdict in its favor was sustained, and the action dismissed. On appeal to this court the judgment was reversed and the cause remanded for further proceedings. *O'Hara v. Hines,* 108 Neb. 74. Upon a second trial plaintiff recovered a judgment for $46,840.11, and from this judgment this appeal is taken.

The evidence upon the second trial is substantially the same as that produced at the first trial, the substance of which is set forth at length in the former opinion. There are a few matters, however, which should be noticed. At the former trial there was no evidence as to changes, if any, in the explosiveness of the detonator that may have taken place by reason of the exposure and the treatment it had been subjected to. At this trial there is direct testimony of certain experts that the exposure of the detonator to the air, the loss of part of its contents, and the length of time it had been manufactured would make no difference in regard to its liability to explode, and they express the opinion that it could not be exploded in the manner testified to by plaintiff. In this connection it may be said that those witnesses testified that fulminate of mercury may be exploded by heat, by a scratch, or by a severe blow. As was in effect said in the former opinion, it is not inconceivable that the pulling and twisting of the wires in the detonator may have scratched or caused friction in the fulminate, and this, rather than the blow upon the rail, caused the explosion. Another difference in the proof is that in this case there is no exploded detonator in evidence with wires about an inch long, said to have been picked up near the place of the explosion. There was evidence tending to prove that even after the accident plaintiff had said that he saw yellow powder escaping from the cylinder, and that he tapped it upon the rail, which he had denied in his testimony. In the main, however, the testimony is the same as at the former trial, except that the testimony of the experts upon explosives may perhaps be stronger at this trial. There is serious doubt in the mind of the court whether the accident occurred in the manner testified to by the plaintiff, or in that narrated by the witness Berg, who testified that he saw the plaintiff hit the detonator with a hammer. Other witnesses testified that at the time of the explosion the plaintiff was 10 or 12 feet away from where the hammer was lying. Upon the disputed

questions of fact the jury had the right to decide, and there is sufficient evidence to sustain their finding that the accident occurred in the manner that plaintiff described.

The principal grounds relied upon for reversal are: That the court had no jurisdiction over the person of the defendant, and over the subject-matter of the suit; and that the evidence is not sufficient to support the verdict.

Error is also assigned as to the giving of instructions by the court, and the refusal to instruct the jury to return a verdict for the defendant. It is also said that it was prejudicial error for the court to embody in its instructions allegations of negligence unsupported by any competent testimony. In this connection it is said that it was not negligence for the defendant to fail to provide wire with which to tie the cloth to the cable, nor for the foreman to direct the use of the wire without examining the same, nor negligence for him to fail to see and note the dangerous condition of the wire. It is pointed out in the former opinion that, under the federal employers' liability act, a fellow workman stands in the shoes of the master, and when he acts for the master in a negligent manner, within the scope of his employment, his negligence is the neglience of the master. The argument in this connection that the workman did not give the wire to plaintiff to promote defendant's business, or in the course of it, but simply to comply with John O'Hara's request, was submitted to the jury, and their verdict settled the question as to whether such conduct of O'Hara was negligent.

Six of the propositions of law relied upon in the appellant's brief and the authorities cited to sustain them, are identically the same as those presented upon the former appeal, and the discussion in the opinion upon that appeal has settled the law as applicable to the facts in this case. There is nothing in the record as now presented which materially detracts from or modifies the force of the facts as recited therein.

It is strongly urged that the court had no jurisdiction of the person of defendant or the subject-matter of the action. The action is brought under the federal employers' liability act. The petition does not allege the place of residence of plaintiff.

By general order No. 18-A of the director general of railroads issued April 18, 1918, general order No. 18, relating to the venue of suits against the director general, was amended to read as follows: "It is therefore ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose." This provision was ineffectual by a later amendment.

In *Alabama & V. R. Co. v. Journey*, 257 U. S. 111, the supreme court of the United States held that it was within the power of the director general to prescribe the venue of such suits. Whether this power existed up to that time had been a disputed question. Some of the inferior federal courts had held that the director general had such power, others held to the contrary. Some of the later cases are: *Moore & Co. v. Atchison, T. & S. F. R. Co.*, 174 N. Y. Supp. 60; *Wainwright v. Pennsylvania R. Co.*, 253 Fed. 459; *Cocker v. New York, O. & W. R. Co.*, 253 Fed. 676; *Haubert v. Baltimore & O. R. Co.*, 259 Fed. 361.

After the petition was filed and summons served in Douglas county, the director general, "appearing specially and for the purpose only of objecting to the jurisdiction of the court over the person of the defendant and over the subject-matter of this action, moves the court to quash the summons herein." As grounds therefor, he alleged that plaintiff did not reside in Douglas county, Nebraska, at the time of the accrual of the cause of action, and that such cause of action did not arise in said county and state. No evidence was presented to prove these allegations, and the motion was properly

overruled. The defendant then answered, raising the same objections to the jurisdiction of the court, and also pleading to the merits.

The orders of the director general are concerned with and govern only the venue of the action. If the action had been brought in the county or district in which the plaintiff resided, the fact that the accident took place in another county or district would not divest the court of jurisdiction. The action itself under these orders is therefore so far transitory in its nature as to the subject-matter, and if jurisdiction of the person of the defendant had been obtained either by proper service of summons or voluntary appearance, the question of the liability of the director general would be properly before the court.

Similar provisions as to venue are to be found in the Code of Kentucky. In that state an action against a common carrier for injury to a passenger, or to other person, or his property, must be brought in the county in which the defendant, or one of several defendants, resides, or in which the plaintiff, or his property, is injured, or in which he resides, if he resided in a county through which the carrier passes. The supreme court of Kentucky held in *Chesapeake, O. & S. W. R. Co. v. Heath's Admr.*, 87 Ky. 651, that said action is both a local and a transitory one. It is transitory because it may be instituted in another county than that in which the tort was committed, and under the Kentucky Code a chief officer, or agent, may be served in any county where he may be found; and it is made local at the option of the plaintiff. It is said: "The action, therefore, being both local and transitory, the common pleas court of McCracken county had jurisdiction of the subject-matter, and could have rendered a personal judgment if there had been any service on the defendant as provided by the Code." It is also said: "The appellant in this case has taken every step to prevent a judgment upon it without service, and *has made no plea to the jurisdiction of the court as to the subject-matter,* or entered any ap-

pearance to the merits by answer or otherwise, until compelled to do so by the trial court." It was held that the special appearance should have been sustained.

Gillen v. Illinois C. R. Co., 137 Ky. 375, was an action against a railroad company for damages from a fire started by the negligence of the company, which injured the fences and timber upon the plaintiff's land. The court, after quoting section 73 of the Code providing that an action against a carrier for injury to a person, or his property, must be brought in the county in which the defendant resides, or in which the plaintiff, or his property, is injured, or in which the plaintiff resides, if he resides in a county through which the carrier passes said: "The purpose of sections 62-77 of the Code is not to regulate the jurisdiction of courts. The Code of Practice does not treat of the jurisdiction of courts, or attempt to regulate it. It simply regulates the procedure in civil actions. The purpose of these sections of the Code, as shown in the title, is to regulate the county in which the action may be brought; or, in other words, the venue of actions. If an action under any of these sections for the recovery of money within the jurisdiction of the court is not brought in the proper county, it may be dismissed if the objection is properly taken."

In a number of decisions of the United States courts, statutes providing for the venue of actions brought thereunder have been considered, and it has been held that, even though the statute under consideration in the particular case provided that actions should be brought only in the district where the defendant resides, or where the cause of action accrued, the defendant, if he made an appearance in an action brought in another district than that of his residence for any other purpose than objecting to the jurisdiction of the court over his person, waived his personal privilege not to be sued in such court. If the court in such case had jurisdiction of the subject-matter, it was given jurisdiction of the person by such an appearance and was vested with full authority to

proceed. The right to defend in the particular district is not a matter of jurisdiction, but of venue only, and the privilege may be waived. *In re Moore,* 209 U. S. 490; *Midland Contracting Co. v. Toledo Foundry & Machine Co.,* 154 Fed. 797; *Arizona & N. M. R. Co. v. Clark,* 235 U. S. 669; *Champion Spark Plug Co. v. Champion Ignition Co.,* 247 Fed. 200; *Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co.,* 210 U. S. 368; *Thames & Mersey Ins. Co. v. United States,* 237 U. S. 19; *St. Louis & S. F. R. Co. v. McBride,* 141 U. S. 127; *United States v. Hvoslef,* 237 U. S. 1.

In most of the cases cited from the United States supreme court, the trial court's attention was called, at the time of the special appearance, to a question based upon the merits of the case, in addition to the objections to the jurisdiction over the person of the defendant. In Nebraska, Ohio, and some other states an objection, which is not well taken, to the jurisdiction of the court over the subject-matter of the action, constitutes a general appearance. *Handy v. Insurance Co.,* 37 Ohio St. 366; *Elliott v. Lawhead,* 43 Ohio St. 171.

In *Perrine v. Knights Templar's & Masons' Life Indemnity Co.,* 71 Neb. 267, on rehearing 71 Neb. 273, defendant filed objections to jurisdiction as follows: "Comes now specially the above named defendant, for the sole purpose of objecting to the jurisdiction of the court, and for no other purpose, and submits that the court is without jurisdiction of the subject-matter or of the person of the defendant for the following reasons," etc. It is said in the syallabus of the case: "The appearance of a defendant, for the sole purpose of objection by motion to the jurisdiction of the court over his person, is not an appearance to the action; but, where the motion also challenges the jurisdiction of the court over the subject-matter of the controversy and is not well founded, it is a voluntary appearance equivalent to a service of summons." This case is followed on this point in the following cases: *Summit Lumber Co. v.*

Cornell-Yale Co., 85 Neb. 468; *Clark v. Bankers Accident Ins. Co.*, 96 Neb. 381; *Lillie v. Modern Woodmen of America*, 89 Neb. 1; *Rakow v. Tate*, 93 Neb. 198; *Legan v. Smith*, 98 Neb. 7; *Maxwell v. Maxwell*, 106 Neb. 689; *State v. Westover*, 107 Neb. 593. See, also, *Mahr v. Union P. R. Co.*, 140 Fed. 921.

If the defendant had only appeared specially to object to the court's jurisdiction over his person on account of the action not being brought in the proper county, and that he was not compelled to litigate the question in Douglas county, the court would not have acquired jurisdiction over his person; but, if the defendant appears for any purpose except to object to the court's jurisdiction over his person, he thereby enters a general appearance in the action. Defendant called for a determination as to whether the court had jurisdiction of the subject-matter of the action, which required an examination of the petition and a ruling as to the nature of the action. He thereby called for the exercise of a judicial function not relating to jurisdiction over his person. He must necessarily be before the court in order that this might be done. There is no great hardship in the rule because, as said in *Western Life Indemnity Co. v Rupp*, 235 U. S. 261, 273:

"A nonresident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. *Pennoyer v. Neff*, 95 U. S. 714; *York v. Texas*, 137 U. S. 15. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the state to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court

to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled."

It must be conceded that, unless the defendant has brought himself under the jurisdiction of the court by a general appearance, the court did not acquire jurisdiction.

Did the district court have jurisdiction of the subject-matter of the action? Until the orders of the director general, the district courts of this state had full jurisdiction to try actions against railroads brought under the federal employers' liability act wherever service upon the defendant could be obtained. The order of the director general fixing the venue did not affect the subject-matter of the action. If, and when, jurisdiction of the person had been obtained, the district court had full power to adjudicate the question whether the defendant had been guilty of actionable negligence. This was the essential matter presented to the court for its determination, and which, if it had acquired jurisdiction of the person, it had the power to decide. A verdict that the defendant was not guilty of negligence, and a judgment dismissing the case would be *res judicata* in every court in the land, always premising that jurisdiction of the person had been obtained. *Hunt v. Hunt,* 72 N. Y. 217.

But, aside from these considerations, these facts are relevant: At the first trial motions were made to dismiss the case for the reason that the plaintiff had not proved facts sufficient to constitute a cause of action, but no objection was made during the trial to the jurisdiction of the court, and the original special appearance and motion to quash the summons had been properly overruled, since there was no evidence to support it. No motion for a rehearing was made in this court after the filing of the former opinion in the case, and the former decision of the court has become the law of the case.

Lastly, it is complained that the verdict is excessive. Plaintiff was earning $3.44 a day at the time of the ac-

cident. He had an expectancy of life, according to the Carlisle table, of 42.87 years. He suffered severe pain and his sight has been totally destroyed. The loss of earning power is only a part of the injury which the plaintiff sustained. He is compelled to walk in darkness for the remainder of his life, to be deprived of all the pleasures and joys which come from vision. His knowledge of the outer world will be largely circumscribed by the loss of the sense of sight, and he must in great measure continually be dependent upon others. No verdict for as large an amount as in this case has ever been sustained for such an injury, so far as the court has been able to ascertain, and no case allowing such a recovery has been cited to us. Considering the present worth of the amount of the verdict, and the amount which it would require to purchase an annuity providing the same daily wages which the plaintiff was earning at the time of the accident, for his expectancy of life, we are of the opinion that any verdict in excess of $37,500 is excessive. The judgment of the district court is affirmed if plaintiff file a remittitur of all in excess of $37,500 as of the date of the judgment, within 20 days, otherwise the judgment of the district court is reversed.

AFFIRMED ON CONDITION.

LETTON, J., dissenting.

If, as I am satisfied, the question of jurisdiction was not passed upon, or defendant concluded on this point by the former decision, the majority opinion is in direct conflict with the following decisions, and overrules them without mentioning them: *Hurlburt v. Palmer,* 39 Neb. 158; *Kyd v. Exchange Bank,* 56 Neb. 557; *Baker v. Union Stock Yards Nat. Bank,* 63 Neb. 801; *Templin v. Kimsey,* 74 Neb. 614; *Stelling v. Peddicord,* 78 Neb. 779.

In these cases it is held that a defendant may plead that he is privileged from suit in the county where the action is brought, without thereby making a general appearance in the action. The cases cited in the opinion

as to a general appearance being made, when jurisdiction over the subject-matter of the suit is challenged, are not applicable. Believing that defendant was privileged from suit in Douglas county, and had not waived this privilege, I respectfully dissent.

ALBERT JOHNSTON ET AL., APPELLANTS, V. J. MARGARET ADEN, APPELLEE.

FILED FEBRUARY 15, 1923. No. 22187.

1. **Adverse Possession.** "When a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own." *Pfeifer v. Scottsbluff Mortgage Loan Co.*, 105 Neb. 621.
2. **Appeal.** Rulings of the trial court on the admission or exclusion of evidence which are not prejudicially erroneous will not be disturbed on appeal.
3. **Trial:** INSTRUCTIONS. Instructions to the jury which correctly state the law when construed together will be held free from error, notwithstanding that a certain paragraph standing alone may be an incomplete exposition of the law applicable to the issues and the evidence.

APPEAL from the district court for Scotts Bluff county: BAYARD H. PAYNE, JUDGE. *Affirmed.*

Olsen & Cottle and *Mothersead & York,* for appellants.

White & Heiss and *Morrow & Morrow, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN, ALDRICH and FLANSBURG, JJ., RAPER and TROUP, District Judges.

MORRISSEY, C. J.

This is an ejectment suit involving a strip of land containing 7.95 acres in the east half of the northeast quarter of section 3, township 21, range 55, in Scotts

Bluff county. Trial was had to a jury, and from a verdict and judgment in favor of defendant, plaintiff has appealed.

Plaintiff is the owner of the northeast quarter of the southeast quarter, and defendant the owner of lot 1 of the section mentioned. There is no dispute as to the chain of title of either tract of ground, nor is there any dispute as to the location of the monuments erected by the official surveyor when the land was originally surveyed. The controversy arises because of the fact that, by an error in the survey, instead of the tract containing 81.22 acres, as shown by the official field notes, it does contain 97.37 acres. The record of the survey shows that the northeast quarter of the southeast quarter, title to which rests in plaintiff, contains 40 acres, and lot 1, title to which rests in defendant, contains 41.22 acres. It is agreed by the parties that under the law, if no intervening rights or claims arose, the excess acreage would be divided between the two claimants proportionately according to the respective acreage of each tract as shown by the survey, thus giving to plaintiff as the owner of the northeast quarter of the southeast quarter a total acreage of 47.95, and giving to defendant as the owner of lot 1 a total acreage of 49.42 acres. The only land involved in this suit is the tract of 7.95 acres which would, under such division, have been attached to or incorporated in the southeast quarter of the northeast quarter.

When the original entrymen went upon their respective lands, it is claimed by defendant that, starting from an established monument on the south side of the quarter section, they measured north 80 rods and there established what they supposed to be the true line separating the northeast quarter of the southeast quarter from lot 1; that the respective entrymen, and their successors in interest, have during all the years from that time down to the bringing of this suit acquiesced in the establishment of such line and recognized it as the divid-

ing line between their respective properties; that such acquiesence extended over a period of more than ten years immediately preceding the bringing of this action, and that plaintiff is, therefore, estopped to maintain this action; and that for more than the statutory period of ten years defendant was in the open, notorious, adverse possession under an absolute claim of right, and that such claim had ripened into a perfect title.

"When a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own." *Pfeifer v. Scottsbluff Mortgage Loan Co.*, 105 Neb. 621.

Evidence was offered to support the claims of each party, and the court fully instructed the jury on the law applicable to the respective claims.

Complaint is made of the ruling of the court in sustaining an objection to an offer of proof calculated to show that, at the time plaintiff, Neeley, acquired title to the southeast quarter of the northeast quarter, his grantor made no representations whatever relative to the location of the boundary line between the property the witness was acquiring and the property held by defendant; but there was no attempt to prove that the witness did not, in fact, have knowledge of the line that had been recognized by the respective owners of the property. If he had such knowledge, it would be entirely immaterial whether it was acquired from anything said by his grantor or otherwise. We find no prejudicial error in the ruling, or in the other rulings on the admission or exclusion of evidence.

Exceptions were taken to a number of the instructions given. The court instructed the jury upon every question that he thought would aid them in arriving at a correct conclusion. In doing this he did not undertake to cover

the whole law of the case in a single paragraph, but expressly advised them that such was not his purpose, and directed them that the whole charge must be read together; and, from a consideration of the entire charge, we reach the conclusion that the disputed questions of fact on which the respective parties relied were fairly submitted to the jury, and that the verdict returned has ample evidence in the record to support it, and the judgment is

AFFIRMED.

LOUIE CLERNT V. STATE OF NEBRASKA.

FILED FEBRUARY 15, 1923. No. 22931.

Robbery: PRINCIPALS. One who accompanies others to the neighborhood of a bank, and there remains in charge of an automobile with the purpose of aiding in the escape of his companions, who enter the bank and by putting in fear the person in charge thereof take and carry away the money and property of the bank, is present, in the eye of the law, at the place of the crime, and may be held as a principal.

ERROR to the district court for Burt county: CHARLES A. GOSS, JUDGE. *Affirmed.*

Jamieson, O'Sullivan & Southard, for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON and ALDRICH, JJ., RAPER and TROUP, District Judges.

MORRISSEY, C. J.

Defendant prosecutes error from a conviction in the district court for Burt county of a violation of section 9622, Comp. St. 1922, which reads as follows:

"Whoever enters any building occupied as a bank, depository or trust company and by violence or by putting in fear any person or persons in charge of or con-

nected with said bank, depository or trust company with intent to take, steal or carry away any of the money, goods, chattels or other property belonging to or in the care, custody or control of said bank, depository or trust company shall be deemed guilty of a felony and on conviction thereof shall be confined in the state penitentiary not less than ten nor more than twenty-five years."

Numerous assignments of error assailing the information and the proceedings are made, but, with the exception of the question which will be hereinafter discussed, these assignments fall under the rule announced in *Smith v. State, ante,* p. 579, and they will not be further noticed in this opinion.

The information charged that defendant did unlawfully, intentionally and feloniously enter a bank building, which is properly described, and did then and therein unlawfully, intentionally and feloniously by violence and by putting in fear the employee in charge of the bank steal, take and carry away money, goods and chattels.

The only evidence in the record is that presented by the state. It appears that on June 2, 1922, defendant and two others drove from Omaha to Decatur in a coupé; that defendant drove the car into an alley about 325 feet from the bank which was entered; that he remained in the car and kept the engine running while his companions entered the bank and by violence took therefrom a sum of money. When defendant's companions entered the bank, the young lady in charge made an outcry, which aroused a number of the men of the village, who, procuring arms, pursued defendant's associates, who ran to and entered the coupé. Defendant then undertook to drive south through the alley that he and his associates might effect an escape, but found that avenue of escape shut off by citizens who opened fire upon the car. The men within the car returned the fire, but finding it too hazardous to proceed farther south the car was reversed and they attempted to effect

an escape from the alley by way of the north entrance. In the hurry and excitement of the moment the car was jammed against a tree with so much force that defendant was thrown from the car to the ground and he and his companions were captured.

With this state of facts as a basis, it is argued that, if defendant be held for any crime whatever, he must be charged as an accessory, and not as a principal.

The rule is well settled in this jurisdiction that one who incites or instigates the commission of a felony when he is neither actually nor constructively present is an aider, abetter or procurer within the meaning of our Criminal Code. Not so, however, with one who is actually, or constructively, present, aiding and assisting in the commission of the crime.

In *Dixon v. State,* 46 Neb. 298, there is a valuable discussion of the subject, and after referring to the sections of the Code defining the crime of aiding, abetting or procuring another to commit a felony, as well as, too, the crime of being an accessory after the fact, and declaring that these sections are merely declaratory of the common law, it is said that they "do not refer to one who is present when the crime is committed, aiding and abetting the commission thereof. Such a person, at common law and under the Code, is a principal and may be indicted and convicted as such under evidence proving his presence aiding the commission of the crime, although his hand was not the instrument of its perpetration."

In that case defendant was charged with producing an abortion. The evidence disclosed that the instrument was used by a third person while defendant was standing several feet distant watching to prevent surprise or in any other way to assist in the commission of the act. In the instant case, defendant was likewise watching and waiting, evidently in agreement with his companions to assist in the commission of the crime charged in the information. This brought him within the rule and made him a principal equally as responsible as if his

was the hand that aimed the revolver at the employee of the bank, or snatched the money from the till. Clark and Marshall, Law of Crimes (2d ed.) sec. 173; 12 Cyc. 184.

Defendant was sentenced to a term of 15 years in the penitentiary and it is urged that this sentence is excessive. The record does not disclose the previous conduct of defendant, and under the circumstances the court does not feel warranted in reducing the sentence imposed by the trial court. If the sentence is excessive, at the proper time and to the proper board, that matter may be presented.

The record is free from error, and the judgment of the trial court is

AFFIRMED.

EDWIN T. SWOBE, APPELLANT, V. DRUMMOND MOTOR COMPANY ET AL., APPELLEES.

FILED FEBRUARY 15, 1923. No. 22206.

1. **Compromise and Settlement:** ESTOPPEL. In an action by a stockholder to restrain a sale and transfer of the assets of the corporation to another corporation on the ground that the proposed transfer was fraudulent as to the selling corporation and as to its creditors, a settlement was made by which the plaintiff sold his stock to a trustee for the corporations, and agreed, by stipulation filed in the case, "that he will not directly or indirectly cause any action to be commenced against the defendants in which the validity of any of the transactions between the defendants be called in question," and further agreed "that he will not directly or indirectly call into question the transfer made or to be made * * * of property referred to in the petition in this case and that the transaction between (the corporations) in issue in this case be ratified." He afterwards, as a creditor, procured a judgment against the selling corporation. In this creditors' bill he is seeking to subject the property of the buying corporation to the payment of this judgment on the ground that the transfer was in fraud of creditors. *Held,* that he is estopped by the stipulation from maintaining an action upon this ground.
2. **Judgment:** RES JUDICATA. Where, in an action at law, two cor-

porations were sued for the recovery of damages for breach of contract, the petition alleging that one of the corporations was the successor and merely a continuation of the other, which was denied by the answer, and a verdict was directed for the buying corporation under these issues, this is an adjudication of the issue as to the identity of the corporations and is *res judicata* between the same parties in another action.

3. **Appeal:** AFFIRMANCE. A judgment supported by the pleadings will, in the absence of a bill of exceptions and special findings, be affirmed. In the absence of a bill of exceptions, a judgment supported by the pleadings will not be set aside because of special findings, if the latter can by any fair interpretation be held to support it.

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

Kennedy, Holland, DeLacy & McLaughlin, and *Stout, Rose, Wells & Martin,* for appellant.

Brome & Ramsey and *Gaines, Van Orsdel & Gaines, contra.*

Heard before MORRISSEY, C.J., LETTON, FLANSBURG and ALDRICH, JJ., RAPER and TROUP, District Judges.

LETTON, J.

This is a suit in equity by which the plaintiff seeks to hold the Douglas Motors Corporation liable for the payment of a judgment in his favor against the Drummond Motor Company, on the grounds that it is the successor to the Drummond Motor Company, and impliedly assumed the debts of that company, or upon the ground that the transfer of assets was fraudulent and void as to creditors of the Drummond Motor Company. The petition alleges the recovery of a judgment by plaintiff, the insolvency of the judgment debtor, and the issuance and return *nulla bona* of an execution. In substance, it alleges that on or about December 7, 1916, several of the directors of the Drummond Motor Company caused the Douglas Motors Corporation to be organized; that at that time the Drummond Motor Company had

outstanding liabilities of about $60,000 in addition to its capital stock; that its total assets at that time were of the value of about $300,000; that the Douglas Motors Corporation was formed for the purpose of fraudulently depriving the Drummond Motor Company of its assets, and its creditors from an opportunity to collect their claims; that afterwards all the assets of the latter company were transferred to the Douglas Motors Corporation by virtue of a contract of sale; that the transfer was only colorable; that the Douglas Motors Corporation is possessed of over $100,000 worth of assets of which the Drummond Motor Company is really the owner. The contract provided that the Douglas Motors Corporation shall pay the inventory value for the merchandise, finished automobiles and automobiles in the course of construction, in its common stock; for the leasehold, good-will and trade-name, $20,000 in common stock; and also pay certain specified debts of the Drummond Motor Company amounting to about $45,000.

The defense is that a former action brought by plaintiff to enjoin the Drummond Motor Company from transferring its assets to the Douglas Motors Corporation was settled by the purchase of plaintiff's stock for the consideration of $3,280 under a written stipulation as follows:

"For and in consideration of the payment to me of thirty-two hundred and eighty dollars ($3,280) to be paid on or before Wednesday March 14, 1917, by the defendants in the above-entitled action, I, Edwin T. Swobe, hereby assign, transfer and convey to Frank W. Bacon, trustee, forty-one (41) shares of common stock of the Drummond Motor Company, which is all the stock that I own in said corporation, and upon payment of said money to me I hereby agree to dismiss the above-entitled action absolutely.

"The said plaintiff agrees that he will not purchase any stock of the Drummond Motor Company under which any action be commenced against the defendants,

and that he will not directly or indirectly cause any action to be commenced against the defendants in which the validity of any of the transactions between the defendants be called in question, and the plaintiff agrees that he will not encourage any action on the part of any stockholders against the Drummond Motor Company. Plaintiff further agrees that he will not directly or indirectly call into question the transfer made or to be made by Drummond Motor Company and the Douglas Motors Corporation of property referred to in the petition in this case and that the transaction between the Drummond Motor Company and the Douglas Motors Corporation in issue in this case be ratified; provided that nothing herein shall be construed as waiving any action or right of action that does not involve a claim of invalidity of any transfers, contracts, or transactions between the Drummond Motor Company and the Douglas Motors Corporation, or seek the rescission of any such contract or transaction."

And it is alleged that the plaintiff is estopped by this stipulation from attacking the validity of the transfer.

A further defense to the claim that the Douglas Motors Corporation is liable as having assumed the debts of the other company will be considered later.

Evidence was taken, and special findings of facts were made. The court found, as a conclusion of law, that the plaintiff would be entitled to satisfy his judgment out of the assets and property of the defendant Douglas Motors Corporation, but is estopped by the operation and effect of the stipulation from alleging that the transfer was fraudulent as to him or other creditors of the Drummond Motor Company. The action was thereupon dismissed for want of equity, and from this judgment this appeal has been taken.

Upon a consideration of the first ground of recovery, alleged by plaintiff, viz., that the alleged transfer was in fraud of the rights of creditors, it seems to us

that the construction placed upon the stipulation by the trial court is reasonable and proper. The settlement was evidently dictated by the desire on the part of the parties to the pending contract of sale, which had been held up by the injunction, to consummate the transaction and to forestall and prevent any further attack by plaintiff upon the validity of the transfer, and the stirring up by him in the future of litigation against defendants, based on the alleged invalidity of the sale. We conclude that the plaintiff is estopped by the stipulation from directly or indirectly calling in question the validity of any of such transactions between the defendants, or calling in question the transfer made of the property, and that it is an effectual bar to this action so far as based upon the ground of fraud.

The suit, however, is in a double aspect, and relief is also sought upon the ground alleged in the petition, that the Douglas Motors Corporation became the successor to the Drummond Motor Company, taking over all of its assets and conducting the business as before, only under a change of name, and that it therefore, under former decisions of this court, impliedly assumed the debts of the Drummond Motor Company. As a defense to this branch of the case, the answer alleges that, after the stipulation had been filed, plaintiff began an action at law against the Drummond Motor Company, Frank W. Bacon, Daniel Baum, Jr., Richard O. Bunn, and Douglas Motors Corporation seeking to recover a money judgment for breach of a contract between himself and the Drummond Motor Company. After alleging the contract and its breach, the petition in that case alleged that the Douglas Motors Corporation was the successor of and a mere continuation of that company, and took over all its assets, and that by reason thereof the Douglas Motors Corporation became obligated as a matter of law to pay all the debts and liabilities of the Drummond Motor Company; that all these allegations were denied in the answer in that case; that

after the evidence was taken the jury were directed to return a verdict in favor of the Douglas Motors Corporation, and a judgment of dismissal as to that company was rendered upon these issues, which judgment is now *res judicata* as against the matters set up in this suit by the plaintiff.

The reply denies that the rights of plaintiff against the Douglas Motors Corporation were adjudicated in the action at law, and alleges that the court in that action "expressly directed the plaintiff to resort to an action in equity," and that pursuant to said direction plaintiff is now maintaining this suit in equity.

The question is presented, whether the action of the court in directing a verdict for the Douglas Motors Corporation and dismissing the case as to it in the action at law brought against it as the successor to the Drummond Motor Company is *res judicata* and operates as a bar to the prosecution of this suit. In bringing the action at law against both corporations, plaintiff relied upon the cases of *Reed Bros. Co. v. First Nat. Bank,* 46 Neb. 168, and *Douglas Printing Co. v. Over,* 69 Neb. 320, upon the theory that the transaction between the corporations was of such a character as to establish that the new corporation was a mere continuation of the old one. The trial court in that action found against the plaintiff on this issue, and directed a verdict for the Douglas Motors Corporation. It conclusively settled that so far as the parties to that suit are concerned the Douglas Motors Corporation was not a mere successor to, and liable at law for the debts of the Drummond Motor Company. However, where one corporation, in fraud of the creditors of another corporation, takes over the whole or any part of the property or assets of the former corporation with the mutual intention and purpose to defraud the creditors of the former corporation, an action in equity in the nature of a creditors' bill will lie to subject such property to the satisfaction of a judgment creditor. The distinction between the two

classes of cases is clearly pointed out in *Sharples Co. v. Harding Creamery Co.*, 78 Neb. 795. It is said: "If the Nebraska-Iowa Company is shown by the petition to be a mere successor to the Harding Company, then doubtless the plaintiff might maintain an action at law for the collection of the debt due from the Harding Company, but we do not think the allegations of the petition sufficient to show that condition. * * * Where, as in this case, the new corporation is not a mere continuance of the old, and the property has been paid for in value by stock in the new company, although the old corporation is insolvent, the subject-matter is one that can only be dealt with in an adequate manner in a court of equity where an accounting should be had of the assets and liabilities of the old corporation, and of the character, identity and value of the property received."

Plaintiff contends that the action now pending is allowable under the latter decision, but such an action is of the nature of a creditors' bill to reach property which has been fraudulently transferred, and the stipulation entered into is an effectual estoppel against maintaining any action which attacks the validity of the transfer.

Plaintiff relies upon certain findings of fact and conclusions of law made by the trial court as justifying a reversal of this case, and the entry of a decree for the sum due upon his judgment. There is no bill of exceptions, and the evidence is not preserved and presented to us. Some of the numbered findings of the trial court contain also conclusions of law. Considering the pleadings, and those findings which are purely findings of fact, and drawing our own conclusions as to the law applicable thereto, we see no reason to disturb the judgment. We find no inconsistency between the pleadings, the findings of fact, the conclusions of law drawn by this court therefrom, and the judgment of dismissal. The judgment of the district court is therefore

AFFIRMED.

WILHELMINA SCHNEIDER, ADMINISTRATRIX, APPELLEE, V. JAMES C. DAVIS, APPELLANT: UNION STOCK YARDS COMPANY, APPELLEE.

FILED FEBRUARY 15, 1923. No. 22215.

1. **Carriers:** STOCK-YARDS COMPANY: LIABILITY. The liability of a stock-yards company as a common carrier begins upon its receipt of live stock from the railroad company at the transfer switch, and ends with its delivery to the consignee, unless by reason of such circumstances as unreasonable delay in acceptance, or other default on the part of the consignee, the relation changes to that of bailee.
2. ———: STATUTE: CONSTRUCTION. Under section 5415, Comp. St. 1922: "Whenever two or more railroads are connected together, the company owning either of such roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight to the consignee of the freight, in the same order in which such freight was shipped." This section applies to the carriage of live stock.
3. ———: LIABILITY. Under the evidence in this case, the Union Stock Yards Company was a common carrier of the live stock consigned, and the director general of railroads is liable as the carrier receiving the freight to be transported.
4. **Statutes:** CONTINUITY. The simultaneous repeal and reenactment of a law has the effect of continuing the uninterrupted operation of the statute.

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

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

A. H. Murdock and *Brown, Baxter & Van Dusen, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN, ALDRICH and GOOD, JJ., RAPER, District Judge.

LETTON, J.

Plaintiff's decedent delivered to the director general of railroads at Rosalie, Nebraska, with other live stock,

31 hogs consigned to Bliss & Wellman at South Omaha. The car containing the shipment was delivered by the director general to the defendant Union Stock Yards Company. Twenty-six hogs only were delivered to the consignee by that company. This action is for the value of the missing hogs.

Bliss & Wellman, the consignee, controlled certain pens at the Union Stock Yards in Omaha. Cars loaded with live stock consigned to dealers at the Omaha market are delivered by the director general to the Stock Yards Company at a transfer track. From the transfer track these cars are transported by the company to the unloading chutes at the stock yards. From these chutes the live stock is driven through alley-ways to pens which are used by the different commission firms. The usual practice is to count the stock as it leaves the chutes, though sometimes the stock is accepted by the commission firms at the unloading chutes or in the alleys. Under section 5415, Comp. St. 1922, the initial carrier is responsible in the first instance for any loss occurring upon the line of the connecting carrier. The director general insists that the hogs were lost after they were taken from the pens at the unloading chute to be driven to the pens of the consignee; that after they left the chutes they were in possession of the Union Stock Yards Company as a bailee only, and not as a common carrier; that, consequently, the director general as the initial carrier is not liable for the loss. Upon the same day this shipment was received by the consignee, another shipment by a different consignor to another consignee had an excess of five head of hogs, which were delivered to the consignee of that shipment.

Appellant cites *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, in support of the proposition that delivery to the unloading chutes terminates the relation of common carrier and its delivery to the consignee, but we find this language in the opinion in that case:

"When animals are offered to a carrier of live stock

to be transported, it is its duty to receive them; and that duty cannot be efficiently discharged, at least in a town or city, without the aid of yards in which the stock offered for shipment can be received and handled with safety, and without inconvenience to the public, while being loaded upon the cars in which they are to be transported. So, when live stock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport, and deliver live stock will not be fully discharged unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee."

We agree with this statement of the law. The entire system of unloading chutes, alleys, gates, pens, etc., is designed for the express purpose of facilitating the forwarding and the receipt and delivery of live stock to the consignee, and form a part of the machinery of transportation. The liability of the Stock Yards Company begins with its receipt of the stock at the transfer switch, and ends with its delivery to the consignee, unless by reason of other circumstances, such as unreasonable delay in acceptance by the consignee, the relation changes to that of bailee. *Panhandle & S. F. R. Co. v. Crawford,* 198 S. W. (Tex. Civ. App.) 1079. We think there is nothing in the opinion in *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.,* 105 Neb. 151, and in the opinion of the supreme court of the United States in the same case, *Chicago & N. W. R. Co. v. Nye-Schneider-Fowler Co.,* 260 U. S. 35, 43 Sup. Ct. Rep. 55, inconsistent with these views. We hold, therefore, that the director general is liable for the nondelivery of the

stock, under the statute and the principles of the case last mentioned.

The action of the court in taxing an attorney's fee against the appellant is assigned as erroneous, for the reason that general order No. 50 of the director general, relating to actions against such official for damages to person or property being transferred by him, contains the proviso: "This order shall not apply to fines, penalties, and forfeitures." We have repeatedly held that an attorney's fee is not a fine, penalty, or forfeiture, but is in the nature of costs. *Marsh & Marsh v. Chicago & N. W. R. Co.*, 103 Neb. 654; *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151; *Eckman Chemical Co. v. Chicago & N. W. R. Co.*, 107 Neb. 268. The decision of the supreme court of the United States in *Chicago & N. W. R. Co. v. Nye-Schneider-Fowler Co.*, 260 U. S. 35, is not inconsistent with this view.

The contention that no fee can be allowed because the act permitting such a fee was repealed by chapter 134, Laws 1919, before the fee was allowed, must also fail. The act of 1919 added the following words to the statute: "And in the event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney fee to be fixed by such court or courts." This was the only change made. The simultaneous repeal and reenactment of all the other provisions of the law had the effect to continue the uninterrupted operation of the statute. *State v. McColl*, 9 Neb. 203; *State v. Bemis*, 45 Neb. 724; *Quick v. Modern Woodmen of America*, 91 Neb. 106; *Bauer v. State*, 99 Neb. 747.

The judgment is for $174.82. The district court allowed $100 as attorney's fee. In view of the liberal allowance made in the trial court, no attorney fee will be allowed here. *Eckman Chemical Co. v. Chicago & N. W. R. Co.*, 107 Neb. 268.

AFFIRMED.

STATE, EX REL. S. C. CLARKE ET AL., APPELLEES, V. GERING IRRIGATION DISTRICT ET AL., APPELLANTS.

FILED FEBRUARY 15, 1923. No. 23028.

1. **Waters:** IRRIGATION DISTRICTS. An irrigation district is a public corporation; its funds are derived from taxation of all land within the district, and the main purpose of its organization is to furnish water for the purpose of irrigation to all the landowners within the district upon fair and equitable terms and conditions.
2. ———: ———: LATERALS. Lateral ditches are often necessary portions of the irrigation works of an irrigation district, and, where necessary, should be provided, maintained and supervised by the district, in order that a just apportionment of water to each landowner may be made.
3. ———: ———: ———. Owners of land within the district may provide and control such laterals themselves if the district fail to do so, and they can agree among themselves as to the proper upkeep of the laterals and the equitable division of the water.
4. ———: ———: MANDAMUS. If, in the case of such a lateral constructed by the landowners, it is not kept in repair, and contentions arise between such landowners, some receiving more water from the lateral than their just share, and others little or no water when entitled to the same, the landowners who are deprived of water may, by writ of mandamus, compel the directors of the irrigation district to take such steps as to provide them with their just share of the water and to supervise the distribution of the same.

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

Olsen & Cottle, Mothersead & York and *Floyd E. Wright,* for appellants.

Morrow & Morrow, contra.

Heard before MORRISSEY, C. J., LETTON, FLANSBURG, DEAN and ALDRICH, JJ., RAPER and TROUP, District Judges.

LETTON, J.

The relators are landowners living within the boundaries of the Gering Irrigation District. Their land is

situated toward the lower end of a lateral, known as lateral No. 2, and deriving its supply of water from the main canal belonging to the district. The lateral is about three or four miles long. The lateral was not constructed by the irrigation district, but by the landowners whose lands it was designed to water. For a number of years the landowners toward the lower end of the lateral have been unable to obtain their proper share of the water taken from the main canal. The upper water-users took so much of the water in times of scarcity that little or none could be had near the lower end of the lateral. They also had trouble during a number of years, both with regard to washouts, when there was an excessive flow in the main canal, and scarcity of water, causing loss of crops in some seasons. A number of years ago the owners of lands toward the lower end of the lateral took steps to form a corporation and to take over and control this lateral, but the effort proved abortive and the troubles have continued. Relators have demanded relief from the directors of the irrigation district, asking that the district take over and control the distribution of water along the lateral, but this request was refused. They thereupon brought this proceeding in mandamus, for the purpose of compelling the board of directors of the district to make immediate provision for the repair and enlargement of lateral No. 2, so as to render its capacity sufficient to furnish them their *pro rata* share of the water, and to require the district, through its superintendent, to supervise and measure the distribution of water through the outlets of the lateral, so that each water-user should receive his *pro rata* share.

The respondents deny that the lateral is any part of the irrigation works of the district. They admit that the district has never attempted to maintain or keep the lateral in repair, or supervise or control it; they allege that Highland Lateral Company No. 2 is the owner of the lateral; that the plan of organization

adopted by the district does not include the construction or repairs of any lateral, but only the delivery of water at the bank of its main canal; that it is not required to deliver water to the respective landowners, but complies with the law by delivering water from the main canal at the bank into the laterals, and that no provision has ever been made for delivering water at any other place; that each landowner has built and maintained the necessary laterals for the conveyance of water from the main canal to his individual lands, and that relators and their predecessors in ownership have for more than 20 years acquiesced in their said plan; that the district has exhausted its tax levy and has no funds with which to perform, and no law authorizing the raising of funds for such a purpose.

The facts alleged in the petition as to the condition of the lateral and the deprivation of water supply to relators are undisputably established, and, in fact, not seriously controverted by respondents.

Since the defenses made are legal in their nature, it becomes necessary to examine the statute to ascertain the duties and powers of the directors of an irrigation district, and the rights of the landowners in the district with respect to the distribution and apportionment of water.

Is the lateral a part of the irrigation works of the district, and does the fact that the district has never constructed a lateral excuse its failure to furnish water to residents? Section 2865, Comp. St. 1922, makes it the duty of the directors of irrigation districts "to make all necessary arrangements for right of way for laterals from the main canal to each tract of land subject to assessment, and when necessary the board shall exercise its rights of eminent domain to procure right of way for the laterals and shall make such rules in regard to the payment for such right of way as may be just and equitable." This evidently contemplates that the district shall procure the right of way for the necessary

laterals "to each tract of land subject to assessment." That the district has not heretofore furnished water except at head gates upon its main canal is no defense. The fact that it has neglected a plain duty for many years is no reason why it should continue to neglect it. That the plan of the district did not contemplate the construction of laterals is also no defense. If the plan was defective and failed to accomplish the statutory duty of the district to furnish water to each landowner in the district, in section 2866 it is provided: "The board, its agents and employees shall have the right to enter upon any land within the district, to make surveys, and may locate the line of any canal or canals and the necessary branches." This language presumes the necessity of surveys and the location of canals and necessary branches after the formation of the district, and assumes that "branches" or laterals may be necessary to carry out the purpose of the organization.

By section 2865 it is made the duty of the board to "establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of this article." This section further provides that water shall be apportioned ratably to each landowner upon the basis of the ratio which the last assessment of said owner for district purposes bears to the whole sum assessed by the district.

An irrigation district is a public corporation. Its funds are derived from the taxation of all land within the district. The very purpose of its organization is to furnish water upon fair and equitable terms and conditions to each and every landowner within the district. Comp. St. 1922, secs. 2857-2953. This, in the case of some small districts, may perhaps be done by supplying water direct to landowners from the banks of one canal. But this can seldom be done in districts embracing many

acres. In such case there must be laterals to carry the water to the ultimate user. Such laterals are necessary portions of the irrigation works and should be provided, maintained and supervised by the district, so that a just apportionment of the water may be supplied to each landowner therein. It would be manifestly unjust and unfair to assess a landowner whose property is situated several miles from the main canal without providing him reasonable facilities to obtain the water for the furnishing of which he is taxed. To sustain the position of the respondents would be to hold that the owners of land adjacent to the main canal are entitled to receive water without further initial outlay, while at the same time other landowners, who are also taxed according to valuation, shall be compelled to build and maintain expensive works and furnish supervision for such works in order to obtain that which is supplied without such expense to others who have no greater right. This would be clearly inequitable, unfair and unjust, and such construction of the statute ought not to be adopted. Of course, landowners may provide their own laterals if they desire, but where there is more than one water-user taking water from the same lateral, and any dispute arises between the users, the district board should regulate the supply, as in the case of other users of water. Water is as essential to successful and profitable agriculture in arid regions as blood is to the body, and its distribution is as necessary to such pursuit as the circulation of the blood is to animal tissues. The statute, both by express direction and by implication, provides that all powers reasonably necessary to carry into effect the object and purpose of the organization are possessed by the board of directors.

That the petition does not show that the district has sufficient funds on hand which can be utilized for the purpose of repairing the lateral is not a sufficient

defense under the circumstances proved in this case. The evidence shows that, upon several occasions during the years in which there has been trouble over the water in the lateral, the presence of a ditch-rider who could and would control the quantity of water withdrawn from the lateral by the upper owners would have allowed the water to which the lower owners were entitled to flow to their lands. Furthermore, the writ did not compel instantaneous action, but only required the board of directors to make provision for the repair and enlargement of the lateral and for its supervision in the future. The refusal to perform the duties requested was never placed by the directors on the ground that they had no funds with which to perform, but their refusal has always been upon the ground that the district had no authority to construct, maintain and supervise the laterals, their duty ending with the opening of the head-gate upon the main canal; and this is the real and substantial issue in this case.

The respondents argue that section 8462, Comp. St. 1922, provides: "Any owner or person in control of any ditch for irrigation purposes * * * shall construct necessary outlets *in the banks* for the delivery of water to all persons who are entitled to the same;" and that this is the measure of their duty. This section is no part of the irrigation district act, and does not affect the duty of the district to furnish water. If applicable at all, it only prescribes upon whom the duty to construct outlets rests.

Similar questions as to the rights of water-users have been presented to the supreme courts of California, Utah, and Idaho, and they have taken the same view. *Jenison v. Redfield,* 149 Cal. 500; *Niday v. Barker,* 16 Idaho, 73; *City of Nampa v. Nampa & Meridian Irrigation District,* 19 Idaho, 779, 23 Idaho, 422; *Harris v. Tarbet,* 19 Utah, 328.

AFFIRMED.

LOUIE OSBORNE FERSON ET AL., APPELLANTS, V. ARMOUR & COMPANY ET AL., APPELLEES.

FILED FEBRUARY 15, 1923. No. 22224.

1. **Pleading:** PETITION. The rules of pleading require a plaintiff in a civil suit to insert in the petition "a statement of the facts constituting the cause of action in ordinary and concise language and without repetition." Comp. St. 1922, sec. 8608.
2. **Contempt.** Litigants and counsel are answerable to the court for violating established rules of procedure and orders made in regard to pleadings.
3. **Pleading:** STRIKING PETITION. A petition may be stricken from the files if fatal defects and improper matter therein extend to the pleading as a whole, or if plaintiffs, in filing it, ignore an order of the court.
4. **Dismissal.** Judicial power to dismiss an action without prejudice for failure of plaintiffs to comply with rules of pleading and orders relating thereto is recognized by statute. Comp. St. 1922, sec. 8598.
5. ———. A court of general jurisdiction has inherent power to protect itself, litigants and the public from vexatious proceedings by dismissing with prejudice suits instituted by plaintiffs who repeatedly violate the rules of pleading and the orders relating thereto, after having had a full opportunity to present litigable controversies in proper form.

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

John O. Yeiser and *John O. Yeiser, Jr.*, for appellants.

Kennedy, Holland, DeLacy & McLaughlin, Wayne Selby, Sears, Horan & Sheppard, Baldrige & Saxton, Gaines, Van Orsdel & Gaines, W. H. Herdman, Montgomery, Hall & Young, Gurley, Fitch & West, Brown, Baxter & Van Dusen, I. J. Dunn and *Chester A. Legg, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH, DAY and GOOD, JJ., TROUP, District Judge.

ROSE, J.

This proceeding was instituted April 9, 1919, to recover $120,000,000 in damages. Plaintiffs claim to

have procured from the government of the United States January 8, 1901, a patent for the invention or discovery of a process for the manufacture of a biscuit or ration combining pork and beans. They also claim to be owners of similar patents issued by other governments. Defendants are corporations and individuals engaged in the packing industries and in other industrial enterprises. The demand of plaintiffs for relief seems to be based on a conspiracy which they claim resulted in personal injuries and indignities and in the destruction or loss of exclusive rights, investments, property, business and profits protected by their patents.

Though the proceeding has been pending in court nearly four years, it has not passed beyond the petitions and the conduct of plaintiffs and their counsel.

Four petitions were filed. The first covered approximately 400 pages of matter, containing, among other things, inflammatory language, conclusions of fact and law, redundant allegations, unnecessary repetitions, scandal, private chat, personal episodes, evidence, criminal charges and other extraneous matters having no legitimate relation to the stating of a cause of action for damages. These flagrant violations of the rules of pleading stand out conspicuously on the face of the petition. They cumber the record, harass defendants and consume time which the court should devote to litigants who invoke processes of the court and judicial powers in an orderly manner. The law does not require defendants to answer such a petition, nor are they required, in attacking it, to perform services equivalent to the drafting of a petition stating in proper form a cause of action against themselves. Following the proper procedure in a case like this, the district court struck the first petition from the files.

Afterward, a shorter petition was filed, and it was also stricken from the record because it did not conform to the statutory rule requiring, "A statement of the facts constituting the cause of action in ordinary

and concise language and without repetition." Comp. St. 1922, sec. 8608.

Later, a third petition, containing generally the improper matter and the other infirmities in both the first and the second petitions, was filed. This was also stricken from the files, the findings of the trial court containing, among other things the following:

"The court further finds that the plaintiffs have been contemptuous of the court, constructively and legally, filing petitions repeatedly, and particularly in filing their third amended petition, after being advised by the court that previous petitions with like defects were improper, and after the striking of such previous petitions from the files; but the court does not find that the plaintiffs are actually and actively contemptuous, and so the court will not order the case dismissed."

After this warning, while the opportunity to file a petition conforming to the rules of pleading and to the orders of the district court was still open, plaintiffs filed a fourth petition containing, in substance, the fatal defects for which the second petition had been condemned. The fourth petition met the same fate as the others, but, in addition, the action was dismissed with prejudice. From the dismissal plaintiffs have appealed.

Did the trial court err in striking the fourth petition from the files and in dismissing the proceeding with prejudice?

While no particular form of expression or literary style is required of plaintiffs in drafting a petition, both the statute and the orderly procedure essential to the administration of justice require "A statement of the facts constituting the cause of action in ordinary and concise language and without repetition." This rule is essential for the purposes of advising defendants of their alleged wrongs or obligations, of raising and defining issues of fact, of ruling on the admissibility

of evidence, and of making findings or of submitting questions to the jury. To aid litigants and the courts in ascertaining the truth about controverted issues of fact for the purpose of administering justice, the state is engaged at an enormous expense in educating men and women to prepare pleadings and to perform other services of attorneys whose duties extend beyond their clients to the courts and the state. A court is not a mere instrument of litigants for the settlement of private controversies. It is a separate department of government. Out of its findings and judgments in actions between private suitors grow rules of conduct applicable to society as a whole. Litigants and counsel alike are answerable to the court for violating established rules of procedure and orders made in regard to pleadings. Plaintiffs' fourth petition not only violated established rules, but it was filed in contempt of court. In a situation like this defendants are not limited to the statutory method of attacking the petition by motion to strike out improper matter or to make allegations more definite and certain. Comp. St. 1922, sec. 8673. It may be stricken from the files, if fatal defects extend to the pleading as a whole, or if plaintiffs in filing it ignored an order of the court. Judicial power to dismiss an action without prejudice for failure of plaintiffs to comply with rules of pleading and orders relating thereto is recognized by statute. Comp. St. 1922, sec. 8598. A court of general jurisdiction has also power, in administering justice as a department of government, to protect itself, litigants and the public from vexatious proceedings by dismissing with prejudice suits instituted by plaintiffs who repeatedly violate the rules of pleading and the orders relating thereto, after having had a full opportunity to present litigable controversies in proper form. This power, however, should be sparingly exercised. Otherwise innocent suitors may suffer from the mistakes or the contumacy of attorneys whom the court itself has licensed to practice law. The

present case, however, is not one wherein the clients are ignorant of the nature and the contents of the petition. Much of the scandal and other objectionable matter condemned could only have been collected and prepared by painstaking care and industry on the part of plaintiffs themselves. Under the circumstances of this particular case, the trial court did not err in dismissing the proceeding with prejudice.

AFFIRMED.

LINCOLN LAND COMPANY, APPELLEE, V. COMMONWEALTH OIL COMPANY, APPELLANT.

FILED FEBRUARY 15, 1923. No. 22230.

1. **Bill of Exceptions:** SETTLEMENT. A district judge has no authority to settle a bill of exceptions more than 100 days after adjournment of the term at which the appealable judgment in the case was rendered and entered on the journal.
2. **Appeal:** BILL OF EXCEPTIONS. An appellee does not lose his right to attack a bill of exceptions because he made no objections to it until after the appellant filed his briefs, if the filing thereof preceded the filing of the bill of exceptions.
3. ———: ———: PRESUMPTION. After the bill of exceptions has been quashed in the appellate court, it will be presumed that the evidence sustains the findings of fact below on the material issues.
4. **Mines and Minerals:** LEASES: ABANDONMENT. A lease for oil and other minerals may be terminated or abandoned by failure of lessee to perform his agreements to prospect for and produce oil or other minerals in paying quantities within two years or otherwise pay stipulated rentals.

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

A. R. Honnold, for appellant.

Mothersead & York and *Hall, Cline & Williams, contra.*

Heard before MORRISSEY, C.J., ROSE, ALDRICH and DAY, JJ., TROUP, District Judge.

ROSE, J.

This is a suit in equity to cancel a recorded lease as a cloud on the title to lands owned by the Lincoln Land Company, plaintiff, in Scotts Bluff county. The lease was dated December 16, 1905. The Goshen Hole Irrigation Company was named therein as lessor and the Commonwealth Oil Company, defendant, as lessee. Lessor demised "all of the oil, gas, salt, coal, iron, gold, copper or other minerals in, under and upon" the premises, so long as those or other minerals are found in paying quantities, in the opinion of the lessee, "or the rent for failure to drill a well or operate said minerals is paid." The annual rental was 10 cents an acre in the event of a failure to drill a well within two years. Plaintiff pleaded, among other things, that it purchased the lands from the Goshen Hole Irrigation Company, lessor, in March, 1908, and that, about the time mentioned, defendant removed its rigging and its drilling apparatus, abandoned the premises permanently and surrendered possession, after having violated its agreement to drill wells or pay rentals according to the terms of the lease. The facts entitling plaintiff to relief in equity were put in issue by the answer of defendant. Upon a trial of the case, the district court found all the issues against defendant, canceled the lease and quieted in plaintiff the title to the lands. Defendant has appealed.

A motion to quash the bill of exceptions was submitted with the case on its merits, and is sustained for the reason that it was signed by the trial judge after the statutory period for allowing it had expired. The judgment from which defendant appealed was rendered and entered on the journal April 13, 1921, at the February term which expired June 3, 1921. The bill of exceptions was signed by the trial judge December 26, 1921. That was too late. He had no authority to settle it more than 100 days after the expiration of the term. *Walker v. Burtless,* 82 Neb. 211. It is argued,

however, that the motion should not be sustained because the briefs of defendant were filed before plaintiff objected to the bill of exceptions. This position is untenable. The bill of exceptions did not reach the appellate court until after defendant's briefs were filed.

With the bill of exceptions quashed in the appellate court, it will be presumed that the evidence sustains the findings of fact below on the material issues. The inquiry on appeal is thus narrowed to the sufficiency of the pleadings to support the judgment canceling the lease and quieting the title in plaintiff.

The lease is a part of the petition and shows on its face that it could only be kept in force indefinitely by drilling wells or paying annual rentals. Violations of these terms are pleaded in the petition. Could the lease be thus terminated or abandoned? The demise was for a period "so long as oil, or gas, or salt, or coal, or iron, or gold, or copper, or other minerals is found in paying quantities, or the rent for failure to drill a well or operate said minerals is paid." In these respects nonperformance for two years was a ground of forfeiture by lessor. For a period of more than 10 years defendant neither prospected nor paid rentals. A lease for oil and other minerals may be terminated or abandoned by failure of lessee to perform his agreements to prospect for and produce oil or other minerals in paying quantities or otherwise pay stipulated rentals. *Guffy v. Hukill*, 34 W. Va. 49; *Ohio Oil Co. v. Detamore*, 165 Ind. 243; *Dill v. Fraze*, 169 Ind. 53; *Peoples Gas Co. v. Dean*, 193 Fed. 938; *Rawlings v. Armel*, 70 Kan. 778; *Caylor v. Bankers Oil Co.*, 110 Kan. 224; *Anthis v. Sullivan Oil & Gas Co.*, 83 Okla. 86; *Foster v. Elk Fork Oil & Gas Co.*, 90 Fed. 178. The petition pleads facts showing defendant terminated the lease or abandoned all rights under it.

AFFIRMED.

WILLIAM WHETSTONE V. STATE OF NEBRASKA.

FILED FEBRUARY 15, 1923. No. 22865.

Bail: RECOGNIZANCE. For the purpose of an appeal by a defendant who has been convicted of a misdemeanor in a prosecution before a justice of the peace, a recognizance with one surety only does not comply with a statutory requirement for a recognizance "with sureties," and is fatally defective. Comp. St. 1922. sec. 9999.

ERROR to the district court for Brown county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

John Wright, for plaintiff in error.

Clarence A. Davis, Attorney General, and *John M. Cotton, contra.*

Donald Gallagher, amicus curiæ.

Heard before MORRISSEY, C.J., ROSE, ALDRICH and GOOD, JJ., RAPER and TROUP, District Judges.

ROSE, J.

In a prosecution by the state before the justice of the peace for Pine precinct, Brown county, William Whetstone, defendant, was charged in three counts of an information with three separate violations of the law relating to intoxicating liquors. The offenses described were respectively possession, transportation, and giving away intoxicating liquors. Upon a trial defendant was convicted as charged and was sentenced to pay a fine of $100 for each of the three offenses. For the purposes of an appeal to the district court for Brown county, the justice of the peace took the recognizance of William Whetstone, defendant, in the sum of $1,000, with Allen E. Whetstone, as sole surety. The district court, holding that the law required more than one surety, dismissed the appeal. Defendant, as plaintiff in error, presents the record for review.

Was the appeal from the justice of the peace properly dismissed in the district court on the ground

that the statute requires more than one surety on the recognizance? The statute relating to appeals in prosecutions for minor offenses declares, among other things:

"No appeal shall be granted or proceedings stayed unless the appellant shall, within twenty-four hours after the rendition of such judgment, enter into a recognizance to the people of the state of Nebraska in a sum not less than one hundred dollars, and with sureties to be fixed and approved by the magistrate before whom said proceedings were had, conditioned for his appearance at the district court of the county at the next term thereof, to answer the complaint against him." Comp. St. 1922, sec. 9999.

These statutory provisions were considered in *Zobel v. State,* 72 Neb. 427, and it was therein said, referring to *Pill v. State,* 43 Neb. 23:

"The substance of the decision is to the effect that the provisions of the statute are mandatory and must be complied with in all material respects, otherwise the recognizance is fatally defective and confers no jurisdiction upon the district court. To the same effect is *Kazda v. State,* 52 Neb. 499. It would seem from a reading of said section of the Criminal Code respecting appeals in misdemeanor cases, that the entering into a recognizance by the defendant, and with sureties, to be fixed and approved by the court, is just as imperative as the provisions relating to the time the appeal must be taken, the time when the recognizance must be entered into, and the amount of the same."

It has generally been the practice, both under the common law and state statutes, to require more than one surety on a recognizance exacted as a condition of exercising the statutory right to appeal from the sentence of a magistrate in a prosecution for a misdemeanor. It was obviously the intention of the legislature in requiring "sureties" to adhere to the usual custom. While the right of appeal is recognized for the benefit of accused,

the purpose of the recognizance is the protection of the public. To make the appeal available, there must be a compliance with the statute. In the sense used the word "sureties" does not mean "surety," and the magistrate has no authority to release defendant from any part of his statutory obligation or to deprive the state of any protection exacted by the legislature. For the purpose of perfecting an appeal, this seems to be the view taken by the courts generally. It has been held that an appeal bond with one surety does not conform to a statutory provision for appeal bonds "with sufficient sureties," though another statute declares that "the singular always includes the plural and *vice versa*, except where such construction would be unreasonable." *Harris v. Regester & Sons*, 70 Md. 109. See, also, *State v. Fitch*, 30 Minn. 532; *Gibson v. Lynch*, 1 Murph. (N. Car.) 495; *Jones v. Sykes*, 1 Murph. (N. Car.) 281; *North American Coal Co. v. Dyett*, 4 Paige Ch. (N. Y.) 273; *White v. Rintoul*, 6 N. Y. Super. Ct. 259.

The conclusion is that the district court properly dismissed the appeal. In this view of the law, other questions argued are immaterial.

AFFIRMED.

MYRTLE M. STEARNS, APPELLEE, V. NEBRASKA BUILDING & INVESTMENT COMPANY, APPELLANT: F. B. BAYLOR, TRUSTEE, INTERVENER.

FILED FEBRUARY 15, 1923. No. 22170.

1. **Abatement**, Where a suit is pending and undertimined in the district court and afterward another suit is commenced in the same court, which purports to be a plea in abatement of the former suit, and wherein neither the parties nor the causes of action are the same as in the former suit, such action does not constitute a good plea in abatement.
2. **Judgment**: RES JUDICATA. The defendant in this action filed an answer and cross-petition, in a former suit begun by plaintiff herein, and recovered a judgment on its counterclaim. At the trial of the former case plaintiff introduced no evidence and, before defendant

recovered its judgment, and presumably before final submission, caused the suit to be dismissed without prejudice to a new action. Subsequently plaintiff began this suit against the same defendant pleading the same cause of action here which was pleaded in the former action. Defendant filed a plea in bar of the plaintiff's present suit pleading *res judicata*. *Held*, that plaintiff had a lawful right to prosecute the present action to judgment, and that the court did not err in denying defendants plea in bar.

3. **Corporations:** ACTION FOR COMMISSIONS: DEFENSES. Where an action is begun against a defendant corporation to enforce the payment of commissions, which it is alleged were agreed to be paid to plaintiff under a verbal contract, and claimed to be due plaintiff for procuring the sale of the defendant corporation's stock, it is no defense to the action that defendant's sales agents, other than plaintiff, effected such sales by alleged fraudulent representations of value made to the purchasers, the plaintiff not being a party to the alleged false representations, and it being neither charged nor proved that plaintiff had knowledge thereof at the time.
4. **Contracts:** ACTION: DEFENSES. Want of mutuality is no defense in an action to recover for services under a verbal contract where a party, at the time of entering into the contract to render the contemplated services, was not legally bound to perform, but subsequently did perform all of the conditions of the contract and thereby came clearly within its terms. *Bigler v. Baker*, 40 Neb. 325.
5. **Appeal:** AFFIRMANCE. The verdict of the jury, as the triers of questions of fact, will not be disturbed when there is sufficient competent evidence to support such verdict.
6. **Evidence** examined, and *held* that the verdict is supported by the evidence.

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

Doyle, Halligan & Doyle, and *Good & Good*, for appellant.

Hainer & Flansburg, *Fred C. Foster* and *Otto K. Perrin*, *contra.*

Johnson, Moorhead & Rine, for intervener.

Heard before MORRISSEY, C. J., LETTON, ALDRICH and DEAN, JJ., REDICK, District Judge.

DEAN, J.

This suit was brought to enforce the collection of certain commissions alleged to be due plaintiff on what is termed an exclusive agency contract for the sale of certain capital stock of the defendant company. The jury found plaintiff was entitled to $5,212.05, less $1,437.60, that being a counterclaim of defendant's, leaving a balance of $3,774.45, for which plaintiff recovered a verdict and judgment. Defendant appealed.

The contract was verbal, and, it is alleged that it was entered into November 10, 1917; that under the contract plaintiff was to and did sell or caused the sale of, capital stock of the defendant company in territory adjacent to the village of Raymond; that her commission should be 10 per cent. upon all stock thereafter sold in such territory, whether sold by her or sold by others; that about January 1, 1919, the rate of her commission was raised from 10 per cent. to 12½ per cent. of the gross amount received from such sales; that to Mrs. Lewis Griggs, sometimes known as Mrs. Fannie E. Griggs, there were sold 319 shares, and to others in the same territory 125 shares; that plaintiff was also instrumental in selling to Fred Johnson defendant's capital stock of the par value of $11,900, and for this sale plaintiff's compensation was to be 10 per cent. of the par value thereof; that upon all of the sales of stock enumerated in plaintiff's petition there was due plaintiff, as commissions, $5,747.55, less $535.50, with which sum she was credited, leaving a balance due her of $5,212.05 as above noted.

The defendant corporation for its answer alleged three separate defenses: First, that plaintiff brought an action against defendant November 24, 1919, setting up the same cause of action which is pleaded in the present case, and therein she prayed for a judgment; that defendant filed its answer and counterclaim December 26, 1919, alleging that defendant advanced to plaintiff $513.46 in cash and also sold to her an automobile for $770; that in the former action plaintiff in her reply

admitted defendant's counterclaim of $513.46, but alleged that the debt was canceled by the service rendered by plaintiff; that in the former suit defendant recovered judgment for $1,328.38 on its counterclaim which, when this action was begun, was a valid judgment, unpaid and unappealed from. Defendant avers that all of the issues pleaded in plaintiff's amended petition in this case were settled in the former case, and that it is a bar to this present action.

Defendant's second defense, in substance, is that about November 10, 1917, the defendant company employed plaintiff to do office work for a salary of $65 a month, which was subsequently raised to $100 a month; that she so continued in defendant's employ from November 10, 1917, to October 31, 1918; that the sale of the stock to Fred Johnson, hereinbefore noted, involved a proposed exchange of a certain note owned by him, secured by a real estate mortgage, for capital stock of the company; that plaintiff agreed with defendant that in making the exchange with Johnson she would accept the difference between the discount necessary to cash the note and mortgage and 10 per cent. as a full payment for her commission in that sale, an amount which approximated $535.50, which she agreed she would accept, and which was then paid to her, as her full conpensation for the Johnson sale, or exchange; that all of the stock sales upon which plaintiff bases her claim in the present case were made when plaintiff was in the employ of defendant upon a salary. Defendant denied that it had a contract with plaintiff to pay her any commission or other compensation for any of the sales sued on.

For a third and further defense, a "Supplemental Answer and Plea in Abatement" was filed by defendant. It is therein alleged that the same Fannie E. Griggs, who bought stock in the defendant corporation, began an action January 28, 1921, by her guardian, C. D. Coe, against defendant, in the district court for Lancaster county, to recover from defendant company $44,250 for

preferred stock which she bought from defendant, the guardian alleging in his petition that the sale of the defendant capital stock was effected by the fraudulent and false representations of the agents of defendant who thereby induced her to purchase; that the stock so purchased by Mrs. Griggs, upon which she based her cause of action against defendant, is a part of the same cause of action upon which the plaintiff herein, Myrtle M. Stearns, bases her cause of action in the present case; that if the guardian of Fannie E. Griggs recovered in the Griggs suit it would be an adjudication of the fact that the purchase of the stock by Griggs was procured by false and fraudulent representations on the part of the agents of the Nebraska Building & Investment Company, and that in such case the plaintiff could recover no commission because of the perpetration of the fraud set up in the Griggs petition; that it therefore became necessary to try the fraud issue presented in the Griggs petition before trying the issues joined in the present suit.

Plaintiff's reply contains the usual averments of denial of new matter in defendant's answer. She admitted the filing of her petition in the former suit, in the district court for Lancaster county, November 24, 1919, therein setting up substantially the same cause of action which is alleged in her petition in the present case; admitted that defendant answered therein and, upon trial, defendant recovered judgment for $1,328.38 on its counterclaim as hereinbefore noted. Plaintiff expressly denied that the issues or any of them tendered by plaintiff's petition herein were submitted to or determined or adjudged by the court in the former action; that, under leave of court, plaintiff in the present case voluntarily dismissed her petition in the former action before judgment was entered, and without prejudice to a future action, and withdrew from the case; that thereupon, in default of any defense being made to the defendant's counterclaim, the court entered judgment against this plaintiff

upon the counterclaim in the former suit in the sum of $1,328.38 and costs.

In respect of the application of the law to the facts, there is a wide divergence of opinion between opposing counsel. The evidence of the parties, submitted in support of their respective pleadings, were in all respects resolved by the jury in favor of plaintiff; so that our discussion of the record should necessarily be confined, for the most part, to the questions of law which are here involved.

It may be noted that plaintiff's amended petition in the present case was filed September 13, 1920. Defendant's brief was filed in this court January 31, 1920, wherein it is argued: "The defendant was compelled to go to trial in the instant case, and the plaintiff recovered a judgment for commission on the stock sold to Fannie E. Griggs. Later, the case of C. D. Coe, guardian of Fannie E. Griggs, against this company, Docket 73-193, was tried, and a judgment was entered against the defendant for the full amount of the stock purchased by Fannie E. Griggs, some $14,000 said case is now before this court on appeal, being case No. 22372." Elsewhere in its brief defendant says, "the arrangement for selling stock to Mrs. Griggs" was made by two men who were its sales managers.

In *Spencer v. Johnston,* 58 Neb. 44, we held: "The pendency of a former action for the same cause, between the same parties and in the same court, constitutes a good plea in abatement." To the same effect is *Richardson v. Opelt,* 60 Neb. 180; 1 C. J. 57, sec. 73, 59, sec. 76; *Walter Commission Co. v. Gilleland & Hamlin,* 98 Mo. App. 584.

It is perfectly apparent that defendant does not come within the rule announced in the *Spencer* case. Neither the parties nor the causes of action are the same. Besides, the suit in support of the plea in abatement was commenced by defendant in the district court only two or three days before the trial of the present case was

begun, and this case had then been pending in that court several months. The court did not err in denying defendant's plea.

Defendant next contends that the court erred in overruling its plea in bar, which is based upon the fact that plaintiff began a suit against defendant November 24, 1919, wherein she set up the same cause of action which is pleaded in this case, and wherein defendant answered and there recovered the $1,328.38 on its counterclaim, all of which is referred to more in detail in the pleadings which are hereinbefore cited.

No authorities are cited in support of its argument on this point. It is elementary that plaintiff waived nothing by the institution of the former suit, which was subsequently dismissed by her, without prejudice, before defendant recovered a judgment on its counterclaim. It appears that plaintiff did not introduce any evidence in the former action, and, in the present case, she admits validity of defendant's judgment upon its counterclaim. Under that state of facts plaintiff had a lawful right, which she exercised, to prosecute the present action to judgment. The court did not err in denying defendant's plea in bar.

Another defense interposed is that this action was prematurely brought. Counsel contend that plaintiff's right of action depends upon whether the sale to Mrs. Griggs was *bona fide,* and, unless that fact is finally established, they insist that plaintiff has no basis for recovery.

We do not think the argument is tenable. The record fairly discloses that plaintiff knew nothing about the fraudulent character of the stock nor of the fraudulent means which it is alleged were employed by defendant's sales organization to effect the sale of such stock, and, as hereinbefore noted, she was in no way a party to the fraud practiced upon Mrs. Griggs or upon any other purchaser. Under the pleaded facts plaintiff should not be, and of course was not, a party to that suit.

There is evidence which tends strongly to prove the

allegations of plaintiff's petition, namely, that her contract with the president of defendant company was that she was to receive a commission of 10 per cent. on all sales in the Raymond territory, whether sold by her or by others, and that she was to go about in that territory, where she formerly lived and where she had many friends and relatives, as her clerical duties in defendant's office would permit, to interest such friends and relatives in the purchase of stock. There is evidence tending to prove that she visited many persons in the designated territory, and that some of them, but by no means all, purchased stock. It sufficiently appears that the court did not err in holding that the present case should not await the trial of the suit begun by the guardian.

Defendant points out that no consideration is pleaded, nor is there an allegation or any evidence in the record of any promise on the part of plaintiff to do or perform any act. In other words, plaintiff incurred no obligation and could terminate the contract at will or work or refuse to work as suited her convenience.

In *Bigler v. Baker*, 40 Neb. 325, we said: "Want of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within its terms." The case is cited with approval in *Dickson v. Stewart*, 71 Neb. 424. See also, 6 R. C. L. 686, sec. 93. In section 94 of the same text, among other things, it is said: "Accordingly, where one makes a promise conditioned upon the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality, and the promisor is liable though the promisee did not at the time of the promise engage to do the act; for upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration, which relates back and renders the promise obligatory." Reversible error cannot be predicated on this assignment. We adhere to the rule announced in the *Bigler* case.

Defendant argues that plaintiff should not receive any compensation on the Griggs sales, the heaviest investor residing in the Raymond territory, on the ground that she did not sell the stock to her. Objection was also made for another reason, namely, that Mrs. Griggs received a commission, or discount, of 10 per cent. on the stock that she purchased because she refused to purchase on any other terms. But, as we have seen, plaintiff testified, in support of the averments of her pleadings, that the president of the defendant company agreed with her that she should have an exclusive agency covering the Raymond district and also a commission of 10 per cent. on the stock bought by Mrs. Griggs, just the same as though no commission, or discount, was allowed to Mrs. Griggs thereon. Plaintiff's evidence throughout tends to support the averments of her petition on every material point.

It is true that the president of the company, and one or more of its employees, denied all of the material evidence of plaintiff, notwithstanding her evidence was in large part corroborated by two of defendant's sales managers, that the arrangements were made to which plaintiff testified with respect to the exclusive sale of stock in the Raymond territory. In fact, one or more of defendant's sales managers corroborated much of plaintiff's material evidence in respect of the issues involved here. It appears, however, that the jury accepted plaintiff's version of the transaction between the parties rather than that of the defendant.

Defendant also contends that no commission should be allowed with respect to sales to three members of the Kerlin family, three brothers of Mrs. Griggs, who purchased stock through Mrs. Griggs to the amount of $11,399, by the use of money appropriated from the sale of land of her father. The same objection is made with respect to a sale to Mrs. Rosa Barton who purchased stock to the amount of $2,659, and also, on the same

grounds, objection is made to the sale of stock to E. L. Kemmerer, a purchaser in the sum of $2,071.

There is also a controversy with respect to certain stock which was sold to Fred Johnson hereinbefore noted, in the aggregate amount of $11,000 or upwards. This sale was effected by the exchange of an interest of that amount in a real estate mortgage owned by Mr. Johnson, as we have seen. Defendant contends that plaintiff is entitled to no compensation in respect of this sale. But she testified that an agreement was entered into between the president of the company and herself to the effect that she should have her commission thereon, and upon all of the stock which was sold and which is herein enumerated, because she introduced the subject of buying stock not only to Johnson, while he was living on a farm in Raymond territory, although at the time the sale was closed he was a resident of Lincoln, but also to the other purchasers in that territory.

The record shows that every disputed question of material fact, testified to by the parties in support of their respective pleadings, was warmly contested. However, the evidence was properly and fairly submitted to the jury, under instructions in which reversible error does not appear. The verdict, too, is not excessive, as defendant charges, but responds to the proved facts. It follows that, under a long-established and familiar rule, the verdict of the jury, as the triers of questions of fact, will not be disturbed when there is sufficient competent evidence to support it. And it appears to be so supported here. Defendant charges that the verdict is the result of passion and prejudice, but, in view of the evidence, we are unable to view it in that light.

Defendant contends that the court erred in giving instructions, numbered 3 and 4 of its own motion, but we do not find error therein.

We conclude that reversible error has not been shown. The judgment is therefore

AFFIRMED.

NANCY A. SANDERS, APPELLEE, V. ISAAC NIGHTENGALE, APPELLANT.

FILED FEBRUARY 15, 1923. No. 22223.

1. **Fraud:** QUESTION FOR JURY. In an action for damages for fraud and deceit in the sale or exchange of property, it is for the jury to determine from the evidence whether facts and circumstances are established which show that plaintiff was justified in relying on the representations made by defendant, and whether such representations were made to induce the exchange of properties.
2. **Trial:** INSTRUCTIONS. "Instructions stating the law correctly as a whole, *held* sufficient, though one or more of them, taken separately, may not have been accurate." *Smith v. Meyers*, 52 Neb. 70.
3. **Appeal:** NEGLECT OF OFFICER. "Where a party free from fault or laches is prevented from having his appeal docketed in the appellate court within the statutory period solely through the neglect or failure of the proper officer to prepare the transcript of the proceedings, the law will not permit him thereby to be deprived of his appeal." *Continental Building & Loan Ass'n v. Mills*, 44 Neb. 136.
4. **Evidence** examined, and *held* that it supports the verdict.

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

M. D. Tyler and *Mapes, McFarland & Mapes*, for appellant.

William L. Dowling and *Earl J. Moyer, contra.*

Heard before MORRISSEY, C.J., LETTON, DEAN and GOOD, JJ., RAPER, District Judge.

DEAN, J.

Mrs. Nancy A. Sanders began this action to recover damages in the sum of $6,750 from defendants, Isaac Nightengale and Fred H. Ellis, which she alleged grew out of the exchange of a farm of 194 acres owned by her in Holt county, which was incumbered by a mortgage of $2,000, for a 12-room hotel property and three town lots on which it was situated, in the village of Winslow, Dodge county. As a part of the same transaction she

gave back a $3,000 mortgage to Nightengale on the hotel property, on the theory that it exceeded the value of her equity in the farm in that amount. She alleged that the exchange was effected by misrepresentations and fraud practiced upon her by defendants in respect of the value of the property which she received in exchange. The jury returned a verdict for $3,500 against defendant Nightengale, and he has appealed from the judgment rendered thereon.

When the exchange was made Mrs. Sanders was a widow about 54 years of age and without business experience. Two of her sons were then in the army and she had no person upon whom to rely for advice. When the trade was made she was employed as a nurse in the home of a family at Norfolk. When the case was tried she was employed as a housemaid. She testified that defendant Ellis, a real estate man, was a schoolmate and a professed friend, and that he introduced the subject of making the exchange to her.

After some preliminaries it appears that Ellis arranged for a meeting of plaintiff and defendant, at which Ellis was present, where the contract, except as to the formality of signing, was agreed upon. There is evidence tending to prove, and which would justify the jury in the belief that the meeting of the parties and the exchange of properties was brought about by Ellis, and that from the inception of the plan Nightengale secretly connived with him to that end.

Plaintiff testified that, when the parties met pursuant to the arrangement, the value of the respective properties was discussed by defendant and Ellis and herself, and that both of them told her that the hotel was a good paying investment and of much greater value than her farm and that it would yield a better income. She was also advised that, practically alone as she was in the world, she could carry on the hotel with much greater convenience than she could carry on a farm in Holt county;

that she believed and relied on and acted on the representations so made with respect to the hotel, its value, its paying qualities and the like, was testified to by her. All of the representations so made she said she afterwards found out were false and untrue and made to cheat and defraud her.

At the trial it was shown that the hotel property had been vacant for some time before the trade was made, and that, shortly before, Nightengale, by his own admission, procured a man to move in and with his family occupy it, rent free, to keep the hotel open and keep up the insurance. It appears that it was so occupied when plaintiff visited the property, but she testified that she did not know and was not informed of the character of the occupancy at the time.

Plaintiff called three or four witnesses who testified respecting the value of plaintiff's farm and its improvements when the trade was made, from which it was made to appear that the property was worth from $55 to $60 an acre. Three or four witnesses, residents of Winslow, testified that Nightengale's town property was worth not to exceed $2,500 or $3,000. On the part of Nightengale, the evidence of several witnesses was introduced tending to prove that the hotel property was worth $5,000 or $6,000.

Nightengale testified that he never saw the Holt county farm before the contract was closed, and for his defense he relies in part upon plaintiff's visit to the hotel property before she signed the contract. He also contends that the value of the farm was misrepresented and that it was not worth $20 an acre. To substantiate this contention he produced three or four witnesses and they testified that its value did not exceed $18 an acre. However, the value of the respective properties and the evidence in respect of fraud and deceit, being questions of fact, were all properly submitted to the jury. It follows that the verdict should not be disturbed merely because of a conflict in the evidence.

Harris v. Polk Investment Co., 188 Ia. 1259, is a case where a purchaser went upon the land in suit after certain representations concerning its condition in that it was not subject to flood-waters and the like, were made by the seller, and which afterwards proved to be false. The court said: "Whether a purchaser is deceived or not is ordinarily a question of fact for the jury. No general rule can be laid down that is applicable to all cases."

Plaintiff testified that, when she found out the fraud that had been perpetrated, she called on Nightengale and proposed that they trade back the respective properties. He told her that, having sold the farm, it was not in his power to do so. He also advised her that a trade was a trade and that she would have to abide by it, or words to that effect.

It is elementary that, in an action for damages for fraud and deceit in the sale or exchange of property, it is for the jury to determine from the evidence whether facts and circumstances are established which show that plaintiff was justified in relying on the representations made by defendant, and whether such representations were made to induce the exchange of properties. The rule is stated in *Realty Investment Co. v. Shafer*, 91 Neb. 798.

Defendant criticises one of the instructions. But, when all are construed together, they properly state the law. The verdict is amply supported by the evidence. Reversible error cannot be predicated upon the giving of the instruction of which complaint is made. *Smith v. Meyers*, 52 Neb. 70.

The transcript in this case was filed out of time and defendant in apt time moved for that reason for a dismissal of the appeal. It is shown, however, that the delay was caused on account of the press of other official business in the office of the clerk of the district court, and through no fault of defendant. We overruled the motion to dismiss on the authority of *Continental Build-*

ing & Loan Ass'n v. Mills, 44 Neb. 136, where it was held: "Where a party free from fault or laches is prevented from having his appeal docketed in the appellate court within the statutory period solely through the neglect or failure of the proper officer to prepare the transcript of the proceedings, the law will not permit him thereby to be deprived of his appeal."

Finding no reversible error, the judgment is

AFFIRMED.

IN RE ESTATE OF VACLAV J. KUBAT.
JOSEPH L. KUBAT ET AL., APPELLANTS, V. CHARLES H. KUBAT ET AL., APPELLEES.

FILED FEBRUARY 15, 1923. No. 22226.

1. **Wills:** CONTEST: QUESTIONS FOR JURY. In an action contesting the validity of a will for want of mental capacity in the testator, and undue influence exerted upon him, if the evidence on these issues is conflicting, they should be submitted to the jury for determination.
2. ———: MENTAL CAPACITY. "If a testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent to make a will." *In re Estate of Laflin,* 108 Neb. 298.
3. **Evidence** examined, and *held* sufficient to sustain the verdict and special findings of the jury.

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

Murphy & Winters, for appellants.

Baker & Ready, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and DAY, JJ., TROUP, District Judge.

ALDRICH, J.

This is an appeal from the judgment of the district court for Douglas county denying the probate of the will of Vaclav J. Kubat, deceased, whose will was contested

by Charles H. Kubat and Mary Lenicek, son and daughter of the deceased, on the ground that the testator was, at the time of the making of the will, of unsound mind, and that the proposed will was obtained through undue influence. The case was tried before a jury, who by their verdict found for the contestants generally, and further that the document offered in evidence was not the last will and testament of Vaclav J. Kubat, deceased. In addition to the instructions, the court submitted two special interrogatories, which with the answers of the jury follow:

"First: Was Vaclav J. Kubat, on February 24, 1920, of sufficient mental capacity to make a will? Answer. No.

"Second: Was the signature of Vaclav J. Kubat to the document dated February 24, 1920, procured by the undue influence of Joseph L. Kubat and his family? Answer. Yes."

Judgment was entered in accordance with the verdict thus rendered by the jury, and proponents are now appealing to this court.

Appellants make three assignments of error, as follows: First. The court erred in not directing a verdict for proponents on the ground that there was no evidence of undue influence. Second. The court erred in not directing a verdict in favor of the proponents on the ground that there was no evidence of mental incapacity. Third. The court erred in giving instruction No. 5.

The first issue presented for our consideration is: Was the deceased testator of sufficient mental capacity to make a will at the time he did on February 24, 1920? On this issue of fact the jury, being properly instructed, found the testator did not have sufficient mental capacity. We agree to their finding.

On the question of mental capacity to make a will, our view of the qualifications requisite is precisely expressed in the court's instruction No. 5, and we quote it with approval:

"Want of sufficient mental capacity to make a will does not necessarily imply a want of mental capacity in all respects or upon all subjects. A person may be entirely sane upon one subject, or a number of subjects, and yet not have the mental capacity requisite to make a valid will. The kind of mental capacity which the law requires as essential to the making of a valid will is that which relates to the person's property, such capacity as will enable the person to know and recollect the property to be disposed of, to have a reasonable conception of the value and uses of property or money, and a reasonable conception of how property or money may be employed or enjoyed. If a person lacks a capacity and knowledge in relation to money or property, such person is not competent to make a valid will, even though he or she may be entirely rational on other subjects, or have a good recollection of early events or early acquaintances."

This fully explains the philosophy of a testator's attitude and what constitutes true mental capacity to make a will, and shows wherein a mental deficiency lies and mental competency rests. The instruction is in accordance with the rules laid down in such cases as *Brugman v. Brugman,* 93 Neb. 408, and *Hacker v. Hoover,* 89 Neb. 317.

Thus it is plain what this court determines as mental capacity to execute a valid instrument. There is no question about the law of this state on that subject. Applying these principles to the instant case, it plainly appears of record that on February 24, 1920, the deceased testator did not have sufficient mental capacity to make a valid will, remembering those to whom he was under obligation, the amount and extent of his property, where it was located, and its nature and character. Such was shown in the record, and that is why the jury answered that the testator did not have sufficient mental capacity. He was, at the time, feeble and helpless, stricken with paralysis, his second stroke. The jury

were correct in answering that question in the negative. We have no criticism to make about the instruction or the special finding, and say they found correctly on the facts.

In Underhill on Wills, sec. 125, it is said: "The mental and physical capacity of the deceased is to be considered in determining what degree of influence will vitiate his will. * * * The will of one whose independence has been weakened by indulgence in dissipation, or whose stamina, physical or mental, has been broken by illness or old age, may be easily overcome. * * * Every case depends wholly upon its own particular facts and attendant circumstances."

The next question for our consideration is one of undue influence, which is closely allied with the testator's weakness of body and mind. The finding of the jury is sustained by certain facts and the inferences therefrom which they bear to the whole subject. The intermeddling with testator on subjects calculated to harass and annoy him, hurrying him purposely to make a will without proper deliberation, is considered undue influence.

"The question whether there was fraud or undue influence in procuring the will, on the part of the plaintiff, and whether the will was executed by the testator without a knowledge of its contents are questions of fact within the exclusive province of the jury, which includes the credibility of witnesses; and the court is not at liberty to review and revise the action of the jury, unless there was not sufficient evidence to sustain a verdict against the will." 28 R. C. L. 405, sec. 417. See, also, *Blume v. Hartman,* 115 Pa. St. 32, 2 Am. St. Rep. 525, and note, p. 532.

The testator at the time of his death on February 29, 1920, was about 83 or 84 years old. He was a Bohemian by birth, and had lived in Cedar Rapids, Iowa, for years. His family consisted of Mary Lenicek, daughter, Joseph L. Kubat and Charles H. Kubat, sons. After the death of his second wife he lived at different places, staying

with his children part of the time and also living among his Bohemian friends. At the time the will was executed, February 24, 1920, and at the time of his death, he was at the home of his son, Joseph L. Kubat, in Omaha. Some two weeks before the execution of the will the testator was stricken with paralysis, his second stroke since 1916.

Within a week of the time the will was made, Joseph L. Kubat borrowed a business form book from Mr. Kratky one of the subscribing witnesses. A form was selected and was used by Mrs. Porter, Joseph L. Kubat's daughter, in writing the will. The will gave to Mary Lenicek and Charles H. Kubat $1,000 each, to Joseph L. Kubat's wife and three children $1,000 each, and to Joseph L. Kubat the residue of the personal estate. There was no real estate.

Witnesses testified that Joseph propped the old man up in bed and gave him pen and ink to sign the will. Both subscribing witnesses testified that the document was not read aloud nor by Vaclav J. Kubat while they were there.

On the night before the execution of the will, Charles H. Kubat was called to Joseph's house to draw his father's will. Joseph produced a memorandum as to how he said the testator wished the estate to be divided. According to the memorandum, Charles H. Kubat and Mary Lenicek were to receive $100 each, otherwise the memorandum provided for bequests in the same amounts and to the same people as did the will. At this point the testimony of Charles H. Kubat is as follows: "Q. Now, tell the jury just what you said when Joe gave you that list for that kind of a distribution. A. When Joe handed me that list, I looked it over, and father was lying there in bed, with his feet toward the north and his head toward the south, and I was right in the middle of the bed, in front of him, Joe right to the south of me. When I looked at it, I was surprised, and I said to Joe, 'Joe, what does this mean, $100 to me and $100 to Mary? Why, you don't mean that, Joe?' He was half crying,

and he says; 'They,' pointing to his wife and children in the next door, 'They want it that way.' 'Why,' I said, 'Joe, it is not what they want, it is what father wants here.' And I then turned to father, and we talked Bohemian. Q. Did you and Joe talk Bohemian in that conversation? A. Yes, sir; every word. Q. What did you say to your father? A. I said to father, 'He wants to give $100 to sister and $100 to me, and why is he going to get 108 times more than me and 108 times more than my sister?' My father reached up and took hold of me and said, 'Charley, Charley, that cannot be. That cannot be.' I said, 'Father, you have a right to give me $100 and I would have to be satisfied, and I would be satisfied, if that is what you want.' He says, 'Charley, that cannot be, you must have your share and sister must have her share, and Joe his share.' Joe was standing there, and I said, 'Joe, you heard what father says.' And he said, 'They want it.' 'Joe', I said, 'it is not what they want, it is as father wants. If father wants to give me $1 only he has a right to do it, but he don't want it that way.' Q. Is that all that was said? A. That is about all, except I said to father, 'If you want me to make the will the way Joe has it here, I will do it.' He says, 'No; it must not be that way.' Q. What was done or said, if anything, with relation to some notes? A. Then Joe went to the back of the bed on the end of the bed where—I thought yesterday that the notes were in the trunk, but, since Joe has mentioned it, I remember he took them out of father's clothes—he got them out of father's pocketbook out of some clothes back of the bed. Q. The clothes were hanging on the bed? A. Yes; on the back of the bed, and he went to them and brought out these three notes. Q. The same three notes that you spoke of? A. The $2,000 note, the $1,300 note, and the $1,000 note. Q. And what did he say to you? A. He brought them out and showed them to me. I had never seen them before, and there was another for $2,000.

He handed that to me. Joe said, 'I want to have father assign these notes over to me.' Q. In the presence of your father? A. Yes. Q. And what was said? A. I said, 'Joe, that is father's property, not your property.' Q. What did he say? A. Joe said, 'Well, I thought I would have him assign them over to me.' * * * Q. Did Joe tell you that night that he had bought them a week before for $5 a piece? A. No; I never heard of that before until yesterday."

This tends to show what influence Joe's family had in making and executing this will; that is, they were doing it, and not the old man. The will is not the testator's as such, as a matter of law and fact.

In *Carroll v. Hause,* 48 N. J. Eq. 269, the court said: "Against a beneficiary having a testator under his control, with power to make his will the will of the testator, especially in a case where the testator has made an unnatural disposition of his property, the law presumes undue influence, and puts upon the beneficiary the burden of showing, affirmatively, that when the testator made his will he did not exercise his power over the testator to his own advantage and to the disadvantage of others having an equal or superior claim upon the bounty of the testator."

In *Purdy v. Hall,* 134 Ill. 298, the court said: "Naturally, the mind sympathizes with the body in that which debilitates, and, even when not otherwise impaired, it may become so wearied from long continued, serious and painful sickness that it is willing to purchase rest and quiet at any price, and when in that condition it is susceptible to undue influence, and is liable to be imposed upon by fraud and misrepresentation. The feebler the mind of the testator, no matter from what cause—whether from sickness or otherwise—the less evidence will be required to invalidate the will of such person."

See, also, *Hegney v. Head,* 126 Mo. 619; *Sheehan v. Kearney,* 82 Miss. 688; *Whitelaw's Exr. v. Sims,* 90 Va.

588; *Miller v. Miller,* 187 Pa. St. 572. These cases were cited with approval by our court in the case of *In re Estate of Paisley,* 91 Neb. 139, and they are again in point, being applicable to the instant case, because appellants fall far short of satisfactorily sustaining the burden of proof imposed upon them by settled rules of law.

The testimony on the question of undue influence, as well as mental capacity of testator, was conflicting, in many particulars in hopeless conflict. We conclude that the attending facts and circumstances leading up to the making of the will, the provisions of the will itself as being unnatural and unjust, Joseph L. Kubat's obtaining $4,300 in promissory notes for a consideration of only $11, the four members of Joseph L. Kubat's family receiving $1,000 each, the apparent influence of Joseph L. Kubat and his family, all taken together, point clearly and unmistakably to the correctness of the jury's findings. The case abounds with evidence of suspicious circumstances and is suggestive of fraud. By force of these circumstances and by force of truth portrayed in the record, nothing else is imposed upon us save to enforce the verdict of the jury and the judgment of the lower court by affirmance.

AFFIRMED.

KRANK WEIGAND ET AL., APPELLEES, V. E. B. HYDE ET AL: W. H. DEVER, INTERVENER, APPELLANT.

FILED FEBRUARY 15, 1923. No. 22181.

1. **Landlord and Tenant:** FRAUD: RELIEF IN EQUITY. Where a lease provides that the lessee shall on demand execute a chattel mortgage on the crops to secure the payment of the rent, but lessee fails to do so, and executes to a third person a first chattel mortgage on the same crops, the execution thereof constitutes a fraud on the part of the lessee, as between himself and the landlord, against which a court of equity may grant relief at the suit of the lessor.
2. ———: FRAUDULENT MORTGAGE OF CROPS: NOTICE. In such case, the mortgagee, if he had notice of the provisions of the lease, and of the landlord's rights thereunder, is not a mortgagee in good faith.

and, in an action by the lessor for specific performance of the terms of the lease, the mortgagee's rights will be subordinated to those of the lessor.

3. ———: ———: ———. Evidence examined, and *held* that the mortgagee had notice of the terms of the lease under which the premises were held, and that he was not a mortgagee in good faith as against the plaintiffs.

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

W. A. Meserve and *W. D. Funk,* for appellant.

P. H. Peterson, contra.

Heard before LETTON, ROSE, DEAN and DAY, JJ., REDICK, District Judge.

DAY, J.

On August 9, 1918, the plaintiffs brought this action against the defendants E. B. Hyde & Sons to enjoin them from disposing of any of the crops growing or grown upon the premises leased to the defendants by the plaintiffs, praying that the lease be performed, and that the plaintiffs be given a lien upon the crops growing or grown upon the land for the year 1918 as security for the rent for that year. In this action W. H. Dever intervened and claimed that a chattel mortgage which he held on the crops was a prior lien to the claim of the plaintiffs. The defendants Hyde & Sons made default, and judgment was entered against them. As between the plaintiffs and the intervener, the court found the equities in favor of the plaintiffs; that the intervener had converted the property covered by his mortgage to his own use; that its value was in excess of the plaintiffs' claim; and rendered a personal judgment against the intervener for the amount found to be due the plaintiffs for the rent of the premises. The intervener appeals.

The appeal presents a controversy between the plaintiffs and the intervener, each claiming a priority lien upon the same crops. The plaintiffs' claim rests upon the

provisions of a lease between them and their tenants, E. B. Hyde & Sons. The intervener bases his claim upon a chattel mortgage executed to him by E. B. Hyde.

The record shows that the plaintiffs were the owners of a large tract of land in Knox county, a part of which was devoted to farm purposes; that they leased the same to the defendants for a period of one year beginning March 1, 1916. Notes were executed by the defendants for the rent reserved, which were also signed by the intervener as surety. By oral agreement between the plaintiffs and defendants the lease was extended for another year, the intervener signing the notes for the rent as surety as before. It also appears, although upon this point there is some dispute, that the plaintiffs and defendants agreed that the lease should be extended for the year commencing March 1, 1918, and that intervener should sign the notes for the rent as surety as he had theretofore done; the intervener, however, was not a party to this agreement. The lease was in writing, and, among other things, contained a stipulation, as follows:

"And it is further expressly agreed that the second party shall secure the performance of the terms and conditions of this lease on his part by giving to the first party on demand a chattel mortgage upon all or any part of the crops growing or gathered on said premises during said term."

About the middle of July, 1918, the defendants had not executed the rental notes, and plaintiffs then demanded that notes be signed in accordance with the agreement. The intervener declined to sign the notes. About July 26, 1918, the plaintiffs made a demand upon the defendants for a chattle mortgage upon the crops, as provided for by the terms of the lease. The defendant E. B. Hyde finally agreed to this and fixed the date on which he would meet the plaintiffs and close the matter up. Instead of keeping his promise and performing the conditions of the lease, he executed on July 31,1918, a chattel mortgage for $2,500 in favor of the intervener,

who was his brother-in-law, upon the crops grown upon the leased premises for that year. A copy of this mortgage was filed for record August 2, 1918. This mortgage was given to secure intervener for advances made to E. B. Hyde & Sons, and to E. B. Hyde, and $200 which was paid to E. B. Hyde at the time of the execution of the chattel mortgage.

Plaintiffs urge that, as the property mortgaged was partnership property, E. B. Hyde had no legal right to secure any of his individual indebtedness by incumbering it. We think, however, that the partnership was dissolved before March 1, 1918, and that E. B. Hyde continued to operate the farm for his individual benefit for that year under the lease; and, except as to the superior rights of plaintiffs as hereinafter shown, he had the right to devote his property to the payment of the debts of the former partnership as well as to his individual debts.

Although there is some dispute upon this point, the evidence shows that at the time the mortgage was executed the intervener had actual notice that the defendant Hyde was holding the premises under a lease containing a clause giving to the plaintiffs the right to demand and receive a chattel mortgage upon the crops grown on the premises to secure the payment of the rent. The intervener was also charged with knowledge that the plaintiffs could enforce this right in an action for specific performance. As between the plaintiffs and the defendant Hyde, the latter was bound in good conscience to live up to the terms of the lease and execute the chattel mortgage to the plaintiffs when demand was made. When, therefore, E. B. Hyde executed the chattel mortgage to his brother-in-law he perpetrated a wrong against the plaintiffs.

To preserve the property it was agreed between the plaintiffs and the intervener, without any prejudice to their respective rights, that the intervener should take possession of the property under his mortgage and sell it, which was done.

Under this state of facts we are called upon to determine, as between the plaintiffs and the intervener, who has the superior equities. It is a well-settled principle that an agreement to give a mortgage for a valuable consideration upon property which is sufficiently specified is in a court of equity regarded as the creation of the mortgage itself. This is held for the reason that equity will treat that as done which ought to be done. And, in such case, a lien will be given precedence over a mortgage or other lien taken by a party who has notice of the rights of the equitable mortgagee. *Bridgeport Electric & Ice Co. v. Meader,* 72 Fed. 115; *Foster Lumber Co. v. Harlan County Bank,* 71 Kan. 158; *Gest v. Packwood,* 39 Fed. 525.

In *Foster Lumber Co. v. Harlan County Bank,* 71 Kan. 158, money was advanced for the purpose of buying a specific tract of land, the borrower orally promising to secure its repayment by a mortgage upon the property when title thereto was obtained. After the title had been procured by the use of the money, the borrower refused to execute the mortgage to the lender and mortgaged the property to a third party who had full knowledge of the rights, claims and equities of the lender. It was held that "equity will regard that as done which the borrower agreed should be done, and which ought to have been done, and will treat the transaction as creating an equitable mortgage upon the land in favor of the lender," and, "such a lien will be given precedence over a mortgage on the land taken by a party who has notice of the rights of the equitable mortgagee."

The case of *Rogers v. Trumble,* 86 Neb. 316, is in many of its aspects similar to the case at bar. In that case it was held that the rights of the mortgagee were superior to those of the landlord. There the lease contained provisions essentially the same as the lease in the case at bar, but in the *Rogers* case the mortgagee had no notice or knowledge of the equitable rights of the landlord, and was held to be a good faith mortgagee.

Under the facts as disclosed by this record, it seems clear that the intervener was not a good faith mortgagee as against plaintiffs' rights. In *State Bank of Lushton v. Kelly Co.*, 49 Neb. 242, it was held that a mortgagee in good faith is one who takes a chattel mortgage to secure a debt actually and justly owing to him, whether pre-existing or not, without actual or constructive notice of prior equities against the mortgaged property.

We do not consider there is anything in *Skala v. Michael, ante,* p. 305, contrary to the doctrine herein announced.

Under the evidence in this case, we are clearly of the opinion that the trial court was right in holding that the plaintiffs' equities were superior to those of the intervener, and in awarding a judgment against the intervener. The judgment of the district court is, therefore,

AFFIRMED.

SOUTHERN NEBRASKA POWER COMPANY, APPELLANT, V. H. G. TAYLOR ET AL., APPELLEES.

FILED FEBRUARY 15, 1923. No. 22238.

1. **Waters:** APPROPRIATION: COMMON LAW RIGHT. Where a riparian owner has appropriated water from a stream for power purposes prior to the time the legislature declared the waters in the streams of the state to be the property of the public, the water-right so acquired by such riparian owner is by virtue of the common law.

2. ———: ———: ———. In such case, the water-power right is not a "franchise" as that word is used in the statute prohibiting the railway commission from granting authority to a public utility corporation to issue stock of the corporation based upon the value of its franchise to be a corporation, or on the value of the right to own, operate, or enjoy any franchise. Comp. St. 1922, sec. 676.

3. ———: ———: VESTED RIGHTS. In such case, a water-power right is a vested property right which may not be taken away or impaired without compensation.

4. ———: ———: ISSUANCE OF STOCK. Where a public utility corporation has succeeded to the water-power right of a riparian owner, and makes application to the state railway commission for authority

to issue stock of the corporation based upon the value of the water-power right, it is proper for the railway commission to make an order granting such authority to the amount the commission finds the value of the water-right to be.

5. ———: ———: ———. In such case, the statute prohibiting the railway commission from granting authority to a public utility corporation to issue stock of the corporation based upon the value of its franchise to be a corporation, or on the value of the right to own, operate, or enjoy any franchise, has no application. Comp. St. 1922, sec. 676.

6. **Evidence** examined, and *held* to sustain the finding of the railway commission and its orders thereon.

APPEAL from the State Railway Commission. *Affirmed.*

J. H. Agee, for appellant.

Clarence A. Davis, Attorney General, and *Hugh La Master, contra.*

Heard before MORRISSEY, C.J., ROSE, ALDRICH, DAY and GOOD, JJ., TROUP, District Judge.

DAY, J.

The Southern Nebraska Power Company, a public utility corporation, made application to the state railway commission for authority to issue additional stock of the corporation based upon the value of its property. In addition to its physical property the company listed a water-power right, upon which it asked permission to issue stock. At the conclusion of the hearing the railway commission made findings as to the value of the physical property, and also found the value of the water-power right to be $50,000. Upon these findings the railway commission issued an order granting the corporation authority to issue additional stock. From the order of the railway commission the corporation has appealed.

No objection is made by appellant to the action of the commission in fixing the value of the physical property. It contends, however, that the value of the water-power right as found by the commission is entirely too low, and urges that under the evidence the water-power right

should have been fixed at not less than $100,000. The attorney general in behalf of the state, appearing in the case for the first time, has filed a brief in which he contends: First, that appellant's water-power right is a franchise, and that under the provisions of section 676, Comp. St. 1922, the railway commission is prohibited from authorizing the issuance of any stock by a public utility corporation, based on the value of its franchise, and that therefore the railway commission erred in permitting the corporation to issue stock to the amount of $50,000 based on the value of the water-power right; and, second, that, should the court hold that the water-power right was not a franchise, then under the record the railway commission's finding as to the value of the water-power right is correct and amply sustained by the evidence.

Section 676, Comp. St. 1922, provides, in substance, that public utility corporations organized under the law of this state may not issue stock of the corporation without first obtaining authority of the state railway commission. The section further provides: "The commission shall have no power to authorize the capitalization of any franchise to be a corporation, or to authorize the capitalization of any franchise, or the right to own, operate, or enjoy any franchise whatsoever, in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or to a political subdivision thereof as the consideration for the grant of such franchise or right."

It appears that in 1878, and long before the state undertook to regulate or control the use of the waters in the streams of the state, Robert Guthrie conceived the idea of operating a grist-mill by means of water-power obtained from water in the Republican river. A little south and west of the city of Superior the Republican river, flowing from the west, makes a sharp turn to the south, and, returning north, forms what might be termed an "ox-bow." The distance across the bow is about three miles. In consideration of Guthrie's erecting the mill, a

number of property owners donated to him a right of way 100 feet wide for the mill-race. The right of way thus acquired, together with a few purchases, and the use of the bed of a dry creek, to which no objection was made, gave him a strip of land 100 feet wide, extending from the intake of the mill-race to where the tail-race returned the water to the river. Guthrie built a diversion dam in the river, constructed his mill-race and tail-race, erected a mill, and operated it for a number of years. At a later period the rights of Guthrie were acquired by Guthrie Brothers, a corporation, and in 1915 appellant was incorporated and succeeded to the rights of Guthrie Brothers. Still later the appellant acquired by purchase an electric light plant, having a franchise from the city of Superior, and also built a transmission line to a neighboring city. The power used to operate these plants was largely obtained from water taken from the river.

During all the years since its first construction, the water-power from the river has been used, except occasionally when some parts of the equipment were undergoing repair. In recent years the principal use of the water-power has been to generate electrical power for the operation of public utilities.

The appellant having succeeded to the water-power rights of Guthrie, the question is presented whether his water-power rights, in any proper sense, can be said to rest upon a franchise. Generally speaking, a franchise is a grant of a special privilege by public authority, the main element of which is the permission to do something which otherwise the grantee would not have the right to do. Under the facts presented by this record, it does not occur to us that the water-power right acquired by Guthrie was a "franchise" as that word is usually understood. By virtue of the fact of his ownership of the right of way connecting with the river, he was a riparian owner, and, as such, had the right to

divert the water for power purposes. This right was not bestowed upon him as a special privilege by the state or any of its municipal subdivisions, but was a common-law right applicable to every riparian owner alike. The only persons who had a right to complain of Guthrie's use of the water were other riparian owners whose rights were thereby infringed upon. Such was the law of the state before the enactments declaring the water in the streams of the state to be dedicated to the use of the people.

In *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District,* 97 Neb. 139, the history of our legislation upon the subject of water-rights is reviewed at considerable length, and it was held that, prior to the enactment of the irrigation statute (Laws 1889, ch. 68), our law provided no method of making a claim of appropriation of water except the construction of works to divert it, and applying the water so diverted to a beneficial use. It was also held that there was no distinction between the use of water for irrigation or for power purposes, and that appropriations which were completed under the act of 1877 (Laws 1877, p. 168) became vested rights and could not be taken for any purpose without just compensation.

It may not be amiss to say here that the law of 1877 simply gave to corporations operating canals for irrigation purposes the right to acquire a right of way by condemnation. In *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.,* 45 Neb. 798, it was held that the common-law doctrine with respect to the rights of riparian owners prevails in this state, except as it may be modified by statute. It was also held that the right of a riparian owner, as such, is a property right, and, when vested, cannot be taken away or impaired without compensation. In *Crawford Co. v. Hathaway,* 67 Neb. 325, it was held that the common-law rule with respect to the rights of private riparian proprietors has been a

part of the law of this state ever since the organization of the state government.

Whatever may be said of a water-power right acquired since the time the legislature declared the use of water in the streams of the state to be dedicated to the people as being a franchise, a question which seems unnecessary to determine, we are quite clear that, under the facts of this record, the water-power right cannot be considered a franchise. Appellant's water-power right is a valuable property right, and it was proper for the railway commission to authorize the corporation to issue stock based upon its value.

Upon the question of the value of the water-power right there was a wide diversity of opinion among the expert witnesses who testified upon that subject. One of them placed the value at something over $200,000. The testimony of the experts was highly technical, and based upon theories which resulted in a saving by the use of water-power over the use of internal combustion engines. One of the experts, whose valuation was the lowest, advanced certain theories upon which his calculation was based, and which resulted in a valuation of $85,000; but, he further testified: "Realizing that my costs were estimated and more or less theoretical, I concluded by saying that I believed a normal value of the water-right to be $50,000. I say this because I realize that something might happen to the water-plant. The dam might wash out again as it has just done; a great many things might happen which would cause this company to generate its power on the oil basis; and, in view of all those contingencies throughout the years, I have considered the $50,000 more reasonable and conservative than the $85,000."

From an examination of the expert testimony, we are unable to say it affirmatively appears that the finding and order of the railway commission were clearly wrong.

The rule is now well established that, in direct ap-

peals to this court from orders of the state railway commission, such orders will not be reversed unless it affirmatively appears from the record that they are clearly wrong. *Byington v. Chicago, R. I. & P. R. Co.*, 96 Neb. 584.

To sum up, we conclude that the water-power right of appellant does not rest upon a franchise; that it was proper for the railway commission to authorize appellant to issue stock of the corporation based upon the value of the water-power right; and that the fixing of the value of the water-power right at $50,000 is fully sustained by the evidence.

The order of the railway commission is

AFFIRMED.

FRANK CALDWELL V. STATE OF NEBRASKA.

FILED FEBRUARY 15, 1923. No. 23117.

1. **Evidence** examined, and *held* sufficient to sustain the verdict and judgment.
2. **Criminal Law:** NEW TRIAL. Showing made by plaintiff in error in support of a motion for a new trial on the ground of newly discovered evidence, *held* insufficient.

ERROR to the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher, for plaintiff in error.

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

Heard before MORRISSEY, C.J., ROSE and DAY, JJ., RAPER, District Judge.

DAY, J.

Frank Caldwell, hereinafter designated defendant, was convicted of an assault with an intent to inflict great bodily injury, and sentenced to serve a term in the penitentiary of from one to five years. He has brought the record of his conviction to this court for review.

It is first urged by the defendant that the evidence is not sufficient to sustain the verdict. This would be true if the jury were limited in their considerations to the evidence produced on behalf of the defendant, but considering the entire evidence, as it was their duty to do, we are of the opinion that the evidence amply sustains the verdict. While there is a direct conflict in the evidence upon almost every material issue, the jury had the right, if they saw fit to do so, to adopt the evidence as given by the state's witnesses as being the true version of the affray.

Without attempting a full analysis of the testimony, the evidence on behalf of the state tended to prove the following state of facts: On January 10, 1922, the defendant went to the home of Albert Spitler for the purpose of getting a wagon belonging to the defendant's brother, George. As defendant was about to drive away with the wagon, Spitler requested him to take the sideboards off, as they belonged to him. Defendant refused to do this and hurriedly drove off, followed by Spitler, the latter attempting to get in the wagon. Defendant struck at Spitler a number of times with a pitchfork handle, and prevented him from getting in the wagon. Spitler says at this time defendant did not hit him, but merely struck at him. Defendant's version of this part of the controversy is that he hit Spitler several times with the pitchfork handle. The defendant took the wagon to the home of his brother, George, some 20 rods distant from the house in which Spitler lived. Spitler followed the defendant to the house of George Caldwell, both arriving there about the same time. As Spitler approached the house, defendant seized a baseball bat and went toward Spitler, warning him to keep off the place. As defendant approached Spitler, the latter picked up a 2 by 4 of convenient length, and the two men engaged in a fencing match, which, according to the testimony of the witnesses, would have done credit to the knights of olden times. Neither party succeeded in striking the

other, or, if they did, no particular injury was inflicted. Outside parties interfered and the fight calmed down. Spitler threw his 2 by 4 down, and defendant laid his baseball bat aside. Spilter started to return home, when he was called to by George Caldwell, and he returned to the place where a number of men were standing near the garage. George Caldwell then called Spitler's attention to the fact that the latter had taken the former's pole strap, and that he had charged him $3 for it. Spitler in turn claimed it had been taken by Russell, who was present. In the argument that ensued heated words were used, and some one present charged Spitler with stealing gasoline. In the controversy between Spitler and Russell a few blows were struck, but no one was hurt. This fight cooled down, and apparently all of the belligerents were ready for peace. At this juncture a man by the name of Hoppe appeared for the first time, coming out of the garage. Defendant's witnesses say that Spitler announced that he could whip all of them, and asked Hoppe whether he wanted some of it. Hoppe struck Spitler on the side of his face with his fist, knocking him down and out. As Spitler lay upon the ground, the testimony of the state's witnesses shows that defendant struck him on the top of the head with the baseball bat, which rendered him unconscious. He was carried into the garage, and soon thereafter neighbors, assisted by George Caldwell, removed him to his home. From these injuries, according to the testimony of his family, Spitler lay in an unconscious state for almost three weeks, and was not able to be about for a number of weeks thereafter. The doctor attending him testified that he was in a semicomatose state for ten days. An X-ray was afterwards taken which disclosed a fracture of the skull. Spitler's hired man, who was present, as well as his daughter, both testify positively as to the striking of Spitler with the ball bat by the defendant. The defendant denies the use of the ball bat at that time, but admits that he was about

tc kick him as he lay upon the ground, but was deterred by some one crying out, "Don't kick him when he's down." One of defendant's witnesses testified that the ball bat was not used at this time, but that defendant kicked at Spitler as he lay on the ground, and just grazed his face as his foot was coming back. Other witnesses say they did not see the ball bat used. Under this state of facts, we think it was clearly the province of the jury to determine whether defendant was guilty of an assault with intent to inflict great bodily injury.

The defendant also urged that the county attorney and his assistant should not have been permitted to prosecute the case because they were attorneys for Spitler in a civil action for damages growing out of the same state of facts. We cannot pass upon the merits of the point thus sought to be raised, because there is no proper showing in the record to support the contention. There was a motion for a new trial filed some six months after the verdict and judgment, supported by a showing of newly discovered evidence, in which a pleading is also filed in regard to the civil case; but this showing comes entirely too late to affect the ruling of the trial court upon the objection to the attorneys for the state trying the case.

It is also urged that the court erred in overruling the motion for a new trial based upon the ground of newly discovered evidence. As to this objection, it is enough to say that the showing was not sufficient. The affidavit in support of the motion simply states that a brother of Spitler had stated that Spitler had been kicked by a horse at one time, and that he frequently had a bleeding of the ear from that injury. It is plain that the party to whom the brother is supposed to have made the statement could not testify to that fact, because it would be hearsay testimony. No claim is made that the brother would testify to these facts if a new trial were granted. Besides this, the defendant has not sought to raise the question by petition, as contemplated by

section 8828, Comp. St. 1922, and, in addition, the provisions of the statute have no application to criminal actions. *Evers v. State,* 87 Neb. 721.

Complaint is also made of the instructions of the court. The instructions as a whole clearly state the law applicable to the record.

While the testimony tends to show that Spitler was manifesting a rather belligerent attitude, still the assault made upon him by the defendant was without justification or excuse.

Under the record the jury were justified in finding that the assault was made with intent to inflict great bodily injury.

No prejudicial error appearing in the record, the judgment is

AFFIRMED.

GOOCH MILLING & ELEVATOR COMPANY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED FEBRUARY 15, 1923. No. 22217.

1. **Appeal:** INSTRUCTIONS. An erroneous instruction, not prejudicial to the complaining party, will not justify a reversal of the judgment.
2. **Statutes:** CONTINUITY. The simultaneous repeal and reenactment of a law has the effect of continuing the uninterrupted operation of the statute.

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

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

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

Heard before MORRISSEY, C. J., LETTON, DEAN and GOOD, JJ., RAPER and TROUP, District Judges.

GOOD, J.

This is an action to recover damages for failure of

defendant to deliver at destination a car-load of flour. Plaintiff had judgment, and defendant has appealed.

The shipment was received at Lincoln, Nebraska, September 28, 1914, and consigned to New York City. It was transported to Chicago, where a connecting carrier refused to take it. Defendant thereupon shipped the flour back to plaintiff at Lincoln. All of said flour was in good condition when returned to plaintiff. Previous to the shipment plaintiff had sold the flour to a customer in New York City for export, and had put it in sacks on which was printed the purchaser's private brand. To fill the order, plaintiff was compelled to purchase flour in New York City on the spot-cash market and to pay therefor a price of 70 cents a sack above the cost of the flour consigned, had it reached its destination. As plaintiff could not sell the flour returned, bearing the private brand of the purchaser, it was compelled to unload the flour and resack it at an expense of $25. Plaintiff had paid $8.33 as a part payment of freight on the original shipment. The facts are not in dispute.

The appellant first insists that the court erred in giving instruction No. 8, which, in effect, directed the jury to allow the plaintiff such sum as would equal the difference between the market value of the flour at Lincoln and of the same kind of flour at New York City, plus any expense, resulting from the negligence of the defendant, which plaintiff had incurred. It is true, as insisted by appellant, that the instruction does not fix any time for determining the value of the flour at the respective places, but, as all the evidence related to the time of the shipment, we are unable to say that appellant was prejudiced by the instruction.

Appellant further insists that there is no such thing as a rule of damages which takes as its measure the difference in value of two articles, at the same time, at different places. As an abstract proposition of law, this may be correct, but it is evident from the record that, because of the failure of defendant to deliver the flour

at its destination, plaintiff was compelled to purchase other flour instead, at an advance of 70 cents a sack.

Appellant further contends that the shipment was made under a bill of lading which, *inter alia,* provided: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading"—and insists that under this clause in the bill of lading it was error to give any instruction relating to the measure of damages, except one based upon the value of the flour at the time and place of shipment, as provided in the bill of lading, and cites, in support of its contention, *New York, P. & N. R. Co. v. Peninsula Produce Exchange,* 240 U. S. 34. We have carefully examined this decision of the supreme court of the United States, and, in our opinion, it is not an authority sustaining appellant's contention. In effect, it holds that the clause is a limitation upon the amount that may be recovered. The evidence discloses that the value of the flour at Lincoln, Nebraska, was largely in excess of the amount recovered. The uncontradicted evidence shows that plaintiff was damaged in a sum slightly in excess of the amount of the verdict, and, if the eighth instruction was erroneous, it was without prejudice to the appellant. An erroneous instruction, not prejudicial to the party complaining, does not justify a reversal of the judgment.

Appellant also complains of the trial court in allowing the plaintiff an attorney's fee of $50, and asserts that there is no statutory authority for the allowance of such fee. It is conceded that section 6063, Rev. St. 1913, authorizes the allowance of such fee, but this statute was repealed in 1919 and reenacted by the same act (Laws 1919, ch. 134), and now appears as section 5422, Comp. St. 1922. Appellant insists that the repeal of section 6063 without a saving clause prevents a re-

covery under that section, and that the new section 5422, Comp. St. 1922, not having been enacted until after the filing of the claim, no allowance can be made thereunder. We are unable to agree with this contention. Section 6063, Rev. St. 1913, was reenacted by the enactment of chapter 134, Laws 1919. It has been frequently held by this court that the simultaneous repeal and reenactment of a law has the effect of continuing the uninterrupted operation of the statute. *State v. McColl*, 9 Neb. 203; *State v. Bemis*, 45 Neb. 724; *Quick v. Modern Woodmen of America*, 91 Neb. 106; *Bauer v. State*, 99 Neb. 747; *Schneider v. Davis, ante*, p. 638.

On appellee's application, it is allowed the sum of $50 for attorney's fees in this court.

No reversible error being apparent, the decision of the district court is

AFFIRMED.

PEERLESS BATTERY MANUFACTURING COMPANY, APPELLEE, V. JAMES L. HAND, APPELLANT.

FILED FEBRUARY 15, 1923. No. 22239.

1. **Contracts:** EVIDENCE: SUFFICIENCY. Evidence examined, and *held* to support the finding of the district court that defendant did not possess any secret process or formula for the manufacture of storage batteries.

2. **Corporations:** CONTRACT: FAILURE OF CONSIDERATION. Where one procures capital stock of a corporation to be issued to him in consideration of his possessing and turning over to such corporation a secret process or formula for the manufacture of storage batteries, and also enters into a contract, as a part of the consideration for the so-called secret process or formula, that he shall receive royalties upon the sale of the products of the corporation, and it transpires that he does not possess any secret formula or process, he thereby acquires no right either to the capital stock or to any royalties upon the sale of products.

3. **Bills and Notes:** CONSIDERATION. The issue of corporate stock, without consideration at the time, may be a sufficient consideration for the giving of a promissory note, of the face value of the stock, at a later date.

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

T. S. Allen, for appellant.

Fred C. Foster, G. N. Foster, O. K. Perrin and *Bert A. Button, contra.*

Heard before MORRISSEY, C.J., ROSE, ALDRICH, DAY and GOOD, JJ., TROUP, District Judge.

GOOD, J.

This action was instituted in the district court for Lancaster county by the appellee, who will hereafter be referred to as plaintiff, to recover upon a promissory note for $7,360, and for an accounting and other relief. Appellant, who will hereafter be referred to as the defendant, filed an answer and cross-petition, in which he admitted the execution of the note for $7,360, but alleged that the same was an accommodation note and without consideration, and further alleged that there was a large amount due him from the plaintiff for various matters, which will not be further referred to. Upon the trial of the cause in the district court, judgment in favor of plaintiff for $1,614.59 was rendered, and the court, in adjusting the various items of debits and credits, determined and held that defendant was liable upon the said promissory note. Defendant has appealed, and the only questions for determination in this court are those relating to the liability of defendant upon the promissory note.

The defendant, one Flinn and others organized the plaintiff corporation in 1919 for the purpose of manufacturing and selling storage batteries. At the time, defendant claimed to be the owner of a secret process and formula, by which a superior storage battery could be produced, and contracted with the plaintiff to turn over to it such secret formula and process, in consideration of which $25,000 of the capital stock of plaintiff

was issued to him in two certificates of $12,500 each. Immediately thereafter defendant assigned and transferred one of said certificates to Flinn, and a new certificate was then issued to Flinn for $12,500, but it was left in the stock book of the company. Flinn then sold to various persons a portion of this stock, to the amount of $7,360 of its face value, for which he received the purchase price. Later, an application was made to the state bureau of securities for leave to sell additional stock, and, upon an investigation of the affairs of the company, the said bureau held that the $25,000 of stock issued to Flinn was bonus stock, for which no adequate consideration had been paid to the company, and declined to authorize the issuance of additional stock unless the $25,000 of capital stock, which had been originally issued to defendant, was called in and canceled. Thereupon a meeting of the board of directors of the plaintiff company was held, and the defendant surrendered and canceled the $12,500 certificate still held by him, and Flinn surrendered and canceled the stock held by him, and which he had not sold, but there was $7,360 of the stock Flinn had sold and which could not be surrendered. Flinn was requested to execute a note as security for the $7,360 of stock, but declined to do so. Thereupon a contract was entered into between plaintiff and defendant, whereby the plaintiff was to allow the defendant certain royalties upon all batteries which it sold, and the defendant to execute and deliver to the company his note for $7,360, and it was further agreed that as the royalties became due to defendant on the sale of batteries one-half thereof should be credited upon the note. Thereafter the company became involved in financial difficulties, and this action resulted. Upon the trial of the cause the district court held the contract void, and that defendant was not entitled to any royalties, for the reason that he did not possess any secret process or formula, and that such contract was but a

subterfuge whereby the stock was issued to defendant as a bonus.

The defendant contends that the district court erred in making this finding. We have examined the record with some care, and have reached the same conclusion as the district court, that defendant did not possess any secret process or formula for the manufacture of storage batteries. It was plainly shown upon his cross-examination that he was utterly ignorant of chemistry or of any knowledge concerning a formula for the manufacture of storage batteries. The trial court, in our opinion, was fully justified in its finding that defendant did not possess or turn over to the plaintiff any secret formula or process, and that the contract was therefore not enforceable.

It is next contended by the defendant that there was no consideration for the promissory note in question, and that it was given as an accommodation. This contention is not well founded. The defendant procured to be issued to himself, without any consideration, $25,000 of the par value of the plaintiff company's stock, and, when called upon to return and cancel this stock, he made restitution only to the extent of the stock that was then in Flinn's and in defendant's name, but $7,360 of the par value of the stock had passed to innocent holders for value and could not be returned and canceled. It was his duty to procure and return the stock or pay the company therefor, and the issue of the stock to him which he afterwards transferred to Flinn, and for which no consideration was paid to the company, was a sufficient consideration for the giving of the promissory note.

It is also in evidence that the plaintiff sued Flinn and recovered a default judgment against him for the $7,360, but this judgment was never collected. The decree of the trial court provided that defendant should be subrogated to the plaintiff's rights in this judgment and that it should inure to his benefit. Defendant was

not prejudiced by the recovery of this judgment against Flinn, nor was he relieved of his liability to the company, so long as the judgment remained unsatisfied.

The view that we take of the facts disclosed by the record renders it unnecessary to consider any of the law questions urged by the defendant.

The judgment of the district court is free from error, and is therefore

AFFIRMED.

FRED A. GALPIN, APPELLEE, V. DAN H. FISHER, APPELLANT.

FILED FEBRUARY 15, 1923. No. 22204.

Master and Servant: NEGLIGENCE OF CHAUFFEUR. The defendant furnished his minor sons an automobile in which to drive to and from school, and one of the sons, while using the car for such purpose, negligently injured plaintiff. The father had directed the sons to drive from home directly to a certain garage, leave the car there till close of school, then drive directly home; the father knew that his orders had been violated but permitted the sons to continue using the car thereafter. The sons drove the car, on the day in question, to a garage, then took the car out a few minutes before school opened, and with some companions drove near the school building for a pleasure ride, during which plaintiff was injured. *Held*, under the rule announced in *Ryne v. Liebers Farm Equipment Co.*, 107 Neb. 454, the issue was properly submitted to the jury.

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

Sullivan, Squires & Johnson and *P. C. Spencer*, for appellant.

N. T. Gadd and *W. A. Prince, contra.*

Heard before MORRISSEY, C.J., LETTON, DEAN, ALDRICH and FLANSBURG, JJ., RAPER and TROUP, District Judges.

RAPER, District Judge.

The petition alleges that the defendant furnished his minor sons an automobile to drive to and from school,

and that one of the sons, while using the car for such purpose, through his negligence, injured plaintiff.

The testimony shows that defendant, who lived several miles from Broken Bow, had two minor sons attending school in that city; that defendant kept a Ford automobile for their regular use in driving to and from school, and also owned a Hudson car, which the boys drove to school on some occasions. The defendant, according to his testimony, which was not disputed, had given directions to the sons to drive from home directly to the Ford garage in Broken Bow, where he had arranged for storage of the car, and leave the car in the garage until close of school, and then return home, and forbade them using the car for any other purpose, and that he directed them to never permit others to ride with them. There is evidence that the boys had used the cars on different occasions to drive to town for various purposes besides going to school, and used the cars to carry others at times about the town, and that the father knew of such occurrences, and, because of such acts, had threatened to stop the sons from using the cars and require them to use a horse and buggy in going to school, but, instead of prohibiting the use of the automobiles, the father permitted the sons to continue using them. On the morning of plaintiff's injury, the father was at work in the field when the boys, on going to the garage for the Ford car to start for school, discovered the Ford car had a flat tire, so they took the Hudson and drove to the Hudson garage in Broken Bow to have some slight repairs made. They intended to leave the car in the Hudson garage and go to school, but, on looking at the time and finding it about 20 or 25 minutes before school opened, took the car out of the garage, picked up a couple of school companions, and started out for a pleasure drive until time for school to begin. On this trip they drove several blocks from the garage, passed the schoolhouse a couple of blocks, turned and came back toward the schoolhouse, where a number of children were

in and about the school grounds, where Marion Fisher, the 19 year old son of defendant, who was driving the car, struck a little girl and ran the car onto the school ground, where the plaintiff was injured. There is ample evidence to sustain the alleged negligence, and no objection is raised to the finding of the jury, on that question, nor as to the amount the jury allowed plaintiff for his damages.

The defendant's contention is that, because he had given the sons positive directions limiting the use of the car, and that the sons, while using the car in disobedience of his orders, injured plaintiff, he is not responsible for their acts committed during such unauthorized use of the car.

The evidence was such that, if the case had been submitted to the jury on the theory that the father had furnished the automobile for the customary convenience and pleasure of the family, under the rule adopted by this court in *Stevens v. Luther,* 105 Neb. 184, and *Linch v. Dobson,* 108 Neb. 632, the jury might have found the father liable. However, the petition, perhaps, was not so drawn as to permit such submission. The trial court took the view that, under the pleadings and evidence, the case came within the principles announced in *Ryne v. Liebers Farm Equipment Co.,* 107 Neb. 454, and instructed the jury that, if they found that Marion Fisher had been directed to drive the automobile over a certain route and place the car in the Ford garage, and that Marion Fisher deviated materially and substantially from the instructions so given him, then the defendant would not be liable, but, if the deviation had been only slight, then such deviation would not of itself relieve the defendant from liability. This instruction was more favorable to the defendant than he was entitled to under the pleadings and evidence.

The evidence is sufficient to support the verdict on that

theory, and it is unnecessary to review the authorities, as the cases in this state above cited are controlling. The verdict and judgment should be affirmed.

AFFIRMED.

JOBBERS OVERALL COMPANY, APPELLEE, V. E. R. DEPUTY COMPANY, APPELLANT.

FILED FEBRUARY 15, 1923. NO. 22247.

1. **Sales:** NONACCEPTANCE: MEASURE OF DAMAGES. Where a buyer wrongfully neglects or refuses to accept and pay for goods, the seller may maintain an action against him for damages for non-acceptance, and, generally, the measure of damages is the difference between the contract price and the market price, if there is a market price, at the time fixed in the contract, or the refusal to accept. This rule is now statutory under the uniform sales act, Comp. St. 1922, sec. 2533.
2. ———: STAPLES: ADMISSIBILITY OF EVIDENCE. The measure of damages for breach of contract of sale of personal property is the difference between the market and contract price, this rule applying to manufactured articles which are staple and have a known market value, but not to especially manufactured articles, and, hence, though the article was manufactured in response to a particular order, evidence that it was staple was admissible. *Manhattan City & I. R. Co. v. General Electric Co.*, 226 Fed. 173.
3. *Diels v. Kennedy*, 88 Neb. 777, is distinguished.

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

Stewart, Perry & Stewart, for appellant

Hall, Baird & Williams, contra.

Heard before MORRISSEY, C.J., LETTON, DEAN and GOOD, JJ., RAPER, District Judge.

RAPER, District Judge.

Action by plaintiff to recover damages for breach of contract for sale of 150 dozen overalls. Plaintiff pleaded as its damages the difference between the cost of manufacturing and the agreed price; that is, the profit it

would have made on the completed sale. Some other items of special damages also were claimed, but were excluded on the trial. The defendant offered proof to show that, at the time of the cancellation of the order, the goods were worth more on the market than the contract price. Such proof was rejected on the ground that it was immaterial. The court instructed the jury that if they found for plaintiff it was entitled to recover the difference between what it cost the plaintiff to furnish the goods at Lynchburg, Virginia, and the price named in the contract. There was a verdict and judgment for plaintiff; defendant appeals. The rejection of defendant's evidence as to the market price of the overalls and the giving of that instruction are alleged as error.

There is evidence that, after the receipt and acceptance of the written order, the plaintiff, an extensive manufacturer of overalls at Lynchburg, Virginia, made up the goods, and that the profit of the company on the contract, if the goods had been accepted and paid for by defendant, would have been $900, which testimony was received over the objection of defendant. Evidence also was given that some of the garments were of unusual size, but nothing so extraordinary in that respect as to indicate they may not have found a sale on the market. Defendant's rejected testimony was to the effect that such goods did have a ready market.

The trial court evidently followed the conclusion of the majority opinion in *Diels v. Kennedy,* 88 Neb. 777, which seems to hold that, on a breach of contract for the sale of flour, the measure of damages would be the difference between the cost of manufacture and the contract price (three judges dissenting). In that case it was not necessary for the court to determine that question. The court was only called upon to say whether there was any element of damage alleged in the petition to which a demurrer had been sustained. The sixth paragraph of the petition, which alleged as damage the difference between the necessary cost of production

and the contract price, had been stricken out by the trial court, and a demurrer then interposed to the petition with that paragraph out. In the lower court the demurrer was sustained and the action dismissed. The real question at issue, and the only one necessary to determine, was: Did the petition without the sixth paragraph state a cause of action? Chief Justice Reese in the opinion says (p. 781): "Our conclusion is that, in any view of the case, the action of the district court in sustaining the demurrer was erroneous. Even had the sixth paragraph of the petition been correctly stricken out, enough remained to constitute a cause of action for some damages, and the demurrer should have been overruled." So the conclusion announced in that case, to the effect that the measure of damages was the difference between cost of production and the contract price, was *obiter dictum* and cannot be considered as authoritative, and such rule is not applicable to a situation where the subject of the sale contract of personal property has a market value that can be readily and definitely fixed. The conclusion stated by Chief Justice Reese has never been adopted by this court in any case, so far as known, where it is shown that the commodity has a market value, but several cases have announced the principle in substance applicable to cases like the one at bar, as follows: "The general rule is that the measure of damages where the buyer repudiates the contract and refuses to receive and accept the goods is the difference between the contract price and the market value of the goods at the time and place of delivery." 35 Cyc. 592. See, also, 24 R. C. L. 116, sec. 386. The text in those two works is supported by nearly all the states in the Union, as well as the supreme court of the United States and other federal decisions. In Nebraska, that general rule has the support of the following cases: *Dodge v. Kiene,* 28 Neb. 216; *Funke v. Allen,* 54 Neb. 407; *Allen v. Rushforth,* 77 Neb. 840; *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros.*

Mfg. Co., 86 Neb. 623; *Tacoma Mill Co. v. Gilcrest Lumber Co.*, 90 Neb. 104; *Fahey v. Updike Elevator Co.*, 103 Neb. 245.

The uniform sales act (Comp. St. 1922, sec. 2533) fixes the liability of the buyer who wrongfully refuses to accept and pay for the goods, which is, in substance, the rule quoted from Cyc., but that does not apply to sales made before the act went into effect, July 28, 1921.

Where there is no market value, or under certain conditions, the rule is different, and the characteristic distinctions are pointed out in *Murray v. Stanton*, 99 Mass. 345, and *Todd v. Gamble*, 148 N. Y. 382, 52 L. R. A. 225. In the first of the two cases cited it is said (p. 349): "When there is 'a market value,' it shows the price at which either party may have relief from the consequences of the default of the other; and therefore it properly measures his damages. But when there is no such standard, the damages must be estimated from other means of valuation." In the New York case, Judge Gray says (p. 385): "Market value, in the ordinary sense, is generally, but not always, the measure of damages, and the application of the rule necessarily must be to a case where it is shown that there is a market value for the subject of the contract of sale." In 35 Cyc. 594, it is further said: "If the article has no market value the measure of damages is the difference between the contract price and the cost of producing it, but to render such a measure of damages applicable there must be proof that the goods have no market value." In the case at bar, there was no testimony that the goods had no market value.

A case from circuit court of appeals, *Manhattan City & I. R. Co. v. General Electric* Co., 226 Fed. 173, is in principle very like the one at bar, and it holds that proof to show that a manufactured article has a market value should be received. Furthermore, if there was a market for the goods, the burden of proof is upon the

seller to establish the market price. *Sweetser v. Mellick*, 4 Idaho, 201; *Jones v. Jennings Bros. & Co.*, 168 Pa. St. 493.

The refusal of the trial court to admit the proffered testimony and the giving of the instruction complained of was error, and the cause is reversed and remanded.

REVERSED.

JENNINGS JOHNSON, APPELLEE, V. DAVID COLE CREAMERY COMPANY, APPELLANT.

FILED FEBRUARY 15, 1923. No. 22492.

1. **Master and Servant:** INJURY TO SERVANT: COMPENSATION. A claimant for compensation under section 3044, Comp. St. 1922, who through an injury has suffered a permanent partial loss of the use or function of both arms, is entitled to recover such proportion of the compensation allowed for total disability, under subdivision 1 of said section, as the extent of his loss would bear to the total loss of such members.

2. ———: ———: ———. Where the employers' liability law (Comp. St. 1922, secs. 3024-3084) fixes the amount of compensation, such compensation can be measured only in the manner directed by the statute.

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

Kennedy, Holland, De Lacy & McLaughlin and *Edward J. Svoboda*, for appellant.

Jamieson, O'Sullivan & Southard, contra.

Heard before MORRISSEY, C. J., LETTON and ALDRICH, JJ., RAPER and TROUP, District Judges.

RAPER, District Judge.

Appeal from award of compensation to a workman. On September 15, 1920, plaintiff, age 23, in the course of his employment by defendant, was severely burned over the back and arms by a gasoline fire, as a result of which he was confined to a hospital for five weeks and

was obliged to have the care of a physician selected by defendant. The defendant paid for medical attendance on plaintiff and his hospital bill an amount largely in excess of the amount required by statute. At the time of injury plaintiff was receiving $37.50 a week, as an automobile mechanic, and was unable to return to his work for six months, during which period plaintiff was paid his regular wages, $37.50 a week. Two weeks after his return to work his wages were reduced to $30 a week, which continued until in May, when he was discharged. On July 5, 1921, he began working as a tinner at $25 a week, in which occupation he has since continued to work. He testified that after his return to work he was unable to perform his duties as automobile mechanic and was given other work. After his discharge the defendant paid $15 a week to plaintiff until July 6, 1921, when the payments were discontinued, and plaintiff filed application before the compensation commission for award, where he was granted $9 a week for 300 weeks from the date of the injury, together with $7.20 each week for the remainder of his life. On the appeal in district court the trial judge found that plaintiff had sustained a permanent partial disability of both arms, to the extent of 37/80 and judgment was rendered awarding plaintiff $6.93 a week from July 6, 1921, for 271 weeks, and thereafter 37/80 of $12 a week, $5.55, for the remainder of his life. The sole controversy on this appeal is the amount awarded.

In the district court three physicians were called as witnesses, two for plaintiff and one for defendant, as to the extent of the disability of the plaintiff. One of plaintiff's witnesses estimated permanent disability of the right arm to be 100 per cent., or total, and of the left arm to be 25 per cent. The other two physicians practically agree on 50 per cent. of disability for the right arm and 10 per cent. for the left arm. The trial judge also saw and examined plaintiff. The court thereupon computed the disability as follows: He gave to each

uninjured arm 100 per cent. efficiency, which makes 200 per cent. for both. Then he added the 100 per cent. for right arm and 25 per cent. for left arm disability as estimated by one physician, which gave 125/200 or 5/8 disability for both. He next took the 50 per cent. for right arm and 10 per cent. for left arm disability, or a total of 60/200 or 3/10 for both, as testified to by the other two medical men. The sum exactly between these two estimates gave the result he adopted as 37/80, permanent disability for both arms, and allowed plaintiff relief on that basis.

As to the testimony of the physician who estimated 100 per cent. total disability of the right arm and 25 per cent. of the left arm, it is apparently made on the supposition that plaintiff could no longer follow his occupation as automobile mechanic, and therefore, as to that occupation, he was totally disabled. This is not the correct theory upon which to interpret the statute as to what is permanent total disability. *Epsten v. Hancock-Epsten Co.*, 101 Neb. 442. The plaintiff's own testimony, as well as that of the medical men, shows conclusively that the only permanent injury to the right arm is caused by a keloid growth, and the skin and scar tissue under the arm have adhered so that it prevents raising the arm higher than the shoulder, with a somewhat restricted movement backward and in some positions toward the front; that is, the arm is bound down to the side by the adhesion. The arm itself is not injured. The fact that he performed various services for defendant when he resumed work, and has, since July 1921, been earning $25 a week as a tinner and engaged in roofing and cornice work, proves beyond question that plaintiff has very good use of his right arm, and that the doctor's conclusion of total disability is based upon a wrong theory. Under a study of the whole evidence, it is apparent that no finding is warranted of a permanent disability greater than 50 per cent. of the right arm and 10 per cent. in the left arm.

Indeed, it seems that such estimates are very liberal, and it is possible there may be some improvement in the future. The left arm has an adhesion which restricts the use of that arm, but in a much less degree than in the right. The finding of the trial court that there is a permanent partial loss of the use of both arms is confirmed, but only to the extent of 10 per cent. in the left and 50 per cent. in the right arm.

As to the method of computation for the compensation to be awarded, it was held by this court in *Frost v. United States Fidelity & Guaranty Co., ante,* p. 161, that in a permanent partial loss of the use of both legs the plaintiff was entitled to recover such proportion of the compensation allowed for total disability, under subdivision 1 of section 3044, Comp. St. 1922, as the extent of his loss would bear to the total loss of such members. Judge Flansburg correctly stated in the opinion that the literal interpretation of the statute is in accord with the legislative intent. The statute seems plain, and this court should follow its clear direction.

By a stipulation and arrangement between the parties, no claim is made for any penalty, and the plaintiff is not entitled to attorney's fees.

The cause is remanded, with directions to award plaintiff $4.50 a week for a period of 271 weeks from and after July 6, 1921, and after the expiration of said 271 weeks, and for the remainder of his life, he shall receive from the defendant the sum of $3.60 a week. The defendant, by an agreement between the parties, has been paying plaintiff $6.93 a week. The amount paid in excess of $4.50 a week shall apply on future payments. No penalty or attorney's fee is allowed. Costs of this appeal taxed to plaintiff.

REMANDED, WITH DIRECTIONS.

REINHOLD L. KARLIN, APPELLANT, V. FRANCISCAN SISTERHOOD OF NEBRASKA, APPELLEE.

FILED FEBRUARY 15, 1923. No. 23062.

1. **Municipal Corporations:** SALE OF VACATED STREETS. When the charter of a city of the second class gives authority to the mayor and city council to sell vacated streets, a sale of such vacated streets by the city should not be set aside merely because the selling price may not equal the actual value, unless such selling price is so grossly inadequate as to raise a presumption that there was fraud, or that the mayor and council had not acted in good faith.
2. ———: ———: PRESUMPTION. Where a mayor and city council, acting within the scope of legislative authority, sell and convey a vacated street, their deed is presumed to be valid and to be based upon adequate consideration, and the party attacking it must by clear proof exclude the legal presumptions in favor of the official acts of such officers.
3. **Evidence** examined, and *held* not sufficient to show fraud or lack of good faith or abuse of discretion on the part of the mayor and city council in vacating and selling certain streets in Columbus to the defendant.

APPEAL from the district court for Platte county: A. M. POST, JUDGE. *Affirmed.*

McElfresh & Walker, for appellant.

Albert & Wagner, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and GOOD, JJ., RAPER, District Judge.

RAPER, District Judge.

This action was commenced October 5, 1921, by plaintiff Karlin, as a taxpayer, and in his own right as a property owner, to enjoin the defendant Franciscan Sisterhood of Nebraska (and other defendants whom it will not be necessary to mention) from closing up and taking possession of certain streets alleged to have been illegally vacated and sold by the city of Columbus to said defendant.

The said defendant has been the owner for many years of blocks 3, 4, 12, and 13, Chambers addition to

Columbus; on block 12 a hospital is maintained. In 1910 the street between blocks 12 and 13 was vacated by an ordinance, and defendant at once took possession, built a brick barn thereon, and has since used same in connection with its hospital. Block 3 is north of block 12 and blocks 4 and 13 are east of 3 and 12. In September, 1920, the streets between blocks 3 and 4, and between 3 and 12, and between 4 and 13, were vacated by ordinances of date September 12, 1920, and of September 7, 1921. The plaintiff owned and lived upon property one block and across two streets east of the easternmost part of the vacated street. November 3, 1921, the city intervened claiming title to the vacated streets. In the latter part of December, 1921, the city, by ordinance duly passed, sold and conveyed the vacated streets to the defendant for $500, and after that the city filed a disclaimer and was dismissed out of the case. Plaintiff filed a supplemental petition setting up the sale of the vacated streets to the defendant and asking that it be canceled. Issues were joined, and at close of the hearing plaintiff was denied relief and the action dismissed.

Appellant bases his right to relief upon the following proposition, so far as need be considered: (1) That the vacation of the streets was induced by and solely resulted in private benefit to defendant, and was so done without providing for or paying damages to plaintiff and other property owners. (2) That the sale of the vacated streets was without adequate consideration and constituted a fraud upon the rights of plaintiff and other taxpayers. (3) That the vacation and sale of the streets to defendant was hasty and ill-considered; was done without regard to the rights of the taxpayers and property owners of the city, and was induced by the defendant for its own personal financial benefit, and did not benefit, the public or the city; and that said acts by the city council constituted an abuse of discretion of the mayor and council, and amounted to a fraud.

The testimony disclosed that the Franciscan Sisterhood is one of the charitable orders of the Catholic church and contemplates enlarging the existing hospital to an extent that will require the expenditure of probably $250,000 or more; that they receive patients from all classes, and accept cases that are charges on Platte and other neighboring counties, charging a weekly sum to the counties, which is much less than the ordinary hospital charge; that under the plans for the improvements it will be necessary or urgently convenient to place some of the new buildings on the block north of the present hospital (on block 3) and to inclose the four blocks and vacated streets with walls and fences, and among other improvements is a contemplated building to house and care for patients with contagious diseases, and which the city and county can have the use of (not, however, without compensation); and that the Sisterhood use the money paid by patients who are financially able, and donations from charitably inclined persons to pay the operating expenses.

The plaintiff produced a witness who testified that the value of the vacated lots which were sold to the defendant was $2,000 and plaintiff offered testimony that by the vacation there would ensue a large expenditure to drain the adjacent streets; also, that the plaintiff's property would be depreciated in value; however, the testimony as to extra cost of drainage was disputed by testimony of defendant. It appears without contradiction that plaintiff has outlet on other streets than those vacated, but he testifies that, in going to certain parts of the city, he will have to go a longer route. Such, in brief, is the state of the record on the more important facts.

The appellee insists that plaintiff has no standing to maintain the action to enjoin the occupation of the vacated streets, and because plaintiff, after the appeal was taken, asked for a modification of the decree by asking affirmative relief in retaxing costs, he is pre-

cluded from maintaining this appeal. In the view we take of the matter, it will be unnecessary to pass upon either of those objections; for this reason, if he does not show a right to the relief, then it matters not whether he is a proper party to maintain the suit, or to pursue the appeal. Upon consideration of all the evidence, we are impelled to hold that the district court's decree was right upon the main questions of fact.

Under the proofs appearing in the record, we are not able to say that the council acted arbitrarily, and abused the discretion vested in them by the statute, in vacating the streets, even though it may have resulted in benefit to the defendant. Such an institution as is maintained by the defendant has more than a mere personal pecuniary object. They are regarded as being of general benefit to the whole community, both city and surrounding country. To have a place where care can properly be bestowed upon the sick and afflicted, without regard to whether they are able to pay, is of itself sufficient proof that it does tend to help and improve the necessities and conveniences of the public at large. Perhaps with its enlarged capacity it may bring patients and their relatives, attendants and friends from a distance, and thus enchance the trade of the merchants and places of entertainment where food and lodging is furnished. These streets were near the outskirts of the city, and there is testimony which shows that these vacated streets never had heavy travel. All these matters, and perhaps others which the council may have had in mind, were no doubt considered, and there is not sufficient proof in the whole record to show that the council acted arbitrarily, or abused their discretion. To warrant the court in interfering with the action of a city council acting within the scope of their statutory authority, the evidence should be such as to show with reasonable certainty that their action could not be construed as having been taken with a view of the general public welfare. The principal question in

this case bearing upon the good faith of the city council and its power to act in vacating the streets seems to be that the defendant is the one solely benefited by the vacation. The case of *Village of Bellevue v. Bellevue Improvement Co.,* 65 Neb. 52, holds that, because the vacation was had at request and principally for the benefit of certain property owners, is not ground for declaring such vacation ordinance invalid.

The plaintiff's property does not abut upon the streets vacated, nor is the ingress and egress to his property interfered with. Under such circumstances he was not entitled to damages on account of such vacation. *Lee v. City of McCook,* 82 Neb. 26, and cases cited therein.

Lastly, as to the claim that the sale of the vacated streets by the city being for a grossly inadequate price, such sale should be declared void. One witness, as above stated, who was interested in same manner as plaintiff gave his opinion that the streets conveyed to defendant were worth $2,000. He appeared as an expert witness as to such value. The trial judge was not bound to accept the opinion of the witness. But it should be remembered, further, that the defendant was claiming a part of the vacated portion by adverse possession. As to whether or not such claim was valid we do not determine, yet the mere claim, enforced by the fact that defendant had erected a brick building on it and had been in possession for a number of years, no doubt would affect the market value. We may also infer that the mayor and members of the council, being residents, and no doubt more or less familiar with values of property, used their knowledge when the sale was ordered. Under these circumstances the finding of the trial judge should not be overturned.

The evidence not being sufficient to establish an abuse of the discretion of the city council, it is not necessary to pass upon the questions as to whether plaintiff was entitled to maintain the action. The

questions of law upon the main facts have been so repeatedly passed upon by this court that citations therefor are not needed.

The action of the district court in dismissing plaintiff's petition is right, and is

AFFIRMED.

RAY C. PAULEY, APPELLEE, V. EARL KNOUSE ET AL., APPELLANTS.

FILED FEBRUARY 15, 1923. No. 22205.

1. **Judicial Sales:** REVERSAL OF JUDGMENT: PARTIES PROTECTED. Upon the reversal of a judgment under which an order of sale is issued and the land of the judgment debtor sold, it is a good faith purchaser only whose title acquired at the judicial sale will be protected by the provisions of sections 8590 and 9023, Comp. St. 1922.
2. **Deeds:** BREACH OF COVENANTS: DAMAGES. In a suit by the grantee against his grantor for breach of covenants of warranty, wherein it appears that the title to the land conveyed completely failed, the measure of damages is the consideration paid for the land, with interest thereon, together with such costs and expenses, including attorney's fees, as were reasonably incurred by the plaintiff in an honest endeavor to maintain his title.
3. ———: ———: WIFE NOT LIABLE. In a suit to recover damages for breach of covenants of warranty, wherein it appears that the wife joins with her husband in the conveyance of property owned by him for the sole purpose of relinquishing such contingent interest in the premises as she may have as a wife, the wife is not liable in damages, and it is error to render judgment against her therefor.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed as to appellant Earl Knouse, and reversed and dismissed as to appellant Bertha M. Knouse.*

A. H. Gutberlet and *Kelso A. Morgan,* for appellants.

Cosgrave, Campbell & Ankeny and *A. Moore Berry, contra.*

Heard before MORRISSEY, C. J., LETTON and DAY, JJ., RAPER and TROUP, District Judges.

TROUP, District Judge.

An action to recover damages for alleged breach of covenants of warranty in the purchase and sale of certain real estate in the city of Lincoln, Nebraska.

In his petition the plaintiff alleges the purchase of the land in question from the defendants on April 6, 1917, for the sum of $1,800, receiving from defendants a deed conveying to him the title to said land in fee simple, with the usual covenants of warranty, a complete failure of the title so conveyed, as evidenced by certain prior adjudications of the court, and prays for damages in the sum of $2,350.

Defendants, answering, admit the sale of the property to plaintiff for the sum stated and the execution and delivery of the warranty deed with the usual covenants of warranty; that defendants obtained title to said premises, through mesne conveyances, from one Roy A. Bickford, who purchased the same at judicial sale; that the title conveyed by defendants to plaintiff is in no way defective; that no breach of warranty has occurred; and deny that plaintiff has been damaged in any sum whatsoever.

A jury being waived, a trial to the court resulted in a judgment for plaintiff in the sum of $2,224.60. Defendants appeal.

All the facts necessary for a review of this case are comprised in a certain stipulation by the parties filed herein, a recital of which will go far toward indicating what the decision in the case must be, the substance of which, together with certain proceedings to which it refers, are as follows:

That on and prior to May, 1915, one Charles L. O'Connor, then a resident of California, was the owner in fee of the real estate in controversy; that on or about May 20, 1915, one Martha E. Coates, the mother-in-law of O'Connor, commenced an action in the district court for Lancaster county, Nebraska, against O'Connor

to recover on an alleged claim for work and labor as nurse, in the sum of $600, by attachment on the real estate in question, and obtained service against the defendant O'Connor by publication. No appearance having been made by the defendant, default was taken, and on September 27, 1915, judgment rendered against him for the sum of $600 and costs; thereafter an order of sale was issued and published, and on November 30, 1915, the premises in question were sold to one Roy A. Bickford for the sum of $600; on December 4, 1915, the sale was confirmed and deed ordered, and on the same day the sheriff's deed was executed and delivered to the purchaser Bickford, who on the same day filed the same for record in the office of the register of deeds of Lancaster county. On December 10, 1915, Bickford conveyed the property to one Snavely, who on April 5, 1916, conveyed to one Adler, who on September 13, 1916, conveyed to one Traver, who on October 18, 1916, conveyed to Earl Knouse, one of the defendants in the present action, who in turn, and on or about April 6, 1917, conveyed by warranty deed containing the usual covenants of warranty the south 100 feet of said lots to the plaintiff herein, Ray C. Pauley, who took possession of the same and erected valuable improvements thereon. On December 10, 1915, and at the same term of court in which the judgment was rendered against him in the suit of Coates v. O'Connor, the said O'Connor filed a motion in said case, supported by affidavits, moving the court to vacate the judgment rendered against him on the ground of accident and mistake on the part of his attorney. Said motion was overruled by the district court, but, upon appeal duly taken, this court on June 15, 1918, reversed the action of the district court and held that, under the facts and circumstances appearing, the judgment rendered against the defendant O'Connor and the sale of his land made thereunder should be vacated and set aside, and the

same was so vacated and set aside. While this court, in its opinion in said case, did not directly pass upon the question whether Bickford was a good or bad faith purchaser at the judicial sale, leaving that to be determined thereafter, nevertheless it did strongly intimate that he was not of the former class, and further held that, in a case where "there has been a sale of attached property under circumstances which would amount to notice to the purchaser of the rights of the defendant, he will be held to purchase subject to the defendant's rights." See *Coats v. O'Connor,* 102 Neb. 602.

Soon after the decision of this court above mentioned, Pauley, the plaintiff in the present suit, instituted an action in the district court for Lancaster county against O'Connor, seeking to quiet the title to said premises in the plaintiff Pauley. By agreement of parties this case was consolidated with the then pending case of Coates v. O'Connor and they were tried together. After a hearing thereon, that court, by its decree of July 10, 1919, found the issues generally in favor of defendant O'Connor, and, among other things, found especially that on June 28, 1915, and soon after the commencement of the suit of Coates v. O'Connor, a *lis pendens* was filed in the office of the register of deeds of Lancaster county giving notice of the commencement of said suit and its purpose, and that the same had never been discharged of record, and further found "that in taking title to the said premises an abstract was furnished which showed the undischarged *lis pendens,* and also disclosed the filing of the bill of exceptions and the motion to vacate the judgment at the same term of court at which the judgment was entered in the case of Coates v. O'Connor." The court further found, "as a matter of law from the stipulation of facts and the findings of facts hereinabove recited and set out, that none of the purchasers dealing with said property were good faith purchasers within

the meaning and intent of the law, and that the said defendant Charles L. O'Connor is entitled as a matter of law, to have his title to said premises quieted and confirmed in himself free and clear of the claims of the plaintiffs and each of them," excepting, however, the matter of improvements; the rights respecting which were left to be determined under the provisions of the occupying claimants act. From this decree no appeal was ever taken, and it therefore stands as a final adjudication upon all matters involved therein.

Thereafter, and on or about March 2, 1920, the present suit was instituted by the plaintiff against the defendants herein for the purpose and with the result as already stated.

Appellants complain of error upon two grounds only, as follows: (1) That the decision of the lower court is contrary to the evidence introduced. (2) Said decision is contrary to the laws of the state of Nebraska and to the decisions of the supreme court of the state of Nebraska. In our opinion neither of these complaints are well founded.

As to the first proposition, it is difficult to conceive how it can reasonably be claimed that the decision of the lower court is contrary to the evidence introduced. It is in evidence that on April 6, 1917, the defendants herein undertook to convey the title to these premises by warranty deed, wherein they covenanted that "we are lawfully seized of said premises; that they are free from incumbrances; and that we have good right and lawful authority to convey the same; and we do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever," excepting only certain specified general and special taxes; and that, in consideration of such warranty and promise of protection, the plaintiff paid the defendants $1,800. It is the undisputed evidence that, after the deed was given and the consideration therefor paid and before the commencement of this suit, it was

conclusively adjudicated by a competent tribunal of the state, in a suit of which the defendants had actual knowledge, that the defendants never at any time had any title whatsoever to the property which they could convey to the plaintiffs or any one else, but, instead, the title at all times belonged to another and in whom the title was thereupon quieted; that being true, the plaintiff obtained no title whatsoever by defendants' deed nor any consideration for the purchase price paid by him to the defendants, and was therefore entitled to recover damages sustained by reason of a breach of the covenants of warranty contained in the deed in question.

As to the amount of damages sustained by the plaintiffs, the greater part thereof, to wit, the purchase price of $1,800, is of course apparent, and the remainder or difference between this sum and the total amount of judgment, to wit, $2,224.60, was for items of expense actually incurred by plaintiff in an effort, in the meantime, to maintain his title, consisting of taxes, court costs and attorney's fees, respecting all of which ample proof was adduced for their allowance by the stipulation of the parties that these expenses were actually incurred and are reasonable in amounts.

As to any contention that reasonable attorney's fees incurred by plaintiff in defense of his title may not be allowed as part of the damages sustained in a suit for breach of covenants of warranty, we think it sufficient to refer to the case of *Walton v. Campbell,* 51 Neb. 788, wherein it is held that in such a case an attorney's fee incurred is one of the proper elements of damages to be allowed. See, also, *Cheney v. Straube,* 35 Neb. 521; *Dale v. Shively,* 8 Kan. 276; *Seitz v. Peoples Savings Bank,* 140 Mich. 106; *Meservey v. Snell,* 94 Ia. 222.

In respect to the second objection, that the decree of the lower court is contrary to the laws of the state and the prior decisions of this court, the claim of defendants seems to be that, notwithstanding the order of this

court vacating the judgment and sale in the case of Coates v. O'Connor, the same should not be allowed to affect Bickford, the purchaser of the property at the judicial sale; that he should be allowed either to retain the title obtained through the judicial sale, or, failing in that, have his purchase money returned to him, and they cite sections 7646, 8087, Rev. St. 1913 (Comp. St. 1922, secs. 8590, 9023), and numerous decisions of this court relating to said sections.

Bickford is not a party to this suit, and we have therefore no authority to make any orders either for or against him. But, if defendants claim that the title to the premises obtained through the judicial sale having failed the purchase money should be restored for their use and benefit, the answer is that, under the provisions of section 8087, it is the judgment creditor (in this case Martha E. Coates) who should restore said money, and we know of no one disposed to prevent defendants from seeking restoration from that source if they so desire. If defendants claim is that, under either section the title obtained through the judicial sale should not fail even though the judgment under which it was obtained was vacated and set aside, then our answer is that under both sections the judicial title is preserved to good faith purchasers only—under section 7646 by its own express provisions, and under section 8087 by a construction of that section by the decisions of this court. See *Coates v. O'Connor,* 102 Neb. 602, particularly the opinion of Judge Sedgwick on motion for rehearing; also, *Kazebeer v. Nunemaker,* 82 Neb. 732.

As already stated, by the decree of the Lancaster county district court of date July 10, 1919, in the consolidated cases of Pauley v. O'Connor, it was expressly and finally adjudicated that "none of the purchasers dealing with said property were good faith purchasers within the meaning and intent of the law." That being the case, Bickford is not of the class of purchasers

whose title is protected by the statute. These objections must therefore be overruled.

Included, however, in this assignment may be considered the objection made in defendants' brief that it was error on the part of the lower court to render judgment against the defendant Bertha M. Knouse. We are of the opinion this point is well taken and should be sustained.

Section 1566, Rev. St. 1913 (Comp. St. 1922, sec. 1515) declares: "A married woman shall not be bound by any covenant in a joint deed of herself and husband." While it has been held that this statute was abrogated by the married woman's act, so far as it attempted to release her from covenants made in a conveyance of property held in her own right, and in which her husband joins, we think the statute still effective to protect her against covenants contained in a deed in which she joins with her husband in a conveyance of property owned by him for the sole purpose of relinquishing such contingent interest as she may have in the premises as wife. See *Pochin v. Conley,* 74 Neb. 429.

The title to the premises conveyed in this instance was exclusively in the defendant Earl Knouse. The defendant Bertha M. Knouse was his wife, and, it not appearing that she had a greater interest, she presumably joined her husband in the conveyance to plaintiff for the purpose only of relinquishing such contingent interest, if any, she may have had in the premises as such wife. In that event she is not liable, and it was error to render judgment against her. The plaintiff, in his brief, does not contend against this objection, and by his silence may therefore be presumed to acknowledge this objection as well founded.

The judgment, therefore, is reversed and the case dismissed as to defendant Bertha M. Knouse, but is affirmed as to the defendant Earl Knouse.

JUDGMENT ACCORDINGLY.

CITY NATIONAL BANK OF LINCOLN, APPELLEE, V. D. R. JONES, APPELLANT.

FILED FEBRUARY 15, 1923. No. 22214.

1. **Bills and Notes:** DIRECTION OF VERDICT. Upon an examination of the evidence in a suit upon promissory notes, in which at the close of the trial the court directed a verdict for the plaintiff for the amount of the notes, *held,* the directed verdict was proper.
2. **Appeal:** HARMLESS ERROR. Upon objection to the refusal of certain testimony on cross-examination, *held,* if the refusal was error at all, it was manifestly error without prejudice.

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

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

Stewart, Perry & Stewart, contra.

Heard before MORRISSEY, C. J., LETTON and ALDRICH, JJ., RAPER and TROUP, District Judges.

TROUP, District Judge.

A suit by the City National Bank of Lincoln, Nebraska, against D. R. Jones and the Standard Securities, a corporation, to recover judgment upon two promissory notes for an amount aggregating $6,057.30, executed and delivered by defendant Jones to his codefendant Standard Securities and by that company indorsed and delivered to plaintiff for value before maturity.

The petition is in the usual form in a suit for the purpose named. By answer the defendant Jones admits the execution and delivery to the Standard Securities the notes in suit, but alleges that said notes were procured by the Standard Securities through the false representations of the officers of that company, and that plaintiff had notice of the fraud or was chargeable with notice at the time of its acceptance of said notes from the payee. The reply denied the allegations of fraud; denied that plaintiff had any notice of alleged fraud having been practiced by the payee upon the maker of the

notes; but, on the contrary, alleges that it purchased said notes in due course of business, for valuable consideration, before due, in good faith, and without notice of any infirmity therein or defense thereto.

A trial was had before the court and jury, at the close of which, however, the court directed a verdict for the plaintiff and against both of said defendants for the amount due on the notes and rendered judgment therefor. Defendant Jones alone appeals, and assigns as error the instruction of the court directing a verdict against him, and this now is the only question for determination.

There is only one way by which this question properly may be determined, and that is carefully to read the evidence and discern what it discloses. This we have done, and, after doing so, we express a serious doubt if, from the entire record, there can be found evidence enough tending to show fraud or misrepresentation practiced by the officers of the Standard Securities upon which the defendant Jones relied to justify the court in submitting to the jury even that question.

But, for the sake of further demonstration, concede that there is. Of course, that is not enough. The case must go further and there must be either some evidence tending to show bad faith or some lack of evidence tending to show good faith on the part of plaintiff in accepting the notes in suit before the right of plaintiff to recover can be defeated.

Assuming that there is evidence of fraud, deception, or false representations practiced on defendant Jones by the officers of the Standard Securities, by which Jones was induced to give to that company one or both of the notes in question, and on which false representations Jones relied and acted and was thereby injured, sufficient to carry that question to the jury, and assuming, which we do, that in such instance the burden rests upon the plaintiff to show its *bona fides* and its entire freedom from knowledge or suspicion of such

false representations before or at the time it acquired said notes, then we are clearly of the opinion that situation has been more than amply met by plaintiff's evidence.

We do not find in the entire record a word of evidence or circumstances arising therefrom to warrant a belief that plaintiff, at or before the acquisition of the notes in suit, had any notice or knowledge of fraud or deception practiced by the payee upon the maker of the notes, either by false representations or otherwise, whereby the maker was induced to execute and deliver said notes, or that plaintiff was in possession of any facts sufficient to suggest that there might be some infirmity in the notes or defense thereto.

The fact that plaintiff at one time exchanged some stock in another corporation for an equal amount of stock in the Standard Securities company, which, soon thereafter, upon the expressed desire of the officers of the Standard Securities, was reexchanged, and the further fact that the business quarters of plaintiff and the Standard Securities were located in the same building, with a more or less obscure passageway between them, unaided by any other fact or suggestion that there was any connivance or secret relation existing between these two parties, are not even circumstances so different from those which are liable to arise or exist at any time between individuals or corporations dealing with each other in due course of business as to warrant serious consideration.

On the other hand, the plaintiff's officers testified that at no time did they have anything to do with the affairs or management of the Standard Securities company, but that for an indefinite time prior to the transaction in question plaintiff had been accustomed to deal with said company, as it had with others, in the acceptance of notes and other securities, and that it had frequently accepted, through said company, the notes of defendant Jones, which he had given for the purchase

of automobile trucks, and which notes had always been taken up when due; that plaintiff supposed, at the time it accepted the notes in question, that they were so-called "truck notes," and knew nothing to the contrary until about two weeks before the trial of this case in the district court.

L. B. Howey, president of plaintiff bank, who had most to do in the purchase of the notes in suit, testified that at the time he accepted these notes for the bank he had no notice or knowledge of any kind of any fraud or misrepresentation practiced or claimed to have been practiced against the maker of said notes, or of any infirmity or defense of any kind existing against them; that he accepted said notes in payment of other truck notes then due of an equal amount, in due course of business, supported by a financial statement of the maker. L. J. Dunn, vice-president of plaintiff bank, testified to the same effect. There is no evidence to the contrary.

Defendant complains that the trial court unduly restricted the cross-examination of plaintiff's witnesses, and an instance is quoted in his brief, presumably as strong as any to be found, to the effect that, when Mr. Howey was being cross-examined as a witness, and it appearing that the notes in suit had been drawn payable to the maker, but properly indorsed by him, referring to one of said notes, the witness was asked: "Did you make any inquiry as to why the note was drawn that way?" to which the court sustained an objection interposed "as immaterial, for the reason that that gives no notice of any infirmity in the note."

While we are of the opinion that it might have been as well, perhaps better, to have permitted an answer to this question, yet as there was no intimation that the answer of the witness, whatever it may have been, would be followed by any disclosure damaging to the plaintiff, the court's ruling, if error at all, was manifestly error without prejudice.

We are clearly of the opinion that the court did not err by instructing a verdict for plaintiff. Indeed we are of the opinion that the court would have erred had it done otherwise, and a verdict for defendant rendered.

AFFIRMED.

STATE, EX REL. HIRAM CHASE, RELATOR, V. GUY T. GRAVES, DISTRICT JUDGE, RESPONDENT.

FILED FEBRUARY 27, 1923. No. 23170.

Mandamus: DENIAL OF WRIT. "Although delay in applying for a writ of mandamus is not an absolute bar, it may be sufficient ground, in the discretion of the court, for denying the writ." *State v. Holmes,* 3 Neb. (Unof.) 183.

Original proceeding in mandamus to compel respondent, as district judge, to abate a suit to partition land. *Writ denied.*

Hiram Chase and *A. R. Oleson*, for relator.

J. A. Singhaus, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., RAPER, District Judge.

PER CURIAM.

This is an original application for a peremptory writ of mandamus to compel the judge of the district court for Thurston county to abate an election to partition a tract of land. Relator claims to be the owner of the land in controversy and insists that plaintiff in the partition suit should be required to test his claim of title in an action at law wherein the right of relator to a jury trial will be protected. Respondent filed herein an answer in which the proceedings in the partition suit are pleaded in detail. The issues are submitted to the court for judgment on the pleadings.

Relator is not entitled to a writ. Mandamus is not in every instance demandable as a matter of right. The

court in many cases may rely on its own discretion in determining whether a writ should be issued. An unreasonable delay resulting in prejudice to a party to be affected by the writ may be a sufficient ground for denying it. *State v. Holmes,* 3 Neb. (Unof.) 183.

If relator was entitled to a writ of mandamus abating the partition suit, the right existed when the district court denied the abatement. Instead of demanding the writ at the time, relator filed answers in the partition suit, participated in the trial, awaited judgment on the issues, permitted the land to be sold and the sale to be confirmed. He did not apply for mandamus until after plaintiff in the partition suit had borrowed money on the strength of the title acquired at the judicial sale and until after the district court had distributed the proceeds thereof. He permitted the time for an appeal to expire without superseding the judgment in the partition suit or attempting to have it reviewed. These are circumstances under which a court may in the exercise of judicial discretion refuse to allow a writ of mandamus without inquiring into the merits.

WRIT DENIED.

ELLA WEDDINGFELD, APPELLANT, V. CAROLINE WEDDINGFELD ET AL., APPELLEES.

FILED FEBRUARY 27, 1923. No. 22243.

Partition. Sections 9238, 9258, and 9261, Comp. St. 1922, construed, and *held* that, when there is an outstanding estate for life, vested in a third person, in the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of the life estate.

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

Kingsbury & Hendrickson, for appellant.

W. D. McCarthy, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and GOOD, JJ., RAPER, District Judge.

MORRISSEY, C. J.

One Weddingfeld died seised of 200 acres of land in Dixon county, Nebraska. Under the provisions of his will, which was duly probated, his widow, Caroline Weddingfeld, one of the defendants in the action, became vested with a life estate in all of the land. Plaintiff and the defendants Ella Virginia Weddingfeld and Albert Weddingfeld, minors, are the joint owners or tenants in common of the remainder. While the owner of the life estate was living and in possession of the property, plaintiff instituted this suit, and by her petition prayed partition of the real estate. The trial court sustained a general demurrer to the petition and dismissed plaintiff's cause of action. The question presented on this appeal is: Can partition be had over the objection of the holder of the life estate in possession during the continuance of the life estate?

"The general rule which prevails with few exceptions unless it has been changed by statute is that a joint tenant or tenant in common will not be permitted to maintain a suit for partition unless he has an estate in possession, namely, such an estate as entitles him to enjoy the present possession of the property and receive the rents and profits thereof as one of the joint tenants or cotenants thereof." 15 Ency. Pl. & Pr. p. 784. See *Brown v. Brown,* 67 W. Va. 251, 28 L. R. A. n. s. 125, and note; *Striker v. Mott,* 2 Paige Ch. (N. Y.) 387; *Eberle v. Gaier,* 89 Ohio St. 118; *Alexander v. Alexander,* 26 Neb. 68.

It will be seen that an essential element requisite to the maintenance of the action is the possession, actual or constructive, or the immediate right to such possession of the lands sought to be partitioned. The proceeding operates upon the possession and enables each of the owners to take and enjoy his share of the common or

joint estate. However, it is argued by plaintiff's attorneys that this action may be maintained by virtue of the provision of section 9238, Comp. St. 1922, which provides:

"When the object of the action is to effect the partition of real property among several joint owners, the petition must describe the property, and the several interests and estates of the several joint owners thereof, if known. All tenants in common, or joint tenants of any estate in land may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed."

Counsel point out that, in this section, "nothing whatever is said about possession or the right of possession." And they argue that because of the absence of a reference to possession or the right of possession the legislature intended to say that partition might be had although the parties seeking the relief had neither the possession nor the right thereto. A reading of the statute, however, discloses that it provides for partition only among "tenants in common or joint tenants." Before it can be invoked to compel the holder of the life estate to submit to partition, a court must first hold that the holder of the life estate and the remaindermen are "tenants in common or joint tenants." It is plain that plaintiff and her two minor children whom she has made defendants are tenants in common or joint tenants in remainder, but they are not tenants in common or joint tenants with the holder of the life estate. She holds her interest in severalty. As to her it is not necessary that the statute make reference to possession, or the lack of possession, because she does not fall within its terms.

But counsel point to two succeeding sections of the statute, namely, 9258, Comp. St. 1922, which provides for the payment of incumbrances, if any are found to exist, and section 9261, which provides:

"If an estate for life or years be found to exist

as an incumbrance upon any part of said property, and if the parties cannot agree upon the sum in gross which they will consider an equivalent for such estate, the court shall direct the avails of the incumbered property to be invested, and the proceeds to be paid to the incumbrancer during the existence of the incumbrance."

When these sections are read in connection with 9238 they cannot be construed to confer upon the remainderman the right to force partition upon the holder of the life estate. Section 9261, upon which chief reliance is placed, does not authorize the court to ascertain the value of the life estate and pay it over to the holder of the life estate, but, on the other hand, it directs the court to have the entire fund created by the sale invested, "and the proceeds to be paid to the incumbrancer during the existence of the incumbrance." It is clear, we think, that the provisions of the last two mentioned sections are meant only to apply, first, to cases where there is an ordinary incumbrance, such as a mortgage; and, second, where there is an estate for life or for years and the holder of such estate voluntarily submits to the partition, but, having gone thus far, fails to agree with the other parties in interest upon the value of the life estate. In that event the court orders the investment of the entire amount realized from the sale. It therefore follows that the demurrer was properly sustained.

The further assignment is made that the court erred in dismissing plaintiff's cause of action against the minor children. Service of summons was not had upon the children and no appearance was made in their behalf. The issue was treated as one between plaintiff and the holder of the life estate, and the order of dismissal was apparently made for the accommodation of plaintiff, so that she might have an order from which appeal would lie to this court.

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

ORMAN S. JEFFERY, APPELLANT, V. SILAS H. BURNHAM, JR., ET AL., APPELLEES.

FILED FEBRUARY 27, 1923. No. 22149.

Trover. Plaintiff agreed to exchange liberty bonds for first mortgages upon irrigated land in Wyoming. The liberty bonds were delivered when the contract was made, and it was agreed that the mortgages should be sent to him by mail. When the papers arrived they proved to be assignments of deferred payment contracts for the sale of land and water rights under the Carey Act. Plaintiff promptly tendered back the notes, assignments, and contracts, and demanded the return of the liberty bonds, which was refused, and the bonds sold. *Held*, that under the evidence the retention and sale of the bonds constituted a conversion, and the plaintiff was entitled to recover.

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

W. L. Kirkpatrick, Good & Good and *P. C. Spencer*, for appellant.

Stout, Rose, Wells & Martin and *Bruce Fullerton, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN, DAY and ALDRICH, JJ., REDICK, District Judge.

LETTON, J.

This is an action for conversion, brought to recover the market value of certain liberty bonds delivered by the plaintiff to defendants in exchange for certain first mortgages upon irrigated land in Wyoming, which were to be sent him by mail.

Plaintiff alleges that defendants tendered some notes and contracts of sale, but that the securities tendered were not first mortgages, as agreed; that he promptly offered to return to defendants all securities and papers delivered by them and demanded the return of his Liberty bonds, which was refused, and the bonds were converted by defendants to their own use.

The defendants admit the receipt of the bonds, and

allege that a contract of exchange was made with plaintiff, and that he was informed of the nature of the securities and was familiar with the same, and that he made the contract of exchange with full knowledge. They deny all allegations of fraud. They also file a counterclaim for $113.77 and interest, as the amount due them on the exchange over and above the face value of the bonds.

The case was tried to the court without a jury, resulting in a judgment for defendants on the plaintiff's claim, and for the plaintiff on the counterclaim. Plaintiff appeals.

James R. Deane, a member of the firm of Burnham & Deane, who had formerly sold some stock in a brick company to the plaintiff, Jeffery, called upon the latter at his home near Benedict, Nebraska, about September 22, 1920, and left with Mr. and Mrs. Jeffery a circular to examine, telling them that they could make 8 per cent. on their money by investment in the securities he was offering, instead of 4¼ per cent. which they were receiving upon the liberty bonds which they held. The circular is entitled:

"Burnham & Deane,
Investment Bankers.
"Dealers in Conservative Bonds,
Mortgages and Investments."

On the next page of the circular:

"Mortgage Notes Yielding 8%

"We offer, subject to prior sale, $175,000 worth of first lien and *first mortgage* on Carey Act lands belonging to the Lake View Canal Co. These securities are the unpaid balance amounting to $37.50 per acre on a perpetual water right granted to the Lake View Canal Company by the state of Wyoming, and are further secured by the land which is irrigated by this water."

The circular states, among other things: "We believe in offering a security that the paramount consideration

is, 'What will the lands on which a *mortgage* is held be worth at maturity?' We further believe, and we always bear this in mind, that unless the land which secures a *mortgage note* is bound, beyond a question of a doubt, to increase in value, that the holder of a *mortgage note* is in a somewhat precarious condition." Also: "Remember, when we present this attractive investment to you, you are not buying a *mortgage which is based on a speculative value.* The value of the water and land which has been purchased in this particular instance has been fixed by the state of Wyoming, therefore, you are absolutely assured that the moment this land is put under cultivation, and a great deal of it has already been put under cultivation, that this land security will increase as time goes on, and you would never have to foreclose for the payment, as the surrounding farmers would not allow this land to be sold for the *mortgage.*" The italics are ours and are inserted merely to make evident the frequent use of the term "mortgage" as describing the articles to be sold.

There are a number of other statements in the circular, which, if all reference to "mortgages" and "first mortgages" were eliminated, might give a fair and correct idea of the nature of the securities, but, when considered in connection with the statements and implications that the securities offered are "mortgage notes" and "first lien and first mortgage on Carey Act lands," they, and the oral statements by Deane, were well calculated to deceive any person not familiar with the somewhat intricate provisions of the United States statutes and the statutes of Wyoming regarding such reclamation projects, and with the nature of assignments of contracts of purchase of water rights under such statutes.

Deane returned to the Jeffery farm on September 29, and, after considerable conversation relating to "mortgages," he left and returned again on the 30th, when he, with Mr. and Mrs. Jeffery, went to the bank

at Benedict. Mr. Ward, the banker, testified as follows: "I said, 'What are you doing Mr. Jeffery? Are you selling these bonds to this man?' or something, and Mr. Deane spoke up and said, 'He is trading me $5,000 worth of liberty bonds for a first real estate mortgage on Wyoming irrigated land drawing 8 per cent. interest;' and he went on to explain how much better it was to be drawing 8 per cent. on a first real estate mortgage than carrying the bonds at 4¼ per cent. and I agreed with him." Mr. Jeffery had delivered the bonds to Deane at the bank. Ward testifies, "I asked Mr. Deane if he had the mortgage with him, and he said, 'No, I haven't, it will be mailed from Lincoln.'" A receipt in the following form was then given by Deane:

"Benedict, Neb. Sept. 30th, 1920.

"$5,000.

"Received of Orman S. Jeffery five thousand and 00/100 dollars. Account mortgage in amount of $5,000 to be mailed from Lincoln office.

"Burnham & Deane by J. R. Deane."

A letter is in the record from Burnham & Deane to Jeffery under date of October 2, acknowledging receipt of the $5,000 in liberty bonds, "received from you on your purchase of five-year notes from us," and inclosing an assignment of water contract and a five-year note of Frank J. Hubka for $3,700.05, indorsed without recourse. The letter also suggests that the firm had selected, in addition to this note, three notes to Oscar Johnson, making a total of $5,422.50, leaving a balance due of $506.70, and concluding, "If this arrangement is not satisfactory, kindly let us know at once." On receipt of this letter with the Hubka contract and note, Jeffery went to Benedict to consult his banker, and he and Mr. Ward went to York to see a lawyer, Mr. Kirkpatrick. The next day, October 6, the Jefferys went to Lincoln to see Mr. Deane in order to procure the return of the bonds. They then tendered back to Deane all the papers which had been

sent and asked for their bonds. Deane looked them over, and handed them back, saying, that Mr. Burnham had the bonds, and he would have to find out if he had disposed of them; that as soon as he saw Mr. Burnham he would write and let them know. Jeffery was unable to wait and went home. The next day they received a letter, dated October 9, stating the bonds had been disposed of "last Saturday," and inclosing two notes given by one Robertson. The letter does not mention "mortgages" but speaks of the papers as "securities." It also states that there is a balance due of $62.63, for which a remittance is asked. This action was brought within 30 days.

Defendants say that Jeffery was familiar with such deferred payment contracts and with their sale and assignment as securities, and contracted with full knowledge at arm's length. This is based on his testimony, as follows: "Q. What, if anything, did he say about the Carey Land Act? A. Well, he said that this land was under the Carey Act, land act, and he says that the Wheatland project was under the Carey Land Act, and I told him that it was, and he said there was nothing that was any better. I told him that I guessed that they were all right as far as anything that I knew, that different ones had told me that that was the best there was, and that was as much as I knew about it. Q. That is the land deal we are talking about? A. The Carey Act water right—you see the Carey Act—that is under the Carey Act water right. Q. You discussed the quality of the Carey Act water right? A. Well, that was about all that was said. He said, 'Well, then, you know what the Carey Act is?' I said, 'That is about all I know about it' "—and upon the further fact that Jeffery, some 20 years before, had bought land with a water right under the Carey Act in Wyoming from a real estate agent, and had finally procured his deed or patent from the state of Wyoming.

These facts do not establish that he was informed of

the nature and character of these securities. This is only an inference of defendants and is unwarranted. There is no evidence that Jeffery ever had anything to do with the purchase or sale of water-right contracts under the Carey Act as securities, or that he contracted for and expected to receive anything but first mortgages upon the land itself. When a man contracts and agrees to exchange first mortgages for liberty bonds, he ought to be required, if he tenders securities other than first mortgages, to show that he fully disclosed the real and true character of such securities before the contract was made so that the minds of the parties met with full knowledge. Deane may have believed all that he said, and all that was in the circular, but this would not deprive Jeffery of the right of rejection if the securities tendered were not such as were represented. Assuming that the notes and assignments of contract are worth as much as mortgages would be worth, this does not affect Jeffery, because he had the right to stand on his contract and insist that his bonds be returned when defendants failed to deliver the mortgages. Such securities are not first mortgages, and to describe them as such in the circular and by oral statement was a misrepresentation as to their character. When the liberty bonds were procured from Jeffery, they were disposed of almost immediately, and, although plaintiff acted with the utmost promptitude as soon as he found that the mortgages he bought were not delivered, the defendants retained and still retain the fruits of the transaction.

On the undisputed facts, Jeffery did not receive that for which he agreed to exchange his bonds. The sale of the bonds by defendants until after Jeffery was willing to accept the notes and assignments sent him was unauthorized, and constituted a conversion of his property. This is not a case of rescission on the ground of fraud. There never was a contract to exchange liberty bonds for the papers sent Jeffery. The contract

with him was never executed by defendants, and the bonds never rightfully became their property.

The case was tried to the court without a jury, but the principle that the findings of a court upon the facts in a law action upon conflicting evidence, like a verdict, will not be set aside unless manifestly wrong does not apply in this case, because the evidence in regard to the material points, when the cross-examination of Mr. Deane is considered, is not in substantial conflict. The allegations of the petition with respect to keeping the tender good are not faultless, but, of course, before any judgment could be rendered in favor of plaintiff the papers sent him would be required to be in the hands of the court for delivery to defendants.

REVERSED AND REMANDED.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT, V. CITY OF ALBION ET AL., APPELLEES.

FILED FEBRUARY 27, 1923. No. 22242.

1. **Municipal Corporations:** STREET IMPROVEMENTS: FINDING OF BENEFITS. Unless there are circumstances which show that the special benefits found by a board of equalization to have accrued to certain property abutting upon a street which has been paved are excessive and unreasonable in amount, all things being considered, a finding by the board which is based upon the idea that the paving has added to the value of the lots a sum equal to the proportionate cost of the improvement is not so unreasonable as to justify setting aside the assessment for that reason alone.

2. ———: ———: ASSESSMENTS: REVIEW: BILL OF EXCEPTIONS. Where the record shows that extended consideration had been made by the board of equalization, of a city of the second class, of the subject of the assessment of lots within a certain paving district, before a property owner appeared who requested and was given leave to introduce evidence, and who asked to have the evidence upon which the board made its findings incorporated in a bill of exceptions, the fact alone that the board refused to insert in the bill of exceptions evidence other than that which was adduced by the property owner will not render the assessment erroneous.

3. ———: ———: ———. It is neither required nor necessary that the amount of special benefits assessed against each lot in a paving district bear any proportionate relation to the actual value of the lot.

4. ———: ———: ———. The special benefits to property of a railroad company conferred by the paving of a street in front of its passenger station, depot ground, and other of its real estate which is suitable to be used by, or leased to, other industries, should be assessed upon the same basis as other real estate abutting upon the improvement is assessed.

APPEAL from the district court for Boone county: A. M. POST, JUDGE. *Affirmed.*

Wymer Dressler, Robert D. Neely, H. C. Vail and *Paul S. Topping,* for appellant.

W. J. Donahue, contra.

Heard before MORRISSEY, C. J., LETTON, GOOD and DEAN, JJ., RAPER, District Judge.

LETTON, J.

The city of Albion created certain paving districts and assessed the sum of $8,258.31 as special benefits against certain property of the Chicago & Northwestern Railway Company within paving district No. 1. From the order of the board of equalization levying such special assessment, the railway company prosecuted error to the district court, which court sustained the assessment. From this judgment the railway company appeals.

The material allegation of the petition in error is that the only facts considered by the city council and the only basis used in making the levy was the cost of the paving, regardless of any other consideration.

Section 4283, Comp. St. 1922, confers the power to pave upon the city council, and the method of assessment is prescribed in section 4286.

The record shows that a notice was published to all property owners in the districts that the city council would sit in special session on October 21, 1918, at 8

o'clock p. m., for the purpose of fixing the valuation of the lots within paving districts Nos. 1, 2, and 3, and for the purpose of equalizing and distributing the costs of the improvement upon the property benefited "according to law and the benefits derived therefrom." The council met, took up the matter, and adjourned until October 24, 1919. A number of adjourned meetings were held, and finally on November 12, 1919, "after arriving at a tentative agreement as to values and benefits, the clerk was instructed to embody the same in a schedule for further consideration at a future meeting." An adjournment was taken to November 14. At that meeting the Chicago & Northwestern Railway Company appeared and requested the privilege of offering testimony in regard to the assessment of paving taxes on their property, and further asked the board to introduce the evidence upon which it based its findings in fixing the assessment, so that it might be preserved in a bill of exceptions. The council permitted the railway company to present whatever testimony it desired, but the request that the evidence leading to the findings of the board be incorporated in a bill of exceptions was refused. Testimony offered by the appellant was then received, and the board adjourned until the next evening. At this time the "board proceeded to further discussion of the benefits to property by reason of the paving and the amount of special tax to be levied on the various properties, when, there still being no complaints on file, and no one appearing with objections to the levying of the special tax for the cost of the paving, curbing and guttering of the streets in paving districts No. 1, No. 2, and No. 3, city of Albion, except the Chicago & Northwestern Railway Company," a resolution was passed determining the value of each lot or parcel of land, and finding that the improvement has benefited all lots, fractions of lots, and parcels of land, and that no lot or other parcel of land in any district has in any way been injured by reason of the improvement; that the

paving, curbing and guttering benefit each lot and tract of land "in proportion to the area thereof, its location in the district, its proximity to the improvement, and the extent and nature of the improvement abutting or adjacent thereto, and the board do further find and fix the amount of benefit to each lot, fraction of lot, and parcel of land in the aforesaid paving districts No. 1, No. 2, and No. 3, of said city, by reason of the aforesaid improvement, at the various amounts set opposite the description of each respective lot" in a schedule attached. The board then levied and assessed the specific tax upon the several lots and parcels of land "according to the benefits accruing thereto by reason of said improvement."

The testimony on behalf of the railway company is to the effect that, from the point where the railway crosses Main street to the end of the pavement near the milling company property, the ground on both sides of the paving is unplatted and is about three feet below the level of the street, and has not been used by the railway company for many years, nor does it derive any benefit from the same; that the land would make about four industrial lots 80 by 160 on one side, and 80 by 120 on the other, which would be worth about $1,000 each; that other lots assessed on Main street are worth as much as $7,000 to $10,000 each.

The city engineer testified that he computed the schedule of assessment according to a zoning system with six zones, so as to provide enough money to pay for the improvement. It is not contended by the appellant that the assessment was not properly made if such a basis of assessment is justifiable. That special assessments can only be based upon special benefits to the property assessed, and that such an assessment beyond the special benefits conferred would be a taking of private property for public use without just compensation, as appellant urges, is settled law in this state. *Schneider v. Plum,* 86 Neb. 129, and other cases cited. In that case a village board, acting under the

same statute as to the method of assessment involved here, was enjoined from collecting a special tax upon plaintiff's property to defray the expense of constructing a concrete sidewalk. The court held the burden was on plaintiff to show lack of authority: "The trustees did not find that the lots were or were not benefited by the construction of the sidewalk, but they arbitrarily assessed upon the real estate the total cost of said improvement. The market value of lots may or may not, according to the circumstances of a particular case, be increased by the construction of a sidewalk adjacent thereto, and the cost of the improvement does not necessarily measure that increase. The trustees were not vested with power to ascertain and then assess the *cost* of the sidewalk, but the benefits accruing to plaintiff's lots by reason of the improvement, not to exceed its cost. We do not intimate that the trustees' record must be faultless, but it must at least show that those officials acted within their jurisdiction and substantially complied with the law."

Of course, without a finding of benefits the assessment was unauthorized. But, in the case at bar, the board specifically found the benefits. It is true that the special benefits to all the property in the district has been found to equal the cost of the paving, but this fact alone is not sufficient to avoid the assessment. The benefits derived, under like conditions, from the paving of a street are usually under a zoning system, in proportion to the frontage and area of the lot assessed, and so with respect to the cost of paving. Unless there are circumstances which show that the special benefits found are excessive and unreasonable in amount, all things being considered, a finding by the board which in substance is based on the idea that the paving has added to the value of the lot a sum equal to the proportionate cost of the improvement is not so unreasonable as to justify setting the assessment aside for that reason alone. *O'Reilley v. City of Kingston,*

114 N. Y. 439; *Hennessy v. Douglas County*, 99 Wis. 129; *City of Springfield v. Sale*, 127 Ill. 359; *Hughes v. City of Portland*, 53 Or. 370. The board must be considered to have acted as appraisers of the benefits, acting upon information and upon their knowledge of the property, and the fact alone that the record does not set forth the evidence upon which the board acted will not render the assessment erroneous. The record shows extended consideration of the subject before appellant appeared and requested evidence to be taken. Of course, there may be cases where the special benefits conferred, if any, may be much less than the cost of paving. In this instance no such condition has definitely been shown to exist, and the burden is on appellant to establish it. The lots of appellant are only a few feet below the level of the street, and, while a witness said they were wet and swampy, he qualified this by saying "in the spring" and other witnesses say they are capable of being put to use for other industries, such as elevators, lumber yards, or other lines of effort often found in the vicinity of railroads. The property has been rendered more easy of access and more desirable by the paving of the street in front of it.

Appellant has pointed out that the amount of special benefits assessed against each lot in the paving district has little or no relation to the actual value of the lot. This is immaterial. The value depends upon other factors. A lot in a city with a ten-story building on it may be worth immensely more than a vacant lot on the same street, and yet the special benefit to, and enhancement of value of, each lot be the same. There seems to be little use for the valuation required by the statute unless it means that the board shall ascertain the value of the property before and its value after the improvement, and assess the difference as the special benefit. But the statute does not so require in direct terms and any method of reaching a substantially just appraisment of the special benefits may be supported. *Norwood v.*

Baker, 172 U. S. 269, is cited to sustain appellant's position, but this case has been modified and distinguished in later cases, so that it has lost much of its force as authority.

It is next contended that there can be no special assessment against a railroad right of way and station ground for local improvements except upon the basis of increased value of the land for *railroad purposes.* A number of cases are cited to sustain this proposition, but a larger number can be found in which the courts take a contrary view, and uphold assessments on the same basis as other property is assessed. 4 Dillon, Municipal Corporations (5th ed.) sec. 1451, and note.

The paving extends in front of the passenger station and depot grounds of the appellant, and the street extends beyond the crossing to industries near the tracks, but it seems to appear from the plat in evidence that most of the property in dispute was originally included within a city block. Under somewhat similar facts, the supreme court of Missouri held that the fact that a railway is a highway, and the railroad corporation is a common carrier, does not exempt land used by a railroad for depot and yard purposes from special taxes for street improvements. *City of Nevada v. Eddy,* 123 Mo. 549, 561. Other courts, whose decisions are collected in Dillon, as above cited, are to the same effect. The policy of this state has been to make private property abutting upon or adjacent to a public improvement pay by special assessment the amount which it has been specially benefited, and in the like situation of public property, such as that of counties, school districts, and quasi-municipal corporations, where city authorities have no power to enforce the collection of the assessment by sale of the property, the legislature provided in 1909 that the payment may be enforced by suit and judgment. Comp. St. 1922, sec. 4283. Churches and charitable institutions which are exempt from general taxation are held liable to pay such special assessments. We see

no reason for, and find no statute authorizing, the exemption of railroad property of the nature of that involved in this assessment.

We find no error in the judgment of the district court.

AFFIRMED.

ESTER SWARTZ, APPELLEE, V. DRAKE REALTY CONSTRUCTION COMPANY, APPELLANT.

FILED FEBRUARY 27, 1923. No. 22258.

1. *Penhansky v. Drake Realty Construction Co., ante,* p. 120, followed as to all errors assigned, except the assignment that the verdict is excessive.
2. **Damages.** Evidence set forth in the opinion *held* not to sustain a verdict for personal injuries in excess of $3,500, and recovery reduced to that amount.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed on condition.*

Kelso A. Morgan and *Livingston & Whitmore,* for appellant.

Weaver & Giller, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and ALDRICH, JJ., RAPER, District Judge.

LETTON, J.

Plaintiff recovered a judgment for $5,000 in this, an action for personal injuries. The particulars of the accident are set forth in the opinion in *Penhansky v. Drake Realty Construction Co., ante,* p. 120. At the time of the accident both Mrs. Penhansky and the plaintiff were knocked down by the negligent operation of an automobile truck driven by defendant's employee. The complaints made of the rulings of the trial court, with the exception of one assignment of error, are ruled by the *Penhansky* opinion, and will not be again considered.

This complaint is that the verdict is excessive, and must have been the result of passion and prejudice on the part of the jury. Plaintiff was knocked down and rendered unconscious for a short time. There was a deep flesh wound on the upper part of her left leg. She was taken to a hospital, where she remained between four and five weeks before she went home. She was severely bruised in the region of the hip and thighs. She was in bed for about two months after she left the hospital, and, when she first became able to sit up, it was necessary that her left leg be elevated and rested upon a pillow on another chair. She was unable to perform her household duties for over six months. When the flesh wound healed, it left a scar and depression in the thigh. The medical testimony on behalf of both plaintiff and defendant as to the location, size and result of the wound is in substantial agreement, and it is conceded that the scar will always remain. It is from two to three inches long and one and one-half inches wide. Her power of locomotion is not interfered with. The scar tissue is more sensitive to cold than the natural skin, but there seems to be no permanent injury to her person except this. She suffered a severe nervous shock at the time of the accident, and considerable pain, which gradually became less as time passed; she still complains of nervousness and pain to some extent.

Considering the facts testified to on her behalf, we think the verdict is excessive, and that, while she is entitled to a full and adequate recovery of the damages suffered, we are of opinion that the sum of $3,500 is as large a verdict as the evidence will sustain for all damages proved. Judgment affirmed, if within 20 days plaintiff file in this court remittitur of $1,500 as of date thereof; otherwise reversed.

AFFIRMED ON CONDITION.

CLARA BAXTER, APPELLANT, V. NEBRASKA BUILDING & INVESTMENT COMPANY, APPELLEE.

FILED FEBRUARY 27, 1923. No. 22182.

1. **Trial:** REQUEST TO WITHDRAW REST: ABUSE OF DISCRETION. In an action to rescind a contract on the ground of fraud and deceit in its procurement, an abuse of sound judicial discretion may be committed where the court refuses, in a proper case, to allow a party to withdraw his rest to correct an alleged mistake in his evidence on a material matter, when it appears that the other party will not be prejudiced thereby in his lawful rights.
2. **Evidence:** ADMISSIBILITY: FALSE REPRESENTATION. Evidence which has to do solely with alleged fraudulent representations made to induce a contract is distinguishable from oral evidence offered to vary the terms of a written contract and, as such, is admissible in an action for fraud and deceit.

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

Slama & Donato, for appellant.

Doyle, Halligan & Doyle, Good & Good and *Johnson, Moorhead & Rine, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DAY and DEAN, JJ., REDICK, District Judge.

DEAN, J.

Plaintiff bought from defendant 45 shares of preferred stock in the defendant corporation for which she paid $4,947.50. This action was brought to rescind the contract of purchase and to recover the money so paid on the ground that fraudulent representations were made by defendant, which plaintiff believed and upon which she relied, which induced her to buy the stock. When the parties rested, a motion was made to withdraw plaintiff's rest to permit her to correct her former evidence on a point which counsel believed to be material. The motion was overruled. Defendant then moved for a directed verdict, which was sustained, and plaintiff appealed.

Plaintiff testified that she found out the falsity of defendant's representations in the latter part of September, 1920, but, after she had given that evidence, she recalled that her statement with respect to the time of the discovery was inadvertent on her part, and that in fact, instead of the middle of September, it was not until about the middle of October, 1920, that she found out that the alleged fraud had been perpetrated upon her, and this was only about a week or ten days before the suit was begun. And it was mainly, but not solely, to correct her evidence on this point that the request was made that her rest be withdrawn.

Defendant contends that plaintiff waived the right to rescind because, *inter alia,* she accepted the semiannual dividends from the company, which amounted to 7 per per cent. annually, from January 1, 1919, to January 1, 1920, and a one-quarter dividend July 1, 1920. It is also contended that a letter written by her to defendant, under date of October 3, 1920, showed that she ratified the contract of purchase by agreeing in that letter to leave part of the money in the company and asking a return of the balance under the terms of the alleged contract. The letter follows:

"I am holding certificates amounting to $5,000, of which I wish to draw $4,000, by November the first. I regret very much to be compelled to ask you for this money at this time as I have a note coming due on that date, and I am compelled to have the money. Hoping I may receive an early reply, Respectfully, Mrs. Clara Baxter, 341 East 3d St., Wahoo, Nebr."

Counsel also contend that plaintiff is estopped from maintaining this action because she discovered the alleged fraud of which she complains about the middle of September, 1920. The argument is based on her evidence and on her letter and also on the evidence of her counsel. Defendant therefore concludes: "The only question to be considered is the action of the court in sustaining defendant's motion for a directed verdict."

But on this point plaintiff's counsel testified on the cross-examination that in September he, Mr. Slama, "didn't know anything about the condition of the company at all," and also that plaintiff at that time was making application for her money, "upon the promises that were made to her." Counsel appears, too, from his cross-examination, to have been insistent in demanding that the money be repaid, and this demand was in an apparent "pursuance of her (plaintiff's) contract," when he made a visit to defendant's office in September.

It may be noted with respect to plaintiff's letter defendant points out that no mention is therein made of rescinding the contract, but that it merely gave to defendant "thirty days' notice she wanted her money back on the terms of the contract." The argument is that the contents of the letter are inconsistent with any intention to rescind. On the back of each of the two or three application forms for the purchase of stock, however, there is an indorsement which in substance provides that, after one year from the date of the issuance of the purchaser's stock certificate, if the purchaser gives 30 days' notice in writing of an intention to resell, it shall then be its duty to resell, or take over such stock as may be offered for resale, upon such terms as said company shall deem to be for the best interest of the company, and to resell the stock.

It is obvious that neither the acceptance of dividends nor the writing of the letter, under the circumstances here involved, should be taken to ratify the contract, as a matter of law, if it should appear that plaintiff did not discover the perpetration of the alleged fraud for about two weeks after the letter was written. The delay in beginning the action, under the facts, was not unreasonable and, besides, it is not made to appear that defendant was prejudiced thereby in any way.

Plaintiff's explanation of the mistake she made with respect to the time when she discovered the fraud is

consistent with the allegations of her petition. She alleged in substance that October 14, 1920, she had an investigation made, and thereafter for the first time learned that the representations made by defendant to induce her to invest in its preferred stock were false and fraudulent. From this, in connection with other evidence on this point, it may reasonably be inferred that the mistake was honestly made. In *Tomer v. Densmore,* 8 Neb. 384, in an opinion by Judge Maxwell, we held that in a proper case evidence might be offered in support of either party, even after the case has been submitted to the jury, provided the party offering such evidence does not thereby obtain an undue advantage. From a review of the facts we conclude that it was an abuse of sound judicial discretion for the trial court to deny plaintiff the right to submit the offered evidence to the jury. The issue was not a question of law for the court to decide, but was a question of fact for determination by the jury.

With respect to material representations made by defendant's agent to induce plaintiff to make the contract, she testified:

"Q. The first time he came to your house, what did he tell you? A. Well, he told me about the Building & Loan Association, and I told him where I had my money, that I had my money in the Occidental Building & Loan Association in Omaha and I was receiving 6 per cent. Well, he told me then how this was similar, and it was a very good investment, and couldn't possibly lose by investing in it, and that they were paying 7 per cent. And, of course, I wanted the 7 per cent. I had put in my little insurance money that I had received from my husband after he died, and I had put that in the * * * Q. Now, just what did he tell you? A. Well, he told me then that this was similar, it was just about the same—it was the same as the Building & Loan Association in Omaha, and that it was protected by the state, and why they could pay the 7 per cent. was be-

cause they had their own material, their own brick-yard and their own lumber-yard, and in every way that they were better equipped, so that they could give me 7 per cent. * * * Q. Now, then, tell the jury what he told you the second time he came to your house. A. Well, he told me just about the same. He went over about the same thing each time, telling me what a good investment it was, and he hated awfully to think of my letting it go by because I could get 7 per cent. and it was such a good thing he didn't like to have me let it go by. And he came to the home many times, and called up there many times, and asked me to solicit money for him, to have my friends invest money, and that he would make it worth while if I invested. Q. What did he tell you, if anything, about your getting your money back? A. He told me that, after they had had the money a year, any time on thirty days' notice I could get my money back; they must have my money one year, and after that I could get it back on thirty days' notice."

The foregoing excerpt from plaintiff's evidence is reproduced from defendant's brief and is urged by it as being "the plaintiff's entire testimony of the representations made to her by defendant's agent."

The widowed plaintiff was untutored in business ways and usages. She was a housekeeper by occupation. When the contract was made she was keeping house for Louis Laudenschlager, her aged father of 86 years, who could neither speak nor understand the English language. Evidently she relied upon the statements which induced her to make the contract and she was clearly within her rights when she wrote the letter of October 3, 1920, which was introduced in evidence by defendant. All of the evidence on this point should have been submitted to the jury. The evidence had to do solely with the inducement and, as such, was distinguishable from an attempt to vary the terms of a written contract by oral testimony.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

STATE BANK OF OMAHA, PLAINTIFF, V. MICHAEL L. ENDRES, TREASURER, ET AL., DEFENDANTS.

FILED FEBRUARY 27, 1923. No. 23169.

Taxation: SHARES OF STOCK IN BANKS. Section 5887, Comp. St. 1922, relating to the duty of the assessor in taxing shares of stock in banks, banking associations and trust companies, in so far only as it declares "such capital stock shall thereupon be listed and assessed by him at the same rate as tangible property is assessed in the taxing district where the principal place of business of such association, bank or company is located," is invalid as to national banks, because it conflicts with the act of congress forbidding states to tax shares of a national bank at a greater rate than is assessed upon other moneyed capital, and, with national banks excluded from its operation, it is also invalid as to state banks, because the latter would then be taxed at a higher rate than national banks, and therefore the taxation would conflict with that part of the state Constitution requiring taxes to be uniform as to class. Rev. St. U. S. sec. 5219; Nebraska Const., art. VIII, sec. 1.

Original suit to enjoin defendants from illegally taxing the property of plaintiff. *Injunction allowed.*

Gaines, Van Orsdel & Gaines, for plaintiff.

Ora S. Spillman, Attorney General, and *George W. Ayres, contra.*

Heard before MORRISSEY, C. J., ROSE, DEAN, DAY and GOOD, JJ., RAPER, District Judge.

DAY, J.

We entertain jurisdiction of this, an original action in this court, upon the ground that the action involves the public revenue. The relief sought is an injunction to protect plaintiff's property from illegal taxation. The issue presented arises upon a demurrer to the petition which alleges that the petition does not state facts sufficient to constitute a cause of action.

Briefly stated, the petition alleges in substance that the plaintiff, the State Bank of Omaha, is a Nebraska corporation conducting a banking business in Omaha, Douglas county, Nebraska, having a capital stock of $300,000, divided into shares of $100 each; that the defendants, Michael L. Endres and Frank Dewey, are respectively the county treasurer and the county clerk of said county; that on April 1, 1922, in compliance with the statute, the plaintiff made out and delivered to the assessor a statement showing the number of shares of its capital stock, the name and residence of each shareholder, the number of shares held by each, and that the value of each share, for the purpose of computing the state and county taxes for the year 1922 and the city tax for the year 1923, was the sum of $153.50; that all the shares of stock have been entered upon the 1922 tax list of said county against the plaintiff and its several shareholders, aggregating the sum of $400,523.60; that moneyed capital in the hands of individual citizens of the state, subject to taxation under the general law relating to taxation of intangible property, exceeds in value $141,000,000; that moneyed capital in the hands of individual citizens in Douglas county, subject to taxation under the general law relating to taxation of intangible property, exceeding the sum of $47,000,000, has been entered upon the tax list of Douglas county for the year 1922, and assessed as intangible property; that the capital stock of state and national banks and trust companies in the state have been valued at over $54,000,000; that there are a large number of national banks in the state and in the city of Omaha, with capital aggregating several millions of dollars, which come directly into competition with the plaintiff and other state banks; that national banks, by virtue of the statutes of the United States, cannot be required to pay taxes upon their capital stock at a greater rate than is levied upon moneyed capital in the state, which in this state is 25 per cent. of the rate levied upon tangible

property; that a large part of the moneyed capital in the hands of the individual citizens of the state, and listed as intangible property, is being used and will be used to buy notes, bonds, commercial paper, real estate mortgages, and in making loans for interest, and thereby come in direct competition with the plaintiff and other state banks; that the rate of taxation for the state for the general and capitol fund is 2.3 mills; that the rate of taxation for Douglas county is 3.6, and for the city of Omaha, for the year 1923, is 22.26 mills; that Frank Dewey, as county clerk, has made up the tax list of Douglas county for the year 1922, and delivered the same to Michael L. Endres, county treasurer; that the tax list shows a valuation on each share of plaintiff's capital stock to be $133.50; that the tax rate entered upon the books of the county clerk and county treasurer requires the plaintiff to pay the same mill rate as is required of real estate and other tangible property, whereas the mill rate levied upon intangible property, except capital stock in state and national banks and trust companies, is 25 per cent. of the mill rate levied upon tangible property; that the plaintiff made a tender to the defendant Michael L. Endres of the full amount of state and county taxes, based upon the same rate as is required to be paid by other moneyed capital, and upon intangible property, but that the treasurer has demanded that the plaintiff pay upon its shares of stock the same rate that is required of tangible property. The plaintiff further alleges that the tax levied upon its shares is unjust, illegal and discriminatory, and prays for an injunction against Michael L. Endres, county treasurer, from collecting a greater rate upon its shares of stock than is levied upon other moneyed capital. The plaintiff also prays that defendant Frank Dewey, as county clerk, be required to enter upon his books against the plaintiff's property the same mill rate levy as is levied against other intangible property.

The question thus raised is whether the plaintiff on

behalf of its stockholders can be required to pay a greater mill rate on its capital stock than is required of national banks and other moneyed capital.

Acting upon authority of the provisions of the Constitution, the legislature of 1921 made some important changes in the revenue laws of the state. Speaking generally, it classified property subject to taxation into two groups—tangible and intangible. Tangible property was required to be listed at its true value, and assessed upon the mill rate levy. The tax upon intangible property, with certain exceptions, was required to be listed at its true value, and a tax levied thereon at 25 per cent. of the mill rate levied upon tangible property.

With respect to shares of stock in banking corporations, it was provided (Comp. St. 1922, sec. 5887) that the officers of banks, loan and trust or investment companies should, on April first of each year, make out a statement under oath and deliver the same to the county assessor, showing the number of shares of stock held by each person, the name and residence of the stockholders, and the value of the stock. It is then made the duty of the assessor to assess the capital stock at the same rate as tangible property is assessed in the taxing district where the principal place of business of the bank is located. In determining the value of the stock for taxation, it is made the duty of the assessor in case of national banks to examine the last report on such bank made to the comptroller of the currency, and in the case of state banks the last report made to the department of trade and commerce. The bank is required to pay the tax thus levied upon its stock, and is given a lien upon the stock of its shareholders for repayment.

From this brief outline of the provisions of the law it is plain that it was the intention of the legislature to classify certain intangible property and to place such property for taxation purposes upon the same basis

as tangible property. It is equally plain that shares of stock in national banks were placed on the same basis as shares of stock in state banks.

Since the passage of the act in question by our legislature, the supreme court of the United States has pointed out more clearly than theretofore the limitations upon the power of the states to tax shares of stock of a national bank. In *Merchants Nat. Bank v. City of Richmond,* 256 U. S. 635, the court reviewed the act of congress (Rev. St. U. S. sec. 5219) which authorized the states to tax shares of stock of national banks, limiting the power, however, so that a greater rate of taxation may not be assessed upon shares of national banks than is assessed upon other moneyed capital, and held: "In the provision of Rev. St. sec. 5219, respecting state taxation of shares of national banks, that it 'shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state,' the words 'moneyed capital in the hands of individual citizens' include bonds, notes and other evidences of indebtedness in the hands of individuals, which are shown to come materially into competition with the national banks in the loan market."

In the light of this decision, it seems clear that the method adopted by our legislature of taxing shares of stock in banks, in so far as it applies to shares of national banks, is beyond the power of the legislature.

If, then, the national banks be excluded from the operation of this section of the statute, what effect does it have upon the state banks? While the legislature has the undoubted right to make a reasonable classification of intangible property for the purposes of taxation, it would seem clear that a classification, the effect of which would be to tax its shares of stock four times as much as the shares of a national bank, would be an unreasonable exercise of its power, and would be in violation of section 1, art. VIII of the Constitution, which, while giving the legislature power to classify intangible proper-

ty, nevertheless requires that taxes shall be uniform as to class.

From what has been said, it would seem to follow that section 5887, Comp. St. 1922, relating to the duty of the assessor in taxing shares of stock in banks, banking associations and trust companies, in so far only as it declares "such capital stock shall thereupon be listed and assessed by him at the same rate as tangible property is assessed in the taxing district where the principal place of business of such association, bank or company is located," is invalid as to national banks, because it conflicts with the act of congress forbidding states to tax shares of a national bank at a greater rate than is assessed upon other moneyed capital, and, with national banks excluded from its operation, it is also invalid as to state banks, because the latter would then be taxed at a higher rate than national banks, and therefore the taxation would conflict with that part of the state Constitution requiring taxes to be uniform as to class. Rev. St. U. S. sec. 5219; Nebraska Const., art. VIII, sec. 1.

It is also suggested by the defendants, but not argued, that injunction is not available to the plaintiff. The tax complained of, being illegal, we think comes within the saving clause of section 6491, Rev. St. 1913. The plaintiff having tendered the amount which could have legally been assessed, viz., 25 per cent. of the mill rate levied against tangible property, the relief prayed for by plaintiff will be granted.

INJUNCTION ALLOWED.

ANNA L. ANDERSON, APPELLANT, V. JAMES L. WALSH ET AL., APPELLEES.

FILED FEBRUARY 27, 1923. No. 22269.

1. **Mortgages:** FORECLOSURE: DEFICIENCY JUDGMENT: FINDINGS. Findings of fact in a decree of foreclosure, showing defendants personally liable for any deficiency that may remain after sale of mortgaged premises, relate only to facts then existing, and do not operate to preclude defendants from setting up, as a defense to an application for deficiency judgment, facts arising after entry of decree.
2. ———: ———: ———: INADEQUACY OF PRICE: CONSIDERATION FOR WAIVER OF DEFICIENCY. Inadequacy of price of land sold at judicial sale may not, after confirmation, be urged as a defense to a deficiency judgment, but it may, before confirmation, afford a basis for a contract between the parties to the action, wherein one waives the right to file objections to confirmation of sale in consideration of the other party relinquishing the right to apply for a deficiency judgment.
3. **Appeal:** OBJECTIONS TO EVIDENCE. It is incumbent on one, not wishing to be bound by evidence made incompetent by statute, to make timely objection when it is offered. It is too late to raise the objection for the first time in the appellate court.

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

G. N. Anderson and *John C. Martin,* for appellant.

Vail & Flory, contra.

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., TROUP, District Judge.

GOOD, J.

Plaintiff has appealed from a decree dismissing her application for a deficiency judgment, after a judicial sale and confirmation thereof in a foreclosure action.

Plaintiff brought action against James L. Walsh, his wife, Mary E., Frank M. Gross, and his wife, Bessie A., to foreclose two mortgages which had been executed by Walsh and wife. After the execution of the mortgages, Walsh and wife conveyed the mortgaged premises by

warranty deed to Frank M. Gross. Plaintiff in her petition alleged that in the warranty deed, as a part of the consideration for the land, Frank M. and Bessie A. Gross assumed and agreed to pay the debts secured by the mortgages. In the prayer of her petition plaintiff asked that all of the defendants be adjudged to pay any deficiency which might remain after applying proceeds of sale to the payment of the debts secured by the mortgages. Summons was personally served on all of the defendants, but none of them made appearance in the original action. Default decree was entered in favor of the plaintiff, which, among other things, contained a finding that Walsh and wife conveyed the lands to Frank M. and Bessie A. Gross, subject to the said mortgages which they assumed and agreed to pay, as alleged. The decree further provided: "And in case said premises do not sell for sufficient to pay the debts and costs, a deficiency judgment be given for the amounts." Thereafter an order of sale was issued and the premises were sold by the sheriff to the plaintiff for the sum of $750, and, after applying the proceeds of the sale to the payment of costs and amount found due, there remained a deficiency of $1,097.06. Plaintiff filed motion for confirmation of sale and for deficiency judgment. When this motion was called up in court, counsel for defendant Gross stated that he had no objection to the confirmation of sale provided no deficiency judgment was asked. The court then entered an order confirming the sale, and gave defendants time to make objections to the application for a deficiency judgment. The defendants Gross and wife filed objections, in which they alleged that, after the sale and before confirmation thereof, they had entered into an agreement with the plaintiff by the terms of which they agreed not to make objection to the confirmation of sale, upon the condition and agreement of the plaintiff that she would not ask for a deficiency judgment in the case, and, relying on said agreement, did not file objections to a confirmation,

though the premises sold for an inadequate price. Plaintiff filed reply, in which she admitted the purchase of the land at judicial sale and that an agreement had been entered into, but that the terms of the oral agreement were entirely different from those contended for by the defendants Gross, and alleged that the right of plaintiff to a deficiency judgment had been adjudicated in the original decree, and that the order confirming the sale without objection estopped the defendants from claiming any defense to the motion, and prayer for deficiency judgment.

On a trial of the issues thus presented, the district court found that, subsequent to the sheriff's sale, an agreement was entered into between plaintiff and defendants, to the effect that defendants would refrain from filing any objections to the confirmation of said sale in consideration of plaintiff waiving and relinquishing her right to ask for a deficiency judgment in said case against defendants; that defendants relied on said agreement and did not file objections to confirmation of sale; that plaintiff purchased the land at sheriff's sale for $750, and that the land was at the time reasonably worth $1,600. The court sustained the objections and denied plaintiff a deficiency judgment.

1. The first legal proposition advanced by plaintiff for a reversal is that the decree in the foreclosure case is a final determination; that all of the defendants are liable for any deficiency remaining after applying the proceeds of the land on the amount found due to plaintiff in that decree, and that it is not subject to review on objections to a deficiency judgment. She cites, in support of her contention, *Parratt v. Hartsuff*, 75 Neb. 706; *Patrick v. National Bank of Commerce*, 63 Neb. 200; *Devries v. Squire*, 55 Neb. 438; *Stover v. Tompkins*, 34 Neb. 465; *Dodge v. Healey*, 103 Neb. 180.

We think none of the cases cited goes further than to hold that: "Where, in a petition filed to obtain the foreclosure of a mortgage, facts are alleged showing a

personal liability on the part of the defendants for the payment of the debt, and judgment for deficiency is asked against them, and where the court, in its decree, finds that they are personally liable for the payment of any deficiency that may exist after a sale of the mortgaged premises, they cannot, while such decree remains in force and unmodified, be permitted, when judgment for deficiency is sought, to set up facts which existed when the original decree was obtained, to show that they are not liable." *Patrick v. National Bank of Commerce, supra.*

In the instant case, the matters that are set up to defeat a deficiency judgment are not matters that existed at the time of the entry of the decree, but arose by virtue of an agreement that was made after the sale and before confirmation. Findings of facts in a decree of foreclosure, showing defendants personally liable for any deficiency, relate only to the facts then existing, and do not operate to preclude defendants from setting up, as a defense, facts arising after entry of decree.

2. It is claimed that the order confirming the sale was a final determination that the land sold for a fair price, and that inadequacy of price could not be raised as an objection to a deficiency judgment. The proposition may be conceded to be sound, but it does not follow that inadequacy of price would not have been a good ground for objecting to confirmation of sale, or that it would not afford a good basis for a contract between the parties by which one waived the right to make valid objection to a confirmation, in consideration of the other party relinquishing the right to apply for a deficiency judgment.

3. It is urged that the agreement, being in parol and being made on behalf of plaintiff by her attorney, is in conflict with section 266, Comp. St. 1922, and not enforceable. Said section, so far as applicable, provides: "An attorney or a counselor has power * * * to bind

his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court." It will be observed that the portion of the statute quoted does not make an oral contract invalid, but only relates to the character of evidence by which it may be established. All the evidence on the question was received in the district court without objection, and the attorney for plaintiff also testified concerning it, though his testimony did not coincide with that produced for defendants. Had plaintiff made timely objection, the evidence might have been excluded, but, in failing to object, she waived her right to have the contract established by only such evidence as the statute makes competent.

It is incumbent on one, not wishing to be bound by evidence made incompetent by statute, to make timely objection when it is offered. It is too late to raise the objection for the first time in the appellate court.

Plaintiff insists that in any event she was entitled to have judgment entered against James L. and Mary E. Walsh, because they made no objections to the application for a deficiency judgment and were not parties to the agreement between her and Gross. It will be observed that the agreement with Gross was not to relinquish her right as against the Grosses alone, but generally to relinquish her right to a deficiency judgment. The effect of the agreement was that plaintiff should take the land in satisfaction of her decree. The district court did not err in denying plaintiff a deficiency judgment as against any of the defendants.

AFFIRMED.

IRVINE C. WEARY, APPELLANT, V. EDWARD WESTERING, APPELLEE.

FILED FEBRUARY 27, 1923. No. 22248.

1. **Appeal:** CONFLICTING EVIDENCE. In this action to recover damages for breach of contract of sale, defendant counterclaimed for plaintiff's breach of the same contract. The evidence was conflicting as to which party was in default and it was within the province of the jury to find that neither party was entitled to recover.
2. **Evidence** examined, and found sufficient to sustain the verdict.

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

Richards & Richards, for appellant.

Cosgrave, Campbell & Ankeny, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and GOOD, JJ., RAPER, District Judge.

RAPER, District Judge.

The plaintiff, Irvine C. Weary, brought action against the defendant, Edward Westering, claiming damage for breach of written contract for the sale of plaintiff's stock of general merchandise in Hubbell. The defendant counterclaimed for damages on an allegation that plaintiff had breached the contract. Each claimed $1,000 as liquidated damages under a provision of the contract which fixed that sum as damages for nonfulfilment of the contract. The jury found against the plaintiff on the petition and against the defendant on the cross-petition. Plaintiff appeals.

The contract provided for an exchange of plaintiff's stock of merchandise for land belonging to defendant in Colorado; the stock of merchandise to be free from incumbrance, and the land be subject to a mortgage of $6,000, the merchandise to be invoiced, and the land value was agreed at $23,000. The contract further provided that defendant agreed to take a second mortgage on the land in the sum of $4,000 "in lieu of some of the obligations now standing against the party of the second

part (plaintiff), but not to exceed $5,000." A further clause provides: "Party of the second part agrees to pay all wholesale and other accounts immediately that said stock may be charged with or held for. Satisfactory to party of the first part (defendant)." An invoice was taken, but when the settlement was attempted trouble began, principally over the construction and effect of the two provisions above quoted. The defendant claimed that plaintiff owed an amount in excess of the $5,000 which defendant had agreed, as he contended, to advance on plaintiff's debts if that much were needed, and defendant further claims that plaintiff did not pay the wholesale bills and never would furnish a correct list of such debts, and he refused to proceed with the deal until plaintiff gave him satisfactory assurance that he could and would pay them, because, as he testified, he did not want to pay plaintiff for the goods and then have creditors take the stock under the bulk sales law. The plaintiff insisted that he was willing and able to pay all his debts, amounting, as he testified, to between $5,900 and $6,000, and that he so assured defendant. It is somewhat difficult to get from the plaintiff's testimony just what he expected of the defendant in regard to the giving of the mortgage of $5,000, but it is undisputed that he did not pay the claims, and never gave a list of his creditors to the defendant. There is a large amount of testimony, much of it contradictory.

The court gave an instruction that plaintiff cannot recover unless he paid or was ready, willing and able to pay all wholesale and other accounts, immediately after the signing of the contract, that the stock of merchandise was charged with or held for, the same being satisfactory to defendant. This is alleged as error. The instruction might have been framed more accurately to comport with the proof; but, inasmuch as both parties testified that their negotiations for completing the contract were carried on for some time, and that a further instruction told the jury that if plaintiff

was willing and able to carry out the contract and defendant refused, plaintiff could recover, it can hardly be said the jury were misled. By another instruction the jury were told that one of the questions for them to decide was "which party to the agreement entered into between the plaintiff and the defendant breached it." The instructions as a whole fairly submitted the issues as to the breaching of the contract. After the jury had been deliberating for some time, they came into court and inquired if they could be permitted to offset one claim with another. The court then instructed the jury, over the objections of plaintiff, that they could not offset one claim against another, but that the jury might find under the instructions already given that neither the plaintiff nor the defendant would be entitled to recover. This is also claimed as error. We do not so view it. There is ample testimony to support the verdict against plaintiff, and as to the finding against defendant of course plaintiff is not objecting.

The rule of damages submitted by the court to the jury is vigorously assailed; but, inasmuch as the jury found there was no damage, it is useless to discuss ways and means of measuring nothing.

On consideration of the whole evidence and the instructions, we feel that the jury's verdict is right, and that there is no prejudicial error in the record. Judgment

AFFIRMED.

W. E. SHARP ET AL V. STATE OF NEBRASKA.

FILED FEBRUARY 27, 1923. No. 22695.

1. **Injunction:** VIOLATION: ABETTORS. A person bound to obey an injunction should not be permitted to evade responsibility for its violation when he has aided or abetted others in violation thereof.
2. ———: ———. In determining whether a party is responsible for the violation of an injunction, one of the tests is, whether the

course of action pursued by him was intentionally instrumental in causing a breach of the mandate.

3. ———: ———. Injunction orders must be fairly and honestly obeyed, and courts will not look with indulgence upon schemes or subterfuges, however devised, designed to thwart their decrees.

4. **Pleadings and evidence** examined, and *held* sufficient to sustain the **judgment.**

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

Hainer, Craft & Lane and *O. B. Clark,* for plaintiffs in error.

J. C. McReynolds, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., RAPER and TROUP, District Judges.

RAPER, District Judge.

In obedience to a mandate from this court, in the case of *Widener v. Sharp,* 106 Neb. 654, the district court for Lancaster county, on the 21st day of November, 1921, entered a decree enjoining the defendants, and their attorneys, agents and successors in office from in any wise enforcing against the plaintiffs the new table of rates adopted by the supreme legislative and governing body of the Royal Highlanders at a special session held at Denver in October, 1919.

December 17, 1921, the plaintiffs filed a motion in the district court for an order citing the defendants and O. B. Clark and B. L. Starboard for contempt for disobedience of the decree. With said motion were also filed affidavits of Gottlieb J. Wenninger and William Widener, plaintiffs, and Homer C. VanBoskirk, A. H. Vanlandingham, and J. C. McReynolds, who were not named as parties to the suit, but are members of the Royal Highlanders. The affidavits set out various acts of O. B. Clark and B. L. Starboard, who are respectively the secretary-treasurer of Bonnie Doon Castle and Moray Castle, of the Royal Highlanders, in effect, charg-

ing these secretary-treasurers, as agents and employees of the defendants, and the defendants with collecting the enjoined rates from the affiants. The court thereupon issued a citation to the defendants W. E. Sharp and F. J. Sharp and their agents for collection of assessments, O. B. Clark and B. L. Starboard "for wilfully and contumaciously violating the order of injunction," which citation was duly served upon the four persons named therein. They filed an answer in which is set forth their respective duties as officers of the order, denying that either of the parties was agent of either of the other parties, and denying that they collected the enjoined rates from either of the affiants; alleging that the payments received were voluntarily paid by the affiants, and asserting that they have in good faith, fully and fairly complied with the terms of the injunction, both in letter and spirit. A trial was had, evidence taken, and on the 17th day of January, 1922, the court discharged O. B. Clark and B. L. Starboard; found defendants W. E. Sharp and F. J. Sharp guilty, assessed a fine of $500 on each, to be paid at the end of one year, and provided that if they cause to be conveyed through three successive issues of the Royal Highlander a plain and specific statement that by the holding of the court the collection of rates made in Nebraska from November 21, 1921, to December 27, 1921, inclusive, was not authorized as to the excess over the certificate rates, and will be returned if personally demanded by those who paid them, and provided further that if the defendants repay, or cause to be repaid, such excess upon such demand, and make due proof thereof to the court by affidavit, then and in such case they shall be deemed to have purged themselves of such constructive contempt and their fines shall stand remitted. The defendants Sharp filed motions for new trial, which were overruled, and they bring error to this court.

The finding of Judge Shepherd gives a clear and comprehensive review of the situation as developed, so it

seems advisable to give a considerable portion herein:

"The opinion of the supreme court is to the effect that the 1919 rates were without authority and therefore without force. It directed this court to enjoin the defendants from enforcing said rates. This means from keeping such rates in force or collecting the same. Considering that the supreme court declared these rates a nullity, it seems reasonable that it meant just about this by the language which it employed. We hold that such was the meaning of 'enforcing' as used in the mandate and in the injunction which we entered in obedience thereto.

"Defendants held their 1921 convention after the opinion in question had been handed down. Said convention passed an edict reenacting the 1919 rates and providing for a new and higher rate after January 1, 1922, and providing further that if members acquiesced by paying the 1919 rates for the remainder of the year, or by written acceptance of the same, they might continue on the 1919 rates and not be subject to the new ones. However, the edict could not be effective until December 27, 1921, because of the limitation of the statute.

"Thereupon they proceeded to collect the condemned rates of 1919 as before the opinion and injunction, though claiming to do so under the reenactment of 1921, and continued to so collect even after the injunction throughout the entire months of November and December and up to the time of the trial of this contempt proceeding. They did not compel the membership to pay these rates by threat of forfeiture or otherwise. They did not dispute that the member had a right to pay the certificate rate if the question was raised. They received the certificate rate if it was tendered. But at least in one of the tributary castles the practice of the secretary was to turn to the edicts whenever a member came to pay, and say this is the rate. It followed that the ordinary uninquiring member paid the 1919 rate,

not from choice, not in a voluntary way, but as a result of a collection system employed by the defendants. Undoubtedly many throughout the state paid the proscribed rates in this way, believing that they must or should. This was a wrong attitude on the part of the defendants. It amounted, according to the view taken by the court, to an enforcing of the 1919 rates and to a violation of the injunction.

"The responsibility rests mainly upon the head officers, the executive castle, including W. E. Sharp, most illustrious protector, and F. J. Sharp, chief secretary, who are cited for contempt. They received account of the collections of the tributary castles. They had oversight of the order. The publication of the official organ of the society (The Highlanders) was in the hands of Secretary F. J. Sharp. He noted in it (July number) the decision of the supreme court declaring the 1919 rates as invalid, announced that application for a rehearing had been made, and stated that said rates would continue to be collected until final disposition of the case or until such rates were superseded by the edict. Subsequent issues, to be sure, gave the 1921 edict in full. But none of them gave any plain information as to the determination of the case in court and as to the protection afforded to the membership thereby. In fact, the October number issued at a time when the supreme court had said its final word and when the injunction of this court was imminent, announced in sterotyped form that the November assessment had been made and that members should pay, etc., precisely as through the months preceding, though in other parts of this issue the option of the new edict was explained and the membership was told how it might escape the higher rates of 1922 by paying the same old rates collected since April, 1920. By continuing the system the society and the defendants enforced the 1919 rates throughout November and December of 1921, and violated the injunction. Because of this, which the court finds as a matter of fact, the de-

fendants W. E. Sharp and F. J. Sharp, respectively most illustrious protector and chief secretary, are adjudged guilty of constructive contempt.

"It is insisted that the society had a right to give its members the option referred to, and that their acceptance of the same made a good contract. But, as the court views it, it did not and could not give such option before the 27th day of December, 1921. As the court views it, such a contract should be made only upon full disclosure of the standing of the 1919 rates and of the rights of the membership with respect to its payments made thereunder, so that members would know what they were giving up by the acceptance of such option. But, as a matter of fact, the society did not give any option to members when it was collecting November and December assessments up to December 27. It could not, because the edict did not and could not go into effect till said 27th day of December. It was conceivable at the time that the old rates were being collected for the months in question that the 1921 edict might never go into effect. There was no basis for such contemplated contract at the time that these collections were being made. Both authority and consideration were lacking to give it validity."

The first alleged error is that the affidavits in support of the motion for the citation do not contain facts sufficient to sustain judgment of guilt. In substance the affidavits state that the defendants Sharp, through their agents, stated to the two plaintiff affiants and two others that the rates they were collecting for the month of November, 1921, were the same as had been collected since April, 1920, and which were the enjoined rates, and the other affidavits show similiar demands and payments by other members of the order of Highlanders. The affidavits are sufficient; but, if there was a defect, the defendants waived it by answering to the merits without challenging the sufficiency of the complaint. 9 Cyc. 39. The court had jurisdiction of the de-

fendants. Plaintiffs in error contend that the court had no authority to hear and determine the rights of any members who were not in fact named as plaintiffs. While this may be the rule in certain cases, in others it has been held that any one who has a pecuniary interest may have relief by contempt proceedings. 13 C. J. 59, sec. 82. However, there arises no necessity for a determination of that proposition here, because there are two actual plaintiffs seeking the remedy, and the right of the court to take jurisdiction does not depend on the status of those affiants who were not originally plaintiffs.

Plaintiffs in error allege that there has been a change of conditions in the by-laws (edicts, as they are called) of the order which constitute a sufficient justification for disregarding the mandate of the injunction. Of course, there may arise a condition subsequent, or an express agreement, which will release the injunction, or a party by conduct may waive his right to have the mandate carried out. No authorities are needed to support this elementary principle. Many cases were cited in plaintiffs' brief, but none of them are applicable to the facts in this case. The opinion of the trial judge clearly states that there could have been no objection to a member paying the proscribed rate, providing he understood his rights and did it voluntarily.

It is urged that the evidence does not show any act of the plaintiffs in error which can be construed as "enforcing" the collection of the old rates. The word "enforce" is used in a multiplicity of ways and is given many shades of meaning and applicability. It does not necessarily imply actual force or coercion. It may mean to exact, to obtain authoritatively; to cause to have force or effect or to be executed; to put in execution; to cause to take effect. The trial court was justified in finding that the method used was in fact enforcing the collection of the old rates.

It is further contended that the secretary-treasurers of the subordinate lodges were not agents of the plain-

tiffs in error. We need not decide the proposition whether it was what may strictly be called an agency. These two chief officers had general charge and oversight of the affairs of the order, and must have known that the collectors were sending in the exact amounts of the enjoined rates. Mrs. Starboard evidently understood, for she so testified, that she was without authority until directed by the higher officers to make any rate other than contained in the edict (which was the old rate). It is a fair inference from the evidence that the plaintiffs in error knew of continued collection of the enjoined rates, and that they knowingly permitted it to go on for the purpose of evading the commands of the injunction. It was the duty of the plaintiffs in error to obey the spirit as well as the letter of the decree, and they cannot excuse themselves where they have knowingly permitted, or aided or abetted its violation by the subordinate officers of the castles or lodges. *People v. Pendleton,* 64 N. Y. 622; *Ex parte Miller,* 129 Ala. 130, 87 Am. St. Rep. 49; 22 Cyc. 1012; *Merchants Stock & Grain Co. v. Board of Trade of City of Chicago,* 201 Fed. 20.

The plaintiffs in error did not profit from the illegal collection, but this is immaterial; and perhaps, as suggested, the payment of the enjoined rates may have been to the advantage of the paying members; but that matter has no weight here, for such consideration was a matter wholly for the paying member. The court should look to the course pursued in ascertaining whether it was intentionally instrumental in causing the collection of the enjoined rates.

The district court provided a fair and inexpensive method by which the defendants can escape the payment of the fines, and if the plaintiffs in error are, as they assert, anxious to carry out the mandate of the injunction, they could long ago have had the fines remitted.

The judgment of the district court is

AFFIRMED.

CHARLES T. ALTIS V. STATE OF NEBRASKA.

FILED FEBRUARY 27, 1923. No. 22867.

1. **Criminal Law:** AMENDMENT OF COMPLAINT: PRELIMINARY HEARING. Where a defendant had a preliminary hearing on a valid complaint, and thereafter a faulty information is filed, and later, by leave of court, an amended information is filed which conforms to the original complaint, the defendant is not entitled to a new preliminary hearing.

2. **Evidence** examined, and *held* sufficient to support the verdict.

ERROR to the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

R. J. Greene and *W. W. Towle,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, DEAN and GOOD, JJ., RAPER, District Judge.

RAPER, District Judge.

Error proceeding from second conviction of defendant in error for wife and child abandonment. The first conviction was reversed by this court in *Altis v. State,* 107 Neb. 540, because of a faulty instruction, and a failure to properly allege the crime. When the case was remanded the county attorney was permitted to file an amended information which contained the omitted essential allegation which was lacking in the former information. A plea in abatement was filed to this amended information, alleging that defendant had not been given a preliminary hearing. Issue was joined on this plea, jury impaneled and trial had thereon. The undisputed evidence showed that before the first information was filed a complaint was filed with a justice of the peace, and a full preliminary hearing had, and the justice in due form found the crime had been committed, and held the defendant to answer to the district court. At the close of the hearing the court directed the jury to return a verdict for the state. The original complaint

before the justice complied in every respect with the conditions required by the opinion of the supreme court in the case of *Altis v. State, supra.* The defect in the first information was evidently caused by an oversight in preparing the information, and the words "without good cause" were inadvertently omitted. The complaint filed with the justice contained these words. The defendant, having been granted a valid preliminary hearing, is not entitled to another on the filing of an amended information which states the same offense as that contained in the original complaint. The action of the district court in directing a verdict against the defendant on the plea in abatement was right.

Plaintiff in error urges that the evidence is not sufficient to sustain the verdict of guilty. A careful reading of the testimony shows that the verdict was fully justified. The defendant, without good cause, wilfully abandoned the wife and three minor children, and wilfully and without good cause wantonly failed and refused to provide for them. The abandonment took place in Lancaster county. The defendant thereafter left the county, and had to be brought from another state on an extradition warrant, but this can in no wise excuse him. But he alleges that the state did not prove he had no property, or that he was earning sufficient wages to provide for the family. It was fully shown that at the time of the abandonment the defendant was a strong, healthy young man and was and had been earning good wages. Of course, it would be impossible for the prosecution to trace him from one locality or state to another, and prove his employment at these different places or the wages he received. The jury had the right to presume, in the absence of proof to the contrary, that his earning capacity remained unimpaired. It was sufficient for the state to show that prior to his departure he had steady employment at remunerative wages, and it is not required to offer further proof that he had means or that he earned

wages after he left. The defendant did not testify in his own behalf, nor did he offer any testimony. The state's proof was ample under the rule announced in *Havlicek v. State,* 101 Neb. 782. The abandonment and failure to provide for the family was wanton and heartless, and without any justification, and his conduct as shown by the evidence fully merits the sentence imposed by the court.

Error is assigned for the court's failure to give eight instructions asked by defendant. All of these, with the exception of two, were fairly included in the instructions given by the court. One of these referred to the presumption of good character. In certain cases the giving of such an instruction would be proper, but the record of this case clearly shows that such instruction was not in any way required. The other proposed instruction was to the effect that if the jury believed any witness had wilfully sworn falsely to material statements, they might wholly disregard the testimony of such witness. There is nothing appearing in the testimony of any witness which would have justified the giving of such instruction.

The defendant had a fair trial, and the judgment of the district court is

AFFIRMED.

CHARLES T. ALTIS V. STATE OF NEBRASKA.

FILED FEBRUARY 27, 1923. NO. 22879.

Bill of Exceptions: APPLICATION FOR AT EXPENSE OF COUNTY: HEARING. Under section 1123, Comp. St. 1922, on application by defendant for an order to require reporter to furnish bill of exceptions at the expense of the county, where objection is made thereto, the court or judge has authority to hear testimony for and against such application, and if the testimony discloses that defendant's claim of poverty is untrue, or that the inability to pay the fee is occasioned by his own wilful act for the purpose of avoiding payment, the court or judge should refuse the order.

ERROR to the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

R. J. Greene, W. W. Towle and *Francis V. Robinson,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, DEAN and GOOD, JJ., RAPER, District Judge.

RAPER, District Judge.

In the divorce action of Jeanette M. Altis, plaintiff, v. Charles T. Altis, defendant, the defendant was adjudged guilty of contempt of court for wilful failure and refusal to obey an order of the court directing the defendant to pay support money for the wife and children during the pendency of the divorce action, and he was sentenced to jail until he paid the allowance or gave bond for the family's support.

Defendant gave notice of appeal, and filed an affidavit stating that he was unable, on account of poverty, to pay the costs of a bill of exceptions, and prayed the court to direct the reporter to make and deliver to defendant bill of exceptions, the fees therefor to be charged to and paid by Lancaster county. Affidavits were filed for and against the application; the court refused the requested order, and the reporter refused to make bill of exceptions for the defendant until the fees therefor were paid.

Two errors are assigned: First, the court was without power to punish the defendant for failure to pay the support money; second, the court erred in refusing the request to require the reporter to furnish bill of exceptions.

The case of *Cain v. Miller, ante,* p. 441, disposes of plaintiff in error's first contention. The testimony not being before us, we must assume that there is sufficient evidence to support the judgment.

As to the second contention, section 1123, Comp. St. 1922, is relied on. This provides that, in criminal cases wherein, after conviction, the defendant shall make an affidavit that he is unable, by reason of his poverty, to pay for such copy, the court or judge thereof may, by order indorsed on such affidavit, direct the reporter to deliver such long-hand copy to such defendant, and his fees therefor shall be paid by the county. It is contended that this statute should be so construed that, on the filing of such affidavit, the court must accept it as true and make the order accordingly. If it be granted that this is a "criminal case," within the meaning of the statute (which, however, we do not determine), the statute cannot reasonably be construed as contended for. The statute says the court "may, by order indorsed on such affdavit," direct the reporter to make long-hand copy of the evidence to defendant. A defendant is not entitled as a matter of constitutional right, for the purpose of appeal from conviction for crime, to have a bill of exceptions furnished to him free; his right to such free bill of exceptions rests wholly upon the statute. From the wording of the statute and the purpose for which it was enacted, it is plain that it was not intended to require the trial court or judge, in a mere ministerial way when objection has been made, to grant the order on the presentation of the affidavit without question and without the authority to inquire into the truthfulness of good faith of defendant's affidavit. If, however, the proof is sufficient to support the application, then, of course, it is the duty of the court or judge to grant the order. The court or judge has the power, under the statute, when objection is made, to receive evidence for and against the application, and on such hearing, if it appears that the defendant's affidavit is untrue or that defendant has wilfully dissipated his property or conveyed or given it away for the very purpose of putting the state to expense of furnishing the bill of exceptions, it cannot justly be

said that, because of defendant's poverty, he is unable to pay the reporter's fee. In the case at bar the court considered the evidence for and against the application, and the evidence is sufficient to support the refusal to grant the order. This procedure was warranted under the statute, and the order of the trial court was proper. The action of the district court is

AFFIRMED.

ROBERT C. FISCHER, APPELLANT, V. WALTER FUELBERTH, APPELLEE.

FILED FEBRUARY 27, 1923. No. 22218.

1. **Estoppel.** The rule that, where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation is begun, change his ground and put his conduct upon another and different consideration, that he is estopped from doing it by a settled principle of law, does not apply to one who, at the time he gave a reason for his conduct, had no knowledge, actual or imputed, of the existence of an additional ground of defense which he afterwards learned and respecting the assertion of which he is sought to be estopped.
2. **Pleading:** DEFENSES. In such case, in a suit against him, the defendant may set up, as one of his defenses, the after-discovered ground, as well as the one first assigned, and be permitted to support the same by evidence and have the same submitted to the jury under proper instructions.

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

M. H. Leamy, for appellant.

Ora S. Spillman, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN, ALDRICH and GOOD, JJ., RAPER and TROUP, District Judges.

TROUP, District Judge.

An action for damages alleged to have been sustained by plaintiff by reason of failure of defendant to comply with his bid for a quantity of hay at an auction sale.

It is alleged in the petition that on January 6, 1920, the plaintiff being possessed of a large amount of personal property, including a quantity of alfalfa hay, exposed the same to public sale at auction, and defendant, being present, bid off 40.3 tons of said hay at an agreed price of $15 a ton and the same was thereupon sold to defendant, the sale amounting to $604.50; that thereafter the defendant refused to accept said hay and pay for the same; thereupon plaintiff notified defendant that he would resell said hay and hold the defendant responsible for any deficiency that might arise by reason thereof, and on February 27, 1920, plaintiff did resell said hay at public auction for the sum of $277.64, which, it is alleged, was the highest price obtainable therefor, and in doing so incurred an additional expense of $8.32, making his damages sustained the sum of $335.18, for which he prays judgment in a suit brought in the district court for Pierce county.

On April 4, 1921, the day before the commencement of the trial in the district court, the defendant filed an answer in which he admits the purchase of the hay at public sale referred to, but alleges that previous to and at the time he purchased the same he was told by plaintiff that the hay was at the place of one Charles Mordhorst, six miles distant from the home of defendant, which was easily accessible thereto, whereas in truth and in fact, as he learned afterwards, said hay was located at the place of one Fred Mordhorst, a distance of 18 miles from defendant's home and not easily accessible thereto, and thereupon and for that reason the defendant refused to accept said hay and so notified the plaintiff.

On April 5, 1921, the same being the day the trial in the district court began, the defendant filed an amended answer in which he alleged the matters set forth in his original answer, and further alleged that at the sale at which defendant purchased the said hay the same was sold by sample, which sample was ex-

hibited to and examined by defendant, and plaintiff, being present, stated to defendant and other bidders that the hay offered for sale was of the same kind and quality as the sample, whereas in truth and in fact it was greatly inferior in quality and was not worth to exceed one-half the value it would have been had it equaled the sample exhibited, all of which was well known to the plaintiff, but not known to defendant, and defendant, relying upon the statements of plaintiff as to the location and quality of said hay, purchased the same, whereas if he had known otherwise he would not have bid therefor.

Plaintiff, replying, denies all allegations of new matter contained in defendant's answer, and further alleges that at the time the defendant refused to comply with his bid and pay for said hay, and at no time since did the defendant make any objection to the quality of said hay or refuse to comply with his bid for the reason said hay was not of the kind or quality represented, and that defendant, having given one reason for his conduct and decision touching said purchase of said hay, cannot now, after litigation has begun, change his ground and put his conduct upon another and different consideration.

At the trial plaintiff objected to the admission of any and all testimony in support of the defendant's claim that the hay was not as represented for the reasons set forth in his reply, but the objections were overruled and the evidence admitted. At the close of the trial plaintiff tendered an instruction covering the proposition and theory contended for in his reply, which instruction the court refused, and instructed the jury upon that subject as follows:

"No. 11. If you find from the evidence that, shortly after the sale, the defendant discovered that the hay was not located on the Charles Mordhorst farm, but on the Fred Mordhorst farm, distant about 18 miles from his home, and for that reason he rescinded the transaction

and refused to make the settlement and payment prescribed by the terms of the sale, and you further find that thereafter he further discovered that the hay was not as represented by the plaintiff and did not comply with the sample exhibited at the time of the sale, but was inferior in quality, then the fact that he placed his refusal to make payment and settlement in the first instance on the ground that the hay was not situated on the Charles Mordhorst farm, but on the Fred Mordhorst farm, would not preclude him from showing the inferior quality of the hay."

The jury returned a verdict for the defendant. The plaintiff appeals.

The sole question presented by the briefs of both sides, and therefore the sole question for consideration and determination here, is: Did the court err in admitting testimony in support of the defense respecting the alleged misrepresentations as to the quality of the hay and by giving the instruction above quoted and refusing to give the instruction tendered by plaintiff?

The plaintiff contends for the application of the rule 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. He is estopped from doing it by a settled principle of law.

This is a familiar and well-established rule in this and many other jurisdictions, and in the opinion of the writer is a sound and most wholesome one to prevent, so far as may be, litigants, so disposed, from trifling with their solemn contracts and other like legal obligations when called into court for a breach thereof, but in our opinion this rule cannot be made to apply in the instant case. We fear that the learned counsel for the plaintiff has over-looked, for the time being, the fact that knowledge, either actual or imputed, by the party

complained against, of the existence of the subject-matter concerning which he is sought to be estopped, is an indispensable element of estoppel.

The undisputed evidence in the case shows that, at the time the defendant refused to complete his contract of purchase and gave as his reason therefor the alleged misrepresentation of the location of the hay, he did not know of the inferior quality of the hay and had no means of knowing it; it was not until a "week or so after" that he learned of the inferior quality of the hay as compared with the sample exhibited at the sale. There is no evidence that after defendant gave his first reason for declining to complete his purchase he ever had any communication with plaintiff on the subject. Now, after he learned of the additional reason, was there a legal duty imposed upon the defendant to communicate the same to the plaintiff before he could avail himself of this additional defense to plaintiff's suit? In our opinion there was not. To illustrate: The defendant, in the first instance, might have refused to complete his contract and remain silent as to any or all reasons he might have had for his conduct, no matter how many he may have believed existed, and still, when sued, set up in his answer any and all defenses available to him, whether coming to his knowledge before or after suit, without apprising the plaintiff of what these defenses were. So, in the present case, when plaintiff demanded of defendant a completion of his purchase by payment for the hay, the defendant refused, giving as his reason therefor the only one of which he then had knowledge, namely, the alleged misrepresentation of the location of the hay, and it was not until afterwards that he learned of the additional objection, to wit, the alleged comparative inferior quality of the hay with the sample. This, as we have seen, defendant was not obliged to communicate to plaintiff. After knowledge of the additional reason, defendant made no declaration respecting the transaction, and therefore could not be estopped from asserting

the latter reason as one of his defenses. The record shows that he asserted both, introduced evidence in support of both, and appropriate instructions respecting both were submitted to the jury, all of which we think properly may be done, and without violation of the rule in question, and without conflict with any decision enforcing the rule, of which we are aware. An examination of all of the many decisions in which the rule is enforced, whether in this state or elsewhere, which an exhaustive search has brought to our attention, without exception, discloses the fact that the person held to be estopped had knowledge, either actual or imputed, of the fact or facts constituting his subsequently offered defense at the time he gave to his adversary the first reason or excuse for his conduct. Of course, it is plain to see that one should expect to find this fact present in all such cases; otherwise, no ground for estoppel would exist.

It is true that defendant's answer was long-delayed, and even then his first answer, filed the day before the trial, did not contain this so-called second defense, and it was not until his amended answer, filed the day the trial began, that this defense was first set up. No objection was made by the defendant to the filing of either of these answers, but, in any event, permission to file the same when they were filed was within the sound discretion of the court. The assertion of this belated defense under the facts disclosed was a circumstance nevertheless which the jury had a right to consider as a possible reflection upon its genuineness, and which it will be presumed the jury did consider in arriving at their verdict.

We think there was no error on the part of the trial court in dealing with the matters complained of, and its judgment therefore must be

AFFIRMED.

JAMES D. LAWSON, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED FEBRUARY 27, 1923. No. 22235.

1. **Railroads:** NEGLIGENCE. Where it appears that after dark the servants in charge of one of defendant's engines, with powerful electric headlight attached, leave the same in such a position that the full glare of said light is cast upon a nearby crossing over which the public pass and animals are liable to be driven, the effect of which light is to cast dark shadows upon the lower ground in the immediate proximity to defendant's track, calculated to frighten cattle being driven over said crossing, and said cattle, becoming frightened, refuse to move forward, but, getting beyond the control of their drivers, crowd westward along defendant's track, where within a few minutes thereafter, a belated fast-moving passenger train of defendant strikes and kills many of the herd, and where it further appears that, after placing the engine and headlight in the position stated, those in charge thereof absented themselves and remained absent therefrom until after the happening of the accident, leaving no one present to remove the cause of the danger by dimming or extinguishing the light, such facts constitute negligence on the part of defendant for the injurious consequences of which it may be held liable.
2. ———: ———. The fact that defendant may have had no actual knowledge of the alleged effect of its light upon the crossing, nor of the propensity of animals to frighten thereat, will not necessarily excuse it from the charge of negligence, where it further appears that, had defendant's servants been at their post of duty, they could, in the exercise of ordinary diligence, have discovered the dangerous effect the headlight was having upon plaintiff's cattle and promptly removed the source of danger by dimming or extinguishing the light.
3. **Negligence:** QUESTION FOR JURY. Even though plaintiff, in doing what he did, with knowledge of certain facts ascribed to him, was guilty of negligence, his negligence cannot be said to be of such a degree as that the court was required, as a matter of law, to direct a verdict for defendant. At most, it produced a case of comparative negligence for the jury.
4. **Instructions** upon the subject of comparative negligence examined and approved.

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

C. A. Magaw, Thomas F. Hamer and *Thomas W. Bockes,* for appellant.

Prince & Prince, Fred A. Nye and *M. H. Worlock, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and DAY, JJ., TROUP, District Judge.

TROUP, District Judge.

Plaintiff brings his action against the defendant, Union Pacific Railroad Company, to recover for the loss of 45 head of cattle killed by one of defendant's fast-moving passenger trains at or near a certain public highway crossing over defendant's tracks in or near the village of Buda, Buffalo county, Nebraska. The undisputed evidence shows the value of the cattle destroyed to be $4,757; but, presumably to avoid federal jurisdiction and maintain his action in the state courts, the plaintiff reduced the amount of recovery asked to $3,000. The jury returned a verdict for plaintiff for $2,000 and interest, a total of $2,472,13. Defendant appeals.

From the petition it appears that at or about 6 o'clock on the evening of December 11, 1917, plaintiff received a shipment of cattle over defendant's road at Buda, Nebraska, and, deciding to drive the cattle to his feed yards located about six miles northwest of Buda that night, plaintiff afoot and three men on horseback assisting him drove the herd from the stock pens along the highway immediately south of and parallel to defendant's tracks, a distance of about 2,000 feet, then north onto the crossing of defendant's mainline tracks, the route taken being the natural and most practical one to point of destination, arriving at the crossing a few minutes before 7 o'clock; that defendant had negligently failed to maintain cattle-guards on either side of said crossing; that defendant's freight train which had brought plaintiff's cattle to Buda was left standing on the south switch track with the engine attached headed west,

equipped with a powerful electric headlight, within a few feet (from 300 to 500) of said highway crossing, which defendant's servants negligently left lighted in full glare casting intense rays of light over and upon said crossing; that defendant's north track at such crossing is about 18 inches higher than the ground in the immediate proximity of said north track, causing the rays from the headlight to cast shadows over the lower ground making it look black; that said cattle, after going upon said crossing, became greatly frightened at said light and the shadows cast beyond its rays, so that they refused to move farther north and cross said mainline track, but "milling" about became unmanageable and crowded off said crossing onto the defendant's tracks west thereof; that at said time a passenger train of defendant company, known as No. 7, and running several hours late, approached from the east at a very high rate of speed, and passing through said town of Buda without lessening its speed negligently ran into said cattle then on defendant's track, killing 45 head thereof; that said cattle were killed wholly through the negligence of defendant in maintaining the powerful and undimmed headlight on the freight engine, the failure to maintain cattle-guards at the crossing in question, and the negligence of its servants in charge of its passenger train in the failure to exercise ordinary care to stop said train before coming into collision with said cattle.

Defendant's answer admits that at the time stated in plaintiff's petition plaintiff and his employees drove a herd of cattle belonging to plaintiff along the public highway south and parallel to defendant's track from the stock pens in Buda to the public highway crossing on defendant's track, referred to in plaintiff's petition, and that said cattle were being driven by plaintiff and his employees upon said public crossing at a time when defendant's westbound passenger train No. 7 was approaching from the east; it admits that no cattle-guards had been constructed on either side of said cross-way, but

alleges that the law did not require the same; it admits that certain of plaintiff's cattle were killed by defendant's train No. 7, but denies each and every other allegation in plaintiff's petition contained. Further answering, defendant alleges that whatever loss or injury plaintiff may have sustained by reason of the killing of said cattle was caused wholly by the negligence of plaintiff and his servants, and without fault or negligence on the part of defendant or its employees. The reply of plaintiff denies all new matter in defendant's answer.

It will be observed that three grounds of negligence against defendant are presented by plaintiff's petition: (1) Negligence in maintaining the headlight on the freight engine standing on the side-track; (2) negligence in failing to maintain cattle-guards at the crossing; and (3) negligence in the operation of the passenger train No. 7 which killed the cattle.

Ground No. 2 was stipulated and instructed out of the case, and ground No. 3 was withdrawn from the jury by one of the court's instructions, so that ground No. 1 was the only one submitted to the jury, and agreed by both parties to be the only one for consideration here.

At the close of the entire evidence in the case the defendant requested a directed verdict in its favor. The same being refused, the case was submitted to the jury, the jury returning a verdict for plaintiff in the sum above stated. The refusal to direct a verdict and the claim that any verdict for plaintiff cannot be upheld, under the evidence, form the principal grounds of error.

An examination of the evidence shows that it substantially supports the allegations of the petition in respect to the ground of negligence to be considered, and further shows that, after placing said engine, with its headlight, in the position stated, the defendant's servants in charge thereof abandoned the same for an indefinite time, with no one in attendance thereat until after the accident to the cattle had happened. Under

the evidence adduced there can be no doubt but the glaring headlight from defendant's freight engine and the effect it had upon the uneven surface at the crossing was the proximate cause of the cattle stampeding which led to their destruction. The blinding light continuing to shine, with neither the engineer nor fireman at his post to remove the cause by dimming the light while the cattle were still upon the crossing, created a negligent condition, for the injurious consequences of which we think the defendant may be held responsible. It was not necessary that this headlight, casting its intense rays over and upon a public crossing, should have been kept burning as it was. The train and engine to which said headlight was attached was at rest and was to be at rest until it received orders to go forward. Allowing the full light to shine, as it did, was not so culpable, in our opinion, as the act of those in charge deserting their post leaving no one to remove the negligent condition by dimming or extinguishing the headlight in case an emergency arose, as one did arise in this instance. If defendant's servants had been at their place of duty and exercised ordinary care to observe what effect the light of their engine was having upon the actions of plaintiff's cattle, in all probability the mischief could have been averted by dimming the headlight while the cattle were still upon the crossing and within the control of the drivers. It was the continuation of the negligent condition after it could and should have been removed that worked havoc among the animals, causing them to break away from the crossing and into a place where they were destroyed.

The case is not unlike one in which unusual noises occur in or about the operation of trains in the vicinity of public crossings calculated to frighten animals. The case of *Williams v. Chicago, B. & Q. R. Co.*, 78 Neb. 695, is of that character, and in which it is said: "Where the conditions are such that noises thus made would endanger a person (plaintiff's team taking fright) at a public

crossing, which result could be avoided by temporarily staying or suspending the noise without materially interfering with the due operation of the train, ordinary care and prudence require that it be thus stayed or suspended until the danger is past." In the course of the opinion the court further observes: "The defendant's liability does not depend alone on what its employees saw, but on what, under the circumstances, they might have seen and should have seen. The fireman at least might have seen the plaintiff's peril, and, in view of all the circumstances, it was certainly the duty of someone engaged in operating the train to see."

So we say, under the circumstances of the instant case, it was the duty of either the engineer or fireman, or both, to have been at his post of duty, and, had either one been there, he would or should have seen the predicament plaintiff's cattle were in, caused by the light from the engine, and that by dimming or even extinguishing same, if necessary, could have averted the accident. Why both of these employees absented themselves from their post of duty under the circumstances does not appear. Neither one was put upon the stand to explain his absence, and from this it is probably fair to infer that neither one had a justifiable excuse for doing so.

The case of *Missouri, K. & T. R. Co. v. Weatherford*, 26 Tex. Civ. App. 20, is one in which the railroad company was held liable for the negligence of its engineer for the unnecessary blowing of the whistle near a crossing resulting in plaintiff's injury, and the court said: "As the jury were authorized to find from the evidence, the employees of the appellant in charge of the engine were negligent in sounding the whistle and keeping it sounding, so that the appellee's team became frightened and ran upon the track. They were required to keep a lookout for the crossing, and if they discovered that appellee's team had taken fright, or by the exercise of ordinary care could have discovered it, or knew that

the noise being made would likely frighten a team of ordinary gentleness, and frightened the team with the unnecesary blowing of the whistle, the appellant would be liable for negligence." Substituting the "headlight" in the case at bar for the "whistle" in the case cited, we have a perfect application. See instruction to same effect, approved in *Missouri, K. & T. R. Co., v. Belew*, 22 Tex. Civ. App. 264; *Gulf, C. & S. F. R. Co. v. Box*, 81 Tex. 670; *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St. 219.

Who can say that under the circumstances in the present case the defendant was not negligent in any degree? Even if the plaintiff was also negligent, it became a question of comparative negligence between the two, and that was a question for the jury to decide.

It is true that while the cattle were about to go upon the crossing the driver in the lead espied what he thought might be a train approaching from the east just appearing around a curve in the road about six miles distant, and called out to his fellow drivers, including the plaintiff, who said, "Go ahead." But the cattle were then upon the crossing, and any attempt to have turned them back at that time in the face of defendant's blinding light would have been a futile thing, as subsequent events proved, and had the condition at the crossing caused by the light and shadow which frightened the cattle not existed, or, existing, had been removed by dimming the light, the plaintiff would have had ample time to have driven his cattle across before the arrival of the train which killed them. It is said by defendant that the plaintiff knew of the existence of the light upon the crossing, and also that no one was on the engine, so far as he discovered, at the time of passing the same on his way to the crossing; that he was also familiar with the construction of the crossing, and with the habits and propensities of cattle to shy or become frightened by a sudden change from light to darkness on the surface of the ground, and that a fair inference

from the evidence is that defendant's servants had no actual knowledge of the effect of the light upon the crossing and no knowledge of the effect the condition created would have upon animals. This much we think is fairly shown or inferred from the evidence. We think, however, there is no evidence showing that plaintiff knew, or had reason to know, that the rays of defendant's headlight cast dark shadows upon the crossing or in immediate proximity thereto, or that plaintiff knew, or had reason to know, that defendant's servants had left the vicinity of their engine so as not to be able, in the exercise of ordinary care, with reasonable promptness, to protect travelers and their property on a public crossing against dangerous emergencies liable to arise on account of the headlight.

But, from what is shown and inferred from the evidence, defendant argues that plaintiff was negligent, and that, if both plaintiff and defendant were negligent, then the negligence of each is to be measured by their comparative knowledge of existing conditions, and that, if plaintiff's knowledge of the danger to be encountered equals or exceeds that of defendant, then defendant is not liable, if plaintiff embraces the danger. We think this may be conceded to the extent, if at all, plaintiff was, in fact or in law, negligent. But we are of the opinion that defendant is presuming too much on plaintiff's supposed negligence. Conceding that plaintiff knew, as he did, of the existence of the light upon the crossing before he drove his cattle there, he did not know, in advance, that it created a dangerous condition, and he had a right to assume that, if a dangerous condition created by said light was suddenly disclosed which was endangering plaintiff's cattle, defendant's servants would be on hand with reasonable promptness to abate the same. *Williams v. Chicago, B. & Q. R. Co., supra.* Under these conditions defendant's proposition itself becomes one of comparative negligence—a matter for the jury to determine under proper instructions.

We think the trial court instructed the jury properly on this question, and that defendant's objections thereto are not well taken, nor is the claim that, because the verdict rendered is less than half of plaintiff's total loss, evidence that the jury found that the defendant's negligence was less than gross and plaintiff's negligence was more than slight as compared with each other. The plaintiff limited his recovery to $3,000 and the jury were so instructed. We are of the opinion that the judgment of the lower court is warranted under the law and the evidence, and that the same should be.

AFFIRMED.

ROSE, J., dissenting.

In my opinion there is no evidence of actionable negligence on the part of defendant.

The following opinion on motion for rehearing was filed July 9, 1923. *Former opinion vacated, and judgment of district court reversed.*

Railroads: NEGLIGENCE. In an action to recover from a railroad company damages for the loss of cattle killed by a passenger train at a highway crossing, while plaintiff was attempting to drive them across the railroad tracks, proof that defendant at the time permitted the headlight of a freight train standing on a side-track 300 feet away to shine on the crossing, and that, in consequence of the light and the shadows cast by it, the cattle took fright and became unmanageable, is not evidence of actionable negligence, where there is nothing to indicate that the engineer and the fireman in charge of the freight train could reasonably or probably have anticipated what happened. *Lawson v. Union P. R. Co., ante.* p. 785, vacated.

Heard before LETTON, ROSE, ALDRICH, DAY and GOOD, JJ., BLACKLEDGE, District Judge.

ROSE, J.

This is an action to recover damages for negligence. After dark, December 11, 1917, a passenger train going west on defendant's railroad ran into a herd of plaintiff's cattle at a highway crossing west of the station at Buda and killed 45 head, worth $4,757. At that place the railroad extends east and west and crosses the

highway at right angles. From the station at Buda the highway runs west about 2,000 feet along the south side of the railroad, turns north and crosses defendant's tracks. Plaintiff drove his cattle west along the highway from the station, turned north and was attempting to cross the railroad tracks when the collision occurred. The railroad grade at the crossing is about 18 inches above the natural level of the ground. A freight train, headed west, from which the cattle had been unloaded, stood on a switch south of the main lines. Plaintiff pleaded that defendant negligently left a glaring headlight on the freight engine, permitted it to shine on the crossing, to cast shadows north of the railroad tracks, to frighten the cattle, and to make them unmanageable. As a resulting loss plaintiff demanded judgment for $3,000. Defendant denied negligence and liability for damages. The jury rendered a verdict in favor of plaintiff for $2,000 and interest computed at $472.13, or a total of $2,472.13. From a judgment thereon defendant appealed. Upon a former hearing the judgment was affirmed. *Lawson v. Union P. R. Co., ante,* p. 785. The sufficiency of the evidence to sustain the judgment being in doubt, a reargument was granted. The case has been re-examined in the light of new briefs and able arguments at the bar.

The only issue of negligence submitted to the jury was the act of defendant in permitting the headlight of the freight engine to shine undimmed while the cattle were on the crossing. If proof of that fact was not evidence of actionable negligence, there was nothing to submit to the jury and their verdict cannot stand.

It is only where different minds may draw different conclusions from evidence of a fact in issue that a question for the jury is presented. If there is no evidence of the fact the jury should not be permitted to make a finding. Was proof that the engineer and fireman left the headlight shining on the crossing evidence of actionable negligence? The answer depends

on whether they could reasonably and probably have anticipated the consequent frightening of the cattle. Plaintiff seems to recognize this principle of the law of negligence and argues that any person with common experience and knowledge knows that a glaring light thrown into the face of animals only a short distance away will frighten them. The light was not thrown in the face of the animals. It was shining on the crossing from the east at a point 300 feet away when the cattle approached from the south. There is no evidence that the engineer or the fireman knew that cattle had a propensity to scare at lights and shadows. Plaintiff was an experienced cattleman and was familiar with the highway at the railroad tracks. While the headlight was shining, assisted by three mounted men, he attempted to cross with the animals in the face of a warning by one of his own employees that a train was approaching. If, as an experienced cattleman, knowing, as he did, that the light from defendant's engine was shining on the crossing, he did not anticipate what happened, is it fair to assume without proof that the engineer and fireman, in reason and probability, knew the propensities of the animals and that the light and shadows would frighten them and make them unmanageable? It seems more reasonable to assume the contrary in the absence of proof, since engineers and firemen in the performance of their duties at night necessarily cross highways at different elevations above the natural surface of the ground, throw light on public crossings at varying angles, cast shadows along railroad tracks, observe the custom to light highway crossings in cities, villages, and country places and witness the endless caravan of moving automobiles as they throw light and cast shadows at highway crossings everywhere. The headlight was one in ordinary use and was part of the necessary equipment. The freight train was standing on a side-track near a station where the engineer was awaiting orders to proceed. He had a right to have his train

ready. If he and the fireman could not have reasonably and probably anticipated the consequence of permitting the light to shine undimmed, they did not owe plaintiff the duty to stay on the motionless engine, watch the crossing and dim the light when the cattle were driven upon the railroad tracks. The better view of the record is that the verdict is without support in the evidence. It follows that the former opinion is withdrawn, the judgment of the district court reversed and the cause remanded for further proceedings.

REVERSED.

P. A. MCCRARY, APPELLEE, V. JOHN F. WOLFF, APPELLANT.

FILED FEBRUARY 27, 1923. No. 22244.

1. **Master and Servant:** EMPLOYERS' LIABILITY ACT: INJURY ARISING OUT OF EMPLOYMENT. Evidence in support of the finding of the trial court that an accidental injury resulting in death arose out of and in the course of employment, within the meaning of the workmen's compensation act, examined and finding sustained.
2. ———: ———: DEPENDENCY. Likewise, as to claim of dependency.
3. ———: ———: COMPENSATION: PENALTIES. Under the workmen's compensation act, periodical instalments of compensation for an injury to an employee do not become due, in the sense that they carry the statutory penalties for nonpayment, until the obligation of the employer is definitely ascertained or settled, where there is a reasonable ground for controversy over defendant's liability or other material issues in the case and defendant in good faith pursues his remedy with proper diligence.

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

Kennedy, Holland, DeLacy & McLaughlin and *E. J. Svoboda,* for appellant.

A. L. Tidd and *Aubrey Duxbury, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH, DAY and GOOD, JJ., TROUP, District Judge.

TROUP, District Judge.

Action by dependent to recover a death claim against the former employer of deceased under the workmen's compensation act as contained in chapter 198, Laws 1913. A decree was entered for claimant for $9.75 a week for 350 weeks, burial, hospital and medical expenses, $180 penalty for waiting time, and $200 attorney's fees. Defendant appeals.

On September 30, 1920, and for some time prior thereto, the deceased, a boy about 19 years of age, was employed by defendant to do work of a general or miscellaneous character in and about defendant's garage in the city of Plattsmouth, Nebraska, including messenger service. At or about 1 o'clock p. m. on September 30 deceased was directed by defendant to go to a certain storage battery station, a place about a block and a half distant from defendant's garage, to get a battery which had been left there for repairs. As the boy started on his errand he espied an acquaintance driving a truck on the street at the rate of about five or six miles an hour, and whom he knew was going by the place where deceased was sent on his errand, and, approaching his friend's truck he attempted to mount upon the running-board, but, missing his hold, he fell underneath the wheels of the truck and was so badly crushed that he died the next day.

That part of the section of the act pertaining to this feature of the case is as follows: "Compensation shall be made for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment, without regard to the negligence of the employer, according to the schedule hereinafter provided, in all cases except when the injury or death is caused by wilful negligence on the part of the employee; and the burden of proof of such fact shall be upon the employer." Laws 1913, ch. 198, sec. 10 (Comp. St. 1922, sec. 3033).

The case is much simplified by defendant's announcement in open court that he makes no claim whatsoever that the accident occurred through the wilful negligence of deceased. We also understand that defendant does not claim that the accident did not occur "in the course of employment." Indeed, it could not well be contended otherwise from the fact that deceased was actually on his way in the performance of the errand of his master when the accident happened. The only question then upon this feature of the case is: Did the accident arise "out of" the boy's employment?

It may be proper to remind ourselves again that, the statute we are dealing with being highly remedial both in character and purpose, the same should be liberally construed to attain the accomplishment of its beneficent purpose. *Parson v. Murphy,* 101 Neb. 542; *United States Fidelity & Guaranty Co. v. Wickline,* 103 Neb. 21. The intention of the act being to compensate all accidental injuries growing out of and received in the service, except those resulting from wilful negligence or intoxication, the courts should guard against a narrow construction and should not exclude a servant from the benefits thereof unless constrained so to do by the clear intent as gathered from the entire act. *State v. District Court,* 129 Minn. 176; *Stephenson v. Schelk,* 173 Wis. 251.

The following undisputed extracts from the evidence will indicate the character of deceased's employment and to some extent the custom of deceased and others employed at defendant's garage to jump on and off moving cars in the performance of their work in and about the garage: "Q. You may state, Mr. Wolff (the boy's employer), what work Loren did around the garage. A. He drove for the doctors, washed cars and ran errands, whatever there was to do—general work around the garage. Q. You may state to the court whether you gave Loren McCrary any instructions prior to this accident. A. I did. Q. You may state what those in-

structions were. A. I instructed him to get a car out of the alley, and before it could be moved there was a battery at the station that it was necessary to get and place in the car; and to get some glass for a window light that was broken, to repair it. Q. You may state, Mr. Wolff, whether or not the help frequently step upon moving automobiles and trucks. A. It is frequent that they have occasion to step upon moving cars when they want to ride. We frequently rent cars out to drive yourself, and they are there to oil and start them out, and they will step on and start them out and then step off frequently when they are moving. Q. You had seen Loren do this? A. No doubt. Q. And you do that yourself, do you not? A. Yes, sir; any one does who is around a garage." The same witness, upon being interrogated on cross-examination if he had not expected deceased to take a car from the garage in going for the battery, answered: "I didn't so instruct him. I didn't tell him how to get it. The only thing I would say was, 'If you can run errands and can make time by taking a car, take a car.'" Arthur Moran, an employee at defendant's garage with deceased, testified substantially to the same effect.

From this evidence we are justified in finding that the deceased had at least the implied license from his employer to jump on and off moving cars in or about the garage in the performance of his work, as they all did. If the accident had happened while deceased was attempting to board a car in or about the garage, could there be any doubt that the accident arose "out of" his employment? Suppose this same truck driver whose car was the means of the accident was driving his car out of the defendant's garage upon the street at a time when the deceased was about to start on his errand, and the deceased, being a friend of the driver and knowing that he was about to drive past the place where deceased was going, attempted to

get aboard while the car was moving at the rate of but five or six miles an hour, scarcely faster than a man can walk, and, missing his hold, the accident happened, could there be any reasonable escape under the evidence from holding that the accident arose "out of" as well as in the course of his employment? We think not. If not, would it not be unreasonable to hold that, because the accident happened apparently less than 100 feet from the garage on the street, but otherwise under the same circumstances above supposed, the accident did not arise "out of" and in the course of employment? It is fair to presume that the young man had in mind when he sought to board the truck that he could accomplish his errand in less time than he could by walking, and thus expedite his master's business. If that be true, then in doing what he did it can scarcely be said, under the evidence, he was departing from the express or implied instructions of his employer.

Ruegg, in his work on Employers' Liability and Workmen's Compensation (8th ed.) 346, says: "The words 'arising out of the employment' may be satisfied if it is shown that the occupation in which the workman was engaged, though not strictly part of his duties, was being done in the mutual interest of the employer and himself"—citing cases.

In *M'Quibban v. Menzies,* 37 Scottish L. R. 526, the court said: "The 'arising out of and in the course of the employment' appear to me to be sufficient to include something which occurs while the workman is in his master's employment and on his master's work, although he is doing something in the interest of his master beyond the scope of what he was employed to do."

In *Buvia v. Daniels* Co., 203 Mich. 73, the court said: "An injury arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury."

Almost innumerable cases along the same line might be cited, but a few additional ones only must suffice: *Mann v. Glastonbury Knitting Co.,* 90 Conn. 116; *Beaudry v. Watkins,* 191 Mich. 445; *Zappala v. Industrial Ins. Commission,* 82 Wash. 314; *State v. District Court, supra.*

It is true, however, that a correct determination of any case of this character must depend largely upon the peculiar facts and circumstances surrounding the particular case in hand. Sometimes what would seem at first to be a very slight fact or circumstance arising in the case will influence the entire decision, resulting in a conclusion different from what otherwise it would have been. This is forcibly illustrated by the case of *State v. District Court,* 138 Minn. 326, the one most relied upon by defendant in the case at bar. Except for a bare inference indulged in by a majority of the court in the case cited and on which alone they base their decision without a hearing upon the facts, giving the decision the appearance of being inconsistent with that court's former decision in *State v. District Court,* 129 Minn. 176, we might well have expected a different conclusion and one more in harmony with the latter case. We are of the opinion the trial court did not err in holding that the accident was one "arising out of and in the course of employment."

The defendant insists that it has not been shown that there are any dependents in this case, that the testimony in behalf of the alleged dependent is exaggerated and unreliable, but that, even admitting dependency, the amount awarded is excessive. We do not believe it is either necessary or profitable to enter into a general discussion of the testimony relating to dependency. The evidence shows that at the time of the accident deceased was a minor 19 years of age, living in the home of his parents with 3 minor brothers and sisters between the ages of 8 and 17 years, and was accustomed to pay into the family exchequer the sum of $65 a month

toward the support of the family; that this sum was required of their son by the parents, that they needed it and relied upon it to assist in defraying the living expenses of themselves and family. If these facts are true, then, under all of the authorities, the claimant herein was a dependent. The matter was heard before the compensation commissioner and again on appeal before a judge of the district court, before both of whom the various witnesses appeared in person, giving to the ones presiding the best opportunity to judge of the truthfulnss of their statements and the value to be placed thereon, and both commissioner and judge found the claimant was a dependent and entitled to the award made. We have examined the evidence with much care and are not prepared to say that, under the evidence and the law pertaining thereto, the finding is not correct. Unless it is clearly wrong, it should not be disturbed. *Simon v. Cathroe Co.,* 106 Neb. 535, and cases cited; *Swift & Co. v. Prince,* 106 Neb. 358; *Way v. Georgia Casualty Co.,* 107 Neb. 508.

In respect to the amount of the award made, will say that, if the same is not precisely correct, we think it is so nearly so that to demonstrate that it is not would require a refined calculation for which the record furnishes no basis. It is quite apparent that the method suggested by defendant is not correct. One member withdrawn from a family of six does not decrease the living expenses of the family one-sixth. Certain fixed charges, such as rent, fuel, light, and perhaps other like expenses, remain the same with a family of five. The method adopted in this instance seems to be in conformance with the customary method under the statute in arriving at an award to be made in a case of partial dependency, and we feel justified in accepting it, at least until some more precise method is devised.

The lower court included in its judgment the sum of $180 as penalty against defendant for delay in making payments after the award had been made by the compen-

sation commissioner. We presume this was done in pursuance of what the court believed was a peremptory requirement of the statute. The defendant protests against the assessment of this penalty, and we are of the opinion his protest is well-founded, and that the record herein presents a case where an assessment of the penalty is not contemplated by the statute. This provision for penalty was placed in the statute evidently with the object, not only to induce prompt payments after the award has been finally established, but, in case the award is contested, to compel prompt action on the part of the defendant in making his defense, and to defeat frivolous delays and chronic procrastinations often occurring in the course of legal proceedings; and, when any of these conditions are found to exist, the penalty should be promptly imposed. But we think it was not intended to apply where it satisfactorily appears that the defendant in perfect good faith is in the process of testing the correctness of a finding against him on one or more material issues in the case and defendant is prosecuting his remedy with proper diligence. Under such circumstances the defendant should be permitted to prosecute his defense free from the imposition of a burdensome penalty. With these conditions in view and as a guide, the question of assessing a penalty or not should be left to the sound discretion of the court. This we think may now be considered the settled doctrine of this court. *Osborn v. Omaha Structural Steel Co.*, 105 Neb. 216; *Hall v. Germantown State Bank*, 105 Neb. 709; *Swift & Co. v. Prince, supra.*

In this case there is nothing whatever in the record to indicate that the defendant did not, from the very first and in the very best of faith, dispute and expect to continue to dispute all liability to the claimant or any one else on account of the accident and death of deceased. So, if any delay occurred between the happening of the accident and the claimant's application to the compensation commissioner for an award, that delay

was due to the claimant herein, and not to the defendant. There is nothing in the record to show when the application was filed with the commissioner, but it does appear that it was heard on April 4, 1921, the award made by the commissioner on April 11, notice of appeal by defendant on same day, petition on appeal filed April 18, the issuance of summons forthwith, the hearing in the district court on June 18. Certainly this record discloses no unnecessary delay on the part of defendant. That the nature of the case and the uncertainty of defendant's liability and the question of dependency afforded grounds for reasonable controversy, there can be no doubt. We think the penalty should not have been imposed, and, therefore, the same will be disallowed.

Defendant complains that the court erred in admitting in evidence certain statements of deceased made to the attending physician shortly after the accident as to how it happened. The point is not well taken. The statements were clearly *res gestæ*. *Collins v. State*, 46 Neb. 37.

The decree of the district court is, therefore, in all things approved, except as to the assessment of penalty of $180, which is set aside. If plaintiff files a remittitur of $180 in this court within ten days from notice of filing of this opinion, the decree will be affirmed; otherwise, the proceeding will be remanded, with direction to the district court, on the record already made, to reform the decree to comply with the views herein expressed.

AFFIRMED ON CONDITION.

MARY REHMEYER, APPELLANT, V. SIMON N. LYSINGER ET AL., APPELLEES.

FILED FEBRUARY 27, 1923. No. 22250.

1. **Principal and Agent:** OSTENSIBLE AUTHORITY. "Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Thomson v. Shelton*, 49 Neb. 644.
2. ———: IMPLIED AUTHORITY. "Where one not in possession of a note assumes to collect both principal and interest as agent of the holder, proof of his authority to receive payment of principal may be implied from facts and circumstances arising in the course of the relations between the holder and the alleged agent with regard to the note, justifying the inference that it was intended that the latter should be empowered to collect both principal and interest." *Kile v. Zimmerman*, 105 Neb. 576.
3. ———: MORTGAGE: ASSIGNMENT: PAYMENT TO MORTGAGEE. "Evidence examined, and *held* sufficient to show that the mortgagee was the agent of its assignee, and the payments to it satisfied the mortgage indebtedness." *Pine v. Mangus*, 76 Neb. 83.
4. **Equity:** ESTOPPEL. "Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one must suffer who has placed the agent in a position to perpetrate the fraud complained of." *Bull v. Mitchell*, 47 Neb. 647.

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

Hainer, Craft, Edgerton & Fraizer, for appellant.

Horth & Ryan, contra.

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., TROUP, District Judge.

TROUP, District Judge.

Plaintiff brought suit in the district court for Hamilton county to foreclose a mortgage upon 80 acres of land therein situated. From a decree finding that the note, which the mortgage was given to secure, had been fully paid and dismissing plaintiff's suit, plaintiff appeals.

The case is another one of a class of which there have been many before this court at one time or another

wherein the plaintiff is seeking to avoid the consequences of the fraudulent acts of a faithless agent.

Plaintiff's petition is in the usual form of one seeking the foreclosure of a real estate mortgage. Defendant's answer narrates a brief history of the transaction in question, alleges the good faith of the defendant in all that he did in respect thereto, his entire lack of knowledge or notice, actual or constructive, of the fact that plaintiff was the assignee of the mortgage in suit or had any interest therein; the agency of the Wentz Company in its relation to the plaintiff throughout the transaction; defendant's payment in full of said note and mortgage; a denial of any lien or claim of plaintiff against the land in question, and the estoppel of plaintiff as against the defendant to the relief she seeks. The reply of plaintiff denies all matter in defendant's answer not admitted in the petition.

The evidence supports the material allegations of defendant's answer, and, without serious dispute, is, in substance, as follows: That W. C. Wentz was in the real estate, loan, brokerage and investment banking business in Aurora, Nebraska, for a period of about 40 years prior to the transaction in question; that he did business as W. C. Wentz, unincorporated, up to March, 1906, at which time he incorporated the business under the same name; that at all times both before and after incorporation W. C. Wentz was virtually the sole owner and in exclusive control of the business until some time in 1918, when he sold the same to his son, Charles W. Wentz, who thereafter was the sole owner and in control of the business; that for convenience in handling loans the same were generally taken in the name of W. C. Wentz while he was owner, and in the name of Charles W. Wentz after he became owner; that on January 2, 1914, the defendants, Lysinger and wife, old and well-known residents of Hamilton county, borrowed $2,000 from the said Wentz Company, giving their note therefor due January 1, 1919, with ten

semi-annual interest coupons attached, all payable to W. C. Wentz, and payable at the office of the W. C. Wentz Company at Aurora, securing said note by a mortgage on 80 acres of land in Hamilton county, said mortgage being recorded January 3, 1914; that the plaintiff, Mary Rehmeyer, is a German lady about 80 years of age, a resident of Hamilton county for 37 years, with an adult son and daughter, and at the time in question resided at Aurora; that on or about January 12, 1914, through her son Gus, plaintiff purchased the Lysinger note and mortgage from the Wentz Company, the mortgage being assigned to plaintiff by W. C. Wentz, and the note and coupons assigned by him in blank without the name of the assignee anywhere appearing therein, although the form provided a space for that purpose, and, thus assigned, delivered the papers to plaintiff, who deposited same in a tin box left in the custody of the Wentz Company, she retaining possession of the key; that plaintiff did not record her assignment of mortgage until more than six and a half years after she received it, and not until more than 15 months after the note and mortgage had matured and same been fully paid by the defendant; that defendant had no knowledge or notice, either actual or constructive, that plaintiff had or claimed any interest in or to said mortgage; that, as interest coupons became due, Wentz Company would notify defendant to pay same, which defendant did from time to time during the five years' life of the mortgage and until all ten coupons were paid, receiving the canceled coupons through the mail from Wentz soon after payment; the plaintiff leaving the matter of collecting interest in charge of Wentz or the Wentz Company, called at the company's office every six months to get her interest, at which time Wentz would get her box, she unlock the same, he would clip coupon and give her check for same, she then lock box again, leave same with Wentz, leaving it to Wentz to give or send the paid coupon to defendant. This plaintiff kept up

regularly through the life of the note and mortgage and for more than 18 months after same matured. Soon after defendant's mortgage became due he arranged with Wentz Company to give a new mortgage for same amount, which he did, in the name of Charles W. Wentz, who a year before had become the owner of the business, which mortgage was immediately sold by Wentz to one Ida K. Long, intervener herein, and the $2,000 received therefor credited to the plaintiff herein in her account on the books of the Wentz Company. When defendant executed a new mortgage he asked for a release of old mortgage and was told by Wentz that he would send papers to him in about a week. Defendant called again, but failed to get the release, and, sickness occurring in defendant's family, the matter drifted along without defendant securing the required discharge of the mortgage. In the meantime, apparently without any attention given to the fact that her note and mortgage had matured, plaintiff continued to call upon the Wentz Company for her interest, and two instalments of interest were paid her by the company after the note and mortgage had matured and the same fully paid by the defendant, the Wentz Company charging her account with the interest payments against her credit on the books of the $2,000 received in payment of her mortgage. So the matter stood when on March 17, 1920, the Wentz Company failed. After the Wentz Company failed, plaintiff, or her son, went to the Wentz Company office for her papers, but same were not in her box, and were afterwards found somewhere among the company's office or bank papers. The first intimation that defendant had that plaintiff owned the mortgage on which he had been paying interest for five years and which, soon after its maturity, he paid in full, was after the company failed and 15 months after payment of plaintiff's mortgage. Upon Wentz obtaining the new mortgage and selling the same to Ida K. Long, he gave to Mrs. Long an assignment of the mortgage, which she

duly recorded on the same day, March 24, 1919. On July 31, 1920, plaintiff's attorney filed with the receiver for the Wentz Company a duly authenticated claim in behalf of plaintiff and against the Wentz Company, for money had, received and converted by the Wentz Company, in the sum of $2,000, the attorney, however testifying that this was done without the knowledge of the plaintiff.

The principal question for decision then is: Was the Wentz Company, as represented first by W. C. Wentz and later by Charles W. Wentz, the agent of plaintiff in collecting the interest and principal due her as assignee of the mortgage in suit? That must be determined alone from a just consideration of the facts above detailed, together with such proper inferences as may be drawn therefrom. The facts speak for themselves, and no amount of comment thereon can add force to the conclusion which these facts compel. After due consideration of the same, we have no hesitation whatever in declaring that the Wentz Company, as thus represented, was the agent of the plaintiff at all times in doing what it did in the collection of all moneys due plaintiff upon her mortgage, and, as such, plaintiff is bound by its acts in that regard. It probably does not appear from the evidence that plaintiff created that company her agent by express words, but that by her own acts and her acquiescence in the acts of the representatives of said company in acting for her in the collection of money due upon her mortgage from the mortgagor through a period of six and a half years she created that company her ostensible agent there can be no question, and that is sufficient.

"Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Thomson v. Shelton,* 49 Neb. 644. See, also, *Phœnix Ins. Co. v. Walter,* 51 Neb. 182; *Pine*

v. Mangus, 76 Neb. 83; *Walker v. Smith,* 92 Neb. 841; *Kile v. Zimmerman,* 105 Neb. 576. Numerous other cases to the same effect abound.

We infer from plaintiff's brief that she does not seriously dispute the fact that the company mentioned had authority to collect the various instalments of interest, but contends that authority to collect interest does not necessarily imply the authority to collect the principal. This is probably true, except, however, as the facts and circumstances surrounding the particular case justify the implication. We think the facts and circumstances surrounding the present case do justify the implication in this instance. The bond and mortgage were made to Wentz in the first instance. The defendant never knew any one else in the transaction but Wentz. In the canceled coupons or other receipts given defendant for payments made there never was revealed the name of any other person as having any ownership or interest in the mortgage than Wentz. Even if it were proper to infer from Wentz's statement to defendant, when the latter requested a release of the old mortgage, that "you will have to wait until I get this money from the east," that the bond and mortgage were therefore held by some person in the east, yet it was perfectly natural to believe that the person in the east, whoever he may be, would require some local agent to attend to the collection of his mortgage when it was apparent he was not doing so himself. Who was more likely to have that authority than Wentz? He was the only one, so far as defendant knew, who had the apparent authority to act in the matter. The note and mortgage never were in the east; they were in the possession and control of either Wentz or the plaintiff at all times, neither of whom at any time ever disclosed to the defendant plaintiff's interest therein. We are satisfied that the facts and circumstances justified defendant in paying the principal as well as the interest

on the mortgage to Wentz. See *Kile v. Zimmerman, supra.*

Plaintiff's next proposition is that the authority of an agent to collect his principal's debt does not include the authority to accept as payment anything but money. Assuming this also to be true, plaintiff's assumption that Wentz satisfied her mortgage with anything but the payment of money is not sustained by the record. Upon the taking of the new mortgage from defendant, Wentz received $2,000 in cash to be applied in satisfaction of plaintiff's mortgage. The fact that he obtained the money through the medium of the sale of a second mortgage can make no difference to plaintiff. That he secured this cash in payment of plaintiff's mortgage and for the express purpose of appropriating the same to plaintiff's use and benefit is evidenced by the fact that he immediately entered the amount to her credit on the books of the company. That her agent Wentz may have kept the fact of this collection secret from plaintiff, or that a year or more thereafter he may have converted or embezzled the money so collected, as he may have done in many other instances, cannot alter the situation. Plaintiff's money was there to her credit. It was at her command at all times. In the sense of liability therefor it is there yet. For the fact that eventually it may be lost, plaintiff's lack of ordinary diligence and her agent's perfidy are alone responsible. Defendant was an old resident and well-known landowner of Hamilton county. Plaintiff knew it was his mortgage she held; he was ignorant of the fact; had she notified him at some time during the life of the mortgage of her ownership therein doubtless her loss would have been spared her. But plaintiff did nothing in that regard and she must bear the natural consequences of her own negligence. That the result of so holding is a hardship upon plaintiff may be admitted. That to hold otherwise would be a hardship upon defendant must also be conceded. In such a case the familiar and well-

established maxim must apply that, where one of two innocent persons must suffer loss he whose negligence caused the injury must bear it, or, to be more specific, as applying to the case at bar: "Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one must suffer who has placed the agent in a position to perpetrate the fraud complained of." *Bull v. Mitchell*, 47 Neb. 647.

We are of the opinion that the decree of the lower court is right and it is therefore, in all things,

AFFIRMED.

HATTIE G. TAYLOR, APPELLANT, V. AXEL M. FLODMAN ET AL., APPELLEES.

FILED FEBRUARY 27, 1923. No. 22256.

Equity: ESTOPPEL. The syllabus in *Rehmeyer v. Lysinger, ante*, p. 805, applied in this case.

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

Hainer, Craft, Edgerton & Fraizer, for appellant.

John C. Martin, contra.

Heard before MORRISSEY, C. J., DAY, ALDRICH and GOOD, JJ., TROUP, District Judge.

TROUP, District Judge.

This is a companion case with that of *Rehmeyer v. Lysinger, ante*, p. 805; the transaction growing out of the defalcation of Charles W. Wentz and his insolvent company at Aurora, Nebraska. The nature of the case and the pleadings and evidence herein are substantially the same as in the *Rehmeyer* case. The judgment of the court below was the same in this case as in that, and a similar judgment must be entered in this court. In one or two particulars the instant case presents a situation even more favorable to appellees than did the case referred to. We deem it neither necessary nor profitable

to discuss the evidence in detail. As in the *Rehmeyer* case, so in the present case, the issues resolve themselves into one of agency, the situation respecting which is simply this: The bond and mortgage, in the first instance, were made to W. C. Wentz, individually; that mortgage was duly recorded in the proper record in Hamilton county, where it remained throughout the life of the mortgage as the only claim upon the land in question. By the terms of the bond all payments of interest and the principal itself were made payable to the order of W. C. Wentz at the Wentz Company office; the mortgagor, or his subsequent grantees, received notice from Wentz, from time to time during the life of the mortgage, to call and make interest payments, which were regularly complied with, the payor receiving from Wentz the canceled coupons in return. The note gave the maker the right to pay $100 or any multiple thereof upon any interest date. Something like a week or more before the maturity of the obligation the defendant prepared to pay the same in full, and accordingly on February 24, 1920, caused a check to be sent through his bank for the sum of $530, the same being in full of the principal, $500, plus $30 for the last interest coupon, with request to execute and forward release of mortgage. Wentz received the cash upon this check and on February 26, 1920, credited plaintiff with full amount of collection in her account on the books of the company which account shows numerous transactions of a like character between plaintiff and the company for a period of over five years immediately previous. Wentz Company failed on March 17, 1920. On May 29, 1920, plaintiff filed her assignment of mortgage and commenced this suit, and then, for the first time, it transpired that plaintiff claimed to be owner of the mortgage and the first time that defendant ever knew there was such a person as the plaintiff in existence, full five years after she took her assignment and

more than three months after the mortgage debt had been paid in full.

For more than five years after plaintiff took the assignment of this mortgage, so far as the evidence discloses, not a soul knew of the transaction except plaintiff and Wentz, and no one could know anything about it except as one or the other of these two individuals imparted the information. The plaintiff uttered not a word to any one concerning it, nor did Wentz. She kept her assignment from the public records, and thereby its very existence from the knowledge of defendant and the world. In the meantime that she made Wentz her agent to collect her interest and look after the mortgage matter for her stands admitted in the record. Under these circumstances, in the name of common sense and reason, why should plaintiff expect the mortgagor or any subsequent grantee to deal with any one but Wentz in the payment of the mortgage debt? *Kile v. Zimmerman* 105 Neb. 576, and cases cited in *Rehmeyer v. Lysinger, supra.* True, it is a hardship that plaintiff should suffer this loss. It is also true that it would be a hardship that defendant should suffer a like loss.

For the reason stated in *Rehmeyer v. Lysinger, supra,* the one whose negligence caused the injury should bear it. The decree of the lower court is in all things

AFFIRMED.

S. L. RIFE, APPELLEE, V. WILLIAM H. SWANSON ET AL., APPELLEES: CHARLES G. LANE, APPELLANT.

EDWARD C. AUSTIN, APPELLEE, V. LULU E. SPATZ ET AL., APPELLEES: CHARLES G. LANE, APPELLANT.

FILED MARCH 12, 1923. NOS. 22276, 22277.

Mortgages: FORECLOSURE: RESALE AT BIDDER'S RISK. A sale under foreclosure was made on March 24, 1921. The sale was confirmed on June 3, 1921. The purchaser failed to pay the purchase price, and, on motion filed July 11, the court on July 12, the purchaser being in court by his attorneys, ordered that the confirmation and sale be set

aside, and a resale ordered at the purchaser's risk and loss in case the real estate sold for less at the resale than the amount of the bid. The purchaser appeals merely from that part of the order which directs the resale to be at his risk. *Held,* that the order of the district court was justified, and that under the circumstances it was unnecessary to issue an order to show cause before setting aside the sale.

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

Tibbets, Fuller & Tibbets, for appellant.

Stiner & Boslaugh, Rinaker, Kidd & Delehant and *Buck & Brubaker, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., RAPER, District Judge.

LETTON, J.

In this case plaintiff Austin recovered a decree of foreclosure for $10,188 which is a first lien on 320 acres of land. Charles G. Lane is the owner of a fifth lien on the same property amounting to $24,022. On March 24, 1921, at the sale under the decree, the property was sold to Lane for $22,500. Objections to confirmation were filed by Swanson, the owner of the equity of redemption. These objections were overruled, and the sale confirmed on June 3, 1921.

After the deduction of costs and expenses and the amount due prior lien-holders, there was applicable on the lien of Lane from the proceeds of the sale $3,411.51. Swanson gave a supersedeas bond for appeal from the confirmation. On July 11, 1921, at the same term of court, Swanson moved to set the sale aside for the reason that the purchase price had not been paid to the sheriff. Plaintiff Austin and cross-petitioner Drake, the holder of the second lien, also filed a motion setting forth that the amounts ordered to be paid to them by the sheriff from the proceeds of sale are now wholly insufficient on account of the accrual of interest, and pray-

ing: (1) That Lane be ordered to pay the full amount of his bid; (2) or that security be given by him, and that upon the disposal of the appeal by Swanson he will pay his bid with interest on the decree prior to his; (3) or that the order of confirmation be modified to provide for the payment of interest on decrees to the date of their payment; (4) or that the order of confirmation be vacated and the real estate ordered resold at Lane's cost.

The court found that Lane had failed to make payment of his bid. The sale was set aside, and the order of confirmation vacated. The supersedeas bond given by Swanson was canceled, and a resale ordered at the cost of Lane and at his risk and loss in case the said real estate upon a resale shall bring less than the amount of the bid therefor at the sale. The court refused to grant a supersedeas, and Lane appeals.

It is held in *Gosmunt v. Gloe*, 55 Neb. 709: "Sales under executions and decrees of foreclosure are made for cash, and the person making such sale should require the purchaser to pay the amount of his bid at the time of the sale. If the officer fails to do so and reports the sale, he is liable for the purchase price."

The practice in this state for many years by most sheriffs has been to require, at the time of sale, a deposit of enough of the purchase price to cover sale costs, and to wait for the balance of the money until at, or just before, the confirmation of the sale. If this is done, the sale will be upheld. Had the sheriff insisted upon this, as he had the right to do, no trouble would have ensued. Under our former decisions, the court might have enforced the payment of the purchase price by proceedings in contempt (*Phillips v. Dawley*, 1 Neb. 320), or the sheriff might have sued Lane to recover the purchase money (*Jones v. Null*, 9 Neb. 254; *Maul v. Hellman*, 39 Neb. 322). Other cases bearing on the question are *Gregory v. Tingley*, 18 Neb. 318; *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 51 Neb. 659. The court also had the power, the purchaser having failed

to comply with his bid, to set the sale aside at his costs and expenses, and to compel him to make good any deficiency in the purchase price at the resale from the amount of his bid at the former sale. *Rowley v. Feldman,* 82 N. Y. Supp. 679; *Camden v. Mayhew,* 129 U. S. 73; 24 Cyc. 45.

Lane is not offering upon this appeal to comply with his bid, but is here objecting to the order of resale at his risk. We are of the opinion that he has no substantial reason to complain of the order. The district court might have applied a much more drastic and summary remedy.

It is said that the court should have made an order to show cause why he should not comply with his bid before setting the sale aside, but we fail to see any reason for this. The motion was made the day before the order was entered. All parties were in court, and it is evident that he did not desire or intend to pay the purchase price. He had made no effort to comply with his bid from March 24 to July 11, and he made no request for time when the motion was filed.

The order of the district court is

AFFIRMED.

VERN HOWARD V. STATE OF NEBRASKA.

FILED MARCH 12, 1923. No. 23157.

1. **Information.** "Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute." *Cordson v. State,* 77 Neb. 416.
2. **Criminal Law:** INTOXICATION: PROOF. Intoxication is a fact which a witness may ascertain in the same manner he ascertains other facts. He may give the details and then may state the ultimate fact of intoxication as derived from observation.
3. ———: NEW TRIAL: SHOWING. In an application for a new trial on the ground of newly discovered evidence, it is elementary that the applicant must state in his affidavit the facts to which the proposed witnesses will testify if present.

ERROR to the district court for Pawnee county: JOHN B. RAPER, JUDGE. *Affirmed as modified.*

Dort & Witte, for plaintiff in error.

Ora S. Spillman, Attorney General, and *George W. Ayres, contra.*

Heard before MORRISSEY, C. J., ROSE, DAY, GOOD and DEAN, JJ.

DEAN, J.

Defendant was convicted under section 3241, Comp. St. 1922, of having been "found in a state of intoxication." It was also charged, and defendant admitted, that he pleaded guilty to an information which charged a like misdemeanor about 6 months before; so that this was the second time that he was charged with being intoxicated. The court sentenced him to confinement in the county jail for a period of 45 days and it was adjudged that he pay the costs of the action. Defendant prosecutes error.

The facts are substantially these. Defendant was driving an automobile about Pawnee City accompanied by three companions. He ran his car into a ditch and the city marshal discovering his plight directed a bystander to take defendant's place at the wheel and drive the car to the courthouse with its occupants. Upon arrival there defendant was placed under arrest and a complaint was subsequently filed. This was at the noon hour and defendant was detained at the sheriff's office until about 5 o'clock, when he was put in jail.

Four or five witnesses testified on the part of the state. The city marshal, having, as he said, observed the manner, the conduct and the appearance of defendant with the view of discovering his condition, testified that he was intoxicated. Two or three of the witnesses, having the same qualifications as the city marshal with respect to observation, testified that they detected the smell of liquor on defendant's breath and that he

was intoxicated. Practically all of the state's witnesses qualified their statements by saying that they had for many years seen and had often observed intoxicated men and that they could tell, by observation, whether a person was intoxicated and by listening to his talk and the like.

The sheriff testified that defendant fell out of a chair in his office. It is argued by defendant that the chair out of which he fell was the ordinary swivel office chair with caster rollers, and that it is not unusual for such chairs to slip out from under a person when they are on a hard floor and tilted back. This, however, was only one feature of the case and was properly submitted with the other evidence for the jury's consideration. It also appears that, as defendant went upstairs in the courthouse, he "put his hand up against the wall to kind of steady himself." This witness said he smelled liquor on defendant's breath and that he appeared to have been drinking. A business man in the town testified that defendant's appearance, conduct, manner and condition indicated that he was intoxicated.

Five or six witnesses testified on the part of defendant. One on the direct examination testified that defendant "was not what I would call drunk." He added that he had evidently been drinking that day. For the defense another witness who had observed defendant's conduct said, "I couldn't say that he was drunk and I couldn't say he was sober, I never examined him," and that he didn't see "anything particularly" from which he "could swear that he was drunk; no." Another witness for defendant said on cross-examination that he thought defendant "had a drink or so," but that he would not say that he was drunk.

That there was competent evidence to support a finding of intoxication sufficiently appears.

Defendant, however, assigns as prejudicial error the fact that the state was permitted to amend the information after the trial had commenced by inserting

the word "unlawful." Section 3241, Comp. St. 1922, under which the information was drawn, reads: "If any person shall be found in a state of intoxication, he shall be deemed guilty of a misdemeanor," etc. The information when filed charged that defendant was "found in a state of intoxication," etc. After the amendment was made the information read that defendant was "found in a state of unlawful intoxication," etc. The only change being the insertion of the word "unlawful."

In 22 Cyc 332, it is said that, where the term "unlawful" is not contained "in the definition of a statutory offense, it need not be employed in an indictment." In *Cordson v. State,* 77 Neb. 416, we held: "Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute."

Clearly the original complaint states an offense in the language of the statute. That was sufficient. The amendment was mere surplusage. It follows that prejudical error cannot be predicated on that assignment of alleged error.

It may be added that on this point the state cites and relies in part on that part of section 10186, Comp. St. 1922, which reads: "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

Defendant argues that the court erred in "admitting in evidence statements of witnesses giving their opinions and conclusions," over defendant's objections in respect of defendant's condition. A number of Nebraska cases are cited, but they have no application here. They have to do for the most part with questions involving the rule where opinion evidence is excluded and the like. In

Minnesota it was held: "One who has witnessed a person's acts, appearance, and speech may express an opinion whether he was intoxicated." *McKillop v. Duluth Street R. Co.,* 53 Minn. 532. In Texas a witness may give his opinion as to whether another person was drunk. *Pace v. State,* 79 S. W. (Tex. Cr. Rep.) 531. In New York certain witnesses testified that the actions of defendant "were those of a drunken man, and that his breath smelled of liquor. This evidence sufficiently established the charge. It is elementary that drunkenness may be proved by observation; expert evidence is not necessary." *People v. Martin,* 36 N. Y. Supp. 437. See Lawson, Expert Evidence (2d ed.) p. 529.

"Intoxication or drunkenness is a fact which may be proven as other facts are proven. A witness * * * would not be confined to a detail of the combination of minute appearances that have enabled him to ascertain the fact of intoxication. The details of conduct, attitude, gesture, words, tones and expression of eye and face may be stated by him, or he may state the fact of intoxication,—a fact which he can ascertain by personal observation, as he ascertains other facts. So, also, a witness may state whether or not a person had the appearance of being intoxicated, and such statement of appearance would be the statement of a fact. Facts which are latent in themselves, and only discoverable by way of appearances more or less symptomatic of the existence of the main fact, may, from their very nature, be shown by the opinions of witnesses as to the existence of such appearances or symptoms. Sanity, intoxication, the state of health or of the affections are facts of this character." *City of Aurora v. Hillman,* 90 Ill. 61, 66.

"The fact of intoxication may be proved by any person who had an opportunity to observe the party whose intoxication is sought to be established at the time in question. * * * Although the witness may describe the facts and circumstances which led him to the con-

clusion that the person was intoxicated, he is not confined to these details." 7 Ency. of Evi. 777.

The rule, as deduced from the weight of authority, is that a witness may testify, from observation, whether a person was intoxicated. Intoxication is a fact which a witness may ascertain in the same manner in which he ascertains other facts. He may give the details and then may state the ultimate fact of intoxication as derived from observation. It may be added that the intoxication which results from an intemperate use of spirituous liquors is a condition that cannot be described by a definition that will fit all cases alike. The court did not err in overruling defendant's objections to the competency of the evidence in respect of the offense with which defendant was charged.

Defendant argues that the court erred in refusing a new trial on the ground of newly discovered evidence. In his affidavit he avers: "That he has within past two days found and located two men, of unimpeachable character and standing, who can and will testify to material facts in favor of defendant, if defendant be granted a new trial, and be thus enabled to produce said witnesses in court in his behalf." It appears that defendant did not state the facts in his affidavit to which the witnesses would testify. It is elementary that the showing was insufficient. It follows that the court did not err in denying the application.

Other assignments of alleged error are pointed out, but on examination we find that reversible error does not appear in the respects noted by counsel. To discuss the assignments so made would unduly extend this opinion. However, we conclude that the district court did not err in overruling the application for a new trial. But from a review of the facts it appears that the ends of justice will be served by a reduction of the jail sentence from 45 to 30 days and it is so ordered.

The judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

HERBERT P. ROSS, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED MARCH 12, 1923. No. 22209.

1. **Trial:** DIRECTION OF VERDICT. *Held,* that the trial court did not err in refusing to direct a verdict for defendant, sufficient competent evidence having been introduced by plaintiff to warrant the submission of the case to the jury.
2. **Appeal:** CONFLICTING EVIDENCE. The verdict of the jury on disputed questions of fact will not be disturbed unless clearly wrong.

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

John L. Webster, for appellant.

W. J. Connell, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN, ALDRICH, DAY and GOOD, JJ., RAPER and TROUP, District Judges.

ALDRICH, J.

Action by plaintiff, Herbert P. Ross, to recover damages alleged to have been sustained by reason of a collision between the motor truck which he was driving and a street car of defendant, Omaha & Council Bluffs Street Railway Company. The accident occurred on January 23, 1918, at the intersection of Nineteenth and Vinton streets in the city of Omaha. Plaintiff approached and entered the intersection from the south, and, he alleged, was struck by defendant's street car with great force, knocking his truck to one side and causing personal injuries. Suit was brought to recover damages in the sum of $6,700. Defendant, in its answer, denied each and every allegation of plaintiff's amended petition, and alleged the street car was proceeding northeasterly along Vinton street at a proper, lawful and safe rate of speed; that as it approached the intersection the motorman sounded his gong; that plaintiff operated the automobile truck unlawfully, driving at a rate of speed in excess of six miles an hour at the street intersection;

that he failed to sound a warning or to look for approaching street cars; and that plaintiff negligently drove his truck against the side of the street car without any fault of defendant or its employees. Defendant's allegations were put in issue by plaintiff's reply. At the close of plaintiff's evidence, and again at the close of all the evidence, defendant moved for a directed verdict. Both motions were overruled, and the case was submitted to the jury, who by their verdict assessed plaintiff's damages in the sum of $5,000. Defendant's motion for a new trial was overruled and judgment rendered on the verdict. Defendant appeals.

Appellant contends that the case comes within the rule laid down by the United States federal court and by severel state courts, and urges the following proposition: "The failure of the plaintiff to look for a street car and to stop his automobile truck before attempting to drive onto the track directly in front of or against the front end of the moving street car was such an act of gross negligence as would have justified and required the court to direct a verdict for defendant company." A careful examination of the record discloses facts which make a case not within the rules discussed by counsel for appellant and which justifies and sustains the jury's finding in plaintiff's favor.

The issue then is a question of fact and must be decided as such according to law, and being a question of fact, what the jury finds, as a matter of law, cannot under the rules of this court be disturbed unless clearly wrong. This is one of the substantial rules of this court and we are not justified in going behind it under the facts in this case. The verdict of the jury is in accordance with the facts.

The following is a quotation from the trial judge's instructions: "The burden of proof is upon the defendant to establish by a preponderance of the evidence that the plaintiff was guilty of negligence contributing to cause the collision in question in a degree sufficient

to defeat his recovery, and if you find from all the evidence that the defendant was guilty of negligence, and that the plaintiff was also guilty of negligence, it would be the duty of the jury to compare the negligence of the respective parties, and if upon such comparison 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 the defendant falls in any degree short of gross negligence, under the circumstances, the contributory negligence of the plaintiff, however slight, will defeat a recovery. On the other hand, if upon such comparison the negligence of the plaintiff is found to be slight and the negligence of the defendant gross, the plaintiff may recover, but in such case it is the duty of the jury to deduct from the amount of damage sustained, if any, such amount as plaintiff's contributory negligence bears to the whole amount of such damage."

The evidence of the witness Swanson is invaluable to this case. He was with the plaintiff and in a position to see the car in question, to note and judge the speed at which it ran and the control of the same as handled by the motorman. This testimony was valuable, inasmuch as it corroborated the essential parts of the testimony of plaintiff.

It is noticeable that the street car "was running at a proper and reasonable rate of speed," which statement, it is claimed, is confirmed by the motorman and other witnesses for the defendant company. The story of plaintiff's witnesses was confirmed by undisputed physical conditions. The witness Swanson testified substantially that the street car was running 20 or 25 miles an hour when it struck the motor truck.

According to plaintiff's testimony the accident happened at 8:15 in the morning. The day was clear. He was driving a truck for Sunderland Brothers Coal Company and was accompanied by a helper, the witness Swanson. Plaintiff made a delivery of coal on South

Nineteenth street and approached the intersection in question with about one ton of coal in his truck. He came to a complete stop when he reached the intersection; the front end of his machine was parallel with the sidewalk on the south side of Vinton street. He looked up Vinton street, both to the right and to the left, and, seeing no street car, sounded a warning with his klaxon and proceeded to cross the intersection to turn west. His car was in low gear, moving at the rate of 3 or 4 miles an hour for a distance of about 25 feet to the north rail of the car track. Plaintiff testified that he did not see the street car until it was 10 or 12 feet from him and when the front wheels of his truck were just about to the rail of the car track. Plaintiff was rendered unconscious and remembered nothing more about the accident. Swanson, the helper, corroborated him in his testimony and added the material statement that no warning was sounded by the motorman from the time Swanson first saw the street car up to the time of the collision. The street car, according to the record, traveled 150 or 200 feet while plaintiff's truck moved 25 feet. This fact evidently was taken into consideration by the jury in arriving at their verdict.

The claim is made that the verdict is excessive and is not borne out by the record. The following testimony was given concerning his injuries: "Q. After you recovered consciousness, while you were at the hospital, to what extent did you suffer pain, either in your head or other parts of your body? A. Well, I suffered with my back, my head and my arm. Q. What arm? A. My right arm. Q. Now, referring to your head, where was the pain in that? A. In the upper part of my jaws, I was struck in the temple here (indicating); I had a large lump on my temple; my nose was all stopped up, I couldn't breathe, and blood was coming through my mouth. Q. What was that, fresh blood? A. Yes, sir. Q. You say your nose was plugged up. What do you mean by that? A. The doctors took cotton and medicine and

plugged it up so it wouldn't bleed, but it kept bleeding through my mouth. Q. Then, where would the blood get out of your head? A. I would have to have a vessel (interrupted) Q. No, but what part, through your nose or your mouth or what? Would you spit it out to get rid of it? A. Yes, sir; it would come through my mouth. Q. To what extent while you were at the hospital did you have this bleeding or hemorrhage from the nose? A. All the time I was there. * * * Q. Now, state to the jury if you ever had any bleeding, or difficulty of that kind, before. A. No. sir; I never had any."

The plaintiff was injured in the back and on the hip or side, also his hearing was affected and was not nearly as good at the time of the trial as before the injury. He was at the hospital about two weeks and had internal bleeding in the head all the time he was there and for some time afterwards. He was injured to such an extent that he had hemorrhages every few weeks and they continued nearly every day until some time in the winter. His hearing in the right ear since the accident is affected, making it very difficult and almost impossible for him to hear. He is highly nervous and irritable and does not sleep well at night. Such being the true condition, we do not believe a verdict of $5,000 is in any way excessive.

Taking all matters into consideration, we hold that the verdict should be and it is,

AFFIRMED.

LETTON, J. dissenting.

Disregarding all the testimony for the defense, and considering alone that given by the plaintiff's witnesses in its most favorable aspect, it clearly establishes that plaintiff, the driver of the truck, was grossly negligent in failing to see the street car until it was within a few feet from him. He testifies that the first and only time he saw the street car was when the front wheels of the truck were on the first rail of the nearest street car

track; the street car being at that time about 10 or 12 feet away. The truck was at a standstill at the curb, and his witness, Swanson, who was riding with him, says the street car was in plain sight while plaintiff was driving from the curb to the car track. It was daylight and there was nothing to obstruct the view. He might have stopped in plenty of time if he had looked to see whether the street car was approaching. His negligence was gross, according to his own testimony, and therefore the evidence is not sufficient to support a verdict in his favor.

JOHN SEATON V. STATE OF NEBRASKA.

FILED MARCH 12, 1923. No. 23106.

1. **Evidence** examined, and *held* sufficient to sustain the verdict.
2. **Instruction** No. 7 *held* to be free from prejudicial error.
3. **Criminal Law:** JURORS: PRESUMPTION. "In the absence of a showing to the contrary, one who has served as a juror is presumed to have been in all respects qualified at the time of serving." *Hart v. State*, 14 Neb. 572.
4. **Burglary:** SENTENCE. It was error for the district court to sentence defendant under section 10248, Comp. St. 1922, the provisions of section 9152, Rev. St. 1913, being in full force and effect and applicable at the time the crime was committed.
5. **Parole:** SUBSTANTIVE RIGHT. The right of parole is a substantial right of which a convicted person cannot be deprived by the court.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed: Sentence reduced.*

D. W. Livingston, for plaintiff in error.

Ora S. Spillman, Attorney General, and *C. L. Dort, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY and GODD, JJ., RAPER and TROUP, District Judges.

ALDRICH, J.

The defendant, John Seaton, was convicted of burglary

in Otoe county, and sentenced to confinement in the penitentiary for an inderterminate sentence of not less than five years nor more than ten years at hard labor. Motion for new trial was overruled, and defendant prosecuted error.

On June 7, 1920, the defendant was arraigned in the district court for Otoe county and entered a plea of not guilty. The case was tried and conviction had. On error to this court the cause was reversed and remanded. The report of the former appeal appears in 106 Neb. 833, 19 A. L. R. 1056.

The first issue to be considered is whether the evidence is sufficient to sustain the conviction. A careful examination of the record discloses all the essential elements of the crime charged in the information, and fully proves defendant's participation as an armed guard stationed near an automobile parked by the law-breakers within a half block of the house which was broken into. The details of his arrest, as testified to by the police officers, and all the attendant circumstances demonstrate defendant's guilt beyond a reasonable doubt. Defendant, being armed with a loaded 45 automatic Colt revolver and acting as a guard, or look-out, was a principal offender and was equally guilty with the others who were actually engaged in the commission of the unlawful act.

The only instruction complained of is No. 7, given by the court on its own motion. Defendant's contention that the instruction is not sustained by the evidence is not well taken. The question as to defendant's knowledge of the unlawful intent of the co-defendants was an issue of fact for the jury. We find the instruction sustained by ample evidence. Mrs. Chapin, a near-by neighbor, who called the police officers, testified that these men were apparently together. Defendant was left with another man in charge of the cars. When the officers came, defendant held them up with a gun. His presence a half block from the scene of the burglary

and the burglary are admitted. As a matter of fact, the evidence, together with the inferences legitimately drawn therefrom, justify the instruction and the verdict.

Defendant contends that the case was not tried by a lawful jury; that one of the jurors was but 22 years of age and therefore incompetent to serve, which fact was unknown by defendant and his counsel until after the verdict had been returned. He cites section 9071, Comp. St. 1922. This matter was urged and submitted on the motion for new trial in the court below. Two affidavits in support thereof are in the bill of exceptions, one affidavit by defendant's counsel, the other by defendant himself. Both are founded upon hearsay evidence and for that reason are incompetent and insufficient to support a reversal of the lower court's finding that there was a lawful jury. No abuse of discretion is shown in the record.

"In the absence of a showing to the contrary, one who has served as a juror is presumed to have been in all respects qualified at the time of serving." *Hart v. State,* 14 Neb. 572. See, also, *Bemis v. City of Omaha,* 81 Neb. 352.

As a matter of fact none of defendant's constitutional guaranties were violated or abridged. As provided by section 11, art. I of the Constitution, defendant had "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

The alleged incompetency was not disclosed by the *voir dire* examination, at which time the question should have been tried out. The objection was waived by failure to examine and challenge.

"The general rule as to waiver of lack of qualification of a juror appears to be that qualifications, the lack of which does not affect the ability of the juror to render a fair and impartial verdict, are waived by failure to object to such juror till after verdict. And so it is that failure to challenge a juror for cause as to his

competency, and to examine him or other witnesses in support of the challenge, is a waiver, even though the fact of incompetency is not known to the party until after verdict. It is clear that the refusal of the trial court to vacate a decree because of the incompetency of a juror, first discovered after verdict and judgment, is not an abuse of its discretion in the premises, where the verdict rendered was the only one which could be rendered consistently with the facts." 16 R. C. L. 284, sec. 100.

The general rule applies to both civil and criminal cases. 16 R. C. L. 286, sec. 102; 287, sec. 103.

Defendant was tried by an impartial jury, none of his constitutional guaranties were denied him and substantial justice has been done.

The lower court erred in one respect. The crime was committed in May, 1920, at which time the old indeterminate sentence law (Rev. St. 1923, sec. 9152) was in force. Under that law the court was to impose sentence between the maximum and minimum provided by law, without fixing the limit or duration of the sentence. Defendant was tried for violation of section 9623, Comp. St. 1922, which provided as penalty imprisonment from one to ten years. The court imposed its sentence of from five to ten years under the provisions of section 10248, Comp. St. 1922, the indeterminate sentence law in force at the time of the trial, allowing the court to "fix the terms of any indeterminate sentence which it desires provided the minimum term fixed by the court shall not be less than the minimum term provided by law for the crime for which the person was convicted, nor the maximum term be greater than the maximum term provided by law for the crime for which the person was convicted." Section 9152, Rev. St. 1913, was repealed by the legislature in 1921. This sentence was in violation of a substantial right to parole, of which the convicted cannot be deprived by the court. *Griffith v. State*, 94 Neb. 55, 61.

Defendant, after having served the minimum term fixed by law, would be eligible to parole. Section 10251, Comp. St. 1922. By increasing the minimum term from one to five years he would be deprived of four years of time within which the board of pardons might permit him to go upon parole.

For these reasons, it follows that the sentence imposed by the district court should be changed to a minimum of one year and a maximum of ten years and it is so ordered. In all other respects the judgment is affirmed.

AFFIRMED: SENTENCE REDUCED.

FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLANT, V. NELLIE GUMAER ET AL., APPELLEES.

FILED MARCH 12, 1923. No. 22252.

Judgment: PREMATURE ENTRY. Where plaintiff files an action in the nature of an interpleader, praying that certain claimants to the fund in his hands be brought into court, and that the court determine the respective rights of such claimants; and where the claimants file a cross-petition against the plaintiff, praying for judgment against him in excess of the amount tendered into court, although no summons may be necessary to be served on the plaintiff, nevertheless the plaintiff is entitled to the same time to plead to the cross-petition as though the defendant filing the cross-petition was plaintiff and the plaintiff was sole defendant. In such case, a default and judgment against the plaintiff on the cross-petition, before the time to plead has expired, is erroneous.

APPEAL from the district court for Gage county: LEONARD W. COLBY, JUDGE. *Reversed, with directions.*

Doyle, Halligan & Doyle, for appellant.

E. O. Kretsinger, and *Sackett & Brewster, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., TROUP, District Judge.

DAY, J.

The Farmers Mutual Insurance Company commenced

this action in the nature of an interpleader, making Nellie Gumaer, Mary Gumaer, and George Lippold, parties defendant. No affirmative relief on behalf of the plaintiff is prayed against either of the defendants. The petition alleges in substance that the plaintiff issued its policy to Nellie Gumaer for $1,800, upon a dwelling-house then owned by her; that on June 20, 1920, while the policy was in full force and effect, the said Nellie Gumaer transferred the title to the insured premises to her mother, Mary Gumaer, without the knowledge or consent of the plaintiff; that on September 20, 1920, Mary Gumaer entered into a contract to sell the said premises to George Lippold, and thereupon the said Nellie Gumaer, without disclosing that she had sold the premises to her mother, notified the plaintiff that the property had been sold to George Lippold, and requested that the policy be changed so as to include the interest of the purchaser; that thereupon on September 20, 1920, the plaintiff, in ignorance of the fact of the sale of the premises by Nellie Gumaer to her mother, caused to be issued and attached to the policy a rider to the effect that loss, if any, under the policy should be payable to Nellie Gumaer and George Lippold, as their interests may appear; that on February 21, 1921, the dwelling-house was destroyed by fire; that Lippold had paid upon his contract of purchase $475; that plaintiff and Lippold agreed that his loss under the policy was $450, and plaintiff agreed to pay him that sum; that the transfer of the premises by Nellie Gumaer to her mother without the knowledge or consent of the plaintiff by the terms of the policy rendered it void so far as it affected the rights of Nellie Gumaer thereunder; that Nellie Gumaer and Mary Gumaer have notified the plaintiff that they claim an equitable lien to any interest that George Lippold may have under the policy, based upon the claim that Lippold has forfeited all his rights under the contract of purchase.

Plaintiff brings into court $450, and asks that the

parties defendant be summoned into court and their respective rights to the $450 determined.

In its final analysis, the petition is essentially a statement to the court that the plaintiff has $450 in its hands; that the three persons named are making claim to it, and that plaintiff brings the fund into court and asks the court to determine, as between the claimants, their respective rights. To this petition Nellie and Mary Gumaer filed an answer and cross-petition on April 29, 1921. The cross-petition, on behalf of Nellie Gumaer, alleged the issuance and delivery of the policy to her for $1,800; the destruction of the dwelling-house by fire; that the deed to her mother was never delivered and was of no validity to transfer title; that Lippold had forfeited all rights under the contract of purchase; and prayed for judgment on the policy for the full sum of $1,800, with interest thereon, and an attorney's fee. On May 2, 1921, Lippold filed a pleading, which he denominated an "inter-plea," in which he claimed relief against the plaintiff on the policy, and also charged that the plaintiff had agreed to pay him the sum of $450 in settlement of the loss. On May 28, 1921, Nellie and Mary Gumaer filed an answer to the "inter-plea" of Lippold, to the effect that Lippold had forfeited all rights under the contract, and that they were entitled to an equitable lien upon the $450, claimed by Lippold against the plaintiff.

Under this state of the pleadings the case was called for trial on May 28, 1921; default was entered against plaintiff for failure to plead to the cross-petition of Nellie Gumaer, and the "inter-plea" of George Lippold, and judgment was rendered against the plaintiff and in favor of defendant Nellie Gumaer on her cross-petition for $1,800 and interest, together with an attorney's fee of $200, and judgment was also rendered in favor of Lippold on his "inter-plea" against plaintiff for $450 and interest. On May 30, 1921, plaintiff filed a motion for a new trial, based upon a number of grounds, which

was overruled. From this judgment the plaintiff appeals.

One of the errors assigned is that the default and judgment against the plaintiff were prematurely entered. We think this assignment is well taken. It will be noted that the plaintiff asked no affirmative relief against either of the defendants. It simply brought a fund into court, alleged that defendants were claiming it, and asked the court to determine the respective rights of the defendants thereto.

The defendants by their respective counterclaims against the plaintiff, praying for affirmative relief against it, presented an entirely new issue in the nature of an independent action. While it was not necessary that a summons should issue against the plaintiff, nevertheless it had the same time to plead to the cross-petitions as though the defendants were plaintiffs and the plaintiff was defendant. While the precise question, so far as we are aware, has not heretofore been passed upon by this court, an analogous question has been considered. In *Cockle Separator Mfg. Co. v. Clark*, 23 Neb. 702, it was held that, when a defendant files an answer against his codefendant in the nature of a cross-petition, although no summons need be issued thereon, yet the co-defendant is entitled to the same time to plead thereto as though the defendant filing the answer was plaintiff and the codefendant sole defendant, and that a decree taken before the time to plead was erroneous. Under this rule the plaintiff had until May 30, 1921, to plead to the cross-petition of Nellie Gumaer, and until June 6, 1921, to plead to the cross-petition of George Lippold.

Besides this, we are of the opinion that the judgment as a whole is not responsive to the pleadings. The pleadings clearly indicate that the claims of the respective parties defendant primarily rest upon the policy. It seems quite clear, therefore, that the liability of the plaintiff could not exceed the amount of the face of the

policy with interest, together with a reasonable attorney's fee. The aggregate judgment of $2,250 with interest, together with an attorney's fee against the plaintiff, based upon its $1,800 policy, is manifestly excessive.

Since the case has been pending in this court, it is claimed by the plaintiff that a full and complete settlement has been made and effected between the plaintiff and the defendants Nellie and Mary Gumaer, which disposes of the whole case. We are asked by the plaintiff to approve the settlement, to determine the amount of an attorney's fee which should be allowed defendants' attorney in this court, and to dismiss the appeal.

Nellie and Mary Gumaer, however, claim that the so-called settlement was procured by fraud, and they have tendered back to the plaintiff the amount paid upon the settlement. Numerous and lengthy affidavits have been filed bearing on the question of the good faith of the settlement. It will serve no good purpose to set out the circumstances and the inducements which led up to the signing of the contract of settlement. Suffice it to say that, upon a consideration of all of the facts and circumstances surrounding the settlement, we are convinced that it ought not to stand, and that the parties should not be bound by it.

Up to this time the merits of the case have not been passed upon. Upon an examination of the record, we have come to the conclusion that the judgment should be reversed, with directions to fix the time for making up the issues as between the respective parties, and that the case be heard upon its merits.

The question of attorney fees for defendants' attorneys can then be determined.

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

REVERSED.

CHARLES W. KIBLER, ADMINISTRATOR, APPELLEE, V. JAMES C. DAVIS, DIRECTOR GENERAL, APPELLANT.

FILED MARCH 12, 1923. No. 22234.

1. **Commerce:** FEDERAL EMPLOYERS' LIABILTY ACT: INTERSTATE EMPLOYMENT. Where one is engaged in shoveling coal into a pit, to be elevated by machinery into a coal chute for immediate use in engines, used in both interstate and intrastate traffic, he is engaged in a work so closely related to interstate transportation as to be a part of it, and is within the protection of the federal employers' liability act.
2. **Evidence,** examined and set out in the opinion, *held* sufficient to sustain a finding of negligence.
3. **Master and Servant:** INJURY TO SERVANT: DEFENSE OF CONTRIBUTORY NEGLIGENCE. In actions under the federal employers' liability act, contributory negligence, no matter how great, is not a defense, but may be considered for the purpose of reducing a recovery.
4. ———: INSTRUCTIONS: ASSUMPTION OF RISK. Where the defense of assumption of risk is submitted to the jury on conflicting evidence and under proper instructions, their verdict is conclusive.
5. **Instruction,** examined and substance stated in the opinion, *held* to correctly state the law applicable to assumption of risk.

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

C. A. Magaw, Thomas W. Bockes and *Thomas F. Hamer,* for appellant.

William E. Shuman and *N. P. McDonald, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., TROUP, District Judge.

GOOD, J.

Plaintiff, as administrator of the estate of Albert Gammill, deceased, recovered a judgment for damages under the federal employers' liability act against the defendant, for negligently causing the death of Gammill, and defendant has appealed.

Defendant denied any negligence on its part, pleaded assumption of risk, and that the death of Gammill re-

sulted wholly from his own negligence, and denied that deceased was engaged in interstate commerce or that defendant was liable under the federal employers' liability act.

The principal questions for solution, as presented by this appeal, are: (1) Was deceased, at the time he met his death, engaged in interstate transportation or in work so closely related to it as to bring the case under the federal employers' liability act? (2) Was defendant guilty of negligence that caused or contributed to the death of Gammill? (3) Did deceased assume the risk of injury? (4) Did the court err in giving or refusing instructions on the subject of assumption of risk?

1. The facts surrounding the employment and death of Mr. Gammill are about as follows: The Union Pacific Railroad Company maintains coal chutes and bins at Kearney, Nebraska, at which all classes of trains, both interstate and intrastate, are coaled. These coal bins are elevated and stand above and over the two main-line tracks and the passing track. Engines stop beneath these bins and receive coal by means of a chute which dumps it into the engine tender. The coal reaches the elevated bins from cars which are first pushed in on what is known as the hopper track, which is immediately north of and adjacent to the passing track. A pit constructed beneath the hopper track receives the coal as it is dumped from the bottom of coal cars, and from this pit it is elevated by machinery to the bins overhead. In dumping the coal into the pit, some remains in the car, and some is spilled about on the hopper track. The coal that remains in the car and that which is scattered about the track is required to be shoveled into the pit. This was the work in which Gammill was employed. The coal bins above the three tracks would hold about 250 tons, and were filled on an average of once in 36 hours, so that the coal placed in these chutes was for immediate use in the engines of the railroad company.

The rule applicable to the question under consideration is that for an employee to come under the federal employers' liability act he must, at the time of the injury, be engaged either in interstate transportation or in work so closely related to it as to be practically a part of it. *Shanks v. Delaware, L & W. R. Co.*, 239 U. S. 556; *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146. While the rule is well established, much difficulty arises over its application to a given state of facts, and there is a marked want of harmony in the decisions of the various courts in determining whether work of a similar character, that is, work that is not directly a part of interstate transportation but is essential to and intimately connected with or related to it, comes within the rule. We think no useful purpose would be subserved by attempting a review of the cases. Each one must be determined upon the facts and circumstances of the particular case. In the instant case, the coal which decedent was shoveling was intended for use in and was essential to the operation of interstate trains. The work performed was the last manual labor performed before it was appropriated to its intended use.

We are of opinion, where one is engaged in shoveling coal into a pit, to be elevated by machinery into a coal chute for immediate use in engines used in both interstate and intrastate traffic, that he is engaged in a work so closely related to interstate transportation as to be a part of it, and that he is within the protection of the federal employers' liability act. Cases in which there is a more or less similar application of the rule are: *Guy v. Cincinnati N. R. Co.*, 198 Mich. 140; *Pedersen v. Delaware, L. & W. R. Co., supra; Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156; *North Carolina R. Co. v. Zachary*, 232 U. S. 248; *Philadelphia, B. & W. R. Co. v. Smith*, 250 U. S. 101; *Erie R. Co. v. Collins*, 253 U. S. 77; *Erie R. Co. v. Szary*, 253 U. S. 86; *Philadelphia & R. R. Co. v. Di Donato*, 256 U. S. 327; *Horton v. Oregon-Washing-*

ton R. & N. Co., 72 Wash. 503; *Southern R. Co. v. Peters*, 194 Ala. 94; *Barlow v. Lehigh V. R. Co.*, 143 N. Y. Supp. 1053; *Chicago, R. I. & P. R. Co. v. Bond*, 47 Okla. 161; *Kelly v. Erie R. Co.*, 177 N. Y. Supp. 278; *Roush v. Baltimore & O. R. Co.*, 243 Fed. 712; *Kamboris v. Oregon-Washington R. & N. Co.*, 75 Or. 358; *Sells v. Grand T. W. R. Co.*, 206 Ill. App. 45; *Slatinka v. United States Railway Administration*, 194 Ia. 159.

2. It is argued that the evidence does not show any actionable negligence on the part of defendant. The evidence shows that the hopper track was a stub track long enough to hold 14 cars. Its eastern end was connected by a switch with the passing track. The western half of the hopper track was level and about four feet higher than the adjacent tracks. The east half inclines downward to the switch. The coal pit is about 30 feet long and located at the east end of the level, elevated portion of the track, and on each side of the pit there is an iron wall some three feet distant from the track. The custom was for the switching crew to set in five or six cars of coal at a time. These would be pushed to the west end of the hopper track, leaving the last car of coal of the string over the pit. When this was unloaded, the shovelers would "pinch" or push the car to the east and allow it to descend the incline by gravity. Then the next car would be "pinched" or pushed over the pit and unloaded and disposed of in like manner as the first, and so on, until the last car was unloaded, which would be left standing over the pit. The switching crew, when being advised that other cars of coal were needed, would then pick up the empty cars and remove them from the hopper track. In doing so, they would sometimes push other cars ahead of the engine and connect with the empty cars to be removed. On the day of the accident all the cars, six in number, had been unloaded and the coal shoveled into the pit by about 10 o'clock in the forenoon. The foreman requested other cars to be set in for unloading, but this was not done

until shortly after noon. Gammill and his fellow workmen were standing or leaning against the west end of the empty car, standing over the coal pit, ready to resume their labors when another supply of coal for unloading was furnished. Shortly after 1 o'clock in the afternoon, the switching crew pulled from the west on the passing track and past the coal pit a string of ten cars, five being loaded box cars and five being loaded with coal. The front end of the engine was coupled to these cars. This string of cars was pushed by the engine onto the hopper track and against the empty coal cars and up the inclined track against the car standing over the pit, to the west of which Gammill was standing, knocking him down, running over him and inflicting injuries from which he died. The evidence shows that this string of cars was pushed violently along the track; that no whistle was blown or other signal given, and that no flagman was placed on the front end of the advancing string of cars to give warning to any one; and it is also disclosed that the engineer on the switch engine was aware of the fact that coal shovelers were likely to be on the hopper track, waiting to perform their duties.

Under the circumstances disclosed, we think there was sufficient in the evidence to warrant the jury in finding that the defendant was negligent.

3. Defendant contends that the rule stated in *Merkouras v. Chicago, B. & Q. R. Co.*, 104 Neb. 491, is in point, but we think there is a clear distinction between the *Merkouras* case and the one at bar. That was a case not under the federal employers' liability act, and the doctrine of comparative negligence was applicable, and it was held in that case that the negligence of plaintiff was more than slight. In actions under the federal act, contributory negligence, no matter how great, is not a defense, but may be considered for the purpose of reducing the recovery. *Fitzpatrick v. Hines*, 105 Neb. 134; *Chicago, R. I. & P. R. Co. v. Ward*, 252 U. S. 18.

4. It is argued that, assuming that there was negligence in the manner of handling the cars, in placing them upon the hopper track, there is no liability, because deceased had assumed the risk of injury arising from the manner in which such cars were ordinarily placed on that track. There is a conflict in the evidence as to whether a flagman was usually kept on the front end of a string of cars, when being pushed onto the hopper track, and the evidence shows that the cars were, on this particular occasion, pushed with more than usual violence. Where the defense of assumption of risk is submitted to the jury on conflicting evidence and under proper instructions, its verdict is conclusive on the question. *Fitzpatrick v. Hines, supra; Morris v. Hines*, 107 Neb. 788.

5. Defendant complains of the giving and refusal of instructions on the subject of assumption of risk. The instruction given is quite lengthy and will not be quoted in full. In effect, it told the jury that an employee assumes the ordinary risks and dangers incident and peculiar to the employment upon which he enters, but does not assume the risks or dangers arising from sudden, unforeseen circumstances, not ordinarily incident to his employment, and further charged that deceased assumed all the risks and hazards incident and peculiar to the business of coal-shoveling, and, if from the evidence they believed the death of Gammill was due to or the result of the risks and hazards incident and peculiar to the business of coal-shoveling, that plaintiff could not recover. We think this instruction fairly stated the law applicable to the question and covered the ground of the instruction requested by defendant. It was unnecessary, and indeed would not have been proper, to have repeated the same rule in another instruction.

No substantial or prejudicial error has been found. The judgment is

AFFIRMED.

HUMPHREY M. EDGECOMBE ET AL., APPELLEES, V. CITY OF RULO, APPELLANT.

FILED MARCH 12, 1923. No. 22302.

1. **Municipal Corporations:** DISCONNECTING TERRITORY: EVIDENCE. Evidence, examined and set out in the opinion, *held* sufficient to support a finding that justice and equity require plaintiff's lands to be disconnected from the city of Rulo.
2. ———: ———. That part of section 4263, Comp. St. 1922, which reads: "The provisions of this section shall not apply to lands laid out into city or village blocks, lots and streets"—construed, and *held* to refer to conditions as existing at the time of bringing action to detach territory from a city or village, and that it does not operate to prevent the detaching of territory which had been platted and laid out into lots and blocks, when such plat had been vacated prior to bringing the action to detach territory.

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

Brogan, Ellick & Raymond, for appellant.

Sloan, Sloan & Keenan, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., TROUP, District Judge.

GOOD, J.

This action was brought under section 4263, Comp. St. 1922, to have certain tracts of land, aggregating 136 acres, detached from the corporate limits of the city of Rulo. The trial resulted in a decree detaching all except a minor part of the lands described, and defendant city has appealed.

The city of Rulo was incorporated in 1858 by a special act of the territorial legislature. The land in question is all owned by the plaintiff Edgecombe; the other plaintiffs are legal voters residing on the land. The lands were at one time platted either as a part of the original incorporated city or of one of its additions, but, while platted on paper, the streets and alleys have never been opened or worked, and for more than 40 years the lands

have been fenced and used exclusively for agricultural purposes. Prior to the commencement of this action, Edgecombe brought an action against the city in which it was enjoined from opening any of the streets in the land in question, and in that action plaintiff's title to the streets and alleys was quieted in him. The plat of plaintiff's land was vacated before this action was begun. No sidewalks or cross-walks penetrate or reach to the lands in question, and, while the city maintains an electric light plant, none of the lights or electric wires is nearer than 300 feet to any part of the premises. The city has a bonded debt of $6,000, still outstanding, for the electric light plant, and has voted bonds in the sum of $13,000 for the construction of a water plant, but which does not include any water-mains, the purpose being to assess the cost of mains against property abutting thereon when they are laid. The owner of the lands, while residing thereon, and his tenants, since he has been leasing the same, have traded at the stores, attended one of the churches, and sent their children to school in the city, and have made use of the streets, sidewalks, etc., in the business part of the city.

1. One of the provisions of the section (section 4263, *supra*) under which the action was brought is: "If the court find in favor of the petitioners, and that justice and equity require that such territory, or any part thereof, be disconnected from such city or village, it shall enter a decree accordingly." Defendant insists that the evidence does not warrant such a finding; that the proximity of the lands to the post office, church and school in Rulo, and because the occupants of the land are in a position to enjoy these privileges, because the bonds for the lighting plant and bonds for a water plant were voted while the land was inside the city limits, and because the residents thereon would have the benefit of city police protection, is sufficient to base a contrary finding to that made.

We cannot accept this view. So far as the post office,

church and school are concerned, they are not maintained by the city. The post office is maintained by the federal government, the school by state and district taxation, of which the landowner pays his proportion, whether within or without the city, and the church is supported by voluntary contributions of its members, but is not and could not be supported by the municipality. So far as the use of the streets and sidewalks is concerned, those are open to all who may have occasion to visit the city on business or pleasure. The land is benefited in no way other or different from any farm in close proximity to such a city. The police protection afforded by the city is negligible. By inference, it appears that the police force consists of a city marshal, and it does not appear that his services have been ever called for upon the lands in question in more than 40 years. While bonds have been issued and voted for public utilities during the time that the land has been in the city, it does not appear that the land or its occupants have received or will receive any substantial benefit therefrom. The evidence is ample to support the finding of the trial court.

2. Another provision of said section 4263 is: "The provisions of this section shall not apply to lands laid out into city or village blocks, lots and streets." Defendant argues that, under the rule laid down in *Sole v. City of Geneva*, 106 Neb. 879, wherein it is held: "When a privilege or right is conferred by statute, on certain prescribed conditions, and a party desiring to avail himself of such privilege or right brings action for the enforcement thereof, he must allege and prove all the facts that are essential to a strict compliance with the prescribed conditions"—the territory cannot be disconnected from the city. If the territory in question, at the time the action was brought, was laid out into city blocks, lots and streets, defendant's contention would be sound, but we think the provision of the statute quoted has reference to conditions existing at the time the action was brought, and not to a condition existing at some

previous date. The land disconnected was not, at the time the action was brought or at the time of entering the decree, laid out into blocks, lots and streets, and the provision of the statute is no bar to granting the relief prayed.

The decree is

AFFIRMED.

HERMAN J. KRAUSE ET AL., APPELLEES, V. PETER J. LONG ET AL., APPELLANTS.

FILED MARCH 12, 1923. No. 23018.

1. **Judgment:** SUIT TO ENJOIN: SUFFICIENCY OF PETITION. Petition examined, and *held* sufficient to state a cause of action to enjoin the enforcement of a judgment.
2. ———: ———. SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* to sustain the findings of fact made by the trial court.
3. ———: FRAUD IN PROCUREMENT: RELIEF IN EQUITY. Equity will afford relief against a judgment procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun.
4. ———: REVIVOR: FRAUD AS DEFENSE. Fraud in procuring a judgment cannot be urged as a defense in a proceeding to revive the same.

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

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

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

Heard before MORRISSEY, C. J., ROSE, DEAN, DAY and GOOD, JJ., RAPER, District Judge.

GOOD, J.

This is an appeal from a decree of the district court for Sheridan county, which enjoined the appellants from

enforcing a judgment, recovered on July 5, 1919, in the district court for Douglas county by Peter J. Long and Anna Long against John H. Krause and Herman J. Krause.

Peter J. Long, the owner of a section of land in Sheridan county, on which was a lake of 200 acres or more, in the latter part of December, 1915, entered into a contract with John H. and Herman J. Krause for the sale of said land for a consideration of $8,000, and received $300 as earnest money. February 3, 1916, the Krauses paid the remainder of the purchase price and received a deed from Long and wife. Two years later Long and wife instituted an action in the district court for Douglas county against the Krauses to recover damages. In that action the Longs charged in their petition that the lake on the land contained potash and valuable mineral which was wholly unknown to them at the time of the conveyance, but that such fact was fully known to the Krauses, and that by the false statements and misrepresentations of the Krauses the plaintiffs in that action were deceived and misled as to the value of the lake. In that action the Longs recovered a judgment for $75,000, which was later affirmed in this court. *Long v. Krause,* 105 Neb. 538. More than two years after the entry of the judgment by the district court, Herman J. Krause and the heirs of John H. Krause, who in the meantime had died, commenced this suit in the district court for Sheridan county to enjoin the collection of the judgment. In this action the plaintiffs allege that the defendants Peter J. Long and Anna Long conspired together to cheat and defraud John H. and Herman J. Krause, and brought the action to prosecute a fraudulent claim against them, and that in procuring the judgment they gave and caused to be given false and perjured testimony, to the effect that at the time of the conveyance of said lands they had no knowledge that there was potash or other valuable mineral in said lake, and that they believed the Krauses desired said land for

grazing purposes only, and that but for such false and perjured testimony the judgment could not have been obtained. The plaintiffs further allege that they did not have knowledge of the perjury of said Longs until long after they could take advantage of said fact in said action. The district court found that the judgment in Douglas county was the product of false and perjured testimony, given by said Peter J. Long and Anna Long; that the true character of the waters of said lake was well known to them at the time of the sale of the lands; that neither of the Longs was deceived or misled by the Krauses as to the value of the lands or quality of the waters in the lake, and enjoined the collection of the judgment.

1. Appellants contend that the petition is fatally defective in the following respects: That it does not contain any averment that the Krauses did not discover the evidence to establish the perjury and fraud complained of within two years of the entry of the judgment; that it does not contain any averment showing due diligence on the part of the Krauses to discover and present the evidence to refute the alleged perjury on the trial of the law action; and, lastly, it is defective because it contains no averment that the value of the lake, as found by the jury, was not its true value.

As to the first objection, the petition shows an averment to the effect that appellees did not have the means, or knowledge of evidence, by which to disprove the alleged perjured evidence given by the Longs until long after they could take advantage of said fact in said action. We deem this averment sufficient to meet the first objection. As to the second objection, the record discloses that the Longs testified that they had no knowledge of the mineral contents of the lake at the time they sold the land, and that they were led by the statements of the Krauses to believe that the latter desired the land for grazing purposes only. Whether the Longs had such knowledge was a fact peculiarly within their own

minds, and the knowledge they possessed could not well be known by others, unless the Longs had disclosed the information. Appellees could not be expected to anticipate that their adversaries would resort to perjury, nor to look for evidence to establish it until such time as they should be apprised of facts that would show that perjury had been committed, or at least put them upon inquiry. We think under the circumstances that no allegation, with respect to diligence was required. As to the third objection, it seems to us wholly immaterial whether the value of the lake, as found by the jury, was its true value. The real question was whether the Longs had been deceived and misled. If at the time they sold the land they knew the mineral content of the lake and knew that the Krauses wanted the land for other than grazing purposes, they were not deceived or misled by the Krauses, and the real value of the lake would be of no consequence, save that it might be a circumstance tending to corroborate the claims of one or the other of the parties. The petition is held to be sufficient to state a cause of action to enjoin the enforcement of the judgment.

2. We have examined and read with care the entire record. The evidence shows that both Long and wife knew before they sold the land to the Krauses that the waters of their lake had been tested for potash, and they believed that, in view of the distance of the lake from the railroad, its waters did not contain sufficient potash to justify the expense of building a pipe line to a reduction plant. They also knew that the Krauses wanted the land because they believed there was potash in the lake in paying quantities. It also shows that they asked and received from 50 to 75 per cent. more for the land than they had offered to sell it for a few months before. Our view of the record is that the evidence not only warrants but compels the findings of fact made by the trial court.

3. Appellants assert that the record shows that ap-

pellees discovered the evidence tendered to support the charge of fraud and perjury within two years of the date of the judgment, and that they could have applied for a vacation of the judgment in the court where rendered, and therefore they should be denied relief in a court of equity.

There is marked contrariety of opinion as to the right to relief in equity against a judgment procured by fraud, where a statutory remedy exists. Equitable jurisdiction on this ground is as ancient as the existence of chancery. Courts of equity have generally been reluctant to concede exclusive jurisdiction to courts of law arising from statutory enactment. In many jurisdictions it is held that the remedy provided by statute is concurrent with equity, and that the aggrieved party may have his election of remedies. 1 Pomeroy, Equity Jurisprudence (4th ed.) 169; 11 Ency. of Pl. and Pr. 1185; *Darst v. Phillips,* 41 Ohio St. 514; *Meyers v. Smith,* 59 Neb. 30; *Munro v. Callahan,* 55 Neb. 75; *Abbott v. Johnston,* 93 Neb. 726; *Wirth v. Weigand,* 85 Neb. 115; *National Surety Co. v. State Bank,* 56 C. C. A. 657; *Thompson v. Laughlin,* 91 Cal. 313; *Wright v. Hake,* 38 Mich. 525; *Brown v. Parker,* 28 Wis. 21.

The rule obtains in this and some other jurisdictions that equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and that to be entitled to equitable relief against the enforcement of a judgment procured by fraud the party must not have neglected to avail himself of a statutory remedy. *Van Antwerp v. Lathrop,* 70 Neb. 747; *State v. Lincoln Medical College,* 86 Neb. 269; *Bankers Life Ins. Co. v. Robbins,* 53 Neb. 44; *Proctor v. Pettitt,* 25 Neb. 96; 23 Cyc. 981; *Wirth v. Weigand, supra; National Surety Co. v. State Bank, supra; Thompson v. Laughlin, supra.*

Subdivision 4, sec. 9160, Comp. St. 1922, confers upon district courts the power to vacate their judgments, after the term for which rendered, for fraud practiced

by the successful party in obtaining the judgment. Section 9167 requires that the proceeding to vacate a judgment for fraud shall be commenced within two years after its rendition.

It becomes important to ascertain whether appellees discovered evidence, by which they could successfully impeach the judgment for fraud, before the expiration of the two-year period. It clearly appears that within two years after the rendition of the judgment appellees had knowledge of evidence tending to indicate that the Longs were guilty of perjury and fraud in procuring the judgment in Douglas county. It also appears that the major portion of the more important evidence, introduced on the trial of this case to establish the fraud, was not known to appellees until after more than two years from the entry of the judgment in Douglas county. Bearing in mind the rule that the evidence to vacate a judgment for fraud must be clear and convincing in its nature, we are of opinion that the evidence known to the appellees at the expiration of the two-year period was insufficient to establish the charge that the judgment was procured by fraud, and that it was not sufficient to have warranted a reasonably prudent person in commencing a proceeding to vacate the judgment for fraud. It is suggested that due diligence on the part of the appellees would have put them in possession of substantially all of the evidence offered. It may not be out of place to remark that it ill becomes one, who has obtained a judgment by his own perjury and fraud, to complain that his victim has not been diligent in discovering the chicanery and fraud perpetrated upon him by which the judgment was procured. There is, however, a very good reason shown why the appellees could not, within the two years, discover the needed evidence. It appears that John H. Krause, now deceased, had been charged with criminal offenses and was very unpopular in the neighborhood of the residence of all of the parties, and persons who knew of the

situation refused to give any information or lend any aid in the investigation by the Krauses and their attorneys, and not until after the affirmance of the Douglas county judgment by this court and news thereof was published in the local newspapers, and when the people of the community realized that a great wrong had been done, did they consent to talk and give information. The mandate from this court was not issued until after the expiration of the two-year period. It is not, therefore, surprising that appellees did not discover sufficient in the way of evidence to prove the fraud until after the lapse of more than two years and until after the expiration of the time when they could have used it in a proceeding to vacate the original judgment.

Equity will afford relief against a judgment procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun.

4. Since this action in equity was begun, the judgment at law was revived as against the heirs of John H. Krause, who died subsequent to the entry of the original judgment. Appellants claim that the revival of the judgment is an adjudication of the question of fraud in its procuration, on the ground that the fraud alleged could have been urged as a defense to the revivor. This contention is unsound for two reasons: First, when a court of equity has once acquired jurisdiction of a cause, it cannot be ousted of its jurisdiction by a subsequent action or proceeding at law in another court. Second, in no case and under no circumstances can the merits of the original judgment be inquired into in a revivor proceeding. Fraud in procuring the original judgment may not be urged as a defense in a proceeding to revive the same. *Supplee v. Halfmann,* 161 Pa. St. 33;

Bruno v. Oviatt, 48 La. Ann. 471; 1 Black, Judgments (2d ed.) sec. 493; 23 Cyc. 1443, 1444. Authorities cited by appellants in support of the contrary view have been examined and found not in point.

From an examination of the entire record, we are satisfied that the judgment of the district court is right, and it is therefore

AFFIRMED.

BENJAMIN A. SIMMONS, APPELLEE, V. RICHARD L. BAKER ET AL., APPELLANTS.

FILED MARCH 12, 1923. No. 22259.

1. **Appeal:** REVIEW. In a law action, begun to recover a payment of money made by plaintiff on an executory written contract for the purchase of real estate, on the ground of fraud, where the defendants denied the alleged fraud, and prayed for specific performance of the contract, the issue is triable to the court without a jury. In such a trial the function of a jury, if one is called, is advisory only. No error can be predicated upon the giving or refusal of instructions.
2. **Vendor and Purchaser:** FRAUD: SUFFICIENCY OF EVIDENCE. Evidence examined, and found sufficient to sustain the decree of the district court awarding relief to plaintiff and refusing specific performance.

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

Halligan, Beatty & Halligan, for appellants.

A. L. Bishop and *Prince & Prince, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN and ALDRICH, JJ., RAPER, District Judge.

RAPER, District Judge.

Action at law was begun by plaintiff to recover from defendants a payment that had been made by plaintiff on a contract for purchase of land. The defendants Baker and Peterson, appellants, in their answer denied plaintiff's right of recovery, and prayed for specific performance of the agreement. The issue, therefore, be-

came triable to the court without a jury. *Card v. Deans*, 84 Neb. 4. However, the court called a jury in an advisory capacity. O. B. Clark and the Bank of Stapleton were, in plaintiff's petition, joined with Baker and Peterson as defendants. Under peremptory instruction, the jury found for Clark and the bank, and the principal issue between plaintiff and Baker and Peterson was submitted to the jury, who found a general verdict for plaintiff, which the court confirmed and adopted as the finding of the court, and further found generally for plaintiff and against defendants Baker and Peterson. Decree was rendered against the appellants on their prayer for specific performance, and plaintiff was awarded the full amount of the payment he had made on the contract, with interest. From this decree Baker and Peterson appealed.

Error is alleged in the giving and refusal of several instructions; in receiving the testimony of witness Doran as to value of the property; in the court's refusal to direct a verdict for defendants,and that the verdict and decree are not supported by sufficient evidence. When a jury is called by the court in an equitable preceeding, their verdict is advisory only. No error can be predicated on the giving or refusal of instructions. *Peterson v. Estate of Bauer*, 76 Neb. 652. It is very doubtful if the knowledge of the value of the land, shown by the witness Doran, was sufficient to permit him to testify thereto, but its admission, if erroneous, was without harm, for the value of the land was not submitted to the jury, and it is evident the jury disregarded it. These alleged errors being thus eliminated, the cause must be determined by this court on the pleadings and evidence.

By the admissions of the parties in the pleadings and the evidence, it is established that plaintiff, a retired hardware merchant, about 60 years of age and in poor health, and with little experience in real estate transactions, lived at Erickson; that O. B. Clark was an old and trusted friend and former fellow townsman; that

Clark was a real estate agent at Stapleton and, in addition to his business as such agent, he owned or had contracts of sale on several hundred acres of land near the land in controversy. Clark knew plaintiff had some money and invited plaintiff to go to Stapleton for a ride, a distance of about 150 miles. A man named Lowden, an associate of Clark, accompanied them. Nothing was said to plaintiff about buying land until plaintiff and Clark had been in Stapleton for several days, during which period plaintiff had accompanied Clark on trips about the country when Clark was trying to sell his own and other lands. Clark then began to importune plaintiff to buy some land, and particularly the half-section in controversy. This half-section was owned by a Mr. Patterson, who had contracted to sell it to one Danker. Defendants Baker and Peterson bought this contract from Danker, who signed his name to a printed form of assignment on the back, without any name appearing as assignee. Baker and Peterson engaged Clark to resell the land, but plaintiff did not know that Clark was acting as their agent until after time for final settlement. During the time that Clark was soliciting plaintiff to buy the land, Clark told plaintiff that it would be a help to Clark if plaintiff would buy, and Lowden told plaintiff that, if he would buy the land, a brother-in-law of Lowden would purchase it at $5 an acre increase in price within 90 days, and was ready to do so, Clark being present when that was stated. No such person was shown to exist. At another time Clark had stated to plaintiff that he would guarantee to sell it within 90 days and make $5 an acre profit and board for the plaintiff. Just before the contract was signed, plaintiff said to Clark, "I don't want no land; now if you pull me into anything here you have got to pull me out," and Clark said, "I'll protect you. don't you worry, you will come out all right." Lowden and Clark had a person, who could not be identified, whom they told in plaintiff's presence that the land was

priced at $55. Clark was to receive all he sold the land for above $42.50 an acre, and there is some testimony, but it is not entirely clear, that Lowden was to receive $400. There are other details of the evidence which indicate that Clark and Lowden were quite insistent upon plaintiff taking the land, Lowden at one time telling plaintiff that if he did not take the land Lowden would and could resell it soon at a profit. It is clear that plaintiff placed reliance upon Clark as his friend and was without knowledge of real estate in the vicinity, that plaintiff relied upon what Clark and Lowden told him, and had no knowledge that they were interested financially in the sale. Plaintiff thereupon entered into a written agreement to purchase the land for $15,000 and paid to Baker and Peterson $2,000. Neither of the appellants had any part in the dealings until the signing of the contract.

It is urged by appellants that plaintiff must have known from Clark's statements and actions that he was acting as agent for appellants, and there are circumstances that strongly point that way. If the plaintiff had been less credulous, he might have found the truth, and, under other circumstances, his failure to make further investigation might well bar him from relief. It can hardly be said that plaintiff was dealing at arm's length with his trusted friend Clark. However, it is certain that he succumbed to the insistent and unfair pressure. The plaintiff's expectations were unduly inflamed and he was pressed into the contract by insistent and unfounded representations, some of which might be ground for rescission, such as statements that Lowden's brother-in-law was ready and able within 90 days to buy the land at an advanced price. 39 Cyc. 1275.

It has been frequently held by this court that specific performance is not generally a legal right, but is directed to the sound legal discretion of the court, and it will not be granted where its enforcement would be unjust, and the courts will be governed to great extent

by the facts and merits of the case as it is presented. Such discretion, however, is not unlimited, and a decree is not to be given or withheld arbitrarily or capriciously, but it is a judicial discretion, to be controlled and governed by equitable rules and principles. *Hoctor-Johnston Co. v. Billings,* 65 Neb. 214; *Edmiston v. Hupp,* 98 Neb. 84. Applying these rules to the whole record in this case, we feel assured that the trial court was fully justified in refusing specific performance of the contract, and that plaintiff was entitled to judgment for the payment he had made.

There is much testimony and discussion in the briefs as to plaintiff's offer at one time to perform and defendants' inability to comply, and various attempts to make settlement, all of which appears unnecessary for us to heed, in view of the decision reached.

The decree of the district court is

AFFIRMED.

THOMAS E. WOODRUFF, APPELLEE, V. THOMAS H. COOPER, APPELLANT.

FILED MARCH 12, 1923. No. 22273.

Parol Evidence. "Where the controversy is between a party to a written contract and one who is neither a party nor a privy to it, the rule excluding parol evidence tending to vary, modify or contradict the writing does not apply." *First Nat. Bank v. Tolerton & Stetson Co.,* 5 Neb. (Unof.) 43.

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

Hugh A. Myers and *Kelso A. Morgan,* for appellant.

Alfred C. Munger, contra.

Heard before MORRISSEY, C. J., LETTON and DEAN, JJ., RAPER, District Judge.

RAPER, District Judge.

This cause was originally instituted in the municipal

court of Omaha by two separate suits. From the decision there an appeal was taken to the district court, where, by agreement, the cases were consolidated and tried together.

The suits are to recover commissions for three automobile trucks sold by plaintiff while he was employed by the Lincoln Snyder Motor Company. The orders for the trucks had been taken by plaintiff, but the commissions were not to be payable until the trucks were delivered. After the taking of these orders by plaintiff, and before the trucks were delivered, the Lincoln Snyder Motor Company sold its stock and business to defendant Cooper. The terms of the sale were reduced to writing, signed by the vendor and vendee. In that writing Cooper agreed, among other things, to pay outstanding debts of the Lincoln Snyder Motor Company to the amount of $1,500. A list of the debts of the vendors was made about the time of the transfer, which aggregated something over $1,700, which, it was claimed, included all the debts that Cooper was to pay. Another list was made of accounts that Cooper did not assume. Plaintiff's claim for commissions did not appear in either list. Of the claim list totaling $1,700, Cooper paid $1,500 and Lincoln Snyder Motor Company paid the balance, but there is no evidence as to what particular debts in the list each party paid. Two of the trucks for which orders had been taken were delivered to Cooper in the transfer, and were later delivered by him to the party to whom plaintiff had sold them. The other truck was not in the stock at the time of the transfer, but soon after was sent by the manufacturer to Cooper, who delivered it to the party who had ordered it from plaintiff, Cooper thus receiving the profit on all three of the sales.

It is alleged in the petition that Cooper, as a part of the sale and transfer, agreed to pay plaintiff's commissions. This is denied by defendant. On the trial of the case the court permitted the plaintiff, over the ob-

jection of defendant, to offer oral testimony that Cooper, as a part of the consideration for the transfer of the property, did agree to pay plaintiff's commissions when the trucks were delivered. The issue was submitted to the jury under instructions which are not criticised in appellant's brief. Verdict and judgment was awarded plaintiff, and the evidence is amply sufficient to sustain the verdict.

The principal contention of appellant is that the court erred in admitting parol evidence to vary the terms of the written agreement entered into between the Lincoln Snyder Motor Company and Cooper. The principle involved has been determined by this court in several cases adversely to appellant. The case of *Heisler Pumping Engine Co. v. Baum,* 86 Neb. 1, is squarely in point, and directly applicable. In *Durland Trust Co. v. Payne,* 106 Neb. 135, the same principle is adopted. These decisions, with the authorities quoted therein, need no further comment. The trial court did not err in admitting the oral testimony.

The judgment is right, and it is

AFFIRMED.

ROY C. MERRITT, APPELLEE, V. JOSEPH JOHNSTON, APPELLANT.

FILED MARCH 12, 1923. No. 22253.

1. **Contract:** CONSTRUCTION. The agreement sued on and set forth in opinion construed, and *held* a contract of employment, and not one of partnership.

2. **Trial:** ACCOUNTING: TRIAL TO JURY. Suit upon a contract of employment to recover the stipulated compensation named therein for services performed, even though said compensation or part thereof consists of a certain per cent. of the net income of defendant's business, is triable primarily before a court and jury, and neither party is entitled, as matter of right, to have the case transferred to a court of equity, unless it should manifestly appear that the issues and items therein are so numerous and the evidence to sustain them so variant, technical and voluminous that a jury is

incompetent to deal intelligently with them and come to a just conclusion.

3. ———: ———: ———. Issues and evidence examined in the case at bar and *held* the trial court did not err in overruling defendant's motion to transfer the case to an equity court.

APPEAL from the district court for Douglas county: L. B. DAY, JUDGE. *Affirmed.*

Gaines, Van Orsdel & Gaines, for appellant.

Harland L. Mossman, contra.

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., TROUP, District Judge.

TROUP, District Judge.

Plaintiff brought his suit at law to recover from defendant an alleged balance due him for compensation as manager of defendant's business, under a certain written contract set forth in his petition, wherein it is stipulated that plaintiff was to receive for his services $150 a month, and in addition thereto one-half of the net income from the business. Plaintiff alleges he entered defendant's employment on September 26, 1918, and remained until November 18, 1920, during which time he drew $150 a month and in every way fulfilled his part of the agreement; that the net income of the business, during the time aforesaid, amounted to $15,936.63; that plaintiff received from defendant on account thereof the sum of $1,195, and no more, and that there remains due him the sum of $7,145.81, for which he prays judgment.

Defendant, answering, admits the contract set forth in the petition; that plaintiff entered employment of defendant thereunder, as stated, and so continued to November 18, 1920, at which time plaintiff, desiring to terminate said contract, offered to accept and thereupon was paid by defendant the sum of $1,200 in full settlement of any amounts that might be due him under said

contract. Further answering defendant denies that the net income of the business is as stated in the petition, and avers that at the time of the settlement the net income had not been ascertained, but that plaintiff, having had full charge of the books, knew better than defendant what the net income was. Plaintiff's reply denies all new matter in defendant's answer.

At the close of plaintiff's testimony the defendant moved the court "to dismiss the jury and to refer the case to the equity court, for the reason that the same, upon the showing made by plaintiff, involves an accounting, and hence is not proper to be submitted to the jury." The motion was overruled; the trial proceeded with the introduction of defendant's evidence; the case was submitted to the jury, and a verdict rendered for plaintiff in the sum of $3,750. Defendant appeals.

The first contention made by defendant is that the contract between the parties hereto is one of partnership, and not employment. We cannot take that view of it. The contract is as follows:

"This agreement, made this 26th day of September, 1918, between Joseph Johnston, doing business as the Western Plumbing & Heating Company of Omaha, Douglas county, Nebraska, and R. C. Merritt of Omaha, Douglas county, Nebraska, Witnesseth:

"Joseph Johnston is the owner of a plumbing and heating business which is conducted under the name of the Western Plumbing & Heating Company, and is desirous of obtaining the services of R. C. Merritt as manager of said business, and R. C. Merritt is desirous of accepting said employment.

"Joseph Johnston agrees to pay to R. C. Merritt for his services the sum of $150 per month, and one-half of the net income received from said business, after the payment of all expenses, and after the payment of an equal salary, to wit, $150 per month to the said Joseph Johnston.

"It is further agreed that in the event of the withdraw-

al of said Joseph Johnston from the plumbing and heating business for any reason whatsoever, or upon the death of the said Joseph Johnston, R. C. Merritt in consideration of said services shall further have a right to continue to conduct said business under the name of Western Plumbing & Heating Company, and shall be from henceforth a joint owner with the said Joseph Johnston of said trade name.

"R. C. Merritt hereby agrees to accept said employment and agrees to devote his best energies and his time to the prosecution of said business and the management of the same.

"In witness whereof the parties have hereunto signed their names this 26th day of September, 1918.

"(Signed) Joe Johnston.

"(Signed) R. C. Merritt.

"(Signed) E. M. Owen, witness."

It would seem that a mere reading of the contract must convince one that it is but a contract for hire, pure and simple, and that the parties to the same must have had no other contemplation in view, except and until at least one or both of the contingencies mentioned in paragraph 4 of said contract should arise. Neither of these contingencies did arise. That the contract provided that part of the compensation to be received by the plaintiff for his services should be a certain portion of the net income of the business does not tend to render it any the less a contract for employment. *Aetna Ins. Co. v. Bank of Wilcox,* 48 Neb. 544; *Whitney v. Gretna State Bank,* 50 Neb. 438; *Agnew v. Montgomery,* 72 Neb. 9. Such a stipulation in a contract between master and servant is of frequent occurence and becoming more so every year, and is generally considered to be highly promotive of the interests of both employer and employed. Besides, the parties themselves have regarded the contract as one of employment only, as evidenced by their pleadings, the substance of which is above set forth; neither was a contrary view assumed by either

party at the trial. In such a case ordinarily for that reason alone the court will be justified in adopting the construction given it by the parties. *School District v. Estes,* 13 Neb. 52; *Paxton & Gallagher v. Smith & Co.,* 41 Neb. 56; *Fiscus v. Wilson,* 74 Neb. 444; *Jobst v. Hayden Bros.,* 84 Neb. 735.

The next position taken by defendant is that, even if the court should hold the contract to be not one of partnership, still the cause of action is of such a nature as that the only proper forum for its determination is a court of equity where an accounting may be had between the parties, and that the trial court erred in not sustaining defendant's motion to transfer the case to an equity court. We do not believe this position is well founded. This action does not call for an accounting. Certainly the defendant does not require one, for he makes no counter charges against the plaintiff in his answer and none arises in the evidence. The action is simply one upon a contract, and its purpose is to recover for a breach thereof, that is, for a failure to pay a part of the compensation stipulated therein. Primarily, therefore, this would be a law action cognizable for trial before a court and jury, and the mere fact that the compensation sued for consists of a portion of the net income of defendant's business, to determine which requires some examination of defendant's books of account, would by no means necessarily transform the case from one at law to one in equity. *Lee v. Washburn,* 80 App. Div. (N. Y.) 410, and cases cited.

Before, if at all, a so-called "accounting", and a court of equity to handle the same, can be demanded in a case like the present one, it must appear that the issues and items are so numerous, complex and technical that it becomes apparent that a jury is unable to deal with it. As was said in the case of *De Bevoise v. H. & W. Co.,* 67 N. J. Eq. 472, wherein it appeared that plaintiff was to receive $2,000 a year salary and 25 per cent. of the net profits:

"To justify a bill in equity for an accounting, the issues must be so numerous, so distinct, and the evidence to sustain them so variant, technical and voluminous, that a jury is incompetent to deal intelligently with them and come to a just conclusion."

Such a situation is not present in the instant case. The defendant employed an expert auditor and accountant to go over his entire accounts with a view of showing just what was desired to be known by either party. Both plaintiff and defendant joined in aiding the accountant in this behalf, with the result that the accountant exhibited to the court and jury a complete, accurate, itemized, typewritten statement of just what the defendant's books showed in this regard and a deduction therefrom of what the net income was for the given time required; so that there was but little or no occasion for any material dispute to arise, and, as we view the evidence, but little or no material dispute did arise, except one pertaining to the correct inventory of defendant's stock, which arose as follows: After the audit was completed and the accountant had fully finished his work, the defendant intimated that the accountant had not taken the correct inventory of the stock as a basis for computation. The accountant stated that he had taken the only inventory which appeared in his books and the only one to which his attention had been called. Defendant stated that he had an inventory at home which defendant, his boy (13 years old), and two of his hired men had taken, and which was materially different and more favorable to defendant than the one taken by the accountant. The accountant stated to defendant that as a responsible public accountant he could not accept an inventory so casually arising and so lacking in authenticity, and the inventory employed by the accountant in the first instance was allowed to stand for the time being and remain as part of his audit. Nevertheless, at the trial the defendant was allowed to introduce the inventory referred to in

evidence and the jury and defendant had the benefit of what it purported to show.

The question of alleged settlement between plaintiff and defendant, as averred in defendant's answer, was likewise fairly submitted to the jury and the jury evidently found against the defendant on that issue. The jury returned a verdict for plaintiff for $3,750, but little more than half of what plaintiff claimed was due and considerably less than what the jury might have awarded under the evidence, and respecting which no complaint seems to be made by defendant, provided the contract in question is to be held one of nonpartnership, which we have decided it is.

We find no reason why the judgment of the lower court should not stand, and the same is therefore

AFFIRMED.

ERNEST MELCHER V. STATE OF NEBRASKA.

FILED MARCH 12, 1923. No. 22701.

1. **Criminal Law:** PLEA IN BAR. Plea in bar examined, and *held,* demurrer to same properly sustained for reasons stated in opinion.
2. ———: ADMISSION OF EVIDENCE. Objection to the admission of certain evidence, same examined, and *held,* even if not properly admitted, its admission was not prejudicial error requiring a reversal of the case.
3. ———: MISCONDUCT OF PROSECUTOR. Complaint of certain statements of the county attorney in his address to the jury considered, and while same disapproved, yet when followed by his reason for the statement, which reason was supported by the evidence, *held* of not such an injurious nature as to justify reversal.
4. **Information:** INTOXICATING LIQUORS: ALLEGATION OF POSSESSION: SURPLUSAGE. Possession of the car used by defendant in transporting intoxicating liquor is not one of the elements required under the statute, either to be alleged or proved, and therefore the character of defendant's possession is immaterial, and an allegation of possession in the complaint will be regarded as mere surplusage.
5. **Evidence** as to guilt of defendant examined, and *held* ample to sustain verdict of conviction.
6. **Intoxicating Liquors:** FORFEITURE OF AUTOMOBILE: RIGHTS OF

CLAIMANT. In a criminal prosecution under section 2, ch. 109, Laws 1919 (Comp. St. 1922, sec. 3274), for the unlawful transportation of intoxicating liquor by means of an automobile, wherein, as part of the prosecution, it is sought to condemn and sell said vehicle for the benefit of the school fund, and wherein it appears that one other than the defendant claims ownership and right of possession of said car, while it is not proper to incumber the criminal action against defendant with an investigation and determination of the alleged ownership and right of possession of said car, nevertheless, after conviction of defendant, no summary order of forfeiture and sale of said car should be made until a reasonable opportunity be afforded claimant to establish his rights of ownership and possession of said car, if any he has, within the exemptions under the statute as indicated by the decisions of this court.

ERROR to the district court for Stanton county: WILLIAM V. ALLEN, JUDGE. *Affirmed in part and reversed in part.*

D. C. Chase and *George A. Eberly,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., RAPER and TROUP District Judges.

TROUP, District Judge.

This is a criminal action wherein the defendant is charged with the unlawful transportation of intoxicating liquors, by means of an automobile used and operated for that purpose. The defendant, being found guilty, was sentenced to a term in the county jail and the automobile condemned and ordered sold. Defendant brings error.

The first assignment of error is that the trial court erred in sustaining a demurrer to defendant's plea in bar. Before a plea to the general issue was entered by defendant he filed what he denominates a plea in bar, setting forth various reasons why, as he claimed, the law under which he was convicted is invalid. The trial court made no mistake in sustaining the demurrer thereto.

The various matters complained of can be raised only under plea in abatement, and not by plea in bar, which latter can be made upon the following grounds only, to wit: "That he (defendant) has before had judgment of acquittal, or been convicted, or been pardoned for the same offense." Comp. St. 1922, sec. 10118. Filing a plea in bar constitutes a waiver of all matters necessary or proper to be raised by plea in abatement. Comp. St. 1922, sec. 10113; *Bush v. State,* 55 Neb. 195.

The defendant's objection to an instruction given by the court to the effect that, in order to convict the defendant of unlawful transportation of intoxicating liquors, it is not necessary for the state to show that at the precise moment the liquor in the automobile in question was found and seized, and the defendant in actual possession of said car arrested, the car was in actual motion, is technical at best and without merit. But technical as it is, any basis for the assumption of the fact that the car was not moving at the time stated is refuted by the evidence. On page six of the bill of exceptions, the arresting officer then being examined, these questions and answers appear: "Q. Now, what, if anything, did you do with the bottles that you found there in the car? A. I left them in at that time. Q. Did you place the defendant, Ernest Melcher, under arrest at that time? A. Well, I walked away from the car a little ways, and then I walked back, and when I got back to the car he had started his car and was leaving the place. Q. Who? A. Melcher. Q. What, if anything, did you say to him at that time? A. I ran and got on the running board and tried to stop him and did stop him. Q. Did you place him under arrest? A. I did." On cross-examination the same witness testified: "Q. When you arrived back at the car, what position was Melcher in? A. He was sitting at the steering wheel backing the car up. Q. He was backing the car out? A. Yes. Q. That's when you jumped on the running board? A. Yes, sir. Q. Did you have any help in making this arrest? A. No; I made it alone. Q.

How did you make the arrest? A. I got in the car and told him to stop."

When the defendant himself was upon the stand he nowhere denied that the car was moving when the officer jumped aboard, except in one place he said he was not backing up, but, on the contrary, on cross-examination, in referring to his companions who had accompanied him in the car to the dance and who were expecting to return with him, he testified: "They said they were ready to go; I told them I was. Q. And there wasn't anybody in your car when you started it up? A. No, sir. Q. You didn't even know that Cal Wood (the arresting officer) was on the ground? A. No. sir." Cal Wood was in hiding, and then it was he came from his hiding-place, jumped upon the running board of the moving car, compelled defendant to stop his car, and placed him under arrest, all the while the liquor being in the car where the officer first discovered it; so that, even if it were necessary to show that the car containing the liquor was actually moving at the moment of arrest and seizure, in order to prove illegal "transportation," which we do not hold it is, the evidence more than supports that fact. Certainly, there is no prejudicial error in the instruction complained of.

Another error assigned is the admission of certain testimony upon cross-examination of defendant as to defendant having engaged in similar transactions prior to the one for which he was then on trial. While we do not approve of the admission of the evidence in question, yet it cannot be said by any means that in this instance it was so prejudicial as to require a reversal of the case.

A complaint is likewise made of certain statements or language used by the county attorney in his address to the jury, the most objectionable of which is as follows: "I say to you that the defendant is a bootlegger and always has been, because his friends said that they didn't believe his statement that he didn't have any liquor." Upon objection being made, the court overruled the same,

with the remark: "The jury will have to pass on that, gentlemen. They are not bound by the arguments. Proceed in order."

This court has heretofore condemned the practice sometimes indulged in by prosecuting officers in making individual assertions respecting the guilt or character of the defendant on trial, and we again reaffirm our disapproval of this practice in so far as the above expression of the county attorney may be within it. In this case, however, the assertion of the prosecutor was followed by a statement of his reason therefor, supported by the evidence in the case, to wit: "Because his friends said that they didn't believe his statement that he didn't have any liquor with him." It was then for the jury to say whether, under the evidence, the assertion was well founded. Under these circumstances we cannot say that the alleged objectionable language was such a transgression of the rule which ought to obtain in this regard as to pronounce it reversible error, particularly so in view of the statute (Comp. St. 1922, sec. 10186) which applies to both of the objections last above referred to, and which provides:

"No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire case, shall consider that no substantial miscarriage of justice has actually occurred."

This statute was doubtless enacted for the very purpose of furnishing to this court express lawful authority to deny the reversal of a case for just such matters as are involved in the above complaints, where, after an examination of the entire case, it shall appear that no substantial miscarriage of justice has actually occurred. We have examined the whole case and are of the opinion, not only that no miscarriage of justice occurred

in finding the defendant guilty as charged, but that a palpable miscarriage of justice would have occurred, had the jury found otherwise.

The claim that the car was not in the "possession" of defendant, according to the legal import of that term, is without merit. It is needless to discuss the nature of defendant's possession and whether it was that of owner, trespasser, or thief. The statute says nothing about possession in connection with the offense to be alleged or proved. Such an allegation contained in the complaint in this instance is not a necessary or material part of the charge and it will be regarded as mere surplusage. All the statute requires is that the car or vehicle in question be used or operated for the purpose named and such allegation properly appears in the complaint. In passing, however, it may be observed that in his petition, found in the record, to suppress certain evidence, the defendant makes oath that the automobile in question was in his "custody and possession" at the time of the seizure of the same by the officer.

Complaint is made by defendant of the court's disposition of the automobile in question and a refusal to admit evidence that the same belonged to another than the defendant. As we understand it, this is a matter in which the defendant is not concerned, particularly since he disclaims all interest in the vehicle himself. The forfeiture of the vehicle is no part of the sentence to be imposed upon defendant for his individual guilt in the transaction, but is an incident only to the conviction of the defendant so unlawfully using it, and therefore proceedings looking to such forfeiture should not incumber that part of the criminal action looking only to a determination of the personal guilt or innocence of the defendant. It is only after the conviction of defendant that the action may proceed against the vehicle with a view to its forfeiture. However, it must be observed that that part of the statute under which this action is prosecuted, as well as one similar thereto re-

lating to forfeiture, has been construed not to apply to one whose property and the possession thereof had been taken without the owner's knowledge or consent, either express or implied, as by act of trespass or theft or by forces of nature beyond his control, and we think properly so, not only for the reason stated in the opinions about to be cited, that in such case it cannot be said, in a legal sense, that the owner parted with his right of possession, but because to hold otherwise would be to permit the property of an innocent person to be taken and sacrificed without due process of law. *Robinson Cadillac Motor Car Co. v. Ratekin,* 104 Neb. 369; *United States v. One Saxon Automobile,* 257 Fed. 251, and cases cited.

In view of this fact, it would seem that an immediate and summary confiscation of said car should not follow conviction, when it appears that in the meantime one claiming to be the owner of said car is endeavoring to assert his rights of ownership thereto, but in such instance a reasonable opportunity should be afforded claimant to establish said rights by invoking such civil remedy for that purpose as the law affords.

In the present case, it appears that the sister of the defendant claimed to be the absolute owner of the car in question, and that defendant had wrongfully taken possession of the same without her knowledge or consent, and she therefore instituted an action of replevin for the possession of said vehicle. Without giving the claimant an opportunity to be heard, either in her replevin action or otherwise, but following a strict literal interpretation of the statute, the court directed the sheriff of the county to repossess himself of said automobile, sell the same at public auction and turn the proceeds thereof into the school fund. This we think the court should not have done until a reasonable opportunity had been given the claimant to establish her property rights, if any she had, to said car, and only upon

her failure or refusal to so do could the summary action be taken that was taken.

That part of the judgment of the court sentencing defendant to county jail and to pay the costs of prosecution is affirmed. That part of the judgment condemning the automobile in question and directing its sale is reversed and same vacated, with directions to fix a reasonable time and opportunity for the claimant to establish her rights of property and possession, if any she has, to said vehicle within the exemptions under the statute above indicated, the ultimate disposition of said vehicle to abide the result of such action.

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3. Evidence *held* sufficient to sustain verdict for rescission of contract for purchase of stock. *Johnson v. Nebraska B. & I. Co.* 235
4. An unenforceable promise is admissible to show fraud, in a suit to rescind a contract for purchase of corporate stock. *Scow v. Bankers Fire Ins. Co.* 241
5. Evidence *held* to establish fraud in sale of corporate stock. *Scow v. Bankers Fire Ins. Co.* 241
6. Though all purchasers of stock in a corporation have been defrauded in the same way, each may sue separately to rescind for fraud. *Scow v. Bankers Fire Ins. Co.* 241
7. In an action for commissions on sales of corporate stock, it is no defense that defendant's agents, other than plaintiff, effected sales by fraudulent representations. *Stearns v. Nebraska B. & I. Co.* 657
8. Want of mutuality is no defense where the contract is performed. *Stearns v. Nebraska B. & I. Co.* 657

9. Evidence *held* to sustain verdict for commissions for sale of stock. *Stearns v. Nebraska B. & I. Co.* 657
10. Plaintiff *held* not entitled to capital stock, or royalties on sale of storage batteries, in consideration of a secret process which he did not possess. *Peerless Battery Mfg. Co. v. Hand* 696

Counties and County Officers.

1. Counties possess only governmental powers. *State v. Board of County Commissioners* 35
2. The state can direct the use, management and disposition of county property acquired by funds raised through taxation. *State v. Board of County Commissioners* 35
3. A statute requiring county commissioners to furnish offices in the county courthouse for the municipal courts *held* not to appropriate property of one district for the use of another. *State v. Board of County Commissioners* 35
4. In absence of statute a citizen cannot recover from the county for destruction of his property by a mob. *Wakeley v. Douglas County* 396

Courts.

1. The term "courts of record," as used in ch. 144, Laws 1921, *held* not to include municipal courts. *State v. Board of County Commissioners* 35
2. A statute requiring county commissioners to provide rooms for the accommodation of the "courts of record" and a statute requiring them to house municipal courts in the courthouse *held* not inconsistent. *State v. Board of County Commissioners* 35
3. Municipal courts are a branch of the state's judicial system. *State v. Board of County Commissioners* 35
4. The supreme court may promulgate rules of practice and procedure not in conflict with existing law. *Nichols v. State* 335
5. Courts will not hesitate to set aside erroneous decisions pertaining to practice. *Cain v. Miller* 441
6. Decisions of the United States supreme court construing the fourth amendment to the federal Constitution are not controlling on the supreme court of Nebraska in the construction of sec. 7, art. I of the state Constitution. *Billings v. State*.. 596

Criminal Law. See ASSAULT AND BATTERY. BAIL. BURGLARY. EMBEZZLEMENT. FALSE PRETENSES. FORGERY. HOMICIDE. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS. LARCENY. PARDON. RAPE. RECEIVING STOLEN GOODS. ROBBERY. SEARCHES AND SEIZURES.

1. Public records kept by a county treasurer are admissible as evidence of his acts. *Heilman v. State* 15

2. Immaterial and harmless errors are not ground for reversal. *Heilman v. State* 15
3. Admission of incompetent evidence is harmless where the fact is established by other evidence. *Watson v. State* 43
4. Remarks of the trial court in ruling on the admissibility of evidence *held* error. *Carrico v. State* 177
5. A verdict of guilty will not be set aside because of mere possibility of innocence. *Hans v. State* 269
6. Misconduct of counsel during argument will not be considered, where there is no reference thereto in the record. *Hans v. State* 269
7. Instruction on credibility *held* not erroneous as giving undue prominence to interest of accused. *Bray v. State* 271
8. Errors not brought to attention of trial court in motion for new trial will not be considered on error. *Hall v. State* 273
9. Permitting the state to withdraw its rest *held* not error. *Hukill v. State* 279
10. Absence of judge during argument presumed to be by consent. *Hukill v. State* 279
11. Misconduct of prosecutor in making statements unwarranted by the evidence *held* cured by cautionary instruction. *Hukill v. State* 279
12. A verdict will not be set aside for want of evidence unless clearly wrong. *Hukill v. State* 279
13. Indorsement on information of name of witness by title, instead of by his given name or initials, *held* not prejudicial. *Hallett v. State* 311
14. Accused may testify as to his intention, if an element of the crime charged. *Nichols v. State* 335
15. Where an answer to a question is unchallenged, a subsequent ruling sustaining an exception to the question is not necessarily prejudicial. *Nichols v. State* 335
16. Where jurors have the statutory qualifications, and accused has not exhausted his peremptory challenges, assigned errors in accepting or excusing veniremen are unavailing. *Nichols v. State* 335
17. Accused *held* not entitled to discharge for failure to file indictment at the term at which he was held to answer, where the felony was committed after the jury called for the term had been discharged. *Nichols v. State* 335
18. Opening statement of county attorney *held* sufficient. *Morris v. State* 412
19. Failure to qualify a witness who testifies to a fact stipulated by the parties is not reversible error. *Sweedland v. State*.. 453
20. Voluntary confessions made to a sheriff are admissible in

evidence. *Sweedland v. State* 453
21. Nonprejudicial errors do not call for reversal of conviction. *Sweedland v. State* 453
22. The court may in its discretion permit the names of additional witnesses to be indorsed upon the information after the trial has begun. *Frey v. State* 483
23. It is not error to admit testimony of a witness whose name was not indorsed on copy of information, where no prejudice is shown, nor continuance requested. *Frey v. State*.... 483
24. A judgment of a court of limited jurisdiction is not admissible unless the record shows jurisdiction of the subject-matter and the parties. *Frey v. State* 483
25. Judgment of police magistrate's court *held* inadmissible for failure to show jurisdiction of the subject-matter. *Frey v. State* 483
26. When an interpreter is appointed to interpret the procedure to accused, it is not the court's duty to require the interpreter to translate all that was said. *Markiewicz v. State*.... 514
27. Where an interpreter is appointed for accused, he cannot say that he has not been confronted by the witnesses because he failed to understand them. *Markiewicz v. State* 514
28. The guaranty that persons accused of crime shall be confronted by the witnesses against them applies to federal courts only, and not to prosecutions in state courts. *Markiewicz v. State* 514
29. An instruction based upon the maxim *"falsus in uno, falsus in omnibus"* should be given only where a witness has testified to a material issue in addition to that upon which he is directly impeached. *Markiewicz v. State* 514
30. To predicate error on the court's refusal to give an instruction based on the maxim *"falsus in uno, falsus in omnibus,"* accused must point out the material testimony to which the maxim should have been applied. *Markiewicz v. State* 514
31. Cautionary instruction as to weight of testimony of police officers and detectives *held* not erroneous. *Markiewicz v. State* 514
32. Where alibi was sole defense, an instruction on that issue only *held* not error. *Baker v. State* 558
33. Instruction defining reasonable doubt *held* erroneous, but not prejudicial. *Baker v. State* 558
34. Whether an election between counts shall be required rests in the discretion of the court. *Baker v. State* 558
35. A verdict on conflicting evidence will not be disturbed where the evidence is sufficient to sustain it. *Smith v. State* 579
36. There is a wide discretion vested in the trial court on appli-

cation for continuance on the eve of trial. *Smith v. State* .. 579
37. Reversal for refusal to grant a continuance will not be granted unless there has been an abuse of discretion. *Smith v. State* 579
38. Assisting counsel may be appointed in a felony case at the instance of the county attorney and under the direction of the court. *Smith v. State* 579
39. Courts will take judicial notice of the worth of United States money. *Lower v. State* 590
40. The court may appoint assistant prosecutors when requested by the county attorney. *Lower v. State* 590
41. The word "actions" as used in the saving clause of the act relating to repeals as affecting pending actions includes both civil and criminal proceedings. *Lower v. State* 590
42. It will not be presumed that the legislature, in the repeal of a criminal statute, intended to cause the dismissal of pending prosecutions. *Lower v. State* 590
43. It will not be presumed that the legislature intended to bestow a legislative pardon by the repeal of a criminal statute. *Lower v. State* 590
44. Articles or information pertinent to the issue will not be excluded because they may have been illegally obtained. *Billings v. State* 596
45. Articles seized in violation of the constitutional provision as to searches and seizures may be received in evidence. *Billings v. State* 596
46. All elements of the crime charged must be stated in the indictment, and failure to do so is ground for reversal. *Anthony v. State* 608
47. Showing on motion for a new trial on ground of newly discovered evidence *held* insufficient. *Caldwell v. State* 689
48. Accused is not entitled to a new preliminary hearing on an amended information which conforms to the original complaint. *Altis v. State* 774
49. Evidence *held* to sustain wife and child abandonment. *Altis v. State* 774
50. A witness may state the ultimate fact of intoxication as derived from observation. *Howard v. State* 817
51. An affidavit in support of an application for a new trial on the ground of newly discovered evidence must state the facts to which the proposed witnessess will testify. *Howard v. State* 817
52. One who has served as a juror is presumed to be qualified, in absence of contrary showing. *Seaton v. State* 828

53. Demurrer to plea in bar *held* properly sustained. *Melcher v. State* 865
54. Admission of evidence of former offenses *held* not prejudicial. *Melcher v. State* 865
55. Statements of prosecutor in argument *held* not to justify reversal. *Melcher v. State* 865

Damages.

1. Rule as to damages for breach of contract stated. *O'Shea v. North American Hotel Co.* 317
2. Speculative profits are not allowable as damages. *O'Shea v. North American Hotel Co.* 317
3. A verdict of $8,500 for permanent partial paralysis *held* not excessive. *Cornforth v. Graham Ice Cream Co.* 426
4. Provision for $500 as damages for nonfulfilment of contract for conveyance of land *held* to be for liquidated damages. *Edgar v. Anthes* 546
5. Verdict for $46,840.11 for loss of sight *held* excessive. *O'Hara v. Davis* 615
6. Damages *held* excessive. *Swartz v. Drake Realty Construction Co.* 746

Death.

Evidence *held* not to show that injury to employee caused his death. *Williams v. Hines* 11

Deeds.

1. The burden of proving mental incapacity as ground for cancelation of a deed is on the party alleging the incapacity. *Clark v. Holmes* 213
2. Undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. *Clark v. Holmes* 213
3. Possession of deed by grantee is *prima facie* evidence of delivery. *Clark v. Holmes* 213
4. Evidence *held* insufficient to show mental incapacity of grantor, undue influence, or nondelivery of deed. *Clark v. Holmes* 213
5. Measure of damages for breach of covenants of warranty stated. *Pauley v. Knouse* 716
6. In a suit for damages for breach of covenants of warranty in a deed to the husband's property, it is error to render judgment against the wife who signed the deed solely to release her contingent interest in the land. *Pauley v. Knouse* 716

Dismissal.

1. A court may dismiss an action without prejudice for plain-

tiff's failure to comply with rules of pleading and orders relating thereto. *Ferson v. Armour & Co.* 648
2. Courts have inherent power to dismiss suits with prejudice where rules of pleading and orders relating thereto are repeatedly violated. *Ferson v. Armour & Co.* 648

Divorce.

1. Though alimony, as such, may not be allowed the husband, the court may decree an equitable portion of joint earnings of the parties to the husband. *Bartunek v. Bartunek* 437
2. An order to pay temporary alimony is not a debt, but a legal duty which may be modified or set aside, upon a proper showing, by the court which rendered it. *Cain v. Miller* 441
3. The constitutional provision against imprisonment for debt *held* not to apply to a wilful refusal to pay temporary alimony. *Cain v. Miller* 441
4. The statutory provisions for the enforcement of decrees for alimony *held* not to abridge the powers of chancery courts to enforce orders in divorce cases by contempt proceedings. *Cain v. Miller* 441
5. The district courts possess legal and equitable powers to enforce decrees in divorce cases. *Cain v. Miller* 441
6. In an action for divorce, wilful refusal to pay temporary alimony constitutes contempt of court, which may be punished by imprisonment. *Cain v. Miller* 441
7. If an imprisoned defaulting husband is unable to pay alimony, he is entitled to discharge from imprisonment. *Cain v. Miller* 441

Ejectment.

Evidence *held* to present an issue of fact for the jury. *Littlejohn v. Fink* 282

Electricity.

1. An electric company must use reasonable care in erecting and maintaining guy wires. *Harris v. Central Power Co.* 500
2. Duty of telephone company in placing cross-arms on telephone poles set on the curb line of an alley stated. *Harris v. Central Power Co.* 500

Embezzlement.

1. In a prosecution for embezzlement, proof of return of money converted after discovery of the shortage is no defense. *Heilman v. State* 15
2. The amount embezzled may be determined by adding amounts taken at different times between specified dates. *Heilman v. State* 15
3. It is not necessary to fix in the verdict the value of money

embezzled. *Lower v. State* 590
4. Evidence *held* to sustain verdict. *Lower v. State* 590

Equity.

1. A suit in equity will not lie where there is an adequate and speedy remedy at law. *Hahn Syetem v. Stroud* 181
2. Equity seeks the substantial rights of parties, and applies the remedy to relieve those having the controlling equities. *Laue v. Braddock* 210
3. Where one of two innocent persons must suffer through fraud of an agent, that one who placed the agent in a position to perpeterate the fraud must suffer. *Rehmeyer v. Lysinger* 805
Taylor v. Flodman 812

Estoppel.

One is not estopped to assert an additional ground of defense of which he had no knowledge at the time he asserted other grounds of defense. *Fischer v. Fuelberth* 779

Evidence. See APPEAL AND ERROR. CRIMINAL LAW.

1. An indorsement on a note is not proved by merely introducing the note in evidence. *Shawnee State Bank v. Lydick* 76
Shawnee State Bank v. Vansyckle 86
2. Admissions of a decedent may be received against his personal representatives to show his contractual liabilities. *In re Estate of Griffin* 116
3. Sale and credit slips showing original entries are admissible in evidence as books of account, where proper foundation is laid. *Redding v. Posten* 197
4. The rule against parol evidence is not applicable in an action to rescind a contract for fraud. *Johnson v. Nebraska B. & I. Co.* 235
5. Negative evidence may be received to contradict positive evidence. *Hook v. Payne* 252
6. An expert accountant's statement of the financial condition of a corporation is admissible in evidence as an admission against interest. *Rewick v. Dierks Lumber & Coal Co.* 300
7. Plaintiff may testify that he relied upon false representations. *Rewick v. Dierks Lumber & Coal Co.* 300
8. Failure to disprove evidence tending to establish a fact against the interest of the opposing party strengthens its probative force. *Morris v. Equitable Life Assurance Society* 348
9. A witness may testify as to the nonexistence of a person; the extent of the search affects the weight, and not the competency, of the evidence. *Morris v. Equitable Life Assurance Society* 348
10. Whether guy wires were negligently placed in an alley is a

matter of common knowledge and not confined to experts. *Harris v. Central Power Co.* 500
11. Recitals in medical certificate of death *held* incompetent to prove cause of death. *Omaha & C. B. Street R. Co. v. Johnson* 526
12. Conversations between a broker, acting for both parties in an exchange of lands, and either party are admissible as a part of the *res gestæ*. *Thomas v. Jarecki* 549
13. Testimony of disinterested witnesses who measured wheat is not overthrown by mere opinion evidence. *Cunningham v. Scott* 586
14. Evidence of fraudulent representations made to induce a contract to purchase stock is admissible in an action for deceit. *Baxter v. Nebraska B. & I. Co.* 748
15. In a controversy between a party to a written contract and one not a party, the rule excluding parol evidence does not apply. *Woodruff v. Cooper* 857

Exceptions, Bill of. See APPEAL and ERROR, 4, 5.

1. A district judge cannot settle a bill of exceptions more than 100 days after adjournment of the term at which the appealable judgment was rendered. *Lincoln Land Co. v. Commonwealth Oil Co.* 652
2. On application for a bill of exceptions by one pleading poverty, the court may hear testimony, and if claim of poverty is untrue should refuse the request. *Altis v. State* 776

False Pretenses.

1. In a prosecution for obtaining property under false pretenses, the jury on conviction must find the value of the property. *Fowler v. State* 400
2. A judgment based on conviction of obtaining property under false pretenses where the jury failed to find the value of the property is erroneous. *Fowler v. State* 400
3. Upon conviction of obtaining property under false pretenses, the court must look to the verdict for the value of the property to determine the sentence. *Fowler v. State* 400
4. Obtaining an extension of a preexisting debt by fraud is not obtaining credit by false pretenses. *Dill v. State* 402
5. An indictment charging obtaining a note by false pretenses must explicitly state the causal connection between the false pretenses and the obtaining of the note. *Anthony v. State* 608

Forgery.

1. Conviction for uttering a forged instrument cannot be sustained without proof of the forgery. *Majors v. State* 316
2. The fraudulent check act did not repeal by implication the

statute relating to forgeries of checks. *Baker v. State* 558

Fraud. See EVIDENCE, 14.

1. Contract for sale of stock by employee to employer *held* admissible to show damage. *Rewick v. Dierks Lumber & Coal Co.* 300
2. Statements of officer of corporation as to value of its stock *held* representations of fact. *Rewick v. Dierks Lumber & Coal Co.* 300
3. Evidence of sales of stock is not admissible as proof of its value. *Rewick v. Dierks Lumber & Coal Co.* 300
4. In an action for fraud in exchange of property, whether plaintiff was justified in relying on representations of defendant is a question for the jury. *Sanders v. Nightengale* 667
5. Evidence *held* to sustain judgment for damages for fraud in exchange of property. *Sanders v. Nightengale* 667

Highways.

1. Where a county has collected road taxes within the limits of a city, it holds one-half thereof in trust for the city. *State v. Gallagher* 111
2. Cities of the second class are road districts and are entitled to have one-half of township road taxes expended within their corporate limits. *State v. Kelly* 113
3. A township has statutory power to raise money by taxation for the construction and repair of its roads and to make contracts therefor. *State v. Bone Creek Township* 202
4. A township may appropriate money for a portion of the expense of paving a state road through the township. *State v. Bone Creek Township* 202
5. Public roads are not "works of internal improvement" requiring appropriations therefor to be submitted to a vote of electors. *State v. Bone Creek Township* 202
6. The paving of a public highway at the partial expense of a township is not a work of "internal improvement" within the constitutional limitation as to donations. *State v. Bone Creek Township* 208
7. Where the public has acquired an easement in a road by user, courts will not inquire as to the validity of the original proceedings establishing the road. *Lee v. Eyerly* 539
8. A township is not liable for injuries from defects in highways. *Pester v. Holmes* 603
9. The exemption of townships from liability for defects in highways extends to its officers, agents, and servants. *Pester v. Holmes* 603

Homestead.

An unacknowledged contract for sale of homestead *held* valid,

where made simultaneously with a warranty deed which was acknowledged. *Farmers Investment Co. v. O'Brien* 19

Homicide.

1. Evidence *held* to sustain conviction of murder in the first degree. *Nichols v. State* 335
2. Proof required to establish *corpus delicti*. *Morris v. State* 412
3. In an information for murder, it is not necessary to specify the portion of the body on which a wound is inflicted. *Morris v. State* 412

Indictment and Information. See ROBBERY, 5.

1. The sufficiency of an oath to a complaint or information is not fixed by the Constitution, but is a matter for legislative and judicial determination. *Watson v. State* 43
2. An immaterial variance between the complaint and the information is not a ground for abatement. *Nichols v. State* 335
3. Form of information for murder in the first degree. *Nichols v. State* 335
4. The technical rules of the common law as to information are relaxed by statute. *Morris v. State* 412
5. Words in an information which when stricken leave an offense sufficiently charged may be treated as surplusage. *Smith v. State* 579
6. It is sufficient to describe a crime in the language of the statute. *Howard v. State* 817
7. Possession of automobile used by accused in unlawful transportation of intoxicating liquor is not an element of the offense, and an allegation of possession is surplusage. *Melcher v. State* 865

Injunction.

1. In a suit to restrain officers of an irrigation district from assessing city lots for irrigation purposes, the officers cannot defend on constitutional grounds available only to taxpayers and bondholders not parties to the suit. *Erickson v. Nine Mile Irrigation District* 189
2. Injunction *held* proper remedy to enforce lessor's right to a lien on crops. *Skala v. Michael* 305
3. An order dissolving an injuncttion on condition *held* not sufficient to show a breach of the injunction bond. *Drainage District v. O'Neill* 552
4. One who aids or abets violation of an injunction cannot evade responsibility. *Sharp v. State* 766
5. A test of responsibility for violation of an injunction is whether the course of action pursued was intentionally instrumental in causing a breach of the mandate. *Sharp v. State* 766

6. Courts will not permit schemes or subterfuges designed to thwart their decrees. *Sharp v. State* 766

Insurance.

1. A mutual benefit association cannot by amendment of its by-laws reduce benefits payable under its contract. *Kennedy v. Royal Highlanders* 24
2. A mutual benefit association possesses the powers enumerated in statutes under which it is organized. *Kennedy v. Royal Highlanders* 24
3. Mutual benefit association certificate providing for payment of endowment *held* valid. *Kennedy v. Royal Highlanders* 24
4. Beneficial association *held* to operate on the "assessment plan" under the statute. *Kennedy v. Royal Highlanders* 24
5. A fraternal society doing business in Nebraska must conform to her laws. *Meyer v. Supreme Lodge, K. of P.* 108
6. Evidence *held* insufficient to sustain judgment against insurer for failing to act on an application for insurance within a reasonable time. *Page v. National Automobile Ins. Co.* 127
7. Statements by employer to obligor in a bond of indemity *held* to be representations; grounds on which representations constitute a defense stated. *Farmers Union Grain Co. v. United States Fidelity & Guaranty Co.* 142
8. Evidence *held* to sustain verdict for plaintiff on a bond of indemnity. *Farmers Union Grain Co. v. United States Fidelity & Guaranty Co.* 142
9. A guaranty company is liable on an employee's fidelity bond without his signature, unless specifically provided that no liability attaches without it. *Farmers Union Grain Co. v. United States Fidelity & Guaranty Co* 142
10. Statements in an application for insurance will not be construed as warranties unless the application and policy admit no other construction. *Farmers Union Grain Co. v. United States Fidelity & Guaranty Co.* 142
11. A subsequent by-law providing for forfeiture of a benefit certificate when death is occasioned by suicide *held* valid. *Miller v. National Council, K. & L. of S.* 199
12. Presumption arising from instinct of self-preservation may be overthrown by circumstantial evidence of suicide. *Miller v. National Council, K. & L. of S.* 199
13. Evidence *held* insufficient to sustain a finding in favor of beneficiary on issue of suicide. *Miller v. National Council, K. & L. of S.* 199
14. Pleading *held* sufficient as to allegation that insured was suffocated by gas. *Birss v. Order of United Commercial Travelers* 226

15. The term "gas," as used in a life insurance policy, defined. *Birss v. Order of United Commercial Travelers* 226
16. Death of insured by inhaling gas *held* within exemption in policy. *Birss v. Order of United Commercial Travelers* 226
17. Where a contract provided that it should become void on the happening of a certain event, a surety's liability was fixed at the time of such event. *O'Shea v. North American Hotel Co.* 317
18. A surety may waive notice of default in performance of contract. *O'Shea v. North American Hotel Co.* 317
19. Where a surety knowingly issues a bond in favor of one who is acting for himself and others, in a suit on the bond the surety cannot defend on the ground that under his contract "no right of action accrues to any one other than the obligee." *O'Shea v. North American Hotel Co.* 317
20. A surety on a building contractor's bond is not liable for damages in excess of the penalty of the bond, with interest from the time the contract was broken. *O'Shea v. North American Hotel Co.* 317
21. Attorney's fee allowed in an action on a fidelity bond. *O'Shea v. North American Hotel Co.* 317
22. The burden is on claimant of life insurance to establish his identity with beneficiary named in policy. *Morris v. Equitable Life Assurance Society* 348

Intoxicating Liquors.

1. A search warrant for search of premises for intoxicating liquors need not describe the owner with the same particularity as a warrant for apprehension of a person. *Watson v. State* 43
2. To make possession of a still unlawful, it must be established that it was intended to be used for the manufacture of intoxicating liquor without permission as required by statute. *Blevins v. State* 183
3. Possession of a still for legitimate purposes is not a crime. *Blevins v. State* 183
4. "Mash" defined. *Blevins v. State* 183
5. Possession of "mash" presumed to be unlawful. *Blevins State* 183
6. Evidence *held* to sustain conviction of unlawful possession of liquor. *Bray v. State* 271
7. Evidence *held* to sustain conviction of unlawful transportation of liquor. *Melcher v. State* 865
8. Claimant of automobile used by accused in unlawful transportation of liquor should have a reasonable opportunity to establish his rights. *Melcher v. State* 865

Judgment.

1. Judgment as to identity of corporations *held res judicata. Swobe v. Drummond Motor Co.* 631
2. Plea in bar *held* not good. *Stearns v. Nebraska B. & I. Co.* 657
3. A default against plaintiff on cross-petition before time to plead has expired is erroneous. *Farmers Mutual Ins. Co. v. Gumaer* 832
4. Petition *held* to state a cause of action to enjoin enforcement of a judgment. *Krause v. Long* 846
5. Evidence *held* to sustain decree for plaintiff in suit to enjoin enforcement of a judgment. *Krause v. Long* 846
6. Equity will afford relief against a judgment procured by fraud which the injured party did not discover within the time allowed for commencing a statutory proceeding to vacate it. *Krause v. Long* 846
7. Fraud in procuring a judgment cannot be urged as a defense in a proceeding to revive it. *Krause v. Long* 846

Judicial Sales.

Only *bona fide* purchasers are protected, where the judgment under which land is sold is reversed. *Pauley v. Knouse* 716

Jury.

1. It is not improper to ascertain whether an insurance company is interested in the action, when impaneling the jury. *Penhansky v. Drake Realty Construction Co.* 120
2. The workmen's compensation act *held* not unconstitutional as denying right of trial by jury. *Nosky v. Farmers Union Cooperative Ass'n* 489

Justice of Peace.

The only judgment a justice of the peace may render on a trial of the right to property is one for costs; and the order directing restoration of the property is not a judicial order. *Fidler v. Adair* 404

Landlord and Tenant.

1. A lessor may enforce his rights to a chattel mortgage on crops in equity; and the suit impounds the crops against subsequent liens. *Skala v. Michael* 305
2. Attachments levied after suit brought to enforce lien on crops provided for in lease *held* subject to equitable right of lessor in possession. *Skala v. Michael* 305
3. Dividing and storing the landlord's share of grain may terminate the relation of landlord and tenant, though the tenant remains in possession of the premises. *Sweedland v. State* 453
4. Where a lease provides that lessee shall on demand execute a

mortgage on the crops for the rent, a mortgage on same to a third person is a fraud on the lessor. *Weigand v. Hyde*.... 678
5. A mortgagee of crops with notice of a lease providing for a mortgage to the lessor on demand to secure the rent is not a mortgagee in good faith. *Weigand v. Hyde* 678
6. Rights of mortgagee of crops *held* subordinate to those of lessor. *Weigand v. Hyde* 678
7. Evidence *held* to show that mortgagee of crops was not a mortgagee in good faith. *Weigand v. Hyde* 678

Larceny.

Evidence *held* to sustain conviction of tenant for larceny of landlord's share of wheat stored on the leased land. *Sweedland v. State* 453

Mandamus.

1. Mandamus will lie to compel directors of an irrigation district to provide water and to supervise its distribution. *State v. Gering Irrigation District* 642
2. Delay may be ground for denial of writ. *State v. Graves* 728

Marriage.

The burden of proof of marriage rests upon the party who pleads it. *Morris v. Equitable Life Assurance Society* 348

Master and Servant.

1. Compensation allowable for permanent partial loss of the use of both legs. *Frost v. United States Fidelity & Guaranty Co.* 161
2. The unreasonableness of refusal to permit an operation is a question of fact. *Frost v. United States Fidelity & Guaranty Co.* 161
3. Refusal to submit to an operation *held* not unreasonable. *Frost v. United States Fidelity & Guaranty Co.* 161
4. A disability superinduced by a preexisting disease *held* an accident arising out of employment. *Gilcrest Lumber Co. v. Rengler* 246
5. Disability prolonged by preexisting disease is compensable for entire period of disability. *Gilcrest Lumber Co. v. Rengler* 246
6. An injury and preexisting disease may combine to produce compensable disability. *Gilcrest Lumber Co. v. Rengler* 246
7. Provision for trial of question of wilful negligence to a jury under part I of the compensation act *held* not applicable to part II of the act. *Nosky v. Farmers Union Cooperative Ass'n* 489
8. Election under the compensation act will be presumed from acts of the parties. *Nosky v. Farmers Union Cooperative Ass'n* 489

9. Evidence *held* to sustain finding that employment was not casual. *Nosky v. Farmers Union Cooperative Ass'n* 489
10. Evidence as to hospital expenses *held* sufficient. *Nosky v. Farmers Union Cooperative Ass'n* 489
11. Evidence in compensation case *held* sufficient. *Nosky v. Farmers Union Cooperative Ass'n* 489
12. An employee who does not reject the compensation act surrenders his rights under the factory act. *Navracel v. Cudahy Packing Co.* 506
13. The employer's wilful negligence does not affect the compensation under the compensation act. *Navracel v. Cudahy Packing Co.* 506
14. A minor may elect under the compensation act. *Navracel v. Cudahy Packing Co.* 506
15. To recover compensation for accidental death, claimant must show with reasonable certainty that the death was proximately caused by the alleged injury. *Omaha & C. B. Street R. Co. v. Johnson* 526
16. Evidence in compensation case *held* insufficient to show that death resulted from the alleged injuries. *Omaha & C. B. Street R. Co. v. Johnson* 526
17. Acceptance of relief benefits by a railroad employee is not a bar to an action against the company for damages. *Roberson v. Chicago, B. & Q. R. Co.* 571
18. Recovery of damages by a railroad employee bars recovery of relief benefits. *Roberson v. Chicago, B. & Q. R. Co.*..... 571
19. A servant is not liable for negligence of the master. *Pester v. Holmes* 603
20. Owner of automobile *held* liable for injury caused by his son's negligence. *Galpin v. Fisher* 700
21. Compensation allowable for permanent partial loss of the use of both arms stated. *Johnson v. Cole Creamery Co.* 707
22. Compensation is fixed by statute. *Johnson v. Cole Creamery Co.* 707
23. Evidence *held* to sustain finding that the injury arose out of the employment. *McCrary v. Wolff* 796
24. Finding of dependency sustained. *McCrary v. Wolff* 796
25. Penalties for nonpayment of compensation do not attach until the obligation of the employer is fixed. *McCrary v. Wolff* 796
26. Evidence *held* to sustain finding of negligence. *Kibler v. Davis* 837
27. Instruction on assumption of risk approved. *Kibler v. Davis* 837
28. Contract *held* one of employment. *Merritt v. Johnston* 859

Mines and Minerals.

A lease for oil and minerals may be terminated for lessee's

failure to perform. *Lincoln Land Co. v. Commonwealth Oil Co.* 652

Mortgages. See CHATTEL MORTGAGES.

1. Whether a deed absolute on its face is a sale or a mortgage depends upon the intention of the parties. *Cox v. Young* 472
2. Parol evidence to establish a deed to be a mortgage must be clear and satisfactory. *Cox v. Young* 472
3. Evidence *held* not to establish a deed to be a mortgage. *Cox v. Young* 472
4. Findings of fact in a decree of foreclosure do not preclude evidence of facts arising after entry of decree on application for deficiency judgment. *Anderson v. Walsh* 759
5. Though inadequacy of price of land sold at judicial sale may not be a defense to a deficiency judgment after confirmation, it may, before confirmation, be a basis for a contract for waiver of right to object to confirmation in consideration of relinquishing right to apply for a deficiency judgment. *Anderson v. Walsh* 759
6. Where purchaser failed to pay his bid, the court may order a resale at the purchaser's risk. *Rife v. Swanson* 814

Municipal Corporations.

1. A city of the first class may frame a charter not inconsistent with the Constitution or statutes. *Consumers Coal Co. v. City of Lincoln* 51
2. General laws applicable to cities yield to provisions framed pursuant to the Constitution. *Consumers Coal Co. v. City of Lincoln* 51
3. The electorate of a city of the first class may adopt a charter in the form of a grant or a limitiation of powers. *Consumers Coal Co. v. City of Lincoln* 51
4. The home rule charter of the city of Lincoln is a grant and not a limitation of powers. *Consumers Coal Co. v. City of Lincoln* 51
5. The rules of construction of a home rule charter are determined by the form of enactment. *Consumers Coal Co. v. City of Lincoln* 51
6. The Lincoln charter confers only such legislative authority as is necessary to the excercise of powers specially enumerated. *Consumers Coal Co. v. City of Lincoln* 51
7. The method of exercising a prescribed power constitutes the measure of the power. *Consumers Coal Co. v. City of Lincoln* 51
8. City of Lincoln *held* not empowered to maintain a fuel yard in competition with private enterprises. *Consumers Coal Co. v. City of Lincoln* 51
9. Maintenance of a municipal fuel yard is a "public purpose"

for which money raised by taxation may be used. *Consumers Coal Co. v. City of Lincoln* 51
10. A home rule charter constituting a grant of power is construed in the same manner as a legislative act containing the same provisions. *Consumers Coal Co. v. City of Lincoln* .. 51
11. Cities of the second class have statutory power to contract for furnishing gas and to fix maximum rates. *City of University Place v. Lincoln Gas & Electric Light Co.* 370
12. Special assessments for construction of sewers should be confined to abutting property. *Hurd v. Sanitary Sewer District* 384
13. Incidental costs and interest may be included in a special assessment. *Hurd v. Sanitary Sewer District* 384
14. The statute providing for a special assessment for the cost of a sewage disposal plant *held* unconstitutional. *Hurd v. Sanitary Sewer District* 384
15. The cost of main sewers in excess of special benefits can only be paid for by general taxation. *Hurd v. Sanitary Sewer District* 384
16. The contracting of pneumonia in the line of duty, resulting in death, *held* within the provisions of the firemen's pension law. *Elliott v. City of Omaha* 473
17. Evidence held sufficient to submit to the jury the question whether a fireman contracted pneumonia while in the line of duty, and whether his death resulted therefrom. *Elliott v. City of Omaha* 473
18. A party attacking a sale of vacated streets must by clear proof exclude the presumption of the validity of acts of public officers. *Karlin v. Franciscan Sisterhood* 711
19. A sale of vacated streets by a city should not be set aside because of inadequacy of price, unless there is a presumption of fraud or bad faith. *Karlin v. Franciscan Sisterhood* 711
20. Special benefits to property of a railroad company should be assessed upon the same basis as other abutting property. *Chicago & N. W. R. Co. v. City of Albion* 739
21. A finding that paving has added to the value of lots a sum equal to the proportionate cost of the improvement will not justify setting aside an assessment. *Chicago & N. W. R. Co. v. City of Albion* 739
22. The fact that the board of equalization refused to insert in the bill of exceptions evidence other than that adduced by an objecting property owner will not render the assessment erroneous. *Chicago & N. W. R. Co. v. City of Albion* 739
23. It is not necessary that special benefits bear any proportionate relation to actual values. *Chicago & N. W. R. Co. v. City of Albion* 739
24. Evidence *held* to sustain judgment for plaintiff in an action to

have land detached from a city. *Edgecombe v. City of Rulo* 843
25. Where a plat of land is vacated, an action to detach it from a municipality lies. *Edgecombe v. City of Rulo* 843

Negligence.

1. Proximate cause defined. *Williams v. Hines* 11
2. Evidence *held* sufficient to submit to the jury the question of negligence of an automobilist in an emergency. *Lammers v. Carstensen* 475
3. Liability for negligence presupposes existence of a duty. *Pester v. Holmes* 603
4 Whether permitting a headlight to shine on a crossing, causing cattle to be frightened, was actionable negligence, *held* a question for the jury. *Lawson v. Union P. R. Co.* 785
5. Permitting a headlight to shine on a crossing, causing cattle to be frightened, *held* not actionable negligence. *Lawson v. Union P. R. Co.* 793
6. Under the federal employers' liability act, contributory negligence is not a defense, but may be considered in mitigation of damages. *Kibler v. Davis* 837

Pardon.

A court cannot deprive a convicted person of the right of parole. *Seaton v. State* 823

Parties.

1. The statute providing that a person in whose name a contract is made for the benefit of another may bring an action without joining the person for whose benefit it is prosecuted is not inconsistent with the statute requiring the joinder of all interested parties as plaintiffs, or defendants. *O'Shea v. North American Hotel Co.* 317
2. A railroad company cannot properly be joined with the director general of railroads in an action against the latter for injury to property in transit. *Egan v. Chicago, B. & Q. R. Co.* 567

Partition.

A remainderman cannot maintain partition over objection of holder of life estate. *Weddingfeld v. Weddingfeld* 729

Partnership.

1. A partner appointed by a court after dissolution to conduct the business until judicial sale may be allowed reasonable compensation for his services. *Efner v. Reynolds* 275
2. In settling the affairs of a newspaper enterprise, allowance of expenses of conducting a subscription contest under an order of court *held* not erroneous. *Efner v. Reynolds* 275

Pleading.

1. An application to amend a pleading is addressed to the sound discretion of the court. *Fidler v. Adair* 404
2. A petition must state facts in ordinary and concise language and without repetition. *Ferson v. Armour & Co.* 648
3. A petition may be stricken if fatal defects and improper matter therein extend to the pleading as a whole, or if plaintiff filing it ignores an order of the court. *Ferson v. Armour & Co.* 648
4. A defendant may set up an after-discovered ground of defense, as well as one first assigned, and he may rely on both. *Fischer v. Fuelberth* 779

Principal and Agent.

1. A person cannot accept part of his servant's adjustment with a telephone company and reject the remainder. *McGrew v. Nebraska Telephone Co.* 264
2. The unauthorized contract of an agent ratified by the principal is binding. *Shimonek v. Nebraska B. & I. Co.* 424
3. The unauthorized act of an agent in agreeing to refund the purchase price of stock *held* ratified by the corporation. *Shimonek v. Nebraska B. & I. Co.* 424
4. Ostensible authority to act as agent may be conferred if the principal allows third persons to act upon apparent agency. *Rehmeyer v. Lysinger* 805
5. Agent *held* authorized to collect money due on notes. *Rehmeyer v. Lysinger* 805
6. Evidence *held* to show that a mortgagee was the agent of his assignee, and payments to him satisfied the mortgage debt. *Rehmeyer v. Lysinger* 805

Process.

1. Irregularities in a summons or service may be corrected by amendment. *Land v. Christenson* 101
2. A void summons cannot be amended. *Land v. Christenson* 101
3. Summons to answer in county court confers no jurisdiction upon the district court. *Land v. Christenson* 101
4. An absconding resident may be served with summons by publication. *Skala v. Brockman* 259
5. Affidavit for service of summons by publication *held* sufficient. *Skala v. Brockman* 259

Quieting Title.

Where the statute providing for quieting title by making the land defendant is complied with, it is not necessary to comply with the statute providing for service on unknown heirs. *Miller v. Ruzicka* 152

Railroads. See CARRIERS.

1. Findings of the state railway commission will not be reversed unless clearly wrong. *Rawlings v. Chicago, B. & Q. R. Co.* 167
2. Evidence *held* to sustain verdict for injuries at crossing. *Hook v. Payne* 252

Rape.

Evidence *held* sufficient. *Lanning v. State* 467

Receiving Stolen Goods.

Evidence *held* to sustain conviction. *Hans v. State* 269
Hall v. State 273

Robbery.

1. Evidence *held* to sustain conviction. *Hukill v. State* 279
2. Sentence *held* not excessive. *Hukill v. State* 279
3. The actual taking of money or property from a bank is not the essence of the charge under the statute defining robbery of a bank. *Smith v. State* 579
4. The felony created by statute defining robbery of a bank lies in the violence against the bank with intent to steal. *Smith v. State* 579
5. An information charging robbery of a bank need not contain an averment that there was money or property in the bank. *Smith v. State* 579
6. Statute making entering of bank with intent to steal a felony *held* constitutional. *Smith v. State* 579
7. One in charge of an automobile for the escape of his companions after commission of a crime is a principal. *Clernt v. State* 628

Sales.

1. Where no price is fixed in a sale of goods, a reasonable price is implied. *Seybolt v. Waters* 99
2. Where there is no agreement as to the price of goods sold, proof of their reasonable value is essential to recovery. *Seybolt v. Waters* 99
3. Evidence that account is correct is insufficient to establish an agreement as to price or the reasonable value of goods sold. *Seybolt v. Waters* 99
4. The measure of damages for nonacceptance is the difference between the contract price and the market price at the time fixed in the contract, or the refusal to accept. *Jobbers Overall Co. v. Deputy Co.* 703
5. Evidence that specially manufactured articles were staple

held admissible to fix the measure of damages for breach of contract of sale. *Jobbers Overall Co. v. Deputy Co.* 703
6. Evidence *held* to sustain verdict that neither party was entitled to recover for breach of contract. *Weary v. Westering* 764

Schools and School Districts,

An order changing the boundaries of school district *held* void, where the posted notice failed to designate the date when the petition would be presented. *Proudfit v. School District* 173

Searches and Seizures.

1. Seizure of property not within the scope of the writ is unconstitutional. *Billings v. State* 596
2. The fourth amendment to the Constitution of the United States relating to searches and seizures applies only to the federal government. *Billings v. State* 596

States.

State *held* not liable for loss of cattle through negligence of individual members of a party of state surveyors. *Benda v. State* 132

Statute of Frauds.

1. An oral contract is not void merely because it does not specifically provide for performance within a year. *In re Estate of Griffin* 116
2. An agreement which has been performed is not within the statute. *In re Estate of Griffin* 116

Statutes.

1. Construction placed on a statute by officers charged with its enforcement, if reasonable, will be followed by the courts. *Kennedy v. Royal Highlanders* 24
2. Provision for housing municipal courts *held* within scope of the title of ch. 120, Laws 1921. *State v. Board of County Commissioners* 33
3. Where two inconsistent statutes enacted at the same legislative session amend a preexisting statute, the later act will prevail. *State v. Board of County Commissioners* 35
4. Where the legislature amends a statute, its error in ignoring a previous amendment thereof will not invalidate the later enactment. *State v. Board of County Commissioners* 35
5. Statutes are construed as prospective only, unless a retrospective effect is expressed or necessarily implied. *Adair v. Miller* 295
6. Ch. 118, Laws 1921, providing for recovery for property destroyed by a mob, *held* unconstitutional. *Wakeley v. Douglas County* 396

7. Failure to define the word "mob" will not invalidate a statute authorizing recovery by a citizen for destruction of property by a mob. *Wakeley v. Douglas County* 396
8. The legislative power of classification of property for taxation cannot be interfered with by the courts, unless the legislature has by an artificial classification violated the provisions of the Constitution prohibiting local and special legislation. *Wakeley v. Douglas County* 396
9. The simultaneous repeal and reenactment of a law continues its uninterrupted operation. *Schneider v. Davis* 638
Gooch Milling & Elevator Co. v. Chicago, B. & Q. R. Co. 693

Taxation. See STATUTES, 8. WATERS, 1-5.
1. Property used exclusively for religious and charitable purposes is exempt from taxation. *St. Elizabeth Hospital v. Lancaster County* 104
2. The use of property is the test of right to exemption. *St. Elizabeth Hospital v. Lancaster County* 104
3. Farm and dairy property used for school purposes is not subject to taxation. *Central Union Conference Ass'n v. Lancaster County* 106
4. Valuation of property for inheritance tax *held* to be the "then cash value" at time of death of decedent. *In re Estate of Woolsey* 133
5. The statute affords an adequate remedy at law for excessive valuation of property for taxation and where the board of equalization has committed prejudicial errors or irregularities. *Hahn System v. Stroud* 181
6. The statute providing that intangible property be taxed at ¼ the rate on tangible property *held* not retrospective. *Adair v. Miller* 295
7. The status of personal property for taxation purposes having become fixed by law is not affected by subsequent legislation. *Adair v. Miller* 295
8. Taxes for general purposes must be levied by valuation uniformly and proportionately. *Hurd v. Sanitary Sewer District* 384
9. The law taxing shares of stock in banks as tangible property, being invalid as to national banks, is also invalid as to state banks. *State Bank v. Endres* 753

Telegraphs and Telephones.

Deprivation of personal use of corporate telephone service is not basis for damages. *McGrew v. Nebraska Telephone Co.* 264

Trial. See APPEAL AND ERROR. CRIMINAL LAW.
1. The credibility of a witness is a question for the jury though

his testimony be improbable. *Shawnee State Bank v. Vansyckle* 86
2. A cautionary instruction as to expert witnesses and a general instruction that the jury are sole judges of the credibility of witnesses are not inconsistent. *Penhansky v. Drake Realty Construction Co.* 120
3. Instruction *held* not to disparage the testimony of expert witnesses. *Penhansky v. Drake Realty Construction Co.* 120
4. An instruction which does not precisely state the issues may not be prejudicial. *Penhansky v. Drake Realty Construction Co.* 120
5. A jury may find in favor of an employee and against the employer if the evidence justifies it under the comparative negligence rule. *Hook v. Payne* 252
6. Instructions when considered as a whole *held* not erroneous for omitting reference to defense of contributory negligence. *Cornforth v. Graham Ice Cream Co.* 426
7. A judgment will not be reversed because of faulty arrangement of instructions. *Cornforth v. Graham Ice Cream Co.* 426
8. If more explicit instructions are desired, complainant should tender them. *Cornforth v. Graham Ice Cream Co.* 426
9. Negligence of an electric company in erecting a guy wire in an alley *held* a question for the jury. *Harris v. Central Power Co.* 500
10. Where a verdict for either party would be supported by sufficient evidence, the case should be submitted to the jury. *Thomas v. Jarecki* 549
11. Instructions correctly stating the law when construed together will be held free from error. *Johnston v. Aden* 625
12. Instructions stating the law correctly as a whole are sufficient, though one or more of them, taken separately, are inaccurate. *Sanders v. Nightengale* 667
13. An erroneous instruction not prejudicial will not justify a reversal. *Gooch Milling & Elevator Co. v. Chicago, B. & Q. R. Co.* 693
14. It is an abuse of discretion to deny withdrawal of rest to correct error in evidence on a material matter, when not prejudicial to the other party. *Baxter v. Nebraska B. & I. Co.* 748
15. In an action for damages from a collision, evidence *held* to warrant submission of case to jury. *Ross v. Omaha & C. B. Street R. Co.* 823
16. Neither party is entitled to have a law action transferred to a court of equity, unless the issues are so numerous that a jury cannot give them intelligent consideration. *Merritt v. Johnston* 859

17. Refusal to transfer an action on a contract of employment to an equity court *held* not error. *Merritt v. Johnston* 859

Trover.

Evidence *held* to show plaintiff entitled to recover value of bonds converted. *Jeffery v. Burnham* 733

Vendor and Purchaser.

1. A purchaser's right to have an incumbrance discharged before acceptance of title may be waived by parol. *Farmers Investment Co. v. O'Brien* 19
2. Provisions of contract that vendor should furnish abstract and pay certain charges against the land *held* waived. *Farmers Investment Co. v. O'Brien* 19
3. Vendor *held* not to have breached his contract by not having a lien satisfied, until informed of the lien and given reasonable opportunity to satisfy it. *Farmers Investment Co. v. O'Brien* 19
4. Where a purchaser of land knows of an undisclosed defect in the title, it is his duty to notify the vendor and give a reasonable opportunity to cure it. *Miller v. Ruzicka* 152
5. An undisclosed defect in title which is cured before decree in an action to recover the purchase price is not available to the purchaser as a defense, nor a basis for rescission on his cross-bill. *Miller v. Ruzicka* 152
6. The value placed on land in an exchange is not binding on the owner in a suit for failure to perform. *Miller v. Ruzicka* 152
7. The remedies for failure to exchange land are specific performance or rescission. *Miller v. Ruzicka* 152
8. Evidence *held* to sustain decree for plaintiff in suit to recover money paid on a land contract procured by fraud. *Simmons v. Baker* 853

Venue.

1. An action to foreclose a vendor's lien is properly brought in the county where the land is located. *Miller v. Ruzicka* 152
2. A suit to rescind a contract for fraud is transitory, though part of the relief asked is the cancelation of mortgages. *Scow v. Bankers Fire Ins. Co.* 241
3. A suit to rescind a contract for fraud and to cancel mortgages need not be brought in the county where the mortgaged land is situated. *Scow v. Bankers Fire Ins. Co.* 241
4. Action against absconding debtor *held* brought in proper county. *Skala v. Brockman* 259

Waters. See INJUNCTION, 1.

1. It is within legislative discretion to exempt city property used

exclusively for other than agricultural purposes from taxation for irrigation purposes. *Erickson v. Nine Mile Irrigation District* 189

2. Irrigation district assessments to pay bonded debts and for maintenance and operation are special assessments, even though not made by acreage or frontage. *Erickson v. Nine Mile Irrigation District* 189
3. Special assessments substantially according to benefits are valid. *Erickson v. Nine Mile Irrigation District* 189
4. City lots within an irrigation dstrict used exclusively for other than agricultural purposes are properly distinguished from lots susceptible to special benefits. *Erickson v. Nine Mile Irrigation District* 189
5. All real property within an irrigation district subject to taxation in favor of bondholders when the bonds are issued remains liable to tax, notwithstanding subsequent legislation exempting city lots. *Erickson v. Nine Mile Irrigation District* 189
6. An irrigation district is a public corporation, organized to furnish water for irrigation to all landowners within the district upon equitable terms. *State v. Gering Irrigation District* 642
7. Lateral ditches should be provided by an irrigation district to furnish a just apportionment of water to each landowner. *State v. Gering Irrigation District* 642
8. Owners of land within an irrigation district may by agreement control laterals if the district fail to do so. *State v. Gering Irrigation District* 642
9. Appropriation of water for power purposes prior to legislation declaring waters in streams of the state to be property of the public was under the common law. *Southern Nebraska Power Co. v. Taylor* 683
10. A water-power right is not a "franchise" under the statute prohibiting a public utility corporation from issuing stock based on the value of its franchise. ***Southern Nebraska Power Co. v. Taylor*** 683
11. A water-power right is a vested property right which may not be taken away or impaired without compensation. *Southern Nebraska Power Co. v. Taylor* 683
12. The state railway commission may authorize a public utility corporation to issue stock based on the value of its water-power right. *Southern Nebraska Power Co. v. Taylor* 683
13. The statute prohibiting the state railway commission from granting authority to a public utility corporation to issue stock based on the value of its franchise *held* not applicable to a corporation exercising a water-right franchise. *Southern Nebraska Power Co. v. Taylor* 683

Wills. See CHARITIES.

1. A devise which is not contrary to settled principles of law or to a statute will be sustained. *Elliott v. Quinn* 5
2. In construing a will, relevant circumstances surrounding the testator at the time of its execution will be considered. *Elliott v. Quinn* 5
3. A devise by implication must so clearly result from the express wording of the will that a contrary intention cannot be supposed. *Hunter v. Miller* 219
4. The presumption that testator intended to fully dispose of his estate will not overcome the rule requiring an express or implied provision to disinherit an heir. *Hunter v. Miller* 219
5. The intention of the testator expressed in his will in terms or by necessary implication controls. *Hunter v. Miller* 219
6. Devise of a life estate to A. with remainder to B. in case A. died without issue, with no express disposition in case A. died with issue, *held* not to vest a remainder in the children of A. *Hunter v. Miller* 219
7. Where there was a devise to A. for life with remainder to B. in case A. died without issue, *held* that testator died intestate as to the remainder; A. having died leaving issue. *Hunter v. Miller* 219
8. The term "issue" *held* not used in a restricted sense as referring to one child. *Hunter v. Miller* 219
9. A devise to A. for life with remainder to her "lawful heirs" *held* to vest a fee in A. *Myers v. Myers* 230
10. The rule in Shelley's case is operative in Nebraska. *Myers v. Myers* 230
11. A divorce with settlement of permanent alimony *held* an implied revocation of will. *In re Estate of Martin* 289
12. An implied revocation of a will by divorce with alimony is not rebutted by showing of affection of husband or a mere intention that the will should stand. *In re Estate of Martin* 289
13. Circumstances occuring after revocation of will cannot be resorted to in determining whether there was a revocation. *In re Estate of Martin* 289
14. Where the evidence is conflicting, issues as to mental incapacity and undue influence should be submitted to the jury. *In re Estate of Kubat* 671
15. If a testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent. *In re Estate of Kubat* 671
16. Evidence *held* to sustain findings of mental incapacity and undue influence. *In re Estate of Kubat* 671

Witnesses.

1. An expert accountant who has examined books of a public officer to ascertain issuable facts may refresh his memory from a compilation and testify to the result of his examination. *Heilman v. State* 15
2. A party surprised by the testimony of his witness may show that he made contradictory statements before the trial. *Penhansky v. Drake Realty Construction Co.* 120
3. A communication by a patient to his physician not necessary to discharge of the latter's duties is not privileged. *Nichols v. State* 335
4. In a proceeding to probate a lost will, the proponent who is a devisee or an heir is competent to testify to conversations with the deceased testatrix. *In re Estate of Kane* 449