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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1910.

VOLUME LXXXVII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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By HARRY C. LINDSAY, REPORTER OF THE SUPREME COURT,
For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

JUSTICES.

MANOAH B. REESE, CHIEF JUSTICE.
JOHN B. BARNES, ASSOCIATE JUSTICE.
CHARLES B. LETTON, ASSOCIATE JUSTICE.
JESSE L. ROOT, ASSOCIATE JUSTICE.
WILLIAM B. ROSE, ASSOCIATE JUSTICE.
JACOB FAWCETT, ASSOCIATE JUSTICE.
SAMUEL H. SEDGWICK, ASSOCIATE JUSTICE.

OFFICERS.

WILLIAM T. THOMPSON*.....Attorney General
ARTHUR F. MULLEN†.....Attorney General
GRANT G. MARTIN.....Deputy Attorney General
HARRY C. LINDSAY.....Reporter and Clerk
HENRY P. STODDART.....Deputy Reporter
VICTOR SEYMOUR.....Deputy Clerk

* Resigned October 28, 1910.
† Appointed October 31, 1910.

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME.

NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
First.....	Gage, Jefferson, Johnson, Nemaha, Pawnee and Richardson.	Leander M. Pemberton.....	Beatrice.
		John B. Raper.....	Pawnee City.
Second.....	Cass and Otoe.....	Harvey D. Travis...	Plattsmouth.
Third.....	Lancaster.....	Albert J. Cornish	Lincoln.
		Lincoln Frost	Lincoln.
		Willard E. Stewart...	Lincoln.
Fourth	Burt, Douglas, Sarpy and Washington.	George A. Day.....	Omaha.
		Lee S. Estelle.....	Omaha.
		Howard Kennedy....	Omaha.
		William A. Redick...	Omaha.
		Willis G. Sears	Tekamah.
		Abraham L. Sutton..	South Omaha.
		Alexander C. Troup..	Omaha.
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	George F. Corcoran..	York.
		Benjamin F. Good...	Wahoo.
Sixth	Colfax, Dodge, Merrick, Nance and Platte.	Conrad Hollenbeck..	Fremont.
		George H. Thomas...	Schuyler.
Seventh	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
Ninth.....	Antelope, Knox, Madison, Pierce and Wayne.	Anson A. Welch.....	Wayne.
Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh.....	Blaine, Boone, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna.....	Greeley.
		James N. Paul.....	St. Paul.
Twelfth.....	Buffalo, Custer, Dawson and Sherman.	Bruno O. Hostetler...	Kearney.
Thirteenth ..	Banner, Cheyenne, Deuel, Garden, Keith, Kimball, Lincoln, Logan, McPherson, Morrill, Perkins and Scott's Bluff.	Hanson M. Grimes...	North Platte.
Fourteenth...	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock and Red Willow.	Robert C. Orr.....	McCook.
Fifteenth	Box Butte, Boyd, Brown, Cherry, Dawes, Holt, Keya Paha, Rock, Sheridan and Sioux.	James J. Harrington	O'Neill.
		William H. Westover	Rushville.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOL. LXXXVI.

BAYLOR, FAHY B.
CALDWELL, EDWARD G.
CLARK, ARTHUR L.
EDGERTON, FRANK EUGENE
HOTZ, WILLIAM J.
JEFFERIS, ALBERT W.
JUNGE, GEORGE E.
MCLAUGHLIN, CHARLES F.
NOLL, DENZIL
PLANTZ, ALDEN CHARLES
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TAYLOR, JOHN L.
WESTOVER, JOSEPH L.
WILCOX, WILLIAM L.

In Memoriam.

GEORGE B. LAKE.

At the session of the supreme court of the state of Nebraska, October 18, 1910, there being present Honorable MANOAH B. REESE, chief justice, Honorable JOHN B. BARNES, Honorable CHARLES B. LETTON, Honorable JESSE L. ROOT, Honorable WILLIAM B. ROSE, Honorable JACOB FAWCETT, and Honorable SAMUEL H. SEDGWICK, associate justices, the following proceedings were had:

MAY IT PLEASE THE COURT:

The committee appointed to draft and report to the court, at this time, suitable resolutions on the death of Honorable GEORGE B. LAKE respectfully submit the following:

It having pleased the Supreme Ruler to remove from this world GEORGE B. LAKE, a distinguished lawyer and jurist, formerly a judge of this court, who died at his residence in Omaha on the 27th of July, last; it is hereby

Resolved, On behalf of the members of this court, and of the bar of Nebraska, that we are deeply sensible of the loss sustained from his death by the community in which he had lived, and the state in which for more than fifty years he had borne an active, influential, and honorable part.

Resolved, That we sympathize sincerely with the surviving members of his family in their great affliction, and the grief and sorrow brought to their home by the loss of the husband and father.

Judge LAKE was born in Greenfield, Saratoga county, New York, on September 15, 1826. From early youth, and until his removal to Nebraska, he lived in the county of Loraine, in northern Ohio. There, under hard conditions of life, and solely by self-aid, he secured a fair education, studied for the profession of law, and was admitted to the bar in Elyria, the county seat, in the year 1851.

After a few years of experience there, he removed with his family to Omaha, in the year 1856, where he soon secured, and during the ensuing ten years maintained, a leading and successful practice in the territorial courts.

Three times elected to the territorial house of representatives, and its speaker during one session, he was influential in the legislation of

the earlier years of the territory, and in the framing of the first constitution, adopted in June, 1866. Under that constitution he was elected chief justice of the supreme court, and assigned for duty to the Second judicial district, comprising the important counties of Cass, Sarpy, Douglas, Saunders, Lancaster, Seward, and Butler; re-elected for six years and serving until the separate supreme court was established in 1875, Judge LAKE continued, under conditions imposing great labor, and many difficulties, to hold the appointed terms in that large and populous district with punctuality and efficiency; taking, also, his full share of the labor and responsibility of this appellate tribunal as then organized.

Chosen without opposition as a delegate to the constitutional convention of 1871, he helped, by counsel and active effort, to incorporate into the instrument then framed the reformatory principles and best features of our present constitution.

Elected in 1875 as a judge of the supreme court then organized, and becoming its first chief justice, he continued by subsequent reelections to be a member of the court until January, 1884, when he declined further service therein, returning to practice in special fields of the law, and to the repose and quiet of private life, in which he continued until his death. It is further

Resolved, That Judge LAKE was recognized as a lawyer learned in his profession, able and skillful in the conduct of his causes, safe and prudent in counsel, faithful, in its full sense, to his client's interests, and rigidly scrupulous of their rights, as well in his own dealings with them as in their controversies with others.

As a trial judge he was prompt, industrious, forceful and efficient, unusually accurate in his conclusions, whether of law or fact, intolerant of all devices to hinder or defeat justice, knowing no personality in his rulings, and, in his administration of the criminal law, believing that guilt should not be shielded or crime go unpunished because of captious technicality or weak sentiment.

As a judge of this court, its volumes of reports bear patent evidence of his research, his ability, his sound judgment, his accurate reasoning, his clear and lucid exposition of legal principles as applied to the case in hand, his direct method of reaching and stating conclusions, and his desire, so far as possible, to arrive at the very right of the matter involved.

As one of the first judges, and serving sixteen years under both constitutions, his influence in shaping the jurisprudence of Nebraska was not unlike, in a lesser degree, that of Chief Justice Marshall on the jurisprudence of the nation.

As a citizen, his simplicity of life, his unswerving integrity, his practice of fair dealing in his own affairs, and his intolerance of fraud, dereliction, or malfeasance in public office illustrated a high type of American citizenship, fitly supplementing his own official career; and his death was the close of a long, fruitful and exemplary life.

Resolved, That this memorial be preserved in the permanent records of the court, and a copy thereof be furnished to the widow and children surviving the deceased.

ELEAZER WAKELEY.
B. E. B. KENNEDY.
CHAS. O. WHEDON.
ENOS F. GRAY.
EDWIN F. WARREN.

CHARLES O. WHEDON:

May It Please the Court: The regular proceedings of this tribunal are at this time interrupted in honor of one who for seventeen years honored the court as one of its members—Judge GEORGE B. LAKE. One who through his maternal ancestor could trace his lineage in a direct line to that eminent Puritan divine, Roger Williams, the founder of the colony of Rhode Island, who because of his bold and outspoken expressions regarding the freedom of the civil magistrate from the dominion of the church was banished from the colony of Massachusetts. An ancestor remote in time, but immediate in his descendant, in sterling integrity, independence, and clear conception of the duties, powers, and functions of different departments of government. An ancestor of whom Bancroft the eminent historian wrote:

"He was the first person in modern Christendom to assert in its plenitude the doctrine of the liberty of conscience, the equality of opinions before the law; and in its defense he was the harbinger of Milton, the precursor and the superior of Jeremy Taylor. For Taylor limited his toleration to a few Christian sects; the philanthropy of Williams compassed the earth. * * * Williams would permit the persecution of no opinion, of no religion, leaving heresy unharmed by law, and orthodoxy unprotected by the terrors of penal statutes."

The indomitable spirit of perseverance which GEORGE B. LAKE inherited from that resolute ancestor is well shown by the struggles of his early youth, the success, honors, and universal respect which he enjoyed in after life.

Left without a mother's tender care when only eighteen months old; an orphan among strangers at the early age of nine years, he obtained such education as was afforded by the common schools of that day, devoted two years to study at Oberlin college, and then in the office of attorneys at Elyria, Ohio, prepared himself for his chosen profession, to the practice of which he was admitted in 1851.

Born when John Quincy Adams was president, he lived through the

administrations of Jackson, Van Buren, William H. Harrison, Tyler, Polk, Taylor, Fillmore, Pierce, Buchanan, Lincoln Johnson, Grant, Hayes, Garfield, Arthur, Cleveland, Benjamin Harrison McKinley, Roosevelt, and died during the incumbency of President Taft.

An idea of the development of this country which he witnessed may be gathered from the fact that if, when he was four years of age, all the railroad tracks in the United States had been laid in one direct line, that line would not have extended from this city to the county seat of Seward county. Its length would have been but 23 miles. He lived to see the railway track mileage of the nation exceed 335,000 miles; enough to construct a single line of track from the earth to, through, and 30,000 miles beyond the moon, and still have more than enough remaining to build a double track around the earth at the equator. Little did he imagine the day he reached his majority that he would live to the time when the capitalization of the railroads of the nation would exceed by more than $9,630,000,000 the taxable value of all the property in the United States as shown by the census of 1850, or that he would participate in a presidential election at which two states lying between the Missouri river and lake Michigan would cast an aggregate vote exceeding by more than 217,000 the total vote cast in the United States when Martin Van Buren was elected in 1836.

He came to Nebraska three years after its territorial boundaries were fixed by congressional enactment, and here spent the remainder of his days. Of his public services to the territory and the state, the resolutions now offered speak. To attempt to add to what is there said regarding those services is but to weaken encomium by the multiplication of words.

To a remarkable degree he ever enjoyed excellent physical health. Meeting him something more than a year ago, when he was enjoying a cigar, I remarked that it was the first time I had ever seen him smoking. "Probably so," he replied, "I did not commence to smoke until I was past eighty." Unpretending and industrious in his daily life, dignified and reserved in his manner, to many he appeared distant, cold, and unsympathetic. But those so impressed were not acquainted with his real character and personality. None possessed a kinder heart, warmer or more generous impulses. He had felt the pangs of poverty; and, especially toward the young man industriously seeking to overcome apparently insurmountable obstacles, he was ever kind, sympathetic, and helpful.

With him the state was a body politic or society of men united to promote their safety, welfare, and advantage by means of their union; hence, the state was to be protected and defended against every species of spoliation, peculation and plunder, equally with the individual. Of unquestioned ability and integrity, none can be found among those familiar with his public career who will not bear witness that against every attempt to cheat, graft or defraud the state he sternly set his face, and those seeking to accomplish such results found in him an active, resourceful, and effective opponent. No man has occupied a judicial position in this state who possessed a clearer conception of the rights, powers, and duties of the several departments of government than he; none more inclined to recognize and confirm them by judicial decision. His views concerning those powers, rights, and duties cannot be better expressed than by quoting from the opinion written by him in Plueler against the State, in which was involved the constitutionality of the license statute, commonly known as the "Slocumb law." He said:

"Were we acting in the capacity of lawmakers, if our business were to determine what the law should be instead of what it is, * * * we might insist that privileges granted through former licenses should be protected, or at least not entirely disregarded by the new law; and also that a material distinction be made in the amounts required from persons selling all kinds of intoxicating liquors, and those selling ale or beer alone. But these are matters purely of governmental policy, entrusted by the constitution exclusively to the legislative department of the government, and with which the judiciary have not the slightest concern, so long as no right secured by the paramount law is invaded, except, when appealed to, to uphold and enforce the properly expressed will of the law-making power."

"It has been said that the temple of fame stands upon the grave; that the flames which burn upon its altars are kindled from the ashes of dead men. If so be it, yet is the superstructure of that temple fabricated from the events of a well ordered, a well spent, life; from a record of private and public duty, faithfully, honestly, and conscientiously performed. Of such material is built the temple of him in honor of whose memory we are here assembled; who has now met "the sleeping partner of life—a change of existence."

ENOS F. GRAY:

May It Please the Court: It is with grateful pride I pay my tribute of respect to the memory of Judge GEORGE B. LAKE. It seems fitting that we should express our appreciation of the great services of the

eminent jurist, who has departed to that bourne from whence no traveler returns.

In the early history of this state, while he sat here with MASON and CROUNSE, and later with GANTT, MAXWELL, and COBB, I learned to know that Judge LAKE was an able lawyer, judicious and accurate in his decisions, and, withal, a courteous and pleasant gentleman. He seemed to possess such large capacity of mind, and manly disposition, as to raise him above the entertainment of envy of others, or personal spleen to mar his intercourse with men.

It is to his services, very largely, we owe the construction of our statutes and constitutional provisions, the application of common law principles in this state, and the settlement of our practice. Every lawyer in this state, now and hereafter, will appreciate the great value of his judicial labors. Our grateful eulogy now is but a breath, and will be forgotten; but what he has done for us is on record for constant use and guidance through all the future of Nebraska. The family and friends of Judge LAKE may erect his memorial stone, emblazoned with their fond remembrances, but he, himself, has written upon our lasting pages a more enduring memorial of his great deserts, and such as will command the respect and admiration of men so long as our state shall exist.

In ancient times all praise was awarded to the hero of war, or the conqueror who had left ruin on his march, and waded through the blood of innocence to a tyrant's throne; but in our age we are allowed to appreciate civic excellence and useful civil services. The man who, with superior capacity of mind, has devoted his energy to the useful service of his fellow men, and, in an eminent degree, has conferred benefits upon his state, is most worthy of our applause; and such a man was Judge LAKE.

An excellent judge, counselor, sage; he has departed

> "To the dark grave, retiring as to rest;
> His people blessing, by his people blest."

HONORABLE MANOAH B. REESE, C. J.:

As is known to all familiar with the early history of this state, Judge LAKE was one of its honored pioneers. My first acquaintance with him was in the year 1871. At that time he was one of the judges of the supreme court, and, by the law then in force, one of the three district judges of the state. Later, by a change in the constitution, the courts were separated, and he became one of the three judges of

the supreme court, the service of those judges upon the district bench having been by that instrument dispensed with and district judges provided for those courts.

In all the long career of Judge LAKE, as both district and supreme judge, there was never at any time a single charge or breath of suspicion against his personal honor and integrity. He was at all times recognized by the bar and the people of the state as a just, conscientious, painstaking, and able judge. He was one of the strong men of the state. He has left an indelible mark upon its jurisprudence. He sought the right in all his decisions, and, when his judgment was convinced as to what was right, he was inflexible, and no other considerations had any place in his mind. In connection with his able associates, Judges GANTT, MAXWELL, and COBB, he succeeded in laying the foundations of the legal policy of the state upon the indestructible rules of Justice and Law, and has thus erected a monument to his memory which can never be shaken or destroyed. He died at a ripe old age in the full glory of a life well spent and a life work well performed. We revere his memory. Many will profit by his example, and will treasure up in fond recollection the name, character, and labors of Judge GEORGE B. LAKE.

BY THE COURT:

It is ordered that the resolutions reported by the committee be spread upon the records of this court, and that they be published in the next volume of the reports.

M. B. REESE,
Chief Justice.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1910.

OSCAR L. STONE, APPELLANT, V. IDA BLANCHARD, APPELLEE.

FILED MAY 20, 1910. No. 16,045.

1. **Forcible Entry and Detainer: JURISDICTION.** A justice of the peace has no jurisdiction to try actions of forcible entry and detainer in which the title to real estate is sought to be recovered, or may be drawn in question, and in such case the district court on appeal has no jurisdiction to try such issue, and should dismiss the action for that reason.

2. ———: ———: DEFENSES. An equitable title to real estate and possession thereunder may be shown as a defense in an action of forcible entry and detainer. A justice of the peace has no jurisdiction to try such a title.

3. ———: ———. No mere claim of title or assertion that title is drawn in question will deprive a justice of the peace of jurisdiction to try the cause. He must ascertain from the evidence whether the action involves or draws in question the title to real estate.

4. ———: ———. Forcible entry and detainer is an action to determine the right of possession only. Any evidence tending to show which party is entitled to possession, whether it be title deeds or other written or oral testimony, should be considered. But a justice of the peace can try only the right of possession. If that right depends upon some right of the defendant, whether legal or equitable, in the property itself, he must dismiss the action for want of jurisdiction.

5. ———: ———: DEFENSES: ESTOPPEL. If title to real estate is sought to be recovered or drawn in question in an action of forcible entry and detainer, questions of estoppel affecting the right of defendant to assert such title cannot be decided by the justice of the peace.

6. ———: EVIDENCE. If a son gives to his mother money with which to procure a home, and pursuant thereto the money is deposited in a bank to the mother's credit, and real estate is purchased with a part of said money, and the mother builds a house thereon with the remainder and occupies the same as her home, the fact that the son took the title to the real estate in his own name without the knowledge of his mother at the time will not enable him or his grantee, who took a deed from the son while the mother was in possession of the property, to recover the possession of the property in an action of forcible entry and detainer.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Burr & Marlay, for appellant.

James A. Brown and *J. T. Allensworth, contra.*

SEDGWICK, J.

This is an action in forcible entry and detainer, tried in justice court and appealed to the district court for Lancaster county. Upon the trial in that court without a jury the court found that the title to real estate was drawn in question, and that, therefore, the justice being without jurisdiction, the district court was without jurisdiction upon appeal, and dismissed the action. The plaintiff has appealed to this court.

The only question presented upon the record is as to whether the title to real estate is drawn in question within the meaning of section 907 of the code, which provides that justices shall not have cognizance "in actions in which the title to real estate is sought to be recovered, or may be drawn in question, except actions for trespass on real estate, which are provided for in this title." The plaintiff introduced in the evidence a warranty deed executed to him by George L. Blanchard and wife, and based his right of possession thereon. He then attempted to show that the defendant knew that he was purchasing the property from George L. Blanchard and encouraged him

in doing so, and other matters tending to show that the defendant ought to be estopped to deny the plaintiff's rights under the deed. This question of estoppel will be again referred to. The defendant, who is the mother of the said George L. Blanchard, testified that she and her husband had separated eight or nine years before, and that at the time they separated and were divorced they had two sons, George L. Blanchard and another son, and that they gave each of them 80 acres of land; that George sold his 80 acres of land and gave her $500 out of the proceeds with which to procure a home; that the money was deposited in the bank in her name, and that about six years before the trial George bought the lot on which the house in question was built out of this $500, and that she, the defendant, built the house thereon with the remaining $400; that she supposed at the time that the title to the lot was taken in her name, and that after she had begun building the house she learned that the title was taken in the name of George, and that thereupon she told George that she "did not like the idea of putting that money on the lot without it being in her name," and that he promised her that when it was all finished "he would make me a deed of it altogether"; that she went into possession of the house and lot as soon as the house was completed, and had occupied it as her own home ever since, a period of about six years, without paying rent to any one or recognizing any one else as the owner. The defendant was cross-examined at length, and appears to be a fair witness, without making any attempt to disguise in any way the facts connected with the transaction. The evidence of her son George was taken, and he testifies in general terms that the house was built with his money, and that it was his house and his property; that he had allowed his mother to reside there because she was his mother, and that he had paid the taxes on the property. There is, however, no denial in the record of the defendant's testimony that, when she and her husband were divorced, they divided their property between their two

sons, and that George, in consideration of receiving the 80 acres of land, agreed to furnish her with a home, and did actually deposit $500 to her credit for that purpose, and that the lot was bought and the house built with this $500.

The plaintiff insists that in an action of forcible entry and detainer to recover possession of real estate an equitable title and possession pursuant thereto is no defense, and that to assert and prove such a title is not competent in such an action, but that question has been more than once determined against him by this court. In *Lipp v. Hunt,* 25 Neb. 91, it appears from the opinion, which was written by the present chief justice of this court, that the plaintiff had the legal title to the property in question, and that the defendant claimed an equitable interest in the land under an oral contract of sale made with one who himself did not have the legal title, but claimed through mesne transfer of a contract of sale given by the South Omaha Land Syndicate to one S. S. Lewis. The evidence showed that the owner of this contract sold the property to the defendant without giving him any writing whatever, and that the defendant took possession and held the property under that purchase. The principal question discussed was whether the defendant's control and possession of the property was such as to give an innocent purchaser notice that he had possession of the property, and, after determining this question in favor of the defendant, the court said: "We presume the law is well settled in this state, at least, that if a purchase of real estate is made, even by an oral contract, if any considerable portion of the purchase money is paid and possession taken by the vendee, that this will be sufficient to take the contract out of the statute of frauds, and entitle the vendee to the performance of his contract. Also, that during such possession, if open and notorious, any purchase of the property by a third party will be with notice of the first vendee's rights, and will not cut off his equities. These questions can be litigated

only in a court having equity powers." All of the important questions presented and discussed in this case appear to have been determined in that decision.

Justice courts cannot try actions which involve title to real estate, or in which such title may be drawn in question. This court has frequently been called upon to construe this statute. No mere claim of title or claim or assertion that title is drawn in question will deprive the justice of power to try and determine the cause. He must ascertain from the evidence whether the action involves or draws in question the title to real estate. Forcible entry and detainer is an action to determine the right of possession, and any competent evidence, whether it be title deeds or other written or oral testimony, tending to show which one of the contending parties is entitled to possession of the disputed property must be considered by the justice. If he can find and determine the right of possession without at the same time determining the rights of the parties, legal or equitable, in the property itself, it cannot be said that the title is drawn in question. If, however, possession is held under and by virtue of some right in the property so that the right of possession cannot be determined without adjusting the right in the property itself, then the title to real estate is drawn in question, within the meaning of the statute. The justice must find from the competent evidence whether title to real estate is drawn in question, and not from the pleadings or from the claims or pretentions of the parties. There must be competent evidence tending to show that there is in fact a title to real estate in question tendering a genuine issue which the parties are entitled to have adjudicated. An unfounded assertion of right, without competent evidence to support it, will not deprive the justice of jurisdiction.

The evidence in this case is amply sufficient to bring it within the law as announced in *Lipp v. Hunt, supra.* George L. Blanchard had good reason to give to his mother a part of the proceeds of the 80 acres of land which

he received as a free gift from her and his father. When the $500 was placed to her credit pursuant to his promise, it became her money, and if this lot was bought and the house built thereon with her money, as the uncontradicted evidence shows, she is in equity the owner of the property and is in possession by virtue of that ownership. These are questions that cannot be tried by a justice of the peace.

The plaintiff introduced evidence tending to show that the defendant knew that he was about to purchase the property and encouraged him to do so without asserting her interest, and it is urged that she ought now to be estopped to claim any right in the property. There are several very sufficient answers to this suggestion. The plaintiff and defendant were near neighbors for several years before the transaction in question, and the plaintiff had beyond question actual notice of facts that would lead any man to suppose that the defendant had some rights in the property. He knew that the defendant was ignorant of her legal rights, and that she supposed that because she failed to get the deed, as her son agreed, she had been effectually deprived of her rights. Her statement to him was that if the property had to be sold she would rather he would buy it than any one else, and other similar statements. And, again, such statements would not affect her right to continue in the possession of the property except so far as they affected her right to the title itself, and the court plainly had no jurisdiction to try her title and no occasion therefore to weigh evidence that would affect her title. Such matters might very properly be presented to a court of equity with power to determine finally the interest of the respective parties in the real estate itself.

We think the judgment of the district court is clearly right, and it is therefore

AFFIRMED.

MINNIE PILKINS ET AL., APPELLEES, V. ERNEST F. HANS ET AL., APPELLANTS.

FILED MAY 20, 1910. No. 16,054.

1. **Intoxicating Liquors:** ACTION FOR DAMAGES: PLEADING. In an action against licensed saloon-keepers for damages arising from the sale of liquors to plaintiff's husband causing his death, it is proper to allege and prove that for some time immediately prior to the day of the death of deceased the defendants had sold liquors to the deceased and had thereby caused him to become an habitual drunkard.

2. ———: ———: EVIDENCE. In such action it is not erroneous to allow a witness to testify that he saw the deceased drinking liquors from a bottle on the day of his death as tending to prove the allegation that deceased became intoxicated on that day. Such evidence becomes material if it is shown by the same or other witnesses that the defendants contributed to his intoxication.

3. **Evidence:** RECORDS. The village records of the bond given by a licensed saloon-keeper, kept by the clerk of the village and identified by him as such, are competent *prima facie* evidence of the execution and delivery of the bond.

4. ———: REVIEW. When a witness has stated all of the facts within his knowledge as to the employment and habits of deceased, it is not prejudicial error to refuse to allow the witness to answer the question whether he was or was not an industrious man.

5. **Intoxicating Liquors:** ACTION FOR DAMAGES: LIABILITY. If a saloon-keeper sells liquor knowing or having good reason to believe that it is intended for deceased, or intended that the deceased shall participate in drinking it and deceased does so participate, he is liable as though he sold to the deceased direct.

6. **Trial:** INSTRUCTIONS. It is erroneous to recite in an instruction certain of the disputed facts in the case, omitting other facts bearing upon the same point, but if the facts so recited are admitted in the pleadings or established without contradiction such recital of facts is without prejudice.

7. **Intoxicating Liquors:** ACTION FOR DAMAGES: MEASURE OF DAMAGES. In an action against licensed saloon-keepers for damages resulting from the sale of liquors, the plaintiff may recover all damages occasioned by the sale. The provisions of section 18 of the act were not intended to limit the measure of damages, but to simplify the proof in such cases.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

H. F. Barnhart and *Mapes & Hazen,* for appellants.

William V. Allen and *William L. Dowling, contra.*

SEDGWICK, J.

On the evening of the 28th day of June, 1907, Jones Pilkins, in attempting to cross the tracks of the Chicago & Northwestern Railway Company at Battle Creek, was run over by the engine and cars and instantly killed. This plaintiff, who is his widow, began this action in her own behalf and in behalf of her four minor children in the district court for Madison county to recover damages alleged to have been suffered because of his death. The keepers of three saloons in the village of Battle Creek and the sureties upon their bonds were made defendants. Upon the trial the jury, under the instruction of the court, found no cause of action against one of the defendants, and found a verdict in favor of plaintiff against the remaining defendants who have appealed to this court. The petition upon which the action was tried alleged in the usual manner the licenses of the saloons and the giving of the bonds required by the statute, and then alleged that for many months prior to the 28th day of June, 1907, "the said Jones Pilkins had acquired the habit of drinking malt, spirituous and vinous liquors at the said saloons of the said defendants to excess, and of becoming intoxicated thereby"; that she had warned the defendants not to sell liquors to her husband, but they disregarded her warning and the rights of the plaintiff and her said minor children, and did "on the 28th day of June, 1907, sell and give to the said Jones Pilkins malt, spirituous and vinous liquors at their saloons, which he, the said Jones Pilkins, then and there drank, whereby he then and by reason thereof became extremely intoxicated" and incapable of caring for himself, and while in that condition "he, the

said Jones Pilkins, stepped onto the track of the Chicago & Northwestern Railway Company in front of a rapidly running train of cars, and was then and there and thereby run over and instantly killed"; that at the date of the death of the deceased he was a young man about 28 years old and a laborer by occupation, and earned and was capable of earning about $700 a year, which he contributed to the support of his family, and was in good health and industrious when not intoxicated; that the plaintiff and her minor children were dependent upon him for her support, and "that by reason of said intoxication of the said Jones Pilkins, produced by the said defendants in the manner aforesaid, and his said death, the plaintiff and her said minor children are entirely destitute and without means of support, and have sustained damages in the sum of $10,000." The answer appears to be a general denial as to the allegations of the cause of the death of the deceased and as to the damages sustained by the plaintiff, and it was so treated by the trial court.

1. The first objection raised by the defendants is that the court erred in allowing proof of sale of liquor by the defendants to the deceased on occasions prior to the date of his death, but we think there was no error in receiving this evidence.

2. It was objected that the court erred in allowing two witnesses to testify to having seen the deceased drinking out of a bottle on one of the back streets of Battle Creek on the evening before his death. The ground of the objection is that there was no evidence showing that the contents of the bottle were obtained at the saloon of either of the defendants, but of course it was competent to show that the deceased was drinking and became intoxicated on that day, and then to show, if possible, that his intoxication was the cause of his death, and that the defendants were responsible for his intoxication. It was not to be supposed that all of this could be proved by one and the same witness, and this evidence was properly received.

3. The plaintiff offered in evidence the bonds filed with the village clerk, as they had been identified by the clerk and shown to be the original bonds filed and to be a part of the records in his case. This evidence was objected to on the ground that there was no evidence of the execution and delivery of the bonds. Thereupon a witness was called to testify that he was acquainted with the handwriting of the president of the surety company and knew that the signature on the bonds was executed by the president of the company. The bonds were then received in evidence, and this ruling of the court is complained of. In *Gran v. Houston,* 45 Neb. 813, it appears in the opinion, at page 833, that an objection was made to the admission of a certified copy of the bond, but the same was admitted over the objection, and it was held that this was not erroneous. The sections of the statute relating thereto were quoted, and it was said that, as "the objection was confined to the admissibility of the bond * * * there was no error, if any committed, which is of any avail." It was not intended to hold that the surety company could not defend under such circumstances upon the ground that it had not executed the bond, but that the record of the bond was sufficient *prima facie* proof to allow its admission in evidence, and if no other evidence was offered it would be sufficient proof of its execution by the defendants. This objection therefore was properly overruled.

4. The defendants complained that their witness was not allowed to answer the question, "Now, from your acquaintance with Mr. Pilkins, you may state whether he was or was not an industrious man," and other similar questions. The witness interrogated testified that he had known the deceased for several years and saw him quite often, and, when asked whether the deceased was in the habit of working, answered, "I seen him work," and, being asked, "Was he in the habit of being generally employed or just occasionally?" answered, "I have seen him work, and I have seen him standing around the stores."

He was asked, "And you may state whether or not he was habitually employed, or was he habitually standing around the stores?" An objection to this question was sustained, and it would seem from the many questions of this class that had been asked and answered that this question might be considered to be suggestive, and its exclusion not such an error as would require a reversal of the judgment. And so the question whether the deceased was or was not an industrious man was also properly excluded. The witness had testified to the facts within his knowledge as to the employment of the deceased, and the jury were as competent as the witness to say whether the deceased should be considered an industrious man. We do not find any other rulings of the court of this nature upon the page of the record referred to, and in reading the evidence of the various witnesses we have not observed any prejudicial error in ruling upon such offers of testimony.

5. The court instructed the jury: "If you find that other persons purchased intoxicating liquors on June 28, 1907, from the persons then in charge of the saloons of any defendant, which was taken out of doors by such purchasers, with the knowledge or consent of the person in charge of such saloon, or under such circumstances that he had good reason to believe at the time of such sale that Jones Pilkins was among the persons who was to drink the same, or a part thereof, and that said Jones Pilkins drank the same, or a part thereof, and by means thereof became intoxicated, or his intoxication was thereby contributed to in any degree, then such sale or giving would be within the meaning of the statute, and if Jones Pilkins thereby became intoxicated, or his intoxication was in any manner contributed to thereby, and while he was in such condition, and by reason thereof, he was run over and killed by a train of cars, substantially as stated in the amended petition, if you find the other elements of the plaintiff's cause of action exist, such principal defend-

ant or defendants as thus sold or gave him such intoxicating liquors, and the surety on his bond, would be liable in this action." It is shown in the evidence that the deceased, with several others, was engaged during the day in breaking a horse or horses by driving through the streets of the village, and there was evidence tending to show that they were all drinking at various times during the day, and tending also to show that they were procuring liquor at the saloons to drink elsewhere, and it was in view of this condition of the evidence that the instruction was given. If the defendants sold liquor to one of these parties knowing or having good reason to know at the time that they were drinking it together, and that the deceased was one of the parties and drinking with them, such sale would undoubtedly be equivalent to the sale to the deceased himself, and we think that the instruction fairly submitted the question to the jury.

6. Instruction No. 5 of the requests of the plaintiffs given by the court recites quite at length circumstances in the case as disclosed by the evidence. The jury by this instruction were told that there was evidence tending to prove those circumstances, and that if they found that the circumstances were proved by the evidence then they might be considered by the jury with all the other testimony in the case in determining whether the deceased purchased and drank intoxicating liquor in the saloon of any of the principal defendants on that day and before his death. We think that this instruction ought not to have been given. The jury should of course consider all of the circumstances in the case that are proved by competent evidence, and to specify some and omit others gives those circumstances that are specified such prominence that might lead the jury to disregard other equally important circumstances. Under ordinary circumstances such an instruction would require a reversal of the judgment. We find, however, that each of the facts recited in this instruction is proved by the evidence and without any conflicting evidence. That being the case, it is of

course true that those facts being undisputed should be considered by the jury in connection with all the other facts in the case that might be more or less controverted. In the trial of a civil case before a jury the court may properly state to the jury the material facts that are admitted by the pleadings or are fully established by uncontradicted evidence; only those material facts that are in dispute should be submitted to the jury. So far as we have observed, the facts recited in this instruction are so clearly proved that it cannot be said that there was any substantial dispute in regard to any of them. If the judge might have told the jury that these facts were established by the pleadings and evidence, it cannot of course be prejudicial to the rights of defendants to recite the facts in the guarded manner of the instruction complained of. We cannot see that the giving of the instruction was prejudicial to the rights of the defendants so as to require a reversal.

7. The jury found the damages of the plaintiff to be $4,500. It is objected that these damages are excessive, so much so as to show that the jury were influenced by passion and prejudice. Section 15 of the act in question (Comp. St. 1909, ch. 50) provides: "The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic." In *Young v. Beveridge,* 81 Neb. 180, it is said in the syllabus: "The measure of damages is the present value of the sum the deceased would probably have contributed to the support of his wife during the period of their joint expectancy of life and the amount he probably would have contributed to the support of the minor child during her dependency, the same being less than the deceased's expectancy." In the opinion an instruction of the trial court is considered, in which instruction the court attempted to tell the jury the rule for determining the damages that are occasioned by loss of support, and while criticising that instruction the opinion says: "In such cases, the measure of recovery to which the widow is entitled is the present

value of the husband's support during their joint expectancy of life; and minor children can recover only for loss of support during their minority, except in cases of dependent adult children." It appears from this that the court had in mind all those damages that result from loss of support, but it was not intended in that case to hold that no other damages can be recovered except those which result from that cause. In the same volume of reports in *Murphy v. Willow Springs Brewing Co.*, 81 Neb. 219, the rule is stated in the third paragraph of the syllabus as follows: "There is no ground for restricting the right of recovery in actions brought under the law governing the sale of intoxicating liquors where death results within narrower limits than actions brought under Lord Campbell's act; and, while loss of means of support is a pecuniary injury, it is not the only damage for which a recovery may be had in such actions." This is undoubtedly the true rule of the measure of damages in such cases. The person licensed must pay *all damages* that a person sustains in consequence of such traffic, and the special provisions found in the statute subsequent to this general provision are intended to extend and enlarge the measure of damages rather than restrict it. Section 18 provides for damages caused by "the acts done or injuries inflicted by a person under the influence of liquor," and the last part of that section also provides that "in an action for damages brought by a married woman, or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification." In construing this latter part of the section in several cases language has been used that apparently has led some to think that an action by a woman for damages caused by the intoxication of her husband was for the sole purpose of recovering for a loss of means of support and that other damages could not be included, but this clearly was not the intention of this

provision of the statute. The meaning of it is that, so far as the damages caused by her loss of means of support are concerned, all those shall be liable who have furnished any intoxicating drinks to the person disqualified by intoxication, at the time while he was so disqualified, thereby causing a liability that would not have existed by the course of the common law. In *Greenlee v. Schoenheit*, 23 Neb. 669, it was held that "an action may be maintained against a vendor of intoxicating liquors by a married woman for damages sustained by her by reason of her money being spent by her husband for intoxicating liquors, or squandered by him while intoxicated, or in the saloon of the liquor seller," and in *Keeling v. Pommer*, 83 Neb. 510, it is said in the second paragraph of the syllabus that "loss of means of support is not the only damage for which a recovery may be had," and it is held that a recovery might be had for "medical attendance paid by her and funeral expenses necessarily incurred by her in procuring the burial of her husband, when such items of damage are alleged and proved."

In this case the defendant was a young man with a wife and four children dependent upon him for support. If his death had been caused by the negligence of the railroad company instead of his own drunkenness, and the action had been against the company for damages, it would not be considered that the amount of the recovery in this case was excessive, and we see no reason for adopting a different rule for the measure of damages in this case. This court has in some damage suits reduced the amount of recovery as fixed by the verdict of the jury; but such questions are generally for the jury, and the court should not interfere with their judgment unless the circumstances are such that all reasonable men, when not influenced by passion or prejudice, must agree that the damages are excessive. There is evidence in the record tending to show that the deceased did not fully realize the responsibilities that rested upon him, and also that he did not economize all of his time and was more or less

wasteful of his energies and his money. There is also evidence that this resulted largely from drinking habits which these defendants helped to develop, as alleged in the petition. There is also evidence that he was a strong, able-bodied man, capable of earning a good living for his family, and that he continued to earn wages by which his family was supported up to the time of his death. We do not feel warranted under all of the circumstances in the case to interfere with the verdict of the jury.

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

AFFIRMED.

ELLA E. LATSON, APPELLANT, V. OLIVE D. BUCK ET AL., APPELLEES.

FILED MAY 23, 1910. No. 16,474.

1. **Statute of Frauds: SALE OF LAND: VOID CONTRACT: FRAUD: RIGHT OF ACTION.** While an oral contract for the sale of lands, between the owner and a real estate broker, is void under the statute of frauds, as defined by section 74, ch. 73, Comp. St. 1909, yet if such contract is fully executed by the parties to it, and either party is damaged or injured by the fraud of the other, the law gives the injured party the same rights of action as he would have had had the contract been valid in its inception.

2. **Pleading: FRAUD.** The petition, stated at length in the opinion, *held* to state a cause of action.

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

John C. Wharton and *Byron G. Burbank*, for appellant.

Smyth, Smith & Schall, contra.

REESE, C. J.

This cause is submitted as under rule 2 of this court, which is to the effect that when counsel can agree upon a

printed abstract of the record and evidence, and file their briefs, the case can be heard in advance without waiting for the cause to be reached in its regular order. In the preparation of the case counsel have misapprehended the rule, and have printed, practically, the whole record. The "abstract" presented consists of a full copy of the petition, the answer, the reply, the evidence, the objections thereto, the ruling of the court sustaining the objections, the decree, the notice of appeal, the supersedeas bond, the stipulation, and the assignment of errors. The history of the case, in so far as was necessary to be presented here, is that plaintiff filed her petition, and when she offered her evidence the defendant objected on the ground that the petition did not state facts sufficient to constitute a cause of action, and that the evidence offered was incompetent, irrelevant and immaterial. The objection was sustained, and plaintiff excepted. It will appear at once that all that was necessary to be shown by the abstract was a copy of the petition, or the substance thereof, a statement that defendants appeared and answered, that the case came on for trial, and when plaintiff offered her evidence the objection was made, stating the grounds, the ruling of the court thereon, and the final dismissal of the case. All other parts of the record are shown in the transcript filed in this court and need not be contained in the abstract. If the trial had proceeded, and the evidence had been admitted, resulting in a finding against the appellant, whether plaintiff or defendant, it would then have been necessary to have abstracted the pleadings and the evidence sufficiently to present the point or points of law relied upon and to be presented; nothing more. It is not contemplated that the whole record shall be printed as in this case. This, however, does not dispense with the filing in this court of the transcript of the record and bill of exceptions. The objection to the introduction of evidence on the ground stated in this record is in effect a demurrer to the petition. *Curtis v. Cutler,* 7 Neb. 315. The presence of an answer can have no bear-

ing upon what the decision should be. The petition must stand or fall according to its own strength.

It is alleged in the petition that on the 1st day of September, 1907, the plaintiff was the owner of lots 2, 3 and 4, in Tukey's subdivision of block 7, of A. S. Patrick's addition to the city of Omaha, of the value of $4,500; that plaintiff verbally employed the defendant David R. Buck to effect a sale thereof at that price in cash or exchange for other property; that he entered upon said employment as her agent, and, after having sought to sell or exchange said real estate, submitted to plaintiff a proposition for an exchange of her said property for a certain farm in Sarpy county (describing the same), owned by Thomas B. Holman, the terms of which were that she should convey her said property to Holman and pay him $1,500 in cash, and Holman convey to her the farm referred to, subject to a school land contract amounting to $568.62; that Buck informed her that Holman would make the exchange on said terms; that they were the best terms that Holman would make for the exchange of their properties; that Holman did not want the lots owned by plaintiff, and would take them only on condition that he (Buck) would exchange some land he had in Colorado therefor, and which he had agreed to do, and assuring plaintiff that said terms were the best that Holman would make, and that he advised plaintiff that it would be for her best interest to accept said proposition; that plaintiff did not meet Holman during said negotiations; that the same were wholly with Buck, upon whom plaintiff relied and whose statements she believed, having no other knowledge or information; that so relying, and by reason thereof, she, on the 26th day of October, 1907, entered into a written contract for said exchange, a copy of which is set out at length in the petition, but which is too long to be here repeated. It must be sufficient to say that it bears date October 26, 1907, and states that it is an agreement "between Thomas B. Holman of Stratton, Colorado, party of the first part, and Ella E. Latson of

Omaha, Nebraska, party of the second part." After the agreement of Holman to sell and convey the lands in Sarpy county (describing it by government subdivisions) is stated, it is recited that "Ella E. Latson agrees to purchase said real estate from said Thomas B. Holman at and for the price of six thousand five hundred sixty-eight and 62-100 dollars ($6,568.62) to be paid for as follows, viz., two hundred dollars ($200) cash as part purchase price, receipt of which is hereby acknowledged; thirteen hundred dollars ($1,300) to be paid when deeds are exchanged, and the following described property at the agreed price of four thousand five hundred dollars ($4,500): lots two, three and four, block seven, in Tukey's subdivision of A. S. Patrick's addition to the city of Omaha, Douglas county, Nebraska, which said property the said Ella E. Latson agrees to transfer by warranty deed to said Thomas B. Holman, his heirs and assigns, or whom he may specify, their heirs and assigns, as part purchase price, as aforesaid; Ella E. Latson, party of the second part, to assume a balance on the school land contract amounting to five hundred sixty eight and 62-100 dollars ($568.62). Said real estate so transferred to be free of all incumbrances." The contract further stipulates for abstracts of titles, each party to pay all taxes due on the property to be transferred, the deal to be closed and finished as soon as abstracts showing perfect titles and deeds are made. There are other provisions of an unimportant character which we need not notice. The contract closes in the usual form, and is signed "Thomas B. Holman, party of the first part, by D. R. Buck & Son, his agent. Ella E. Latson, party of the second part."

It is further alleged in the petition that Holman was willing to sell his farm to plaintiff for $2,500 in cash, subject to a balance of $568.62 unpaid upon a school land contract of which Buck had knowledge at all times during said negotiations, at the time of the signing of the contract, the exchange of the properties, and the payment of the $1,500 in cash paid by her, but he purposely and in-

tentionally concealed the same from plaintiff, and at all times intended thereby to defraud plaintiff; that he never agreed with Holman to, and never did, exchange any Colorado or other lands, or thing of value, with said Holman for the lots owned by plaintiff; that Holman never knew of the terms of the contract entered into, never saw it, or knew that there were any provisions therein relating to the lots owned by plaintiff, never made nor authorized D. R. Buck & Son, or the said David R. Buck, to make it; that he never purchased said lots of plaintiff or owned them, or knew of them prior to the exchange of properties, but that the same and all its terms were concealed from him by defendant for the fraudulent purpose of defrauding plaintiff; that on the 14th day of November, 1907, plaintiff, at the request of David R. Buck, did cause her said lots to be conveyed to the defendant Olive D. Buck, the wife of the said David R. Buck; that the said Buck told plaintiff that he had conveyed his Colorado lands to Holman; that Holman was to convey the plaintiff's lots to him, but that to save the making and recording of one deed for plaintiff to cause the conveyance of her lots to be made direct to his said wife, Olive D. Buck, which plaintiff did, and in so doing she relied wholly upon the statements made by said Buck, believing the same to be true, when, in fact, they were false and fraudulent, and made for the purpose of defrauding her out of said lots and getting them for his own exclusive benefit and without paying anything therefor; that Holman never directed that plaintiff deed said lots to the said Olive D. Buck, nor did he ever specify her as the person to whom said lots should be conveyed; that on the 12th day of November, 1907, the said Olive D. Buck, anticipating the conveyance by plaintiff of said lots to her, together with her husband, the said David R. Buck, executed a mortgage to one J. C. Camberg upon said three lots to secure the payment of the sum of $1,500; that the said David R. Buck received the said $1,500 named in said mortgage, and paid $1,000 thereof to said Holman, which, added to the $1,500

paid by plaintiff, made and aggregated the sum of $2,500, the price of the land as fixed by Holman and for which he was willing to sell it, the theory being that the whole amount paid Holman was paid by plaintiff in cash and from her property, leaving property and money to the extent and value of $3,500 in the hands of defendant which he appropriated to his own use and which belonged to plaintiff. The prayer of the petition is, in effect, for a reconveyance of the three lots in the city of Omaha, subject to the mortgage for $1,500 placed thereon by defendants, the petition alleging that they are both insolvent. The petition is of great length, is much involved, and, as we think, might have been much shortened and more easily comprehended had the facts been more systematically grouped.

As we understand the petition, it is sought to be and is alleged that defendant had the Holman farm for sale at the price of $2,500; that plaintiff placed her property in his hands for sale or exchange for other property, by and under a verbal agreement; that defendant, while advising with plaintiff, advised her that the Holman farm could be had for $6,500, which was $4,000 more than the price asked by Holman, and advised plaintiff to make the exchange on that basis; that during the negotiations he informed her that he had a tract of land in Colorado which he could exchange with Holman and take plaintiff's property, and later informed her that he had consummated the exchange with Holman, both of which statements were untrue; that instead of informing plaintiff the true price at which Holman held the land he inflated it so as to include plaintiff's property, the $1,500 which she was to pay, and the $568.62 of indebtedness to the state on the Holman school land; that before her conveyance of the city property defendants executed a mortgage thereon for $1,500, and upon completion of the transfer took $1,000 of the $1,500 so secured by the mortgage, added it to the $1,500 cash paid by plaintiff, making the $2,500, to be paid to Holman, and with it paid for the land; that dur-

ing all of said time the fiduciary relation existed between plaintiff and defendant; that plaintiff relied upon and believed the statements made by defendant, and, so relying, she made the exchange, and was thereby defrauded.

The answer consists, for the most part, of specific denials of the averments of the petition, but contains affirmative allegations as to the knowledge of plaintiff of certain important facts, forming the issues of fact, but as the objection to the introduction of evidence was made and decided upon the belief that the petition did not contain facts sufficient to constitute a cause of action, we will have to ignore the answer, treat it as never filed, and devote our whole attention to the matter of the averments of the petition, treating them all, for the purpose of this decision, as true and admitted so to be.

One of the contentions on the part of defendants is that Buck could not be the agent of plaintiff, or, at least, was not, for the reason that plaintiff knew that he was the agent for Holman, and was therefore bound to him as such agent, and could not represent plaintiff in the transaction referred to. We find nothing in the petition showing just when or how Buck was created the agent for Holman, but it alleged that the creation of that relation between plaintiff and Buck dated from the 1st day of September, 1907, nearly two months prior to the date of the written contract. It is not alleged, nor does it appear, that the agency of Buck for plaintiff was sought to be created for the exchange of properties with Holman, but that the possibilities of that deal may have arisen after Buck had both properties for sale. In that event we know of no rule of law that would have required Buck to terminate his agency for either party, but may, with the knowledge of both parties to the transaction, have so continued. *Campbell v. Baxter,* 41 Neb. 729; *Andrew v. Whitwer,* 3 Neb. (Unof.) 55; *Strawbridge v. Swan,* 43 Neb. 781. In so far as this question may become important, if at all, in this case, it would have to depend upon the evidence.

The principal contention is over the effect of the pro-

visions of section 74, ch. 73, Comp. St. 1909, upon the issues in this case. That section is as follows: "Every contract for the sale of lands, between the owner thereof, and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent."

In *Baker v. Gillan,* 68 Neb. 368, we held, in substance, that the enactment of the above section was an extension or enlargement of the statute of frauds and became a part thereof, and we therefore conclude that it must be governed by the same principles as are applied to those statutes generally.

We think it is well settled that, while a contract, void by statute, will not be *enforced* as between the parties to it, yet if the contract has been executed by one or both parties to it, the bar of the statute is removed, and the contract may, under certain circumstances, be proved. *Kendall v. Garneau,* 55 Neb. 403; *Platte County Independent Telephone Co. v. Leigh Independent Telephone Co.,* 80 Neb. 46; *Bibb v. Allen,* 149 U. S. 481, 497; *Milner v. Harris,* 1 Neb. (Unof.) 584; *Bailey v. Bishop,* 67 S. E. (N. Car.) 968.

In Browne, Statute of Frauds (5th ed.) sec. 116, it is said: "Where the contract has been in fact completely executed on both sides, the rights, duties, and obligations of the parties resulting from such performance stand unaffected by the statute," citing a number of cases which need not be referred to. At the close of the section he says: "So with all cases of contracts embraced by the statute. When fully executed on both sides, the positions of the parties are fixed, subject, of course, to the power of a court of equity to afford relief in cases of fraud and mistake."

As we have seen, the petition alleges the establishment of a fiduciary relation between Buck and plaintiff. If the

creation of that relation grew out of a void contract under the statute of frauds, but that contract has been fully executed and carried out by both parties, as alleged in the petition, the subject of the fraudulent acts of either party by which the other is damaged, or his property rights injured, is as fully open to investigation by the courts of equity as if the contract had been legal and binding in the first instance. We are not unmindful of the cases cited in appellees' brief decided by this court upon the question of the right of a broker, under a verbal contract, to recover compensation for services rendered in making a sale, and we fully indorse and approve all that is said in the decisions referred to, but cannot see that they can exert any controlling influence over this case.

What we have said here applies alone to the averments of the petition, and can have no bearing upon the truth or untruth of the facts alleged should the cause be finally tried upon issues joined. We think the averments of the petition, taken as true for the purposes of this decision, state facts sufficient to constitute a cause of action, and that the ruling of the district court in excluding all evidence in its support was erroneous.

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

REVERSED.

LETTON, J., concurring.

I concur in the conclusion reached, but am inclined to think that the reasoning of the opinion is at variance with the cases in this court in which we have held that a broker is not entitled to recover upon a *quantum meruit* for services rendered in disposing of real estate under a parol contract for commissions. I am satisfied that the conclusion is correct, and that the petition states a cause of action. To hold otherwise would permit a person to procure the confidence of another by inducing his victim to believe he was his agent and acting in his behalf, and,

after procuring an undue and improper advantage by means of such reliance upon the relations of trust and confidence so created, to set up the statute as a bar to being called upon to account. This was not the purpose of the law. It was enacted to prevent fraud, and not to foster it. The action is not upon a contract of agency. It is for fraud committed under the cloak of agency, and whether compensation for services rendered by the alleged agent can or cannot be recovered on account of the statutory bar is not material. If the plaintiff was induced to confide in the defendant by reason of her belief that he was her agent, and he so represented, or wilfully acted in such a manner as to deceive her, and took advantage of this belief to defraud her, she is entitled to recover. Cases based upon this principle, though differing in the facts, are: *Corder v. O'Neill,* 176 Mo. 401; *Busick v. Van Ness,* 44 N. J. Eq. 82; *Tate v. Watts,* 42 Ill. App. 103; *McNaughton v. Smith,* 136 Mich. 368; *Haycraft v. Creasy,* 2 East (Eng.) 92.

ROOT and SEDGWICK, JJ., concur in these views.

PENNINGTON COUNTY BANK, APPELLANT, V. ANTON BAUMAN, JR., SHERIFF, APPELLEE.

DODGE COUNTY BANK, APPELLEE, V. FRANCES MCGIVERIN, APPELLEE; PENNINGTON COUNTY BANK, INTERVENER, APPELLANT.

FILED MAY 23, 1910. No. 16,237.

1. Replevin: FAILURE TO PROSECUTE: REMEDY OF DEFENDANT. In a replevin action in the district court, where the plaintiff has obtained possession of the property, and fails to prosecute or maintain his action, not through lack of jurisdiction, but because of a defect in his petition which he declines or fails to remedy by amendment, the defendant is entitled to judgment,

and to a trial of his right of property or possession, for the purpose of establishing his damages. Code, sec. 190. *Garber v. Palmer, Blanchard & Co.*, 47 Neb. 699.

2. Judgment: RES JUDICATA. In a suit on the bond given by plaintiff in such a case, and where there has been no material change of conditions, the judgment in the replevin action is *res judicata* of all matters which were or might have been litigated in that action.

3. Chattel Mortgages: LIENS: PRIORITIES. A chattel mortgage duly recorded in one state will not, under the doctrine of comity, be given priority by the courts of another state, to which the chattels are removed by the consent of the mortgagee, over local attaching creditors.

REHEARING of case reported in 85 Neb. 226. *Former judgment of reversal vacated and judgment of district court affirmed.*

BARNES, J.

This case has been reargued and submitted on a motion for a rehearing, and will be treated as though a rehearing had been granted. For a statement of the facts, about which there is no dispute, reference may be had to our former opinion (85 Neb. 226), by which we reversed the judgment of the district court and remanded the cause for further proceedings.

Plaintiff contends that our former decision was wrong and that the judgment of the district court should have been affirmed. It is argued that the judgment in the replevin suit, in which the bond sued on in this action was given, is a bar to the defenses interposed herein. This seems to have been the holding of the district court, which resulted in the judgment assailed by this appeal. By our former opinion it is held that the judgment in the replevin case was not a bar to the defenses interposed in this suit, on authority of *Campbell v. Crone*, 10 Neb. 571, *Rodgers v. Levy*, 36 Neb. 601, *State v. Letton*, 56 Neb. 158, and *Reid, Murdoch & Co. v. Panska*, 56 Neb. 195. *Campbell v. Crone, supra*, was a case commenced in the county court, and was there dismissed for want of jurisdiction.

On error to the district court the judgment was reversed, and the case was brought to this court by a petition in error. The judgment of the district court was affirmed, and it was held that, where a defendant caused the action to be dismissed for want of jurisdiction, he could not complain if the court afterwards refused to hear him in that action as to his right to the property replevied, or on the question of his damages. In *Rodgers v. Levy, supra,* it apeared that A brought an action in replevin against B which was dismissed because A did not have the legal capacity to sue, and it was held that the judgment of dismissal for that cause did not bar a future action for the same property. In *State v. Letton, supra,* defendant procured the dismissal of an action of replevin for want of jurisdiction, and, following *Campbell v. Crone, supra,* it was properly held that he could not thereafter require the court to impanel a jury to inquire as to his rights of property and possession. *Reid, Murdoch & Co. v. Panska, supra,* was also dismissed for want of jurisdiction, and the decision followed the rule announced in the foregoing cases.

We are therefore of opinion that those decisions are not in point, and that this case should be ruled by *Garber v. Palmer, Blanchard & Co.,* 47 Neb. 699, and *Ahlman v. Meyer & Schurman,* 19 Neb. 63. In *Garber v. Palmer, Blanchard & Co., supra,* construing section 190 of the code, which governs the procedure in actions of replevin originally commenced in the district court, we said: "When a plaintiff in replevin who has obtained the property fails in his proof or fails to prosecute the action, the defendant is entitled to judgment, and to a trial of his right of property or possession, for the purpose of establishing his damages." It must be conceded that the district court had jurisdiction of the replevin action in which the bond in question was given. The plaintiff therein failed, not for lack of jurisdiction, but because his petition, which he failed to amend, although given leave to do so, was demurrable as not stating facts which would en-

title him to a judgment for the possession of the property in controversy. Plaintiff might have rendered its petition sufficient by amendment, which it failed to do, and therefore, under the general rule that a judgment is *res judicata* of every question which was or might have been determined in the action in which it is rendered, we are constrained to hold that the judgment in the replevin action was a bar to the defenses interposed in this suit.

Defendant now contends that, between the time of the commencement of the replevin action and the institution of the present suit on the replevin bond, there was such a change of conditions as would enable it to assert the lien of its mortgage as a defense to, or counterclaim, the value of its right of possession of the property described therein against any judgment obtained in this action. It appears, however, that the change of conditions relied on arises from the fact that at the time the replevin action was commenced defendant's mortgage was not yet due, and that prior to the institution of the present suit it had become due. We do not think that this was such a material change of conditions as would entitle the defendant to the relief which it now claims. Defendant could have amended its petition in the replevin action so as to set forth facts which would, at that time, have entitled it to the possession of the property described in its mortgage. The right of possession was the gist of that action, and that right could have been maintained under the facts of that case as well before the mortgage became due as afterwards. So it is apparent that there has been no material change of conditions such as would avoid the legal effect of the judgment in that action.

There is another reason why the judgment of the district court should be affirmed. The plaintiff now insists that its lien as an attaching creditor upon the property in question in the replevin action was superior and paramount to that of the mortgage. This point was not brought to our attention on the former hearing, but is now urged with much force.

In *Snyder v. Yates,* 112 Tenn. 309, 64 L. R. A. 353, it was held that a chattel mortgage duly recorded in one state will not, under the doctrine of comity, be given priority by the courts of another state, to which the chattels are removed, over local attaching creditors who had no actual notice of it. This rule seems to be supported by the great weight of authority in many of our sister states, and we are of opinion that where a mortgagee, residing in another state where his mortgage is recorded, permits the mortgagor to bring the property into this state, a *bona fide* attaching creditor of the mortgagor, without notice, will acquire a lien thereon by virtue of his attachment sued out in this jurisdiction superior to that of the mortgagee.

For the foregoing reasons, our former judgment of reversal is set aside, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA V. UNION PACIFIC RAILROAD COMPANY.

FILED MAY 23, 1910. No. 15,988.

1. **Statutes:** CONSTRUCTION. The acts of the legislature popularly known as the "Railway Commission Act" (laws 1907, ch. 90), the "Anti-Pass Act" (laws 1907, ch. 93), and the "Two-Cent Fare Act" (laws 1907, ch. 92), follow the mandate to the legislature contained in section 7, art. XI of the constitution, are *in pari materia*, and must be construed together.

2. **Carriers:** RATES: UNIFORMITY. Under the law in this state, a railroad company or other common carrier may not exchange transportation for services or property by way of barter, uniformity of charge being required.

3. ———: ———: ———. To procure uniformity there must be a standard measurement. The only standard measure possible in order to insure absolute uniformity in the charge is money.

4. ———: ———: ———. A contract which provides for transportation to be issued in exchange for newspaper advertising or for

services the value of which is indeterminate, and which permits the amount to be paid for such service to be fixed by agreement of the parties, leaves the rate charged for the transportation a variable quantity.

5. ———: ———: ———. A contract by a railroad company to furnish to the proprietors of a newspaper, as requested, transportation at the statutory rate (under certain limitations and restrictions not required in ordinary tickets) in payment for advertising to be furnished "at agreed rates," which agreed rates are not specified in the contract, but which are to be settled by the parties themselves by another agreement, is in violation of section 14 of the "Railway Commission Act" (laws 1907, ch. 90, Ann. St. 1909, sec. 10662), which prohibits common carriers from charging one person a greater or less compensation than another, and which prohibits charging "other than the rates fixed and established."

6. ———: ———: ———. If the proprietor of one newspaper may be selected by the defendant to receive transportation in return for such services, while the proprietor of another cannot avail himself, at his own option, of the privileges of such a contract, then equality and uniformity of charge do not exist.

7. ———: ———: ———. Such a contract contravenes the intent and purpose of the statutes which prohibit unjust discriminations, and which seek to preserve to every individual an equal right to the transportation service of every common carrier within the state upon equal terms with every other individual.

ORIGINAL action by the state to enjoin defendant from carrying out certain contracts. *Injunction allowed.*

William T. Thompson, Attorney General, for plaintiff.

Nelson H. Loomis, Edson Rich and *E. H. Crocker, contra.*

LETTON, J.

This is an original action in this court brought by the attorney general in the name of the state and by the authority of the Nebraska State Railway Commission to enjoin the defendant railroad company and its officers, agents, and servants from carrying out certain contracts made with the owners of certain newspapers in the state

of Nebraska providing for the issuance of railroad tickets and the furnishing of transportation to certain classes of persons named in the contract, for advertising to be furnished the railroad company in the newspapers belonging to the other contracting parties. A temporary restraining order was prayed for and granted at the time of the filing of the petition. It is shown by the evidence that the command of the restraining order was obeyed and that since its issuance no other contracts of the kind have been entered into, the contracts in existence have been abrogated, and the transportation issued recalled. The defendant railroad company, however, still insists that the execution of such contracts and the furnishing of transportation in accordance therewith is not a violation of law, and, while obeying the restraining order, insists upon its right to have this question determined.

Before considering the legal proposition involved, it will be necessary to summarily state the evidence. A copy of a contract entered into with the owner of the "New Era" of Kearney is set forth in the petition, and it is conceded that contracts entered into with a number of other publishers in the state are substantially the same. The contract referred to is as follows:

"Whereas, W. L. Hand, of Kearney, Nebr., is the President of the New Era Standard, a daily, semi-weekly, weekly, monthly newspaper, published at Kearney, in the county of Buffalo, and state of Nebraska, a general weekly newspaper, established 1880, having a circulation of 1,000 copies per issue, desires to enter into a contract with the Union Pacific Railroad Co. for advertising in said newspaper as hereinafter provided: Now, therefore, this agreement made and entered into upon the second day of January, 1908, by and between the said W. L. Hand, as party of the first part, and said Union Pacific Railroad Co., as party of the second part, witnesseth: That the party of the first part agrees to publish in the issue of said paper, at agreed rates, from January second, 1908, to Dec. 31, 1908, as follows:

"1st.—Such display advertisements, or lines of local notices in the regular local news columns of said paper from time to time during the life of this contract, as shall be furnished in manuscript or printed copy by the party of the second part.

"2d.—It is agreed that in full payment for the said advertising, the said second party shall pay, and the first party shall accept nontransferable advertising transportation over the lines of Union Pacific Railroad Co. in the state of Nebraska only, to the value of one hundred ($100.00), the transportation not to be limited beyond the time the contract expires, and not extended under any circumstances. The Union Pacific Railroad Co. reserves to itself the right to limit such transportation to any train or class of trains, and to refuse to honor said transportation upon any special, limited or fast mail train.

"3d.—It is understood that no ticket issued under this contract shall under any circumstances be used by the holder for any part of an interstate journey, and if presented for passage in connection with an interstate journey, shall be void and conductor will lift ticket or tickets and collect full fare.

"4th.—It is also further agreed that the transportation above referred to must be requested and used during the calendar year, and that no claim for failure so to do will be considered. The transportation referred to above is to be granted for W. L. Hand, who occupies the position of Editor and Manager, family of W. L. Hand, John A. Rhone, who occupies the position of Secretary and Foreman, and family of A. Rhone on the newspaper above mentioned, or in the name of the Wife, Son or Daughter of the Proprietor, Business Manager or Editor of the paper above mentioned.

"5th.—It is understood and agreed that, should said transportation be sold, loaned or traded off, or presented for passage by any person other than the one whose name is written thereon, it shall then be taken up by the conductor and not again made good by the party of the sec-

ond part to the said first party. The misuse of transportation may be considered as sufficient cause for the cancelation of this contract.

"6th.—It is also understood and agreed that no additional transportation is to be granted on account of said advertisement, and that the conditions specified on each ticket are hereby made a part of this contract.

"7th.—The party of the second part will not pay for the publication of its time tables unless such publication be specially authorized in writing by the General Passenger Agent of Union Pacific Railroad Co.

"8th.—The party of the second part reserves the right to revoke this contract at will, discontinue the advertisement, and call in the transportation issued.

"9th.—If the ownership of said publication be transferred, it is agreed that the assumption of this contract is to be made a part of the consideration for said transfer. Otherwise this contract shall thereby be canceled and all transportation thereunder shall thereby become void.

"10th.—Should the person or persons to whom transportation is issued on account of this contract sever his or her connection with said paper from any cause whatever, then the transportation held by such person or persons shall be surrendered to the party of the second part at once and no transportation issued for any other person or persons on account of said paper until after the said transportation has been returned. It is also agreed that a copy of each issue of said paper shall be mailed free to agent of said Co. at Kearney, Nebr., and Chas. Ware, Superintendent at Omaha, Nebr., and also one to E. L. Lomax, General Passenger Agent, at Omaha, Nebr. All requests for transportation must be made through the agent above.

"11th.—This contract expires Dec. 31, 1908.

"In witness whereof, the said first party has hereunto set his hand and seal, and the said party of the second part has caused this contract to be executed by its General Passenger Agent upon the second day of January, 1908.

(Signed) New Era Pub. Co, by W. L. Hand, Pres. Union Pacific Railroad Co. By (Signed) E. L. Lomax, General Passenger Agent. Darlow."

The testimony of the employee in charge of the advertising department of the defendant in regard to the customary dealings with newspaper owners under the contract is to the effect that the advertisements placed in all such newspapers are to be charged at the regular rate charged by the newspaper in each case to the public generally for the same service, which would vary in different localities; that a statement or bill would be rendered by the publisher for the advertising done, and that the transportation issued did not exceed the value of the advertising when the transportation was measured at the rate of two cents per mile; that it was not issued when the advertising was placed, but after the advertising had been run, and the statement of the amount due followed; that the transportation issued did not exceed the amount of the bills rendered, and that special forms of trip, 500-mile, and 1,000-mile tickets were issued under these contracts. It is also shown that the railroad company had no permission or authority from the railway commission to enter into the contracts, either before or after their execution.

The attorney general contends that the contracts and the tickets issued in conformity therewith constitute a violation of the acts popularly known as the "Railway Commission Act" (laws 1907, ch. 90, Ann. St. 1909, secs. 10649-10663), the "Anti-Pass Act" (laws 1907, ch. 93, Ann. St. 1909, secs. 10664, 10665), and the "Two-Cent Fare Act" (laws 1907, ch. 92, Ann. St. 1909, secs. 10618, 10619), and that the transportation issued under the contract constituted a special rate, an unjust discrimination, and an unreasonable preference, as defined by said acts. He takes the broad ground that transportation furnished by a railroad company for any consideration other than a money consideration, to an adult, and at a rate other than two cents per mile, constitutes an unjust discrimination prohibited by law.

The defendant contends that, under the contract, the railroad company paid for the advertising furnished at the regular published and current rates by credits upon its books for the amount furnished, and that the transportation was paid for at the full legal rate of two cents per mile by such credits; that the Nebraska law is designedly different from the interstate commerce acts, in that it does not prohibit "different" compensation for transportation, and does not limit payment to cash only; that if the act had regulated the medium of payment it would have been unconstitutional; that there was no attempt to discriminate, or to violate the two-cent fare law, and that what was done had no such effect.

The sections of the statutes (Ann. St., 1909) controlling the case are as follows:

Section 10618. "It shall be unlawful for any railroad corporation operating, or which shall hereafter operate, a railroad in this state to charge, collect, demand, or receive for the transportation of any passenger over twelve years of age, with baggage, not exceeding two hundred pounds in weight, on any train over its line of road in the state of Nebraska, a sum exceeding two cents per mile, provided, that no railroad company shall be required to sell any ticket for less than five cents."

Section 10662, so far as applicable, is as follows: "If any railway company or common carrier subject to the provisions of this act, directly or indirectly, through or by its agents, officers or employees, by any special rate, rebate, drawback. or other device, shall charge, demand, collect or receive from any person, firm or corporation, a greater or less compensation for any service rendered, or to be rendered by it than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service, the same shall constitute an unjust discrimination, which is hereby forbidden and declared to be unlawful. (*a*) If any railway company or common carrier subject to the provisions of this act, through or by its officers, agents, or employees,

makes or gives any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, * * * the same shall constitute an unjust discrimination, which is hereby prohibited. * * * (*f*) Any officer, agent or employee of any railway company or common carrier subject to the provisions of this act, who, by means of false billing, false classification, false weight, or by any other device, shall suffer or permit any person or persons to obtain transportation for property at less than the regular rates then in force on said line of said railway company or common carrier, or any part thereof, or who, by means of false billing, false classification, false weighing, or by any device whatsoever, shall charge any person, firm or corporation for the transportation of property other than the rates fixed and established, upon the line of said railway company or common carrier, shall be guilty of a misdemeanor."

Section 10664, prohibiting free transportation, should also be considered as bearing upon legislative policy in this regard. These provisions of the statutes, though forming parts of separate acts, enacted at different times, treat of the same subject matter. They form stages in the progressive development of legislation seeking to correct abuses which formerly existed. They carry out specifically the mandate to the legislature given by section 7, art. XI of the constitution, that "The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies in this state and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." They are, therefore, *in pari materia* and must be construed together. *State v. Omaha Elevator Co.*, 75 Neb. 637; *State v. Martyn*, 82 Neb. 225.

The statute provides that the carrier shall not collect or receive "a greater or less compensation" from one person than from another. The railway commission act commanded all railway companies in Nebraska to file with

the railway commission scheduled rates and charges in effect on their lines in the state of Nebraska on January 1, 1907, which rates should be the rates and charges in force and effect unless changed by the railway commission in conformity with procedure provided for in the act. The rate of charge for passenger transportation was also fixed by statute. These rates and charges are expressed and measured by dollars and cents. If a railway company can adopt the principle of barter and receive in return for its service specific articles the value of which may vary from day to day, and often may be uncertain, the magnitude of the task of ascertainment of the value of each article alone would render the regulation of rates, so as to prevent discrimination, absolutely impossible. To procure uniformity there must be a standard measurement. The only measure possible in order to insure absolute uniformity in the charge is the standard medium of exchange and measure of value—money.

But, it is contended, although the rate charged for advertising varies in different localities, yet the amount charged in each instance is the regular current rate charged to the public generally in that locality, and that, since the railway company would be required to pay this rate in money for the advertising furnished, it is not discrimination to pay for it in transportation at the statutory rate.

This argument loses sight of two considerations: First, that no price or rate of charges for the advertising is fixed in the contract. The publication is to be "at agreed rates," leaving the parties free to fix for themselves by agreement the value of the service rendered and the price to be paid. It is true that the witness testifies that the agreement has always been the same as the current rate for advertising in the locality, but there is nothing in the contract which requires the price agreed upon to be the current rate to the public generally. A contract which permits transportation to be issued in exchange for a product or for services, the value of which is indeterminate, and which

leaves the charge to be fixed by agreement of the parties, plainly leaves the price of the transportation a variable quantity. The price of the ticket would vary exactly as the price of the advertising varied. If the parties agree upon a high rate of advertising, they agree to a low rate for transportation, and *vice versa*. It could never have been the intention of the legislature to permit such an opportunity to evade the terms of the law. Giving the defendant credit for acting in good faith, as its witness testifies, in making the contracts complained of, and in making agreements thereafter to pay for advertising at current prices, still to uphold such contracts would open a door which in the hands of designing persons might operate to nullify the most essential and beneficial provisions of this legislation. *Union P. R. Co. v. Goodridge*, 149 U. S. 680; *United States v. Atchison, T. & S. F. R. Co.*, 163 Fed. 111.

Furthermore, there is no proof that any persons or corporations, other than the favored persons with whom the railroad company is willing to enter into such contracts, may avail themselves of the privilege of paying for transportation for themselves or for their employees or members of their respective families by the use of their advertising pages. If the proprietor of one newspaper may be selected by the defendant to receive transportation in return for such services, while the proprietor of another cannot avail himself, at his own option, of the privileges of such a contract, then certainly equality and uniformity of charge, which is required by both common law and statute, do not exist (*McDuffee v. Portland & R. R. Co.*, 52 N. H. 430; *Sandford v. Catawissa, W. & E. R. Co.*, 24 Pa. St. 378), while if money were the only consideration and the same rate were charged, each would stand exactly upon the same footing.

The defendant insists that the only advantage that it derives from these contracts is that it thereby sells transportation to persons who otherwise might not purchase it; but, if persons belonging to a certain class are induced

to purchase transportation in excess of that which they would buy for cash, it is plain that the inducement must be sufficiently strong to cause them to believe that they are receiving transportation for a less amount than if they paid for it in money, or that they are receiving advertising patronage not otherwise to be had. There evidently must be some advantage accruing to the contracting parties, or each of them must think so, else they would not enter into the contract.

If the newspaper owner is of the opinion that, under the contract, in return for advertising at current prices to the public generally, he is receiving transportation upon the same basis and under no other or greater limitations than the public generally, he is in error. In addition to the limitations expressed in the contract itself that the transportation shall not be limited beyond the time the contract expires, and not extended under any circumstances; that it cannot be used for any part of an interstate journey, and if presented for passage in connection with an interstate journey shall be void; that if the ownership of the publication is transferred, unless the contract is assumed, all transportation thereunder shall thereby become void, it is provided in the 500 and 1,000-mile ticket issued thereunder that in case the holder severs his connection with the publication on account of which the ticket is issued, or in case the advertising contract under which it is issued shall be canceled, all further rights under the contract to the use or possession of the ticket are surrendered, and the same may be taken up wherever found.

A somewhat similar contract, made with reference to Munsey's Magazine, was under consideration in the case of *United States v. Chicago, I. & L. R. Co.*, 163 Fed. 114, although the contract in that case was less objectionable than that under consideration, being specific with regard to the cost of the advertising. It specified the amount of advertising space to be furnished in exchange for tickets to the value of $500, while this contract leaves the whole

matter of price open to future agreement. The court say: "Indeed, if it is taken at its cash value, why should the transportation be limited as specified in the contract? If the magazine is paying $500 to the defendant, why does it accept transportation both of less and different value than it would accept if it bought its tickets with money? Why embarrass itself with menacing pains and penalties for failure to observe all the conditions of the special contract, when by the use of cash it may travel and give no concern to technical limitations? It seems fair to conclude that either the advertising is of less than cash value, or the advertisers are grossly imposed upon by the railroad." The court further point out that in that contract, as in this, there is no provision requiring that the advertising must have been furnished before the transportation is given, and shows that the publisher could under the contract demand the tickets at once if he chose and at the beginning of the term, and therefore in the mere matter of interest the rate would be less and different from that which is published.

The principal point urged in the oral argument by counsel for defendant was that, since the statute does not prohibit receiving a "different" compensation, the contract is not in violation of the statute. Counsel urges that the case of *United States v. Chicago, I. & L. R. Co., supra*, is based upon the peculiar language of the Hepburn act (34 U. S. St. at Large, pt. 1, ch. 3591, p. 584), whereby the word "different" was added to the words "greater or less compensation" in the Elkins act, but we do not so understand the decision in this case. While the writer of the opinion discusses the change in the statute, and holds the facts bring the case within the terms of the Hepburn act, he does not say that the contract does not violate the Elkins act. But, regardless of what the decisions of the federal courts have been upon the Elkins act, under the provisions of section 10662 of the Nebraska statute, it is an infraction of law "by any device whatsoever" to "charge any person, firm or corporation for the transportation of

property *other* than the rates fixed and established." The difference between the meaning of a statute which prohibits a "different" compensation and one which prohibits a charge "*other* than the fixed and established rates" is to the writer imperceptible, and the reasoning applicable to one statute seems to apply with equal force to the provisions of the other. Moreover, in *Armour Packing Co. v. United States,* 209 U. S. 56, 72, the Elkins act (32 U. S. St. at Large, pt. 1, ch. 708, p. 847) is construed, and it is said: "The Elkins act proceeded upon broad lines and was evidently intended to effectuate the purpose of congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law." We think the purpose of the acts identical, and construe the Nebraska statute to have the same intent, and to make the same requirements in this behalf.

To sum up, when it is considered that, although the transportation is said to be sold at the rate of two cents per mile, it is, in fact, hedged about by many restrictions and limitations not contained in the tickets offered for sale to the general public for the same price in cash; considering, also, that the privileges, if any, and whatever they may be, under the contract, are not open upon the same terms to all persons engaged in the publication of newspapers within the state; considering, also, the fact that the amount to be paid for the advertising, and therefore necessarily the amount to be paid for transportation under the terms of the contract, may be fixed at whatever rate the parties subsequently agree upon, it seems obvious that the contract runs counter to the intent and purpose of the constitution and statutes quoted. These seek to prohibit unjust discriminations, either direct or indirect; they are designed to take away from a public carrier the power of arbitrary selection of persons or corporations as the objects of its favor or disfavor; they seek to preserve to every individual an equal right to the trans-

portation service of every common carrier within the state upon equal terms with every other individual. As was said of the interstate commerce act (32 U. S. St. at Large, pt. 1, ch. 708, p. 847) of 1903 by Mr. Justice White, in *New York, N. H. & H. R. Co. v. Interstate Commerce Commission,* 200 U. S. 361, 391: "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism; these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

We are convinced that (to adopt the language of Mr. Justice Day in *American Express Co. v. United States,* 212 U. S. 522, 532, decided February 23, 1909): "In the absence of express exceptions, we think it was the intention of congress (the legislature) to prevent a departure from the published rates and schedules in any manner whatsoever. If this be not so, a wide door is opened to favoritism in the carriage of property." The fundamental principles covering the duties of common carriers to the public in respect to equal privileges have been clearly elucidated in the following cases, and are so well settled as to make quotation needless, but the opinions are worthy of careful consideration: *Messenger v. Pennsylvania R. Co.,* 36 N. J. Law, 407; *M'Neill v. Durham & C. R. Co.,* 132 N. Car. 510; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission, supra; United States v. Wells-Fargo Express Co.,* 161 Fed. 606.

Even though, as it pleads, the defendant may have entered into these contracts with no intention of violating the law, and has obeyed the restraining order of the court, yet the practice was pernicious and was an unlawful discrimination under the statute.

The prayer of the petition for a permanent injunction against defendants must be allowed.

INJUNCTION ALLOWED.

ROSE, J., not sitting.

HITCHCOCK COUNTY V. JOHN W. COLE ET AL., APPELLANTS; CONRAD WAGNER, APPELLEE.

FILED MAY 23, 1910. No. 15,992.

Judgment: VACATING. A district court has no jurisdiction to vacate its own judgment in a cause after the term at which such judgment was rendered, except by petition in equity, or in accordance with the provisions of section 602 of the code.

Appeal from the district court for Hitchcock county: ROBERT C. ORR, JUDGE. *Reversed with directions.*

C. H. Boyle and *C. E. Eldred,* for appellants.

John W. Cole and *Morlan, Ritchie & Wolff, contra.*

LETTON, J.

At the April, 1906, term of the district court for Hitchcock county a decree was entered in this action allowing certain real estate to be redeemed from a tax foreclosure sale, upon the appellants, the executrices of the estate of William Keeler, deceased, paying to Conrad Wagner, the purchaser at the sale, who had purchased the premises for the sum of $451 the sum of $225, being the amount of the tax lien and costs, and giving Wagner judgment against Hitchcock county for $226, being the amount of purchase money paid by him in excess of the amount of the tax lien and costs.

On an appeal from this judgment by Hitchcock county, it was decided by this court (*Hitchcock County v. Cole*, 80 Neb. 375) that the judgment against Hitchcock county was erroneous, that Wagner should have been reimbursed for the full amount of the purchase money, but that the order should have been against the persons seeking to redeem, and not against the county. The judgment of the district court was reversed and the cause remanded. On March 12, 1908, after the cause had been remanded, a motion was filed in the district court by Wagner, moving the court to set aside and vacate the order made in April, 1906, allowing the executrices to redeem for $225 upon the payment into court by Wagner for their use the sum of $225 and costs, or that the balance of $407.24 still due him under the laws of the state be declared a first lien on the premises, and execution awarded. Objections to the jurisdiction of the court were filed by the executrices on the ground that the decree sought to be set aside was entered April 19, 1906, the motion was not filed until April 12, 1908, and at a subsequent term, and that the court had no power to vacate, set aside or modify the former decree at this time. These objections were overruled, and the motion was sustained. The order allowing redemption on payment of $225, made at the April, 1906, term, was set aside, and it was ordered that unless the defendants seeking to redeem shall pay to Wagner within 40 days the sum of $407.24, balance due on purchase price, and costs, the same is declared a first lien on the premises, and if not paid within 40 days that the order vacating the order of redemption shall be deemed final. Exceptions were duly taken to the several rulings, and the executrices have appealed from this order.

The order is clearly erroneous. The decree rendered at the April, 1906, term, fixing the amount to be paid to Wagner in order to redeem from the sale, was not appealed from. The only appeal taken was by Hitchcock county from the judgment against it and in favor of Wagner. The decree rendered upon the issues raised be-

tween Wagner and the defendants seeking to redeem was not affected by this appeal. *Polk v. Covell,* 43 Neb. 884. The matters in controversy between Wagner and such defendants were adjudicated by this decree, and, no appeal having been taken by either of these parties therefrom, the decree, after the expiration of the term at which it was rendered, could not be opened up or set aside except for one of the grounds mentioned in section 602 of the code, or by an original action in equity founded upon some recognized ground for equitable relief. *Sherman County v. Nichols,* 65 Neb. 250; *McGrew v. State Bank,* 60 Neb. 716; *Dillon v. Chicago, K. & N. R. Co.,* 58 Neb. 472.

So far as it determined the amount necessary to be paid into court for Wagner's benefit in order to redeem, this decree was erroneous. *Smith v. Carnahan,* 83 Neb. 667; *Butler v. Libe,* 81 Neb. 740, 744; *Clarence v. Cunningham,* 86 Neb. 434. But the court had jurisdiction to render it. It might have been reversed or modified upon an appeal by Wagner, but it was not appealed from by him. The appeal taken by Hitchcock county did not affect the issues between these parties, nor the order allowing redemption; hence, it had no effect upon this order. *Nebraska Hardware Co. v. Humphrey Hardware Co.,* 81 Neb. 693. The result is unfortunate to Mr. Wagner, but the mistake was made in the former decree, which he was apparently satisfied with at the time. If doubtful of the result, he might have brought up the validity of the former order or decree, and had it determined at the same time that the appeal of the county from the judgment against it was determined, but this he failed to do.

The district court had no authority at the time it acted to set aside the former decree. Its judgment, therefore, is reversed and the cause remanded, with directions to set aside and vacate the order of October 12, 1908, and to reinstate the decree rendered April 19, 1906.

REVERSED.

IN RE ESTATE OF CHARLES SCHUCK.

LIZZIE JONES, APPELLANT, V. ESTATE OF CHARLES SCHUCK ET AL., APPELLEES.

FILED MAY 23, 1910. No. 15,997.

Wills: CONSTRUCTION. A widow who served as executrix under the will of her deceased husband *held* not answerable to his children in her final account for the income arising after his death from the estate of which he died seized, where he disposed of his property as follows: "I hereby bequeath and grant to my beloved wife, Augusta Johanna Schuck, all my personal and real estate of which I shall die possessed, to be used by her for her support and her dependent children, but not to be sold or wasted, but to use the income of it as heretofore directed," and "after the death of my wife it is my will that the said personal and real estate shall be divided equally between my eleven children."

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

John C. Stevens, for appellant.

S. W. Christy and *L. E. Cottle, contra.*

ROSE, J.

This appeal requires an examination of the following provisions of the duly probated will of Charles Schuck, deceased:

"First, I hereby constitute and appoint my beloved wife, Augusta Johanna Schuck, executrix of this my last will and testament, directing her to pay all my lawful debts and funeral expenses and to dispose of the balance of my estate as hereinafter directed.

"Second, I hereby bequeath and grant to my beloved wife, Augusta Johanna Schuck, all my personal and real estate of which I shall die possessed, to be used by her for her support and her dependent children, but not to be sold or wasted, but to use the income of it as heretofore directed.

"Third, after the death of my wife it is my will that the said personal and real estate shall be divided equally between my eleven children, to wit: Mrs. Lizzie Jones, Inland, Neb.; Mrs. Anna Bertha Scherwitz, Inland, Neb.; Mrs. Ida Guthrie, Denver, Colo.; Mrs. Louisa Schlick, Clay Center, Neb.; John Schuck, Inland, Neb.; Mrs. Mary Schmidt, Spring Ranche, Neb.; Eddie Schuck, Inland, Neb.; Charles Schuck, Inland, Neb.; Clara Schuck, Inland, Neb.; Herman Schuck, Inland, Neb.; Maude Schuck, Inland, Neb."

Testator's widow qualified as executrix, and the meaning of the will was first called in question in the county court of Clay county by objections to her final account and to her being discharged. Her final account showed there remained in her hands as unexpended proceeds of testator's personalty, after payment of debts and expenses of administration, the sum of $1,153. Executrix did not account for the interest on that sum nor for the rents and profits of the real estate of which testator died seized. The objections were founded on these propositions: The executrix, under the terms of the will, is responsible as trustee to testator's children for all of the estate not necessary for the support of herself and dependent children, including the income from both personal property and real estate. Out of the income not necessary for such support she cannot create for her individual benefit a separate estate which, at her death, may not be distributed according to the terms of the will. For the purpose of executing her trust she should be continued in her office of executrix until a trustee is appointed to administer the trust or until her life estate is terminated by her death. These propositions were all rejected by the county court in passing on the objections to the final report of the executrix. The result was that her account was confirmed and she was discharged with the balance of the proceeds of the personalty in her hands, and as a life tenant she was left in control of all of the realty of which testator died seized. Testator was twice married. Executrix was

his second wife. Lizzie Jones was the issue of the first marriage, and the other children named in his will were the issue of the second. It was Lizzie Jones who filed the objections in the county court. When they were overruled, she appealed to the district court for Clay county. The ruling there was likewise adverse to her, and as appellant she is now in this court urging the same objections and asking for the reversal of the judgment of the district court, where the decision was practically the same as in the county court, except that executrix was required to give a bond to account to testator's children for the unexpended balance of the proceeds of testator's personal property. Of this requirement, however, the executrix makes no complaint.

The following facts are established by stipulation: The rental value of the real estate of which testator died seized is $800 a year. The amount of money on hand as shown by the report of the executrix is $1,153, and is all of the personal estate left by testator at the time of his death, except what was applied by executrix to the payment of his debts and expenses of administration. Testatator left eleven children, four of whom are minors. One of them is feeble-minded and will require constant care during life. In this situation the will of the husband and father is: "I hereby bequeath and grant to my beloved wife, Augusta Johanna Schuck, all my personal and real estate of which I shall die possessed, to be used by her for her support and her dependent children, but not to be sold or wasted, but to use the income of it as heretofore directed"; and "after the death of my wife it is my will that the said personal and real estate shall be divided equally between my eleven children." It seems clear that what testator willed was the personal and real estate possessed by him at the time of his death. The language used does not evince an intention to will the children any of the income arising after his death from either the personalty or realty. What he gave his wife for the support of herself and dependent children was described in his own

words as "my personal and real estate of which I shall die possessed, to be used by her for her support and her dependent children, but not to be sold or wasted, but to use the income of it as heretofore directed." What he gave to his children, after the death of his wife, was "said personal and real estate," referring to the words previously used, namely: "My personal and real estate of which I shall die possessed." An intention to will the children that part of the income, if any, not necessary for the support of the widow and dependent children, is nowhere expressed; but the entire will, when considered in connection with the facts disclosed, indicates a purpose on part of the testator to give to his children, subject to the life estate of the widow, the estate, both real and personal, of which he died seized, after payment of the debts and expenses of administration. Under this interpretation of the will the executrix is not required to account to any of the children for any part of the income arising after the death of testator from the estate of which he died seized. This conclusion requires an affirmance of the judgment of the district court.

AFFIRMED.

SWAN OLSON, APPELLEE, V. FLORENCE C. HANIKA, ADMINISTRATRIX, ET AL., APPELLANTS.

FILED JUNE 10, 1910. No. 16,041.

1. **Specific Performance:** EVIDENCE. In an action against the widow, who was the administratrix of the estate of her deceased husband, and his heirs at law, for the specific performance of a contract by which it was alleged that plaintiff borrowed of the deceased the money to purchase the land in question, which was paid for the land by the deceased, and the title taken by him as security for the payment of the money loaned, the evidence is examined and found to be sufficient to sustain a finding and decree in favor of plaintiff.

2. Appeal: AMENDMENT AFTER JUDGMENT. The action was prosecuted by plaintiff in his own name and on his own behalf, but there was some evidence tending to show that the purchase was intended for his minor daughter. Instead of ordering the deed made to plaintiff, the court directed that it be made to his said minor daughter. Whereupon plaintiff by leave of court amended his petition to correspond with the decree. *Held*, That the irregularity, if there were such, not being to the prejudice of defendants, they could not be heard to complain.

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

Thomas L. Sloan and *W. S. Summers*, for appellants.

Howard Saxton and *Harry L. Keefe, contra.*

REESE, C. J.

This action was originally commenced against the widow and heirs of Adolph J. Hanika, deceased, by plaintiff in his own behalf, whereby he sought the specific performance of an alleged contract with said Adolph J. Hanika, deceased, for the purchase of the southeast quarter of the northeast quarter of section 31, township 25, range 7, in Thurston county. It was alleged in the petition, in substance, that on or about the 1st day of August, 1903, they mutually entered into an oral agreement whereby the said Adolph J. Hanika was to and did loan to plaintiff the sum of $1,332 for the purchase of the land from the then owner; that the rate of interest agreed to be paid was 10 per cent. per annum, and that to secure the same the title to said property was to be taken in the name of said Hanika to be held in trust until said principal sum and interest were paid, when said Hanika was to convey the property to plaintiff; that the land was purchased, the money being furnished by Hanika, and upon the completion of said purchase plaintiff entered into the possession of the same under said contract, and had paid the interest due from time to time, and offered to pay the

principal in full, but that the defendant Florence C. Hanika, the widow of said Adolph J. Hanika, deceased, and administratrix of his estate, refused to accept the same and refused to make the conveyance. After due service of summons upon all defendants a guardian *ad litem* was appointed for the minor defendants, when he and the other defendants answered by general denials. The full amount of the alleged purchase price, with interest then due, together with certain items of expense paid by Hanika in completing the purchase, was tendered and paid into court. A trial was had in the district court, which resulted in a finding and decree against defendants, but that the purchase was made by plaintiff for his minor daughter, Blanche Olson, and it was ordered that the land be conveyed to her, instead of to plaintiff. After the rendition of the decree plaintiff asked and obtained leave to amend his petition to conform to the decree and facts proved, by alleging that the purchase was made for the benefit of Blanche Olson, plaintiff's minor daughter, and the amended petition was filed. Defendants appeal.

Owing to the decease of Adolph J. Hanika, the testimony of plaintiff as to the transaction between t n was excluded, and the oral evidence in support of laintiff's claim is quite meager. There is, however, evic ice in its support which is probably sufficient to sustain the decree. The fact of plaintiff's possession of the land, as well as the payment by him of certain sums claimed to have been paid as interest, is well established, but it is contended by the defense that the possession was that of a tenant and the payments were cash rental. The evidence supporting this contention by the defense is very slight. In fact there is no proof that plaintiff ever agreed that the payments were for rent. A son of the deceased was called as a witness by the defense, and he testified to a conversation between plaintiff and his father in August, 1905, which would seem to indicate that there was something between the parties of the nature of a contract of the kind claimed by plaintiff. The witness was asked to state the

conversation, when he answered: "Well, Mr. Olson came over there (to Hanika's home) to get some money one day; it was in August, and him and father were down to the barn, and they were talking over this land deal, and my father said he thought this land would be a good interest on his money. Mr. Olson said he would like to have the land if he was able to buy it." He was then asked: "State what your father then said?" Answer: "He said if Mr. Olson could pay him in reasonable time for the land he could have it." This conversation was not inquired into with any degree of particularity, and for some reason plaintiff was not permitted to testify concerning it. It is probable that as persuasive evidence as any introduced were certain entries in the account book of the deceased, showing his account with plaintiff. These entries are as follows: "Aug. 7, money loaned on land bid, $333.00; Sept. 19, money loaned on land (Preston), $999.00; Sept. 19, money paid for making deed, $2.50; (without date), filing deed, 45 ct." The land in question was shown to be what is known as the "Preston" land. It is adjoining the farm of plaintiff, and remote from that owned by deceased at the time.

As we have seen, there was some evidence tending to show that the purchase was made for, or rather that plaintiff intended the land for, his daughter, Blanche Olson. Out of abundant caution, perhaps, the court ordered the conveyance to be made to her. The reason for this part of the decree, aside from that evidence, is not shown by the record. Plaintiff sought to correct the irregularity by amending his petition so as to make it conform to the facts and decree. Without inquiring into the regularity of this proceeding, it must be enough to say that plaintiff is content with the decree, and we are unable to discover how it can be prejudicial to defendants, and we can discover no reason for molesting it.

The decree of the district court is

AFFIRMED.

NICHOLAS F. THORMAN, APPELLANT, V. ANDREW BRYNGELSON, APPELLEE.

FILED JUNE 10, 1910. No. 16,083.

1. **Libel and Slander:** PROVINCE OF COURT AND JURY. In an action for slander it is for the court to decide in the first instance whether the alleged defamatory language used was slanderous *per se* if it were susceptible of the meaning attributed to it by the plaintiff in his petition, but for the jury to say whether the defendant by the use of the language intended to convey the idea to those who heard him that plaintiff was guilty of the crime alleged to have been committed and to so charge him.

2. ———: QUESTION FOR JURY. It was alleged in the petition, with proper innuendo, that defendant asked plaintiff in the presence and hearing of other persons if he stole corn, stating that his (defendant's) corn had been stolen, whereupon plaintiff asked defendant if his meaning was to charge him with the crime of stealing the corn, when defendant answered, "I mean just what I say," and plaintiff again inquired if defendant meant to accuse him of stealing the corn, when defendant answered, "There is very strong evidence that you did." Language charging one, in the presence of others, with stealing corn is actionable *per se* as matter of law. As to whether, by the language used (if so used), defendant intended to charge plaintiff with the crime of stealing corn is a question of fact to be decided by the jury.

3. ———: PETITION. A petition, the charging part of which is set out in the opinion, is *held* to state a cause of action, and that a general demurrer thereto was improperly sustained.

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

A. R. Oleson, for appellant.

Hunker & Krake, contra.

REESE, C. J.

This is an action for slander, instituted in the district court for Cuming county. The body or charging part of the petition is as follows:

"(1) Your said plaintiff is a resident and inhabitant

of the county of Cuming, in the state of Nebraska, living near Wisner, in said county, where he has resided for a number of years last past; that he is a farmer by occupation, but is not the owner of land but is a renter of land.

"(2) That on the 16th day of December, 1908, the said defendant, wickedly intending to injure the plaintiff in his good name and reputation, accosted the said plaintiff in the village of Wisner, Nebraska, in the presence of divers and numerous persons and in their hearing, falsely and maliciously did speak and publish of and concerning the said plaintiff false and defamatory words as follows: 'Say, Nick (meaning this plaintiff), do you (meaning this plaintiff) steal corn?' That when said defendant accosted your said plaintiff in that manner, your said plaintiff considered that the said defendant was joking, and that he thereupon jokingly replied that, 'Yes, I steal corn every day if I can.' That the defendant thereupon continued and your said plaintiff then observed that the said defendant was angry and was not joking nor jesting in the manner as plaintiff first supposed; that said defendant thereupon said, 'Well, we had some corn stolen' (meaning thereby that he and his brother had had some of their corn stolen); that your said plaintiff replied, saying, 'Well, you (meaning defendant) don't mean to say that I stole your corn, do you?' That defendant then replied to said plaintiff, saying, 'I mean just what I say,' to which your said plaintiff replied, saying to said defendant, 'Andrew (meaning defendant), you (meaning defendant) don't accuse me of that, do you?' That thereupon the said defendant replied, saying, 'There is very strong evidence that you (meaning plaintiff) did.' That all of his conversation and false and defamatory charges were made by said defendant of and concerning plaintiff in a public and angry and insolent manner in the presence and hearing of divers persons who understood the same, and that by the words aforesaid the said defendant then and thereby publicly charged the said plaintiff with stealing corn from their premises; that said charge was wholly

false and unfounded and was so spoken and published by the said defendant to the great and lasting injury of your said plaintiff."

To this petition defendant filed a general demurrer, which was sustained by the court, and, plaintiff electing to stand upon his petition as filed, the action was dismissed at his costs, and from which he appeals, contending that the court erred in holding that the averments of the petition do not state a cause of action. It is to be regretted that the law of the case has not been as well briefed as the importance of the question would seem to demand, not a single authority being cited by the appellee in support of the ruling of the district court. Stripped of all verbiage and innuendo, the conversation between the parties was as follows: Defendant: "Say, Nick, do you steal corn?" Plaintiff: "Yes, I steal corn every day if I can." Defendant: "Well, we had some corn stolen." Plaintiff: "Well, you don't mean to say that I stole your corn, do you?" Defendant: "I mean just what I say." Plaintiff: "Andrew, you don't accuse me of that, do you?" Defendant: "There is very strong evidence that you did."

The question arises: What would the bystanders, alleged to have been present and in hearing, understand from the language used, giving it its common and ordinary meaning, that defendant meant by the words uttered? Did he intend in this way to charge plaintiff with the stealing of his corn? If he did, the language would probably be actionable *per se*. If not, if the language was not susceptible of that meaning, when considered as above indicated, it would not. It is alleged that defendant stated he had had corn stolen, and there was very strong evidence that plaintiff was guilty of the theft. Was this equivalent to a direct charge that plaintiff was the guilty party? The rule seems to be that it must appear: "(1) That some *act* was imputed by the defendant; (2) that such act is of a *criminal* or indictable *nature;* and (3) that it was meant to be imputed to the *plaintiff*. The imputation of an act may be inferred, although the terms of

the communication be indirect, and although the act imputed be, in legal strictness, impossible." Starkie (Folkard), Slander and Libel (4th Eng. ed.) sec. 56. In the succeeding section the author, in discussing the subject, "From what words a criminal act is to be inferred," says: "Wherever words are used calculated to impress upon the minds of the hearers a suspicion of the plaintiff's having committed a criminal act, such an inference may and ought to be drawn, whatever form of expression may have been adopted. * * * Where the terms of a communication are indirect, the imputation of an act committed may be inferred where the defendant expresses a *suspicion,* or *opinion,* or *institutes a comparison,* or delivers the words as matter of *hearsay,* or by way of *interrogation* or *answer,* or *exclamation,* or uses *disjunctive* or *adjective* words, or speaks *ironically,* or, in general, where the statement virtually includes or assumes the commission of the principal act, or a strong suspicion of it." (The italics are the author's.) And in all such cases the question whether the words were used maliciously and with intent to defame is for the determination of the jury.

In 25 Cyc. 294, it is said in the text: "As a general rule to charge one orally with the crime of larceny is actionable *per se.* In order to be actionable *per se,* however, it is not necessary that the words spoken should by themselves constitute a technical charge of crime or that there should be a directly affirmative charge; it is sufficient if the words would naturally and presumably be understood by the hearers as charging the crime of larceny"—citing a number of cases. By the same authority, on page 542, it is said: "It is the province of the court to determine what constitutes libel or slander abstractly. Hence, if the language is plain and unambiguous, it is a question of law whether or not it is libelous or slanderous. But if the language is ambiguous and susceptible of two meanings, one defamatory and the other not, it is for the jury to decide in what sense it was used. However, it is for the court to determine whether or not the language on its

face is capable of a double meaning and should be submitted to the jury for construction. It is the duty of the court to say whether a publication is capable of the meaning ascribed to it by the innuendo. But when the court is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it"—citing cases.

There can be no question but that defendant stated that his corn had been stolen; in short, that a crime had been committed. This, the court must hold, would be slanderous, if the defendant intended to charge that plaintiff was the guilty party and so intended for the bystanders to understand. As to whether he did so intend, the charge not being made in direct terms, is a question of fact for the decision of the jury. Townshend, Slander and Libel (4th ed.) sec. 281. See, also, *Alcorn v. Bass*, 17 Ind. App. 500. It is not deemed necessary to multiply citations upon this part of the case.

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

REVERSED.

CARRIE E. BAYARD, APPELLANT, V. CITY OF FRANKLIN, APPELLEE.

FILED JUNE 10, 1910. No. 16,586.

1. **Municipal Corporations: PRESENTATION OF CLAIMS.** The word "claims" in section 80, art. I, ch. 14, Comp. St. 1909, relating to cities and villages, applies alone to those arising upon contract, and not upon tort, as for a personal injury caused by the negligence of the city. *Butterfield v. City of Beaver City*, 84 Neb. 417, and *Nance v. Falls City*, 16 Neb. 85, followed and approved.
2. ———: ———. Said section 80, art. I, ch. 14, Comp. St. 1909, is in force, and was not modified or repealed by chapters 15 and 16, laws 1885.
3. **Judgment for costs, rendered against plaintiff, who was successful in her suit against the city, reversed and costs ordered to be taxed to the city.**

APPEAL from the district court for Franklin county: ED L. ADAMS, JUDGE. *Reversed with directions.*

W. H. Miller and *George A. Adams,* for appellant.

H. W. Short, contra.

REESE, C. J.

This case is here the second time. Plaintiff recovered a judgment against defendant for personal injuries, and, the cause having been appealed to this court, the judgment was affirmed. 84 Neb. 150. Upon the cause being remanded to the district court, for the purpose of enforcing the judgment, defendant filed its motion to tax the costs made in the district court to plaintiff, stating as the grounds thereof that the claim for damages was never filed or presented to the city council of defendant prior to the commencement of the action in the district court. The motion was sustained, and the costs taxed to plaintiff. From the order retaxing the costs plaintiff appeals.

It will be seen from this statement that the only question presented is as to whether, as a prerequisite to the commencement of the suit, plaintiff's claim for damages should have been presented to the city council of defendant for allowance, or, failing to do so, be subject to the payment of all the costs in the district court without reference to whether she was successful or not. It is conceded that plaintiff's claim was not so filed. Ordinarily we should be content by referring to the case of *Butterfield v. City of Beaver City,* 84 Neb. 417, and our decisions cited therein, where it was held that such filing and presentation were not necessary to the recovery of costs. But it is contended by defendant that that case and those cited therein should not be followed, but that the decision in *City of Crete v. Childs,* 11 Neb. 252, should be adhered to. This contention is based on chapters 15 and 16, laws 1885, by which it is claimed that cities of more than 1,000

and less than 25,000 inhabitants are by chapter 16 brought under the provisions of chapter 15, which is for the government of cities having more than 10,000 inhabitants, and that section 34 of the last named act, which provides that claims against the city for personal injuries must be presented to the city council for allowance before suit, or, in case of failure, no costs can be allowed. We have sought to follow the changes in the acts of the legislature governing cities and villages, but, for want of uniform references to statutes amended, changed or repealed, it has been impossible to do so to our satisfaction in the limited time at our command. The classification of cities has been the subject of continual changes since 1[illegible] it could serve no good purpose, had we the time, to [illegible] up and specify the changes made. Chapter 15, laws 1885, is an amendment of the law providing for the government of cities of the second class having more than 10,000 inhabitants. In 1889 a new act was passed (laws 1889, ch. 15) providing for the government of cities having a population of less than 25,000 and more than 8,000 inhabitants, which was to all intents and purposes a substitute for the act of which chapter 15, laws 1885, is an amendment, and in which the section providing for the allowance of unliquidated claims against cities was again amended, but practically unchanged in so far as the requirement for filing of the claim with the council was concerned. The section was again amended in 1895 (laws 1895, ch. 13), but the portion under consideration was not changed in any important feature as to claims. In 1901 the section, practically unchanged, was carried into chapter 18, laws 1901, which was declared to be for the government of cities having more than 5,000 and less than 25,000 inhabitants. Similar action was taken in 1903 (laws 1903, ch. 19) with like results. This legislation seems to have effectually removed the section from its application to cities of the class to which defendant belongs. In 1879 a complete and independent act was passed providing "for the organization, government, and powers of

cities and villages" (laws 1879, p. 191, secs. 1-118), in which the section under consideration and which forms the basis of the decision in *Butterfield v. City of Beaver City, supra,* occurs. That act was originally limited to cities, towns and villages having more than 1,500 and less than 15,000, but the compiler of the statutes has substituted section 1, ch. 16, laws 1885, for section 1 of the act of 1879, which is article I, ch. 14 of the present Compiled Statutes; and this was correctly done, as the act of 1885 specifically refers to and amends that section. By that amendment the number of population was changed to "more than 1,000 and less than 25,000," and which classification includes cities of the class to which defendant belongs. We are not aware of any amendment or repeal of the act, or section 80 thereof, construed in *Butterfield v. City of Beaver City, supra,* and the decisions therein cited, and those decisions will be followed in this case. We conclude, therefore, that defendant is liable for the costs in this case, and that the district court erred in taxing them to plaintiff.

The judgment of the district court is reversed and the cause remanded, with directions to that court to vacate its order taxing the costs to plaintiff, and restore the original judgment taxing them to defendant.

REVERSED.

HENRY GLANTZ, ADMINISTRATOR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JUNE 10, 1910. No. 16,001.

1. **Master and Servant:** ASSUMPTION OF RISKS: BURDEN OF PROOF. A servant assumes the ordinary risks arising from the manner of conducting the master's business, in which he is to take part, and from the appliances used therefor, when such risks are known to him, or are apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the

employment, or continues in it without complaint or objections to the hazards; the presumption in such case is that such risks have been assumed by him, and in order to recover for injuries caused thereby the burden is upon the plaintiff to establish an exception to the rule. Unless he has done so, it is error to instruct the jury that "the burden is on the defendant to show that the plaintiff has assumed the risk of the accident complained of."

2. ———: ———: INSTRUCTIONS. In an action by the administrator of the estate of one who was struck and killed by a passing switch engine while employed and working as a section hand or trackman, who it appears knew the dangers and assumed the risks of such employment, it is error to instruct the jury that "It is the duty of the master to exercise reasonable care to provide a safe place for the servant to work."

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

James E. Kelby and *Byron Clark*, for appellant.

Wilmer B. Comstock, contra.

BARNES, J.

Action for damages for the death of plaintiff's intestate, alleged to have been caused by the wrongful act of the defendant. Plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that the plaintiff's intestate, Philip Feuerstein, was, on the 22d day of December, 1906, and theretofore had been, employed by the defendant as a sectionman, and was working on that section of the defendant's railroad track extending from Lincoln to Havelock; that while repairing one of defendant's switch tracks, at or near Havelock, on that day, he was run over and killed by one of defendant's switch engines.

The plaintiff, as grounds for a recovery, alleged, in substance, that the switch engine which ran over Feuerstein was improperly and negligently constructed, in that it was equipped with a high square tank which obstructed the view of the engineer and fireman so that they were

unable to see the deceased and warn him of his danger; that it was the custom of the defendant in the Havelock yards to have a switchman stationed on the footboard of its switch engines in order to warn persons on its tracks of its approach, and that at the time of the accident this custom was not observed; that the escaping steam from a passing freight train rendered it impossible for the deceased to hear or see the approaching engine which ran him down, or to hear the ringing of the bell thereof, if it was ringing. The defendant denied the allegations of negligence, alleged assumption of risk, and pleaded the contributory negligence of the deceased as a defense to the action. The reply was a general denial.

To maintain the action on his part, plaintiff called as a witness one Henry Seder, who was working with the deceased at the time he was killed, and who testified, in substance, that they were working at a switch near Havelock; that a freight train came along on the main line about 40 feet from them; that at that time a switch engine was backing toward the switch on which they were at work; that steam escaped from the freight engine and made a noise—a loud noise; that then the switch engine backed up and ran over Feuerstein, who was standing with one foot inside and the other foot outside of the rail; that Feuerstein was using a pick, and was on the north side, while he was on the south side; that he got off the track when he heard the switch engine bell, and that he was watching the engine; that when he got off the track he called to Feuerstein once before he was struck by the engine. When called later by the defendant the witness further testified that he heard the bell ringing and got off from the track; that he called to Feuerstein, and said, "Look out"; that at that time the section foreman was absent, having been gone about 15 or 20 minutes; that when he went away he warned them both to look out for the switch engine; that the engine, while switching, had passed them about 20 times during that day; that they were always warned by the foreman to look out for switch

engines and trains; that there was nothing to prevent them from seeing the approaching switch engine; that there was steam escaping from the safety valve on the top of the freight engine, but not from the cylinder cocks.

On the question of the construction of the switch engine, the record discloses that it was an ordinary road engine of small size with the common square tank, which had been replaced by a larger and heavier engine to supply the needs of the increasing traffic; that it was then equipped with what are called "foot-boards," and was thus fitted for switching and yard work; that it was suitable for that purpose and was similar to those used for switching by the defendant and other railroads; that, while switch engines are sometimes constructed with sloping tanks, both kinds are in general use for switching purposes, and the only difference between them is that the engineer and fireman can see the track a little nearer the back of an engine with a sloping tank than they can with one having a square tank.

Again, the evidence in this case fails to show that the construction of the engine was the proximate cause of the accident in this case. Indeed, there is no proof in the record which shows that it in any way contributed thereto.

It further appears, by plaintiff's own evidence, that the deceased had been working on the section and in the yards of the defendant company for about two months, was familiar with his work and knew its dangers; that the engine in question was in use during that time, and the deceased was familiar with its construction; that his eyesight was good and his hearing perfect. It also appears that he was fully aware of the dangers incident to his employment, and, in the absence of any proof to the contrary, he must be presumed to have assumed the ordinary hazards thereof.

It is alleged in plaintiff's petition that it was the custom of the defendant to station a man on the footboard of its switch engines while working in its Havelock yards to warn persons of their approach, but it appears from

the evidence that some of defendant's tracks were constructed through its shops at that place; that when passing through them a guard is stationed on the footboard to warn the shopmen to keep off from the tracks, but no such lookout is or ever has been stationed on the footboards of engines while switching in defendant's yards, and it is the duty of the sectionmen or trackmen to themselves look out for approaching engines and trains, this being one of the ordinary hazards arising from the nature of their employment, and thus provide for their own safety, and the deceased was fully aware of that fact.

Defendant contends that the eighth paragraph of the court's instructions is erroneous. Therein the jury were told, among other things, that "the burden is also upon the defendant to show that the plaintiff assumed the risk of the accident which resulted in his death." This is one of the principal errors complained of. In support of this contention defendant has called our attention to the case of *Malm v. Thelin*, 47 Neb. 686, where it is said: "A servant assumes risks arising from defective appliances used or to be used by him, or from the manner in which the business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment, or continues in it without complaint or objection as to the hazards. * * * The presumption is that such risk has been assumed by the servant, and, in order to recover, the burden is upon the plaintiff to establish one of the exceptions to the rule." This case was followed and approved in *Evans Laundry Co. v. Crawford*, 67 Neb. 153. See, also, *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, and *Missouri P. R. Co. v. Baxter*, 42 Neb. 793.

It is the universal rule that in operating railroads employees in that business assume the risks which are peculiar thereto, and sectionmen or trackmen must necessarily assume the hazards incident to switching cars and the movement of passing engines and trains. *Little Rock*

& M. R. Co. v. Barry, 84 Fed. 944. We have not overlooked the case of *Grimm v. Omaha Electric L. & P. Co.,* 79 Neb. 387, where in general terms a contrary rule is stated. But in that case the servant was sent to perform an extra hazardous duty, without any warning as to the then unusually dangerous condition of defendant's wires, and of which he had no knowledge. Therefore, that decision is clearly right, because that case was within the exception to the general rule so often announced by our former decisions. We are therefore of opinion that the district court, in view of the testimony in this case, which fails to bring it within any of the exceptions to the general rule, erred in giving the instruction complained of.

Complaint is also made of the tenth paragraph of the instructions in which the jury were told that it is the duty of the master to exercise reasonable care to provide a safe place for the servant to work. It is contended that by this instruction the jury must have been led to believe that there was some evidence in the case that the place where Feuerstein was required to work was unusually dangerous and unsafe, and that by reason thereof he lost his life. Defendant insists that this instruction should not have been given because the question of safe place was not involved in this action. It is a matter of common knowledge that a railroad track is a place of danger, and sectionmen or trackmen must be aware of that fact; that it is impracticable and impossible for a railroad company to keep a constant watch or lookout for the protection of sectionmen while engaged in construction or repair work upon its tracks; that therefore they are required to exercise their faculties of sight and hearing and thus avoid injuries from passing engines and trains. In this case, it appears, as above stated, that the deceased was familiar with the work; that he was acquainted with the yards, tracks and switches of the defendant company; that he knew of the construction of its switch engine, and therefore must have been fully aware of the dangers incident to his employment. With this knowledge he sought and

obtained work from the defendant company, and remained in its service without complaint until he was killed. In view of these facts, we are of opinion that the court should not have included the question of safe place in its instructions to the jury.

It is also contended, among other things, that the evidence is insufficient to sustain the verdict. Upon this question we express no opinion, for it is possible that the case may be tried again, and that the evidence upon such trial may not be the same as that contained in the record now before us.

For the foregoing reasons, we are of opinion that the errors above mentioned entitle the defendant to a new trial, and the judgment of the district court is therefore reversed and the cause is remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

LETTON, J., concurring in conclusion.

I concur in the reversal of this case, but not for the reasons stated in the foregoing opinion. I think the proper rule as to pleading in case of assumption of risk is laid down in the syllabus in *Evans Laundry Co. v. Crawford*, 67 Neb. 153, as follows: "It is not required that the master who is sued by a servant for an injury received while engaged in the line of his employment shall plead in his answer that the servant assumed the usual and ordinary risks and hazards incident to the service, in order to be entitled to an instruction to the jury as to the rule of law regarding such assumed risks. Where the assumption of a risk not usually and ordinarily incident to the employment is relied on as a defense in an action against the master for negligence, such assumption of risk must be specially pleaded."

I am also of opinion that, while the instructions are more extended than necessary under the simple issues presented in this case, yet there is nothing seriously preju-

dicial to defendant therein when the whole charge is considered. The judgment should be reversed for the reasons that the evidence fails to sustain the verdict, and that if the jury had obeyed the instructions of the court it must have found for the defendant. The court instructed the jury that "if the defendant company was operating its switch engine at that time, with the ordinary and usual tender such as Philip Feuerstein had been accustomed to see it operate when engaged in his work, or if the defendant company was maintaining the kind of a lookout such as said Feuerstein had been accustomed to see it maintain, then said Feuerstein assumed the risks incident thereto." The evidence shows without dispute that the deceased had worked in the Havelock yards for two or three months before he was killed; that this particular engine was the only switch engine used in these yards; that it had been running there for two months or more before the day of the accident, and that on that day it had been running backward and forward on these tracks about 15 or 20 times. It is also clearly proved that it was not the custom to keep men upon the running boards of the engine, except when entering the shops in which tracks were laid and many men employed. The defendant "was operating its switch engine, at that time, with the ordinary and usual tender such as Philip Feuerstein had been accustomed to see it operate when engaged in his work," and was also "maintaining the kind of a lookout such as said Feuerstein had been accustomed to see it maintain." There being no evidence to the contrary upon these propositions, and the deceased having assumed the ordinary risks of his employment, the verdict is not supported by the evidence and is contrary to the instructions of the court.

For these reasons, the judgment of the district court should be reversed.

REESE, C. J., dissenting.

I think the foregoing opinion may be fairly construed

to mean that, by reason of the fact that defendant made common use of the square tank engine for switching purposes, it thereby escapes liability for injuries to its employees by reason of the more dangerous character of the engine. If I am correct in this conclusion I cannot agree to the doctrine announced. It is the duty of an employer to provide for his servants such appliances and to make use of such machinery as will tend to reduce the dangers of the employment as much as can be reasonably done. If a square tank is more dangerous in a switch or track yard than the engine with a sloping tank, it is the duty to use that which creates the least danger, if accessible. It is unimportant as to how much, or how generally, the more dangerous appliance is used. It ought not to be used at all. Human life is too sacred to be weighed in the balance with the matter of the employer's convenience or economy. The common knowledge of mankind is that the square tank engine is a more dangerous implement, running back and forth in the switching yards, than the sloping tank. As to whether the quality of the tank used in this case served to increase the danger or contributed to the death of the deceased is a question for the jury, under proper instructions, to whom these questions should be submitted.

It may be true that the construction of a footboard upon the rear of an engine tank was not *intended* in the first instance as a place of lookout from which to warn people who are in danger of being killed or injured by the engines, yet our common knowledge, experience and observation tell us that that footboard affords a most excellent point of observation from which to warn people of their danger, and, in switching yards especially, where employees are continually moving about, the safety of persons could be greatly enhanced by placing an employee upon such advantageous point. This is especially true when a square tank which cuts off the view of the engineer and fireman is used. Questions of this kind should be left to the jury.

SEDGWICK, J., dissenting.

1. It appears from the majority opinion that the judgment of the district court is reversed because of the giving of two instructions which are deemed erroneous. In one of the instructions given the court used the following language: "The burden is also upon the defendant to show that the plaintiff assumed the risk of the accident which resulted in his death." This is held to be erroneous upon the authority of *Malm v. Thelin,* 47 Neb. 686, from which case the following language is quoted in the majority opinion: "The presumption is that such risk has been assumed by the servant, and, in order to recover, the burden is upon the plaintiff to establish one of the exceptions to the rule." I do not think that this language is applicable to the case at bar. In *Malm v. Thelin,* there was evidence tending to show that defective machinery was used under a promise by the master to remove the defect, and it was held that such evidence was inadmissible "where such promise had not been pleaded." The holding is that, when some special fact is relied upon as avoiding the general rule of assumption of risk, such special fact must be pleaded and proved by the plaintiff. If plaintiff relies upon the fact that the machinery was dangerous by reason of defects therein, and cannot deny that he knew of the defective condition of the machinery, and voluntarily continued to use it with full knowledge of the danger connected therewith, he may still deny that he assumed the risk if the master induced him to continue such use by promising to remove the defect, but the burden is upon the plaintiff to prove such promise upon the part of the master, and no such proof is competent unless that issue is tendered by plaintiff in his pleadings. This is the technical rule advanced in *Malm v. Thelin.* No such condition as this arises in the case at bar. The answer alleged that "the risk and danger in moving of engines and trains on the tracks on which he was to work was a risk and danger assumed by him in such work," and the reply

was a general denial. There was no plea in the reply to avoid the assumption of risk on the part of the plaintiff. He simply denied that the risks were of such a nature and the circumstances were of such a character as to require him to assume the risk, and upon this issue, that is, the issue as to whether the plaintiff did in fact assume the risk, the burden of proof is upon the party alleging it, which in this case was the defendant. *Grimm v. Omaha Electric L. & P. Co.*, 79 Neb. 395, and cases cited.

Under the authority of *Malm v. Thelin* no evidence as to assumption of risk was competent in this case except upon the general issue as to whether or not the plaintiff did assume all the risks to which he was subjected. There was no evidence offered of any special promise on the part of the defendant, or of any special circumstances that would change or affect the general rule that the assumption of risk is an affirmative matter to be presented and proved by the defendant, and the instruction of the court properly stated the issue as it was presented. The whole charge to the jury must be construed together; and the court correctly instructed the jury on the assumption of risk in other instructions. Instruction No. 11 is as follows: "By acceptance of an employment, a servant assumes all risks of injury caused (*a*) by the negligence of a competent fellow servant; (*b*) by the dangers incidental to the business; (*c*) by the dangers arising from the existing conditions of the premises, machinery, etc., which are known or ought to be known to the servant at the time, therefore no duty is imposed upon the master to protect a servant against these risks, and he consequently cannot be guilty of negligence in connection therewith. The risk that a master will himself be negligent is not assumed by the servant, and where the master owes any duty to the servant, he cannot escape liability by delegating its performance to an agent. A servant by accepting the employment impliedly agrees to assume all risks of injury arising from an existing condition of affairs, however dangerous that condition may be, provided that (*a*) he

knows and appreciates the danger; (*b*) or in the exercise of reasonable care would know and appreciate it; (*c*) and if the danger is obvious he is held to know and appreciate it. As to such dangers, the master owes no duty to the servant. However, as to dangers which due care would not disclose to him, the master is bound to warn him."

2. The majority opinion holds that "the question of safe place was not involved in this action," but the instruction does not tell the jury that the master is bound under all circumstances to furnish a safe place to work. He must not "carelessly subject his servant to any danger not necessarily incident to or connected with his employment," and he must exercise reasonable care to provide his servant with a reasonably safe place in which to work, taking into account the nature of the business in which he is engaged. Instruction No. 10 which contains the language held to be erroneous is as follows: "It is the duty of the master to use reasonable care in the conduct of his business, so as not to carelessly subject his servant to any dangers not necessarily incident to or connected with his employment. It is also the master's duty to exercise reasonable care to provide his servant with a reasonably safe place in which to work, taking into account the nature of the business in which he is engaged, and the servant has a right to assume that the place furnished him in which to work is reasonably safe and suitable for the performance of the services required, taking into consideration the nature of the employment, unless there are some obvious dangers. If there are dangers incident to the employment that are not obvious to a man of the employee's experience and understanding, then it is the duty of the master to give proper directions as to how the work should be done to avoid such dangers." This instruction was immediately followed by instruction No. 11, quoted above, in which the duties of the servant and the risks assumed by him are correctly and plainly explained.

I am unable to see how the issue presented by the pleadings and evidence could be more fairly or accurately

stated. If these instructions were erroneous it was because of the condition of the evidence that was before the jury, and the holding of the majority opinion is in effect that the evidence was such that the court should have told the jury that the plaintiff assumed all of the risks of the employment in which he was engaged. It seems to me that the court should either have instructed the jury to find a verdict for the defendant or else should have given the instructions substantially as they were given. In other words, I think that the case was carefully and properly tried, and that there is no escape for the defendant unless it is held that the evidence was not sufficient to support the verdict.

BARBARA KUHLMAN, APPELLEE, V. WILLIAM J. LEMP BREWING COMPANY, APPELLANT.

FILED JUNE 10, 1910. No. 16,069.

1. **Landlord and Tenant:** HOLDING OVER THE TERM. Where a tenant under a written lease for one year, with the option of again leasing the premises for one or more years, holds over without exercising his option, his landlord may, if he so elects, consider him his tenant for another year, and thus render him liable for the payment of rent for that period at the rental fixed by the terms of the lease.

2. ———: ———: TERMINATION OF TENANCY. Where, in such a case, and while holding over, the tenant claims the right to terminate his tenancy at any time, under conditions expressed in the lease, he must allege and prove the existence of the conditions and his compliance therewith, in order to escape the legal consequences of holding over the term.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

H. C. Brome and *Clinton Brome*, for appellant.

D. W. Livingston and *George H. Heinke, contra.*

BARNES, J.

Action in the district court for Otoe county to recover rent alleged to be due for the use of certain premises situated in the city of Auburn in said county. The plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that there was a written lease between the parties by which the defendant rented from the plaintiff the premises in question from the 1st day of May, 1906, to the 1st day of May, 1907, at $50 a month, payable monthly in advance. The lease in question also contained the following provision: "It is further hereby expressly agreed by and between the parties hereto that the said William J. Lemp Brewing Company is to have the option of leasing said premises upon the same terms as embodied in this lease after the expiration of the term herein granted for the further period of three years, making a total term of four years, provided, however, that in case the city of Auburn shall prohibit the sale of intoxicating liquors within its borders, or pass obnoxious laws or ordinances forcing the keepers of saloons for the sale of intoxicating liquors to close their places of business, or render such business so unprofitable as to compel them to quit business, then the said William J. Lemp Brewing Company may upon reasonable notice terminate the tenancy under this contract, and cancel and annul this lease."

It further appears that the defendant took possession of the building situated on the premises described in the lease, and from the 4th day of May, 1906, until the 4th day of May, 1907, conducted a saloon, either by itself or others, for the sale of intoxicating liquors therein; that some time in April, 1907, it informed the plaintiff that if a license to sell intoxicating liquors could not be procured it would not exercise its option to again lease the premises as provided by the terms of its existing lease, and there is no claim that it exercised such option. It also appears that two attempts were made to procure a license, which were not

successful, on account of personal objections to the applicant; and that, pending the proceeding therefor, the defendant occupied the premises with its stock and fixtures until about the middle of June, 1907; that on the 29th day of that month defendant delivered the key to the building to one Butts, an employee of the plaintiff's husband. There is no evidence in the record showing or tending to show that the city of Auburn prohibited the sale of intoxicating liquors within its borders, or passed obnoxious laws or ordinances forcing the keepers of saloons for the sale of intoxicating liquors to close their places of business, or render such business so unprofitable as to compel them to quit the business, and that defendant gave no notice to the plaintiff of its intention to terminate the lease other than that above mentioned.

At the close of the evidence the court instructed the jury, among other things, as follows: Instruction No. 5. "You are instructed that where a tenant with the consent of his landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy for a like term and upon the same conditions, and you are instructed that the first term mentioned in the lease was one year, and if you find from the evidence that the defendant held over his term, that is, stayed in possession until May 5, 1907, or the 29th day of June, 1907, either with the express consent of the plaintiff Barbara Kuhlman or by her implied consent, then you are instructed that the defendant would be liable for rent at the rate of $50 a month for the year ending May 1, 1908. You are instructed in this case that there is no evidence in this case that the city of Auburn prohibited the sale of intoxicating liquors in said city, or passed laws forcing saloons to close their places of business, or to render their business unprofitable."

Defendant strenuously contends that the giving of this instruction was reversible error, and argues that by holding over from May 4, 1907, to about the middle of June of that year, it became at most only a tenant at will, and

could thereafter terminate the lease at any time it desired to do so. To this contention we cannot give our assent. It may be said that upon this question there is a division of the authorities, but this court is fairly committed to the rule that where a tenant under a written lease for one year, with the option of renewal, or of again leasing the premises for one or more years, holds over without exercising his option, the landlord may, if he so desires, consider him a tenant for another year, and liable for the rent for that period at the rate fixed by the terms of the lease. *Bradley v. Slater,* 50 Neb. 682; *Critchfield v. Remaley,* 21 Neb. 178; *Yates v. Kinney,* 19 Neb. 275; *Thiebaud v. First Nat. Bank,* 42 Ind. 212.

In *Haynes v. Aldrich,* 28 Am. St. Rep. 636 (133 N. Y. 287) it was said: "From tenant's holding over after the expiration of his term, the law implies an agreement to hold for a year upon the terms of the prior lease. The option to so regard it is with the landlord, and not with the tenant, and the latter holds over at his peril." In that case the holding over was for the period of two days, which occurred by reason of difficulty on the part of the lessee to procure trucks with which to move, and also from the illness of a boarder; and it was held that this would not prevent the holding over from operating as a renewal of the lease for another year if the landlord so elected to treat it, and it was said: "Lessor's election to treat a holding over as a renewal of the lease for another year, having been manifested in direct and unequivocal language, is not avoided by evidence that he subsequently visited the premises, and, finding them deserted by his tenant, had some repairs attended to, and tried in vain to rent them to another tenant." Indeed, without citing further authorities, we may safely say that the rule adopted by this court is sustained by the great weight of authority in this country.

Defendant has cited some cases to the contrary, among which are *Andrews v. Marshall Creamery Co.,* 118 Ia. 595, and *Spangler v. Rogers,* 123 Ia. 724. It appears, however,

that those cases were governed by section 2991 of the Iowa code, which provides that a tenant holding over a specified term becomes a tenant at will, and that the tenancy may be terminated upon giving thirty days' notice, and therefore do not sustain the defendant's contention.

Finally, defendant contends that the provision contained in the lease which is quoted above gave it the option of terminating the tenancy at any time upon the happening of certain events and the giving of reasonable notice, and therefore it could not be held for the payment of rent after May 1, 1907. It must be observed, however, that there is no evidence in the record that the events upon which the right to cancel the lease depended ever occurred, or that reasonable notice was given to the plaintiff of the defendant's intention to terminate its tenancy, and therefore the district court did not err in giving the instruction complained of.

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

AFFIRMED.

J. C. ROBINSON SEED COMPANY, APPELLEE, V. JOHN HAMILTON ET AL., APPELLANTS.

FILED JUNE 10, 1910. No. 16,077.

1. **Crops: CONTRACT: CONSTRUCTION.** One who grows for and agrees to deliver a certain crop to the owner or possessor of real estate for an agreed price per hundred pounds, under a written contract by which it is expressly provided "that nothing herein contained shall be construed to make the instrument a lease of the premises between the parties hereto, or divest the owner of his title to the crop," is a mere cropper, and acquires no title to any portion of the crop, and cannot sell or mortgage the same or any part of it, without the consent of the owner.

2. ———: **RIGHT TO SELL: BURDEN OF PROOF.** If the cropper claims the right to sell a portion of the crop by reason of a division thereof, or an oral agreement varying the terms of his written contract, the burden is upon him to establish such right by competent evidence.

3. ———: ———: EVIDENCE. Evidence examined, and found insufficient to require the submission of the question of a division of the crop or an oral modification of the written contract to the jury.

4. ———: REPLEVIN: DEMAND AND TENDER. Where the cropper has wrongfully delivered a part of the crop to another than the owner thereof, such owner may maintain replevin therefor without demand, or tender of the cropper's agreed compensation.

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

John C. Wharton and *Byron G. Burbank,* for appellants.

Baxter & Van Dusen, contra.

BARNES, J.

Action of replevin in the district court for Douglas county to recover the possession of 30,000 pounds of Stowell's evergreen sweet corn. The plaintiff had the verdict and judgment, and the defendants have appealed.

It appears that at all times hereinafter mentioned Mary T. Robinson was the owner of a farm situated near Waterloo, in Douglas county, Nebraska, known as the "Riverside farm"; that for the year 1907 she leased this land to the plaintiff, the J. C. Robinson Seed Company, which was engaged in raising and selling corn and other seeds at wholesale; that the plaintiff, in conducting its business, contracted with various retail dealers throughout the United States certain quantities of seeds of many kinds at stipulated prices; that, in order to supply such seeds and make sure of filling its orders, it entered into contracts with divers persons to grow for it different varieties of corn and vine seeds for certain agreed compensations, and to that end in the year 1907 it entered into a written contract with the defendant Hamilton to raise 50 acres, more or less, of Stowell's evergreen sweet corn for it on its Riverside farm above mentioned, for which the seed company was to pay him $1.20 per hundred pounds when delivered to it at its seed house, or

f. o. b. the cars at Waterloo, Nebraska. As an additional compensation Hamilton was to have the use of the house and buildings situated on the farm, and was to take good care of the same, cut the weeds on the roadside, and generally care for the premises in a careful and up-to-date manner. It was also provided that in case the corn, when ready for delivery, should not have a germinating quality of 85 per cent., then the plaintiff had the option to reject it and give three-fifths of it to Hamilton as his compensation, retaining the remaining two-fifths for itself. It was provided that delivery of the corn shelled and in good clean merchantable condition should be made on January 1, 1908, and it was expressly provided that nothing therein contained should be construed to make the instrument a lease of the premises between the parties thereto, or divest the seed company of its title to the crop.

It further appears that defendant Hamilton moved into the house, situated on the farm, and planted about 50 acres of Stowell's evergreen sweet corn thereon, according to the terms of the contract; that he cultivated the same and harvested the crop in due season; that on the 1st day of December, 1907, he mortgaged three-fifths of it to one H. B. Waldron, without plaintiff's knowledge, and shortly afterwards sold the same to the defendant J. C. Hively Seed Company, without either the knowledge or consent of the plaintiff. It also appears, without question, that before the sale to Hively, or the Hively Seed Company, plaintiff, by letter, notified Hively that Hamilton had refused to deliver the corn, that it owned the same, and warned all persons not to purchase it of Hamilton under penalty of being sued for conversion. By the terms of the contract the corn was to be delivered to the plaintiff on the 1st day of January, 1908; that on or about the 12th day of December, 1907, defendant Hamilton shelled and delivered two-fifths of the corn to the plaintiff at its seed house in Waterloo, and at the same time delivered the other three-fifths of it to the J. C. Hively Seed Company by storing it in a barn on the premises of the

father of H. B. Waldron, the person to whom he had executed the chattel mortgage above mentioned; that H. B. Waldron was the cashier of the Citizens Bank of Waterloo, and sold and assigned the mortgage above mentioned to the defendant bank; that on the 17th day of December, 1907, the plaintiff made a demand upon Hamilton for the corn which had been delivered by him to the Hively Seed Company, and immediately commenced this suit, and thereby obtained possession of the corn, which had been stored in Waldron's barn as above stated, under the writ of replevin herein. Upon the trial in the district court, after all of the evidence had been introduced, the plaintiff moved the court to direct a verdict in its favor for the possession of the corn. Its motion was sustained, verdict was directed, was returned accordingly, and judgment was rendered thereon for the plaintiff. This, among other things, is assigned as error.

Defendants' first contention is that Hamilton, who grew the corn in question, and the Robinson Seed Company, could modify the terms of the written contract by a subsequent parol agreement; that they did so modify the contract; that the plaintiff consented to the division of the corn by Hamilton, and agreed to take two-fifths and give him the remaining three-fifths thereof. By this contention defendants admit the validity of the contract, and concede that without its verbal modification the plaintiff was the absolute owner, and entitled to the possession of the corn in controversy. Therefore the principal inquiry is. Does the evidence show or tend to show an agreement between the parties by which the corn was divided, as above stated?

The only testimony upon this point is the evidence of the defendant Hamilton, who testified, in substance, as follows: That just before the 12th day of December, 1907, he met J. C. Robinson, president of the plaintiff seed company, close to Traber's store in Waterloo, Nebraska, and told him he was going to sell his corn and he wanted sacks to deliver his in at the same time. "Q. What did

he say? A. He said he would study over it, to come down the next morning and he would let me know. Q. Did you go down the next morning? A. I came down the next morning, and he asked how many sacks I wanted. Q. What did you tell him? A. I told him it was between 1,200 and 1,500 bushels, and he told one of his men to give me sacks enough to put it in." On cross-examination he testified as follows: "Q. Where did you meet Mr. Robinson? A. In Mr. Traber's store in Waterloo. Q. What was said between you at that time? A. I told Mr. Robinson I was going to sell my share of the corn, and I wanted sacks to deliver his share at the same time. Q. What did Mr. Robinson say to that? A. He told me he would study over it, for me to come down the next morning and he would let me know. Q. Now, have you stated all the conversation? A. No; there was that too— Q. I am speaking about this one—this one in Traber's store. Have you stated all of that? A. Yes, sir. Q. Didn't Mr. Robinson tell you at that time, in substance, that you would get yourself in trouble if you attempted to sell the corn? A. I don't remember anything if he did. Q. Do you say he didn't tell you that? A. I say he didn't, to my knowledge. Q. Not to your knowledge? You knew at that time you had grown the corn under the contract, of course? A. Yes, sir." He further testified that after he had delivered two-fifths of the corn to the seed company and three-fifths of it had been stored in Waldron's barn, he saw Robinson on the street; that Robinson asked him if he had got his two-fifths of the corn delivered, and that he told Robinson he had. "Q. What did he say then? A. I told him I had it all delivered except 265 pounds. Q. What did he say? A. He asked me where it was, I told him it was in Mr. Waldron's barn. Q. What did he say then? A. I said I was going to fetch it to him. He said 'All right.' Q. What did you do, if anything, as a matter of fact? A. I went and got the corn and delivered it. Q. How much? A. 265 pounds. Q. Did you weigh it then? A. Yes, sir. Q. Was it weighed? A.

Yes, sir. Q. Where was it weighed? A. In Mr. Waldron's barn."

The foregoing is the substance of the evidence in regard to the division of the corn, and it would seem that Hamilton himself doubted its sufficiency, for he testified, in face of his written contract, that he had rented the farm for two-fifths of the crop. It is not disputed that under ordinary conditions $1.20 per hundred pounds was a fair price, and a reasonable compensation for raising the kind of corn in question. But it appears that about the 1st of December, 1907, there was reported to be a shortage of seed sweet corn, and its price advanced to $5 or $6 per hundred pounds, and it seems clear that this was the reason for Hamilton's refusal to carry out his contract and deliver all of the crop to the plaintiff. It was also the basis of his determination to retain for himself and sell three-fifths of the plaintiff's corn. Considering the whole record, including the fact that before any of the conversations between Robinson and Hamilton took place relating to a division of the corn, Hamilton mortgaged three-fifths of it without the plaintiff's knowledge or consent, and sold the same to the defendant J. C. Hively Seed Company, and the further undisputed fact that before such conversations occurred, if they ever did occur, the plaintiff had notified the Hively Seed Company, and others, that Hamilton had refused to deliver the corn, and warned them not to purchase it, or have anything to do with it, under penalty of being sued for conversion, it seems clear that the trial court was right in holding that the evidence was wholly insufficient to establish a modification of the written contract, or a division of the corn raised by Hamilton under its provisions, and did not err in directing a verdict for the plaintiff.

It is contended, however, that the corn in question did not have germinating qualities of at least 85 per cent., and therefore did not all belong to the plaintiff. In order to justify his refusal to deliver it to plaintiff, Hamilton and the Hively Seed Company claim to have made

some tests which disclosed that its germinating qualities were about 80 per cent., instead of 85 per cent., but that fact is entirely immaterial to this controversy, because they were thus attempting to exercise an option which did not belong to Hamilton, but could only be exercised by the plaintiff in case it saw fit to reject the corn for that reason. It is true that by the terms of the contract plaintiff had the right to reject the corn in case it failed to possess germinating qualities of 85 per cent., and, instead of paying $1.20 per hundred pounds to Hamilton for raising it, it could have required him to accept three-fifths of it as his compensation, but it is not claimed that the plaintiff ever exercised or attempted to exercise this option; on the other hand, it was satisfied with the germinating qualities of the corn, and stood ready to accept it and pay Hamilton for raising it in accordance with the terms of the written agreement, and of this Hamilton and defendant, the Hively Seed Company, had due notice. Therefore the failure of the corn to show germinating qualities of 85 per cent., if that fact existed, was no excuse for Hamilton's failure to deliver it according to his agreement and on plaintiff's demand therefor, and the case of *Robinson v. Stricklin*, 73 Neb. 242, upon which defendants seem to rely, is not in point, and should not control our judgment in the case at bar.

Defendants also contend that the plaintiff's tender of $1.20 per hundred pounds for raising the corn in question was not kept good, and therefore it could not recover in this action. To this contention it is a sufficient answer to say that no tender was required in order to maintain the action. According to the terms of the contract the corn belonged to the plaintiff, and Hamilton had no right or interest in it which he could convey to another without the consent of the plaintiff. Therefore, if such consent was not given, and we have already held that it was not, plaintiff could, without a tender, maintain replevin to recover its property from any one in whose possession it was found.

It is claimed, on the part of the defendant bank, that the district court erred in excluding its offer to prove that at the time Waldron took the chattel mortgage on the corn in question the plaintiff's contract with Hamilton was not recorded; that Waldron took the mortgage in good faith and without any notice of the plaintiff's rights. A similar question was before the supreme court of Iowa in *Gilman Linseed Oil Co. v. Norton & Worthington,* 89 Ia. 434, 48 Am. St. Rep. 400, and it was there contended that the contract was one which the statute required to be filed; that it was invalid because no record of the same had been made. The court said: "The transfer of title did not depend upon any condition, and the transaction was not, in any sense, a conditional sale of property; and section 1922 of the code, which requires sale, contracts, and leases wherein the transfer of title or ownership of personal property is made to depend upon any condition to be in writing and recorded, to be valid against certain creditors and purchasers without notice, has no application."

It was also contended in that case that the plaintiff was estopped from asserting title, and that contention was disposed of as follows: "It is contended that the plaintiff is estopped to deny the right of Lamar & Co. to sell the seed, for the reason that it had given them the possession and control of it, and the apparent right to treat and dispose of it as their own. The plaintiff did not authorize Lamar & Co. to ship the flax seed to anyone but itself, and it did not know anything of the shipments until after they were made. If it is estopped to claim the seed, it is because Lamar & Co. were buying wheat and other grain, and selling it on their own account. But, in our opinion, that fact alone was insufficient to bind the plaintiff by selling the seed in question. 'The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give good title.' " It follows, of course, that if Hamilton could not

give title to a purchaser by a sale of the property, he could not give a mortgagee any interest in it by executing to him a chattel mortgage. We are therefore of opinion that the court did not err in excluding the evidence offered.

Finally, it is contended by defendant Hively that he was a *bona fide* purchaser of the corn in question, and therefore the plaintiff could not maintain this action against him. What we have heretofore said touching Hamilton's power to deprive the plaintiff of its property by executing a chattel mortgage thereon applies with equal force to this contention of the Hively Seed Company. In addition to this, as we have already seen, before it completed its purchase of the corn Hively received notice from the plaintiff of its ownership of the corn, and a warning not to purchase it or have anything to do with it under penalty of being sued for conversion. So we are of opinion that the Hively Seed Company obtained no right or title to the property as against the plaintiff by the transaction between it and the defendant Hamilton.

From a careful examination of the whole record, we are satisfied that no reversible error was committed by the district court, and its judgment is therefore

AFFIRMED.

STATE OF NEBRASKA ET AL., APPELLEES, V. SEVERAL PARCELS OF LAND (OMAHA COUNTRY CLUB), APPELLANT.

FILED JUNE 10, 1910. No. 16,624.

1. **Appeal:** REMAND. Where, on appeal to this court, a case is decided upon the merits and a mandate is issued to the district court commanding it to enter a specific judgment which will finally dispose of all the matters in controversy, the district court has no discretion, but must render a judgment in conformity with the mandate.

2. ———: ———: NOTICE. An objection that one of the defendants was not served with a notice of the appeal will not authorize the

district court to again consider the merits of the case or excuse it from complying strictly with the terms of the mandate.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Affirmed.*

W. H. Herdman and *E. M. Morsman, Jr.*, for appellant.

E. W. Simeral, contra.

BARNES, J.

Appeal from a decree of the district court for Douglas county entered in conformity to a mandate of this court in what is commonly called a "scavenger tax" foreclosure proceeding.

It appears that one William J. Connell was the owner of the real estate upon which the delinquent taxes in question were assessed and levied, and thereafter sold the same to the Omaha Country Club. In the foreclosure suit Connell and the Country Club filed a joint answer to the petition, and the state replied. Upon the issues thus joined the district court on the 26th day of October, 1907, entered a decree by which it was declared that the amount of taxes due and delinquent on the premises in question was $692.01, with interest thereon from July 1, 1907, at the rate of 1 per cent. a month; that on the 18th day of January, 1908, the state filed a transcript of the proceedings in this court, and in order to perfect its appeal from said decree caused a notice thereof to be served on defendant Connell, but no such notice was served upon the country club, and no notice of plaintiff's intention to appeal was filed with the clerk of the district court as provided by section 3 of the act of 1907 (laws 1907, ch. 162), providing for appeals from judgments of the district court. The Country Club made no appearance in this court; but Connell, the former owner of the premises, who had conveyed the same to the Country Club with a warranty against incumbrances, entered his appearance, and all of the matters of defense set forth in the joint

answer above mentioned were litigated in this court. Upon the hearing the true amount of taxes due and delinquent upon the premises was found and decreed to be $2,007.45, with interest thereon at the rate of 1 per cent. a month from the date of said decree, and the land was ordered to be sold to satisfy the same. It was further ordered that the appellant should pay his own costs and the appellee should pay the costs he had incurred in this court. *State v. Several Parcels of Land* (Connell), 82 Neb. 570. In due time a mandate was issued to the district court commanding it to enter a decree in conformity to our judgment. When the mandate reached that court a motion was filed for a decree in conformity thereto, and it was objected that this court had no jurisdiction to render judgment on the appeal because no notice thereof had been served upon the Country Club. The district court overruled the objection and entered a decree as ordered by our mandate, and the Country Club has prosecuted this appeal. The state filed a motion to dismiss the proceeding, which was overruled *pro forma*, and the cause has been argued and submitted upon the appeal. The questions of notice and jurisdiction have been ably presented, both upon the oral argument and in the brief of counsel, but we do not deem it either necessary or proper to discuss them, because this appeal must be determined upon another question, as we shall presently see; and we feel that we ought to reserve our decision upon the matters above mentioned until such time as a case is presented in which our judgment will depend upon the construction of the statute relating to notice in perfecting appeals to this court.

As above stated, the judgment appealed from was entered by the district court in strict conformity to the mandate of this court, and we think the rule is now settled beyond controversy that the district court had no discretion in the matter, and could not have rendered any other decree than the one in question herein. *Oliver v. Lansing*, 51 Neb. 818; *State v. Dickinson*, 63 Neb. 869; *State*

v. Thompson, 69 Neb. 157; *State v. Omaha Nat. Bank,* 60 Neb. 235; *State v. Farrington,* 86 Neb. 653; *Kerr v. McCreary,* 86 Neb. 786. In *State v. Farrington, supra,* it was said: "Where a cause is reversed and remanded by this court, with a direction to the district court to enter a judgment as prayed for in the petition, the trial court has no discretion, but must render a judgment in conformity with the mandate." In *Kerr v. McCreary, supra,* we held: "Where, on appeal to this court, a case is decided upon the merits and a mandate issued to the district court commanding it to enter a specific judgment which will finally dispose of all the matters in controversy in said case, and the district court, in obedience to said mandate, enters a judgment in strict conformity therewith, such judgment is final and cannot be superseded or appealed from."

The case at bar falls squarely within the foregoing rule, which finally disposes of the matter of this appeal. Therefore, as above stated, we deem it neither necessary nor proper for us to determine the effect upon the Country Club of the state's failure to serve it with notice of the former appeal; and we reserve any decision upon that question until it shall be presented to us in some proper proceeding.

For the foregoing reason, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

LANCASTER COUNTY ET AL., APPELLEES, V. LINCOLN AUDITORIUM ASSOCIATION ET AL., APPELLANTS.

FILED JUNE 10, 1910. No. 16,074.

1. **Corporations:** POWERS: LEASES. A corporate body having power to execute a lease of property for 25 years has equal power to cancel the lease with the consent of the lessee, and to execute a new lease for a longer term to another lessee.

2. **Counties: CONTRACTS: DISCRETION OF COUNTY BOARD.** In the absence of fraud or collusion, a contract made in good faith by a board of county commissioners on behalf of the county within their powers may not be interfered with by the courts merely because they may be of opinion the county board might have made a better bargain.

3. ———: ———: ———. The direction of county affairs is committed to the proper officers of the county, and, in the absence of bad faith or a gross abuse of discretion amounting virtually to such, their proceedings, if regular, may not be reviewed and set aside by the courts in a collateral action by a taxpayer.

4. **Corporations: SURRENDER OF LEASE: SUIT TO SET ASIDE: ESTOPPEL.** A stockholder in a corporation whose directors have surrendered a lease upon certain real estate, who at the time advocates such surrender, and who, having knowledge that the new lessee is expending large sums of money in repairs and improvements, remains silent four years before bringing an action as a stockholder to set aside the surrender for want of power in the directors, is estopped to maintain such action.

5. ———: **POWERS: LEASES.** A corporation authorized to hold real estate in fee may become lessee in a lease whose term exceeds the term of its charter existence.

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

Hall, Woods & Pound and *Strode & Strode,* for appellants.

Walter J. Lamb and *F. M. Tyrrell, contra.*

LETTON, J.

This action was begun by the county of Lancaster against the Lincoln Auditorium Association (hereinafter called the Association), Elmer C. Rewick, and the Lincoln Amusement Company, the object being to cancel a lease, dated February 20, 1903, executed by the county to the Union Commercial Club (hereinafter called the Club) of Lincoln, Nebraska, of three lots in Lincoln upon a part of which the auditorium building stands; to set aside the interest of Rewick and the Amusement company in the premises; to recover rent and damages, and for the

appointment of a receiver. Later, Walter J. Lamb intervened, alleging that he was a taxpayer of the city and a stockholder of the association; that he was the owner of a large apartment building adjacent to the auditorium building; that a lease which was made by the county to the association on September 1, 1899, contained certain conditions for the benefit of the public (which will be referred to hereafter); that this lease was canceled by the county board and the association on February 20, 1903, and that the cancelation of this lease and the execution of a new lease to the club on the same day were *ultra vires,* illegal, and void, and so likewise was a transfer thereafter made of the last named lease by the club to the association. He alleges further the maintenance of certain specified nuisances in the auditorium building whereby he has been damaged in the occupancy and renting of his adjacent property, and prays for a decree canceling both leases, for an injunction restraining the maintenance of the nuisances specified and for general equitable relief.

The answer of the association to this intervention is virtually a general denial, with a plea that the intervener is estopped to complain, for that the last lease was entered into by the parties with his knowledge and consent, and under his legal advice and direction, and that he was fully aware of changes and alterations made in the building from time to time, but made no objection thereto. Its answer to the petition pleads the validity of the several leases, the expenditure of large sums of money upon the property in reliance upon these instruments, and the acceptance and retention of rent by the county under the second lease.

A large volume of testimony was taken. At the conclusion of the trial the district court made special findings of fact and conclusions of law covering 27 typewritten pages, which it would serve no good purpose to set forth at length. In substance, the court found that the cancelation of the first lease and the execution of the

second was unauthorized, and that the intervener was entitled to relief as to the nuisances. The second lease was set aside, the petition of the county dismissed, no allowance was made to the association for improvements, and judgment for damages was entered in favor of Mr. Lamb against the defendants. The defendants were also enjoined from operating a skating rink in the building and from using a "Military Band Organ" in connection therewith, and from permitting certain obnoxious performances therein. From this decree the county took no appeal, so that the adverse decision upon its petition is final. The defendants appeal from the decree in favor of the intervener.

A summary statement of the facts found by the district court must be made in order that the cause may be understood. In September, 1897, the citizens of Lincoln at a public meeting resolved to erect a public hall for the purpose of holding political and other public meetings. The parties interested by public subscription raised the sum of about $10,000. To better accomplish the purpose, the Lincoln Auditorium Association was organized as a corporation, the date of its beginning being the 12th day of October, 1897, and its termination being fixed in its articles as January 21, 1905, the expressed powers of the corporation being to manage and control the auditorium building and to buy and sell lots and rent the real estate necessary. On September 1, 1899, the first lease was entered into between the county and the association for the term of 25 years. Among the agreements therein contained were that the association at its own expense should within 12 months from the date of the lease build and furnish an auditorium capable of seating at least 3,400 people, to cost not less than $15,000; that the building should be kept in repair by the association free of all charge to the county; that the association should pay all taxes and assessments; that the building should be furnished free for county and district conventions, and at actual expenses for city conventions; that at the termina-

tion of the lease the building, fixtures and appurtenances should become the property of the county; that the building was to be rented for other purposes at reasonable charges, and that the county was to receive one-half of the net receipts. It also contained a number of other conditions not necessary to set forth at length.

The building was erected in 1899, and used as designed until the 20th of February, 1903. The association, however, became financially embarrassed, was unable to make expenses, and paid no revenues to the county. In October, 1897, The Union Commercial Club was organized as a corporation, its corporate existence fixed to terminate June 12, 1948. Some time in 1903 it was proposed to erect a building for this club upon a portion of the leased property. Mr. Lamb, the intervener, who is an attorney of experience and ability, advocated the selection of this site and the securing of a lease from the county to the club for a period of 50 years, and advised the club that the county authorities had power to execute such a lease. The old lease was canceled and a new lease executed to the club for a term of 50 years at an annual rental of $350, payable January 1 of each year. By the terms of the new lease the club was given the right to build a brick building on the lots for a club house, but not required to do so, and at the expiration of the lease all the buildings on the premises were to remain the property of the club, with the right to remove them at the termination of the lease. The project fell through and the club building was never erected.

The principal difference between the leases is that in the later one a fixed sum is to be paid annually as rent and the building does not become the property of the county at the end of 25 years. Some minor details, mainly concerning the public interest, are also omitted which will be referred to later. Both contain strict provisions for forfeiture if the lessee fails to carry out the conditions, provide for repairs, payment of taxes, use of building, etc.

The Union Commercial Club was succeeded by the Lincoln Commercial Club, and in January, 1904, that club, in consideration of the association assuming the obligations of the lease of February 20, 1903, and paying all back rent due the county, assigned and transferred to the association all its rights under the lease.

The matter of leasing the lots was never submitted to a vote of the people of the county, and there is no proof that the action of the board of directors of the club in accepting the first or transferring the second lease was ratified by the stockholders. The association has been in charge of the building since 1903, and the defendant Rewick has been the general manager of the building, and since January, 1904, had constituted the Lincoln Amusement Company. While Mr. Rewick was in charge of the building it was used as a roller skating rink, a large and noisy "Band Organ" was played in the evenings, and at certain times amusements were carried on therein which annoyed Mr. Lamb and interfered with his tenants in the adjoining building. The defendants have expended on the auditorium building and grounds and have paid out for paving and assessments over $7,500.

Both the defendants and intervener, who are the only parties appearing here, agree that the lots in question upon which the auditorium building is situated were not "public grounds" of the county, and that the board of county commissioners had the power, without first submitting the question to a vote of the electors of the county, to enter into the first lease, and afterwards, with the consent of the lessee, to cancel and set aside the same and release the property for the term of 50 years. This seems also to have been the view taken by the district court, since it upheld the first lease. But the intervener takes the position that the 50-year lease is void because under the first lease the building became real estate when built and belonged to the county and the county authorities could not give it away; because the Commercial Club had no power to enter into it, in that the lease was for a

term beyond its coroporate existence; and, further, because of the failure to erect a club house, which he asserts was part of the consideration.

As to the county commissioners "giving away" the real estate of the county: Under the first lease the county was receiving no revenue, and if the same conditions continued it was not improbable that at the end of the term all it would have to show for the use of the lots would be a building 25 years old, unsuited for county purposes, of uncertain value, while, under the new lease, it receives the sum of $350 a year for 50 years. The board may have erred in judgment in looking at the matter, and may have made a bad bargain, but there is no fraud or collusion shown, nor has there been a gross abuse of discretion established. The direction of county affairs is entrusted by law to the county board, and not to the courts. Neither are infallible. It is probable that, where no sinister influences are shown to exist, county affairs may in the long run be best administered by the men chosen by the people for that express purpose. While the intervener and other citizens of the county may be possessed of business acumen which would prevent them making such a contract, we are of opinion that it is not void for want of consideration. *Getzschmann v. Board of Commissioners,* 76 Neb. 648. Moreover, under the new lease the improvements, not being county property, are liable to taxation for county and other purposes, and this feature, among others, may have appealed strongly to the board.

As to the right of the parties to cancel the first lease: The association is a private corporation. Prior to the cancelation of the first lease it had carried on its business at a loss and was seriously embarrassed. There is no law which compelled it to operate and carry on business at a loss, since it was not a public corporation. Its activity in behalf of the public was purely voluntary, and was not imposed by any law or statute. It had no power to appropriate private property to its own use against the will of the owner, but was in all respects a private corpora-

tion, though carrying on a *quasi* public enterprise. It had the same rights and duties as the owner of any other public hall or public meeting place, save as modified by its articles and by the terms of the lease. It had the same right, therefore, to transfer or otherwise dispose of its lease with the consent of the lessor that any other person or corporation has, and the rules applicable to public corporations with respect to compelling them to perform their corporate functions have no application. The action of the board of directors in canceling this lease in January, 1903, was acquiesced in by all the stockholders of the association. The intervener, with full knowledge of the fact, took an active part in advising the club to accept the 50-year lease, and never objected or raised any question as to the power or authority of the county commissioners to cancel the first lease or the directors of the club to execute the second until July, 1907, more than four years later. The moving cause of his objection then made seems to have been his desire to put a stop to the music of the "Military Band Organ" whose delectable sounds furnished accompaniment to the roller skaters, and to prevent the roars of the lions in Hagenback's animal show from disturbing his tenants and himself.

We are of opinion, therefore, that, so far as the right of Mr. Lamb to object to the surrender of the lease as a stockholder in the association is concerned, he waived the same by remaining silent during the long period within which the club, and its assignee, the association, within his knowledge expended large sums of money upon the building and lots. Indeed, upon the oral argument he virtually conceded that it was not the impairment of his rights as a stockholder in the association of which he complained, but of his rights as an adjacent property owner to be free from nuisance, and of his interest as a subscriber to the auditorium building fund that the property be not diverted from the use for which the money had been subscribed by the public. He was an active participant in

the proceedings which led up to the cancelation of the first lease and the making of the second, an ardent advocate at public meetings of the cancelation of the old lease and the making of the new, and he testifies himself that he urged the county to decline to make the second lease. Under these circumstances we think Mr. Lamb is in no position to complain either of the action of the county commissioners or of the directors of the Commercial Club on this account.

The new lease by its terms expires on February 20, 1953. The charter of the Commercial Club terminates January 1, 1948. The lease, therefore, is for a period of about 5 years longer than the corporate existence of the club. This it is contended makes the lease void. We see no reason why this should be the case. There is nothing to prevent the Commercial Club from amending its charter so as to extend the period of its corporate existence, and, being authorized by statute to purchase real estate in fee simple for specific purposes, it may acquire any lesser estate or interest which is vendable. If the club was authorized to hold and own property in fee, it is clear that it may hold a lesser term extending beyond its corporate existence. The lease is certainly valid for the term of the corporate existence of the club and for the full term if this existence is renewed. *Brown v. Schleier,* 118 Fed. 981; *Detroit v. Detroit Citizens Street R. Co.,* 184 U. S. 368; *People v. National Trust Co.,* 82 N. Y. 283; *Hill v. Atlantic & N. C. R. Co.,* 143 N. Car. 539, 55 S. E. 854.

The second lease has been assigned to the Auditorium Association, of which Mr. Lamb is a stockholder. If its terms are more advantageous to that association than the terms of the first lease, the change was for his benefit, and he has no standing in court to complain on that account. As a matter of fact, whatever position he took in the district court, the only serious complaint which he makes here as to the cancelation of the 25-year lease is that in the new lease some of the provisions of the first lease

which he considered to be for the public benefit and necessary to carry out, preserve and effectuate the purpose and intention of the original subscribers to the building fund have not been incorporated. Both parties seem to agree that the decree of the district court should be modified so as to reinstate the 50-year lease, to continue the injunction as to the offensive practices complained of, and to provide, further, for the better protection of the purposes for which the money was subscribed by inserting in the decree provisions of the first lease, which were omitted in the second one.

This being so, the decree of the district court is accordingly modified as follows: That portion of the decree setting aside the second lease and reinstating the lease of January, 1897, is vacated. The lease of February 20, 1903, is declared to be a valid instrument in all respects, and the injunction heretofore granted is continued in force. It is further ordered and decreed that the lessee shall keep the buildings on the said premises insured for their full value in responsible insurance companies, and in case of loss by fire or other agency the money derived from insurance policies shall be used for the re-erection of the buildings thereon within 18 months after the loss; that it shall keep the portion of said lots not occupied by the auditorium building in a neat and park-like condition and free from all buildings and structures, except by the consent of the board of commissioners of Lancaster county; that the lessee shall not allow any intoxicating liquors to be sold on said premises or allow any gambling or any other immoral or unlawful practices or anything calculated to injure the reputation or impair the value of said premises or the adjacent property of the neighborhood; that the lessee shall not assign the lots or underlet the premises without the consent of the county board of Lancaster county in writing, and no mortgage lien or other incumbrance shall be placed against said lots or the improvements and buildings thereon. It is further ordered that the judgment in favor of the Auditorium As-

sociation against Lancaster county be set aside, and that in all other respects the judgment of the district court be affirmed; each party to pay his own costs in this court.

JUDGMENT ACCORDINGLY.

LOUISA H. HJELM, ADMINISTRATRIX, APPELLEE, V. JOSEPH B. VOLZ, APPELLEE; SWIFT & COMPANY, APPELLANT.

FILED JUNE 10, 1910. No. 16,079.

1. **Appeal: VERDICT: CONCLUSIVENESS.** Where there is a sharp conflict in the evidence as to a material fact in a case, the verdict of the jury must ordinarily be taken as conclusively settling for a reviewing court that the testimony of the witnesses for the prevailing party as to the disputed fact reflects the actual conditions.
2. **Master and Servant: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.** Whether a workman was guilty of contributory negligence in entering a cylinder containing a revolving shaft with arms, at a time when the shaft was out of gear, and after the foreman and other employees in the building where the machinery was used had been informed of the fact that he would enter at that time, was a question for the jury, and their finding in that respect will not be set aside.
3. ———: ASSUMPTION OF RISK: QUESTION FOR JURY. And so, also, under such circumstances, as to the question whether he assumed the risk of so doing.
4. ———: FELLOW SERVANTS. In this state what is known as the "department rule" as to fellow servants is in force. *Union P. R. Co. v. Erickson*, 41 Neb. 1, followed.
5. ———: ———. Under this rule, evidence examined, and *held* that the deceased, who was a millwright working in any part of the packing plant as directed, and an oiler, employed only in the fertilizer dryer house, were not fellow servants.

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

Greene, Breckenridge & Matters, for appellant.

Henry C. Murphy and *James C. Kinsler, contra.*

LETTON, J.

This action was brought by the administratrix of the estate of Carl Hjelm, deceased, on behalf of the widow and next of kin to recover damages for the wrongful killing of the deceased. The petition is lengthy, but in substance it alleges that the deceased was a millwright in the employment of the defendant, Swift & Company, in its packing house at South Omaha, Nebraska; that on July 20, 1906, he was directed to fasten a bar attached to a revolving shaft in a dryer used in the fertilizer department. To do so it became necessary for him to enter the dryer, which is a large iron cylinder inclosed in an outer cylinder, and between the outer and inner cylinders steam is admitted for the purpose of heating the contents of the inner cylinder. The shaft is caused to revolve in the inner cylinder by a gear wheel outside of the dryer actuated by a small pinion moved by means of a clutch pulley. That in order to cause the shaft to revolve it is necessary to pull or throw a clutch against the pulley, and that attached to the clutch for the purpose of moving it is an iron lever about 3⅓ feet long; that a lever stand is adjacent, upon which the lever rests, and upon which it slides in order to engage or disengage the clutch; that when the appliance was originally constructed there was attached to the lever stand a lock and chain by which the lever could be held so that it would be impossible for the pulley to become engaged and the shaft to revolve when it became necessary for any one to go inside the dryer, but that at the time that deceased was ordered to go into the cylinder and make the repairs the lock and chain had been broken off or removed; that there was no other means provided to fasten the lever; that by reason of the lock being absent the dryer was in an unsafe and dangerous condition, and was an unsafe place to work, unless the clutch lever was securely fastened; that defendants failed to instruct him regarding the danger. It is further alleged that after Hjelm entered the dryer the

machinery was started through the negligence of the defendants; that he was caught therein and injured, and that he died within a short time.

The defendant company filed an answer, admitting that Hjelm was in its employment and that it was his duty to make repairs in the dryer. It alleged that the dryer was properly equipped and was provided with a lock and chain; pleads that Hjelm assumed the risks of the service which were open and obvious; avers that if the negligence of any other person contributed to the injury such negligence was that of a fellow servant of said Hjelm working about said dryer, who carelessly and accidentally started said dryer without inquiry as to the situation of the said Hjelm; and avers that he was guilty of negligence himself in entering the dryer without securely fastening it. A motion was made by the plaintiff to require defendant to set forth more specifically the name of the person referred to as a fellow servant who started the dryer and in what respect his action was careless and negligent. This motion was sustained, and thereafter the defendant filed an amended answer substantially the same as the former, except that in the fifth paragraph thereof it pleaded: "If the negligence of any person other than that of the said Carl Hjelm, deceased, in any manner contributed to the injury resulting in the death of said Carl Hjelm, such negligence was that of Mads Englund or Joe Opocenski, or some other fellow servant of said Hjelm, working about said dryer, who carelessly or accidentally started said dryer in motion without inquiry as to the situation of said Hjelm, whose presence in the dryer would have been apparent to the most casual observer." For reply to this allegation the plaintiff admitted that the dryer "was carelessly and negligently started in motion by Joe Opocenski," but denied that Opocenski was a fellow servant of Hjelm. The reply further specifically denied all the affirmative allegations of negligence of deceased in the answer.

The evidence shows that there were three dryers in the

same room, which was in a three-story building known as the "fertilizer dryer"; that the main-line shafting was on the third floor; that from this shaft the power was communicated by means of a clutch pulley and belt to a line of shafting on the second floor, from which separate belts were run through the floor to each dryer on the first floor. The pulley to which these belts ran was caused to engage and operate the gear wheel on the end of each dryer by means of a clutch operated by a lever which worked horizontally. When the machinery was first received no fastening was provided for this lever, but under the direction of Mr. Branstad, master mechanic, a chain was bolted to the frame upon which the lever rested and a padlock furnished, by which, when the lever was drawn to the south end of the lever stand throwing the clutch out of gear, it might be locked. This would render it impossible to start the dryer shaft. The key was kept in the office of the fertilizer foreman. The day before the accident the operation of the dryer had been stopped on account of the pounding of a bar in the inside. This was reported to the master mechanic, who directed the deceased and one Mads Englund, another millwright, to make the necessary repairs. Englund testifies that in the evening when Hjelm and he went to the dryer for that purpose they found that it was too hot to go into. They then went up to the second floor and found Dreamel, Sterba, and Opocenski. Dreamel was the head of the fertilizer department, Sterba was the foreman in the dryer room, and Opocenski was the oiler in that building. Hjelm told Dreamel that the dryer was too hot. Dreamel then told him to leave it until the next morning. Both Sterba and Opocenski were present at this conversation. The next morning Hjelm and he went back to work. It was dark at the north end of the dryer where the hole was through which it must be entered, so they took an incandescent light upon an extension wire and looked in. At that time the shaft was set so that one of the arms stood across the center of the manhole. Englund then went to the south

end and started the machinery, making the shaft move a little, and, as soon as the arm had passed the hole, Hjelm called to him and he threw the lever out and stopped it. He then pushed the lever over as far as he could get it and pushed it down over the edge of the stand. He testifies that there was then no lock or chain attached to the lever stand; that at one time he had seen a lock and chain there, but it was not there at this time. He says that he then went to the north end of the dryer; that Hjelm then went to the water-closet; that the witness went into the dryer, found it so hot he could not work, came out, and went to the third floor to get some sacks to lie upon while working in the dryer; that while on that floor he saw the oiler, Opocenski, throw out the clutch lever on the mainline shaft; that Opocenski then went down stairs ahead of him to the first floor, and that just as he came down he saw Opocenski jump upon the concrete base of No. 3 dryer, and saw the big gear wheel moving a little. He testifies: "I say to Joe, 'What are you doing?' Q. You said, what are you doing? A. Yes, sir. He say, 'I want to stop the power.' Q. Which way did he have the lever, with respect to his hand? A. His hand was on the lever, the clutch lever. Q. And which way did he have the lever? A. He got the lever clear into the clutch." Englund asked him if he was sure nobody was in the dryer, and he said there was not. Opocenski then threw the lever to the south and threw the clutch out. Englund then heard some one calling; he went to the north end of the dryer, and found Hjelm caught in the cylinder. He went back to the gear wheel, and with Opocenski's help turned the wheel, so that the arm of the shaft cleared the opening and they could pull Hjelm out. On cross-examination he testified that about six or eight weeks before the accident he had seen a lock and chain on the lever stand; that on the morning of the accident he saw a small chain on the north end of the lever stand hanging down in the dust, but he saw no lock there; that when he saw Opocenski he had hold of the clutch lever holding it into

gear. The power had been turned off upstairs, but the dryer was still running, the shaft moving only a little. It seems that, in order to "stop the power" after the clutch was thrown out on the upper floor, the dryers or some of them if not in gear would be thrown in, so as, by increasing the load, to check the running of the shafts and pulleys. Since this testimony of Englund's forms the basis of the plaintiff's case, it will be unnecessary to consider in detail all of the testimony of defendant's witnesses, and we only consider such of it as elucidates the particular point under discussion.

1. The first point made by appellant is that the dryer was suitably equipped with a safety device. Counsel vigorously insist that there is no proof as to the lack of a lock and chain, as well as of a number of other facts essential to recovery; but this is evidently based upon the idea that the testimony of the witnesses for the defendant is true in all respects, and that much of that in behalf of the plaintiff is not worthy of belief. With this idea, the jury evidently did not agree, and, since the matters in which the testimony conflicts have been settled by the jury in favor of the plaintiff, we must assume those facts established which were testified to by the plaintiff's witnesses. There is a sharp and direct conflict in the testimony as to whether or not there was a lock on the chain at the lever stand on the morning of the accident. The testimony of Englund, Washington, and Beatty is in direct contradiction to that of Branstad, Volz, Russell, and other witnesses for defendant. The jury, however, has settled this controversy, and must have found that the story of the plaintiff's witnesses was true, and we are not at liberty to interfere with their finding in that respect, even though from the inanimate page we might think there was grave reason to doubt the statements. It may be considered as established, therefore, that there was no lock on the lever stand at the time of the accident, and it is clearly shown that the lock was a necessary and proper appliance in order to prevent just such accidents.

2. As pointed out in appellant's brief, while there is a clear distinction between assumption of risk and contributory negligence, it often happens that both of these principles may be applicable to the same facts. In this case if the machinery had been in gear when Hjelm entered the dryer, he would have assumed the risk of it starting, and would also have been guilty, under ordinary circumstances in working hours, of contributory negligence which would bar recovery. But the machinery was not in gear at the time, and whether the lock and chain were in place or not, it was for the jury to determine whether the fact that Hjelm went into the dryer without fastening the gear wheel in some manner was negligence. In this connection they were entitled to consider the fact that on the evening before he had informed the only men in the building whom the evidence shows had anything to do with the control of the machinery therein that he was going into the dryer the first thing in the morning. The question whether after taking this precaution he was negligent in entering the dryer without fastening the gear wheel so that no one could start the machinery, and the question of whether he assumed this risk have been settled by the verdict.

3. The principal issue left in the case, then, is whether the act of setting the dryer in motion was, as the defendant pleads, the "negligence * * * of Mads Englund or Joe Opocenski, or some other fellow servant of Hjelm, * * * who carelessly or accidentally started said dryer in motion without inquiry as to the situation of said Hjelm, whose presence in the dryer would have been apparent to the most casual observer." After the case had been submitted to the jury, the following question in writing was received by the court: "To the Court: If the jury agrees that the oiler started the machinery by throwing in the clutch on the shaft that operated No. 3 dryer, and was thereby responsible for the death of Hjelm, would that sufficiently relieve said Hjelm from responsibility, if in the judgment of the jury or any of them he

did not use ordinary care to make the machinery safe before going into the dryer, No. 8 and No. 10 of the instruction of the court seeming to the jury to conflict at this point?"

The court answered this inquiry by an additional instruction as follows: "A master has a right to assume that an employee will use that ordinary care and caution that an ordinary prudent and careful man would use when going into a place of danger, and an employee has a right to assume that, when going into a place of danger, the master will use that care and caution an ordinary careful and prudent man would use in keeping the premises reasonably safe for an employee to work. If the plaintiff has satisfied you by a preponderance of the evidence that the deceased notified the fertilizer department that he was going into the dryer on the morning of the injury, and, notwithstanding said knowledge, said oiler carelessly and negligently turned on the power and thereby caused the death of the deceased, and you further find said oiler was not a fellow servant of the deceased, then you are instructed that the defendant would be liable for the death of the deceased, even though the deceased did not use ordinary care in going into said dryer."

The defendant complains that this "took from the jury every question in the case save only the right to find that Opocenski, the oiler, started up the machinery, and that he was not a fellow servant," but in our view of the issues and of the evidence this is the pivotal question in the case. Even if a lock had been furnished and not used, if, as Englund testifies, those in charge of the dryer house and the oiler, Opocenski, had been told in the evening that the men were going into the dryer that morning, then, if Opocenski, having this knowledge, carelessly started the dryer, his master would be liable, if he were not a fellow servant of the deceased.

This brings us then to the final question, which is whether, as alleged in the answer, Opocenski was a fellow servant with Hjelm. The evidence shows that the

mechanical department included millwrights, elevator conductors, and oilers; that there are six elevator conductors employed, whose occupation it is to operate the elevators in the various buildings of the plant and who have nothing to do with repairs; that there are five regular day oilers who are assigned to the different buildings, and one of whom, Opocenski, was assigned to the fertilizer dryer house. It is the duty of the oiler in the dryer house to oil the machinery on all three floors of the building and on the top of the building, to start and stop the machinery under the direction of the fertilizer foreman, to do slight repairs and correct minor irregularities in the running of the machinery in that building. His time is kept by the fertilizer department; he is on the pay roll of that department and receives checks charged to it. His whole time is occupied in the dryer building. When repairs such as the tightening of bars in the dryer or other work around the machines are needed, the defect is reported by the fertilizer foreman to the millwright foreman, and men of the regular millwright force are sent to do the work. While such repairs are being made the oiler attends to his regular duties in the building, and does not form one of the millwright gang. The deceased and other members of the regular millwright force were in no way under the direction and control of the fertilizer department. Their duty was to install, repair, or demolish machinery as required in any of the numerous buildings composing the packing plant. They were directed solely by the millwright foreman, and were employed strictly in the occupation or trade known as that of "millwright," which is a calling demanding mechanical skill of rather a high degree. The duties of the oiler were of a character which could be performed by persons of a lower degree of mechanical skill. His services were all rendered in or about the fertilizer dryer building to which he was assigned. He was under the immediate direction of the foreman of that building, and in a remoter degree was also under the direction of the mechanical department, but his most im-

portant duties respecting the working and stopping of the machinery, etc., were directed by the fertilizer foreman. He was not consociated with the millwrights in the same task. At the time of the accident there was no community of action between the millwrights, who were engaged in repairing the dryer under the direction of the millwright foreman, and the oiler who stopped the power, which was a part of his regular duties. Their spheres of activity, while connected in the sense that the duties of both were concerned with machinery, and that the oiler was to some extent under the direction of the millwright foreman, were separate and distinct, and as we have seen even when working in the same building they were not associated. It is clear that these servants were not so associated together in the same lines of employment as to constitute fellow servants under the rule adopted in this state, which is commonly known as the "department rule." *Norfolk Beet-Sugar Co. v. Koch,* 52 Neb. 197; *Union P. R. Co. v. Erickson,* 41 Neb. 1. This is the rule here, and, while rejected in a number of other jurisdictions with courts of high standing, we are not inclined to depart from it. Under this rule it is a question of fact for the jury to determine whether the persons involved are fellow servants. They have determined that Opocenski and Hjelm were not fellow servants, and their finding is fully supported by the evidence.

We have been cited by the defendant to a number of cases where this court has held that the person injured had assumed the risk of his employment, and to others where the servant had been guilty of contributory negligence sufficient to bar recovery, but the facts in the cases cited are so different from those in the instant one that the holding in those cases that as a matter of law the employer was not liable is no justification for such a holding here.

Under the facts testified to in the case, we find no prejudicial error in the instructions complained of. The judgment of the district court, therefore, is

AFFIRMED.

L. C. MADSEN, TRUSTEE, APPELLEE, V. FARMERS & MERCHANTS INSURANCE COMPANY, APPELLANT.

FILED JUNE 10, 1910. No. 16,082.

1. Insurance: UNFILED CHATTEL MORTGAGE: MATERIALITY. The existence in the hands of the mortgagee of an outstanding, unfiled chattel mortgage upon a stock of goods, given as security for a guaranty of a debt of the mortgagor, is a fact material to the risk in a contract of insurance of the goods, even though the instrument contains a clause that it "shall not be valid until and unless filed."

2. ———: ———: CONCEALMENT. If such a mortgage exists, and the applicant for insurance, when inquired of whether the property "is mortgaged or otherwise incumbered," answers in the negative, this is the concealment of a fact material to the risk, which, under the conditions of the policy that "this entire policy shall be void if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof. * * * This entire policy shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage"—avoids the contract.

APPEAL from the district court for Howard county: JAMES N. PAUL, JUDGE. *Affirmed on condition.*

A. L. Chase and *Charles A. Robbins,* for appellant.

Charles B. Keller and *T. T. Bell, contra.*

LETTON, J.

This is an action upon an insurance policy. The policy was dated October 15, 1907. It provided for $4,700 insurance upon merchandise, $300 upon furniture and fixtures, and $100 upon a piano, all contained in a store building in Cotesfield, Nebraska, the property of Joseph Jarosz. On the 1st of December, 1907, the property was destroyed by fire. The petition alleges that a few days afterwards defendant offered to pay the full amount of the policy within 60 days, as provided by the policy, or to pay the

same immediately, less a discount of 2 per cent.; that the plaintiff, who is the trustee in bankruptcy of Jarosz, accepted the discount proposition, but that afterwards the defendant refused to pay the loss upon the ground that there was a chattel mortgage on the property when the policy was written. The defendant denies the settlement, pleads concealment of material facts, and fraud and misrepresentation in the written application, in that, on or about the 27th of February, 1907, Jarosz executed a chattel mortgage to one St. Nadolinski covering all of the insured goods; that by collusion this mortgage was kept secret and concealed, and the defendant was thereby induced to execute a policy which it would not have done had it been informed of the incumbrance. It further alleged that when proofs of loss were prepared and received defendant had no knowledge of the existence of the mortgage, and that when it ascertained this fact it tendered back to the assured the full amount of the premium, which it still proffers. The reply is a general denial. At the conclusion of the trial both parties moved for a directed verdict. The court instructed the jury to return a verdict for the full amount claimed by the plaintiff.

The only material question presented is: Was the policy void at its inception by reason of the execution of the instrument, exhibit 6, which defendant contends is a chattel mortgage and was such at the time it was executed, but which plaintiff claims did not become a mortgage under its terms until filed in the office of the county clerk? Jarosz purchased this stock of merchandise from T. T. Bell of St. Paul, Nebraska. Mr. Bell testifies that at the time he sold the stock of goods he went to Cotesfield for the purpose of closing the transaction; that he had a contract of sale drawn which contained a guarantee of the payments to be made by Jarosz, and that Mr. Nadolinski, who was Jarosz' father-in-law, agreed to sign the guarantee, but insisted that he should have some security from Jarosz "so that he could have some rights in the property if Jarosz should not pay as he agreed, or if

he should feel insecure in any other way." Mr. Bell further testified that he had no chattel mortgage blank with him, but that he did have a real estate mortgage blank which he changed so as to cover the chattel property. Jarosz then said "that he was afraid that if he gave a chattel mortgage on the stock it would make him trouble in getting credit as well as getting insurance." Mr. Bell then said: "There was one way it could be done; that if Mr. Nadolinski would agree that this paper should not be a lien or should not be valid until he felt unsafe, and then filed it, it could be fixed in that way so it would be a lien after it was filed." Nadolinski then said: "All he wanted was something so that if he should feel insecure that he could get hold upon the property and protect himself against his guarantee on this bond." That after a few more words Mr. Bell inserted the words: "And shall not be valid until filed." That he "told them * * * that would enable him to get a lien on the property when it was filed, and until that time it would not be a valid mortgage"; and, the instrument then being read to Jarosz and Nadolinski, the contract of purchase was signed by Nadolinski, and the mortgage by Jarosz. On cross-examination Mr. Bell testified that he told them that if Jarosz gave a chattel mortgage on the property he could not get insurance, and that he might have told them that if the paper was put upon record then it would be a lien and would invalidate any insurance they might have. Exhibit 6, the instrument referred to, is in form a mortgage upon the stock of goods, furniture and fixtures. It contains the following provisions: "This mortgage is given to secure said St. Nadolinski against loss and liability by reason of his guaranteeing the contract of Jos. B. Jarosz in the purchase of said stock from T. T. Bell, and shall not be valid until and unless filed." Jarosz was then given possession of the stock of goods. The mortgage was filed by Nadolinski the day after the fire.

The defendant contends that the instrument executed and delivered by Jarosz to Nadolinski was a chattel mort-

gage on the property, that it was an "incumbrance" within the meaning of the application and policy; and further contends that the policy is void for fraudulent concealment by the insured of the character of his title and interest in the property. The plaintiff insists that the express condition in the instrument, "And shall not be valid until and unless filed," is a condition precedent which had never been complied with before the destruction of the property by fire, and that consequently the mortgage never took effect or became valid; that, this being the case, there was no misrepresentation or concealment in the application; that there being then no chattel mortgage in existence the negative answer to the question whether the property was "mortgaged or otherwise incumbered" was true. We are of opinion that at the time the insurance was procured Jarosz concealed from the insurer a material fact concerning the subject of insurance. He knew at the time that the instrument, exhibit 6, was executed that if the fact were known that a chattel mortgage existed on the stock it would be impossible to procure insurance, and therefore knew that this fact was material to the risk, yet at the time of applying for the insurance he stated that the property was not "mortgaged or otherwise incumbered." The existence of this instrument was a fact which the insurance company was entitled to know, so that it might decide whether to enter into the insurance contract or not. In all insurance contracts there is a moral hazard, and it is necessary to the safe operation of the business, and entirely proper and right, that an insurer should require information from the applicant which will allow it to determine from the facts the extent of this hazard and of the risk which it is assuming. The instrument affected the rights of the insured in the property. His interest in it was not the same as it was before it was executed, being subject to the will of the mortgagee. It was not the property itself that was in reality the subject of the insurance contract, but it was the interest of the insured therein, and an instrument

which affected such interest to such an extent as did this mortgage most certainly affected the moral hazard. *Stanisics v. Hartford Fire Ins. Co.*, 83 Neb. 768. A clear discussion of this subject is found in the opinion of Judge Sanborn in *Connecticut Fire Ins. Co. v. Manning*, 160 Fed. 382, from which we quote: "The property insured against fire in this policy, and in like policies of insurance ordinarily, is not the real or personal property described therein, but it is the interest of the assured in that property. The extent of his interest is therefore necessarily material to the risk which the underwriter assumes. The moral hazard is one of the main elements, if not the chief element, of an insurance risk, and it is never negligible. It is always material to the risk. Moral hazard is but another name for a pecuniary interest in the assured to permit the property to burn. Statistics, experience, and observation all teach alike that the moral hazard * * * is greatest when the assured may gain the most by the burning of the property. The extent of the interest of the assured in the property insured measures the moral hazard, and hence is always material to the risk of the insurance. But any incumbrance upon the interest of the assured diminishes that interest by the amount of the incumbrance and thus becomes itself material to the risk. The responsibility of the assured, his ability to pay the premiums upon his policy, is another important consideration to the underwriter, and the extent of his interest in the insured property, the incumbrance upon it, and his indebtedness on account of that incumbrance tend clearly to show his responsibility, and in that way are material to the risk." See, also, *Secrest v. Hartford Fire Ins. Co.*, 68 S. Car. 378, 47 S. E. 680; *Hutchins v. Cleveland Mutual Ins. Co.*, 11 Ohio St. 477; *Lee v. Agricultural Ins. Co.*, 79 Ia. 379. The instrument, although written upon a real estate mortgage blank, was a valid mortgage upon the property. The consideration had passed, the mortgagor had lost all control over the instrument, and its entire possession and control had

vested in the mortgagee. He might file the same at any time. It is apparent from the testimony that the parties understood it was to be kept from the records for the express purpose of obtaining credit and insurance. The object, so far as concerned the defendant here, was to deceive the insurer into believing that no one, other than Jarosz, had any interest in the property. Such proceedings are not favored. *Ackerman v. Ackerman*, 50 Neb. 54.

While, as the plaintiff contends, forfeitures are looked upon by courts with ill favor, and will be enforced only when the strict letter of the contract requires it, it is equally true that good faith and fair dealing are required in insurance contracts as much as in any other contract, and that courts are as reluctant to countenance deceiving an insurance company by the concealment of material facts as deceiving any other corporation or an individual. We have heretofore said: "When the insurer makes inquiry about facts material to the risk, he is justified in acting on the assumption that the information imparted by the applicant for insurance is correct. He is entitled to know whether the property to be insured is incumbered, and, if so, to what extent, so that he may act intelligently in determining whether he will accept or decline the risk. The representations of the applicant become the basis of insurance, and if they be false, touching matters material to the risk, the contract obtained through their influence cannot be enforced; and it is, in such case, quite immaterial whether the misstatement resulted from bad faith or from accident or ignorance"—citing cases. *Seal v. Farmers & Merchants Ins. Co.*, 59 Neb. 253.

The policy contains the following provision: "This entire policy shall be void if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof. * * * This entire policy shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage." It was the duty of Jarosz to be candid and fair in his deal-

ing with the insurance company, and to state the facts with reference to the execution and delivery of this instrument, so that the company might determine for itself whether it was willing to assume the risk. The concealment by him of these facts was a violation of the foregoing condition of the policy, and his negative answer to the question, "Is the property mortgaged or otherwise incumbered?" was untrue. Whether the instrument in question was a mortgage or not, it constituted an "incumbrance" upon the property presently effective or not at the option of Nadolinski. It was a lien, as defined by 2 Bouvier, Law Dictionary, 226: "A hold or claim which one person has upon the property of another as a security for some debt or charge." *Sessions v. Irwin,* 8 Neb. 5. See, also, Black, Law Dictionary, 613, defining "Incumbrance."

For these reasons, we think the district court erred in directing a verdict for the full amount of the policy. The plaintiff, however, was entitled to a verdict for the amount of the insurance upon the piano, which was not included in the mortgage. The judgment of the district court will therefore be affirmed, if plaintiff files a remittitur of the verdict in excess of $100, with interest at 7 per cent. from the 12th day of December, 1907, within 40 days; otherwise, the judgment will be reversed and the cause remanded for further proceedings; costs in this court taxed to plaintiff.

AFFIRMED.

SCOTT W. KIMES, APPELLANT, V. EDWIN R. LIBBY, APPELLEE.

FILED JUNE 10, 1910. No. 16,035.

1. **Boundaries:** MISTAKEN LOCATION: CONCLUSIVENESS. Where the true line between coterminous tracts of land can be ascertained, and the owners of the real estate by mistake agree upon an erroneous boundary, believing it to be the true line, they will not be concluded thereby from claiming to the correct line when

discovered, unless the statute of limitations has run, or equitable reasons exist for adhering to the erroneous line.

2. Adverse Possession: PUBLIC LANDS: RIGHTS OF ENTRYMAN. The statute of limitations will not run in favor of an occupant of land the title whereof is in the United States as against the entryman, until the latter's right to a patent has been completed by the performance on his part of every act entitling him to that conveyance.

3. Boundaries: LOCATION: ESTOPPEL. The evidence in this case examined in the opinion, and *held* insufficient to bar the defendant from asserting title to all of the real estate described in his patent therefor.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Affirmed.*

J. B. Smith, for appellant.

N. D. Jackson and *C. H. Kelsey, contra.*

ROOT, J.

This is an action to quiet in plaintiff title to about 15 acres of land. The defendant in his answer prayed for like relief and prevailed. The plaintiff appeals.

The plaintiff in 1884, entered as a homestead under the federal law the east half of the southwest quarter of section 5, in township 25 north, of range 8 west, in Antelope county, and other lands, and his patent was issued in March, 1892. About 1884 the defendant entered the west half of the southwest quarter of said section under the acts of congress relating to timber culture. He became entitled to a patent in 1894, and it was issued in 1895. In 1885 the plaintiff and the defendant employed the county surveyor, a Mr. McGee, to locate the line dividing their respective eighties, and subsequently occupied and cultivated their holdings with respect to the line established by that official. In 1889 or 1890, the proof is not convincing as to the exact date, the litigants constructed a fence upon the line established by Mr. McGee. In 1902 the defendant caused Mr. Staples, the county surveyor of

Antelope county, to resurvey the defendant's farm, and said official located the dividing line between the east and west half of the southwest quarter about 15 rods east of the line established by McGee. To this point there is no conflict in the evidence, but from thenceforward the testimony is conflicting. The plaintiff testifies that the parties hereto agreed that McGee should establish the line and each landowner would abide thereby. The plaintiff further testifies that in 1902 he was coerced into moving his fence and did not at that time know his rights in the premises. The further claim of title by adverse possession to the tract of land in dispute is advanced by the plaintiff.

Concerning the McGee survey, the evidence is satisfactory that the parties did not know the location of the dividing line between their farms; that they accepted that survey as satisfactory evidence of the true line, acted in accordance therewith, but made no specific agreement to abide by McGee's survey. The evidence further proves that Staples', and not McGee's, survey established the true line between the litigants' farms. McGee admits he did not have all of the government field notes with respect to this section at the time he made his survey, and his description of the methods employed by him in locating the line between the litigants' respective farms does not evidence the care taken by Mr. Staples while engaged in the same task. It is undisputed that the southwest government corner to section 5 and the quarter corner on the south side of the section are not evidenced by any monuments or pits created by the government surveyors, and that there are no such monuments or pits to indicate the corners of many of the interior sections in the township. Mr. Staples devoted about three days to surveying in the township in order to locate the line in dispute. He located the government corners one mile west, one mile north, three miles south, and five miles east, respectively, from the southwest corner of section 5, and checked his measurements and lines by the location of other estab-

lished government corners. There was nothing other than Mr. McGee's insufficient data and hasty work to prevent the parties in 1885 from locating the line between their farms.

The rule applicable to this state of facts is stated in *Trussel v. Lewis*, 13 Neb. 415: "Where the true line can be ascertained, and parties by mistake agree upon an erroneous line as their boundary, believing it to be the true line, they will not be concluded by such agreement from claiming to the true line when discovered, unless the statute of limitations has run, or equitable reasons exist for establishing an erroneous line." The first exception to the general rule is asserted by the plaintiff to establish title in himself to the strip of land in dispute because 17 years passed subsequent to the 1885 survey before he was disturbed, and in the meantime he had occupied the real estate and enjoyed the profits arising therefrom. It appears, however, that until 1895 the legal title to this land was in the United States, and until July, 1894, the defendant had not complied with the timber culture law so as to entitle him to a patent. Under these circumstances the statute of limitations did not commence to run in the plaintiff's favor until July, 1894. *Mills v. Tracer*, 35 Neb. 292. The defendant resumed possession of the land in 1902, and title by adverse possession did not vest in the plaintiff.

We think no equitable reasons exist for adhering to the erroneous line. No improvements other than a fence were constructed because the line was erroneously located by McGee, and the plaintiff had the same means that were accessible to the defendant to ascertain the correct boundary. The fact is also established, by a fair preponderance of the evidence, that before the 1902 survey was closed the plaintiff in a conversation with the defendant in the presence of the surveyor and his assistants recognized the later survey as the correct one and agreed to move his fence. Within about two weeks he voluntarily moved that fence to the line established by the Staples' survey,

and until 1907, when this suit was commenced, acquiesced in the later line as the correct boundary. The defendant voluntarily relinquished to his neighbor in section 6 a strip of land corresponding in width to that in suit in the instant case. The plaintiff has taken advantage of surveys made by Staples based upon the corners used as starting points in the Libby survey to secure from another neighbor possession of a tract of land theretofore occupied and claimed by that neighbor.

We can discover no equitable considerations to justify the plaintiff's present claim that the erroneous line established by Mr. McGee should be accepted in the place of the true one located by Mr. Staples and for five years recognized by all parties in interest as correct.

The judgment of the district court is right and is

AFFIRMED.

SHERIDAN COAL COMPANY, APPELLANT, V. C. W. HULL COMPANY, APPELLEE.

FILED JUNE 10, 1910. No. 16,042.

1. **Pleading:** SUFFICIENCY AFTER JUDGMENT. Where the sufficiency of an answer to support a counterclaim is not questioned until after judgment, all reasonable intendments should be indulged in support of the pleading.

2. **Sales:** OFFER: ACCEPTANCE. An affirmative answer to a proposition to purchase coal, followed by a delivery of a major part of the fuel referred to, may be taken as satisfactory evidence of an acceptance of the proposition, although the answer indicates there may be a brief delay in the first delivery of the coal.

3. **Trial:** INSTRUCTIONS: REVIEW. Upon appeal, the district court's instructions will be considered together, and the losing party will not be heard to complain that an instruction is not precisely and clearly stated if he did not request a proper instruction upon the subject.

4. **Appeal:** VERDICT: CONCLUSIVENESS. Questions of fact upon conflicting evidence are to be decided by the jury in actions at law,

and their finding will not be set aside on the ground of the want of evidence to support it unless it appears that the verdict is manifestly wrong.

5. Witnesses: EXAMINATION. Where a witness is called to contradict the testimony of a former witness who has stated that certain things were said, it is within the discretion of the trial court to permit counsel to ask leading questions.

6. An unauthorized declaration of an agent, made after the transaction to which it relates is completed, is not competent evidence against the principal.

7. Appeal: AUTHORITY OF AGENT: ADMISSIBILITY OF EVIDENCE. An agent of a corporation having charge and control of an inferior servant of that master may properly testify to the scope of such servant's duties, and if he is permitted to deny that servant's authority to make admissions adverse to their common employer's interests, the error, if any, will be held without prejudice where it clearly appears, independently of that denial, that no such authority was vested in the servant.

8. Evidence: BOOKS OF ACCOUNT. Where the evidence discloses that a corporation extensively engaged in trade, in the regular course of its business in purchasing merchandise, causes every order to be entered in a book and numbered before it is transmitted to the person with whom the corporation is dealing, and during litigation it becomes important to prove whether an order was written and transmitted, the court in its discretion may, in connection with other evidence tending to prove that such an order was written and transmitted to the sendee and a proper foundation has been laid by verifying the book and entry therein, permit the corporation to introduce such an entry in evidence.

9. ———: SECONDARY EVIDENCE. Where a proper foundation has been laid, secondary evidence may be received of the contents of a document which cannot be produced.

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

B. N. Robertson, for appellant.

F. A. Brogan, contra.

ROOT, J.

Each party to this suit is a corporation; the plaintiff is engaged in mining and shipping coal, and maintains

offices in the city of Omaha; the defendant is a wholesale and retail dealer in coal in said city. The plaintiff demands a balance due upon shipments of coal to defendant, and the latter asserts a counterclaim because, as alleged, the plaintiff failed to deliver to the defendant 1,500 tons of slack coal in 1907. The issue between the parties is whether a contract between them made about July 19, 1907, was oral and for 2,500 tons of coal, or in writing for 4,000 tons thereof. The defendant asserts that the contract is embodied in two letters, one written by the defendant to the plaintiff, and the other by the plaintiff to the defendant, as follows: "C. W. Hull Co., Omaha, Neb., July 19, 1907. Order No. 909. Above number must be shown on invoice. To Sheridan Coal Co., Omaha, Neb. Gentlemen: Please enter the following order and ship as stated below to C. W. Hull Co. at Omaha, Neb., via C. B. & Q., one hundred (100) cars each to contain 40 tons Cherokee slack coal at $0.60 per ton f. o. b. mine. To be shipped to arrive in Omaha at the rate of two (2) cars or 80 tons per day beginning July 26. Please acknowledge receipt of this order and if you are unable to fill as specified, notify us *immediately.* Invoice and correspondence relating to this order *must* invariably bear our order number. Regardless of distinction of shipment, the invoice, bill of lading, notice and all other correspondence pertaining to this shipment *must* be addressed to us at Omaha, Neb. C. W. Hull Co., By M. E. Serat." "Sheridan Coal Co., Omaha, Neb., July 20, 1907. C. W. Hull Co., Omaha, Neb. Dear Sirs: Your order No. 909. Shipments will begin on this order today at the rate of 80 tons per day. Yours resp., J. H. Rogers, G. S. A."

The defendant further alleges that Rogers is the plaintiff's general sales agent, had authority to execute the contract, and that plaintiff delivered 2,507.75 tons of said coal, but refused to deliver the remaining 1,492.25 tons thereof. The defendant's manager testifies that on July 19, 1907, he caused the letter first copied in this opinion to be written, and signed it or caused his clerk to attach the

witness' signature thereto. There is considerable evidence tending to prove the manner in which the defendant transacts its business, and to the effect that the letter was duly posted after having been addressed to the plaintiff. It is conceded that the second letter was written by the plaintiff and received by the defendant. The litigants disagree as to whether this letter referred to an alleged order given over the telephone or to the letter of July 19. There is a mass of evidence in the record difficult to reconcile if all of the witnesses are gifted with accurate memories and have testified without equivocation or mental reservation.

1. It is insisted that the defendant did not plead sufficient facts in its answer to state a cause of action against the plaintiff, and therefore the court erred in submitting the issue of defendant's damages to the jury. No such question seems to have been raised in the district court. We shall, therefore, construe the pleading liberally in favor of the defendant. *Merrill v. Equitable Farm & Stock Improvement Co.*, 49 Neb. 198; *Latenser v. Misner*, 56 Neb. 340.

The plaintiff argues that the letter of July 19, if written and sent, contained two conditions: (1) The coal is "to be shipped to arrive in Omaha at the rate of two (2) cars or 80 tons per day, beginning July 26"; (2) the receipt of the order must be acknowledged. The plaintiff further urges that the defendant did not acknowledge receipt of the letter of July 19, but stated that shipments would begin July 20 at the rate of 80 tons per day. It also argues that the letter of July 20 in effect rejected the conditions imposed in the offer, and converted the transaction into a conditional sale. The following is from plaintiff's brief: "If conditional, the plaintiff would not be liable for failure to fulfil the contract unless the 1,492.25 tons of coal actually arrived in Omaha. * * * Whether it did so arrive or not the record is silent." We are not inclined to adopt the plaintiff's theory of the legal effect of the letters. It is true, as argued by counsel, that

in the making of a contract of sale the minds of the parties must assent to the same thing and in the same sense, and that a counter proposition amounts to a rejection of a proposition theretofore made concerning the same subject matter. But what will constitute an acceptance depends frequently upon circumstances. A direct, unequivocal, written acceptance of an offer to purchase is satisfactory evidence of the fact, but, if the parties have not stipulated otherwise, the acceptance need not be in any particular form nor evidenced by express words; the delivery by the vendor of a part of the property referred to in the offer to buy may take the place of words as proof of an acceptance. In the instant case we shall not assume that coal shipped from the plaintiff's mines via the Chicago, Burlington & Quincy Railway Company, July 20 would not reach Omaha on July 26 of that year; but, if there was a delay of a day or two in delivering the initial two cars of coal, the failure to perform that condition contained in the defendant's proposition was waived when it accepted the coal. If the letter of July 20 contained a counter proposition, the plaintiff was asking for more time within which to commence delivering the coal, and if the parties by their conduct, as the jury must have found, accepted the letters as the basis for a sale, it does not lie in the plaintiff's mouth to say no contract ever existed. Upon the pleadings and the proof the court was right in instructing the jury there were but two questions for their determination: (1) Was a written contract made for 4,000 tons of coal, as claimed by the defendant; (2) the amount of the defendant's damage if the contract was made.

2. The plaintiff asserts the court erred in instruction numbered 5 in assuming that the letter of July 19 was in evidence, and in stating that the letter of July 20 is an acceptance of the former communication. We think the instructions taken together properly advised the jury. Two special findings were submitted for their consideration, and they answered that the plaintiff did receive from

the defendant the letter of July 19, and that the letter of July 20 was written in acknowledgment thereof. Instruction 5 is not so clear as might be desired, but we do not believe, when considered with the other instructions and the special findings, it could or did mislead the jury. The plaintiff made no request for instructions, and ought not to complain that any instruction given by the court is indefinite. *Chicago, B. & Q. R. Co. v. Oyster,* 58 Neb. 1; *Stein v. Vannice,* 44 Neb. 132. The argument that the entire charge is unfair to the plaintiff has no support in the record.

3. It is argued with great plausibility that the verdict and the answers to the special interrogatories are not sustained by sufficient evidence. There are many facts and circumstances shown by the evidence tending strongly to corroborate the principal actors in the transaction, so the weight of the evidence must be determined by the credibility of the respective witnesses. This subject was for the jury, and is not for this court to deal with. If the jury believed Serat, their verdict is sustained by sufficient evidence. The assignment is not well taken. *O'Leary v. Iskey,* 12 Neb. 136; *Reid v. Colby,* 26 Neb. 469, 512; *Fremont, E. & M. V. R. Co. v. French,* 48 Neb. 638; *Fisher v. Chambers,* 84 Neb. 92.

4. Mr. Rogers, the plaintiff's sales agent, testified to a conversation over the telephone with Mr. Serat, the defendant's manager, July 19, and stated, in substance, that Serat at that time ordered 2,500 tons of coal, and no more. In rebuttal the defendant's counsel propounded the following question, which the witness was permitted to answer over the plaintiff's objections: "Mr. Serat, did you on the 19th day of July, 1907, call up Mr. Rogers and give him a verbal order for 2,500 tons of Cherokee slack coal?" It is argued that the question is not only leading, but calls for the witness' conclusion; that he should have stated what, if anything, he did and said, and should not have been permitted by a negative answer to give character to the transaction. Serat on cross-examination ad-

mitted he had talked over the telephone with Rogers, but said he could not remember the date, and the plaintiff did not press its cross-examination upon this subject. Generally leading questions should not be propounded on direct examination, nor should a nonexpert witness be asked to state his conclusion concerning the substance of the issue; but where a witness is called to contradict the testimony of a former witness who has stated that certain expressions were used during a conversation, it is not an unusual practice to ask the witness called in rebuttal whether those statements were made. Starkie, Evidence (10th ed.) *169; *Union P. R. Co. v. O'Brien,* 161 U. S. 451; *Norton v. Parsons,* 67 Vt. 526. We have not lost sight of the fact that by a negative answer to this question the witness was not only contradicting the witness Rogers, but testifying against the plaintiff's contention that the contract between the parties was oral and not written; but we think the subject was one within the discretion of the trial judge, and, while we would be as well satisfied had he sustained the objection, we do not consider he committed reversible error in overruling it.

5. Mr. Megeath, the plaintiff's president, testified, in substance, that about August 31, during a conversation over the telephone with a Mr. Prohaska, one of the defendant's employees, Prohaska inquired whether the plaintiff intended to ship any more coal, and the witness answered in the negative and said the contract had been filled, to which Prohaska responded: "We will consider the order filled." The proof shows that Prohaska was a rate and reconsignment clerk in the defendant's employ, and had nothing to do with the purchase of coal. Subsequently, Serat was recalled, and over the plaintiff's objections was permitted to state that Prohaska had no authority to make admissions to parties from whom Hull & Company purchased coal, and it was no part of his duty to check up the filling of orders. Prohaska's conduct in no manner induced the plaintiff to perform any act or relinquish any right; his statement was of doubtful

materiality, but, in any event, he did not have authority to make an admission involving a construction of the contract. *Gale Sulky Harrow Co. v. Laughlin,* 31 Neb. 103; 16 Cyc. 1008. Serat was Prohaska's superior and could properly testify to the scope of the latter's employment and duties. Undoubtedly the court would have committed no error had it sustained the objection to the question calling for Serat's conclusion as to whether Prohaska had authority to make admissions against the defendant's interest; but it clearly appears from the facts that he had no such authority, and the error, if any, is without prejudice.

6. The defendant was permitted over the plaintiff's objections to introduce in evidence the entry upon one line of its order book. The evidence discloses that, whenever the defendant prepares an order for the purchase of coal or material, an entry is made in this book, and that orders are consecutively numbered therein at the time the entries are made. It will be observed that both the letter of July 19, which the defendant insists was transmitted to the plaintiff, and the letter of July 20, written by the plaintiff, contains the number "909." The entry admitted in evidence is thus numbered, and the proof shows it was made in the due course of business in the defendant's office. This entry in no manner contradicts the contents of either letter, but it was part of the *res gestæ* of the transaction, and has some probative force in connection with the testimony of the witnesses and the fact that the number appears on the plaintiff's letter and on the one testified to by the defendant. *Labaree v. Klosterman,* 33 Neb. 150; *Fleming v. Yost,* 137 Ind. 95; *Place v. Baugher,* 159 Ind. 232; 1 Greenleaf, Evidence (16th ed.) sec. 120.

7. Counsel argue that the court erred in permitting the witness Kennedy to testify that exhibit 1 is a correct copy of the defendant's order 909. A sufficient foundation was laid to show the execution of the order of which exhibit 1 is said to be a copy. There is evidence tending to prove

the order was sent to and received by the plaintiff; notice was served upon the plaintiff to produce the original order in court, and it did not do so. The plaintiff's witnesses testified that no such order was received at the office. The copy was competent evidence and properly received in evidence.

A careful consideration of the record and of the briefs of counsel convinces us that the plaintiff has no just cause to complain of the district court, and the judgment of that court is

AFFIRMED.

CLYDE WALTERS, APPELLANT, V. VILLAGE OF EXETER, APPELLEE.

FILED JUNE 10, 1910. No. 16,059.

1. **Villages:** CARE OF STREETS. A village is not required by law to keep its streets in an absolutely safe condition for public use, but only to employ reasonable diligence to keep them in a reasonably safe condition for the use of persons passing over them in the exercise of ordinary care and caution.

2. **Appeal:** INSTRUCTIONS: REVIEW. Instructions will not be reviewed in this court if not excepted to in the district court by the complaining party.

3. **Trial:** NEGLIGENCE: QUESTION FOR JURY. Where different minds may reasonably draw diverse inferences from the same state of facts as to whether they do or do not establish negligence or contributory negligence, those questions, if material, should be submitted to the jury.

4. **Appeal:** VERDICT: CONFLICTING EVIDENCE. And when the jury, upon conflicting evidence and instructions not excepted to by the losing party, has found that the defendant was not guilty of negligence, this court will not ordinarily reverse that finding.

5. ———: JOINT ASSIGNMENT OF ERRORS. Where the refusal to give several instructions is made the subject of a joint assignment in the motion for a new trial, those instructions will be examined only so far as may be necessary to determine whether one of them was properly refused.

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

F. B. Donisthorpe, for appellant.

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

ROOT, J.

This is an action for personal injuries caused, as alleged, by the defendant's negligence. The defendant prevailed, and the plaintiff appeals.

The proof shows that the defendant in constructing its streets created a basin about 15 feet wide and 20 feet in length along the outer edge of a sidewalk near the intersection of two streets. The evidence is conflicting concerning the depth of this sag. One witness testifies that it was 16 inches in depth near the center of the tract, whereas other witnesses swore it was not more than 4 or 6 inches deep. There is testimony tending to show that a culvert, constructed so as to furnish an outlet for surface water that might accumulate in this depression, was out of repair and filled with dirt and debris, but there is testimony to the effect that the culvert never furnished a way for such waters. At the time of the accident the water in the sag was frozen and the ice was covered with snow. The plaintiff drove his horse onto the pond, and the animal slipped and fell. The plaintiff, in alighting to protect himself and to assist his horse, fractured a bone in a lower limb. A preponderance of the evidence tends to prove that the plaintiff slipped upon the ice and in some manner fractured the injured bone, but there is some evidence to the effect that a laprobe or the lines interfered with the free movement of his lower limbs as he attempted to get out of the buggy, so that he fell from the vehicle. At the time of the accident the ground was covered with ice and snow, the result of a sleet storm followed by snow. The court instructed the jury that the

defendant was charged with the duty of keeping its streets and walks "in a reasonable state of repair and in such condition as not to endanger the safety of people exercising ordinary care and prudence when using them as foot-passengers or in passing over them in vehicles; and, if the village by its officers negligently fails to do this, then the village is responsible in damages for any injury resulting to a person lawfully using the streets, resulting from such defective condition, unless the injury may be directly attributed to the negligence of the party so injured; bearing in mind, in this connection, that the sidewalks are specially provided for foot passengers and the wagon road for vehicles." The court further charged that if the jury found from all of the evidence that the village authorities knew or ought to have known that the ice at the point where the plaintiff was injured might cause a person using the way to fall and injure himself, and by the exercise of ordinary care and prudence those officials could have remedied that condition, the defendant was liable if the plaintiff without fault or negligence on his part was injured by reason of such defect, but that the defendant was not required to keep the roadway as safe as its sidewalks for the use of pedestrains. The plaintiff took no exception to any part of the court's charge, and for the purposes of this case it must be taken as a correct statement of the law; it was binding upon the jurors, and should be respected upon appeal. *Boyesen v. Heidelbrecht,* 56 Neb. 570; *Larsen v. Sanzieri,* 83 Neb. 384.

The plaintiff insists that the verdict is not supported by the evidence. Negligence is but an inference to be deduced from primary facts. Under the charge of the court it was the jury's duty to determine and find whether the failure of the village trustees to drain a little pool of water extending between the sidewalk and the center of the street, or their failure to erect barriers or give other warning of the ice beneath its mantle of snow, was negligence and the proximate cause of the plaintiff's injury. We must presume the verdict reflects the judgment of the

jurors, and that they answered those questions in the negative. We are satisfied, after carefully considering the testimony, that there is ample support in the record for that verdict.

Error is predicated upon the court's refusal to give certain instructions requested by the plaintiff. In the motion for a new trial the assignment concerning these instructions is *en masse*, and under a well-established rule of practice, if any instruction requested was properly refused, the assignment should be overruled. *Kliment v. Corcoran*, 51 Neb. 142; *Atwood v. Marshall*, 52 Neb. 173; *Morsch v. Besack*, 52 Neb. 502. See, also, cases referred to in 2 Page, Nebraska Digest, p. 1574.

The third instruction requested is based upon the proposition that the defendant is charged with the duty of keeping its streets in a safe condition for travel. Too high a degree of diligence on the part of the defendant is required thereby. The law holds the defendant to an exercise of reasonable diligence to keep its streets in a reasonably safe condition for travel by persons using ordinary care and caution. *Strubble v. Village of De Witt*, 81 Neb. 504. It follows that the court did not err in overruling this assignment in the motion for a new trial.

Finally, it may fairly be said that the plaintiff has no just cause for complaint; the court was liberal in permitting the introduction of practically all of the testimony proffered by him, and the instructions are as favorable to the plaintiff as the facts will justify.

The judgment of the district court, therefore, is

AFFIRMED.

LEWIS E. HALLSTEAD, APPELLANT, V. JAMES E. PERRIGO, APPELLEE.

FILED JUNE 10, 1910. No. 16,086.

1. **Principal and Agent: REVOCATION OF AUTHORITY.** If a principal who has given an agent authority to sell the former's land him-

self sells and disposes of that real estate before the agent procures a purchaser therefor, the agent's power to sell is revoked by operation of law.

2. ———: ———: POWER COUPLED WITH INTEREST. Where an agent is vested with a mere naked authority not coupled with an interest, his principal may revoke that authority before performance; but if the agent has rendered services and incurred expense in the course of his employment before his authority was canceled, the principal will be liable therefor, unless it is otherwise provided by the terms of their agreement.

3. A general demurrer to a petition admits the truth of all allegations well pleaded therein.

4. Pleading: SUFFICIENCY. Where a petition discloses that the defendant has invaded the plaintiff's legal rights under circumstances making the former liable for nominal damages, a general demurrer to the petition should be overruled.

5. ———: ———. And if the pleader further alleges in the petition the existence of facts justifying a judgment for compensatory damages, a judgment sustaining a general demurrer and dismissing the action should be reversed, although those allegations are indefinite and subject to a motion to make more certain.

APPEAL from the district court for Boone county: JAMES R. HANNA, JUDGE. *Reversed.*

C. E. Spear and *F. D. Williams,* for appellant.

A. E. Garten, contra.

ROOT, J.

August 29, 1907, the defendant in a written statement duly authorized the plaintiff to sell the former's land. The following is a copy of the writing, omitting matters of description:

"James E. Perrigo of Albion, of the county of Boone and the State of Neb., do hereby authorize L. E. Hallstead, of Petersburg, Nebraska, to bargain and sell the above lands at the price set forth and do hereby agree that I will convey as above said lands on sale of the same. I further agree that the above described lands shall be left with said L. E. Hallstead, for sale as above Jan. 1 from date hereof and thereafter until 10 days notice is

given of the withdrawal of said lands from said L. E. Hallstead hands in writing and if said L. E. Hallstead sell or are in any manner instrumental in selling said land during said time I will pay L. E. Hallstead commission thereon at the rate of 5 per cent. for first $1,000.00 and 2½ per cent. on balance per $1,000.00. And if said lands are sold by .....or others without the aid of L. E. Hallstead, directly or indirectly, or indirectly will pay them .....dollars, in full for all trouble in showing or advertising said lands. I will furnish abstract in case of sale, and I agree not to place the property in the hands of any other agent during the continuance of this agreement."

The plaintiff alleges in his petition that it was the understanding and agreement of the parties that said document gave the plaintiff the exclusive right to sell the defendant's farm during the period of time named in the contract; that the plaintiff advertised said land for sale and exhibited it to prospective purchasers, but the defendant, in violation of his agreement, employed another broker, and through that agent in September, 1907, sold the land for $67.50 an acre. Damages in the sum of $305 are demanded. A general demurrer to the petition was sustained, and the plaintiff's action dismissed. Plaintiff appeals.

The cause is submitted in this court upon printed arguments and the record. A consideration of these documents convinces us that the learned district judge erred in sustaining the demurrer. Section 10856, Ann. St. 1909, concerning brokers' contracts, is satisfied by the contract of agency. By the terms of the document the defendant agreed not to employ any agent other than the plaintiff prior to January 1, 1908, for the purpose of selling the land described in the contract. The defendant did not thereby disable himself from revoking the agency at any time. *Woods v. Hart*, 50 Neb. 497; *Miller v. Wehrman*, 81 Neb. 388; *Walker v. Denison*, 86 Ill. 142; *Chambers v. Seay*, 73 Ala. 372. The defendant had the right to

sell his land either by his own efforts or through the agency of a third person, and the sale would by operation of law revoke the plaintiff's authority to sell the defendant's land. *Bissell v. Terry,* 69 Ill. 184; *Walker v. Denison, supra.* If the sale were accomplished independently of the plaintiff's efforts, the defendant would not be liable to plaintiff for a commission, unless the latter had theretofore produced a person ready, able and willing to purchase the real estate upon the terms set forth in the contract of agency. *Tracy v. Dean,* 77 Neb. 382; *Bolton v. Coburn,* 78 Neb. 731; *Waterman v. Boltinghouse,* 82 Cal. 659; *Sibbald v. Bethlehem Iron Co.,* 83 N. Y. 378; *Chambers v. Seay, supra.* The decisions cited by the plaintiff to the effect that he ought to recover a commission do not sustain his argument. They relate to instances where the agent had produced a purchaser before the defendant had sold through agencies other than the plaintiff, or where the contract provided the agent should be paid a commission if the land were sold, without regard to the individual responsible therefor. According to the plaintiff's petition, his agency had not been revoked prior to the date the defendant's land was sold by the rival broker, and theretofore the plaintiff had performed services and incurred expense in the course of his employment. These acts, in connection with the defendant's agreement not to employ another broker and not to revoke the plaintiff's authority prior to Jan. 1, 1908, created an obligation on the part of the defendant to respect his promise. If that obligation is violated, the plaintiff may at least recover the reasonable value of services rendered and for money properly expended in furtherance of his employment. *Chambers v. Seay, supra; Walker v. Denison, supra; Glover v. Henderson,* 120 Mo. 367; Mechem, Law of Agency, sec. 621; Evans (Ewell) Agency, p. *84.

But little reference is made in the petition to services rendered and expense incurred by the plaintiff in the execution of his agency, but the petition is not barren upon these points. The remedy is a motion for a more specific

statement, and not a general demurrer. If the allegations in the petition are true, and cannot be avoided by the defendant, the plaintiff's legal rights have been invaded by the defendant, and the plaintiff should at least recover nominal damages therefor. 13 Cyc. 14. It may be that if no more than nominal damages can be recovered the judgment, although erroneous, ought not to be reversed. *Roberts v. Minneapolis Threshing Machine Co.*, 8 S. Dak. 579. In the instant case, if the allegations in the petition are true, more than nominal damages should be assessed. The defendant contends that, unless a broker has earned his commission, he may not recover for a breach of his contract, but no such construction should be placed upon the statute. The law was enacted to protect the owners of real estate against trumped up claims presented by real estate brokers, but when the statute has been satisfied the principal should answer for any breach of his contract. We do not think the contract should be construed to release the defendant from all liability if the allegations in the petition are true.

This opinion should not be construed to the prejudice of any lawful defense the defendant may interpose by answer to the plaintiff's claim.

For the reasons above stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FRANKLIN COUNTY, APPELLEE, V. WILT & POLLY, APPELLANTS.

FILED JUNE 10, 1910. No. 16,333.

Mandamus: CONSTRUCTION OF BRIDGE BY OWNER OF MILL-RACE. Section 6162, Ann. St. 1909, does not apply to a natural person, the owner of a private mill and appurtenances constructed entirely upon his own land in 1873, whose raceway is intersected by a highway laid out in 1880.

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

W. C. Dorsey and *Bernard McNeny,* for appellants.

George J. Marshall, contra.

ROOT, J.

This is a mandamus proceeding to compel the respondents to construct a bridge at the intersection of their mill-race and a highway. The writ was issued, and the respondents appeal.

The facts, in so far as they are disclosed by the record, are undisputed. The raceway in question was constructed by the respondents' grantor in 1873 upon premises owned by him in fee simple. In 1880 a highway was laid out so as to intersect said raceway. A bridge subsequently constructed by the county in the highway and over the raceway has been continuously used by the public, but is now out of repair.

In 1887 the legislature passed an act entitled "An act to compel railroad corporations and others to make and keep in repair crossings." Laws 1887, ch. 73. (Ann. St. 1909, sec. 6162 *et seq.*) Section 1 of that act is as follows: "Any railroad corporation, canal company, mill owner, or any person or persons who now own, or may hereafter own or operate, any railroad, canal, or ditch that crosses any public or private road shall make and keep in good repair good and sufficient crossings on all such roads, including all the grading, bridges, ditches, and culverts that may be necessary, within their right of way."

Counsel for the respondents argue that the order of the district judge deprives their client of his property without due process of law, whereas the relator's counsel urges that the judgment compels the performance of a duty imposed by the legislature in the exercise of the

police power. There is nothing in the record to indicate that the mill to which the raceway is appurtenant is a toll mill, that any right exercised in operating it was acquired by the exercise of the right of eminent domain, or that the respondents' business is affected in any manner with a public interest. Prior to the date the mill and its appurtenances were constructed and a water right was vested in the respondents' grantors, the legislature had not announced the policy of the state to dedicate all unappropriated water in the natural streams to the use of the public, nor had it vested persons, natural or corporate, with the power of eminent domain with respect to the appropriation and application of water for all beneficial purposes. If we adopt the argument of relator's counsel we shall hold that the legislature had power, and intended, to compel a natural person not exercising a franchise or conducting a business affected with a public interest, and whose property rights vested years before a highway was laid out over his premises and prior to the enactment of the statute, to construct and keep in repair a bridge forming part of the public way where it intersects his raceway. Counsel for the relator suggests that in *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 112, this court held the statute to be a valid exercise of the police power, and that it applies to highways laid out across a railway subsequent to its construction. It will be noticed that Judge NORVAL, in his well-reasoned opinion in that case, bases his conclusion upon the right of the legislature to impose burdens upon public service corporations in addition to those specifically mentioned in their charters, but reasonably necessary for the protection of their patrons. The decision is supported by sound reason and excellent authority. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226.

It is a matter of common knowledge that every part of a roadbed used for railroad purposes must be properly constructed and carefully maintained to insure the safety of persons upon the carrier's moving trains, and that to

permit the highway authorities to assume jurisdiction over the construction and reparation of railway crossings would invite disaster and death. But at the intersection of a raceway and an ordinary highway no such condition obtains. Highways must, and frequently do, cross natural streams. There is no danger peculiar to the use of a bridge spanning an artificial watercourse that does not apply to a like use of a viaduct over a natural stream. The public authorities are better equipped to construct and repair bridges than are individual millers and ditch owners, so that the reasoning of Judge NORVAL does not apply to the instant case.

Independently of the statute, the miller's liability in case his raceway crosses a highway laid out before the raceway is constructed is well established. In that event he should reunite the way by the construction of a bridge and thereafter keep it in repair. *City of Lowell v. Proprietors of Locks & Canals,* 104 Mass. 18; *Eyler v. County Commissioners,* 49 Md. 257; *Woodring v. Forks Township,* 28 Pa. St. 355; *President and Trustees of West Bend v. Mann,* 59 Wis. 69; *State v. Lake Koen N., R. & I. Co.,* 63 Kan. 394; *Trustees of Burton Township v. Tuttle,* 30 Ohio St. 62. But if the highway is laid out over an artificial waterway theretofore constructed, the proprietor of the canal, unless bound by the terms of a franchise or private contract, is under no duty to construct or repair a viaduct in the highway and over the waterway. *Perley v. Chandler,* 6 Mass. *454; *City of Oswego v. Oswego Canal Co.,* 6 N. Y. 257; *Morris Canal & Banking Co. v. State,* 4 Zab. (N. J.) 62; *City of Denver v. Mullen,* 7 Colo. 345. If the legislature, under the circumstances of this case, may force the respondents to construct the bridge in question, it can compel the proprietor to construct and maintain bridges over creeks and other natural watercourses upon his premises should the public authorities lay out and open a public highway through his land so as to cross those streams, and it may further impose upon him the expense of grading and keeping in repair the

highway wherever it traverses his land and without regard to special benefits bestowed. It must be remembered that, if those burdens are properly laid in the exercise of the police power, the landowner cannot, as a matter of right, demand reimbursement. We shall not say that the legislature may or may not provide by general statute that such burdens may be imposed upon the individual, but, if the public authorities assert that the landowner owes that duty, they should cite a statute that, fairly considered, leaves no reasonable doubt in the mind concerning the individual's obligation.

It will be noticed that the act commands the persons therein described to construct and repair crossings "within their right of way." Giving effect to all of the language employed by the lawmakers, it would fairly seem that the statute does not refer to the owner of a private mill whose title to the land through which his raceway is excavated is in fee simple, subject to a mere easement in favor of the public. The relator therefore has not made out a case against the respondents.

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

REVERSED.

SUE A. COX, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JUNE 10, 1910. No. 16,002.

1. **Railroads: FENCING STATION GROUNDS: NEGLIGENCE.** A railway company is not chargeable with negligence for failing to fence its station grounds in a village, where it is not required by statute to do so.

2. ———: ———: **KILLING ANIMALS: NEGLIGENCE.** In an action against a railway company to recover the value of animals killed by a train on defendant's track, proof that the train was at the time running at a speed of twelve miles an hour through an

unincorporated village, where the fencing of tracks was not required by statute, is not of itself evidence of negligence.

3. ———: ———: ———: ———. In an action against a railway company to recover the value of animals killed by a train on defendant's track, the mere fact of killing is not sufficient to establish negligence on the part of those in charge of the train, where the animals were killed on station grounds, the fencing of which was not required by statute.

APPEAL from the district court for Pierce county: ANSON A. WELCH, JUDGE. *Reversed.*

Burt Mapes, B. T. White, C. C. Wright and *B. H. Dunham,* for appellant.

Fred H. Free and *K. W. McDonald, contra.*

ROSE, J.

A short distance west of the station at Foster, Pierce county, a train operated by defendant on its railway struck and killed a colt October 27, 1905. In November following a cow was killed near the same place in the same manner. Plaintiff was owner of both animals, and in a suit against defendant for their value recovered a judgment for $104.70. Defendant has appealed.

In the petition the negligence imputed to defendant was its failure to maintain proper fences and cattle-guards and to stop its trains in time to avoid injury to plaintiff's stock. Defendant answered that plaintiff's loss, if any, was due to her own negligence, and not to any negligence on part of defendant. The answer contains the further allegation that the animals went upon defendant's premises and were killed on its station grounds, where it was not required to maintain fences or cattle-guards. Foster is an unincorporated village. Main street runs north and south and crosses defendant's railway and station grounds diagonally at the east end of the station. Front street crosses Main street from southeast to northwest, runs parallel to the railway, and is the northern boundary of the station grounds. The village is immediately north

of the railway tracks, and in 1905 contained two general stores, a livery barn and other places of business. Defendant in addition to its main line maintained a switch track 1,800 feet or more in length. The station is located between the tracks about the same distance from each of the switch connections with the main line. Defendant kept an agent constantly at the station. On the station grounds there were corn cribs, an elevator and stock-yards. Six daily trains passed Foster, all stopping except a through freight which usually stopped also. The side-track was used daily for switching purposes. During 1905, 237 cars of freight were received or shipped. The stock-yards were northwest of the station on Front street, with the east end about 100 feet from Main street. East of the stock-yards on Front street and on Main street the station grounds were open. Defendant had, however, constructed a wire fence from a shed at the west end of the stock-yards to the west end of the station grounds on the northern boundary. Negligence in failing to maintain fences and cattle-guards is alleged by plaintiff as follows: "Defendant negligently permitted its fences at the north end of a shed built and attached to the northwest side of the stockyards in Foster, an unincorporated village in Foster precinct, Pierce county, Nebraska, to be and become in a defective condition in this: That it permitted the said fence to become detached from said shed, and to remain so detached; that said defendant company failed to put in a cattle-guard where the said fence stopped."

There is no definite or positive testimony showing where the animals came onto defendant's premises, but plaintiff's position is, and there is some proof of tracks tending to show, that they entered at the gap in the fence west of the shed, though there is also evidence of tracks coming from the direction of Main street. Both animals were found between the main track and the switch track, the colt about 150 feet west of the station, and the cow 50 feet or more still farther west. In any event, they entered from a platted part of the village, either from Front street

through the gap or from an open street abutting on the station grounds. The statute requiring railroad companies to fence their tracks contains the following exceptions: "Except at the crossings of public roads and highways and within the limits of towns, cities, and villages." Comp. St. 1909, ch. 72, art. I, sec. 1. Within the meaning of these exceptions defendant was not required by statute to fence its station grounds at Foster, where plaintiff's animals entered, or where they were killed, and consequently was not liable for damages for failing to do so. The trial court, nevertheless, submitted that question to the jury, and in doing so erred to the prejudice of defendant.

The question of defendant's negligence in operating its trains was also submitted to the jury, and this is assigned as error on the ground there was no evidence of such negligence. There is uncontradicted testimony that the cow was killed by a special train in the evening, after dark, and that the colt was struck in the morning, before daylight. There is no proof that the speed of either train exceeded twelve miles an hour at Foster, and this of itself did not show negligence. *Burlington & M. R. R. Co. v. Wendt,* 12 Neb. 76. The mere killing of the animals was not evidence of negligence on the part of defendant. *Starke v. Chicago, B. & Q. R. Co.*, 82 Neb. 800; *Burlington & M. R. R. Co. v. Wendt,* 12 Neb. 76. The evidence is insufficient to support a finding that defendant was negligent in operating its trains or in failing to stop them before striking the animals, and that question should not have been submitted to the jury.

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

REVERSED.

ROBERT MITCHELL, APPELLEE, V. ISAAC G. GRIFFITH ET AL., APPELLANTS.

FILED JUNE 10, 1910. No. 16,087.

Deeds: REFORMATION: MUTUAL MISTAKE. A deed may be reformed to include omitted lands purchased by grantee, where it is shown by clear and convincing evidence that the omission resulted from a mutual mistake, and that the deed, when thus reformed, will express the intention of the parties at the time it was executed.

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

Justin E. Porter, for appellants.

Albert W. Crites, contra.

ROSE, J.

By deed dated April 24, 1901, Isaac G. Griffith and wife, defendants, conveyed to Robert Mitchell, plaintiff, 1,240 acres of land in Dawes county. This is a suit by plaintiff to reform the deed by including in the conveyance an additional quarter-section owned at the time by defendants, situated half a mile from the main tract, and described in the record as the "Godfrey land." The district court granted the relief sought by plaintiff, and defendants have appealed.

The deed was reformed on account of a mutual mistake in omitting the Godfrey land. The controlling question presented is the sufficiency of the evidence to justify the decree. Some time before the deed was executed Griffith herded sheep for plaintiff in Wyoming, bought a large number of ewes from his employer on credit, and brought them to Dawes county. He testified he bought the lands to provide pasturage for sheep. At one time he took plaintiff's sheep on the shares. At another time he and plaintiff were partners in the sheep business. His ventures proved to be disastrous. As a result he owed plaintiff over $2,000, and wanted to sell him the ranch to

square accounts. The deed in controversy was drawn in the office of Reynolds & Slattery at Chadron. Reynolds testified that Griffith came to the office and said he had sold the ranch to plaintiff, and that he gave descriptions of the different quarter-sections and pieces of land, saying they contained all the land he had. Slattery testified he drew the deed which was finally executed; that the Godfrey land was included in the transaction and was purchased with the other tracts; that Griffith told him to prepare a deed conveying to plaintiff all the land he had; that in the fall of 1907, when notified of the mistake, he promised to give plaintiff a quitclaim deed for the purpose of correcting it. A ranch hand testified that after the deed was executed he helped to dig a well on the Godfrey land, when in plaintiff's employ, and was assisted by Griffith who said he had sold out "and didn't have any more land than a jack rabbit, or something of that kind." Plaintiff testified that the Godfrey land was included in the purchase; that the purchase price was paid; that none of defendant's land was reserved; that during the negotiations, or afterward, Griffith turned over to him a number of deeds and other papers relating to the lands purchased, and that among them there was a deed to the Godfrey land, in which Griffith was grantee; that he never learned of the omission until told of it by an abstracter who was employed in 1907 to make an abstract of title.

Defendants testified that the lands sold were in a contiguous body, and did not include the Godfrey land which was half a mile from the other tracts; that they did not sell it; that one quarter-section described in the deed was the family homestead of defendants, and in lieu thereof the Godfrey land was reserved; that it was not included in the transaction; that it was properly omitted from the deed, and that Mrs. Griffith would not join in a conveyance with the Godfrey land included. Plaintiff's testimony of a different import was contradicted by defendants. They were unable, however, to refute proof of the following facts: Defendants left the neighborhood after

the sale and never again had possession of the Godfrey land. They never afterward made any improvements on it, and never paid the taxes or received any income from it. Plaintiff redeemed the Godfrey land from a tax sale, and thereafter paid the taxes on it and used it the same as the other tracts. On the record presented, the proof of the mutual mistake is clear and convincing, and the evidence shows that the deed as reformed expresses the intention of the parties at the time it was executed. The finding here is the same as that of the trial court.

Some complaint is made of errors in admitting evidence, but the case was tried to the court without a jury, and the conclusion announced is based wholly on evidence properly admitted. It is therefore unnecessary to consider assigned errors in the rulings on evidence.

AFFIRMED.

BOYD BURROWES, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JUNE 10, 1910. No. 15,846.

1. **Courts: DECISIONS: REVIEW OF EVIDENCE.** In considering an assignment that the judgment of the lower court is not sustained by the evidence, an appellate court is not required to set out and discuss the evidence *in extenso*. It is sufficient if the opinion fairly reflects the evidence material to a decision upon such assignment.

2. **Carriers: SHIPMENT OF GOODS: LIABILITY.** When a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation and the carrier so accepts them, the liability of the carrier as a practical insurer of the safe delivery of the goods at once attaches; but such liability does not attach until the goods are unconditionally surrendered by the shipper and accepted by the carrier.

3. **Rehearing Denied.** Our former opinion adhered to.

OPINION on motion for rehearing of case reported in 85 Neb. 497. *Rehearing denied.*

FAWCETT, J.

A reargument was allowed upon a motion for a rehearing. Counsel for plaintiff vigorously assails our former opinion (85 Neb. 497) upon the ground that "the opinion does not reveal the facts." This is a serious charge, but a careful reexamination of the record shows it to be without foundation. That the opinion does not mention and discuss all of the testimony will be conceded in any case, but the opinion in the case at bar fairly reflects all of the material evidence in the record. This was sufficient. The gravamen of counsel's complaint is that the opinion does not show that all of the goods which were to go as freight had been loaded, and that the goods yet to be loaded were such as were to go as baggage. The fact, even if it had been undisputed (which is not the case), that all of plaintiff's property which was to go as freight had been loaded and that only such as was to go as baggage remained to be loaded, is immaterial, for the reason that, under plaintiff's arrangement with defendant's agent, it was all to be loaded by plaintiff in the same car—the one which had been switched onto the side track for plaintiff's accommodation. It was entirely at plaintiff's pleasure when he would load it. The only requirement was that, if he desired to have the car attached to the passenger train which was to leave the station at 9:30 on Monday morning, he must have the loading completed before that time. The defendant was accommodating him in setting apart for his use a freight car and in agreeing to attach such freight car to its passenger train. No trains pass through Loup City on Sunday. It is apparent that the agent of the defendant was not required to be at the station on Sunday. He left town in the forenoon, having previously advised plaintiff that he was going to do so. On the evening before, he had the engine of a passing freight train switch the freight car onto a side-track, and on Sunday morning, before leaving town, advised plaintiff, through one of plaintiff's employees, as to the location of the car.

During the afternoon of Sunday, plaintiff and his men, with the aid of a drayman, loaded a portion of his stuff, keeping out the sleeping tents and cook tent, the gasoline cook stove and cooking utensils, and certain bedding for use that night, intending to load them into the car before train time next morning. No report was made to the agent of what had been done. Plaintiff was unable to even state whether or not the car door had been closed. The drayman, it is true, testified that he helped to push the door shut when they got the stuff in Sunday afternoon, but it was not locked, or sealed, or precautions of any kind taken to guard the car against tramps, thieves, or other evilly disposed persons—a condition which, as shown by the testimony of defendant's agent, would not have been permitted to exist had delivery been made. About 5 o'clock the next morning, before plaintiff was awake, the car took fire and was burned. No arrangements had been made for tickets, no money had been paid to the company, the agent had no knowledge that anything was in the car, no weights had been furnished defendant's agent by plaintiff, nor any way bill made out, nor anything done which would indicate even an attempt at delivery of the stuff that had been loaded to the defendant company. The car was not yet ready for shipment. It was not under the control of defendant. Defendant would have had no right, at the time of the fire, to have coupled on to the car and hauled it to its proposed destination. Plaintiff still had the right, if he saw fit, to remove all his stuff from the car the next morning and decline to ship at all, or he might decide not to go on the early train, but to wait for the next and later train. The case is not like one where freight is delivered to a railroad company or loaded upon a railroad company's depot platform for immediate shipment. If such had been the case here, clearly the defendant would have been liable, but we do not see how it can be said that plaintiff's goods had been delivered to the company for immediate shipment until they had all been loaded and the company notified

of that fact. Both of these important elements are wanting. The writer has very serious doubts as to whether even the liability of a warehouseman attached to defendant by what had been done by plaintiff at the time of the fire; but, be that as it may, it is clear that no liability as a common carrier had yet attached.

Counsel for plaintiff refers to *Chicago, B. & Q. R. Co. v. Powers,* 73 Neb. 816 cited in our former opinion, and says that he is satisfied with the law therein announced. In that opinion the court, speaking through Mr. Commissioner OLDHAM, said: "It is also clearly shown that the owners of the cattle intended to take the stock out of the pens in the morning, to feed, water and range them until about 10 o'clock. We think the rule well established that, when a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier as a practical insurer of the safe delivery of the goods at once attaches. *Kansas City, P. & G. R. Co. v. Barnett,* 69 Ark. 150, 61 S. W. 919. But, we think it equally well settled that such liability does not attach until the goods are unconditionally surrendered by the shipper and accepted by the carrier." We think that decision decisive of the case at bar. There had not been an unconditional surrender by the shipper and an acceptance by the carrier in the present case. Hence, under the rule there announced, no liability had attached. Then, again, we are unable to see any difference between an arrangement by which one shipper is privileged to take stock out of the pens in the morning, for any purpose, prior to shipment, and an arrangement that another shipper is to have the right to keep out part of his shipment until the next morning before loading. There could not, in the very nature of the case, be an unconditional surrender until the final loading in either case, and a final delivery to the carrier.

Our former judgment is clearly right, and is adhered to.

REHEARING DENIED.

WILLIAM L. SHACKLEY ET AL., ADMINISTRATORS, APPELLANTS, V. ANNIE B. HOMER ET AL., APPELLEES.

FILED JUNE 10, 1910. No. 16,012.

1. Wills: CONSTRUCTION: VESTED ESTATE IN FEE: DEFEASANCE. Where real estate is devised to executors, to be held by them in trust until C shall attain the age of 25 years, when the same shall be conveyed to him in fee, with a devise over, in the event of C's death prior to attaining such age, to C's widow and children, if any, and, if none, then to C's mother, and brother and sister of the full blood, this will confer on C a vested estate in fee simple, subject to the prior chattel interest given to the executors, and also subject to defeasance in the event of his death before attaining such age.

2. Mortgages: FORECLOSURE: PARTIES: JURISDICTION. And in such a case, in a suit brought to foreclose a mortgage upon the real estate so devised, executed by the testator in his lifetime, where the probate of the will is being litigated, so that the executors named have not qualified, and no administrators *c. t. a.* have been or could be appointed in their stead, the service of summons upon C and upon all persons then living who would take the devise over in the event of C's death prior to his attaining the age of 25 years, and upon the widow and heirs at law of the testator, and upon the special administrator of the estate of the testator, confers upon the court jurisdiction over the said real estate and the title thereto, and of all parties in interest in said real estate and title.

3. ———: ———: REDEMPTION. And the confirmation of a sale under a decree in such suit, and the execution and delivery of a sheriff's deed for the real estate involved therein, will bar all equity of redemption of the defendants so served and will pass to the grantee in said deed all interest and title in and to said real estate owned by the testator at the time of his decease.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Affirmed.*

Henry E. Maxwell, for appellants.

William Baird & Sons and *E. H. Scott, contra.*

FAWCETT, J.

Harrison W. Cremer died June 3, 1896, in Douglas county, leaving a last will and testament, the parts material to this inquiry being as follows:

"Item 2. I give and bequeath to my executors, hereinafter named, and their successors, the following described real estate, situate in the county of Douglas, Nebraska, to wit: Lot seven (7) and the west twelve (12) inches in width of the south half of lot eight (8) in block one hundred and thirty-six (136), lot one (1), in block fifty-seven (57), and lot five (5) in block forty (40), all in the city of Omaha aforesaid, together with all and singular the buildings and appurtenances thereunto belonging; in trust, however, for the objects, uses and purposes following, that is to say: That until such times as they shall convey said several lots or parcels of real estate as hereinafter directed, they shall manage and control the same to the best advantage of my estate and of said realty, leasing the same to the best advantage, collect rents, pay all lawful taxes, make all necessary repairs, effect reasonable insurance on the buildings, and do all things else requisite for the due preservation and care of the property. If the buildings upon either of the three parcels of ground shall, during the time they are in charge of my executors, be destroyed, or damaged by fire, or otherwise, they must rebuild or repair the same as soon as possible, and to that end, if the funds realized from the insurance upon the destroyed or injured building, or other available means, shall be inadequate for that purpose, they may borrow such additional sum as may be required, and secure the payment thereof upon the particular property whereon it is to be expended, by a mortgage to be by them duly executed, but not for a credit extending beyond the time when it is to be finally conveyed by them in fee as hereinafter directed. Out of the income of said three parcels of real estate (which is to be considered as a joint fund), in addition to the expenditures contemplated above for its

preservation and care, I direct the payment of all interest as it shall mature, upon any mortgage incumbrance resting thereon, the several bequests herein made of money to my wife, and my sons and daughters, and the balance thereof they shall deposit in the Omaha National Bank, upon the best terms that can be made as to interest thereon, as and for a sinking fund, which, in the order, and at the several times fixed herein for the conveyance of said several parcels of real estate to certain of my heirs, and to the full extent that it has then accrued, shall be applied toward the payment of any incumbrance then resting on the particular piece of property then to be conveyed. If any mortgage indebtedness resting on either of said parcels of real estate at the time of my decease shall mature while my executors are in charge thereof, I direct them to replace or extend the same by a new loan, securing the payment by a mortgage upon that particular piece of property, but such extension or new loan must not reach beyond the time fixed herein for their final conveyance of the premises by which it is secured."

"Item 4. Subject to the foregoing provisions respecting the same, I give and bequeath to my beloved son, Leonidas R. Cremer, the above mentioned lot five (5) in block forty (40) and to my beloved son, Cedric E. Cremer, said lot seven (7) and the west twelve (12) inches in width of the south ½ of lot eight (8) in block one hundred and thirty-six (136) in the city of Omaha, Nebraska, the same to be conveyed to them, respectively, on reaching the age of twenty-five years, by my executors, by deeds duly executed and delivered, so as to convey to each of them a good title in fee simple, but subject to whatever incumbrance may be then resting thereon after the preceding provisions respecting the same have been complied with. But, in the event of the death of either of my said sons, Leonidas or Cedric, before reaching the age of twenty-five years, leaving surviving him a widow, or child or children, then in like manner my executors shall convey a one-third part of the premises hereby devised to such

son to his widow and the remaining two-thirds thereof to such child or children, share and share alike. If he leave no widow, but leaves a child or children the premises shall be conveyed to them. If he leave a widow, but no children, they shall convey to the widow an undivided one-third of the premises, and the residue to his mother, brother and sister, of the full blood, or such of them as shall then be living, share and share alike. Provided, however, that if such brother or sister shall have died leaving children, they shall receive the share that their parent, if living, would have been entitled to under this will. If either of my said sons, Leonidas or Cedric, shall so die, leaving no widow or children, then the whole of the estate herein devised to him shall be conveyed to his mother, and his brother and sister of the full blood, or such of them as shall then be living, share and share alike. Provided, further, that if such brother or sister shall have died, leaving issue, such issue shall have and take the portion that such brother or sister, if living, would have been entitled to hereunder."

Similar provisions are made by the fifth item of the will for the daughter Mina, with respect to the other lot.

"Item 7. I do hereby nominate my friends Charles C. Housel, formely of said city of Omaha, but now of Chicago, Illinois, and W. B. Millard of said city of Omaha, to be the executors of this my last will and testament, having full confidence that they will faithfully carry out its provisions."

A number of questions are presented in the pleadings and have been ably argued by counsel, both in their briefs and at the bar; but the conclusion we have reached renders it unnecessary to consider any but the one question: What interest, if any, did Cedric E. Cremer take under the will of Harrison W. Cremer, deceased? Did he take a present vested interest in and title to the property devised, on the death of his father, or was such devise contingent merely, so that no interest or title would ever vest in him unless and until he attained the age of 25

years? Having reached such conclusion, it is unnecessary to set out *in extenso* the allegations of the pleadings. It will be sufficient to an understanding of the case to state that the two gentlemen named in the will as executors never qualified as such; that shortly after the death of the testator, and while a contest of the will was still pending, the Omaha Loan & Trust Company brought suit in the district court for Douglas county to foreclose defaulted interest coupons upon a $40,000 mortgage which had been executed and delivered to it by Harrison W. Cremer in his lifetime. The principal mortgage at the time of such foreclosure was held by the defendants Anna B. Homer and Margaret H. Davis, under an assignment from the said loan and trust company. In the foreclosure suit referred to, the trust company made defendants: The devisees named in the fourth and fifth items of the will; the widow and all of the heirs at law of Harrison W. Cremer, deceased; Housel and Millard, named as executors in the will, and William Wallace, who had been appointed special administrator. All of said parties were duly served with summons. This included all of the persons then living who would take the devise over in the event of the death of Cedric E. Cremer, without having married, prior to his reaching the age of 25 years. A decree of foreclosure was entered, and the property sold thereunder to the Omaha Loan & Trust Company. The sale was duly confirmed, and a sheriff's deed issued to said company. The company subsequently conveyed the property in controversy to the Omaha National Bank. Some time thereafter, and before any administrator *c. t. a.* had been appointed, Mrs. Homer and Mrs. Davis foreclosed the principal mortgage. They made defendants all of the persons who had been made defendants in the first foreclosure, with others. Service of summons was duly had upon all of such defendants, and a decree of foreclosure entered. The premises were sold under such decree to said Homer and Davis. The sale was duly confirmed, and a deed issued to them therefor. Subsequently

thereto the plaintiffs, William L. Shackley and Edward S. Flor, were appointed administrators, with the will annexed. After having duly qualified, they instituted this suit.

The prayer of the petition is that an account be taken of the rents and profits collected by defendants since August 29, 1896; that plaintiffs be permitted to redeem from said mortgage; of the amount necessary to be paid in order to make such redemption; that defendants be required to acknowledge satisfaction of said mortgage upon the records of Douglas county and deliver to plaintiffs possession of said real estate; that the cloud cast on plaintiffs' title to said real estate by said sheriff's deeds be removed, and for such other and further relief as justice and equity may require. The district court found that the facts alleged in the petition and disclosed by the evidence fail to show that the plaintiffs have any equitable rights in and to the premises in controversy, and dismissed their suit for want of equity, with costs.

Plaintiffs contend that the law gives the property in fee simple to the executors "and their successors" in trust; that Cedric E. Cremer never had any title, legal or equitable, to the property; that the trusts imposed by the law are annexed to the office of the executors, and not to the persons nominated as executors in their individual character; that Charles C. Housel and Willard B. Millard, having failed to qualify, never became executors and did not take title to the property; that upon the appointment and qualification of appellants as administrators with the will annexed, they were vested with the fee title to the property in trust for the uses, objects and purposes specified in the will; that appellants' title relates back to the death of the testator; that the owner of the fee title to the property was not before the court in either of the suits to foreclose the mortgage; that the fee was not cut off by the decree, or the pretended sale thereunder, in either suit, and that appellants are, therefore, entitled to redeem the property from the mortgage.

The sympathy of the writer for the young man who has lost what his father doubtless thought was a valuable devise is such that he spent several days in an industrious but vain attempt to sustain plaintiffs' contention and permit a redemption. An exhaustive examination of the authorities forces the conclusion that to do so would be to disregard the plain intention of the testator as expressed in his will, and to give no heed to the holdings of many eminent courts in numerous cases decided both in this country and in England, where similar questions so often arise that in 1829 (*Duffield v. Duffield*, 3 Bligh (Eng.) 260, 311) Lord Eldon said: "In *Boraston's Case* (2 Coke (Eng.) 16, 19) it appears from the margin of the report, that there were then (the twenty-eighth year of the reign of Queen Elizabeth) one hundred and seventy authorities upon the same subject." He added: "Yet the circumstances of this case are not precisely similar to those of any preceding case." In the decisions of the high and able courts of a country so prolific of cases of a similar character, in all their varying forms, involving vast estates, we may well expect to find careful consideration and elucidation of the question.

With the provisions of the will in mind, let us see what the courts of England have held. A review of the most noted cases, in chronological order, will be both interesting and instructive.

In *Boraston's Case*, referred to by Lord Eldon, *supra*, the will gave to Thomas Amery and Amphillis, his wife, certain real estate "for eight years next after my decease," upon certain conditions, "and after the term of the said eight years, the said upper part to remain to my executors until such time as Hugh Boraston shall accomplish his full age of 21 years, and the mean profits to be employed by my executors towards the performance of this my last will and testament; and when the said Hugh shall come to his age of 21 years, then I will he shall enjoy the said upper part to him and to his heirs forever." Hugh died when about the age of nine years. After his

death and after the death of Thomas and Amphillis, Philip Boraston, as brother and heir of the said Hugh, entered into the lands, and demised them to William Ambrye. Subsequently Constance Brand and Margaret Davies, granddaughters of the testator, Thomas Boraston (their husbands joining) claiming that no remainder was vested in Hugh Boraston until he attained his age of 21 years, and that forasmuch as Hugh never attained his said age, the land never vested in him, but remained in the heirs general, executed to plaintiff Richard Hynde a seven years' lease of the lands in controversy. Ambrye, who held under his demise from Philip, by command of Philip, entered upon the land, and Hynde brought ejectment. The court sustained the contention of defendant that the executors had a good term for 12 years, which was not determined by the death of Hugh, and held: "The case at bar is no other in effect, but that a man devises his lands to his executors (for the payment of his debts) *until his son shall or should have come to his full age* (*of twenty-one years*) the remainder to his son in fee; for altho' these are adverbs of time, when, etc., and then, etc., yet they do not amount to make anything to precede the settling of the remainder, no more than in the common case. A man leases land for life or years, and after the decease of the lessee, or the term ended, the remainder to another, yet it shall remain presently; for when these adverbs refer to a thing, which must of necessity happen, there they make no contingency, and it is certain that every man must die, for *statutum est hominibus semel mori,* and every term will end; for *tempus edax rerum;* and in the case at bar, certain it is, that Hugh would or might have accomplished his age of 21 years, which are in this case of a will, all one in construction of law. So that these adverbs (*then* and *when*), in our case, are demonstrations of the time, when the remainder to Hugh shall take effect in possession, as in the said cases of a lease for life, and lease for years, and not when the remainder shall vest;

quod fuit concessum per totam curiam." And judgment was given that the plaintiff should take nothing by his bill. That case has been followed with scarcely any deviation to the present day.

In *Goodtitle* d. *Hayward v. Whitby*, 1 Burr. (Eng.) 228, R. P. devised his lands to Thomas Hayward and John Bates, and the survivor of them, and the heirs of such survivor "in trust, that they and the survivor of them, his heirs and assigns, should lay out, employ and bestow the rents and profits of the devised premises, for the maintenance, education, bringing up and putting forth into the world, of Thomas and John Hayward, sons of the testator's sister Elizabeth Hayward, during their minorities; and when and as they should respectively attain their ages of 21, then to the use and behoof of the said sons of his sister Hayward, the said Thomas Hayward and John Hayward, and their heirs, equally." The testator then made the said two trustees, Thomas Hayward and John Bates, his executors. Thomas Whitby claimed as testator's heir at law. Thomas Hayward, the elder of the testator's said two nephews, died under the age of 21 years, and without issue. Upon his death (his brother John being then under age), Whitby was by the trustees let into his moiety. John, having come of age, brought ejectment, claiming the moiety of his deceased brother, as well as his own moiety. The question construed by the court was "whether this moiety of Thomas, the deceased brother, belongs to John Hayward, either as heir to his brother, or as surviving joint tenant; or whether it belongs to Thomas Whitby, as heir at law of the testator as an undevised estate." In the opinion by Lord Mansfield, it is said: "Testator died. T. H. and J. B., the two trustees, entered into possession. Then Thomas Hayward, one of the two nephews and devisees died, under age, and without issue. Then the trustees let the now defendant, the testator's heir at law, into possession of his moiety. But it is not material what *they* did among *themselves;* that will not affect the *right*

of the plaintiff. The question is, 'whether the estate *rested* immediately in the two nephews, upon the death of the testator, or *remained in contingency,* till their respective coming of age:' and, consequently, 'whether this moiety belongs to John Hayward, upon the death of his brother Thomas, either as his heir at law, or as survivor; or whether it descends to the heir at law of the testator, as being undevised.' In the construction of wills, adjudged cases may very properly be argued from; if they establish general rules of construction, to find out the intention of the testator; which intention ought to prevail, if agreeable to the rules of law. Here it is agreed that a fee is devised to the nephews; but it is made a question 'whether it be a fee depending upon a precedent contingency; or, an immediate fee.'" He then laid down two rules, the second of which is: "Where an absolute property is given, and a particular interest given, in the *meantime,* as '*until* the devisee shall come of age, etc., and *when* he shall come of age, etc., then to him, etc.,' the rule is, that that shall not operate as a condition precedent; but as a description of the time when the remainderman is to take *in possession.* And to this purpose is *Boraston's Case,* * * * where this doctrine is fully laid down and explained. * * * Here, upon the *reason* of the thing, the infant is the object of the testator's bounty; and the testator does not mean to deprive him of it, in *any event.* Now suppose that this object of the testator's bounty *marries,* and *dies* before his age of 21, leaving children; *could the testator intend,* in such an event, to *disinherit him?* Certainly, he could not. And as to the testator's heir at law, his heir at law is only to take what the testator has not devised away from him. But in the present case the testator takes no notice of this Thomas Whitby, who is indeed stated to be (but it doth not appear *how*) his heir at law. And he does not except any thing out of the interest he has given to his nephews; he only makes a trust, to be executed for *their benefit;* and devises *nothing* for the benefit of the *trus-*

tees, who were also his executors. And this is *only a chattel*-interest, which *cannot last twenty-one years.* On the rule in Matthew Manning's case, here is (at the utmost) only an *exception,* by this devise to the trustees, *out of* the absolute property given to his nephews. It is so plain upon the true intent and meaning of this will, that it is a shame to cite cases upon it. * * * So here, the *property* is *absolutely given:* and the limitation is only of the *trust.* Therefore, upon the whole, he held the present case to be: An *immediate* gift to the two nephews; with a trust to be executed for their benefit, during their minority."

The case of *Bromfield v. Crowder,* 1 B. & P. N. R. (Eng.) 313, will be found to be a leading case very generally cited in subsequent decisions. In that case, John Davenport, the testator, by his will, after charging his real and personal estate to the payment of his debts, legacies and funeral expenses, directed his executors to pay to his nephew, the defendant Samuel Crowder, an annuity of £50 during his life, payable quarterly, upon the express condition that "if the said Samuel Crowder should at any time mortgage, sell, assign, dispose of, or in any manner incumber the same or any part thereof, then and from thenceforth the future payments of such annuity should cease and determine and be at an end to all intents and purposes whatsoever, and the same should be considered as if no such bequest had been made." He then gave to his godson John Davenport Bromfield, the plaintiff in the cause, the sum of £100, provided he lived to attain the age of 21 years, otherwise such legacy was not to be paid or payable. He then devised unto his wife Elizabeth Davenport and her assigns all his real estate for life. After her decease, to his cousin Joshua Rose, his heirs and assigns forever. He subsequently made a codicil revoking that part of his will which gave his estate to Joshua Rose and his heirs forever, in case he survived testator's wife, and gave the estate to Joshua during the term of his natural life in case he survived the wife,

"and at the decease of Mrs. E. Davenport and Mr. Joshua Rose, or the longest liver of them, I give all my real estate, of what nature and kind soever, to my godson John Davenport Bromfield, son of Charles Bromfield of St. Ann's, Liverpool, if the said John Davenport Bromfield shall live to attain the age of 21 years; but in case he die before he attains that age, and his brother Charles Bromfield shall survive him, in that case I give my real estate to Charles Bromfield his brother, if he lives to attain the age of 21 years, but not otherwise, but in case both the above-mentioned boys die before either of them attain the age of 21 years, then I give my real estate to John Vale my godson, * * * and his heirs forever." The testator died, leaving defendant Samuel Crowder, his nephew and heir at law. Subsequently to his death, a bill was filed on behalf of the creditors to have a portion of the estate sold to pay debts, which was done. Pending these proceedings, Elizabeth Davenport died and on her death Joshua Rose entered into possession. Subsequently Joshua died. The plaintiff John Davenport Bromfield, being then an infant under the age of 21 years, in June following, by his next friend, filed his bill in chancery against the defendant, claiming the unsold part of the real estate, praying "that his right to the said real estates upon the death of the said Joshua Rose might be declared." Defendant answered, and the case came on to be heard before the master of rolls. Defendant contended that plaintiff had no right or title to the estates, because the devise to plaintiff and to his brother Charles and to John Vale were contingent remainders limited upon the estates for life devised to Elizabeth Davenport and Joshua Rose, and that inasmuch as the preceding particular estates determined and were at an end before the events happened on which the said premises were to become vested, such remainders could not then take effect, and subsequently the said estates remaining unsold did, upon the death of Joshua Rose, result and then belonged to defendant Crowder as the heir at law of the testator. The master of the rolls or-

dered a case to be made for the opinion of the judges upon the following question: "Whether the plaintiff John Davenport Bromfield, in the events which have happened, takes any and what estate or interest in the freehold estates of the said John Davenport the testator?"

In his argument, counsel for plaintiff makes this terse and well-supported statement: "The law favours vested estates, because it dislikes estates in abeyance and contingency; and there are many cases where, from the import of the will, it should appear that the estate was in contingency, and yet it has been holden to be vested." The opinion by Sir James Mansfield, Ch. J., after stating the will, said: "All the testator's real estate is given to the plaintiff immediately on the death of the preceding devisees, if he live to attain 21; if he die before 21, and his brother Charles Bromfield survive, then the testator gives his real estate to the said Charles Bromfield, if he live to attain 21, but not otherwise. If both die under 21, then he gives it to his godson, John Vale, in fee. The plaintiff was under 21 at the time of the death of the surviving devisee, and the question is, whether he took any and what estate in the freehold or copyhold premises? There does not appear to us to be any distinction between the freehold and the copyhold. In fact, this is an immediate devise to the plaintiff, to take place on the death of the two preceding devisees. If so, we must either break in upon the terms of the will, or give them effect. In the latter case, there is an end of all argument about the word 'if.' There is nothing in the will to prove that the testator meant the plaintiff not to take a vested estate unless he survived 21. Indeed, the true sense of the thing is, that the devisor meant him to take it as an immediate devise in himself, but that it was to go over in the event of his dying under 21. It must be admitted, that according to repeated decisions, no precise words are necessary to constitute a condition precedent in wills. They must be construed according to the intention of the parties; and it would be absurd, considering the various circum-

stances under which wills are made, to require particular terms to express particular meanings. The apparent intention, as collected from the whole will, must always control particular expressions. Now the fairest construction that can be put upon this will, independent of authority, is, that the plaintiff took an immediate vested estate on the death of the preceding devisees, with a condition subsequent. With respect to the cases, that of *Edwards v. Hammond* is on all fours with the present. The circumstance of the devise over being to a stranger makes no difference; for it is clear that the testator meant no one to take his estate unless in the event of the plaintiff dying under 21. *Edwards v. Hammond* is neither opposed nor weakened by any case. No doubt the general meaning of the word 'if' implies a condition precedent, unless it be controlled by other words. But, in this case, there is a variance between the expression and the meaning, and the case of *Edwards v. Hammond* sanctions us in giving effect to the latter. On these grounds, we are of opinion that the estate vested in the plaintiff on the death of the preceding devisees; and the expression, 'all my estate,' is so general as to pass an estate in fee. Besides, it would be an absurdity on the face of the will, to construe it only an estate for life. * * * This case has been argued before us by counsel, and we are of opinion that, in the events that have happened, the plaintiff John Davenport Bromfield takes a vested estate in fee simple in the freehold and copyhold estates of the said John Davenport the testator, determinable upon the contingency of his dying under the age of 21 years."

In *Doe* d. *Hunt v. Moore*, 14 East (Eng.) 601, James Moore, the testator, gave "John Moore, son of my said cousin John Moore aforesaid, *when he attains the age of twenty-one years* (certain real estate), to hold to him his heirs and assigns forever; but in case he should die before he attains the age of 21 years, then I give and devise the last mentioned estate to his brother James Moore, when he attains the age of 21 years, to hold the same to him,

his heirs and assigns for ever. Also, I give and devise to the said James Moore, *when* he attains the age of 21 years (certain real estate), to hold to him his heirs and assigns for ever; but in case he should die before he attains the age of 21 years, then I give and devise the four last-mentioned estates to his brother Robert Moore, son of my said cousin John Moore, when he attains the age of 21 years, to hold to him his heirs and assigns for ever. Also I give and devise to the said Robert Moore, *when* he shall attain the age of 21 years (certain real estate), to hold the same to him his heirs and assigns forever; but in case he shall die before he shall attain the age of 21 years, then I give and devise the six last-mentioned estates, * * * to his brother Charles Edward Moore, * * * When he attains the age of 21 years, to hold to him, his heirs and assigns forever; but in case he shall die before he attains the age of 21 years, then I give and devise the said seven last-mentioned estates to all the daughters of my said cousin John Moore aforesaid, equally, share and share alike." Testator died, leaving Sarah Hunt and Samuel James Dawes, two of the lessors of the plaintiff, as his heirs at law. Upon the death of the testator, John Moore, the defendant, and Edward Moore, in the name and on behalf of the said John Moore, the son, James Moore, Robert Moore, and Charles Edward Moore, the devisees named in the will, entered into the possession of the seven last-mentioned estates, and are now in possession thereof. The devisees John, James, Robert and Charles Edward Moore, the sons of the testator's cousin, John, were all under the age of 21 years. Elizabeth, the only daughter of testator's cousin, had attained the age of 21 years. The question reserved was whether the lessors of the plaintiff, or any or either of them, as heirs at law of the testator, or otherwise, take any, and what estate or interest in the said seven devised estates, or in any of them. The opinion was by Lord Ellenborough, C. J. After stating the case, the opinion states: "On behalf of the plaintiff, it was contended that the devisees at-

taining the age of 21 years was a condition precedent to any estate vesting in them, and that in the meantime the same descended to the lessors of the plaintiff, who were the heirs at law of the testator. And the cases of a bequest of *personal* estate were relied on, where it has been held that a legacy given to one, if or *when* he shall attain 21, lapses in the event of the legatee dying under 21. (Citing cases.) And it was argued that there was no distinction between devises of *real* and bequests of *personal* estate in this respect. But that is not so; for the rules by which *legacies* are governed are borrowed all or the greater part from the civil law; whereas the decisions on the devises of *real* estate have established a different rule; and, according to them, a devise to A *when he attains* 21, to hold to him and his heirs, and if he die under 21, then over, does not make the devisee's attaining 21 a condition precedent to the vesting of the interest in him; but the dying under 21 is a condition subsequent, on which the estate is to be devested. (Citing cases, the last of which is *Bromfield v. Crowder, supra,* which latter case was affirmed in the House of Lords.) These we consider as authorities precisely in point, especially the last case (*Bromfield v. Crowder*), the pendency of which in the House of Lords was the occasion of our judgment in this case being deferred. To which may be added *Goodtitle v. Whitby*, 1 Burr. (Eng.) 228, (*supra*). These authorities were attempted to be distinguished, on the ground that they were cases of a *remainder*, and not of an *immediate devise,* as in the case here; but that forms no substantial ground of distinction; the estate vests *immediately*, whether any particular interest is carved out of it to take effect in possession in the meantime, or not. * * * We are therefore of opinion that in this case the plaintiffs, who are the heirs at law of the testator, did not take any estate or interest in the premises so devised."

In *Doe* d. *Roake v. Nowell*, 1 M. & S. (Eng.) 327, Sarah Trymmer devised her freehold estate "to my said nephew John Roake for his life, on consideration that out of the

rents thereof he do from time to time keep such estates in proper and tenantable repair, and on the decease of my said nephew John Roake, I devise all my said estates (subject to and chargeable with the payment of thirty pounds a year to Ann, the wife of the said John Roake for her life * * *) *to and among his children lawfully begotten, equally, at the age of 21, and their heirs, as tenants in common. But if only one child shall live to attain such age, to him or her, and his or her heirs, at his or her age of 21; and in case my said nephew John Roake shall die without lawful issue, or such lawful issue shall die before 21,* then I devise all the said estates (chargeable with said annuity) to and among my said nephews and nieces, Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, or such of them as shall be then living, and their heirs and assigns forever." The testatrix died, leaving John Roake, the devisee, surviving. Roake was then a widower, and had no issue. On testatrix' death, he entered upon the premises. He subsequently married and afterwards had the four lessors of the plaintiff, his only children. He subsequently "levied a fine *sur conuzance de droit,* etc., on the premises, with proclamations to the use of himself in fee, in pursuance of a covenant contained in an indenture made on the 5th of November in that year. Two of the lessors of the plaintiff were born before the execution of the indenture and levying the fine above mentioned. In Trinity term, 1797, J. Roake also suffered a recovery of the premises to the use of such persons as he should appoint, and on 21st May, 1802, by deeds of lease and release appointed the same to the defendant in fee. J. Roake was in possession of the premises, as devisee under the will at the date of the said indenture and fine, and died on the 13th of February, 1803, leaving the four lessors of the plaintiff him surviving, being then all infants under the age of 21 years. The two first lessors of the plaintiff have since attained their respective ages of 21 years, subsequently to which and before the date of the demises

in this ejectment an actual and formal entry was made by the plaintiff's lessors respectively upon the premises in question for the purpose of avoiding the operation of the fine and recovery. The question for the opinion of the court is what interest (if any) the lessors of the plaintiff, the children of John Roake, or any of them, take under Sarah Trymmer's will? and whether the fine or recovery has barred their title." In the opinion, Lord Ellenborough, C. J., says: "I think this case concluded by *Bromfield v. Crowder;* which was very fully considered. That was a devise in remainder of all the testator's estate to J. D. Bromfield, if the said J. D. B. should live to attain the age of 21, but in case J. D. B. died under 21, and C. Bromfield should survive him, then over; and it was resolved that J. D. Bromfield took a vested estate determinable upon the contingency of his dying under 21. After that decision came the case of *Doe v. Moore,* which was an immediate devise of the testator's real estate in fee to J. Moore, when he attained the age of 21, but in case he died before 21, then to his brother; and there it was held that J. Moore took a vested estate. So that it appears whether the devise be in remainder or an immediate devise, there is no substantial distinction. Here the words of the devise, after the decease of J. Roake, are to and among his children equally at the age of 21, but if only one child shall live to attain such age, to such child at the age of 21; and in case J. Roake shall die without issue, or such issue shall die before 21, then over. I see nothing in this devise to distinguish it from the above cases. The consequence is that the children must be considered as taking vested remainders." This case was appealed to the House of Lords, and is reported in 5 Dow (Eng.) 202, under the title of *Randoll v. Doe* d. *Roake.* This report of the case contains elaborate arguments by counsel on either side, in which *Bromfield v. Crowder, Doe* d. *Roake v. Nowell, Goodtitle* d. *Hayward v. Whitby, Doe* d. *Hunt v. Moore, supra,* and *Edwards v. Hammond,* commented upon in

Bromfield v. Crowder, *supra*, are all cited and discussed. The opinion by Lord Eldon states: "In either view of this case it is a case of hardship. If the fine should be destroyed, some of the parties' purchasers may be damnified; and if not, then the devisees will be deprived of the estates. But in the view of hardship, we have nothing to do with it; and after a careful consideration of the special verdict, and all that appears within the four corners of the instrument, the nature of the case, the authorities, and effect of the whole of the will, it is my humble opinion that this judgment ought to be affirmed."

Phipps v. Ackers, 9 Cl. & Fin. (Eng.) *583, is another House of Lords case, and is a leading case, very generally cited in subsequent decisions. In that case the syllabus reads: "A testator gave all his real and personal estates to trustees; and as to his lands at W., which he held in fee simple, he directed that the trustees should stand seised thereof, in trust to convey the same to G. H. A., 'when and as soon as he should attain his age of 21 years'; but in case he should die before he attained that age, without leaving issue of his body, then that the said lands at W., given and devised to him, should sink into the residue of the testator's real and personal estates; and he gave the residue to J. C. At the testator's death G. H. A. was only 12 years of age. *Held*, that an equitable estate in fee in the lands at W. vested in G. H. A. immediately on the testator's death, liable to be devested in the event of his dying under 21 without leaving issue of his body."

At the time of the testator's death, his beneficiary, G. H. Ackers, was about 12 years of age. He attained his age of 21 years in 1833. Two years prior thereto, Mrs. Phipps, the plaintiff, testator's heiress at law, filed a bill in chancery against the acting trustee and G. H. Ackers, and others, stating the will, and also that the rents received by the trustee amounted to a considerable sum. The bill prayed, among other things, that it might be declared that plaintiff was entitled to the rents and profits from

the death of the testator until such time as G. H. Ackers should attain 21 years of age. A demurrer to the bill for want of equity was allowed. The report contains elaborate argument by counsel on either side. (Citing substantially all of the cases above noted, with others.) Counsel for G. H. Ackers, in their argument, say: "If G. H. Ackers should die under 21 and without issue, the Wheelock estate was to pass to the residuary devisee, James Coops; but if G. H. Ackers attained 21, the trustees were to convey the estate to him; or if he died under 21, leaving issue, the issue were to take it; and yet it is contended that this was not a vested estate. It is sufficient to look at the will, without the aid of cases, to see that this was a vested estate, because it is manifest that the ancestor must take in order that the issue might take, unless the solecism is to be supported that an heir can take as heir without an ancestor." A very terse statement, indeed, of the question.

The opinion was delivered by Lord Ch. J. Tindal, in the course of which he says: "In order to answer your Lordships' question, it is not necessary for us to say what would be the legal effect of a simple devise to A. and his heirs when or if he shall attain 21, without any concomitant provisions calculated to show whether the testator did or did not mean to treat the attaining 21 as a condition precedent. In such a case Mr. Fearne may be right in the opinion found among his posthumous works, that until the devisee attains the prescribed age, he takes no interest whatever in the devised lands. But whatever might be the true meaning of such a devise if it should occur by itself, there is ample authority for saying that such words may, from the context, be taken not to indicate the time when the estate is to vest, but to point out an event on the happening of which an estate already vested is to be devested in favor of some other person. And the cases on this subject appear to be resolvable into two classes: First, those in which the courts have relied on the circumstance that the estate,

prior to the attainment of the age of 21, has been given to some third person, either for the benefit of the devisee himself, as in *Goodtitle v. Whitby,* or for the benefit of some other persons to endure during the minority, as in *Boraston's Case* and *Mansfield v. Dugard;* and, secondly, those cases in which the estates are given over in the event of the devisee dying under 21, as in *Edwards v. Hammond, Bromfield v. Crowder,* and *Doe d. Hunt v. Moore.* The first class of cases proceeds on the ground that the estate given to the devisee on his attaining 21, is in fact only a remainder, taking effect in its natural order, on the determination of the preceding estates; and that the attaining the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates. The second class of cases goes on the principle that the subsequent gift over in the event of the devisee dying under 21, sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being devested on a future contingency. Whether the doctrine on which this second class of cases has rested was originally altogether satisfactory, is a point which we need not discuss. It is sufficient to say that it clearly has been established and recognized as a settled rule of construction, not only in the courts below but also in your Lordships' House, and that rule appears to us clearly to govern the case put to us by your Lordships: in conformity with which rule, therefore, we beg leave to state, that on the question put to us, we are of opinion that G. H. A., on the decease of the testator, took an estate in fee simple in the lands and hereditaments at W., subject to be devested in the event of his dying under 21 and without issue."

On further consideration of the case, the Lord Chancel-

lor, on behalf of the House, stated: "The testator, by his will, devised his estate to trustees; and with respect to the Wheelock estate, the estate in question, he directed that the trustees should stand seised and possessed of it, in trust, to convey and assure it to George Holland Ackers, his godson, when and so soon as he should attain the age of 21 years, but that if he should die under the age of 21 years without leaving issue of his body lawfully begotten, in that case the estate should form part of his residuary estates, which he devised to another person. The question is, under this devise, what estate George Holland Ackers took in the Wheelock estate? * * * The object which your Lordships had in view was, that the learned judges should review the cases of *Doe* d. *Hunt v. Moore* and *Bromfield v. Crowder,* and other cases of that class. The judges, after consideration, unanimously pronounce this, as their opinion, that George Holland Ackers took a vested estate in fee in the Wheelock estate, liable to be devested in the event of his dying under 21 without leaving lawful issue. I am, for one, perfectly satisfied with that decision of the learned judges, and I have no doubt my noble and learned friends concur with me in that opinion; and the only question, therefore, that remains to be considered is this, whether a different construction should be put on this will, which conveys an equitable estate, from that which the learned judges have put upon the will as applied to a legal estate; or, in other words, whether the direction to convey makes any difference with respect to the disposition of the property? I am clearly of opinion that it does not; and I agree entirely in what fell from Sir William Grant, in the case of *Stanley v. Stanley,* that the right is not affected by the direction to convey, but that the conveyance must conform to the right, and that the will itself is an equitable conveyance, until that is displaced by the legal conveyance which is directed to be made. I am of opinion, therefore, that in this case George Holland Ackers took an equitable vested estate in fee in the Wheelock

estate, and that it was devested on his dying under the age of 21 years without leaving lawful issue. The consequence of this is that the judgment of the vice-chancellor must be affirmed."

Lord Brougham also wrote an opinion in the case, in the course of which he says: "We may then assume that if this devise had been to George Holland Ackers directly, the legal estate, the estate given, would have been vested and not contingent. The only question that remains is, whether the interposition of trustees, the trust being declared to assign, convey, and assure the premises (not to receive the rents and profits—that was *Stanley v. Stanley,* but only to convey) to George Holland Ackers, when and so soon as he shall attain 21 years makes any difference, and converts the vested into a contingent interest. It was contended, that because the immediate interest is vested in the trustees, and that they are only directed to convey and to assign to George Holland Ackers, when he is of age, the act done to entitle George Holland Ackers is postponed till that time, and his interest therefore only vests at that time. But there can be no doubt that the act which entitles him is the devise; from this he derives his interest, though an equitable interest; and the only difference between his case and that of a devisee without trustees interposed or directed to convey, is that the legal estate remains in the trustees during his minority, and that the equitable estate vesting in him during that minority would be devested upon his decease under age. The inclination certainly should always be to make the rules of courts of equity conform as much as possible to the principles recognized at law; and I can see no reason whatever for dealing upon different principles with the vesting of an equitable and of a legal interest, in respect to the present question. * * * Upon the whole, I can see no reason to doubt that the estate, in the present case, vested immediately in George Holland Ackers, determinable upon his dying under the age specified, the trustees taking an interest for his behoof, limited to his minority."

When this case was originally commenced, G. H. Ackers, James Ackers (formerly James Coops, the devise to whom was to pass to him when he attained the age of 24 years, provided he gave security to do certain things and should take the surname of Ackers), and Benjamin Williams, trustee (his co-trustee Hobson refusing to join), were made defendants. (*Phipps v. Williams,* 5 Sim. (Eng. Ch.) *44.) They separately demurred generally. In concluding his opinion, the vice-chancellor said: "The consequence, therefore, is that the demurrer of George Holland Ackers must be allowed and the demurrer of James Ackers must be overruled. And as to the demurrer of the trustees, it should never have been put upon the files of the court at all." Why not? Because the estate having vested upon the death of the testator in G. H. Ackers, and, the controversy between Phipps and G. H. Ackers and James (Coops) Ackers, involving simply the question of when and in whom the estate vested, it was a matter of no concern to the trustees. They were merely the depositories or holders of the naked legal title of the estate, the equitable and actual title to which was vested in their *cestui que trust,* the devisee named in the will.

In a much later case (*Browne v. Browne,* 3 Sm. & G. (Eng. Ch.) 568), the high court of chancery reviews a number of the authorities cited, and also considers *Festing v. Allen,* 12 Mees. & Wels. (Eng.) *279, cited in some of the cases as supporting the doctrine of a contingent remainder. The vice-chancellor in the opinion says: "The question in this case is, whether the devise in trust for all and every the child and children of Richard Staples Browne, who should live to attain the age of 21, is, upon the true construction of the whole will, a contingent remainder. A devise in these terms uncontrolled by anything in the context certainly creates a contingent remainder. But in this case the words of gift are preceded and followed by various limitations. It has long been established that words of gift in a will, which taken by themselves would make the gift contingent, may be con-

trolled and qualified by the terms of the next limitation or by other expressions in the will, so as to justify the construction that the devisee takes an immediate, although defeasible, estate." In considering *Festing v. Allen*, which was a decision by the court of exchequer, the learned chancellor says: "The view expressed by the court of exchequer of the cases of *Doe v. Moore*, and *Phipps v. Ackers*, is not supported by any just appeal to previous decisions, or illustrated by any force of argument on established principles of law. On the contrary, it affects to discredit repeated decisions of the House of Lords, which have for generations governed the right to property on principles heretofore, and, it is to be hoped, still, sufficiently established, and being established not to be shaken without public mischief. * * * It is a rule of law that an estate in remainder must take effect *eo instante* that the particular estate determines; and if the remainder be limited on a contingency which has not happened when the particular estate determines, it must fail. To modify the intolerable hardship of defeating the clear intentions of testators, it is an established rule of construction that in doubtful cases a remainder shall, if possible, be construed to be vested rather than contingent. For this purpose words of contingency are as much as possible to be treated as referring rather to the period when the remainder is to become vested absolutely and indefeasibly, than as preventing the remainderman from taking any present interest, and thereby altogether losing the estate. This rule is the foundation of that long series of decisions in which it has been variously applied, from *Boraston's Case* downwards. It is a rational and intelligible rule, repeatedly affirmed and applied by the House of Lords." The chancellor then considers *Bromfield v. Crowder* and *Doe v. Nowell, supra*, and says: "In each of these cases (and in others of the same kind) the full event upon which alone, in the words of gift, the estate was to arise, had not taken place; yet in favor of the intention manifested in the more general language of

the gift over, the remainder was treated by the House of Lords as vested before the full event on which the gift was made to depend. * * * In the present case the language of the gift over in default of issue, is upon principle and authority suffciently large to show the testator's intention, that the gift over should not take effect if there were any children (for in cases like this the word 'issue' is held to mean children) who might live to attain the age of 21. These words of qualification are sufficiently strong, unless the decision in *Festing v. Allen* be considered an authoritative decision. The court of exchequer, indeed, declared that they did not feel much doubt (if they felt any doubt at all) as to that case. They did not affect to reconcile their decision with the decision of the House of Lords in *Randoll v. Doe,* nor with the principle of that case and the case of *Bromfield v. Crowder;* nor does it seem to have occurred to them that there was anything startling in treating the gift over as one to take effect only on the occurrence of that very event which would have defeated it, or on the event of there being no children at all. The old maxim, *'Ex antecedentibus et consequentibus fit optima interpretatio,'* is a sound rule in the construction of instruments. To magnify words of contingency by a narrow and microscopic view, which excludes the fair operation of the context, is not consistent with established principles of construction, or likely to produce any other than an erroneous result. Where the court of exchequer resolved to review decisions of the House of Lords, and to restrain and discredit, or evade the application of a principle established by the highest authorities, a profound consideration of the question might have been expected, and the fruits of that consideration to justify so extraordinary a course might have appeared in some overwhelming force of reasoning and illustration, to show that words of contingency incorporated in a gift have a more uncontrollable force when applied to the description of a person than of an event. The reports of the two other cases, in which the decision

in *Festing v. Allen* has been followed, afford nothing to increase the inadequate weight of that case. It is satisfactory to find that there are at least two subsequent cases in which it has not been followed, and that the Vice-Chancellor Knight Bruce, in the case of *Riley v. Garnett*, preferred adhering to older authorities so often affirmed by the House of Lords. * * * Upon the whole, therefore, guided by an intelligibile principle, sanctioned by the highest authorities, and not shaken by any adequate weight of subsequent decision or argument, the true construction of this will seems to be that the plaintiff, as the only child of Richard Staples Browne, is devisee in fee of an estate in fee simple, determinable in case of his dying under the age of 21. The decree must be to that effect."

We will now consider a few of the cases from our sister states.

In *Hughes v. Hughes*, 12 B. Mon. (Ky.) 115, the will gave "to Charles S. Hughes, Mary E. Hughes, and Sarah F. Hughes, children of Richard F. Hughes, deceased, *when* they become of age, or marry, one tract of land, beginning," etc. The testator had four children and three grandchildren living, the three latter being the children of Richard F. Hughes named in the foregoing devise. On the part of the grandchildren, it was contended that, under the first clause, they acquired a vested interest in the land, with a right to take immediate enjoyment. The court cites and follows *Doe* d. *Hunt v. Moore*, *Doe* d. *Roake v. Nowell*, and *Bromfield v. Crowder*, *supra*.

In *Toner, Ex'r, v. Collins*, 67 Ia. 369, the syllabus reads: "The testator bequeathed to his executors, in trust for his children, certain real estate, with the following provision, among others: 'My said executors shall have the management and control of said property by me devised to them in trust for my said children, and they are to have the control and management thereof until they shall get married; and when any of my said children shall marry, with the consent of said executors, any worthy

person, then the part or portion of property herein devised, or the proceeds thereof, * * * shall be and become the property of said child so marrying, and my said executors shall make the necessary conveyance thereof, so as to vest the absolute title in said legatee.' *Held,* that the marrying of a child with the consent of the executors was not a condition precedent to the vesting in him or her of an interest in the estate, but only a condition for the termination of the trust as to one so marrying; and that the will, considered as a whole, vested in the children, upon the death of the testator, a present equitable interest in the estate. Consequently, where one of the daughters died at the age of 22, unmarried, and bequeathed to B. (her fiance) all her property, personal and real, and all her interest in her father's estate, either as heir or devisee under his will, *held*, that her death terminated the trust as to the property bequeathed to the executors for her use, and they were properly decreed by the court below to convey the legal title thereof to B."

In *Raney v. Heath*, 2 Pat. & H. (Va.) 206, the third paragraph of the syllabus reads: "A will contained the following clause: 'I give and bequeath my estate, except what I shall hereinafter name, both real and personal, to my brother Benjamin B. Heath's children; providing either of them shall live to the age of 21. If neither of them live to be 21, it is my desire that my sister Lilly Raney and my sister Barbara B. Lee's children have it equally between them.' *Held,* that the legacy to the children of Benjamin B. Heath vested at the death of the testator, subject to be divested on the death of all of them under the age of 21, *and that the same rule applied to both the real and personal estate.*" In the opinion, the court say: "That the terms of the bequest to the children of B. B. Heath, standing alone and unaccompanied with the limitation over, would have imported a contingent legacy as to the personalty, and a contingent devise as to the realty, is a proposition about which there is no room for doubt or difference of opinion.

And it is equally clear and well settled upon authority, that the limitation over made it, as to the land, a vested devise; the limitation over in the event of the death of all under age being considered explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, namely, that at the specified age it should become absolute and indefeasible. The effect of the construction is to convert the first words, which seem to import a condition precedent and thereby to render the devise contingent, into a condition subsequent, whereby the vested estate of the devisee would be divested or defeated upon failure to attain the age prescribed. This rule of construction as to devises is now settled and established beyond the reach of cavil, by an unbroken series of concurrent decisions, beginning with *Edwards v. Hammond,* * * * followed by *Bromfield v. Crowder,* * * * *Doe* d. *Hunt v. Moore,* * * * and *Phipps v. Ackers,*" *supra.*

The opinion upon this point concludes: "Upon the rule, then, which obtains in devises, and which I think ought to prevail in a case like this, in which both land and personalty are blended, because the rule is not only clearly settled and undisputed, but is in itself reasonable and ought to be held equally applicable to personalty as to land, I am of opinion that the bequest under consideration was vested and not contingent, and that there is no error in the decree of the court below in so declaring."

In *Roome, Adm'x, v. Phillips,* 24 N. Y. 463, the syllabus reads: "Devise of an estate for life to the testator's father, remainder to the heir-at-law and only child of the testator, 'after the decease of my father, and when he the said child shall become 21 years of age, and become married, and has children, and in case of his the said child's decease before that period and after my father's decease, then the said real estate' was given over to other persons. *Held,* that the child took a vested remainder, subject to be divested only on his dying under

the age of 21." In the opinion the court say: "It seems to me it was the clear intention of the testator that his son Elisha, on the demise of John Burrows, the testator's father, should take the estate in fee, upon his arriving at the age of 21 years. He was also to take it, upon such demise, upon his marriage and having children. It vested in him in fee, on the death of the life tenant; and he was entitled to the possession on the happening of either of those events, subject to his being wholly divested on his dying before attaining the age of 21 years, and on the happening of which latter event, the devise over took effect; and it only took effect on his dying before the age of 21." The court then cite with approval *Goodtitle v. Whitby, Bromfield v. Crowder,* and *Doe* d. *Hunt v. Moore, supra.*

In *Kerlin's Lessee v. Bull,* 1 Dall. (Pa.) 175, the syllabus reads: "A testator devised as follows: 'I give and bequeath unto my son A, *when* he arrives at the age of 21 years (a certain tract of land), to hold to him, his heirs and assigns forever.' Afterwards, he bequeathed to his wife the use and profits of all his lands, for the maintenance and education of his children, until his sons should attain the age of 21, etc. A died after the testator, under age, intestate, and without issue, leaving a mother, brothers and sisters. *Held,* that this was a *vested* devise in A and that the estate was to be divided equally among his brothers and sisters." In the opinion the court say: "The *absolute property* is given to *John,* when he should arrive at age, and the use and profits in the meantime to his mother, for the maintenance and education of all the children. This last devise is a *particular* interest, and no more than a chattel interest. The son *John* was the principal object of the testator's bounty, and if he had married, and died before 21 years of age, leaving *children,* he certainly meant not that this estate should go from *them.* This, therefore, was an *immediate gift* to *John,* though he was not to have the *possession* until he came of age. All the cases support this judg-

ment." In like manner, we think that, in the case at bar, Cedric was the principal object of the testator's bounty. That the testator did not intend, in the event of Cedric's marriage before reaching the age of 25, that the property should go from his children, is evidenced by the fact that he expressly provides that it shall go to them in such an event. It follows, therefore, that the devise in question was an immediate gift to Cedric, though he was not to have the possession until he arrived at the age of 25 years, and that the interest of the executors was no more than a chattel interest.

The *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315, is a well-reasoned case on this question. The opinion is by Sheldon, J., one of the ablest judges who ever graced that eminent court. The eighth paragraph of the syllabus reads: "Where lands are devised to a trustee to be held by him in trust until A shall attain his majority, when the same shall be conveyed to him in fee, this will confer on A a vested estate in fee simple, subject to the prior chattel interest given to the trustee, and, consequently, on the death of A under age, the property will descend to his heir at law. But a devise to A when he shall attain the age of 21 years, standing isolated and detached from the context, will confer a contingent interest only." The ninth paragraph reads: "Where a devise over is made dependent upon the first devisee dying before he becomes of age, or without issue, or any similar event, the devise is equivalent to a provision that the first donee shall take an immediate vested interest liable to be defeated by the happening of the contingency named; and if it does not happen, the estate then becomes absolute and indefeasible." I will not quote further from this well-reasoned opinion. The opinion speaks for itself. It is cited with approval in *Hall v. Waterman*, 220 Ill. 569, 4 L. R. A. n. s. 776.

To the same effect is *Withers' Adm'r v. Sims*, 80 Va. 651.

Voesel v. Rieger, 75 Neb. 180, is also in point. The

syllabus reads: "Where a testator devised lands to his daughter in fee, but with a limitation over by way of executory devise in favor of her brothers and sisters, contingent upon her dying within a definite term of years without surviving issue, and the daughter died within the specified term leaving such issue, the latter succeeded to the estate of its mother in fee simple." The opinion is short and sustains the principle announced in the foregoing cases.

In concluding our citation of cases, we call attention to *Archer v. Jacobs,* 101 N. W. 195 (125 Ia. 467). We will not extend this opinion by quotations from that case other than a few of the paragraphs of the syllabus:

1. "A remainder limited to a certain person on the termination of a life estate vests at the same instant and by the same grant as the life estate, and, although the remainderman cannot enter upon the possession, use, or enjoyment of the property until the termination of the life estate, yet the fee, less the life estate, is in him, and will descend to his heirs if he dies before coming into possssion, or, as an estate of inheritance, may be aliened by him, or subjected to the claims of his creditors."

3. "Courts will hold a remainder to be vested if it can be done without manifest violation of the intention of the donor."

4. "The uncertainty whether a remainderman will outlive the life tenancy and come into actual possession does not make the remainder contingent."

7. "A clause in a will devising property to testator's grandchildren upon the death of their mother does not indicate an intention to postpone the vesting of the remainder to the date of the mother's death, instead of from the date of testator's death, but merely refers to the time when the remainderman shall come into the enjoyment of the estate."

In the light of the foregoing authorities, it may be said that this rule of law and of construction that we are invoking is well settled. Does the rule apply to the case

at bar? In applying the rule that "we are to sit in the seat of the testator and construe his will," we must give effect to every expression contained therein, if by any reasonable construction we can give it meaning and legal effect. Sitting in that seat we find the testator considering the uncertainties of life and the certainty of his ultimate demise. He is also considering his worldly estate and the natural objects of his bounty. His youngest child, Cedric, is only a lad of about seven years. Two other children are minors. How will he provide for them so as to secure to them a support while they are growing to manhood and womanhood? They should not only be provided with the necessaries of life, but they should receive an education as well. While gaining an education they should be free from the cares of business and the management of property. And so he directs that the properties set out in the second item of his will be placed in the hands of executors, to be held by them in trust until such time as his children may reasonably be expected to have completed their education, at the age of 25 years, respectively, when his executors shall convey to each his or her respective devise; and, pending the arrival of those respective periods of time, he, by the third item of his will, directs that "out of the net income of the real estate mentioned in the next preceding item (item 2) my executors pay the following money bequests, viz., to my beloved wife, Ida Cremer, the sum of fifty dollars per month, monthly, from the time of my death until our youngest child Cedric E. Cremer shall reach the age of 25 years; to each of my three younger children, Leonidas R. Cremer, Mina Cremer, and Cedric E. Cremer, for their education and support, the sum of thirty-three and one-third dollars per month, monthly, from the time of my death until they severally arrive at the age of 25 years. If either of my said sons shall die before reaching the age of 25 years, leaving a widow and children, or either, the payments in this item provided for such son shall, after his death, be made to them, or such of them as shall sur-

vive; but if he leave no wife or child such payment shall cease;" and a like proviso as to his daughter Mina, followed by a provision for two other children by a former wife. Still sitting in the seat of the testator, with an impartial desire to ascertain his will from the words he is using, the conclusion is irresistible that the children are the special objects of his bounty, and that he does not mean to deprive them of it, *in any event.* He not only is trying to secure it to them, at a time when they will be able to care for it, but gives it to their wives, or husband, and children, in the event of their marriage and demise prior to such time.

The further conclusion is equally irresistible that he had no thought or intention of vesting in his executors anything more than such an interest—"chattel interest," the supreme court of Illinois and other eminent courts have termed it—as would enable them to protect and manage the estate until the children named should respectively attain the age when, in his judgment, they would be out of school and be sufficiently mature to manage it themselves. As said in *Phipps v. Ackers, supra,* their right "is not affected by the direction to convey, but that the conveyance must conform to the (their) right, and that the will itself is an equitable conveyance, until that is displaced by the legal conveyance which is directed to be made." That he intended the property involved in this suit to vest immediately upon his death, in Cedric, subject to the temporary provision for his mother until Cedric reached the age of 25 years, and thereafter in Cedric alone, is beyond the possibility of a doubt. The language employed to express his intention is not susceptible of any other reasonable construction. We therefore hold that, upon the death of Harrison W. Cremer, the full equitable title to the property in controversy vested, *eo instante,* in Cedric E. Cremer, charged with its proportion of the allowance of $50 per month to his mother, Ida Cremer, until he reached the age of 25 years, subject to a defeasance as provided in the will in the event of his

death before attaining that age; and that pending the qualification of the executors named in the will, or the appointment and qualification of administrators *c. t. a.* in the event of the refusal or failure of such executors to qualify, the legal title likewise vested in him, subject to be nominally and temporarily divested by a subsequent qualification of such executors, or the appointment and qualification of such administrators; and that in case of a failure of the executors to qualify, and a failure of the appointment and qualification of administrators *c. t. a.* prior to his reaching the age of 25 years, his title and right of possession of said property would, upon his attaining such age, become absolute in fee simple.

As we have seen, the summons in the foreclosure suit was served upon Cedric and his mother Ida; upon Housel and Millard, named in the will as executors; upon Leonidas R. Cremer and Mina Cremer, the brother and sister of the full blood, who under the will would take the devise over in the event of Cedric's death before reaching the age of 25 years; upon all of the other heirs at law of the testator, and upon the special administrator. This included every person *in esse* who was in any manner interested in either the property or the title. As has been shown, the executors had not then qualified. They could not qualify until the will was admitted to probate. This could not be done until the contest proceedings then being prosecuted were terminated. If the will should be set aside, the title would be in the heirs at law; if sustained, it would be in the devisees until the executors qualified. If not, then it certainly was in the special administrator, subject to the payment of the debts of the deceased. But it is urged that the title was not in either; that it was in abeyance; and that the mortgagee was bound to delay its foreclosure suit until the termination of the contest of the will and the qualification of the executors; that this would not deprive the mortgagee of its remedy, but would simply postpone the enforcement of it. But why should the mortgagee be put to such delay?

It may be said that lawful interest is always a sufficient compensation for delay in the payment of money. While this is true as a general rule, like all general rules it has its exceptions, and this seems to be such a case. The will contest might be prolonged for years, as such contests usually are. During that time the property, which it appears was then not of sufficient value to attract purchasers to the foreclosure sale, might depreciate in value, and the mortgagee be deprived of a large portion of its security. There are at least two reasons why we do not think the mortgagee was required to wait: First, it is contrary to the views of this court that titles to land may rest in abeyance. *Yoesel v. Rieger,* 75 Neb. 180; *Clark v. Fleischmann,* 81 Neb. 445. While this rule was not fully considered in those two cases, it is a rule that has been frequently announced, and one which we believe to be sound. Second, under our constitution every person is entitled to have justice administered without delay; and a mortgagor should not be permitted, in person or by his will, to raise a controversy over the mortgaged property which will delay enforcement of the mortgage in the event of default in payment thereof. The volume of business transacted in this country upon borrowed capital is enormous, and to hold this point as contended for by plaintiffs might prove to be a very serious matter.

After carefully considering the case in all its aspects, we hold that the district court, in the foreclosure suits, acquired jurisdiction over the property and the title, and of all persons interested therein.

The judgment of the district court is, therefore,

AFFIRMED.

HOOSIER MANUFACTURING COMPANY, APPELLANT, V. CHARLES W. SWENSON ET AL., APPELLEES.

FILED JUNE 10, 1910. No. 16,051.

1. **Sales:** COUNTERCLAIMS. The first and second counterclaims filed by defendants and set out in the opinion examined, and *held* that the general demurrers thereto were properly overruled.
2. **Instructions,** referred to in the opinion, examined, and *held* properly given.
3. **Evidence** examined, and *held* to so clearly sustain the verdict of the jury as to render a discussion thereof unnecessary.
4. **Courts:** FORMER DECISIONS. Where the questions of law involved in a case appealed to this court have been definitely settled by our former adjudications, further review of such authorities is not required.

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

Crane & Boucher, for appellant.

Baldrige, De Bord & Fradenburg, contra.

FAWCETT, J.

Plaintiff, an Indiana corporation, brought this action in the district court for Douglas county to recover a balance of $592.35 for a lot of coats and overalls of its manufacture which it had sold to defendants, who are wholesale dealers in such goods. Defendants admit the purchase and receipt of the goods set out in plaintiff's petition, but deny that they were of the value alleged; admit making the payments set out in plaintiff's petition, but deny that there is anything due plaintiff; and plead two counterclaims.

In their first counterclaim they allege, substantially, that the goods were purchased from samples then exhibited by plaintiff, and in reliance upon plaintiff's assurance and warranty that the goods when shipped should

be of certain specified color, weight and material and of good workmanship, and all equal to the samples then shown them by plaintiff; that thereafter plaintiff shipped to them coats and overalls on or about the dates alleged; that the goods so furnished and delivered were of inferior quality, weight, material, color, and workmanship to the samples by which the same were sold to them; that they were not properly cut, nor like the samples; that said garments were too short, the material was of less weight than the samples, and less than that agreed to be furnished; that said garments so furnished were worth at least $1 per dozen garments less than those which the plaintiff had agreed to furnish; that by reason of such breach they have been damaged in the sum of $300. Attached to and made a part of their answer and counterclaim is a full statement of the goods so furnished by plaintiff, together with the number of each kind of garment, the factory number of such garment, the price which defendants agreed to pay therefor providing they were up to sample and contract, and the fair market value of the garments delivered, together with the difference in the values of said respective items.

In their second counterclaim they allege that on or about January 29, 1906, plaintiff accepted from them an order for 90 dozen duck coats of plaintiff's make and brand; that they ordered said coats for the purpose of reselling same, in the course of their mercantile business, at a profit; that plaintiff, knowing that they were ordering the said goods for such purpose, agreed to furnish the same at the purchase price for the respective garments as shown in an exhibit attached to and made a part of said counterclaim; that thereafter they made resales of such goods to customers at a profit, and gave directions and orders to plaintiff to furnish the same; that plaintiff wholly failed and refused to furnish said goods so ordered, and that defendants lost, in expenses of making such resales and profits upon the goods so resold by them, large sums of money, aggregating $342.25; that said goods so

purchased from plaintiff were for plaintiff's make and brands and could not be filled with any other goods, and that defendants were thereby prevented from consummating arrangements for such resales. Defendants attached to and made a part of said counterclaim an itemized statement giving the numbers of the goods so sold and agreed to be furnished, together with the respective numbers of each, the prices at which plaintiff agreed to sell the same to defendants, the prices at which defendants had made resales, and the respective amounts of profits upon each item so resold which they claim to have lost by reason of the failure of plaintiff to furnish said goods as ordered.

A third counterclaim was filed, but, as the court directed a verdict in favor of plaintiff upon that claim, and defendants have not appealed therefrom, it need not be considered. A general demurrer was filed by plaintiff to the answer, and to each of the counterclaims, all of which were overruled.

For answer to defendants' first counterclaim, after denying all allegations except such as were specifically admitted, plaintiff alleged that defendants gave plaintiff an order for all the goods first described in said first counterclaim, together with an order for five-twelfths dozen of each of the garments described, and immediately after the giving of such order, and during the month of February, 1906, plaintiff delivered to defendants said five-twelfths dozen of each of said garments, which defendants received and accepted without complaint and paid for; that thereafter, and at the times and in the quantities stated in plaintiff's petition and in said first counterclaim, all the goods described therein were delivered to defendants, and defendants accepted said goods without complaint, placed them upon sale and sold them and paid a large portion of the purchase price of the same; wherefore defendants are estopped to claim that said goods described in said first counterclaim were not in accordance with the terms upon which they were purchased. For answer to the second counterclaim, after the same

general denials as above set out, plaintiff alleged that on the said 29th of January, 1906, it received an order from defendants for goods to be shipped; that said order included the goods described in plaintiff's petition, together with the goods attempted to be described in defendants' second counterclaim; that in accordance with the terms of said order plaintiff immediately following the date of the same, and during the month of February, 1906, shipped to defendants five-twelfths dozen of each of the garments described in said order, which garments were accepted, retained and paid for by defendants; that immediately upon receiving said garments "defendants made unwarranted and unjust claims to this plaintiff that a portion of the goods so ordered and received by them, to wit, coats, and described in said order as 550, 520, 530, 486, 480, 484, 516, and 518, which goods were to be shipped in August following, were too small; that the sleeves of the coats were too short, and that said coats were not as large as the sizes marked on same, which complaints were wholly unwarranted and unfounded"; that in said order it was ordered that the goods described in plaintiff's petition should be shipped as soon as possible, and that the goods described in said counterclaim and set-off should be shipped during the month of August, 1906; that thereupon plaintiff did ship the goods described in plaintiff's petition at the times required by said order, and at the dates and in the quantities set forth in the petition, the purchase price being the sum of $3,566.37, to be paid by said defendants; that defendants received and accepted said goods, and paid therefor the sum of $2,251, and failed and refused to pay the balance of the purchase price, amounting to the sum of $1,315.37, "and made unfounded and unwarranted claims that plaintiff was liable to them in damages because certain goods were not shipped to them, and because certain goods received and accepted by them were deficient in quality, and contended to this plaintiff that they were not liable for and would not pay said sum, whereby and by reason of which un-

founded and unwarranted complaints and refusal to pay for the goods theretofore received, this plaintiff was relieved of any and all obligations to ship to the defendants any of the goods described in said counterclaim and set-off, and thereby became relieved of and from all liability because of said order, and this plaintiff was justified in refusing to ship said goods"; that on November 2, 1906, defendants canceled said order for goods, and directed plaintiff not to ship the same, in which cancelation plaintiff acquiesced, and thereby said order for goods became of no effect, and both plaintiff and defendants were thereby mutually relieved from any liability for and on account of said order; that the order for the goods above set forth contained the further provision: "If the production of the factory be curtailed by strikes or lock-outs to counteract strikes, or by other unavoidable occurrences, the delivery on this contract shall be proportioned to the whole production"; that during the months of May, June, July, August, September, and October, 1906, there were strikes and other labor troubles at the factory of plaintiff, which, together with unusual and continuous hot weather during the summer of 1906, so curtailed the production of said factory that it became and was impossible to manufacture and ship said goods prior to the time defendants canceled said order. Defendants, for reply to plaintiff's answer to its counterclaims, deny that they made any unfounded or unwarranted claims; that plaintiff had any right to any greater or further payments than defendants had made; that plaintiff was in any manner relieved or excused from shipping all goods ordered; that they ever acquiesced in the cancelation of said orders; and allege that plaintiff failed, neglected and refused to ship said goods, and in November, 1906, when it was too late for defendants to fill orders for the same, "which said date was long after the time when plaintiff had agreed to ship and deliver said goods to these defendants," defendants then stated to plaintiff that they would hold plaintiff responsible for all damage resulting to defendants because

of plaintiff's failure to ship and deliver said goods; deny that it was because of any labor difficulties or trouble at its factory that plaintiff failed, refused and neglected to ship the said goods, and allege that at the time of plaintiff's failure and refusal to ship the goods plaintiff assigned as its only reason for such refusal and failure to ship that the defendants had not paid the plaintiff what plaintiff then claimed to be due; that "plaintiff further stated that until said defendants withdrew all claim that the goods shipped by the plaintiff were not up to the sample and contract, that the plaintiff would not ship any further goods to the defendants;" allege that plaintiff's refusal and failure to ship the goods was without any foundation or warrant; and that, having based such refusal upon the sole ground of defendants' refusal to pay the amount they claimed to be due, plaintiff "is now estopped from pleading or proving or asserting that it failed, neglected or refused to furnish said additional goods for any other or different reasons;" allege that when the garments which plaintiff alleges it shipped to defendants were received by defendants they promptly and vigorously and in several communications to plaintiff complained and objected that the goods so delivered were not up to those ordered by defendants and were not up to or equal in weight, workmanship, color, and size of the samples by which said goods were sold by plaintiff to defendants, and deny generally all allegations in plaintiff's petition, not specifically admitted.

The trial upon the issues thus joined resulted in a verdict in favor of the defendants for the sum of $24.20. From a judgment upon the verdict, plaintiff appeals.

The errors assigned and argued by plaintiff are: That the court erred in overruling plaintiff's demurrers; in giving the third instruction relating to defendants' second counterclaim; in giving instructions 4 and 5, in reference to defendants' second counterclaim; that the verdict is not sustained by the evidence upon either of said counterclaims; that the court erred in admitting in evidence the

testimony of the defendants as to statements made by one O. F. Evans; in allowing defendants to testify that, as shown by original orders in their possession, the goods described in the second counterclaim were resold by them and their traveling salesmen, and that the amount of such orders exceeded the purchase price to be paid to the plaintiff; in overruling plaintiff's motion to instruct the jury to return a verdict in its favor; in overruling plaintiff's motion for a new trial, and in rendering judgment for defendants.

With regard to the assignment that the court erred in permitting the defendants to testify to statements made by O. F. Evans, it may be said that it appears that O. F. Evans is secretary of plaintiff, and that the statements were made while he was in defendants' place of business for the purpose, as claimed by defendants, of trying to adjust the controversy which had arisen between plaintiff and defendants. In this state of the record we do not think the court erred in admitting the testimony objected to.

Nor do we think the court erred in overruling plaintiff's demurrers. Each of the counterclaims was sustained by sufficient allegations.

We do not deem it necessary to set out the instructions here. A careful examination of the three challenged in plaintiff's brief shows that they are in proper form, and correctly state the law applicable to the pleadings and to the evidence which had been introduced upon the trial.

Nor do we think any good purpose would be served by attempting to set out or to give a resume of the evidence. In our judgment it was ample to sustain the verdict returned by the jury.

The questions of law involved are settled in this state. *Punteney-Mitchell Mfg. Co. v. Northwall Co.*, 70 Neb. 688; *Burr v. Redhead, Norton, Lathrop Co.*, 52 Neb. 617; *Wittenberg v. Mollyneaux*, 60 Neb. 583; *McConnell v. Lewis*, 58 Neb. 188, and *Schrandt v. Young*, 2 Neb. (Unof.) 546.

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

AFFIRMED.

STATE OF NEBRASKA V. JAMES HAND ET AL.

FILED JUNE 10, 1910. No. 16,071.

Marriage: VALIDITY. A marriage which is prohibited by statute because contrary to the policy of our laws is yet valid if celebrated elsewhere according to the laws of the place where celebrated, even if the parties are citizens and residents of this state, and have gone abroad for the purpose of evading our laws, there being no legislative enactment that such a marriage out of the state shall have no validity here.

ERROR to the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Exceptions overruled.*

D. W. Livingston, for plaintiff in error.

John C. Watson, contra.

FAWCETT, J.

The defendants were informed against by the county attorney of Otoe county for the crime of fornication. There was a trial to the court without a jury upon a stipulation of facts. The court found the defendants not guilty, and ordered that they be discharged. Thereupon the county attorney, by leave of court, under the provisions of section 483 of the criminal code, filed his petition in error in this court, alleging that the finding and judgment of the court below "in acquitting and discharging the said defendants was contrary to law." From the stipulation of facts it appears that the defendants are within the class prohibited by the laws of this state from entering into the marriage relation; that on November 23, 1892, while both defendants were residents of this state, they went into the state of Iowa to celebrate their marriage for the express

purpose of evading the laws of the state of Nebraska. This is the question for our consideration. After their marriage they returned to Omaha, and there lived together as husband and wife for a period of three years. They then removed successively to the states of Utah, Idaho, and Oregon, in all of which states they lived and cohabited together and were known among their friends and acquaintances as husband and wife. Thereafter they returned to Nebraska, where they also lived in that relation until the time of their arrest. It is conceded that by the laws of Iowa the marriage of defendants when consummated there was lawful in that state. Did the court err in finding them not guilty of the charge preferred against them and in ordering their discharge? We think not. In *Medway v. Needham*, 16 Mass. *157, the man, a mulatto, and the woman, a white woman, were inhabitants and residents of Massachusetts. Desiring to be married, and the law of Massachusetts prohibiting such marriage, they went into the neighboring province of Rhode Island and were there married according to the laws of that province, such a marriage not being then prohibited by the laws thereof. In the syllabus the court say: "A marriage, which is good by the laws of the country where it is entered into, is valid in any other country; and although it should appear that the parties went into another state to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign state will nevertheless be valid in the country where the parties live." In the opinion the court say: "The law now in force in this state not only prohibits the marriage of negroes and mulattoes with white persons, but expressly declares such marriages to be void. But they are only void if contracted within this state, in violation of its laws. If the marriage takes place in a state whose laws allow it, the marriage is certainly good there; and it would produce greater inconveniences than those attempted to be guarded against, if a contract of this solemn nature, valid in a neighboring state, could be dissolved at the will

of either of the parties, by stepping over the line of a state, which might prohibit such marriages." In *Van Voorhis v. Brintnall,* 86 N. Y. 18, in the syllabus, the court say: "The validity of a marriage contract is to be determined by the law of the state where it was entered into; if valid there it is to be recognized as such in the courts of this state, unless contrary to the prohibitions of natural law, or the express prohibitions of a statute. While every state can regulate the *status* of its own citizens, in the absence of express words, a legislative intent to contravene the *jus gentium* under which the question of the validity of a marriage contract is referred to the *lex loci contractus* cannot be inferred; the intent must find clear and unmistakable expression." The court cite *Medway v. Needham, supra,* and also quote from *Putnam v. Putnam,* 8 Pick. (Mass.) 433, the following: "If it shall be found inconvenient, or repugnant to sound principle, it may be expected that the legislature will explictly enact that marriages contracted within another state, which if entered into here would be void, shall have no force within this commonwealth." Acting on that idea, Massachusetts subsequently enacted a law as follows: "When persons resident in this state, in order to evade the preceding provisions and with an intention of returning to reside in this state, go into another state or country and there have their marriage solemnized, and afterward return and reside here, the marriage shall be deemed void in this state." (Gen. St. 1860, ch. 106, sec. 6.) After the passage of that law, the supreme court of Massachusetts in *Commonwealth v. Lane,* 113 Mass. 458, in an opinion by Mr. Chief Justice Gray, on page 464, say: "A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the laws of the place, even if the parties are citizens and resident of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the state shall have no validity here. This has been repeatedly

affirmed by well-considered decisions." And this seems to be the overwhelming weight of the better reasoned cases on the subject. 1 Bishop, Marriage, Divorce and Separation, sec. 880; *Courtright v. Courtright,* 11 Ohio Dec. (reprint) 413; *State v. Shattuck,* 69 Vt. 403; *Norman v. Norman,* 121 Cal. 620, 54 Pac. 143, quoting from *Commonwealth v. Lane, supra; Sturgis v. Sturgis,* 51 Or. 10, 93 Pac. 696.

To hold otherwise would be to render void numberless marriages and to make illegitimate thousands of children the country over. In 1 Bishop, Marriage, Divorce and Separation, sec. 882, this thought seems to have been in the mind of the author. He says: "It was formerly common for English parties, wishing to intermarry without a compliance with their own marriage acts, to go into Scotland and there interchange the matrimonial consent simply in the presence of witnesses. Gretna Green was the most convenient point for the required hasty visit; and thus Gretna Green marriages became famous, and there was no question of their validity. But parliament, in 1856, by 19 and 20 Victoria, ch. 96, sec. 1, put an end to this by declaring that thereafter 'no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony shall be valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for 21 days next preceding such marriage.'" We do not question the power of a state to pass a law similar to that passed by Massachusetts, as hereinbefore set out, but our legislature has not seen fit to do so. On the contrary, section 5316 Ann. St. 1907, provides: "All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state." See *Gibson v. Gibson,* 24 Neb. 394; *Bailey v. State,* 36 Neb. 808; *Hills v. State,* 61 Neb. 589.

While the decisions upon this point are not uniform and authorities can be found opposed to those above cited,

the reasoning of such authorities does not appeal to us as being sound in law or for the good of society. The district court did not err in its construction of the law, and the exceptions of the state are, therefore,

OVERRULED.

WALTER QUIMBY, APPELLEE, V. BEE BUILDING COMPANY, APPELLANT.

FILED JUNE 10, 1910. No. 16,078.

1. **Carriers**: PASSENGER ELEVATORS: LIABILITY. One who installs passenger elevators in his building for the use of his tenants and the public generally is subject to the same degree of care in transporting and protecting his passengers as is imposed upon common carriers.
2. ———: LIABILITY. Common carriers of passengers should be held to the strictest accountability and be required to exercise the highest degree of care and forethought of which the human mind is capable. This rule is founded on principles of public policy and enforced by the courts for the protection of the public.
3. Instructions given by the trial court and set out in the opinion sustained.
4. Instructions requested by the defendant and refused by the court and set out in the opinion *held* properly refused.
5. Evidence examined and set out in the opinion *held* sufficient to sustain the verdict of the jury.

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

Greene, Breckenridge & Matters, for appellant.

Weaver & Giller, contra.

FAWCETT, J.

Plaintiff, a boy twelve years of age, who, during the summer vacation of school, was acting as a messenger boy for the Postal Telegraph Company, was injured in

one of the passenger elevators of defendant. From a judgment in his favor for such injury, defendant appeals.

The evidence shows that the floor of defendant's building, at each landing, projects some two or more inches into the elevator shaft and inside of the wire network surrounding the shaft. The space between the floor of the elevator at the opening thereof and the floor of the building is just enough to permit the elevator to pass; so that, if a person standing at the door of the elevator should permit his foot to extend even a very little over the edge of the elevator floor, it would be caught by the lower part of the floor landing above as he ascended. At the time of the injury complained of, plaintiff entered the elevator for the purpose of being carried to a floor above, where he desired to deliver a message. The evidence is somewhat conflicting as to whether he entered the elevator at the first or second floor, but we regard that as immaterial. When the elevator reached the third floor, plaintiff's foot was caught between the elevator floor and the projection above noted, and he received the injury complained of. Plaintiff testified that, when he entered the elevator, he "just turned around and leaned against the side of the elevator—was going to get out right away as soon as I got to the floor I wanted off on"; that he stood near the door all the time. It is evident that while standing there his foot was partially extended beyond the edge of the elevator floor. The elevator conductor testified that plaintiff "stepped clear in the car, something unusual, then stepped back. There being rubber on the floor I did not hear him." This plaintiff denied. The elevator conductor also testified that the boy had been going up and down the elevator for about a month; that he had several times cautioned him to stand back from the door, and on one occasion had pushed him back. He admits that he did not give plaintiff any such direction or caution at the time of the injury. On cross-examination he testified that he had been running an elevator for eight years; that it is dangerous for people to stand up near the door, as

elevators pass up and down, and especially as they go up, and that it was his duty to caution people to step back whenever he saw them "up in front." Plaintiff insists that the construction of the building and elevator as above outlined was negligent, and that defendant's agent in charge of the elevator was negligent in permitting the plaintiff, who was only a boy, to stand in what he, the conductor, knew was a place of danger.

The fourth instruction given by the court on its own motion is as follows: "You are instructed it was the duty of the defendant, the Bee Building Company, to use the greatest amount of human care and skill consistent with the operation of said elevators to prevent injuries to its passengers while they were being transported from one part of the building to the other. It is also the duty of the defendant to use greater care and caution in transporting passengers of tender age than when carrying adults or passengers of mature years, but in this case there is no presumption of negligence from the mere fact that said Walter Quimby was a passenger and received an injury while being carried by the elevator." Defendant seriously objects to all but the last clause of this instruction, on the ground that it imposed too great a burden upon defendant; that it in fact imposed upon defendant an obligation which was impossible of performance. In this contention we are unable to concur. One who installs passenger elevators in his building for the use of his tenants and the public generally is subject to the same degree of care in transporting and protecting his passengers as is imposed upon common carriers.

In *Marker v. Mitchell,* 54 Fed. 637, the syllabus reads: "A landlord who runs an elevator for the use of his tenants and their visitors thereby becomes a common carrier, and is charged with the highest degree of care which human foresight can suggest, both as to the machinery and the conduct of his servants; and an instruction that he owes to persons thus put completely under his control 'the highest degree of care consistent with the possibility

of injury,' while unfortunate in the choice of words, does not misstate the law, and, being explained by the context, is no ground for reversal." In discussing this instruction in the opinion, Taft, Circuit Judge, said: "I am of opinion that the language used by the court was not fortunate. The highest degree of care consistent with the possibility of injury is rather a blind expression, but it seems to me that it was sufficiently explained by the context in the charge, and that it did not, therefore, mislead the jury. 'Consistent with the possibility of injury,' as thus explained, meant 'commensurate with or proportionate to the possibility of injury in the use of the elevator.' The theory of the court was that the liability of Mitchell in the running of a passenger elevator was the same as that of a common carrier, and the standard for a common carrier is the highest degree of care which human foresight can suggest. This view is sustained by the case of *Goodsell v. Taylor,* a decision of the supreme court of Minnesota, reported in 42 N. W. 873, and by the case of *Treadwell v. Whittier,* a decision of the supreme court of California, reported in 22 Pac. 266. It is contended that such a rule applies to the machinery used, but does not apply to the conduct of the employees of a common carrier. No case has been cited which makes this distinction. On the contrary, the opinion of the supreme court of the United States in *Stokes v. Saltonstall,* 13 Pet. (U. S.) *181, considered in connection with the facts of that case, seems to refute the contention."

In the Minnesota case (*Goodsell v. Taylor,* 41 Minn. 207), cited by Judge Taft, Gilfillan, C. J., says: "The relation between the owner and manager of an elevator for passengers and those carried in it is similar to that between an ordinary common carrier of passengers and those carried by him. The same reason exists for requiring on the part of the owner the utmost human care and foresight, and for making him responsible for the slightest degree of negligence."

In the syllabus of the California case (*Treadwell v.*

Whittier, 80 Cal. 574), cited by Judge Taft, it is held: "Persons operating an elevator in lifting passengers are to be treated as carriers of passengers, and the same duties and responsibilities rest on them as to care and diligence as on the carriers of passengers by stage-coach or railway. Though not insurers of the absolute safety of the passengers, they are bound to the utmost care and diligence of very cautious persons, as far as human care and foresight can go, and are responsible for injury occasioned by the slighest neglect against which human prudence and foresight might have guarded. The responsibility is proportioned to the danger, and is of the highest character in the case of those who operate elevators for lifting persons from one level to another."

In *Western Union Telegraph Co. v. Woods,* 88 Ill. App. 375, the syllabus reads:

"(1) Persons operating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one floor to another in buildings. It is the duty of such carriers of passengers to use extraordinary care in and about the operation of such elevators so as to prevent injury to persons therein.

"(2) A carrier of passengers by elevator is bound to exercise the highest degree of human care, vigilance and foresight which is reasonable under the circumstances, and in view of the character of the mode of conveyance adopted, reasonably to guard against accidents."

In *Chicago, B. & Q. R. Co. v. Landauer,* 39 Neb. 803, in speaking of the rule as applied to common carriers, we said: "Common carriers of passengers should be held to the strictest accountability and be required to exercise the highest degree of care and forethought of which the human mind is capable. This rule is founded on principles of public policy and enforced by the courts for the protection of the traveling public." In *Spellman v. Lincoln Rapid Transit Co.,* 36 Neb. 890, we applied the rule to street railway companies, and held: "Where a pas-

senger, without negligence on his part, is injured by the derailment of the car in which he is traveling, the carrier, to overcome the presumption of negligence caused by such derailment, must show that the accident was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented." That case is cited by SULLIVAN, J., and its doctrine reaffirmed in *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672. In the light of the above authorities, the giving of instruction number 4 was not error.

Instruction number 5 is also complained of. It reads: "If you find from a preponderance of the evidence that the defendant, the Bee Building Company, failed to exercise that high degree of care and caution required of them while carrying said Walter Quimby, and the defendant negligently permitted said Walter Quimby to become injured on account of a failure on its part to properly care for said Walter Quimby while a passenger, and you further find that the injuries of said Walter Quimby were the direct result of such negligence on the part of said defendant, then you are instructed that your verdict should be for the plaintiff." We are unable to discover any error in this instruction.

Defendant also complains because the court refused to give instructions 2, 3 and 4, requested by defendant. Number 2 reads: "There is no presumption that the defendant was negligent from the fact that the plaintiff was injured in the elevator, and you must find from a preponderance of the testimony that the defendant in some manner failed to exercise the highest possible care consistent with the operation of the elevator, and that the failure to exercise such care was the proximate cause of plaintiff's injury." This instruction was fairly covered by the last clause of No. 4, given by the court on its own motion.

Instruction number 3 states: "The defendant did not

insure the safety of the plaintiff as a passenger in its elevator, unless the plaintiff kept himself and all parts of his body within the elevator proper; and the defendant owed the plaintiff no duty, under the facts shown by the evidence in this case, to protect him from the consequences of his own carelessness in putting his foot over the edge of the floor, if you find that he was careless in so doing." Instruction number 4 is to the same effect. It reads: "It is not necessary that the plaintiff's conduct should be negligent in order to bar his recovery. If by his voluntary action he put his feet in a place where injury would probably result to him, the elevator conductor was not bound, in any and all events, to push the plaintiff away from the door, unless he knew that the plaintiff was in such position of danger." In *East Saginaw City R. Co. v. Bohn,* 27 Mich. 503, the syllabus reads: "While the company would not be liable to a person of suitable age and discretion who, being warned of the danger in riding upon the front platform of the car, should persist in doing so, yet, in case of a child, lacking such discretion, and to whom, consequently, negligence could not be imputed, it would be the duty of the officers of the company not to stop with a warning, but to compel such child to occupy the proper place in the car." One of the children in that case was a boy twelve and a half years of age. The two instructions above noted are clearly erroneous, in announcing the doctrine that the elevator conductor owed plaintiff, a boy twelve years of age, no duty. We think the very opposite of that is true. This elevator conductor knew that it was dangerous to stand near the door of the elevator when it was in motion. He knew that it was his duty to warn passengers, whether children or adults, to stand back from the door. He failed to give such warning to plaintiff, who, at the time, was the only passenger in the car. He seeks to justify his conduct by saying that he was giving his attention to the running of his car. But it is a matter of common knowledge that such a car is managed by the manipula-

tion of a lever, which is done with one hand, and that the conductor has the free play of his eyes and of his other hand, by the diligent use of which he can guard against just such accidents as happened in this case. We think the case was properly submitted to the jury, and that it was warranted in finding the defendant guilty of negligence in not properly warning and safeguarding this boy while a passenger in its elevator, regardless of the question as to whether or not there was negligence in its construction.

The judgment of the district court is

AFFIRMED.

FRANK SWOBODA, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JUNE 10, 1910. No. 16,080.

1. **Constitutional Law:** EMPLOYER'S LIABILITY ACTS. The Employer's Liability Act of 1907 (Comp. St., ch. 21, sec. 3), providing that every railway company operating a railway engine, car or train in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car or train for said company, for all damages which may result from the negligence of any of its officers, agents, or employees, is a valid law under the constitution of Nebraska, and is not repugnant to the fourteenth amendment of the federal constitution.
2. **Master and Servant:** INJURY: EVIDENCE. Evidence examined and set out in the opinion held sufficient to show that plaintiff at the time of his injury was engaged in construction or repair work within the meaning of such act.

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

N. H. Loomis, Edson Rich, James E. Rait and *E. H. Crocker,* for appellant.

Smyth, Smith & Schall, contra.

FAWCETT, J.

This case involves a construction of section 3, ch. 21, Comp. St. 1909, adopted in 1907, commonly called the "Employer's Liability Act." One of the departments of defendant's shops in the city of Omaha is known as the blacksmith shop. Plaintiff was employed therein as a helper. He and another helper, Carl Gall, were operating a steam hammer weighing about 500 pounds, in flattening iron washers. Gall was operating the hammer by means of levers. Plaintiff stood in front of the hammer, placing and removing the washers on a steel die of the hammer. One blow was required to flatten each washer. As the hammer lifted, plaintiff would remove the flattened washer with his hand, and replace another for the next stroke of the hammer. The negligence alleged is that Gall, who was controlling the hammer, carelessly and negligently caused it to descend while plaintiff's right hand was thereunder, and while plaintiff, in the exercise of due care and in the performance of his duties, was endeavoring to remove from the plate a washer theretofore placed by him thereon. The evidence shows that the washers then being made were for general use by defendant in the repair of its engines and cars; that when cars or engines are being repaired and a bolt goes through a piece of wood, one of these washers is always placed at the head of the bolt; that the shop in which plaintiff was working employs about 135 men; that there are 29 blacksmiths who work the forges, 4 driving hammers, 5 bolt machines, 2 shears, about 22 furnaces in operation, 9 power hammers, and 2 similar to the one in question. The foremen of the shop, when asked what they did in the way of repairing iron work on cars, answered: "Every article which is made of metal; we repair every article of iron or steel; do the necessary repairing or make new where it is ordered"; that when engines are to be repaired they are taken to the machine shop and stripped down to the base, and whatever is necessary to be repaired on the engines is

sent to the blacksmith shop, "and we repair those things and take them back to the machine shop and put them back on the engine"; that any part of the iron work or metal parts of an engine that get out of repair are sent to that shop to be repaired; that they also do the repairing of iron work on freight cars, box cars, passenger cars and engines, and also construct new parts of cars and engines.

The defenses relied upon are that the work upon which plaintiff was engaged at the time of his injury was not "construction" or "repair work," as such words are used under the employer's liability act; that plaintiff's injuries were received by and through the carelessness of his fellow servant contributing thereto; that the employer's liability act, under which plaintiff is seeking to recover, is violative of section 1 of article 14 of amendments to the constitution of the United States; and that "said act by its provisions makes railroad companies liable for injuries to employees resulting from the negligence of fellow servants and co-employees when such injured employees are injured in construction and repair work not involving the dangers and hazards peculiar to the business of constructing, maintaining, and operating railroads, when no such liability is attached by the state of Nebraska to other employers for similar hazards, thereby depriving railroad companies of the equal protection of the laws accorded to all other litigants, persons, or corporations within the state of Nebraska, and violating that part of section 1 of the fourteenth article of amendments to the constitution, which provides 'no state shall make or enforce any law, * * * nor deny to any person within its jurisdiction the equal protection of the laws.'" From a judgment in favor of plaintiff, defendant appeals.

Section 3, ch. 21, Comp. St. 1909, provides: "That every railway company operating a railway engine, car or train in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work, or in the use and operation

of any engine, car or train for said company, * * * for all damages which may result from negligence of any of its officers, agents, or employees, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works." Counsel for defendant in their brief clearly state their position as follows: "The defendant contends that this statute affects only such employees as are injured through a risk or hazard incident and peculiar to the business of constructing, repairing and operating railroads, and that, while the statute on its face is broad enough to cover other employees, if extended beyond railroad hazards, it is violative of the fourteenth amendment to the constitution of the United States for the reason that the state of Nebraska cannot impose burdens or restrictions upon railroad companies with reference to personal injuries unless all employers are equally affected by the statute in cases where the injuries arise in the same manner."

Authorities are not wanting to sustain defendant's contention. They are cited and ably presented in defendant's brief. But the clear weight of authority and the better reasoning is the other way. It would be interesting to review the authorities, but that has been so ably done by the supreme court of the United States, and other courts, in the cases cited below, that we shall not enter into a general review of the cases.

In *Missouri P. R. Co. v. Mackey*, 32 L. ed. 107 (127 U. S. 205) the syllabus reads: (1) "The law of Kansas making a railroad company liable to an employee for the negligence or mismanagement of other employees or agents of the same company is not in conflict with the fourteenth amendment to the constitution of the United States, in that it deprives the company of its property without due process of law, and denies to it the equal protection of the laws."

(2) "Legislation which is special in its character is not obnoxious to the last clause of the fourteenth amendment,

if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed."

Instruction number 8 given by the court below, and complained of by defendant here, was evidently taken from the opinion in this case. The instruction in almost identical language is quoted by Mr. Justice Field, and approved.

In *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, the court say: "Considering this statute as applying to railroad corporations only, we think it cannot be regarded as in conflict with the fourteenth amendment." The opinion by Mr. Chief Justice Fuller then reviews a number of the cases on the subject, among them *Peirce v. Van Dusen*, 78 Fed. 693, which, considering the prominence of the judges who decided it, we will briefly refer to. The opinion was by Harlan, Circuit Justice, and associated with him were Circuit Judges Taft (now President) and Lurton (now associate justice of the supreme court). The third paragraph of the syllabus reads: "The third section of said statute, altering the rule as to the liability of an employer for the negligence of fellow servants, as it applies to all railroad corporations operating railroads in the state, and to all of a given class of railroad employees, is not repugnant to the provision of the constitution of Ohio that all laws of a general nature shall have uniform operation throughout the state." To show that the same argument was made before these eminent judges as is being made here, we quote from the opinion (p. 701): "But it is contended that the Ohio statute is repugnant to the provision of the constitution of Ohio declaring that 'all laws of a general nature shall have uniform operation throughout the state.' Article 2, sec. 26. The argument made in support of this view by the learned counsel for the receiver may be thus summarized: That the act imposes a liability for damages for the negligence of fellow servants only as against a railroad company operating a railroad within Ohio; that it confers a right

of action only upon employees of such railroad companies; that no other employer is subject to the liability, and no other employee is given the right; that the act selects from the general class of employers railroad companies operating railroads, and imposes upon them a special burden; that the act is special class legislation, not uniform throughout the state, and applies to no person or company engaged in any other occupation employing servants, although the occupation be equally hazardous. Consequently, the act is special in its operation and effect, is confined to particular corporations engaged in a specific business, does not cover the whole subject of the relations of master and servant, and is not, therefore, of a general nature, and of uniform operation throughout the state, within the meaning of the constitution of Ohio." The opinion then reviews the cases cited by counsel in support of their contention, and on p. 704, concludes: "We do not deem it necessary to pursue this subject further. We think it clear that the Ohio statute is not obnoxious to the constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state. As it applies to all railroad corporations operating railroads within the state, it is, within the meaning of the state constitution, general in its nature; and, as it applies to all of a given class of railroad employees, it operates uniformly throughout the state."

In *Nicholson v. Transylvania R. Co.*, 138 N. Car. 516, the court, in considering a statute giving any employee of a railroad "operating" in that state a cause of action for injuries suffered because of the negligence of a fellow servant, on page 519, say: "But the act applies only to employees of a 'railroad operating,' not that such employees must be operating the trains, but they must be employees in some department of its work, of a railroad which is being operated. Such business is a distinct, well-known business, with many risks peculiar to itself, and all the employees in such business, whether running trains, building or repairing bridges, laying tracks, work-

ing in the shops or doing any work in the service of an 'operating railroad,' are classified and exempted from the rule which requires employees to assume the risk of all injuries which may be caused by the negligence of a fellow servant."

In *Georgia Railroad & Banking Co. v. Ivey*, 73 Ga. 499, in considering a similar statute, the court say: "This is no special law. It is a law applicable to all railroad companies and their employees, whether employed in running trains or not. It would be more special and less general if applicable only to those engaged in running the trains. It is a general law embracing in its terms all railroads and their employees."

Without pursuing the subject further, it is sufficient to say that statutes similar to ours are sustained and held not in conflict with the fourteenth amendment to the constitution of the United States, or with state constitutions against special or class legislation, in the following cases: *Ditberner v. Chicago, M. & St. P. R. Co.*, 47 Wis. 138; *Kane v. Erie R. Co.*, 133 Fed. 681; *Erie R. Co. v. Kane*, 155 Fed. 118; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1; *Campbell v. Cook*, 86 Tex. 630; *Hancock v. Norfolk & W. R. Co.*, 124 N. Car. 222, and a very extended discussion of the subject in *Callahan v. St. Louis, M. B. T. R. Co.*, 170 Mo. 473, 60 L. R. A. 249. We have also announced the same doctrine in *Insurance Co. v. Bachler*, 44 Neb. 549, 565, where we had under consideration the provisions of the valued policy law, which allows the taxing of an attorney's fee in cases where a recovery is had by the assured. We there said: "It is said that this act is class legislation because it applies only to insurance companies; but where a law is general and uniform throughout the state, and operates alike upon all persons and localities of a class, it is not objectionable as wanting uniformity of operation."

The defendant's contention that plaintiff is not within the class protected by the statute because he was not injured through a risk or hazard incident and peculiar to

the business of constructing, repairing and operating railroads is not sustained by the wording of the statute. The statute reads: "That every railway company operating a railway engine, car or train in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work." That constitutes one class of employees who are entitled to the benefit of the statute. Then, separated from the former by the disjunctive "or," we have the other class, viz., "or in the use and operation of any engine, car or train for said company." It is clear from this wording of the statute that the legislature intended that the fellow servant rule (not law) should not apply to any of the employees of any railroad in the state who were either engaged in the operation of engines, cars or trains, or were engaged in construction or repair work. Substantially the same reason sustains the entire classification; that is to say, there are dangers inherent in and peculiar to all the vocations described in the statute, which are rarely, if ever, encountered by employees working for a master not engaged in the operation of a railway. The legislature well knew that substantially all railway construction or repair work is dangerous, performed either in the immediate vicinity of tracks upon which trains are passing or by the use of dangerous machinery, as in the case at bar. Classifications should receive a practical construction, and we are of opinion that a reasonable application of the law to the facts in the case before us not only brings the plaintiff within its purview, but forbids a holding that the law itself is obnoxious to the constitution of the United States or to the constitution of the state of Nebraska.

We must not be understood as deciding that all work of construction or repair of any article or structure performed in the service of a railroad company comes within the purview of the statute. The work of a railroad company is divided into many departments. The duties and hazards of employees in one department may be as dis-

similar from those in other departments as are those of a clerk or bookkeeper in the uptown headquarters from those of an engineer or brakeman on a train; and questions may hereafter arise as to the scope of the act under consideration, which we do not now decide. But, where the work of construction or repair is as closely connected with the actual operation and use of the railroad as the work of the present plaintiff, it seems clear that it is within the class of hazards covered by the act.

Approving and following the authorities above cited, we hold that the act under consideration is valid, and that plaintiff, at the time of his injury, was engaged in construction or repair work within the meaning of the act. This being true, the court did not err in giving the eighth instruction complained of, nor in refusing to give the fourth instruction requested by the defendant.

The judgment of the district court is therefore

AFFIRMED.

NORA E. PIERCE, ADMINISTRATRIX, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED JUNE 10, 1910. No. 16,623.

Bill of Exceptions: SUBMISSION. A proposed bill of exceptions is not submitted to the adverse party or his attorney of record, within the meaning of the statute, by leaving it at the residence of the attorney in his absence.

APPEAL from the district court for Valley county: JAMES R. HANNA, JUDGE. *Motion to quash bill of exceptions. Sustained.*

James E. Kelby and *Halleck F. Rose,* for appellants.

John J. Sullivan, H. E. Olcson and *A. Norman, contra.*

FAWCETT, J.

Plaintiff moves to quash defendant's bill of exceptions, for the reason that the same was not served within 80 days from the adjournment *sine die* of the term of court at which judgment was rendered. The service of the bill was by hanging it to the door knob of the residence of Mr. Oleson, one of the attorneys for plaintiff, at 14 minutes before midnight on the eightieth day. The bill was found there by the attorney on the next morning. It was seasonably returned to counsel for defendant with proper objections. The district court allowed the bill, and plaintiff now moves that the same be quashed. Section 311 of the code provides: "When the decision is not entered on the record or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment *sine die* of the term of court at which judgment is rendered or at which the motion for a new trial is ruled on, and submit the same to the adverse party or his attorney of record for examination and amendment if desired. * * * In cases where a party seeking to obtain the allowance of a bill of exceptions has used due diligence in that behalf, but has failed to secure the settlement and allowance of the same as herein required, it shall be competent for the judge who tried the cause, upon due showing of diligence and not otherwise, to extend the time herein allowed, but not beyond the forty days additional to that herein provided." That the time for serving a bill of exceptions cannot be extended beyond eighty days is firmly settled in this state. *Horbach v. City of Omaha*, 49 Neb. 851; *Mathews v. Mulford*, 53 Neb. 252; *Stock v. Luebben*, 72 Neb. 254; *Bressler v. Wayne County*, 82 Neb. 758.

Certain statements made by Mr. Norman, one of the plaintiff's attorneys, at about the hour of midnight, and after the bill of exceptions had been fastened to Mr. Ole-

son's door knob, are relied upon as constituting a waiver of the manner of service. Upon this point Mr. Norman and his wife and son testified that this conversation was 15 minutes after midnight. Defendant's attorneys testified that it was one and one-half minutes before midnight. Mr. Norman states that when the attorneys for defendant called at his house Mr. Marley, one of defendant's attorneys, said: "That he had been trying to locate me for the purpose of serving a bill of exceptions, but that as he could not find me he had left the bill of exceptions at the residence of Mr. Oleson. I then said: 'That is all right, service upon Mr. Oleson is just as good as service upon me.' Mr. Marley then said: 'But Mr. Oleson was not at home.' To which I replied: 'Oh, Mr. Oleson was not at home.' I then closed the door and the conversation ended." Mr. Marley states that he told Mr. Norman "that I had been seeking him to make service of the bill of exceptions in said case, and that I had left the bill of exceptions in said case at the residence of plaintiff's attorney, H. E. Oleson. Upon being informed that the bill of exceptions had so been left at the residence of said Oleson, said Norman said to me, in the presence of said witnesses, 'That is all right.' Understanding from the statement so made that said Norman expressly assented to the manner in which said service was made, I departed, leaving the bill of exceptions, as before stated, at the residence of said Oleson for the examination of plaintiff and her attorneys." Mr. Marley's departure, leaving the bill of exceptions suspended to Mr. Oleson's door knob, was not in reliance upon Mr. Norman's statement, for, as stated in his own affidavit, it was then not more than two minutes before midnight, and, if Mr. Norman had not made the statement attributed to him, counsel for defendant could not within so short a time have made any other disposition of the bill. Moreover, Mr. Norman's affidavit that, when he said "All right," he had not been told that Mr. Oleson was not at home, is not contradicted. We do not think the manner of service was waived.

It is also urged that it is shown that, on the morning of the next day after they attached the bill of exceptions to the door knob of Mr. Oleson's residence, the bill was seen in the hands of counsel for plaintiff, and that it thus clearly appears that the bill actually came into the hands of counsel for plaintiff. This is true; but, as further shown, it did not come into their hands until the morning of the eighty-first day, when Mr. Oleson opened his door on that morning. This could not have any greater effect than if counsel for defendant had been standing upon Mr. Oleson's porch when he opened the door that morning and had then served it upon him. It would have been in that case, as in this, one day too late. The case therefore resolves itself down to the simple proposition: Was the attaching of the bill of exceptions to Mr. Oleson's door knob at 14 minutes before midnight on the last day a compliance with section 311 of the code? In *Lancaster County Bank v. Gillilan,* 49 Neb. 165, the bill was attempted to be served by leaving it at the office of opposing counsel in his absence. We held such service insufficient. In the opinion, by Mr. Commissioner IRVINE, it is said: "Section 311 of the code provides, among other things, that the party excepting shall reduce his exceptions to writing 'and submit the same to the adverse party or his attorney of record for examination and amendment if desired.' The question is therefore presented whether leaving the proposed bill at the office of the attorney of record is a 'submission' thereof to such attorney within the meaning of the statute. The question is a new one in this court, and our attention has not been directed to any adjudications elsewhere under similar statutes. It has been several times said that the object of the statute in requiring a submission to the adverse party or his attorney is to obtain an accurate bill. (Citing cases.) In *Fitzgerald v. Brandt,* 36 Neb. 683, there were several appellees, whose interests were diverse. The proposed bill of exceptions was left at the office of the attorneys for one appellee, and the others were notified that the

bill had been left there for their examination and would so remain for the time allowed by law. It was held that this was not a submission within the statute. A summons may be served by leaving a copy thereof at the usual place of residence of the defendant, and there are other cases where service may be made otherwise than by delivery personally to the party to be served; but such substituted service is valid only because made so by statute, and there can be no doubt that, in the absence of a statute to the contrary, service upon a person means personal service, and nothing else. This statute provides that the proposed bill may be submitted to the adverse party or his attorney of record, but provides for no other manner of service. As has been said, the object of the requirement is to obtain an accurate bill, by giving to the adverse party an opportunity to examine the proposed bill and suggest amendments. The statute permits only ten days for this purpose. Practicing attorneys cannot always be in their offices, and to hold that a proposed bill is properly submitted by leaving it at the office of the attorney during his absence might frequently operate to deprive him of the opportunity of examination and suggesting amendments. There is no provision by which this period of ten days may be extended. On the other hand, the statute allows the party proposing the bill 15 days from the rising of court in which to submit the bill. Code, sec. 311; *First Nat. Bank v. Bartlett,* 8 Neb. 319. This time may be extended by the court to 40 days from the adjournment of the term, and, upon showing of diligence, the judge may extend the time for another period of 40 days. It would seem, therefore, as if it were the intention of the legislature to allow to the appellant or plaintiff in error ample time to properly submit the bill, and to require prompt action by the adverse party upon its submission. An inability to submit the bill to the adverse party or his attorney, on account of absence of the latter, the party proposing the bill having been diligent, would undoubtedly be good cause for extending the time,

and the rights of both parties would thereby be saved; whereas giving the statute such a construction as would be required to sustain this bill would in many cases deprive a party, successful in the district court, of his right to suggest amendments. Opposing the construction we have indicated is the fact that contingencies may arise where it becomes impossible to submit the bill within the longest period allowed by statute if personal service is required. The adverse party may be a nonresident. His attorney of record may be absent for a very extended period. Such contingencies are, however, so remote that the legislature has evidently failed to provide therefor, and they are so remote that the court, in order to meet them, should not adopt a construction of the statute which would be disastrous to the rights of the parties under situations frequently arising. The motion to quash the bill is sustained." Under the above authorities, it is clear that there was no service of the bill of exceptions in this case within the time and in the manner required by law.

The motion to quash the bill of exceptions, is, therefore,

SUSTAINED.

ISAAC A. WOOD, ADMINISTRATOR, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JUNE 10, 1910. No. 15,968.

1. **Municipal Corporations: DEFECTIVE SIDEWALKS: INJURY: NOTICE.** In an action against a city for damages caused by a defect in a sidewalk, in which the evidence received without objection tends to prove that the walk upon which the accident occurred on a given street along an entire block is decayed and in a condition dangerous to persons passing over it, and that the city authorities had notice of the general condition of the walk, it is not necessary to prove notice to the city of the condition of the walk at the particular point where the accident occurred.

2. ———: ———: NOTICE: INSTRUCTIONS. Under the statute governing cities of the metropolitan class, prior to the recent statute requiring written notice, such city was not chargeable with negligence in not repairing defective walks without notice for a sufficient time to make repairs, unless the defect had existed so long as to imply notice. But it is not prejudicial error to instruct the jury that to hold the city liable it must be found that it had notice "at the time of the injury" if in a preceding instruction the rule is correctly and completely stated.

3. Appeal: WAIVER OF ERROR. Errors, if any, in receiving incompetent evidence are presumed to have been waived unless objected to when the evidence is offered.

4. Instructions examined, and found not prejudicially erroneous as applied to the evidence in the case.

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

Harry E. Burnam, I. J. Dunn and *John A. Rine,* for appellant.

John O. Yeiser, contra.

SEDGWICK, J.

In 1904 Mrs. Mary A. Eddy accidentally fell on the walk on a public street in the city of Omaha and was severely injured, so that afterwards as a result of this injury, as it is alleged in the petition, Mrs. Eddy died. The plaintiff, as the administrator of her estate, brought this action against the city to recover damages. From the judgment in his favor in the district court the city has appealed.

1. The first controverted matter relates to the character of the alleged defect in the walk. The plaintiff contends that the entire walk along the south side of Harney street from Forty-second to Forty-third street was defective and dangerous. This action, he says, was begun and he presents the case upon that theory. The brief of the defendant presents a case in which the contention relates to a particular point in the walk. Was there a

broken or loose plank where the accident occurred? Did the city have due notice of the defect and proper opportunity to remedy it? It is from this point of view that the defendant's case has been investigated and is now presented. Neither view seems to be definitely presented by the pleadings. The allegations of the petition would seem in some degree at least to justify defendant's theory of the issues being controverted. After the general allegation that the walk from Forty-second to Forty-third street was defective and dangerous, and that defendant had knowledge of its condition for more than ten days before the injury, it is alleged that the deceased stepped upon a board which was "unavoidably tilted up by her son's stepping on a loose board of such sidewalk which was broken between the stringers, * * * and said particular board would have been discovered to be so broken and would have been replaced and repaired if the said generally defective sidewalk had been repaired." The defendant now contends that the allegation is that the broken board caused the injury, and that there is no evidence that the city had notice of this defect. Construing the petition, as the law requires, more strictly against the pleader, there would be ground for defendant's contention if it had been timely presented to the court. There was no motion to make the petition more definite and certain. The answer, so far as it relates to this contention, was a general denial. The plaintiff by his first witness introduced evidence tending to show the defective condition of the entire walk from Forty-second to Forty-third street. This evidence was received without objection, and was thoroughly canvassed by defendant upon cross-examination. It may therefore be considered that this case was tried in the district court upon the plaintiff's contention that this entire block of the walk in question was in a dangerous condition.

The witness above referred to lived on Harney street between Forty-second and Forty-third streets and had lived in Omaha for 15 years. At the time of the accident

the deceased and her son were living at the house of this witness. He testified that he knew the condition of the walk thoroughly and that it was "exceedingly poor from Forty-second to Forty-third street"; that at different places the stringers had rotted away, leaving the boards practically without proper support; that the boards themselves were not sound; that many of them were rotted in places, and there was not one of these boards, if supported at each end, "but what would have broken in the middle if you stepped on it," and that this was the general condition of the entire walk, and that about two weeks before the accident he went to the city hall and notified Mr. Coburn at the city office of the condition of the walk between Forty-second and Forty-third streets; that Mr. Coburn had charge of the sidewalk, and then promised the witness to see that it was put in shape. There is other evidence of the same general nature in the record, and, if believed by the jury, would abundantly establish the negligence of the city in allowing the walk for an entire block upon a prominent street to become and remain in such a condition. Upon the trial of such an issue as this, the contention of the defendant that the city was not notified that the particular plank that caused the accident was loose or broken would be without merit. It is not at all analogous to *Nothdurft v. City of Lincoln,* 66 Neb. 434, and similar cases, in which it was complained that a certain plank or planks had become loose or defective.

2. The next error asserted and particularly assigned in the brief as the statute requires is that the court erred in admitting in evidence certain exhibits, numbered 2 and 4. These were notices by the board of public works of the city to certain property owners, notifying them that the sidewalk in front of their respective premises on the south side of Harney street was defective and in a dangerous condition, and requiring them to repair the same or construct a new walk in place thereof. These notices were served in the preceding year. No. 2 specified

the sidewalk between Forty-second and Forty-fourth streets, and No. 4 the walk "west of 42d street." The objection to these exhibits was that they failed to specify the particular spot at which the accident occurred. These notices tend to show that the city authorities had knowledge of the condition of this walk from Forty-second to Forty-third streets, which was, as we have seen, the principal matter under controversy, and we think that they were properly received in evidence. Other similar objections are unavailable for the same reasons.

3. It is also contended in the brief that "the city had no notice and was not chargeable with knowledge of the alleged decayed condition of the stringers at the place where the accident occurred." This objection is partly predicated upon the contention that the inquiry should be confined to the particular point where the accident occurred. This phase of the objection has already been sufficiently answered. The remaining argument upon this point appears to relate to the sufficiency of the evidence to establish notice to the city, but the evidence amply justified the finding of the jury in that regard.

4. The defendant complains of instruction No. 6, given by the court, which is as follows: "Under its charter and under the law, it is the duty of the defendant to exercise ordinary care to keep its sidewalks, including the one in question, in a reasonably safe condition for use in the ordinary modes used by pedestrians, and it is liable to the plaintiff for any damages, if any were sustained by him, by reason of the death of Mary A. Eddy resulting from the negligence of the defendant to perform that duty, unless you find that said Mary A. Eddy was guilty of negligence directly contributing to said injury, and provided further that the city had notice of the unsafe condition of the sidewalk in question at the time of the injury."

It is the last sentence of the instruction that is objected to. This expression, if taken alone, would undoubtedly be erroneous. Notice to the city at the time of

the injury would not be sufficient. There should be such notice as would have given the city opportunity to repair the defect before the injury occurred. However, the language complained of is substantially derived from the second instruction requested by the defendant. It appears that the defendant's attorneys, as well as the court, assumed that the matter of notice to the city had been so well explained to the jury as to preclude any danger of their being misled in that regard. In stating the material matters to be proved by the plaintiff by a preponderance of the evidence in instruction No. 4, given by the court, the jury were told that the plaintiff must establish "that the defendant had notice of such defective condition of said sidewalk in time to have remedied the defect before the accident occurred." The jury must have understood from the instructions taken together that the object of the notice to the city was to give opportunity to repair the defect, and it is wholly improbable that the jury were misled as to the notice required. Furthermore, the evidence on this point was so strong as to admit of no other finding than that the city authorities had notice of the condition of this walk long before the accident occurred. The defendant therefore could not be prejudiced by any instructions the court might give upon this point.

5. The next complaint is as to the rulings of the court admitting evidence of damages. It is said in the brief that the court ought not to have allowed evidence of plans which the plaintiff and his mother had made in regard to his education and in regard to going into business to provide money to pay for his expenses in school, and we find that the plaintiff's attorney inquired of the plaintiff when he was upon the witness stand in regard to these matters. He asked the plaintiff these questions: "State whether or not your attending school for this period was the part of any of the plans of your mother extending beyond the period of 21?" "State what the general plans with respect to your mother and yourself were of which that you have detailed was a part?" Both of which were

objected to by the defendant and excluded by the court. Afterwards he was asked in regard to the expenses of his schooling by the year, and similar matters, to which questions and answers no objection was interposed. Later on in the record there appear some questions and answers which we are unable to construe. The record states that it was a cross-examination by the defendant's attorney and that the defendant objected to the questions. From these questions and answers it would appear that the plaintiff's mother had not formulated any definite plans, but that she expected later on to keep boarders, and, as stated by the witness, "it was simply a plan to help earn the means of completing your (my) education." He also stated the amount of his tuition at the medical school, and the cost of his board and room and other expenses yearly. The record recites that all of these questions were asked by defendant's attorney, and that some of them were objected to by the defendant's attorney, and others by the plaintiff's attorney, but the principal questions calling for the evidence that is especially objected to in the brief were without objection by any one. We do not find that the record presents this question as it is discussed in the brief.

6. A witness was examined with a view of locating a particular point in this walk which was defective. It is complained that no foundation was laid for this testimony, but this objection is unavailing because under the issues as they were tried it was competent to show the condition of this walk at all points between Forty-second and Forty-third streets.

7. The court instructed the jury fully as to the measure of damages, and in doing so said: "You will assess the amount of the recovery at such sum as you find from the evidence will compensate the said Charles Nelson Eddy for the pecuniary loss he has sustained by reason of the death of his mother. * * * You are not permitted, however, to allow any damages on account of mental suffering or bereavement, or as a solace on ac-

count of such death, as the law recognizes only pecuniary loss; nor are you permitted to allow any damages by way of vindictive or punitive damages. You should consider the relation of the parties, the earning capacity of the mother, her disposition to support her son, the probability or improbability of her continuing to do so, the loss of companionship and advice, in so far as you find from the evidence such elements to be of a pecuniary loss to said Charles Nelson Eddy." The complaint is that this instruction allowed the plaintiff to recover for the loss of the companionship of his mother, but the instruction appears to be well guarded in that respect. The jury are told that they are not to allow damages for the loss of the solace of his mother's companionship, but so far as the companionship and advice of his mother are of a pecuniary value they may take that into consideration; and we think that under the evidence in this case this cannot be said to be prejudicially erroneous.

Not finding any error in the record prejudicial to the rights of the defendant, the judgment of the district court is

AFFIRMED.

FIRST NATIONAL BANK, APPELLANT, V. GEORGE HEDGECOCK, APPELLEE.

FILED JUNE 10, 1910. No. 15,975.

1. **Trial:** SUBMISSION OF CASE: ADDITIONAL INSTRUCTIONS. It is proper for the district court to further instruct the jury after the cause has been submitted, when upon written communication from the jury it appears that further instruction is necessary to enable the jury to correctly understand the issue submitted.
2. **Notes:** PROOF: CONSTRUCTION OF STATUTE. Section 1100*a* of the code relates only to cases before justices of the peace, and, in the county court, to cases within the jurisdiction of a justice.
3. **Appeal:** ASSIGNMENT OF ERRORS IN MOTION FOR NEW TRIAL. When in a motion for a new trial in the district court there is no general assignment of "errors of law occurring at the trial," this court will consider only such errors occurring at the trial as are specifically assigned in the motion.

4. **Evidence:** PROOF OF SIGNATURE. When the issue being tried is as to the genuineness of an alleged signature of defendant, it is proper to put in evidence signatures admitted or clearly proved to be those of defendant for comparison with the disputed signature. This comparison may be made by an expert, but he must show himself qualified before testifying to his opinion based upon such comparison.

5. ———: SECONDARY EVIDENCE. When a contract is reduced to writing, the writing is the best evidence of its terms, and must be produced, or its absence satisfactorily accounted for, in all cases where proof of the terms of the contract is offered.

6. **Appeal:** ASSIGNMENT OF ERRORS IN BRIEFS. The statute requires that the brief in this court shall set out particularly the errors asserted, and assignments not so made and definitely discussed in the brief will not ordinarily be considered.

7. ———: VERDICT: CONFLICTING EVIDENCE. The verdict of a jury will not be set aside for want of evidence to support it, if there is a substantial conflict of evidence upon the issue presented.

APPEAL from the district court for Box Butte county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

Eugene Burton, for appellant.

Boyd & Barker, contra.

SEDGWICK, J.

This action was begun in the county court of Box Butte county, and, after trial there, was appealed to the district court for that county. It is a suit upon a promissory note for $212, alleged to have been given by the defendant to the Monarch Specialty Company of Shenandoah, Iowa. The agent for that company, one J. R. Curran, made a contract with the defendant for the sale of some stock food, and he testifies that this note was given pursuant to that contract. Afterwards the said Curran presented this note to the plaintiff as the note of the defendant, and sold the same to the plaintiff. The defendant denied that he ever signed or delivered the note, and this was the question tried to the jury in the district

court. The verdict was for the defendant, and the plaintiff has appealed.

1. After the case had been submitted, the jury in writing inquired of the court if they were to decide "whether or not the defendant signed plaintiff's exhibit A (the note) in the form it now is," and if they were to decide as to the defendant's knowledge, when he signed the note, that the note was what it purported to be. The answer of the court was in writing, and was to the effect that, if the plaintiff had established by a preponderance of the evidence that the defendant signed the note in suit, they must find for the plaintiff; but, if the evidence was evenly balanced on that point, or preponderated in favor of the defendant, their verdict should be for the defendant. The court also told the jury that the defendant did not allege that there was any change made in the form or any alterations in the note, "but denies that he signed it in any form, and for that reason you are confined to the question, did he or did he not sign exhibit A?" There is no doubt of the right and duty of the court to further instruct the jury after it has retired, if it appears that such further instruction is necessary in order to enable the jury to correctly understand the issues submitted. There was no evidence offered tending to show any alteration of the note, and we do not see any error in the court's instruction in this regard. The jury were properly told that the burden of proof in this respect was upon the plaintiff, notwithstanding that the defendant had not filed in the county court the affidavit mentioned in section 1100*a* of the code. That section relates only to cases in which a justice of the peace has jurisdiction, and therefore the rule announced in *First Nat. Bank v. Carson,* 30 Neb. 104, does not apply.

2. The plaintiff in its motion for a new trial in the district court did not make the general assignment of "errors of law occurring at the trial," but relied upon specific assignments of errors. Under such circumstances we can only investigate such errors as were specifically

assigned in the motion for a new trial. The theory of our law is that, after a trial in the district court, the court should have an opportunity to correct any errors that may have occurred, and for that purpose it was necessary to call the attention of the court to the errors relied upon in the motion for a new trial. If there is no general assignment of "errors of law occurring at the trial," which is allowed by statute, the trial court might assume that all errors relied upon were specifically assigned in the motion. The plaintiff presented several matters in its brief in this court in which it is claimed that the court erred in the progress of the trial, but we are considering only those matters which were properly called to the attention of the trial court in the motion.

3. The defendant testified in his own behalf, and denied that he signed the note sued upon. He identified the signature to each of two separate documents as his signature. These two papers were then put in evidence for the purpose of comparing the signatures thereto with the signature of the note. The witness Pierce was shown these papers and the signature upon the note, and asked whether they were the same signatures. The defendant objected to the question, and the court sustained the objection. This was assigned as error in the motion for a new trial, and is now insisted upon. The witness had testified that he had been engaged in the banking business for several years, and that he was acquainted with the defendant, had seen him write and knew his signature, and that he believed the signature upon the note in suit was the signature of the defendant. He testified that he was not an expert in handwriting, and there was no attempt to show that he was able to say by comparison whether two separate names were written by the same person. There is nothing to show that the witness considered himself competent to do so, and we think no sufficient foundation was laid requiring the admission of the evidence.

4. The defendant testified that the contract as to the

sale of the stock food, for which plaintiff claimed the note was given, was in writing; that a duplicate was given to him and that he had misplaced it. The defendant apparently desired to prove the contents of this writing by parol evidence, and the court, it seems, considered it competent to do so, "to explain what occurred there when the note was given." The plaintiff's attorney objected that it was incompetent and immaterial. There is no doubt that evidence as to the transactions in which it was claimed that the note was given was competent, but, if the contract itself was to be used for that purpose, the general rule would apply that the best evidence of which the circumstances admit must be produced, and the writing itself would be the best evidence to prove the contract for any purpose. This rule does not exclude oral evidence of an independent fact on the ground that the same fact is included in a contract which is collateral to the issue being tried. "There is a clear distinction between proving the existence of a fact which has been put in writing and proving the writing or contents of the writing itself. If the essential fact to be proved is not the contents of a written instrument, but an independent fact, to which the writing is merely collateral, or of which it is merely an incident, there is no reason for the application of the rule." 1 Elliott, Evidence, sec. 216. We find, however, no error in connection with this matter requiring a reversal of the judgment. The statute requires that the brief of appellant shall "set out particularly each error asserted." The assignments in the brief of errors asserted as to receiving parol evidence of the terms of the contract are not in strict compliance with the statute in that respect. "The court erred in overruling plaintiff's objection to the third interrogatory and answer thereto found on page 34 of the bill of exceptions" is not a satisfactory compliance with the requirement to "set out particularly the error asserted." The interrogatories on page 34 are not numbered. Counting from the top of the page, the third sentence marked "Q" is: "What has become of it?"

From the prior questions and answers it appears that this question relates to the written contract, but the question does not call for the terms of the contract, and the answer, so far as the witness was allowed to go, does not relate to the contents of the written instrument. There could be no prejudice from this question and answer; at least, none that is suggested in the brief. The fourth interrogatory on page 36 is assigned in the same way. Counting unnumbered questions again from the top of page 36 of the bill of exceptions we find that the fourth question was asked the defendant by his counsel. He was asked how he was to pay for the stock food. The evidence of the witness Curran had already been given for plaintiff, in which he said that the note in suit was given in payment for the stock food, and it was competent to rebut that evidence by showing that the stock food was to be paid for in another way, and the objection was properly overruled. As to "the first interrogatory on page 37," it may be said that, as far as we are able to identify the matter aimed at in the assignment, it appears that by the question the witness was asked whether certain matter that he had testified to "was embodied in the written contract," and the answer was, "No." There could be no prejudice in this question and answer.

The witness, Brown Church, testified that he was present when the contract in regard to the stock food was made, and that the agreement was that the stock food should be "paid for as Mr. Hedgecock sold it." He was asked if Curran made any agreement as to his returning at a later date. No objection was made to the question, and he answered in substance that Curran said that when defendant ordered goods he, Curran, would come and drive with Mr. Hedgecock and pay his livery rates and help him sell them and pay him for his team. The court overruled a motion to strike out this answer. This is complained of in the brief as "the third interrogatory and answer thereto on page 54." No reason is suggested in the brief for considering this evidence incom-

petent, nor why this ruling should require a reversal of the judgment. There are other similar assignments, and it is sufficient to say that this court will not ordinarily consider questions of errors that are not particularly set out and definitely discussed in the brief.

5. The court allowed the defendant at the suggestion of his attorney to write his signature several times in the presence of the jury, and in some instances to write it upon one sheet of paper lying over another sheet, apparently to illustrate how a signature could be obtained on the second sheet without the observation of the signer. These sheets of paper were afterwards offered in evidence. It does not appear that there was any evidence that defendant's signature to the note was procured in such manner. The contract that defendant admitted he signed in the transaction with Curran was not in evidence, so that whether the signature to the note was obtained by such means appears to be conjecture merely. Probably no sufficient foundation was laid for admitting such experiments to the consideration of the jury. No reason, however, is pointed out in the brief for supposing that the defendant was prejudiced by this proceeding, and none occurs to us.

6. It is alleged in the brief that one of the jurors, who, it is said, was an expert with the pen, illustrated to the jury, while considering the case, how easily a signature can be imitated. We find no evidence of such a transaction in the bill of exceptions. We cannot look for it elsewhere.

7. The last and most important contention is that the verdict is not supported by the evidence. The jury are supposed to be more competent than the court to determine such issues. The defendant testified that he never signed the note in suit, and one of plaintiff's witnesses, while testifying that he believed the signature to the note was the genuine signature of defendant, said that he was not an expert in handwriting, but had often seen defendant write, and that the signature to the note was not as

defendant generally signed his name. He pointed out several points of difference, and expressed a considerable doubt as to the correctness of his opinion. It cannot be said that there is no substantial conflict in the evidence, and the verdict of the jury must be sustained.

AFFIRMED.

STATE, EX REL. JAMES W. CATTERN, APPELLEE, V. BOARD OF SUPERVISORS, APPELLANT.

FILED JUNE 10, 1910. No. 16,003.

Appeal: DISMISSAL. Upon appeal in an action in which this court has concurrent original jurisdiction, the parties are entitled to have the cause advanced upon motion. If they neglect to do so, and by reason of delay a decision of the cause cannot affect the substantial rights of the parties in respect to the matters complained of, the appeal will be dismissed by this court upon its own motion.

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

John W. Graham, George L. Loomis, H. C. Maynard and *J. C. Cook,* for appellant.

F. W. Button, contra.

SEDGWICK, J.

The board of supervisors of Dodge county at its first meeting in January, 1908, awarded the contract of printing the county supplies for the year 1908 to the Perkins-Howard Company. This relator, claiming to be the lowest bidder, applied to the district court for Dodge county for a writ of mandamus to compel the board to convene and award the contract to relator. Upon trial in the district court a peremptory writ was ordered, as prayed by the relator. The respondents have appealed to this court.

No attempt was made to have the case advanced for hearing in this court, as might have been done under rule 5; nor was any application made to this court to supersede the judgment of the district court. The board convened pursuant to the judgment of the district court and awarded the contract to the relator, who has fully performed the same. It appears therefore that the decision of this court upon the question presented will have no practical effect on the interest of the parties, not even on the question of costs, as the record before us does not show how much, if any, costs were adjudged in favor of the relator. Under such circumstances this court has several times refused to proceed further. *Heesch v. Snyder,* 85 Neb. 778, and cases there cited.

APPEAL DISMISSED.

MARK UPDIKE, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JUNE 10, 1910. No. 16,014.

Municipal Corporations: DEFECTIVE STREETS: NOTICE. Section 207 of the act governing cities of the metropolitan class (Comp. St. 1907, ch. 12*a*), requiring written notice of defective public ways or sidewalks thereof to be filed with the clerk five days before the occurrence of the injury complained of, has no application to defects caused by the city itself in negligently constructing a sewer in one of the streets of the city.

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

Harry E. Burnam, I. J. Dunn and *John A. Rine,* for appellant.

F. W. Fitch, contra.

SEDGWICK, J.

While the plaintiff, who was a teamster, was driving along Sixteenth street in the city of Omaha with a loaded

wagon, the pavement gave way and let the wagon down with such force that it threw the plaintiff from his seat to the pavement. He brought this action in the district court for Douglas county to recover from the city the damages which he alleged he sustained by reason of the injuries received in his fall. He recovered in the district court, and the city has appealed.

Plaintiff alleges in his petition that some time prior to the 26th day of July, 1906, the defendant city constructed a sewer along, through and under Sixteenth street from Vinton street south (north) to some point in the vicinity of Pacific or Pierce, and to lay said sewer made an excavation through the center of said street running north and south to the depth necessary to build such sewer, and in filling the excavation after said sewer was constructed the city carelessly and negligently placed the dirt over said excavation in said sewer in such a way as to cause the same subsequently to settle, and that by reason of the careless and negligent omission to properly construct, pack, tamp and harden said earth, the dirt fell in said sewer and gradually settled so as to leave an opening and excavation immediately under the surface of said street, and that afterwards the city relaid or paved the street over said excavation, and placed the paving, consisting of granite block stone, upon and along said excavation in such a way as to hide, cover up and obscure the defect in so packing, filling in, tamping and making solid the dirt underneath said paving along and upon said Sixteenth street, especially in the vicinity of Center and Sixteenth streets; and that on said 26th day of July, 1906, he was employed as a laborer in hauling and delivering sand, and was driving a team attached to a wagon loaded with sand, on which wagon the plaintiff was riding and driving, and being near the center of Sixteenth street in the vicinity of Center street, and while driving along over the paving of said street, because of the defect in so constructing said sewer, and because of covering up the same by paving, both wheels on the left hand side of said

wagon broke through the paving and into the excavation so made by the settling of the dirt and earth in said excavation for said sewer, and that because of said defect in the street and overturning of the wagon the plaintiff was suddenly and without warning and without fault on his part thrown from the wagon to the street; that his right foot and ankle were broken thereby and he was permanently injured.

The plaintiff alleged that after the accident he gave the notice thereof required by statute, but the petition contained no allegation that prior to the said accident the notice had been given of the defect in the street, required by section 207, ch. 12*a*, Comp. St. 1907. There was a general demurrer to the petition, which was overruled, and the defendant answered admitting that the sewer was constructed along Sixteenth street by the defendant prior to July, 1906, and that the defendant caused the street to be paved, and admitted that the plaintiff was injured to some extent, and that at the time and place where the plaintiff was injured a portion of the paving gave way while the plaintiff was driving a team and wagon over and along the street. The answer alleged that the accident and injury to the plaintiff was not caused by any defect in the street of which the city had, or was chargeable with, notice, or that the city could have discovered by an inspection or examination of the street, and that the defect complained of was not due to any act or omission on the part of the defendant, but was due to causes over which the defendant had no control and for which the defendant was not responsible.

There was a great deal of evidence given by both parties, and the principal question controverted in the evidence was as to the cause of the settling of the earth in the sewer trench. The plaintiff insisted and produced evidence tending to prove that the sewer in question along Sixteenth street, which was laid at the depth of something over 20 feet, and which was constructed about 19 years before the accident, was not properly covered at

the time of its construction; that the earth was carelessly replaced in the sewer trench and was insufficiently tamped, and that this caused the earth to settle, leaving the cavity under the paving. It appears to be conceded by both parties that there was a considerable settling of the earth at many places along this sewer, and that for several years prior to the accident it became necessary for the city in repaving the street to break down the concrete under the paving at various places along the sewer line and fill up the cavity under the paving caused by the settling of the earth from time to time. The defendant insisted that this happened in all parts of the city; that the conditions were such that it was impossible to replace the earth in sewer trenches so as to prevent settling, and that particularly at the place where this accident occurred the settling of the earth was caused not only by natural conditions that could not be avoided, but also by the breaking of a water pipe which allowed large quantities of water to enter the sewer trench beneath the paving. A large part of defendant's brief is devoted to the discussion of the evidence as bearing upon this question, and there is much evidence tending to show that the settling of the earth and the cavity under the paving might have resulted from natural causes and from the action of the water from the broken service pipes. There is also evidence tending to show, as the plaintiff claimed, that the sewer trench was improperly filled, which was the cause of the cavity. The issue so presented was manifestly for the jury and presents no question of law to the court. It is unnecessary to attempt an analysis of the large mass of testimony upon this point. The jury have resolved this question in favor of the plaintiff, and we must therefore consider that the original construction of the sewer by the defendant was improper, and that this was the cause of the cavity under the paving. Whether the original improper construction of the sewer was the proximate cause of the accident is a question of fact and is the subject of much conflicting evidence. This is also a question for the

jury, and must be considered as determined in plaintiff's favor by the verdict.

This brings us to the consideration of the important question in the case. Section 207, ch. 12*a*, Comp. St. 1907, provides as follows: "Cities of the metropolitan class shall be absolutely exempt from liability for damages or injuries suffered or sustained by reason of defective public ways or the sidewalks thereof within such cities, unless actual notice in writing of the defect of such public way or sidewalk shall have been filed with the city clerk at least five days before the occurrence of such injury or damage. In the absence of such notice, so filed, the city shall not be liable, and in all cases such notice shall describe with particularity the place and nature of the defects of which complaint is made." No written notice of the defect in the paving at the point where the accident occurred had been filed with the city clerk, and the defendant insists that the statute applies in such case and that the plaintiff cannot recover.

The attorneys for defendant have furnished an able discussion which has greatly assisted us in our inquiry as to the true purpose and meaning of the statute in question. It is insisted that unless provided by the statute no liability exists; that it does not require a legislative act to exempt municipalities from liability for defective streets, but it does require a statute to create such liability. The man who claims that the city would be liable must point to the law creating such liability, and there is none except that imposed by the legislative enactment; that, when the legislature by statute fixed such liability with reference to defective streets, the statute must be held to be exclusive; that the legislature may absolutely exempt the municipality from liability, or exempt it unless certain conditions are complied with; that if the legislature keeps within its constitutional right, and the language of the act is plain and free from doubt, there is nothing to interpret, and the courts should accept the law as it is; that it is not for the court to determine

whether it is good or bad, just or unjust, reasonable or unreasonable; that a city acts through its officers, agents, or servants, but the city does not act by and through the doings of every officer, agent and employee; strictly speaking, the city acts officially only through its mayor and council, and that the city is not charged with "absolute knowledge" of the acts of a day laborer, a policeman, a fireman or other employees, and the knowledge of such persons is not the knowledge of the city; that it was because the courts held the city to strict accountability, and held that the act of an agent or employee in many matters was the act of the city, that the legislature enacted section 207; that the city attorney of Omaha drafted this section of the statute for the express purpose of protecting the city against claims based upon implied notice of which the city actually had no notice or knowledge; that by this statute the city is not to be held liable for the negligent conduct of any individual, whether citizen, agent, officer or employee of the city, which causes a defect in the street, until the city in its official governmental capacity has had its attention directed to the particular defect by written notice.

While this case has been pending in this court the decision in *Tewksbury v. City of Lincoln*, 84 Neb. 571, has been published. In that case a statute substantially the same as said section 207 was construed. While the case at bar might be distinguished in some respects from that case, the defendant has not attempted to do so. The brief, so far as the construction of the statute is involved, is confined to an attack upon that decision as unsound. The criticisms of the brief are especially directed to a quotation from the opinion in that case as follows: "To hold that five days' notice should be given for a wrong committed by the city itself one hour, or one day, before the occurrence of the accident, and of which the city already has absolute knowledge, would be in the highest degree ludicrous and attribute to the lawmaker a want of foresight, insight and comprehension which we cannot do.

It is true that the statute provides that the city shall be 'absolutely exempt from liability' unless such notice be given, but we must give a reasonable construction to the language of the act. The law never requires an impossible thing. The section presupposes that the defect in the public way must have existed at least five days, otherwise the notice would be impossible." The criticism is that, when the language of the statute is plain and unambiguous, it is not the province of the court to say that the lawmakers acted without foresight and comprehension, if they are acting within their constitutional limitations. The language criticised, however, assumes that it is proper and necessary to ascertain the real intention of the legislature, and that in determining that intention the court will give such construction to the statute as will not attribute to the lawmaker a want of foresight and comprehension, and we are entirely satisfied with the language there used.

Is it true that no liability exists unless provided by statute? There is no express statute making the city liable for damages caused by defects in the street. If it can be said that the liability arises from statute, it is by implication only, and this implication is not derived from the language of the statute or any of its express provisions. It is not derived from a construction of the statute itself. It is rather an implication which the common law raises from the fact that the legislature has conferred certain privileges upon the municipality. When the legislature confers powers upon the city for the advantage of the city itself to enable it to hold its property and to conduct such affairs as are for the benefit of the city in its corporate capacity as distinguished from those powers which relate to its governmental functions, such privileges and benefits carry with them duties and liabilities of the same character as are imposed upon private corporations or individuals, who enjoy corresponding privileges. It is quite generally held that when the city accepts such powers and privileges it accepts them with

the conditions that the common law imposes. The law requires that in using such powers and privileges the city, like individuals, must so use them as not to violate the rights of others, and in doing so must use ordinary care and diligence to avoid injuries to others. This duty is not derived from the construction of the language of the statute, but is derived from the obligations which by the common law accompany such powers and privileges. It seems, therefore, that to say that the liabilitiy is created by statute, without qualification, may be misleading. In *Goddard v. City of Lincoln,* 69 Neb. 594, it was said: "As the liability in such cases must rest on some express or implied provision of the statute, it is clear that the legislature may place such limitations upon it as it may deem proper, or, for that matter, take it away entirely." We have seen in what sense the liability is implied from the provisions of the statute, but what is meant by saying that the statute may take away the liability entirely? It was not necessary in that case to say, and we do not think that the language used must be construed as meaning, that the legislature can confer powers and privileges of the nature above suggested and at the same time relieve the municipality of all liability for their improper exercise. The defendant insists that it can, and to explain this position the following illustration is given: "Suppose the city dug a sewer trench and left it open, and the first night a man fell in and was injured. Would the city be liable?" The question is answered in the negative, and it is argued that to hold that the city would be liable in such case assumes "that somehow the city was liable until the legislature passed a law exempting the city from liability; whereas, on the contrary, there was no liability until the legislature so declared."

Can it be possible that the legislature is competent to authorize a city or any private corporation or individual, in the transaction of its own affairs and for its own benefit, to make a trench across a public thoroughfare and to

take no precautions against dangers to the traveling public, and at the same time relieve the city from any liability for the consequence of such an act? It would seem more reasonable to say that, if the legislature intended to relieve the city from incurring liability for such damages, it should withdraw from the city the power and privilege of constructing such a trench, and that when it is said that the legislature might relieve a city from all liability it is inferred that in order to do so it must prevent the city from engaging in such transactions.

There is no doubt that if the legislature keeps within its constitutional right, and the purpose and meaning of the act are clear and unambiguous, "the court should accept the law as it is." When it is found that the attempted legislation is not prohibited by constitutional limitations of the legislative power, the next thing for the courts to do is to find out, if they can, the intention of the legislature, and when that is determined and declared the duty of the courts in that regard is performed. It is not the duty nor the privilege of courts to change the meaning of constitutional acts of the legislature, nor to modify or enlarge their scope and purpose. The meaning of the legislature must be derived from the language used, all valid legislation on the given subject being considered and construed together. What did the lawmakers intend to do? If there was some apparent evil to be remedied, what remedy did the legislature propose to provide?

The defendant assumes that the object of the statute in question was to relieve the city of some part of the burden of claims for damages of this character. Can it be that the intention was to establish an arbitrary line of division between claims against the city for the purpose, without regard to merit or justice, of lessening the number of claims? Does the written notice required by statute become an essential element of the claim against the city? Was it intended that persons from other parts of the state, who had no means of knowing whether dangerous pitfalls existed or whether notice had been filed

with the city clerk, should be discriminated against? Of course, it will not be presumed that the legislature intended such a result.

The city must act by its agents, and if it sends an agent to do a specified act, as to open a trench across a thoroughfare, that act, when done, is, of course, the act of the city. To provide that a notice must be lodged with the clerk stating that the trench has been opened, and is not being guarded, and that the stranger who falls into the trench within five days after such statement is filed has no remedy, but one who falls into the trench after the five days have expired may recover damages, will no doubt have the effect to limit the number of claims against the city; and so would a provision that under such circumstances none but an inhabitant of the city might recover, or one of light complexion. If the legislature could grant the power to a city to construct such work and allow it to so remain without guarding the public in any way, for a period of five days, and exempt the city from liability for damages, which is at least doubtful, it would not be presumed to have intended to do so, if a different and more reasonable purpose can be derived from the statute.

In another part of the brief a better reason for this legislation is suggested. "What was the purpose of requiring this notice? Clearly, to direct the attention of the proper officers of the city to the fact that at a particular point on one of the public highways of the city there exists at the time a condition in the public highway which renders the street unsafe and dangerous for public travel, a condition likely to result in injury to some traveler on the highway. The purpose of this notice was to enable the city to prevent accidents by repairing or guarding the defect." This is undoubtedly the real purpose of the legislation. The city had been held liable in some cases in which it was uncertain whether the officers of the city had notice of the defect complained of. It was regarded as a question of fact for the jury to determine whether they knew, or the circumstances were such that with reason-

able diligence they must and ought to have known, of the dangerous condition of the streets. And having apparently more regard for the financial interests of the city than for the rights of strangers or danger to the citizens, the legislature purposed to change this. There should no longer be any liability on the part of the city unless its officers actually knew of the defect. It was not presumed that the officers of the city would themselves create the defect. The statute was not necessary nor intended for such a contingency. To so construe the statute would be to hold that the intention of the legislature was to bar a proportion of the claims against the city without regard to the justice of the claims or the conditions under which they arose.

If we suppose that the statute applies in a case like this, what should the notice contain? If prior to this accident the written notice specified in the statute had been filed with the clerk, it must have stated that the original construction of the sewer was negligent, and that the earth had settled over the sewer so that there was danger of the paving giving way, and that the defect was hidden so that ordinary passengers would not discover it. If such a notice had been given, the city authorities must be presumed, pursuant to such notice, to have done precisely what they did do in this case. It appears that for several years prior to this accident the authorities recognized the deficiency in the construction of the sewer and made many attempts, more or less effective, to remedy the defect. Can the defendant now deny liability because such notice was not given? It is generally held that where written notice is required it may be waived by the party entitled to it. The fact that the city knew of the condition of the street and recognized its duty to remedy it, and attempted, however ineffectively, to do so, is equivalent to notice and amounts to a waiver of notice, so that the city cannot now say it had no notice of the defect.

In *Goddard v. City of Lincoln*, 69 Neb. 594, it was held that the plaintiff could not recover because the written

notice required by section 110 of the act governing cities of the first class, which is substantially the same as the statute herein considered, was not given. In that case a sidewalk had become badly and dangerously out of repair. "The boards of the same * * * being loose * * * and one or two boards being entirely removed therefrom, so that said sidewalk was, at said time and place, in an unsafe and dangerous condition." When a walk or a street through wear or some accidental cause becomes in an unsafe condition, the city authorities will perform this duty if the necessity of so doing comes to their knowledge. This at least the statute assumes, and its object and effect is to make certain that the officers of the city shall have such knowledge. The statute requiring notice of the defect to be in writing filed with the clerk is analogous to the statute of frauds. It guards against mistake or perjury in doubtful cases. The proof that notice has been given must be in writing. If the act causing the dangerous condition is done by the officers of the city themselves, the knowledge of its existence is inherent in the act. To suppose that the legislature intended that they must be notified of their own act is to question the judgment and motives of the lawmakers. The defect was not caused by the city, and from its nature must have been without the knowledge of its officers. In such case knowledge must in some way be conveyed to the city officials, and the statutory method of accomplishing this had not been followed. The decision in that case was clearly right, but it furnishes no precedent for a case like this.

In *Schmidt v. City of Fremont*, 70 Neb. 577, the construction of section 39, art. III, ch. 13, Comp. St. 1901, was involved. That section provided that no city shall be liable for damages arising from defective sidewalks, unless written notice of the accident or injury complained of was given within 30 days after its occurrence, and it was held that the plaintiff could not recover because such notice had not been given. The object of that statute was to enable the city officials to properly investigate the nature and

validity of the claim presented. It devolved a duty upon the claimant himself, and made that duty a part of his procedure in establishing his claim, one of the necessary steps in enforcing his remedy analogous to the three days' notice required by the statute of forcible entry and detainer. The case is distinguishable from the one under consideration. Statutes somewhat similar to ours have been considered by other courts, although we have not observed any decisions involving the precise point here presented.

In *City of Houston v. Isaacks*, 3 S. W. 693 (68 Tex. 116), the law as applied in that state is stated in the first paragraph of the syllabus as follows: "A provision in a city charter exempting the corporation from liability to any person for damages caused by a street being out of repair through the gross negligence of the corporation, unless the same shall have remained so for 10 days after special notice in writing to the mayor or street commissioner, does not apply where the city having put a contractor to work upon the street, and after he had commenced work, and made an excavation in the street, rendering it unsafe for travel, discharged him, and left the work in an unfinished condition. A person injured in consequence of such defect in the street may recover of the city though he has not given the 10 days' notice. The city having by its own procurement made the street unsafe, and knowingly left it so, cannot escape behind the charter provisions, as it might if the defect had resulted from any extrinsic cause." In the opinion the court suggests a doubt as to the power of the legislature to exempt a city from all liability in such cases: "The provision is a most stringent one, and its practical effect would seem to be to exempt the city from all liability for such defects as ordinarily accrue. But we cannot say that it should not be enforced in a case to which it is applicable. We are of opinion, however, that it does not apply to the case before us. There may be some reason in requiring notice to the city authorities of a defect accruing from ordinary causes; such as the action of floods, the use of the street

by the public, or it may be said from any cause except by the action of the city itself. But in the present case the city put a contractor to work upon the street, stipulating to have an excavation made which was to be filled with gravel, and, after the work had been begun and the street had been rendered unsafe for travel, discharged the contractor, and left the work in an unfinished condition."

The charter of the city of Fond du Lac, Wisconsin, provided that "no action shall be maintained against the city for injuries caused by any defect in the condition of the street, unless notice in writing, signed by the injured party, shall have been given to the proper persons within five days of the injury," and it was held that the requirement of notice had no application when the plaintiff "was injured through his horse taking fright at a large wooden roller, which had been used in the care of the streets, and left standing therein by the servants of the defendant." The Wisconsin court also suggested a doubt as to the power of the legislature to exempt from liability in such cases. Mr. Chief Justice Cole in the opinion said: "I should have great doubt about the validity of the provision requiring the notice to be *given within five days of the injury,* even if the liability of the city in the case was wholly statutory. The time fixed is unreasonably short, and in many cases could not be complied with. The injured person might be unconscious, or so seriously hurt that he could not state 'the place where, and the time when, such injury was received, and the nature of the same,' within that period; so that the remedy given is coupled with an impossible condition. Such a provision is unreasonable and unjust. * * * It is an arbitrary and unreasonable provision, which professes to give a remedy for an injury, but annexes to it a condition which in many cases cannot be complied with." *Hughes v. City of Fond du Lac,* 73 Wis. 380, 41 N. W. 407.

In *Still v. City of Houston,* 66 S. W. 76 (27 Tex. Civ. App. 447) the ground of the decision is stated in the third paragraph of the syllabus as follows: "A city charter pro-

vided that the corporation should not be liable for any injuries sustained owing to the defective condition of sidewalks, etc., unless such condition should have continued for 10 days after notice to the mayor or certain committees. A city sold certain fences on property through which a street was opened, and authorized the purchaser to remove them, which he did to the knowledge of the city, but he failed to fill a hole left where a fence post was removed, and subsequently a pedestrian stepped into such hole, it being just beside the sidewalk. *Held* that, though no notice of such hole had been given, the charter provision did not protect the city, inasmuch as the act of the purchaser was, under the circumstances, to be considered the act of the city, and the provision had no application to such case." In the opinion the court said: "This action was taken by the very officers to whom the charter required the notice to be given. The city is not sought to be held liable for any injury caused by a defect accruing from any extrinsic cause, but for having by its own procurement made the street unsafe and knowingly left it in that condition."

The charter of the city of Springfield, Illinois, provided that a city should not be liable for damages arising from the bad condition of the streets by reason of the neglect of the proper officers to repair the same, until notice was given and reasonable time given to make the repairs. The action was for damages for injuries sustained by falling into a sewer which was being made in one of the streets of the city. While the statute did not purport to exempt the city from liability in all cases where the notice had not been given, but only in case the proper officer had negligently failed to repair the defect, still that court expressed a doubt as to the propriety of such a clause. "Laying out of view all consideration of the propriety of such a clause, and its inconsistency with other provisions of the charter, and with established rules of law, it is very manifest it cannot apply to this case. * * * The injury complained of was not the result of a defective

street, which a traveler upon it might have noticed and reported, but for permitting the sewer in it to be excavated in a manner hazardous to the safety of the people." *City of Springfield v. Le Claire,* 49 Ill. 476.

In *City of Dallas v. McAllister,* 39 S. W. (Tex.) 173, a sewer on one of the principal streets had caved in, leaving a dangerous depression up and down the street ten or twelve feet long. It had been there about two months. The driver of a wagon was going around this broken place in the paving where the street appeared to be solid, when the sewer caved in under the wagon, causing the injuries complained of. It was held that, since the testimony tended to show a connection between the original break and the one through which the injury occurred in such a manner as to indicate that in repairing the former the cause of the latter would have become known, the city was liable for the damages, notwithstanding a clause in the charter which provided that no action should be maintained against the city for injuries caused from streets being out of repair from the gross negligence of the city, unless the same shall have remained so for ten days after special notice in writing to the mayor or city engineer, and no such notice had been given. The court said: "The evidence, however, shows that the entire sewer was defective and dangerous from the place of the accident down to the original caving in, a distance of 15 or 20 feet, for it is testified to that, when the wagon went down, the ground caved all the way down to the other cavity. It is therefore a reasonable inference that the sewer was in an unsafe condition all the way down, and that notice of this would have followed ordinary care in repairing the first break; hence, the city must be taken to have had knowledge of it, and be chargeable with the consequences."

In *Adams v. City of Oshkosh,* 36 N. W. 614 (71 Wis. 49), the case is stated in the syllabus as follows: "Plaintiff's horse was killed on a principal street of a muncipal corporation by running, in the night-time, upon a pile of gravel and stones placed there by an employee of the city

while repairing the street. In an action to recover the value of the horse, *held,* that the provision of the charter 'that the city shall not be liable to or for any damages arising or growing out of any sidewalks, streets, drains, sewers, gutters, ditches, or bridges in said city being in a defective or damaged condition, or out of repair, unless it be shown that previous to the happening of the same one of the aldermen of the ward in which the same is located had knowledge thereof,' etc., does not apply to obstructions placed in the street by an employee of the city while in its employ." The court said in the opinion: "There is no claim that either of the aldermen of the ward had actual notice of the obstruction in the street, nor that it had existed for three weeks; so that, if the statue applies to an obstruction placed in the street by an employee of the city while engaged in repairing said street, the plaintiff did not make out a case. After a careful consideration of the statute, we think it was not the intent of the legislature to cover a case of this kind. In the case at bar the aldermen of the ward, in discharging a duty imposed upon them by law, were in fact engaged in repairing the street in question, and one of their employees negligently permitted the obstruction to be placed in and remain in said street. We think, in a case of this kind, the act of the employee while engaged in his employment must be considered as the act of the aldermen of the ward, and that the city, through the action of its ward officer, permitted the obstruction to be placed in the street and to remain there. It cannot be supposed that the legislature intended to release the city from damages caused by the action of its officers in repairing its streets, when its employees create the obstruction, because such officers had no actual notice of the obstruction. In such case the acts of the employees are the acts of the officers, and their knowledge must be construed to be the knowledge of the employer. This would be the rule in every other case, and we cannot think the legislature intended to alter so just a rule in favor of the city."

In *MacMullen v. City of Middletown,* 187 N. Y. 37, it was held that the requirement in a city charter that written notice should be given of the existence of snow or ice on sidewalks is constitutional. The court said: "The charter created a liability for a neglect of the duty to remove snow and ice from the streets and sidewalks and gave a remedy by action. * * * The requirement is the expression of the legislative will that the notice of the defective condition of the public way, which has occasioned the injury sustained, shall be of so certain a character as to charge the corporation with actual knowledge. It was always the legal rule that notice should be brought home to the corporation, or facts from which notice was reasonably inferable. In order that something more certain than constructive notice should be relied upon, provisions were inserted in municipal charters that 'actual notice' of the alleged defect must be shown." This was perhaps all that it was necessary to say in deciding the case. In the absence of any statute upon the subject, the city would not be required to remove the snow as fast as it fell upon the walk. It would only be liable if it knew that the walk had become dangerous by reason of the accumulation of snow and ice and failed to protect the public by causing it to be removed. No one could doubt the power of the legislature to prescribe the manner of giving such notice and the method of proof that the city officials had such knowledge when notice was necessary; but the court discussed at great length the question whether removing snow and ice from walks is a governmental function, and concludes that it is, contrary to the view of most other courts, and especially of this court as expressed in *Burke v. City of South Omaha,* 79 Neb. 793, and *Tewksbury v. City of Lincoln,* 84 Neb. 571. The language used in the opinion in *MacMullen v. City of Middletown, supra,* which appears to be in conflict with our conclusion in this case, is based upon the proposition that such duties are governmental functions. The reasoning upon this question in *Tewksbury v. City of Lin-*

coln, supra, and other authorities there cited, preclude this court from accepting such a view.

In *Parsons v. City and County of San Francisco,* 23 Cal. 463, it was held that the city was not liable in consequence of its streets or highways being out of repair. The statute exempting cities from such liability was held to be constitutional, but this is put expressly upon the ground that the statute afforded the injured parties a complete remedy. It made the person or persons on whom the law may have imposed the obligation to repair such streets, and also the officer or officers through whose official negligence such defects remained unrepaired, jointly and severally liable to the parties injured. This was thought to be a complete remedy, and if the officer by whose negligence the injury was caused and his official bonds are presumed to be responsible, the remedy would appear to be complete.

In *Williams v. City of Galveston,* 41 Tex. Civ. App. 63, it was held that the city was not liable for damages caused by a defective bridge. The charter provision exempting the city from such liability was upheld. This opinion also placed the decision upon the theory that the repair of bridges is a governmental function. It is said in the opinion: "The counties in the state are held exempt from liability for the negligent construction or maintenance of public highways, and the act in question does no more than place the city of Galveston upon a plane with the counties."

If this court were not already fully committed to the doctrine that in the performance of such duties the cities are not exercising governmental functions, it might be thought necessary to further discuss this question.

It was complained in the brief that there were some errors in the instruction of the court to the jury, but these supposed errors are not discussed at length. For the most part objections made to the instructions are derived from principles already discussed, and it does not appear to be advisable to prolong this opinion after hav-

ing devoted so much space to the main question involved. We have found no errors in the instruction requiring a reversal of the judgment.

The judgment of the district court is

AFFIRMED.

ROSE, J., concurring.

I concur in the affirmance on the grounds that the statute requiring notice does not apply to the defects of which complaint is made in plaintiff's petition.

ROOT, J., dissenting.

I am unable to concur in the majority opinion. The courts are not in accord concerning the principle controlling the liability of a municipal corporation for personal injuries inflicted by reason of its defective streets. In *City of Omaha v. Olmstead,* 5 Neb. 446, we held that the city, in accepting its charter and the privileges therein bestowed, by implication promised the state to perform the duties thereby cast upon the municipality, and individuals injured by the city's failure to keep its promise had a right of action against the city. "The acceptance of these privileges is considered as raising an implied promise on the part of the city to perform its corporate duties; and this implied agreement made with the sovereign power inures to the benefit of every individual interested in the proper performance of such duties." 5 Neb. 446, *supra.* In *Goodrich v. University Place,* 80 Neb. 774, the law is reexamined, and the liability of a city for personal injuries is again based upon its implied contract with the sovereign state. Judge Dillon suggests there is no contractual relation between the state and a municipality in those cases where the city may not reject, but is compelled to accept, its charter. 2 Dillon, Municipal Corporations (4th ed.) sec. 967. Judge Dillon admits, however, that the reason given by us in *City of Omaha v. Olmstead* and *Goodrich v. University Place, supra,* for holding a city liable in personal injury cases,

sustains many decisions imposing a like liability upon municipalities. If the law may raise an implied promise by a city and fasten a liability upon it for a failure to keep that promise because the city has acted under a charter it is powerless to reject, it seems arbitrary and unjust to deny the city the benefit of those immunities specifically granted the city therein.

The defendant's charter (Comp. St. 1907, ch. 12*a*, sec. 207) provides that it "shall be absolutely exempt from liability for damages or injuries suffered or sustained by reason of defective public ways or the sidewalks," unless notice in writing of the defect shall have been filed with the city clerk at least five days before the accident occurred. And, further, "in the absence of such notice, so filed, the city shall not be liable." If, as suggested in the majority opinion, the legislature does not have the power to absolutely exempt a city from liability to respond in damages to those injured by reason of its defective streets, or may not lawfully provide that such a liability shall not arise unless the city shall have had notice in writing of the defect before such accident occurs, the statute is void if construed according to its terms. No principle of law is cited to sustain the suggestion made in the majority opinion. No adjudicated case has been referred to, nor do I believe one can be found, to sustain the proposition that the legislature may not, by the enactment of a statute uniform as to the class of cities upon which it operates, exempt a municipality from all liability because of personal injuries inflicted by reason of its defective streets or alleys. On the other hand, statutes granting such an exemption have been sustained by courts of last resort. *O'Harra v. City of Portland,* 3 Or. 525; *Rankin v. Buckman,* 9 Or. 253; *Wilmington v. Ewing,* 45 L. R. A. (Del.) 79; *Williams v. City of Galveston,* 41 Tex. Civ. App. 63.

In the opinion filed in the last cited case, the court did say, as suggested in the majority opinion, that the effect of the statute is to reduce the city's liability to that of a

county. The majority opinion is also correct in stating that we hold that a city in controlling its streets exercises corporate and not governmental functions, but that question was not involved in the Texas case. The supreme court of Texas is in harmony with our decisions upon that subject. The real point determined in *Williams v. City of Galveston, supra,* was that the legislature had the power to relieve a city from the liability theretofore imposed upon it by judicial construction. Having the power to grant complete immunity, it follows as a matter of course that the legislature may extend a qualified exemption to the city. We so held in *Goddard v. City of Lincoln,* 69 Neb. 594, where a statute identical in terms with the one considered in the case at bar was construed and upheld. That case did not involve the mere determination of the power of the legislature to relieve the city from liability in cases resting upon imputed notice to the city that a sidewalk was defective. The plaintiff in the *Goddard* case alleged in his petition that the sidewalk at the point where his intestate was injured was unsafe and dangerous by reason of the absence of boards which had formed a part of the way, and that the defendant city had "full knowledge" of said defect for a long time prior to the accident. The defendant's demurrer to the petition was sustained, and we affirmed the judgment of the district court. The constitutionality of the statute was raised, considered and determined in the *Goddard* case, and we held that, although the city had knowledge for a long time prior to the accident of the defect responsible for the injury, the defendant was not liable because the statutory written notice had not been given. See, also, *McNally v. City of Cohoes,* 53 Hun (N. Y.) 202; *MacMullen v. City of Middletown,* 187 N. Y. 37. But it is said that a fair consideration of all the other legislation upon the subject, in connection with the statute concerning notice and the apparent evil to be remedied thereby, will convince the impartial, judicial mind that the statute should not be literally construed. There is no ambiguity in the

statute under consideration; it is not inconsistent with any other provision in the city charter, nor does it conflict with any other legislative act. Under these circumstances the court should hesitate before applying rules of construction to read exceptions into the written law inconsistent with the context and tenor thereof. *Morrill v. Taylor,* 6 Neb. 236; *State v. Liedtke,* 9 Neb. 468; *State v. Moore,* 45 Neb. 12; *Stoppert v. Nierle,* 45 Neb. 105.

It is argued, however, that in *Tewksbury v. City of Lincoln,* 84 Neb. 571, we departed from the literal meaning of the Lincoln charter, and for that reason are not bound by the language employed by the legislature in the statute under consideration in the instant case. *Tewksbury v. City of Lincoln* was a hard case, and if it is authority for the majority opinion should be overruled; but I am not willing to concede so much. In that case, while employees of the city of Lincoln were engaged for their master in flushing a sewer during cold weather, they negligently sprayed a street crossing so that it became slippery and dangerous. The plaintiff, while those servants were at work and by reason of such negligence, slipped, fell and was injured. We said: "The law never requires an impossible thing. The section presupposes that the defect in the public way must have existed at least five days, otherwise the notice would be impossible." A well-recognized rule of statutory construction was thereby applied. 2 Sutherland (Lewis), Statutory Construction (2d ed.), sec. 516. The instant suit presents no such feature, and the rule ought not to be applied. It is suggested, however, that where the defect has been caused by the city it has knowledge of the fact, waives the written notice, and the statute does not apply. This argument proceeds upon the assumption that the legislature did not intend to release the city where it had knowledge of the defect. We held to the contrary in *Goddard v. City of Lincoln, supra.* Furthermore, a municipal corporation is without perception, intellect or memory, and all knowledge acquired or notice received by it must be

by imputation from the knowledge of or notice to some of its officers or agents. In the case at bar the defendant's negligence is inferred from the alleged fact that in 1887, 20 years before the plaintiff was injured, the municipality failed to properly tamp the dirt on each side of and above a sewer 24 inches in diameter laid 20 feet beneath the surface of a street in said city; that subsequently the dirt settled in said trench, and the city paved the street so as to conceal the open trench. The defendant's liability, however, is predicated solely upon the alleged failure of the city to properly tamp or otherwise settle the dirt in said trench in 1887. That there may be no uncertainty upon this point I quote the eighth paragraph of the district court's charge to the jury: "You are instructed, as a matter of law, the plaintiff cannot recover in this case unless the city was negligent in the construction of said sewer; that is to say, failed to use ordinary care and caution in tamping or ramming the dirt when refilling said sewer. And if the plaintiff has failed to satisfy you by a preponderance of the evidence that the city so failed, or if you find the evidence evenly balanced, then you should find for the defendant."

The judicial mind may logically reason and understand that whatever knowledge the city's agents or officers may have acquired in 1887 concerning the negligent tamping of earth in said sewer was by some process communicated to a conscious municipal mind and continued within the memory and understanding of that intangible person for two decades, but the layman may be excused for refusing to accept that logic. The mere fact that courts do thus reason is a satisfactory explanation for the enactment of the statute under consideration. Many cases are brought against a city for personal injuries where the doctrine of *respondeat superior* is invoked to induce and justify a judgment. Where any considerable period of time exists between the happening of the alleged negligence and the injury to the plaintiff, there is fully as much probability that the city will be wrongfully mulcted in damages, as in

those cases where imputed notice to the city of a defect in its streets caused by the negligence of third persons, or the action of the elements, is the basis for the demand. In the case at bar the defendant's negligence, if established, is demonstrated by the testimony of a member of the defendant's city council in 1887, who testified, in substance, that once or twice a day while the contractor was filling said trench he noticed the methods employed by the workmen, and observed that the specifications in the contract between the contractor and the city were being ignored. This evidence was supplemented by expert testimony. There is proof to the effect that at intervals subsequent to the construction of said sewer, and up to within about a year before the accident, the city had refilled parts of said trench and repaired the pavement along the line of the sewer, but the testimony further shows that the soil in Omaha is of a peculiar texture, and when used to fill excavations will settle, notwithstanding all known ordinary methods may be used to make it firm. An impartial consideration of the facts and the well-known inclination of juries to accept slight proof to support a finding of notice to a municipality of defects in its streets leads to the belief that the legislature intended to make the city's liability depend upon the statutory written notice in all cases where a defective street is the proximate cause of an injury.

Judge Gray, in *MacMullen v. City of Middletown*, 187 N. Y. 37, gives a logical reason for statutes like the one considered in the instant case: "The novelty of the case, in the feature of the statutory requirement that a written notice shall have been given, is explained in the legislative purpose to make that certain, which before was, often, uncertain. The fact of knowledge should no longer be dependent upon inferences from the evidence of circumstances; nor the liability of the municipality be left to a determination reached upon an indulgent construction of the legal rule as to actual notice." I do not understand the opinion in the cited case to hold, as suggested

in the majority opinion, that the city was exempt from liability because the removal of snow and ice from sidewalks is a governmental function; the court recognizes that the defendant, in the absence of legislation upon the subject, would be liable for its neglect in such a case. I again take the liberty of quoting from the opinion: "Where the charter of a municipal corporation is silent upon the subject, the legislature may be regarded as having left its liability to depend upon the general rule that, if the power conferred relates to the accomplishment of corporate purposes, for the corporate benefit, the corporation is as a private company and there attaches the same responsibility as there would to a legal individual, if possessing like powers and franchises. But where the charter voices the will of the legislature, upon the subject of the responsibility of the political agency of the state to answer to the complaint of a private individual, it announces a rule of conduct which is to govern the relations of the municipality with its citizens. No right is thereby taken away; but relative rights are defined, which are to be binding upon those who choose to remain residents of the municipality."

The opinion further demonstrates that in the distribution through charters to municipalities of governmental powers and administrative duties, there is no constitutional limitation upon the regulative power of the legislature. The legislature may specifically impose a liability, in cases like the one at bar, may attach conditions thereto, leave the citizen to the judge-made law upon the subject, or exempt the municipality from all financial responsibility. The legislature has prescribed conditions precedent to the defendant's liability for its defective streets, which shield it from the plaintiff's claim. If the statute works a hardship to the citizen, the legislature should remedy the evil by an amendment to the law. We should not destroy the statute under the guise of construing its meaning.

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

LETTON, J., dissenting.

The facts in this case do not bring it within the rule of the *Tewksbury* case, where the injury was the immediate and direct result of the negligence of the city's servants. In the present case the city is held liable for a latent defect in its streets, caused by a contractor 20 years before the accident.

In my opinion, the city is not liable in the absence of the statutory notice.

IN RE ESTATE OF NANCY BRUSHA.

FILED JUNE 10, 1910. No 16,021.

1. **Executors and Administrators:** APPOINTMENT: NOTICE. When the probate court orders service of notice of application for appointment of an administrator for an intestate estate by publication, the order being somewhat ambiguous in its language, and afterwards a publication is made such as the court might have ordered under the provisions of the statute and such as the order of the court might be reasonably construed to authorize, and the court approves and acts upon such service and appoints an administrator, the refusal of the court to set aside such appointment for want of legal notice thereof will be sustained.

2. ———: CLAIMS: ALLOWANCE: LIMITATIONS. It is erroneous for the probate court to allow against the estate of a deceased person a claim that is on its face barred by the statute of limitations.

3. ———: ———: SETTING ASIDE ALLOWANCE. When the probate court allows a claim against a decedent's estate, with the consent of the administrator, and at the same term a party interested as heir of the estate, who has not consented to such allowance, shows to the court by petition that a substantial part of the claim so allowed appears upon the face of the claim to be barred by the statute of limitations and asks that the allowance be set aside, such petition should be granted.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Judgment of district court reversed and judgment of county court affirmed as modified.*

John C. Watson, for appellant.

L. F. Jackson and *E. F. Warren, contra.*

SEDGWICK, J.

Nancy Brusha died at her residence in Otoe county in April, 1907. A son survived her, and also a brother and two sisters. Afterwards her brother, George W. Hawke, filed in the county court of Otoe county a petition for the appointment of an administrator of the estate of the deceased. In that petition he alleged that the son of the deceased, William Brusha, was about 40 years of age, and that his postoffice address is unknown "and has been unknown to your petitioner or any relative of said Nancy Brusha for 18 years or more." Upon this petition Robert Payne was appointed administrator, and afterwards the said George W. Hawke filed his claim against the deceased with the county court of said county, which was allowed by the court, and the said William Brusha afterwards filed his petition in the county court to set aside the appointment of the said administrator and the allowance of all claims that had been allowed against the estate, and especially the claim of the said George W. Hawke. The administrator and the said George W. Hawke filed separate demurrers to the said petition, which were sustained, and the petition was dismissed. William Brusha thereupon appealed to the district court, and upon hearing in that court the judgment of the county court was affirmed, and the petitioner has appealed to this court. While the proceedings have been pending in this court the claimant has died, and the proceedings have been revived in the name of his administrator.

1. The first contention is that the order appointing the administrator is void for want of sufficient notice. The statute provides: "When application shall be made to the judge of probate for the appointment of an administrator of an intestate estate, or for letters of administration with the will annexed, he shall cause the notice of the same, and of the time and place of the hearing thereof, to be given by personal service on all persons interested, or by publication, under an order of such court, in such newspaper printed in this state as he may direct." Ann. St. 1909, sec. 5060. This statute leaves the matter to the probate court to determine what publication shall be made in case personal service is not had upon the parties interested. Pursuant to this statute the court ordered "that notice of these proceedings be given by publishing a copy of this order in the Nebraska City News, a newspaper printed in said county once a week, three successive weeks prior to said day of hearing." It appears from the proof of publication that the Nebraska City News is a daily paper, and that this notice was published daily therein, except Sundays, commencing on the 21th day of April and ending on the 8th day of May, so that the first publication was two weeks before the day of hearing. The notice was not published for three full weeks, but it was published more than once in each one of three several weeks. The language of the order in this respect is perhaps somewhat indefinite, and whether this publication is to be regarded as a compliance with the order depends upon the construction to be given to the order. Under the statute above quoted it was of course competent for the court to order the publication as it was in fact made, and, as the court has so construed the order by approving and acting upon the publication, we are of opinion that the publication was sufficient. The order appointing the administrator upon this notice should not be vacated.

2. The second contention of the petitioner is more serious. It appears that pursuant to the statute the county court made an order in regard to the hearing of claims

against the estate as follows: "All creditors of said deceased will meet the administrator of said estate, before me, county judge, in said court, at Nebraska City, in said county and state, on July 9th, 1907, September 9th, 1907, and November 9th, 1907, at 2 o'clock P. M., each day for the purpose of presenting their claims for examination, adjustment and allowance. Creditors have until November 9th, 1907, but no longer, in which to file their claims in this court against said estate." There were numerous claims filed and allowed against the estate, and among them, as before stated, a claim of the brother, George W. Hawke. The amount of the claim as filed was $1,529.09. A part of the claim was barred by the statute of limitations, as appeared upon the face of the claim. The total amount of the claim not so barred by the statute of limitations was $1,108.64, and the claim was allowed at $1,217.59, so that upon the face of the record itself it appeared that more than $100 had been allowed that was barred by the statute of limitations. In section 221 of the decedent act (Comp. St. 1909, ch. 23), it is provided: "No claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate as a set-off or otherwise." Section 610 of the code makes sections 602 to 611, inclusive, applicable to probate courts, and section 610 contains the following language: "In estimating time, the probate court shall, for this purpose, be considered as holding, in each year, three terms of four months each, the first commencing on the first day of January of each year." The order allowing the claim complained of was made on the 9th day of September, 1907, and the petition to vacate that order was filed during the same term of the probate court, to wit, on the 8th day of November, 1907, and, as already noticed, the time limited by the court for adjusting claims against the estate had not yet expired. The petition alleges that the petitioner was then and had for several years been a resident in California, and that he was not aware of the death of his mother, or the proceedings

that were being taken in regard to her estate. The probate court, of course, had complete control of its proceedings during the term in which they were entered, and under the circumstances above cited we think that the showing of diligence on the part of the petitioner was sufficient, and that the county court's attention being called at the same term to the fact that with the consent, as this record shows, of the administrator a claim had been allowed, a substantial part of which was barred by the statute of limitations, the order should have been set aside, and a rehearing had upon the claim.

For these reasons, the judgment of the district court is reversed, and the judgment of the county court modified so as to set aside the order allowing the claim of George W. Hawke. In all other respects the judgment of the county court is affirmed. All costs are taxed against the estate of George W. Hawke.

JUDGMENT ACCORDINGLY.

IRETUS W. JACOBY, APPELLANT, V. GUS A. VIELE, APPELLEE.

FILED JUNE 10, 1910. No. 16,039.

Specific Performance: AGREEMENT TO EXECUTE LEASE. When an agreement to sell and convey land includes also an agreement on the part of the purchaser to lease to the vendor certain buildings and improvements situated on said land, and by accident and oversight of the parties the lease is not executed at the time of the execution and delivery of the deed, and the vendor of the land retains and uses the said buildings and improvements for a part of the agreed term of lease, an action in equity may be maintained to enforce the execution of such lease and to restrain the purchaser of the land from interfering with the possession and use of said buildings and improvements during the agreed term of the lease.

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

Burr & Marlay, for appellant.

George A. Adams, contra.

SEDGWICK, J.

A general demurrer was sustained to the plaintiff's petition in the district court for Lancaster county and a judgment entered dismissing the same, and the plaintiff has appealed to this court.

The petition alleges that in February, 1907, the plaintiff and several others were the joint owners of three separate tracts of land; that these three tracts of land had been used as one farm and owned by the same parties for a great many years, and had a dwelling house and other farm improvements thereon; that plaintiff had resided in the dwelling house for more than 30 years, and that at the time named the plaintiff and other owners of the said tracts of land entered into negotiations with the defendant to sell and did afterwards sell to the defendant one of the three said tracts of land, and that at that time a part of the farm improvements above named were located on the tract so sold to the defendant, consisting of several corncribs and a buggy house, and that these improvements occupied substantially an acre of ground upon the tract sold to the defendant, which ground was surrounded by a wire fence; and that during the said negotiations for the sale of the said tract to the defendant, and as a part of the same negotiations and contract, it was agreed between the plaintiff and all parties interested with him on the one part, and the defendant on the other part, that the defendant, when he received his deed for the said tract of land, should execute and deliver to the plaintiff a lease for the said acre of ground and the said corncribs and buggy house thereon for the term of ten years at the agreed rental of $10 a year, which the plaintiff agreed to pay him therefor, but by mere oversight at the time the said deed was delivered the defendant failed

and neglected, in closing up said negotiations, to execute and deliver to plaintiff the said lease, and the defendant has removed some of the said improvements from the said acre tract, and is threatening to remove them and exclude the said plaintiff from the use of the said tract and improvements.

It is argued in the brief of the defendant that the agreement to lease this acre of land and improvements is within the statute of frauds, and, not having been put in writing, is void. This contention of the defendant cannot be sustained. If the agreement of these parties had been that the stipulation in regard to the lease of this acre of ground and the cribs and other improvements thereon should be inserted in the deed, and the provision was omitted from the deed by accident or oversight, there could of course be no doubt that an action to reform the deed would be sustained, and we see no distinction between such an action and the case now at bar. If the contract of the parties had been completed as it was agreed upon, the deed and the lease would be construed together as one contract, and would be virtually one writing, and this action is therefore essentially an action to reform the written contract and make it as it was agreed upon and intended to be by the parties.

It is suggested in the defendant's brief that some of the allegations of the petition are untrue. With this, of course, we have nothing to do. We must take the allegations as they are, and when the defendant has answered and the proof is taken, the court can determine the merits of the controversy.

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

REVERSED.

CHARLES A. HETZEL, APPELLEE, V. HORACE G. LYON ET AL., APPELLANTS.

FILED JUNE 10, 1910. No. 16,089.

1. **Statute of Frauds: BROKERAGE CONTRACT: PAROL MODIFICATION.** A contract of agency between a landowner and broker or agent for the sale of the land of the former, which by its terms limits the time of its continuance, may be modified by parol so as to extend the time of the existence of the agent's authority to sell under the contract.
2. **Appeal: ADMISSION OF EVIDENCE.** It is not reversible error to admit in evidence a written contract, when the substance of the contract is already in evidence and the record contains no contradiction of such evidence.

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

C. Patterson, for appellants.

Albert W. Crites, contra.

SEDGWICK, J.

The plaintiff recovered a judgment against the defendants in the district court for Sheridan county for $500 as commissions on a contract for the sale of lands of the defendants. The defendants have appealed to this court.

The contract between the parties authorizing the plaintiff to sell the lands of the defendants was in writing, signed by both parties, and described the land to be sold, and set forth the compensation to be allowed the agent. It also contained the following stipulation: "This contract shall terminate at the end of 60 days from date, unless an extension of time is made in writing and attached hereto." It was dated July 5, 1906. No agreement in writing was made by the parties extending the time of the contract. The evidence shows that after the expiration of the time named in the contract the plaintiff, at the solicitation of the defendants, continued to

endeavor to find a purchaser for the land, and that in September, 1907, he found a purchaser and sold the land to one Weidling, which sale was satisfactory to the defendants. It seems that other agents claimed to have something to do with the sale of the land and to be entitled to the commissions. The defendants settled with them, and took their bond indemnifying the defendants against any claims that the plaintiff might make for commissions.

The principal question raised and discussed by the defendants in their brief is whether a contract of this kind, which contains a limitation of the time of its continuance, can be extended by a parol agreement between the parties upon sufficient consideration, or whether such agreement extending the time of the contract must be in writing, signed by the parties thereto. We consider that this question has already been determined by this court. In *Rank v. Garvey*, 66 Neb. 767, the question was presented whether such a contract of agency could be modified by parol agreement so as to change the price at which the agent was authorized to sell the land, and it is said in the opinion that "the instrument granting the agent authority to sell, as originally given, would have been sufficient to meet the statute, even though it had not named the price at which the agent could sell. It follows, therefore, that the parties were at liberty to modify by parol such portions of the contract as the statute does not require should be in writing." Applying this rule to the case at bar, it must be said that the statute does not require that the time for the existence of the agent's auhority to sell must be stated in the written contract, and therefore that is one of the provisions that may be modified by parol. This disposes of the principal question in the case.

It is urged in the defendants' brief that the court erred in allowing the plaintiff to introduce in evidence the contract of guarantee above referred to. It appears that the deposition of Mr. Weidling, to whom the land was sold by plaintiff, was taken and read in evidence, and that as

a part of that deposition there were attached certain letters written by the defendant Horace G. Lyon to Mr. Weidling, and in one of them, dated December 28, 1907, in which the defendant details some of the particulars of his controversy with the plaintiff in regard to these commissions, the defendant says: "I settled with the Maverick people on this basis, and took their receipt in full and a bond fully indemnifying me against any judgments, costs or personal expense from any suit that Hetzel had brought or might bring." It is stated in the plaintiff's brief, and, so far as we have been able to ascertain, correctly stated, that these letters were put in evidence before the jury without objections on the part of the defendants. There is other evidence of the same general nature which appears to have been received without objection, and this evidence, so far as we have seen, was not contradicted. It therefore appears that the defendants have not been prejudiced by the introduction of the indemnifying bond in question.

All the other objections urged in the brief depend entirely upon matters already disposed of, and we find no reversible error in the record.

The judgment of the district court is therefore

AFFIRMED.

JULIA C. BENSON, APPELLANT, V. HERMAN B. PETERS, APPELLEE.

FILED JUNE 10, 1910. No. 16,440.

1. **Appeal:** EVIDENCE: REVIEW. When a judgment is reversed by this court for want of evidence to support it, and the cause remanded for another trial, and the evidence upon another trial is the same as on the former trial, the question as to the sufficiency of the evidence will not be again examined.

2. **Evidence:** CONCLUSIONS. In a jury trial, a question that calls for the conclusion of a witness on the issue being tried is incompetent.

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

Weaver & Giller, for appellant.

Greene, Breckenridge & Matters, contra.

SEDGWICK, J.

This is the second appeal in this case. The opinion upon the former appeal is reported in 82 Neb. 189, where a sufficient statement of the nature of the case may be found. Upon the first trial the plaintiff recovered a judgment which was reversed in the opinion referred to. Upon another trial in the district court the judge, after hearing the evidence, instructed the jury to find a verdict for the defendant, and the plaintiff has appealed.

The plaintiff insists that the evidence was sufficient to require that the case be submitted to the jury, but at the same time it is conceded that the evidence is precisely the same that it was upon the former trial, in which it was held by this court to be insufficient to support a verdict in favor of the plaintiff. The real cause of complaint of the plaintiff upon this hearing is in the exclusion of evidence, and in regard to this the plaintiff in the brief says: "Upon this trial of the case in the district court before his Honor Judge Day, Mrs. Benson undertook to supply the link which the majority of the supreme court held was wanting." The plaintiff was a chambermaid in the Merchants' hotel in Omaha, and the defendant was the proprietor of the hotel. Her alleged cause of action was that she was required to go from the rooms where she worked to her meals by way of the freight elevator to the basement, and then to the kitchen, and that at the time of her accident the basement was dark, and she, in stepping from the elevator, slipped and sprained her ankle. In the former opinion it was said: "The sum of the evidence intended to connect the alleged carelessness with the injury is that the basement was dark and that

the plaintiff slipped and sprained her ankle. There is no evidence indicating that the darkness was responsible for the injury. The alleged carelessness has not been shown to be the proximate cause of the injury sustained."

On the last trial the plaintiff's counsel asked her, while she was upon the witness stand: "Would you have slipped and been injured if the light had been turned on?" This was excluded upon objection, and the plaintiff excepted. She was then asked: "What caused you to slip and sprain your ankle?" which was likewise excluded. She then offered to show in answer to these questions that the cause of her slipping and spraining her ankle was the darkness, which would not allow her to see where she was stepping. She was told that she might describe the conditions and describe what she did, but not state her conclusions. The witness had already testified that there was an electric lamp near the elevator, but the light was not turned on, and that the girls sometimes turned on the light from the elevator as they went down, but that she did not do so on this occasion; that it was dark on this occasion when she stepped out, and that when she stepped onto the step from the elevator, "I got injured, I sprained my ankle, my foot. Q. How did you sprain it? A. By stepping on the board. Q. What was the matter with the board? A. It was slippery, I think." She was then asked: "And was it dark—or was it so that you could not see where you were stepping?" This question was objected to by the defendant as leading and suggestive, but the objection was overruled, and she answered: "I could not see where I was stepping, but I thought I was stepping on the board or the plank." Then she was asked: "Would you have slipped and been injured if the light had been turned on?" This question, as has already been stated, she was not allowed to answer, and this ruling is manifestly correct. This was the principal question that the jury was called upon to answer, and in the condition of the evidence, and under the former decision of this court, it was the very gist of the case.

There being no other error complained of, the judgment of the district court is

AFFIRMED.

CITY SAVINGS BANK, APPELLANT, V. MARY E. CARLON, APPELLEE.

FILED JUNE 10, 1910. No. 16,583.

1. **Pleading:** DEMURRER. The merits of a general demurrer to a petition must be determined from the allegations of the petition alone.

2. **New Trial:** PETITION IN EQUITY: DEMURRER: PRESUMPTION. Upon a general demurrer to a petition in an action in equity for a new trial of a civil action at law on the ground of newly discovered evidence it will be presumed that the facts found upon the former trial will be found the same upon the new trial, unless the petition for new trial shows that additional evidence can be produced as to such facts.

3. ———: NEWLY DISCOVERED EVIDENCE. The courts will not grant a new trial on the ground of newly discovered evidence unless it appears probable that a different result may be reached.

4. ———: FALSE TESTIMONY. Evidence tending to show that the prevailing party upon the former trial testified falsely upon a vital issue in the case, which false testimony if believed might have controlled the decision, is material; and if it appears that the defeated party was without fault or negligence in not producing such evidence, and that the same can be produced on another trial, and might probably change the result, a new trial should be granted.

5. ———: DILIGENCE. The allegation of the petition examined, and *held* to be sufficient to show due diligence to procure for the former trial the evidence which it is alleged has been discovered since that trial.

6. **Receivers:** LIABILITY OF PARTIES FOR ACTS OF RECEIVER. A receiver appointed by the court in the progress of litigation acts as receiver for all of the parties interested; but he is not the agent for the parties in the sense that each of the parties interested in the litigation is personally severally responsible for his wrongful or negligent acts.

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

William Baird & Sons, for appellant.

H. H. Bowes and *E. C. Hodder, contra.*

SEDGWICK, J.

The injury complained of in this case occurred in September, 1903. It was alleged that an old cistern on the property occupied by the bank had been filled, and the work was so carelessly and negligently done by the bank that, while Mrs. Carlon was passing on the walk that had been laid over the cistern, the walk gave way and she was injured. The case has been several times tried to a jury, and this is the third time it has appeared in this court. *Carlon v. City Savings Bank,* 82 Neb. 582, 85 Neb. 659. Upon the last jury trial in the lower court, Mrs. Carlon had a substantial judgment against the bank, which was affirmed by this court. Shortly after, the bank began this action in the lower court to obtain a new trial of the cause on the ground of newly discovered evidence, showing that the plaintiff in the former proceedings had prevailed by means of fraud and perjury. In its petition the bank alleges that, in her action against the bank, Mrs. Carlon alleged that the bank was the owner of the premises of which she was in possession as tenant, and that there was on said premises, between the dwelling house and an outhouse, under a sidewalk, an open cistern, which the bank undertook to fill, and in attempting to fill said cistern used frozen dirt and manure, and placed back over the cistern a walk which was rotted underneath and weakened by age, and that the filling of said cistern was negligently done, and that she, while passing over said walk, broke through the same, and by reason thereof sustained injuries. The petition herein also alleges that the bank answered in that action that it did not own, and was not

in possession or control of, the premises described at the time of the alleged filling of said cistern, and did not fill or cause said cistern to be filled, and that said plea was true and was a complete defense to said action. The petition herein further alleges that at the time the cistern was filled the premises occupied by Mrs. Carlon as tenant were in possession and under the control of William K. Potter, receiver of the Omaha Loan & Trust Company, who also collected the rents and appropriated the same to his own account, as receiver, and who was in no respect authorized to represent the bank in any way, and that the cistern was filled in the month of November, 1902, and that the said Potter retained possession and control of the same, collecting the rents and appropriating the same until the month of March, 1903, when by order of the court he turned over the control of the premises to the bank, and that the bank then took the premises without any knowledge of the existence of said cistern or the alleged filling of the same on said premises until after the happening of the accident complained of, and that one Badgerow was an employee of the bank and in possession of the premises in question from and after the 19th day of March, 1903, and that Mrs. Carlon, for the purpose of inducing the court and jury to believe that the bank caused said cistern to be filled, testified on the trial of said cause that she notified said Badgerow within a week of the 19th day of March, 1903, of the existence of said cistern, and that said Badgerow thereupon proceeded to cause said cistern to be filled, and that said testimony was wholly untrue, and that said Badgerow did not cause said cistern to be filled or know of the existence of the same until some time in the month of August, 1903, and that said cistern was in fact filled by and under the direction of an employee of William K. Potter, receiver, in the month of November, 1902, long before the bank took charge of said premises; that the verdict of the jury and judgment of the court against the bank in favor of Mrs. Carlon was based upon the aforesaid false testimony. The petition herein

further alleges that the said Potter, as receiver, kept books of account, among which was a journal of original entries, and in which, in the regular order of business, there was entered an account of the employment by the said receiver of one Laritsen to fill the said cistern and the payment of him for the said services by the said receiver. A copy of the alleged entry is set out in the petition, from which it appears that it was entered on the 21st day of November, 1902.

There seems to be no doubt of the competency of this evidence, and that it might have great weight in determining the principal issue presented in this case, which was whether the bank in fact caused the cistern to be filled and so was chargeable with any negligence in performing the work. The defendant, however, insists that the plaintiff has not shown proper diligence to procure this evidence upon the trial of the case. Determining this cause upon the allegations of the petition alone, and not anticipating what the evidence as to diligence may be upon issues properly joined, we are of opinion that due diligence is shown. It appears from the allegations of the petition that this record, which it is now sought to use in evidence, was one of the books kept by the Omaha Loan & Trust Company, and that afterwards the books connected with this receivership were "stored in the garret of the court house" of Douglas county, and that the officers and attorneys of the bank were not aware that the books had been so stored, and that they employed one Weeden before the trial of the action in which the judgment was rendered to find the account books of the receiver; that the said Weeden was chief clerk of the Omaha Loan & Trust Company prior to the appointment of Potter as receiver, and was retained by Potter after his appointment, and had charge of the books which were taken and used by Potter as receiver, and knew the book which contained the rent account of these premises; that the plaintiff was informed and believed that Weeden was the person who had the best means of knowing and of finding

the said book, and that Weeden was a competent and reliable person and the most likely to find the whereabouts of said book, and after diligent and thorough search and inquiry before the trial of said action the said Weeden was unable to find the said book, and the same could not be obtained to be used on the trial, but it has now by accident been ascertained that the books were stored as aforesaid and the said rent account book can be procured to be used at the trial. It is also alleged in the petition that Mrs. Carlon, upon the trial, testified that she did not know who was the workman employed to perform the labor of filling the cistern, and that the plaintiff was unable to ascertain the name of the party so employed, and that Mrs. Carlon's testimony in that regard was false; that she did know that one Jens Laritsen King, who was commonly known among his associates as Laritsen, performed the work, and that some time prior to the trial in which she obtained the judgment she took said Laritsen to the office of her attorneys for the purpose of finding what his testimony would be if called as a witness, and after asking him questions told him that she did not want him as a witness, and that if a new trial of this case is had the plaintiff can produce the said Laritsen as a witness and prove by him that the said cistern was filled in November, 1902, and that he was employed by Potter, and not by the bank, to do the work. The petition is very lengthy, and we cannot set it out in full, but we do not find any allegations in the petition that are inconsistent with the allegations already referred to, or that tend to show a lack of diligence on the part of the plaintiff to procure the new evidence which it now appears can be procured.

It is further urged by the defendant that upon the former hearing of this case in this court it was determined by this court that the said Potter, who is now in this petition admitted to be the party who filled the said cistern, was in so doing acting for the bank. It may be that, if upon the evidence presented upon the former appeal it

was determined by this court that the said Potter was agent for the bank and so acted in filling the said cistern (this petition admitting that the said Potter caused the said work to be done), the bank would now be bound by the former adjudication that Potter acted for the bank in filling the cistern, unless it was further alleged in the petition that new and additional evidence upon that point could now be obtained. The courts will not grant a new trial of a cause on the ground of newly discovered evidence, unless it is made to appear probable that a different result will be reached, and if it was determined upon the former trial that Potter acted for the bank in filling the cistern it would be presumed that another trial would result the same, unless it appears that new evidence could be procured upon that point. We do not, however, find from the opinion, as it is reported in 85 Neb. 659, that it was determined that Potter acted for the bank in doing this work. It is said, on page 662, that some time in the year 1901 the Omaha Loan & Trust Company, which was the agent of the Omaha Loan & Trust Company Savings Bank, became insolvent, and that Potter was at that time appointed as receiver thereof, and that for a time as such receiver and agent for the defendant bank he collected the rent for the premises in question. Of course, a receiver appointed by the court in the progress of litigation acts as receiver for all of the parties to the litigation and may be said in some sense to that extent to be agent of all the parties, but he is not the agent in the sense that the parties to the litigation have employed him and can control his actions. He is the arm of the court and is under the control of the court, and the parties to the litigation are not necessarily responsible for the wrongs which he may commit as receiver. By receiving the property at the hands of the court on the termination of the receivership, the bank did not adopt all of the acts of the receiver while in control of the property under the orders of the court, and would not thereby make itself responsible for the wrongdoing of the receiver in the course of his re-

ceivership. The bank had no control of the receiver; he took his orders from the court, and not from the litigants. It is not said in the opinion referred to in what sense he acted as agent for the bank, nor is it said how long he continued to act as such agent after his appointment as receiver in 1901. The decision is put upon the ground stated in the next sentence of the opinion, to wit: "That before the repairs were made the defendant bank had taken charge of the property and was collecting the rent." This statement was predicated upon the very evidence that is complained of as false and fraudulent. It is the statement of a conclusion of fact that, of course, is never regarded as the law of the case when, upon another trial of the same case, additional evidence can be procured bearing upon the point so stated. This the petition alleges can be done in this case. If the new evidence which the bank alleges it can procure should tend to show that the cistern was filled before the property was turned over to the bank, that might require a different finding of fact. Upon another trial it would be competent to furnish additional evidence as to whether the repairs were made before or after the property was turned over to the bank, and that is the purpose of the new evidence which the bank now alleges it can procure.

We cannot consider evidence taken before the district court nor affidavits filed in this court in determining the sufficiency of this petition. The attorneys for Mrs. Carlon discuss many things in their brief and in the oral argument that would be very pertinent to an investigation upon issues joined, but are not presented by the allegations of this petition. They cannot be considered upon this demurrer. The court should have required the defendant to answer, and the question as to the materiality of the evidence now offered and the diligence or lack of diligence of the bank should have been determined upon evidence received upon the trial of the issue so presented.

The judgment of the district court is reversed and the

cause remanded for further proceedings in accordance with this opinion.

REVERSED.

STATE, EX REL. JAMES G. EMERSON, RELATOR, V. ANTON BAUMAN, JR., SHERIFF, RESPONDENT.

FILED JUNE 11, 1910. No. 16,705.

Habeas Corpus: RETURN: REMAND: RECOGNIZANCE. Where, upon the return of the respondent to an order in habeas corpus, it appears without question that the petitioner stands charged in a court of competent jurisdiction with the commission of a bailable offense against the laws of this state, and the sureties on his recognizance fixed by the examining magistrate are for any cause released from liability, this court will not discharge the petitioner, but will remand him to the district court where such charge is pending, and require him to enter into a proper recognizance in such amount as this court shall deem reasonable for his appearance to answer to the charge there lodged against him.

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

John W. Graham and *Frank Dolezal,* for relator.

J. C. Cook and *Loomis & Maynard, contra.*

BARNES, J.

Original application for a writ of habeas corpus.

It appears from the pleadings and affidavits before us that the petitioner, James G. Emerson, was arrested at Arlington, Nebraska, on the 26th day of May, 1910, on a charge of forging a bank check for $492 and having it cashed by the Commercial National Bank of Fremont, which is situated and doing business in that city in Dodge county, Nebraska, and he was thereupon lodged in the county jail of that county. At the time of his arrest the petitioner was searched, the money which he had obtained upon the forged check was found upon his person

and was returned to the bank. He was again searched, and there was found secreted in his clothing the sum of $5,200 in currency, which the sheriff took into his possession. That money, however, was afterwards turned over to his attorneys. Complaint was duly filed before the county judge of Dodge county on the 28th day of May, 1910, charging petitioner with the crime of forgery and uttering the forged instrument. To this complaint he pleaded not guilty, waived his preliminary examination, and was bound over for his appearance at the next term of the district court for Dodge county, with bail fixed at the sum of $2,500. The state insisted that the amount of bail required was insufficient to secure the petitioner's attendance to answer the charges preferred against him, and objection was also made to the financial responsibility of the security tendered. The objections were overruled, the bond was approved by the examining magistrate, and the petitioner was discharged. He was immediately rearrested upon suspicion of his having committed another crime in the state of Iowa. Sufficient evidence was not procured to warrant his detention upon that charge, and he therefore petitioned the district court for a writ of habeas corpus. A hearing was had thereon, the writ was awarded, and he was discharged. While that matter was pending before the district court the county attorney filed a transcript of the proceedings before the county judge upon the petitioner's preliminary examination on the charge of forging and uttering the forged instrument, and immediately upon his discharge under the writ of habeas corpus he was again arrested, or taken into custody by the state, pending a hearing upon a motion which had been filed by the county attorney in the district court to increase the bond theretofore fixed by the examining magistrate to a sum sufficient to secure his attendance at the next term of the court to answer to the complaint, and also to require other and further sureties on the bond. The petitioner filed objections to the jurisdiction and to the competency of the judge then presiding in the district

court, which at that time was in session, and thereupon the hearing upon the motion or motions above mentioned was continued until such a time as the other judge of that district could reach Fremont, pending which time the presiding judge ordered the petitioner to give an additional bond of $1,500, which he failed to do, and immediately thereafter commenced this proceeding.

Counsel for the petitioner strenuously contend that the order of the examining magistrate fixing the amount of the petitioner's bond, and approving the surety thereto, was a final order which rendered the whole matter *res judicata,* and the district court was without power or authority to increase the amount of bail or require the giving of additional security. We think this contention is beside the mark. It appears from the application in this case that the petitioner stands charged before the district court for Dodge county with the commission of a bailable offense, and we are of opinion that the state, by rearresting the defendant and taking him from the custody of his surety upon the bond fixed and approved by the examining magistrate, has released the surety thereon. Therefore the petitioner is now before us charged with a bailable offense against the criminal laws of this state, without bond.

It is provided by section 358 of the criminal code relating to habeas corpus that, "When the said judge shall have examined into the cause of the caption and detention of the person so brought before him, and shall be satisfied that the person is unlawfully imprisoned or detained, he shall forthwith discharge such prisoner from said confinement. And in case the person or persons applying for such writ shall be confined or detained in a legal manner, on a charge of having committed any crime or offense, the said judge shall, at his discretion, commit, discharge, or let to bail such person or persons, and if the said judge shall deem the offense bailable, on principles of law, he shall cause the person charged as aforesaid to enter into recognizance, with one or more sufficient securi-

ties, in such sum as the judge shall think reasonable, the circumstances of the prisoner and the nature of the offense charged considered, conditioned for his appearance at the next court where the offense is cognizable; and said judge shall certify his proceedings, together with the recognizance, forthwith, to the proper court; and if the person or persons charged as aforesaid shall fail to enter into such recognizance, he or they shall be committed to prison by such judge." Having examined the showing made upon this application in compliance with the provisions of the section above quoted, we are of opinion that it is our duty to require the petitioner to appear at the next term of the district court for Dodge county to answer to the charge there lodged against him; and we are of the further opinion that under all the circumstances of this case the amount of his recognizance should be, and is hereby, fixed at the sum of $4,000.

It is therefore ordered that the petitioner's application to be discharged from custody be, and the same is hereby, denied; and he is remanded to the custody of the sheriff of Dodge county to answer to the charge contained in the complaint lodged against him in the district court for that county, and upon his giving a suitable recognizance in the sum of $4,000, with surety to be approved by that court, or any judge thereof, the petitioner will be released; but upon a failure to give such recognizance he shall be committed to the jail of Dodge county and there remain to await the further action of the district court, or until such time as he shall be lawfully discharged from custody.

JUDGMENT ACCORDINGLY.

WILLIAM N. HUNTER, APPELLEE, V. CORA MAY BUCHANAN, APPELLANT; WARREN D. TIBBITS ET AL., APPELLEES.

FILED JUNE 29, 1910. No. 16,046.

1. **Insane Persons: SALE OF LAND TO PAY DEBTS.** A sale of real estate by a guardian of an insane ward, under license for the purpose of paying debts due from the ward, is a proceeding *in rem*, and not adverse to the interests of the ward.

2. ———: ———: **NOTICE.** In such cases the provisions of section 49, ch. 23, Comp. St. 1909, do not require the service of the notice of the application for a license to be made upon the insane ward.

3. ———: ———: **APPROVAL OF BOND: COLLATERAL ATTACK.** Where a license was legally issued for the sale of the real estate of an insane ward, the property sold for its value, the sale confirmed, deed made, and the proceeds duly accounted for by the guardian, the sale will not be held void upon collateral attack for the sole reason that the guardian's bond required by section 54, ch. 23, Comp. St. 1909, made to the judge of the district court, was not formally approved by such judge.

4. ———: **GUARDIAN AD LITEM: DUTIES: APPEAL.** The duties of a guardian *ad litem* duly appointed by a court to defend the interests of an insane ward do not necessarily terminate with the decision of the case in which he was appointed, but he has authority, in a proper case, to appeal said cause to the court of last resort.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

W. F. Moran, for appellant.

Paul Jessen and *E. F. Warren, contra.*

REESE, C. J.

The facts in this case, as shown by the pleadings and evidence, may be briefly stated as follows: In 1891 Cora May Buchanan was the owner in fee of lots 1 and 2, in block 3, in Gray's addition to the village of Syracuse, Otoe county, in this state, and was managing and controlling her own property. There was a small house on lot 2.

Lot 1, a corner lot, was vacant. Desiring to build a house on lot 1, she applied to W. E. Page, a lumber dealer in Syracuse, for the loan of sufficient money for the construction of the house, or that she be furnished with the material necessary for that purpose and for which she could pay a part of the purchase price. A contract was entered into and the material furnished and for which she made a partial payment, but much less in amount than what she had promised and doubtless thought she could pay. The material was furnished and the house partly constructed. Mechanics' and laborers' liens accumulated, which were canceled by Page until he had invested in the property between $880 and $900, and which were claims against Mrs. Buchanan and largely, if not entirely, against the property. In the meantime Mrs. Buchanan had become insane and not competent to transact her own business or manage her property or affairs, nor had she the means whereby the indebtedness could be paid or her house completed. Her mother, Mary A. Tibbits, and her three brothers, Emery D. Tibbits, Arthur D. Tibbits and Warren D. Tibbits, were residents of Otoe county, and were her only prospective heirs and the only persons interested in her personal or financial welfare; she being a widow and childless. Her father was deceased and she had no near relatives save those above named. She was placed in the hospital for the insane near the city of Lincoln, where she now is, with no prospect of recovery. Soon after her failure to complete her house on lot 1, and on the 30th day of July, 1902, Emery D. Tibbits, one of the brothers above referred to, was duly appointed her guardian by the county court of Otoe county, he having qualified as required by law, and entered upon the discharge of his duties as such guardian. Subsequently thereto he made his application to the judge of the district court for Otoe county for license to sell lot 1 for the purpose of paying the liens upon the property, alleging that its value was $800. The county commissioners gave their approval of the proposed sale,

the license was granted, bond was given by the guardian, and the lot sold to W. E. Page for the sum of $725, the sale confirmed and deed executed. The price for which the lot was sold was applied to the payment, in part, of Page's claims; the unpaid remainder was canceled by him, so that the real results of the sale were more than the value of the property. The only alleged defect in this proceeding was the failure to serve notice on Mrs. Buchanan, and it is claimed that for that reason the sale was void. This presents the question as to whether such notice was essential to the jurisdiction of the court granting the license.

In support of the contention that such notice was necessary to confer jurisdiction and that the sale without it was void, we are cited to *Myers v. McGavock,* 39 Neb. 843. In that case the guardian applied for a license to sell the real estate of his minor wards for the purpose of raising funds to be used in their maintenance and education, and the contention was made that the sale was void for the reason that the notice of the application was not served upon the wards. That contention was based on section 49, ch. 23, Comp. St. 1909 (Ann. St. 1909, sec. 5418), which is as follows: "A copy of such order shall be personally served on the next of kin of such ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or shall be published at least three successive weeks in such newspaper circulating in the county as the court shall specify in the order." The court, by a commissioner, held that, as the proceeding had for its object the maintenance and education of the wards, and therefore for their benefit, it was not adversary and no notice as to them was necessary. It is true that the commissioner held in the opinion, by way of argument, but not deciding any question involved in the case, that had the application been for any other purpose than the maintenance and education of the wards a different rule would have been applied and a notice would have been necessary. But this was purely dictum, and such

holding was in no sense necessary to the decision of the case then pending.

We have searched the statute in vain for any intimation of a rule different in one case from the other. It is provided in section 22, ch. 34, Comp. St. 1909 (Ann. St. 1909, sec. 5392) that guardians, whether for minors or other persons, "shall pay all just debts due from the ward out of his personal estate and the income of his real estate, if sufficient; or if not, then out of his real estate, upon obtaining a license for the sale thereof, and disposing of the same in the manner provided by law." The statutes confer jurisdiction upon the district court and the judge thereof to grant licenses to guardians to sell the real estate of their wards. If it is proper and legal to issue the license in a case brought for one purpose, it must be equally so in all, for the statutes make no distinction. As bearing upon the question upon whom the notice must be served, under the provisions of section 49, above quoted, reference might be made to section 109 of the same chapter, which provides: "All those who are next of kin and heirs apparent or presumptive of the ward shall be considered as interested in the estate, and may appear and answer to the petition of the guardian, and when personal notice of the time and place of hearing the petition is required to be given, they shall be notified as persons interested according to the provisions respecting similar sales by executors and administrators, contained in this subdivision." Such are the "persons interested in the estate," referred to in section 49. We think it must be conceded that there is no direct provision of the statute requiring notice of the application to be served upon the ward.

In *Mohr v. Manierre*, 101 U. S. 417, a question quite similar to this was under consideration by the supreme court of the United States. In that case the contention arose upon the alleged failure of the guardian of an insane ward to publish notice in the manner provided by the statutes of Wisconsin, some claiming that the notice was,

and others that it was not, published for the full period required by the statute. In writing the opinion Mr. Justice Field said: "We shall assume, however, that the notice was not published for the full period prescribed, and the question for consideration is whether such omission, all other requisites of the statute having been complied with, rendered the order of the court invalid *as against the plaintiff Mohr,* the then lunatic; or, in other words, whether such publication was essential to the jurisdiction of the court to grant the license to sell." After stating the statute and discussing the subject at some length it is said: "It is apparent from these sections that the publication of notice of the hearing is only intended for the protection of parties having adversary interests in the property, and is not essential to the jurisdiction of the court. It may be dispensed with if the parties having such interests consent to the sale. The consent could not be signed by the lunatic, for he, by his condition, would be incapable of giving a consent; and yet upon the others' consent, the court could proceed to act without notice to him. Nor, indeed, was there any reason why publication of notice should be made for other parties than those who held adversary interests. The lunatic could not be affected by such publication any more than by his consent. The application of the guardian to the county court was required by the law only as a check against any improvident action by him. There was nothing in the nature of the proceedings which required a notice of any kind, so far as the rights of the lunatic were concerned. The law would have been free from objection had it simply authorized, upon the consent of the court, a sale of the lunatic's property for the payment of his debts. The authority of the court in that case, as in this, would have existed to license the sale whenever it appeared that the personal estate of the lunatic was insufficient to pay his debts, and that a sale of his real property was necessary for that purpose. There is no charge of fraud in the action of the guardian, nor is it

suggested that the property sold did not bring a fair price. The simple question is whether, as against the lunatic, the license to sell was invalid for insufficient publication of notice of the hearing, the same being, as already stated, required only for the protection of other parties interested in the estate. The decision of this court in *Grignon's Lessee v. Astor,* 2 How. (U. S.) *319, to which we have already referred, would seem to be decisive on this point. Indeed, it goes beyond what is required for the affirmance of the judgment here."

The case of *Mickel v. Hicks,* 19 Kan. 578, cited in *Myers v. McGavock, supra,* is not in point in that case nor in this, to the extent that the question there was as to the proceedings of an administrator in the sale of real estate under the statutes of that state in the matter of giving notice. The question arose as to whether the sale of real estate by an administrator was not a proceeding *in rem?* Judge Brewer, in writing the opinion, says: "An examination of the authorities discloses a wonderful disagreement"—citing a number of cases holding that they do. He, however, gives his adherence to the opposite view, apparently, that, upon the death of the owner of real estate, the title and possession pass immediately to his heirs; that it is not sold as of course, but only when necessary to pay the debts of the deceased; that until that fact is judicially established the heirs may not be divested of their title, and before one is divested of title to property he ought to have his day in court.

In *Scarf v. Aldrich,* 97 Cal. 360, the statute required the order of the sale of the ward's real estate to be "personally served on the next of kin of the ward, and upon all persons interested in the estate," etc. (which is identical with the statute in this state), or the publication thereof for three successive weeks. It was contended that by reason of a defective notice the sale was void. It was also contended that proceedings by a guardian for the sale of his ward's land were adverse to the ward, and that a substantial compliance with the statute was a pre-

requisite for obtaining authority to proceed. Upon this part of the case the court said: "Respondent's principal error lies in the first part of his contention, viz., that the proceedings are adverse to the ward; for in fact the proceedings are by the ward and for his benefit. Our statute does not require that notice shall be given to or served upon the ward, thus emphasizing what is apparent from the nature and object of the proceeding, and clearly distinguishing it from a proceeding by an administrator to sell the real estate of the intestate to pay debts, which is clearly adverse to the heir, and therefore a valid and sufficient notice to the heir is essential to give the court jurisdiction over him as party to the proceeding. But in the case of guardians' sales, the minor is in court by the filing of the petition, and submits his property to the jurisdiction and order of the court. An order for the sale of the property is not an order against or adverse to the minor, but is a granting of his request. It is not a judgment *in personam,* but operates only on the property, and is therefore *in rem.*" See, also, *Agricultural Ins. Co. v. Barnard,* 96 N. Y. 525.

In 21 Cyc. 125, it is said in the text: "In many jurisdictions it is held that in the absence of a statutory requirement notice is not required to be given upon application for the sale of the land of minors"—citing cases from a number of states. It must be conceded that, aside from the holdings of the court in this state, there is, to use the language of Judge Brewer in *Mickel v. Hicks, supra,* "a wonderful disagreement" of authorities. It is true, we think, that practically all agree that if a proceeding by a guardian to sell real estate of his ward is not adversary, but in the nature of a proceeding *in rem,* and the statute does not in terms require the notice to be served upon the ward, the failure to cause such notice to be served will not render the sale invalid. Many of the courts have held that the application to sell real estate by an administrator is an adverse proceeding, while a similar application by a guardian to sell the land of his ward is

not, but we do not call to mind any case holding the reverse, the reasons given being substantially as stated in *Mohr v. Manierre,* 101 U. S. 417, herein above referred to. In this state it has been heretofore held in at least two cases that an application by an administrator to sell real estate belonging to the estate of which he is such administrator is not an adversary proceeding, but *in rem. McClay v. Foxworthy,* 18 Neb. 295, and *Schroeder v. Wilcox,* 39 Neb. 136, which are followed and approved in *Brusha v. Phipps,* 86 Neb. 822, decided during the present term of this court. Such being the rule adopted in this jurisdiction, it follows with the stronger reason that it must be held to apply to the sale in question, and that it was not void. We therefore hold that the sale of the lot referred to as lot 1 was valid and transferred the title thereto to the purchaser.

The attack made upon plaintiff's title to lot 2 is upon the ground that the bond of the guardian given to the judge of the district court in connection with the application for license to sell said lot 2 was approved by the clerk of the district court, and not by the judge, as required by section 5423, Ann. St. 1909 (Comp. St. 1909, ch. 23, sec. 54), and that for that reason the sale of said lot was void. In support of this contention the case of *Bachelor v. Korb,* 58 Neb. 122, in connection with a number of decisions of other courts, is cited. So far as the record shows, every essential step in the proceeding, except as to the approval of the bond, was regular and in strict accordance with the requirements of the statute. With the exception of the testimony of E. F. Warren, Esq., who was the attorney for the guardian in the application for license to sell, the record is bare of any facts in connection with what occurred at the time the bond was approved. Mr. Warren stated frankly upon the witness stand that, as the transaction occurred some three or four years before the giving of his testimony, his memory was not clear upon the subject. He was asked to give his best recollection of the transaction. His answer

was: "As I recollect this proceeding, I came into court when Judge Jessen (judge of the district court) was on the bench. It was in the morning. I then presented to him the papers in the case, together with the bond for signature, and that he was busy hearing some other matters, and he said to take it to the clerk of the court. Now, that is my recollection of the way that was. Of course, as I said before, I wouldn't swear to it, because that was about three or four years ago," and that he then took the bond to the clerk. There is no showing in the record that the district court was not in session on the date of the approval of the bond, and we must assume that Mr. Warren's recollection in that particular was correct. Had he been mistaken, the attorney representing the opposite side of the case would certainly have shown it; the records being at hand at the time. This being true, the act of the judge and clerk must be held to have been the action of the court, and the question arises, would this slight deviation render the whole proceeding void? The bond was made payable to the judge of the district court as required by law.

In *Bachelor v. Korb, supra,* it is said, quoting from the opinion: "This bond was never presented to, nor in any manner approved by, the judge of said district court. It was, however, filed in the court and approved by the clerk thereof." So far as is shown by the decision, the court was not in session and the bond was filed in vacation without the knowledge or acquiescence of the judge, and wholly without his direction or approval, and the sale was held void. In this respect that case is to be distinguished from this and is no authority for holding the sale in this case void. In the course of the opinion the writer, at page 127, refers to the opinion written by himself in *Myers v. McGavock,* 39 Neb. 843, and quotes from what is said at page 865, a part of which is as follows: "On the trial of the case at bar the defendants proved by the attorney who conducted the proceeding on behalf of the guardian that the bond was in fact presented to and ap-

proved by the presiding judge. The fact of the approval of the bond, like any other fact, might be proved by the best evidence attainable. We are of opinion, however, that in this collateral proceeding the guardian's deed could not be declared void because the bond filed for the purpose of obtaining the license to sell the real estate was not formally approved. *Emery v. Vrooman,* 19 Wis. *689; *Pursley v. Hayes,* 22 Ia. 11; *Hamiel v. Donnelly,* 75 Ia. 93."

We have examined the cases cited and find that they fully and without reservation sustain the reasoning of the commissioner in both the *Bachelor v. Korb* and *Myers v. McGavock* cases, *supra,* and that by the reasoning and logic of both cases the sale in this case should be held valid. It may not be amiss to here state that the record and proofs as touching both sales involved in this inquiry show that the utmost good faith has characterized every step taken by the two guardians (brothers of Mrs. Buchanan) and by the purchasers of the lots in question. In each case the property was sold for its full value, and her estate has received full and due credit and actually received the benefits of the amounts for which the lots were sold. There is no semblance of fraud on the part of any one connected with either of the transactions, and we the more readily affirm the decision of the district court.

After this suit was commenced, the defendants, the Tibbits, having failed to answer, a default was entered against them, including Warren D. Tibbits, the guardian of Mrs. Buchanan. The court then appointed Mr. W. F. Moran guardian *ad litem,* who filed his answer consisting of a general denial, and alleging a number of affirmative defenses. Subsequently the guardian and other members of the family obtained leave and answered, setting up the facts and in substance admitting plaintiff's equities. The guardian *ad litem* remained in the case, seeking to support the title of the ward, and when the cause was determined in favor of plaintiff took this appeal. Practically

from the date of the filing of the answers by the general guardian and other presumptive heirs of Mrs. Buchanan there arose something of a contention between the general guardian and the guardian *ad litem* as to the right of the latter to maintain control of the defense and take this appeal. A motion to dismiss the appeal was filed in this court and overruled. At each step of the proceedings the authority of the guardian *ad litem* has been questioned, as matter of law, and we are asked to decide the question as to the continued powers of such guardian. In 22 Cyc. 706, the subject of the powers of guardians *ad litem* is discussed and cases cited in support of the text, but of which the limited time at our disposal will not permit a review. It must be sufficient to say that it is there shown that such guardian does not become *functus officio* by the rendition of a judgment or decree in the cause in which he has been appointed, but that he may take and prosecute an appeal therefrom. In all cases he should exercise care to subserve and conserve the interests of his ward alone. *Wirth v. Weigand,* 85 Neb. 115.

The judgment of the district court is in all things

AFFIRMED.

LETTON and SEDGWICK, JJ.

We concur in the conclusion, but express no opinion as to the third point in the syllabus and the second point discussed in the opinion.

FAWCETT, J., dissenting.

I am unable to reconcile the majority opinion with section 54, ch. 23, Comp. St. 1909, or with the construction of that statute so clearly and distinctly made in *Bachelor v. Korb,* 58 Neb. 122. The section of the statute reads: "Every guardian licensed to sell real estate, as aforesaid, shall, before the sale, give bond to the judge of the dis-

trict court with sufficient surety or sureties, to be approved by such judge, with condition to sell the same in the manner prescribed by law for sales of real estate, by executors and administrators, and to account for and dispose of the proceeds of the sale in the manner provided by law."

In construing that statute in *Bachelor v. Korb*, the first three paragraphs of the syllabus read as follows:

"(1) The provision of the statute (Comp. St. 1897, ch. 23, sec. 54), requiring a guardian licensed to sell the real estate of his wards to give a bond to the judge of the district court, to be approved by such judge, is mandatory.

"(2) The district courts are not invested with discretion to require or not a guardian appointed in this state, when licensed to sell lands in this state of his wards, to give the bond required by said section 54.

"(3) Such a guardian's sale of the lands of his ward is void unless, before such sale, the guardian executes the bond required by said section 54. The judge of the district court granting the license must be the obligee in the bond, and it must be approved by such judge."

It is not disputed that the district judge did not approve the bond. The uncontradicted evidence shows that the attorney for the guardian tendered the bond to the district judge while he was upon the bench hearing a case, and that the judge, without even looking at the bond, directed counsel to take it to the clerk. The bond was taken to the clerk and by him approved. In my judgment, and under the rule announced in *Bachelor v. Korb*, the bond was absolutely void. It will not do to say that the action of the judge while upon the bench, in directing the attorney to take the bond to the clerk, was an approval by the court. If the statute permitted the approval of such bond by the court, I think it is clear that that would have been sufficient. But the court is not given the power to approve such bond. The bond must run to the district judge and must be approved by him as judge, and not when sitting as a court. Such a proceeding is

purely statutory and the statute must be literally complied with. The fact that the purchaser acted in good faith and paid a full consideration for the property cannot avail him anything. He was bound to know that the guardian had no authority to make the sale. In the eighth paragraph of the syllabus in *Bachelor v. Korb,* we held: "The rule of *caveat emptor* applies to a purchaser at a guardian's sale of the real estate of his ward."

In *Veeder v. McKinley-Lanning Loan & Trust Co.,* 61 Neb. 892, *Bachelor v. Korb, supra,* is cited with approval and quoted from as follows: "The rule of *caveat emptor* applies to a purchaser at a guardian's sale of the real estate of his ward. * * * But the defendants in error, though they may have paid a valuable consideration for this real estate, are not innocent purchasers of it. One who purchases real estate at a guardian's sale, or purchases from the vendee of that sale, must take notice at his peril of the authority of the guardian to make the sale. The doctrine of *caveat emptor* applies to purchasers at guardians' sales."

In *Neary v. Neary,* 70 Neb. 319, we again put the seal of our approval upon *Bachelor v. Korb* in the following language: "The cases of *Bachelor v. Korb,* 58 Neb. 122, and of *Veeder v. McKinley-Lanning Loan & Trust Co.,* 61 Neb. 892, are instructive cases upon the doctrine followed in this state."

If I could see any way to affirm the judgment in the case at bar without doing violence to the statute and to our former holdings, I would be glad to do so. But, however unfortunate the situation of the purchaser at the guardian's sale may be, the court, in my judgment, is powerless to give him any relief in this case.

VALERIA W. COAD, APPELLANT, V. MARK M. COAD, APPELLEE.

FILED JUNE 29, 1910. No. 16,081.

1. Marriage: CIVIL CONTRACT: RULES APPLICABLE. The contract of marriage being a civil contract, the rules to be applied thereto must be, to a great extent, the same as are applied to other contracts.

2. ———: ESTOPPEL. If one party to such relation induces the other to believe, in good faith, that the contract is made and is binding, the law will hold the party taking such advantage to the full terms of the agreement as in other cases.

3. ———: ———. Subject to the terms of the contract, the acts and conduct of the parties, if one party to the agreement is known by the other to rely, in good faith, upon the validity and binding force of such contract of marriage, the other party will be bound by it.

4. ———: COMMON LAW MARRIAGE. Proof of a common law marriage, if sufficient to establish the relation, will sustain an action for divorce and alimony to the same extent as though the marriage were solemnized in strict accordance with law and usage.

5. ———: EVIDENCE. While the mere fact of the repeated indulgence in sexual intercourse is not of itself conclusive proof of the marriage relation, yet such fact is always a proper subject for consideration in connection with and after evidence of the agreement to enter, *in præsenti*, into the matrimonial state.

6. ———: PRESUMPTION. When there is evidence of an agreement of marriage, valid at common law, and the proof of continued sexual intercourse is unquestioned, the law will presume the acts of the parties to have been lawful and in accordance with the well-recognized rules of good morals and social duty, rather than that they were criminal and in violation of good morals and social obligations, as the law does not presume that people intentionally do wrong.

7. ———: EVIDENCE. Where the evidence as to the fact of the entry into the relation of husband and wife by present agreement is conflicting, the subsequent conduct and actions of the party sought to be charged may be considered as circumstances tending to throw light upon the question of the truth of the allegation that such contract was made.

8. ———: ———. The evidence, referred to at some length in the

opinion, is examined, and it is *held* that the actions and conduct of defendant in connection with his letters, written to plaintiff, tend more strongly to establish the status of husband and wife than that of the criminal relation of libertine and mistress.

9. ———: ———. The letters and correspondence between the parties subsequent to the alleged entry into the marriage relation do not contain, in direct terms, any reference to the contract or relation, nor did either party, in terms, hold out or represent to the community at large that such relation existed. It was testified to by plaintiff, and denied by defendant, that their conduct in that behalf was by mutual agreement and at the request of defendant, based upon reasons which were satisfactory to plaintiff and to which she assented. This, if true, would sufficiently explain the conduct of the parties in that respect. The conduct of the parties tended strongly to support the contention of plaintiff.

10. ———: ———. Under all the evidence it is *held* that the marriage relation exists between the parties, and that plaintiff is entitled to a divorce and reasonable alimony.

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

Price & Abbott and *George L. Loomis,* for appellant.

Isaac E. Congdon, W. J. Coad and *Hall, Woods & Pound, contra.*

REESE, C. J.

This is an action for divorce and alimony. It is alleged in the amended petition that on the 1st day of January, 1905, plaintiff and defendant "entered into a contract of marriage, whereby plaintiff and defendant entered into the relation of husband and wife," neither being under any disability, and that that relation has existed between them from that date hitherto. Such facts are stated in the petition as, if sustained by the evidence, would constitute a common law marriage and entitle plaintiff to a divorce. It is averred that defendant is the owner of property in this state of the value of $800,000, and that

plaintiff is without means. The averments of the petition need not be stated with any greater particularity. The answer of defendant is a general denial. A trial was had in the district court involving the examination of a great number of witnesses, the evidence being presented here in a bill of exceptions of over 600 pages. The trial resulted in a finding and decree in favor of defendant, and plaintiff appeals.

The real, and practically the sole, issue upon which the determination of the cause depends is as to whether or not there was such an agreement and contract between the parties, followed by cohabitation, etc., as to create what is termed a common law marriage. If that relation existed at any time, it has not been dissolved, and, under the evidence as to the subsequent conduct of defendant, plaintiff would be entitled to a decree in her favor. If, however, that relation did not in law exist, the decree against her will have to be affirmed.

The law governing common law marriages is pretty well settled in this state by our former decisions and will not be herein discussed with the view of throwing any new or further light upon the subject. We need only refer to the following among other cases: *Gibson v. Gibson*, 24 Neb. 394; *Olson v. Peterson*, 33 Neb. 358; *Bailey v. State*, 36 Neb. 808; *University of Michigan v. McGuckin*, 62 Neb. 489, 64 Neb. 300; *Eaton v. Eaton*, 66 Neb. 676, annotated in 1 Am. & Eng. Ann. Cas., 199; *Sorensen v. Sorensen*, 68 Neb. 483, 490, 500, 509. Marriage being a civil contract, the rules to be applied must be, to a great extent, the same as are applied to ordinary contracts. Hence, if one party to such relation induces the other to believe in good faith that the contract is made and binding, the law will hold the party taking such advantage to the full terms of the agreement, as in other cases. So, if one party to the agreement is known by the other to rely upon the contract in good faith and that it is binding, the other party will be bound by it. This, of course, must depend upon

what is said and done, the same as in other cases. Proof of a common law marriage is sufficient to sustain an action for divorce and alimony. A common law marriage, while criminal under our statutes, is just as valid a marriage as if solemnized under all the forms of law, usage and custom, and is followed by exactly the same results. While the mere fact of the indulgence in the sexual intercourse and relation is not of itself conclusive proof of the marriage, yet it is always a proper subject for consideration after evidence of the agreement to enter into the matrimonial relation. Again, where such presumption may arise, the law will always presume that the acts of persons are lawful and that the commission of crime was not intended. If, under the circumstances shown, a person may have acted from motives of morality and purity, the presumption in favor of such motives will prevail, as the presumption is that people do not intentionally do wrong. These propositions are so well established that no citations are deemed necessary.

The evidence in this case established beyond dispute or conflict that after the first day of January, 1905, defendant very frequently went to the house of plaintiff, who resided with her widowed mother, in Omaha, and that no kind of formality in his visits was observed, and, when there, his actions and conduct were as free and informal and homelike as that of any husband; that plaintiff and her mother were in straitened financial circumstances, and that finally he caused their removal to Lincoln where they were placed in his own house, and the relations between them continued as before; that during the whole time he furnished money to aid in the expenses of the household; that neither party ever held the other out to the public, or even to their most intimate acquaintances and friends, as wife or husband, nor did they in their voluminous correspondence ever refer to each other in that light, yet the general terms used were often endearing and affectionate. Upon these two propositions it is testified by defendant that their relations were at

all times meretricious and that they had existed long before the date named. This is denied upon the part of the plaintiff, and she insisted on the witness-stand that their relations were never criminal, and did not exist at all until after the date referred to. She also testified that the alleged marriage was kept secret at the special instance and request of defendant, for reasons which were assigned by him and which were by her deemed reasonable, but particularly because it was in accordance with his request and to which, for that reason, and having faith in him and his assurances, she agreed. The bill of exceptions contains about 20 letters from defendant to plaintiff written during the year 1904, the last date being in the latter part of December of that year and just prior to the time when the plaintiff and her mother testified that the contract of marriage was entered into. There are five letters written in the fall and winter of 1903. It is to be remembered that at the time of the commencement of this correspondence plaintiff was the lawful wife of a Mr. Hoover, but they failed to agree, were separated, and an action by plaintiff for divorce was then pending. The decree of final divorce was entered March 6, 1904, and was doubtless aided in a financial way by defendant.

The letters written in 1904 abound in expressions of friendship and affection, but cannot be here set out at length. A few selections may be made from the closing portions of some of them. In the letter of January 13, 1904, to "My Dear Val," he closes with, "Good bye my dear girl, be good to yourself till I see you again. From your cousin M. M. C." February 9: "My Dear Val * * * I wish you would write me as soon as you can. Give my regards to the folks. Hoping to hear from you soon, I am, your devoted friend." March 6: "My Dear Val * * * May sweet memories around your heart entwine leaving a place for a friend of Old Lang Sine (Auld Lang Syne)." March 19: "My Dear Val * * * I am your loving friend." April 12: "My Dear Val * * * I will bid you good bye and hoping to see you at the earliest op-

portunity I am as ever your dear old friend and sweetheart." April 30: "My Dear Valeria * * * I want to see you very bad. I hope your dear old father is getting better and that he may be able to get well. Give my regards to the folks and with best love to yourself, I am, sincerely yours." May 10: "My Dear Val * * * Goodbye Darling. Be good to yourself my dear. Hoping to hear and see you soon, I am, sincerely yours." May 23: "My Dear Val * * * In hopes to get that long letter very soon telling me about everything and that you have got almost well. I close for the present with many kind wishes. I am, your sincere friend and lover." July 7: "My Dear Val * * * I hope this will find you in better health and spirits and that you are improving in every way. I will inclose you a check in this letter of 50. I hope it will help to relieve you in your distress. Hoping (to) have the pleasure of seeing you soon, I am, your sincere friend and sweetheart." This must be sufficient to show the trend of defendant's letters prior to the date of the alleged contract of marriage. It may be said—is said, in effect, by defendant—that these are the letters of a libertine to his mistress. We have read them, as well as many others written prior to January 1, 1905, and have been unable to find a single word which necessarily implies an impure thought or reference. We cannot believe they were so intended, nor that any part of them can be rightfuly so construed.

The history of the case shows that plaintiff's father and mother were Germans, and, as many do, they kept intoxicating liquors in their home; that during the early days of this state they kept a hotel in Sidney, and, in connection with it, a saloon. At that time plaintiff was a little child. Defendant had a ranch near Sidney, and patronized the hotel and thus became acquainted with the family. Plaintiff's father finally closed out his business, removed to Denver for a time, and then to Omaha, where again they met and the acquaintance was renewed. Plaintiff was then the wife of Hoover, but a separation had

taken place. Her father was in poor health—probably drinking heavily—and the family were not living in affluence. Plaintiff's father became bedridden, and, after lingering a long time, died. Plaintiff's health had failed her and her prospects of long life were not promising. With the aid of $100 furnished by defendant she went to Denver for treatment, going to the home of an aunt, and while there defendant visited her. From his testimony it is very apparent that plaintiff was in a precarious condition, her prospects of recovery being very remote. Soon thereafter the death of plaintiff's father occurred, which required her immediate return to Omaha for the purpose of attending the funeral. She appears not to have returned to Denver.

Plaintiff testified that prior to the 1st day of January, 1905, defendant upon several occasions proposed marriage, but that she did not agree thereto, owing to the condition of her health and her financial embarrassments, not as an absolute refusal, but deferring the consideration of the subject until conditions and prospects became more favorable. This he as positively denies. She and her mother both testify that he came to their house on the 1st day of January, 1905, and proposed immediate marriage. Plaintiff testified that the proposition was first made to her in the absence of her mother who was in the kitchen preparing the evening meal; that she was urged to agree to it, and that the contract should be made between them without the intervention of a clergyman or other officer authorized to solemnize marriages; that to this she at first objected, but, upon his assurance that such a marriage would be valid, she consented, and they together went into the room where plaintiff's mother was, when defendant repeated to both his statement, and that they were thereby married; that plaintiff's mother objected to the proceeding, but upon the assurance of defendant that such an agreement was valid, and the declaration of plaintiff that such an arrangement was satisfactory to her, her mother yielded, saying they were both

old enough to know their own business and she would no longer object; that the contract was thereupon ratified by them, and by a kiss administered to each by defendant the matter was considered settled; that defendant remained there that night occupying a room and bed with plaintiff; that he was absent a portion of the next day, telling them before leaving where he was going and that he would return later in the day; that he did return and remained during the night as before, and from that time on his visits were of the same character, his conduct being as a member of the family, contributing to its necessities, and occupying the room and bed with plaintiff as her husband. The testimony of plaintiff's mother coincides with that of plaintiff as to all that occurred after the entry into the kitchen by plaintiff and defendant. Another witness, disinterested, testified to seeing defendant at the rooms of plaintiff and her mother on that day. The whole of this testimony is met by defendant with a sweeping and positive denial. He denies being present at the house of plaintiff on, or at any time near, the date named, and offers quite persuasive evidence in support of his denial. It is shown that about the 29th day of November previous he met with an accident on his ranch near Fremont by the falling of a horse upon which he was riding, resulting in the fracture of his clavicle bone, and by which he was confined to his room until the latter part of December, if not to a later date. It is shown, however, that he was sufficiently recovered to leave home for the state of Wyoming about the 8th of January. A number of checks, letters and telegrams, bearing date at Fremont, January 1 and 2, were introduced in evidence under the testimony of defendant that they were issued on the dates and at the place printed therein. Witnesses were also called who testified that from the time he received the injury until his departure for Wyoming he did not leave the ranch, except on one or two occasions when he was absent but a short time, going to Fremont to consult his surgeon, one of which

witnesses claimed to have been his housekeeper and acting as his nurse. However, a niece of defendant, who has been of his household continually for many years, whose testimony was taken by deposition and which bears upon its face the indelible stamp of candor and truth, was not interrogated upon that topic at all, and she was in a position to know as much, or possibly more, upon the subject than any other, her testimony being limited to the fact of defendant's injury in November, 1904, that the nurse above referred to took care of him, and that he left for his ranch in Wyoming "some time in January, 1905." The testimony of the alleged nurse does not impress us as being in all things absolutely candid and truthful. It was given by deposition. She stated that at the time he left for the Wyoming ranch "he was all right, only his shoulder bothered him a little," but that he could use it for ordinary purposes. Did this case depend entirely and solely upon the oral evidence of plaintiff, her mother, and the other witness, referred to as having seen him at their home in Omaha on the date named, we might, under the evidence offered by defendant, well hesitate to hold that there was a marriage, but the claim that there was not is scarcely borne out by defendant's subsequent conduct. It is shown, and not denied, that after said time his attentions to plaintiff and her mother, his apparent care and solicitude for their welfare, suffered no abatement.

There are no letters in the bill of exceptions from defendant to plaintiff written during the year 1905, unless the one hereinafter referred to, dated January 18, was written in that year, although it is apparent that many were written, and frequent payments of money were made to plaintiff to enable her to maintain the household. On the 2d of February, 1906, he wrote her as follows: "Fremont, Neb., February 2, 1906. V. W. Allenspach, 703½ North 16th street, Omaha, Neb. My Dear Val. I just got home last night. Will be down in a couple of days when I get things straightened up here.

We are fixing up horses to have a sale 26th this mo. and I am very busy now. In a few days I will have things in shape. I sent you a check last week for 25 before I left the springs. The springs helped me while I was there, but I am trouble(d) (with) sciatic rheumatism and that will take a different treatment to cure it. I will go down and see you the first opportunity. Hope yourself and mother are well. Give my regards to mother, also self. Hope to see you in the near future. I am, as ever yours." April 19 he wrote as follows: "Fremont, April 19th, 1906. V. W. Allenspach, 706½ North 16th Street, Omaha, Neb. My Dear Val. I will send you down something tomorrow if I don't go down myself. So be good to yourself and don't get restless if I am behind, as I am very busy just now. With love and kind regards to self and mother." On April 21, 1906, he wrote, referring to his last letter, saying he could not come that day as he had to go to Lincoln to get carpenters started to finish the house; that he inclosed his check for 25 and would come over from Lincoln if he could; that the house was now empty and "I will have it finished right away now, so you can get in before the weather gets too warm. I will have them finish up the inside of the house first so you can get in right away. They can finish the outside after you go in. I will be down and talk it over with you soon as I can." On April 29 he wrote her at considerable length, describing his labors in Lincoln cleaning and painting the house, saying that if she did not keep chickens she could get "3 pr. month" for the barn, and stating the number of rooms in the house. He closed the letter with the following language: "Hoping to see you soon. Regards to mother and not forgetting you, dear, I am, yours very truly." On July 21 he writes: "I wrote you a few days ago to know if you wanted me to bring down the dog you spoke of, but did not get any answer from, and also that I would be down Saturday or Sunday, but I got a letter from William Coad yesterday saying he would be here this evening to see me on business, so I won't be

able to get down until Monday, but I will be down Mo. sure. I have been doctoring all week and had to stay in bed two days. I have one pretty lame foot. Hoping to see you soon, I am, yours truly, M. M. Coad. If you get this in time drop me a line and let me know if you want me to take this dog down or not."

These letters are all addressed to "V. W. Allenspach," but the complimentary address is to "My Dear Val" as before. The many orthographical errors have been corrected, otherwise we have aimed to be exact in copying. For want of time and to avoid extending this opinion to too great length many letters are not herein referred to. Such parts of the correspondence as have been omitted are equally free from improper or unseemly references, as are those set out. The question again presents itself: Do these letters impress one as those of a libertine to his mistress, or of a husband to a wife who would be presumed to be interested in his personal affairs, his health, his aches and pains? True there is no reference to a marriage, nor to the married relation, and he has continually addressed her by her former name. If the testimony of plaintiff that all this had been agreed upon in the first instance is to be believed, it furnishes a ready explanation, for she stated that it was feared by defendant that the correspondence might fall into other hands, and for business reasons he desired the marriage kept secret, and when the proper time came to make it known they would take the promised trip to Europe.

We find but three letters from plaintiff to defendant in the bill of exceptions. One dated April 8, 1905, to "My Dear Mr. Coad," signed "As ever you know, yours, Valeria"; another dated August 14, 1907, to "Our Dear Mr. Coad," signed "As ever, you know"; and the other of October 20, 1907, to "Dear Mr. Coad," and signed "Sinc. Valeria W. Allenspach." They are devoted to business matters and throw no special light upon the subject under consideration. That she has written many letters to defendant is clear by his letters to her and the testimony of the parties, but they have probably not been preserved.

This being an equity case, this court is required to retry the cause upon the evidence submitted and preserved in the bill of exceptions and "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." Code, sec. 681*a*. While in cases where the evidence is conflicting we may (and should) consider the findings of the district court (*Wetherell v. Adams,* 80 Neb. 584), yet the burden is, by appeal, placed upon this court to retry the case. That the evidence as to the specific contract of marriage is conflicting there can be no doubt, but that the sexual relations have existed between the parties to a great extent, at least after January 1, 1905, at the residence of plaintiff by the procurement of defendant, and latterly, in the house of defendant, and that during the whole time he has contributed to the maintenance of the household, and that, when present, he has to quite an extent assumed the position of the controller of domestic affairs, is not to be doubted. His letters so indicate, and his reference to plaintiff's mother as "mother" would seem to indicate something of a recognition of the relation insisted upon by plaintiff. From a consideration of the whole record we are unable to give a certificate of high moral character to either party, but when we consider, as the evidence shows, that defendant was an acquaintance of the family at the time when plaintiff was a child, that he, after the lapse of years, sought and obtained a renewal of that acquaintance, and from that time on pressed his attentions upon plaintiff, seeking to keep in touch with her and the family, apparently solicitous for their welfare, never being willing that their relations should be broken off, we are constrained to believe that his purposes were not of the baser sort. On January 18 (year not given) he wrote to plaintiff as follows: "My Dear Val. What in the world is the matter with (you). Are you sick, or have you gone to where your father was,

or what is the delay in writing to me? I have written you three letters. Now, if you get this one, be sure and answer by return mail, as I am uneasy about you wherever you are. Be sure and answer. This is written in a hurry as I am going to the office to-night, and if I don't hear from you I won't know what to think. If you are away you said you would write me, so be sure write, or wire me if you are in a hurry and can't write. Excuse this as I am in a big hurry. Hope to hear from you by return mail. From your friend M. M. C." This may show in some degree the solicitude, often otherwise expressed, on the part of defendant for the well being of plaintiff, and that the desire for close relations were not all entertained by plaintiff. He was a man of mature years, neither in his youth nor dotage, and was not in any sense "captured" by the wiles and blandishments of plaintiff.

On the 13th day of June, 1907, defendant procured from plaintiff the execution of the following instrument: "Received of Mark M. Coad, one hundred and fifty dollars ($150) in full settlement and satisfaction of any and all claims and demands of every nature and description, either of a business or personal nature, which I have or may claim against him. And I hereby acknowledge full payment for any and all real estate heretofore, or on this day deeded by me to Mark M. Coad, and full satisfaction and release of each and every promise that he may have made to me in reference thereto, and in reference to any other matter whatsoever, and of any and every cause of action which I have or claim against him growing out of any promise made or anything said or done by him to me prior to date hereof. Dated this 13th day of June, 1907. Valeria W. Allenspach."

The testimony of the notary before whom this instrument was acknowledged was taken in court, by which it is shown that the paper was prepared by an attorney before its presentation for signature, the notary accompanying defendant when he went to obtain the signature. It was shown that, from the conversation then had, the

subject of signing such instrument had been talked of before, but what was said was not made known to the notary. At the time he and defendant were there plaintiff declined to sign, and her mother became strenuous in her objections, and for some purpose stepped into the kitchen, when the door was closed by some one and locked, thus excluding her from further participation in the discussion. The notary was asked what conversation he heard between defendant and plaintiff, or what defendant said to plaintiff "at the time while urging her to sign these papers." The answer was: "Well, the conversation was a long one. They talked about the matter there for at least an hour, I should say, and he was insisting on her signing and she was objecting to it, and so was her mother. Her mother seemed to be more strenuous in the objection than her daughter, and she kept declining to sign, and asked me what I thought about it, and I told her I was not her attorney and did not care to advise her what to do, and Mr. Coad kept urging her to do it, and finally she said to him that her mother thought that they ought not to sign it, because her mother was afraid he was going to put her out of the house and would not support them. Her mother was in the kitchen pounding on the door, and making a loud noise, and Mr. Coad said, 'Haven't I always supported you?' or words to that effect, and she said, 'Yes, but mamma is afraid you will put us out of here and will not support us any more,' and he said, 'You need not worry about that. I will take care of you,' or words to that effect." Plaintiff testified at considerable length as to what occurred and her reasons for affixing her signature, based upon the assurances of defendant and her confidence in him and his promises. We cannot see that this paper is entitled to very much weight or consideration. It is clear that it was reluctantly signed and with a reliance upon the promises of plaintiff that she "need not worry" and that he would "take care" of her. If the marital relation did exist, the instrument was void in so far as it might have sought to

dissolve that relation, and voidable as to the real estate transactions which were concerned. Plaintiff and her mother both testified that defendant returned to the home where they lived and continued his sexual relations with plaintiff, occupying the room and bed with her for two nights. This is denied by defendant, but there are some circumstances which tend, though not strongly, to sustain them. Had a child or children been born, the result of the intercourse between the parties, we think no court would, or could, bastardize them under the evidence. They would have been held born in lawful wedlock and legitimate.

We are persuaded that it would be against the law and its presumptions, as well as against public morals, to hold that the marital relations did not exist between the parties to this suit. The judgment of the district court is reversed, and a decree will be entered in this court finding that that relation does exist, and that plaintiff is entitled to and is given a decree of absolute divorce, that she is entitled to receive and is decreed to have judgment for $20,000 as her alimony in full, and that execution issue for the collection of the same, and that she have judgment for her costs in this case expended.

JUDGMENT ACCORDINGLY.

FAWCETT, LETTON and ROOT, JJ., dissent from the majority opinion in this case.

At the outset it may be said the defendant's testimony convicts him of such shocking immorality that he is entitled to no other relief in a court of equity than the evidence taken all together compels that court to grant. On the other hand, exact and impartial justice demands that, if the evidence does not establish the plaintiff's cause of action, she should take nothing by her writ simply for the reason that the defendant has violated the laws of God and of man. The testimony proves that the plaintiff, preceding her marriage to Col. Hoover in 1901, was a suc-

cessful business woman; that for some reasons her relations with Hoover were unsatisfactory, so that in the spring of 1902 they separated and were finally divorced in March, 1904. In the meantime the plaintiff and Col. Hoover engaged in litigation for a divorce, the one party prosecuting a suit in Douglas county, and the other a similar suit in an interior county.

In the summer of 1902 the plaintiff met the defendant at Fremont; shortly thereafter he gave her $10, and followed this donation with gifts of sums of money of from $10 to $100, aggregating many hundreds of dollars. The plaintiff accepted this money without any protest or scruple, and plunged into a voluminous correspondence with her aged admirer. Whether this pursuit culminated in a marriage depends upon the truthfulness of the testimony that January 1, 1905, the defendant was present in Omaha, then and there entered into a common law marriage with the plaintiff, and remained in that city for three consecutive days. The testimony to sustain such a finding is referred to in the majority opinion. Opposed to this we have the defendant's positive denial that he was present in Omaha upon that day or that he ever entered into any such arrangement with the plaintiff, and in this connection it should be remembered that the plaintiff made the defendant her own witness and thereby vouched to the court for his credibility. The record further discloses that the defendant during the latter part of December, 1904, and until January 8, 1905, was confined to his home near Fremont about 35 miles from Omaha. The physician who treated Coad for a broken collar bone during this period testified that subsequent to January 2, 1905, the defendant came to the witness' office in Fremont for the purpose of having an examination made to ascertain whether the patient could safely travel west to attend to his business affairs; that the defendant then stated in substance it was the first time he had been away from his farm since the doctor's last visit in December. This statement was hearsay, self-serving from

the litigants' present standpoint and entitled to but little weight, but the proof shows without contradiction that the defendant was injured in 1904 and later departed from Fremont for the west about January 8, 1905. Checks purporting to have been drawn by Coad in Dodge county December 31, January 2, and January 3, in payment of local bills are in the record. The evidence to our minds is persuasive that these checks were drawn by Coad in Dodge county and upon their respective dates. January 1, 1905, was Sunday. On that day the defendant wrote a letter from Dodge county and mailed it to George Robertson at Lawrence, Kansas. Robertson testified that he received the letter January 2, 1905, and the original letter dated January 1, 1905, in the defendant's handwriting is in evidence. Robertson testifies that on the 3d of January, 1905, he received a telegram from Coad, dated Fremont, Neb., January 2, and in response thereto came to Fremont and entered Coad's employ. All of these documents, except the telegram, are in Coad's handwriting and were prepared at a time when the necessity for manufacturing evidence could not have been known to him. The nurse who attended Coad in December, 1904, and in January, 1905, until he went west, testifies positively that the defendant was not away from home January 1, 2 or 3, 1905. The majority opinion states this witness ought not to be believed, but we find nothing in the record to justify such an aspersion; her answers are direct, and she sustained herself well upon cross-examination.

The presumption that the litigants' relations were lawful rather than meretricious, relied upon to sustain a finding against the defendant, to our minds should vanish in the light of the undisputed facts that, while the plaintiff was the lawful, wedded wife of Col. Hoover, she continually accepted money from the defendant, encouraged his advances, and received without objection his letters referring to mutual embraces and describing himself as her lover and sweetheart. The litigants' conduct at all

times repels the thought that they were or are man and wife. No person other than the plaintiff's mother testifies to having heard Coad refer to the plaintiff as his wife; he never held the plaintiff out to the world or to any disinterested individual as his spouse; she has not produced a scrap of paper whereon he described her as his wife, nor does she claim he ever wrote her to that effect; she signed her maiden name to, and acknowledged, deeds conveying her property, and signed that name to hotel registers when away from home; subsequently to this alleged marriage she never darkened the door of the defendant's home except for the purpose of extorting money from him; she remained in that house over night on two or three occasions after January 1, 1905, but never occupied his room, nor did she claim to any one there, not even to her intimate friend, Miss Paxton, Coad's housekeeper, that she was Mark Coad's wife. Indeed the plaintiff does not deny Miss Paxton's testimony to the effect that the plaintiff complained that Coad had promised to marry her. Several letters written to the defendant by the plaintiff subsequent to January 1, 1905, are in evidence, and he is addressed therein as "My Dear Mr. Coad," "Our Dear Mr. Coad," and "Dear Mr. Coad," but in no instance did she address him as husband. All of the letters between the parties were private, and if they were married some expression evidencing that fact would in all probability have appeared in their correspondence. It is true the plaintiff testifies that the defendant assigned as a reason for his desire that their marriage remain a secret that he did not want the fact known until he had settled his business affairs with a brother, but the proof is uncontradicted that he had severed all business relations with his brother 20 years prior to 1905, and, during the period of time covered by the plaintiff's testimony, the defendant's business was under his sole control. The fact that on one or two occasions subsequent to January 1, 1905, he referred to the plaintiff's mother in his letters as "Mother" is not entitled to much weight, because he

described her by that term in at least one letter written before this so-called marriage.

In 1906 the defendant induced the plaintiff and her mother to move from Omaha to Lincoln and occupy a small dwelling owned by him in that city. In June, 1907, as shown by the majority opinion, the defendant settled with the plaintiff for all demands she had upon him. He who runs may read in the written release, signed by the plaintiff at that time, satisfaction for the defendant's unlawful acts as well as for property rights and legitimate demands. At the time this release was signed the plaintiff objected to executing the instrument, not because it belied her present claim and ignored her status as his wife, if any such status existed, but for the reason stated at that time by the plaintiff and her mother that, if the release were signed, Coad would no longer support them. It would seem, if the plaintiff believed at that time she was the defendant's wife, she would have asserted that fact, and would not have signed a paper releasing all claims against a husband whom she well knew was worth almost a million dollars. The fact she made no such claim is convincing evidence against the existence of the marriage relation. It was patent Coad intended to sever their relations and discard her, and her conduct then is entirely incompatible with her testimony now. The plaintiff and her mother do testify the defendant, the night following the execution of that release, and subsequently, occupied the plaintiff's bed, but the defendant denies the testimony, and we are inclined to believe in this particular he told the truth.

Furthermore, about two weeks before this suit was commenced and six months after the settlement in 1907, Robertson, the defendant's foreman, called upon the plaintiff and her mother, and Robertson testifies that the mother, in the plaintiff's presence, stated that "Mr. Coad had not done the right thing by them, and that he had promised to support them with funds, and that he had got all of the property from them, *and that he had even*

gone the length of promising to marry her daughter, and had not done so," and the plaintiff took no exception to her mother's statement. This testimony is not denied by either the plaintiff or her mother. The plaintiff cannot excuse her silence at this time or excuse her mother's statement upon the theory that they believed the defendant had tricked and deceived her and they thought the marriage relation did not exist, because each woman has testified that the defendant explained to them January 1, 1905, that the plaintiff and defendant were entering into a common law marriage.

Lack of time and space forbids a further analysis of the evidence, but sufficient, it seems to us, has been shown to demonstrate that the majority opinion is not supported by a preponderance of the evidence, and that the judgment of the district court, based upon that evidence and his observation of the witnesses while testifying in court, should not be disturbed.

CLELL D. CAMPBELL, APPELLEE, V. FRANK B. KIMBALL ET AL., APPELLANTS; GEORGE BERG ET AL., APPELLEES.

FILED JUNE 29, 1910. No. 16,096.

1. **Mechanics' Liens: SUBCONTRACTORS: LIABILITY FOR FILING FEES.** Where a contractor for the construction of improvements upon real estate distributes portions of his contract to subcontractors, no contractual relation arises thereby between the owner and the subcontractors, the liens upon the property in favor of the subcontractors being given by law, and the completion of the work undertaken by the subcontractors creates a debt due from the contractor to them. Upon the failure to pay said debt the contractor becomes liable to the subcontractors for the full amount which the subcontractors are entitled to receive. If the subcontractors find it necessary to file mechanics' liens, the contractor is also liable for the fees paid therefor. For these items the owner is not, ordinarily, liable.

2. ———: ———: ———. Where, in an action by a contractor and subcontractors to enforce mechanics' liens, the trial court charges

the above named items to the owner of the improved property, the amount thereof should be deducted from the sum due from such owner to the principal contractor.

3. ———: INTEREST. The amount finally found due from the owner of the improved property should draw interest at the legal rate (in the absence of a contract fixing a different rate) from the date the debt became due and payable.

4. Contracts: WAIVER OF PROVISIONS. Where a written contract between the owners of the property to be improved and the principal contractor provides that certain claims shall be presented in writing to the architects by the contractor within a specified time or they will not be allowed, that no alterations from the plans and specifications shall be made except upon the written order of the architects fixing the amount due thereon, that no extras shall be furnished except upon similar orders, these and like provisions, if ignored by the parties to the contract and the architects, will be ignored by the courts.

5. ———: TIME LIMIT: PAROL EXTENSION. Where a written agreement between the owners and principal contractor fixed the time limit within which the work is to be completed and after which damages shall be allowed if the work is not completed, it is within the power of the parties to change said time limit by oral agreement, afterward made, extending the time, and the courts will respect such change, made in good faith, and refuse damages suffered prior to the date fixed by the change.

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

T. F. A. Williams, for appellants.

Field, Ricketts & Ricketts, S. L. Geisthardt, Hall, Woods & Pound, Strode & Strode, Flansburg & Williams and *J. R. Berry, contra.*

REESE, C. J.

This is an action to foreclose a mechanic's lien for material furnished and labor performed under a contract to remodel a theatre building in the city of Lincoln. The suit is by the contractor, who undertook to complete the work for the sum of $15,225. The contract was entered into June 15, 1907, and stipulated that

the work was to be completed on or before the 24th day of August of the same year, and if not completed on that date a deduction of $50 a day for the excess of time was to be made from the contract price. Certain mortgagees were made parties defendant; but as it was shown by their answers and the stipulation of the parties that the mortgages were not due, and as defendants were in no way in default in respect to them, they were not foreclosed. A number of subcontractors who had filed liens on the property of defendants upon which the work had been performed were also made parties defendant and filed their answers setting up their liens, but at the beginning of the trial it was stipulated in open court as to the amount due each, and that they were entitled to foreclosures, and, so far as any contest as to their claims is concerned, they also have dropped out of the case. The contest remains exclusively between plaintiff, the contractor, and defendants, the Kimballs, as owners of the property involved in the controversy. The work was not completed by the time fixed in the contract, nor for some time thereafter. Plaintiff's claim is based upon the alleged completion of the contract, and for a large number of "extras" in the way of material furnished and labor performed, but which need not be set out here in detail, while defendants claim damages for failure to complete the work within the proper time, for money expended in the employment of help in pushing the work, for parts of the details of the contract which were omitted by agreement, for damage caused by the delay by being compelled to cancel dates with theatrical companies, and for the stipulated $50 a day for all time after August 24 during which they were deprived of the use of the building. To these demands plaintiff replied that the delay was caused by the default of defendants in not surrendering possession of the property to plaintiff in order that he might proceed with the work, and in requiring so many changes from the plans and specifications, and the number of extras, not provided for in the contract, which were found to be necessary and

demanded by defendants. More specific reference to the details of the pleadings might be made, but it is thought that this general statement will be sufficient at this time. A trial was had in the district court involving the introduction of a large volume of evidence.

The decree is in part as follows: "Wherefore it is considered, ordered, adjudged and decreed by the court that the defendant George Berg, do have and recover from defendants William R. Kimball and Frank B. Kimball the sum of $380.40, and that defendant Hardy Furniture Company do have and recover from said defendants Kimball the sum of $13.95, and that defendants Searle & Chapin Lumber Company do have and recover from said defendants Kimball the sum of $683.06, and that defendant R. S. Young Building & Supply Company do have and recover from said defendants Kimball the sum of $629.76, and that plaintiff do have and recover from said defendants Kimball the sum of $2,529.17." This is arrived at by allowing plaintiff the contract price of $15,225 for the remodeling and rebuilding of the structure, to which is added the sum of $1,269.45 for extras, and deducting from the total the amount paid, the reduction resulting from change of plans, and the further sum of $775 for delay in the completion of the building other than delay caused by defendants. Defendants appeal. Plaintiff enters a cross-appeal. The assignments of error, in so far as they are deemed material, will be disposed of in the order presented by each in the briefs.

In ascertaining the several amounts due the subcontractors, the court added to their principal debts the fees for recording the liens, found the total of the same, and rendered judgment against the defendants therefor. Complaint is made of this action of the court. Complaint is also made of the manner of disposing of the interest due upon the subcontractors' claims. In this we are unable to detect any error. It must be conceded that there was no contractual relation between defendants and the subcontractors. That relation existed only be-

tween them and the principal contractor. It was the duty of the principal contractor to pay the amounts due his subcontractors as soon as their claims matured. The contract between defendants and plaintiff provided for monthly payments of 85 per cent. of the money earned by the contractor. The purpose of the payment of these instalments was to enable the contractor to pay for material and labor as the compensation therefor became due. Failing in this, he became liable to his subcontractors for all that the subcontractors might finally demand under the law. The owners of the property owed no personal duty to the subcontractors, except to see that the principal contractor was not paid in full until the demands of the subcontractors were provided for. Failing so to do, the property upon which the improvements were made would be held liable without reference to whether he owed the principal contractor or not, but within his contract price. Under section 11, art. I, ch. 54, Comp. St. 1909, the fees for filing the accounts in the office of the county clerk, or register of deeds, can be collected by the subcontractors, but these amounts should have been deducted from the decree in favor of plaintiff. The total of fees paid is $7.35. This is also provided for by article IX of the contract between plaintiff and defendants, which is as follows: "Art. IX. * * * If at any time there shall be evidence of any lien or claim for which, if established, the owners of the said premises might become liable, and which is chargeable to the contractor, the owners shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify them against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owners all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor('s) default." To that extent the judgment of the district court will be modified.

It is next contended that "the district court erred in adjudging that appellants Kimball should pay interest on the entire balance found by the court to be due Campbell." If we understand defendants' contention we are unable to see any merit in it. Upon the completion of the work under the contract plaintiff was entitled to receive the amount then due him. If not paid, it would, in the absence of a contract providing otherwise, draw interest at the legal rate. True, in this case, the parties could not agree to an adjustment of their differences, and preferred to leave the striking of the balance for the purpose of ascertaining the amount then due to the court. But that sum, when ascertained, would draw interest from the time it became due under the contract. The decree does not inform us of the date from which the interest was computed. As we have seen, the contract provided for a deduction of $50 a day from the price to be paid for each day after August 24, during which time the work was not completed. It was also provided in the contract that no allowance should be made for delays caused by the default of the owners "unless a claim therefor is presented in writing to the architects within 48 hours after the occurrence of such delay," and that "no alterations shall be made in the work except upon the written order of the architect; the amount to be paid by the owners or allowed by the contractor by virtue of such alterations to be stated in said order." Had these provisions of the contract been observed by the parties to it during the progress of the work, it is clear enough that much trouble and expense might have been avoided and this suit never heard of; but the evidence from the beginning to the end shows, beyond all question, that they were wholly and entirely ignored by the architects and all parties to the contract. If changes or the supply of extras were desired by defendants, they ordered them verbally and the changes and extras were made and supplied. So, also, with the architects. We have not found that a single order for changes or extras was made in writing,

nor in many instances was anything said as to their cost. The provisions above referred to might as well not have been incorporated into the contract. A great deal of time and testimony during the trial were devoted to the matter of changes and extras. We are unable to discover any error in the record in this part of the case. The failure to observe the provisions of the contract rested with all the parties, and it is too late now to enforce them. These observations practically dispose of the cross-appeal by plaintiff upon the contention that "the court erred in awarding damages against Campbell and in favor of the Kimball Brothers for delay in completing the work," that "the time specified within which the work was to be completed was waived by the Kimballs," and that the court erred in its allowance for extras, the amount allowed not being a just allowance. It is true, in a sense, that the time specified in which the work was to be completed was waived by defendants, but, if so, it is equally true that the extension was not without its limitation. We think it may be fairly inferred from the evidence that a short time before the expiration of the time in the contract defendants and the architects became convinced that it would be impossible for plaintiff to finish the work within the time so limited. Upon an interview being had with him, he agreed with them on another limitation fixed for not later than September 21. This involved the cancelation of the theatrical contracts, and the work was not completed so that the house could be profitably occupied until long after that date, and that to the damage of defendants. Had this question been submitted to us in the first instance, it is possible we might have come to a conclusion differing somewhat from that reached by the trial court, but from an examination of the whole case we are unable to detect any material deviation from the lines of justice and equity except in the particulars herein above noted.

The judgment of the district court will be modified to the extent of deducting the said sum of $7.35 from the

judgment in plaintiff's favor, leaving due plaintiff from defendants the sum of $2,521.82, and for which amount judgment is entered, plus accrued interest. As thus modified, the judgment is affirmed; each party to pay his own costs in this court.

AFFIRMED AS MODIFIED.

HENRY RUPKE, APPELLEE, V. MARY MORAN ET AL., APPELLANTS.

FILED JUNE 29, 1910. No. 16,040.

1. **Quieting Title: RIVAL HOMESTEAD CLAIMANTS.** In an action by one of two rival homestead claimants to a tract of public land to quiet his title and enjoin the other claimant from interfering with his possession thereof, it is proper for the state courts to decline to pass upon the question of ownership until after the government has parted with its title by duly issuing a patent therefor to one of such claimants.

2. ———: ———: **INJUNCTION.** In a proper case the district court may grant a restraining order to the one who holds the receiver's final receipt for the land in question in so far as it may be necessary to protect his homestead rights.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

L. C. Burr, for appellants.

W. T. Stevens and *Claude Wilson, contra.*

BARNES, J.

This is a suit in equity to restrain the defendants from interfering with the plaintiff in his attempt to comply with his right to perfect his homestead entry under the statutes of the United States upon the northeast quarter of the northeast quarter of section 33, township 11 north,

of range 7 east of the sixth P. M., situated in Lancaster county, Nebraska, and to quiet his alleged title thereto. The plaintiff had judgment granting him a restraining order, but the trial court declined to consider the question of title. The defendants have appealed.

The cause was submitted to the district court for Lancaster county upon a stipulation or agreed statement of facts, which we find to be in substance as follows: On the 7th day of September, 1876, one Joseph P. Loosee, who had been a soldier of the civil war, obtained a receiver's final receipt from the register and receiver of the local land office at Lincoln, Nebraska, to said land as an additional homestead entry. No patent has ever been issued to said land, and the legal title thereto is still held by the government. On the same day that he received his final certificate Loosee and his wife made a warranty deed to said land to one James Moran. On April 9, 1877, the commissioner of the general land office of the United States held Loosee's entry for cancelation for the reason that the land was within and a part of the grant to the Burlington & Missouri River Railroad Company, and was not subject to homestead entry. On May 1, 1877, Loosee appealed from the decision of the commissioner of the general land office canceling his said entry, and under date of April 20, 1878, the secretary of the interior affirmed the decision of the land commissioner. On May 1, 1878, the commissioner of the general land office entered an order formally canceling on the records of his office Loosee's additional homestead entry of the land in controversy. On February 23, 1882, Loosee filed an application for a reinstatement of his entry, and on May 18, 1882, his application was denied. The land in question on the 29th day of March, 1888, was opened for homestead entry by an order of the commissioner of the general land office. On the 20th day of May, 1891, one Edward L. Sayer applied to the local land office to enter said tract of land as a homestead, and received the usual register and receiver's receipts therefor. On February

13, 1896, a hearing was had before the register and receiver of the local land office of the United States at Lincoln, Nebraska, between the said Sayer, on the one part, and Joseph P. Loosee and the heirs of James Moran, who are now the defendants herein, on the other part, which hearing or contest involved the right of homestead entry to the land in question. The register and receiver of the Lincoln land office in a joint opinion found in favor of said Sayer and against Loosee and the defendants herein. Loosee and the defendants appealed to the general land office of the United States, and the commissioner affirmed the decision of the local register and receiver, and ordered that Sayer's homestead application should be allowed. In his decision the commissioner found that James Moran, to whose rights the defendants herein have succeeded, had exhausted his homestead rights prior to September 7, 1876, and was not qualified to take the land under the preemption laws for the reason that he was then the owner of 640 acres of land to which the tract in question is adjacent. Loosee and the Morans again applied to the secretary of the interior, who on the 26th day of October, 1896, affirmed the decision of the commissioner of the general land office allowing Sayer's entry. Loosee and the defendants herein filed a motion for a review of said decision, which was on February 27, 1897, denied. Sayer abandoned his homestead entry, and on February 7, 1907, it was canceled for that reason. On the 11th day of February of that year the plaintiff, Henry Rupke, also an honorably discharged soldier of the civil war, a resident and citizen of the United States, made a homestead entry on the said land and received the register and receiver's receipts therefor. Immediately thereafter he attempted to take possession of the land, at least to the extent of erecting a house or residence thereon, and to comply with the provisions of the homestead laws of the United States in order to perfect his said entry. Thereupon the defendants, who are in possession of said land, refused to permit him to go upon the premises or per-

form any of the acts necessary to perfect his homestead entry, but at all times have by threats and force of arms prevented him from so doing. The decree of the trial court was in his favor, and enjoined the defendants from interfering with him in any manner, or from in any way preventing him from going upon the land in question and perfecting his homestead entry.

Defendants contend at the outset that they are the owners of the premises in question; that Loosee had a right to make a deed to Moran as soon as he received his final receipt, and that by so doing Moran took absolute title to the premises. On the other hand, it is contended that Moran took no better title to the land than Loosee had; that he took it subject to all rights on the part of the government to cancel Loosee's entry the same as though he had not parted with his interest to Moran. In *Peyton v. Desmond,* 129 Fed. 1, it is said: "One who purchases from an entryman, on the faith of a final receipt or patent certificate, before the issuance of a patent, takes only the equity of his vendor, subject to the authority of the land department to cancel the entry, while the legal title remains in the United States, if it is found that the entry is based upon an error of law or a clear misapprehension of the facts, which, if not corrected, will lead to the transfer of the government's title to one not entitled to it. The land department being a special tribunal to which congress has confided the administration of the public land laws, the final judgment of that department as to matters of fact properly determinable by it is conclusive, when brought to notice in a collateral proceeding." In *Swigart v. Walker,* 49 Kan. 100, it was held: "The commissioner of the general land office of the United States has authority to cancel a final homestead receipt and set aside the entry at any time before the patent issues, and a purchaser from the entryman after a final receipt is given and before the issuance of the patent takes the land subject to this supervisory power of the commissioner and of the secretary of the interior."

Defendants insist that, when Loosee made his filing on the land in question as an additional soldier's homestead entry, he became the absolute owner thereof; that title passed *eo instante* from the government to him, and his immediate transfer thereof to James Moran invested his grantee with an indefeasible title thereto. In support of this contention, defendants rely principally upon the two cases of *Webster v. Luther*, 163 U. S. 331, and *Ard v. Brandon*, 156 U. S. 537. At first blush, it would seem that those cases sustain the defendants' position. A careful examination, however, discloses that in *Webster v. Luther, supra,* the widow of a deceased soldier made application to the local land office to enter the land there in question as an additional soldier's homestead, and received the register and receiver's receipt therefor; that her entry was approved, and in due time she received a patent for the lands which conveyed to her the full legal title; that, when she received the register and receiver's receipts as aforesaid, she executed a power of attorney to one Boggs, by which she empowered him to sell the land upon such terms as he should see fit, receive the money therefor from the purchaser, and deliver to him such a deed or conveyance thereof as to him seemed necessary; that Boggs sold the land and deeded it to Luther, which deed was duly recorded; that thereafter, and when she received the patent from the United States, she deeded the land to Webster, and the controversy was between them as to who was the owner of the land and had the legal title thereto. The supreme court of the United States held that, when the widow made her filing, paid the fees and received the receiver's final receipt for the land, *which was subject to entry as an additional soldier's homestead,* she became the owner thereof; that she could then legally sell and dispose of it even before she received the patent, and that by the sale and conveyance made by her attorney in fact Luther took the legal title thereto.

In the *Ard* case, *supra*, which is nearer in point than any of the other authorities cited, it appears that one who

was qualified to make a homestead entry in good faith applied to make such entry upon public land within the indemnity limits of a railroad grant, but not within its place limits, and which had not been withdrawn from homestead entry and settlement, but was at the time he made his application subject to such entry. His application was refused, and afterwards the land was withdrawn from entry and was patented to the railroad company. The applicant remained upon the land and cultivated it, and the action was one to oust him of possession. It was held that his application was wrongfully rejected, and that his rights under it were not affected by the fact that he took no appeal.

It will thus be seen that the point of distinction is, in those cases the land was subject to homestead entry when the applications were made, while in the case at bar the land was not subject to such entry, and Loosee's attempted entry was canceled for that reason. That this distinction is fatal to defendants' contention seems clear. Again, in both of those cases the government had parted with its title to the land when the actions were commenced, while in this case the title is still in the United States. We are therefore of opinion that those authorities are of no assistance in the solution of the question now before us, and until such time as the government parts with its title we should not attempt to determine the question of ownership or title thereto.

It is further contended that they have acquired title by adverse possession, and point to the fact that they have been in possession of the land for more than 30 years. It is conceded that one cannot acquire title by adverse possession as against the government; but it is said that, if the land belonged to the railroad company, then the defendants' possession has ripened into a perfect title, and the court should hold that they are the owners thereof. The trouble with this contention is that it appears from the agreed statement of facts that the railroad company has never complied with the terms of its

grant, and has not heretofore, and does not now, claim any interest therein; that it has never been a party to any of the proceedings, either before the local land office or the department of the interior, and it is not now a party to this suit. Therefore, it cannot be said that defendants have acquired title by adverse possession as against the railroad company, because it has never had any title whatever to the lands in question. It thus seems clear that defendants' contention cannot be upheld.

It appears from the record that the trial court declined to pass upon the question of title, dismissed defendants' cross-petition without prejudice to any future action, and enjoined them from disturbing the plaintiff in his attempt to exercise sufficient dominion over the land in question to protect his homestead rights. In this there was no error, and the judgment of the district court is

AFFIRMED.

ROBERT C. SELLERS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED JUNE 29, 1910. No. 16,112.

1. **Master and Servant: INJURY: ASSUMPTION OF RISKS.** Evidence examined, its substance stated in the opinion, and *held* insufficient to sustain a judgment for the plaintiff.
2. **Trial: DIRECTING VERDICT.** In such a case it is error for the trial court to refuse to direct a verdict for the defendant.

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

James E. Kelby and *Frank E. Bishop,* for appellant.

Meier & Meier, contra.

BARNES, J.

The plaintiff had the verdict and recovered a judgment in the district court for Lancaster county against the de-

fendant company for injuries received in attempting to step from a slanting platform, where he was at work, into an ordinary freight car. His left foot slipped and he struck the shin of his right leg against the threshold of the car door. From that judgment defendant has appealed.

It appears from the record that at the Lincoln storehouse of the defendant there is a track upon which cars are placed for loading and unloading, with a platform on the west side of the track at a level with the floor of an ordinary freight car. The north end of this platform extends about 40 feet on a uniform incline from the flat portion thereof to a level with the track on which the cars ordinarily stand; that the plaintiff had worked at this platform and storehouse for about six months before the day of the accident; that up to noon of that day he was engaged with a gang of fellow workmen unloading sacks of castings out of the car onto the flat part of the platform, and thereafter depositing them in the storehouse. During the noon hour, as was the defendant's custom, other cars were placed for loading and unloading at the level part of the platform. This placed the one that plaintiff had been working in at the north end of the string of cars alongside of the inclined portion of the platform because it was nearly unloaded, and was to be thereafter removed out of the way. By the direction of the foreman, plaintiff resumed his work in this car about 1 o'clock, and about an hour thereafter he was injured in attempting to step back into the car after having deposited a sack of castings upon the platform. It appears that he was thoroughly familiar with the location of the tracks and platform, and had been engaged in a similar work for something over six months before the accident occurred, which was on the 17th day of August, 1906, when, so far as the testimony shows, the weather conditions were perfect.

Plaintiff's testimony as to how the accident occurred was, in substance, as follows: He told us to go and un-

load the car, and we went and started to unload the car, and I had been unloading the car and was taking the castings out of the car; when I started back in I slipped and fell, and my shin hit the edge of the car door. "Q. Now, when you slipped and fell, state just how your foot or leg slipped or fell? A. I was just stepping into the car. I just took out a sack of castings—I was stepping into the car, and I put this foot in, and just as I put my foot in my foot slipped and my shin struck against the casing of that door. Q. How long had you been working for the defendant at the time when you sustained this injury? A. Well, I suppose it was about six months. I commenced to work there I think in May. Q. And just what kind of work had you been doing at that time? A. Why, I had been trucking, unloading cars, just the same as the rest of them. Of course, we always used the truck. Q. How high was the floor of the car from the sloping platform? A. Well, there where I fell it was about a foot and a half or two feet, I could not say exactly, because it hurt me so bad, and I never thought about measuring it. Q. As I understand you, you say you were getting into the car. A. I was going into the car. Yes, sir. Q. Taking a load with you? A. No, sir. Q. Just your person going in? A. Yes, sir. Q. Was it in the daytime? A. Yes, sir. Q. In broad daylight? A. Yes, sir, in broad daylight. Q. You had no load or anything you were taking into the car then? A. No, sir. Q. Simply going in to get another sack of castings? A. Yes, sir. Q. You say you stepped on the door sill? A. I stepped into the door with my left foot, and my foot slipped and my shin hit the door casing. Q. That was all there was of it? A. That was all there was of it. * * * By the Court: Q. Do you claim that the platform was out of repair? A. No; there was nothing out of repair there. I don't claim that."

The foregoing are the undisputed facts as shown by the record. These facts, to our minds, do not show any negligence on the part of the defendant company. It had the right to use the inclined platform in conducting its

business. It is a matter of everyday knowledge, of which the court may take judicial notice, that the slanting platform in question was necessary and suitable for the transaction of the business of the railroad company, especially in trucking freight from the ground or tracks up to the level part of the platform, and as matter of convenience for loading its cars. The defendant had the right, in the absence of negligence, to plan and arrange the means and manner of doing its work, and a servant in entering and remaining in the employment of the defendant must be held to have assumed the risk of doing the work in the manner and with the appliances so manifest and observable as these were. The defendant company was not an insurer of the plaintiff against injury from his own carelessness. Its whole duty was performed by furnishing a reasonably safe and feasible place for the performance of the work. It seems to be admitted by the plaintiff that the platform, or car floor, the car door sill, and all of the appliances were in perfect condition, were not defective in any respect, and the plaintiff, when he entered upon the performance of his work, must be held to have assumed the ordinary and obvious risks of performing it. Indeed, this is a case where plaintiff's injury must have been the result purely of accident, and, if not so, then it was caused by his own negligent and careless conduct. He knew the situation perfectly; he had worked at this very car and at the slanting platform for at least an hour, and had been repeatedly in and out of the car with sacks of castings; he had nothing to manage or control but his own bodily movements in stepping from the platform back into the car for another load. As above stated, there is no pretense that there was any defect or irregularity. Nor was there anything wrong in the condition of either the platform, the door sill or the car floor. It is clear that in attempting to lift his body with one step of his left foot plaintiff, for some unexplained cause, slipped and struck his shin against the door sill of the car. There was nothing to interfere

with, to hasten, or to affect his movement, which was entirely under his own control and in every respect unhindered. It seems clear that no one is to blame for his injury but the plaintiff himself, and as a plain matter of law and reason recovery in this case should be denied. *Omaha Bottling Co. v. Theiler*, 59 Neb. 257; *Central Granaries Co. v. Ault*, 75 Neb. 249, 255; *Anderson v. Union Stock Yards Co.*, 77 Neb. 196; *Bryant v. Beebe & Runyan Furniture Co.*, 78 Neb. 155; *Manley v. Minneapolis Paint Co.*, 76 Minn. 169; *Bolsem v. Iowa C. R. Co.*, 140 Ia. 73; *Williams v. Choctaw, O. & G. R. Co.*, 149 Fed. 104; *Benson v. Peters*, 82 Neb. 189; *Westlake v. Murphy*, 85 Neb. 45.

At the close of all of the evidence the defendant moved the court to direct the jury to return a verdict in its favor, which motion was overruled. It is apparent from the foregoing that the motion should have been sustained, for it seems clear to us that the plaintiff failed to establish facts sufficient to entitle him to recover.

Without considering any of the other questions presented by this record, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

REESE, C. J., dissenting.

I do not express any opinion as to what the result of this hearing should be, and therefore do not wish to be considered as opposing the reversal of the judgment in this case. However, I do wish to express my dissent from that part of the opinion from which any inference may be drawn that the injury from which plaintiff has suffered is, or can be in any sense, attributable to his carelessness or negligence. It is not necessary that I review the facts in the case as disclosed by the evidence. In my judgment the most that can be said is that the injury is the result of an unfortunate accident for which no one is to blame.

CHARLES P. BRESEE, APPELLANT, V. JOSEPH C. PARSONS ET AL., APPELLEES.

FILED JUNE 29, 1910. No. 16,109.

1. **Names: IDENTITY: PRESUMPTIONS.** In an action in ejectment the answer alleged that the land was owned in fee simple by one Thomas B. McMillan on April 1, 1903. Plaintiff derived title by a conveyance from Thomas B. McMillan on May 18, 1908. There was insufficient proof of the title of one of McMillan's grantors. *Held*, That under the allegations of title in McMillan in the answer, in the absence of any evidence to rebut it, the presumption of identity should be applied, and the prior defective conveyance was immaterial.

2. ———: ———: ———. As a general proposition, identity of name is *prima facie* evidence of identity of person, and is sufficient proof of the fact in the absence of all evidence to the contrary.

3. **Occupying Claimants: VOID TAX DEED.** A person claiming title under a void tax deed and making valuable and lasting improvements on the land, paying taxes, etc., is entitled to compensation for the same. *Page v. Davis*, 26 Neb. 670.

APPEAL from the district court for Sioux county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

Andrew M. Morrissey and *Allen G. Fisher*, for appellant.

A. W. Crites, contra.

LETTON, J.

This is an action in ejectment. The petition is in the ordinary form and pleads plaintiff's ownership of 160 acres of land in Sioux county.

Each of the defendants filed separate answers claiming title under certain tax foreclosure proceedings under which the premises were sold and conveyed to Parsons by the sheriff of Sioux county. They further plead the payment of certain amounts for taxes for the years 1899 to 1907, inclusive, that valuable and lasting improvements have been made upon the land, and that plaintiff has not paid or tendered the taxes or costs. They also deny

every other allegation in the petition, and pray that the title be quieted in them and for general equitable relief. The reply pleads that the foreclosure proceedings were void on account of lack of jurisdiction, and tenders whatever sum the court may find due for taxes and interest after allowing credit for rents and mesne profits. The court found that the plaintiff is the owner of an undivided one-half interest in the property; that the defendants are holding the land in good faith under a claim of ownership, and have made valuable and lasting improvements thereon; that they have not been paid for the improvements or any part thereof by the plaintiff; that he has been damaged in the sum of $2.50 by the unlawful detention, and rendered judgment accordingly. The defendants then applied to the court for the appointment of appraisers under the occupying claimant act (Comp. St. 1909, ch. 63), and it was ordered that before eviction a hearing be had for the purpose of determining the value of the improvements. From the judgment and order plaintiff appeals.

At the trial a number of mesne conveyances were received in evidence whereby the title to the premises was proved from the United States to William Snyder and George B. Scrambling. A deed executed by William Snyder conveying to G. D. Scrambling the undivided one-half of the premises was then received. The plaintiff then offered a copy of the record of a warranty deed from George D. Scrambling and wife, and George B. Scrambling, single, to Thomas B. McMillan. This was objected to for the reason that "it does not appear to be acknowledged by one of the grantors, George B. Scrambling, and for the further reason it is secondary evidence and no proof of the original." This deed is signed by all three parties, but is only acknowledged by George D. Scrambling, and Orpha Scrambling, his wife. The court sustained the objection as to the undivided one-half interest of George B. Scrambling, but admitted it in evidence as to the interest of George D. Scrambling and wife. The next

deed in the chain is from Thomas B. McMillan and wife of Douglas county, Nebraska, and purports to convey the entire title to the plaintiff Charles P. Bresee.

The principal complaint made by the plaintiff is of the holding by the trial court that he is the owner of only an undivided one-half interest in the premises. He contends that since the separate answers allege specifically that the land was owned in fee simple by one Thomas B. McMillan on April 1, 1903, this was an admission of title in McMillan: that the proof shows that McMillan was the grantor in the deed of May 18, 1908, to the plaintiff, and, therefore, that under the pleadings the court should have found that the entire title was in him.

The defendant insists that there are no admissions in the answer. But the answer, after pleading ownership of part of the land, pleads in this respect, as follows: "And for further answer and defense to said petition, this answering defendant respectfully avers and shows to the court that on the first day of April, A. D. 1903, the said land, with other land described as follows: * * * then owned in fee simple by one Thomas B. McMillan, became and was liable to taxation for state, county and school district purposes, and the same has ever since been liable to such taxation, * * * and it was the duty of the said Thomas B. McMillan to seasonably make payment of said taxes each year."

The question presented is whether an allegation that the land belonged in 1903 to one "Thomas B. McMillan" without further description of the person, when followed by proof of conveyance from "Thomas B. McMillan and Katie McMillan, his wife, of Douglas county, Nebraska," to the plaintiff of date May 18, 1908, is sufficient to prove title in the plaintiff. The deposition of Mrs. Katie McMillan was offered in evidence as to the residence of her husband, Thomas B. McMillan, and herself in Douglas county, Nebraska, for about 40 years last past. This was excluded as immaterial, but we think it should have been received.

Under these allegations in the answer and the proof, we think it sufficiently appears that the Thomas B. McMillan who owned the land in 1903 and the Thomas B. McMillan of the deed of 1908 is the same person. "As a general proposition identity of name is *prima facie* evidence of identity of person, and is sufficient proof of the fact in the absence of all evidence to the contrary." Warvelle, Ejectment, sec. 291. We believe, in the absence of evidence to the contrary, the presumption must be applied, and are of opinion that the learned trial court failed to give proper weight to the admissions in the pleadings as to the title of Thomas B. McMillan, plaintiff's grantor, to the entire estate, and that plaintiff is entitled to a decree for the whole estate, instead of an undivided one-half interest.

It is next contended that the court had no jurisdiction to make an order at this time for relief under the occupying claimant act. Parsons testifies that he has placed a number of valuable improvements upon the land in section 10, and that Marsteller has placed about $75 worth of fencing upon the other 80 acres. Judgment has been rendered against these defendants for the possession of an undivided one-half of the land. This ended the controversy in the absence of an appeal, and the defendants were entitled to have the value of their improvements determined under the occupying claimant act. Apparently upon the taking of the appeal the proceedings were stayed to await the final determination of the action in this court. When a case is finally determined in the district court, or after an appeal to this court and being remanded to that court, defendants in such cases are entitled to proceed under the occupying claimant act. *Burlington & M. R. R. Co. v. Dobson,* 17 Neb. 455.

Plaintiff also insists that the defendants are not *bona fide* purchasers of the land, and therefore are not entitled to the benefit of the occupying claimant act. In *Page v. Davis,* 26 Neb. 670, it was said: "Had the legislature intended to exclude all tax deeds and tax titles, it would

no doubt have done so in plain, unequivocal language. There would seem to be no reason why a party who makes valuable and lasting improvements on land under a tax deed should not be paid for the same, as in other cases; and unless the statute expressly provides that no improvements shall be paid for, the claimant will be entitled to compensation. There is no such restriction in the statute, and the law should be applied alike to all—those claiming under tax deeds as well as others."

The title of defendants was derived under a void sale for unpaid taxes, and they are entitled to the benefit of the act.

For the reasons stated, the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED.

MARY KAFKA, ADMINISTRATRIX, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED JUNE 29, 1910. No. 16,285.

1. **New Trial:** MOTION FOR JUDGMENT: WAIVER. A motion for judgment on special findings notwithstanding the general verdict, and one for a new trial, may be filed by the defendant at the same time; and the submission and decision of the former motion will not operate as a waiver of the latter.

2. **Negligence:** QUESTIONS FOR JURY. "If different minds may reasonably draw different conclusions or inferences from the state of facts established by the evidence in a cause, whether such facts show negligence or contributory negligence is not a question of law for the court, but must be submitted to the jury." *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb. 730.

3. **Railroads:** USE OF STREETS: LIABILITY. "A railroad company operating a train upon a city street, used in common by it and by pedestrians and vehicles, may be required to take precautions against collisions which are not necessary when it is operating trains upon its own right of way." *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790.

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

Montgomery & Hall and *Frank T. Ransom,* for appellant.

S. A. Searle and *J. L. Kaley, contra.*

LETTON, J.

This is the second time this case has been before this court. See 78 Neb. 140. When it was here before, the sole point determined was that the district court erred in sustaining a motion for judgment for the defendant on the special findings of the jury notwithstanding the general verdict. It was held that the special findings were insufficient to sustain the judgment, and the judgment of the district court was reversed and the cause remanded for further proceedings. Prior to the order sustaining the motion for judgment upon the special findings, a motion for a new trial had been filed by the defendant. This motion was not ruled upon until after the cause had been remanded to the district court, when it was overruled. The court then rendered judgment in favor of the plaintiff upon the general verdict, and from this judgment the defendant now appeals.

Plaintiff insists that the two motions filed by the defendant, one for judgment on the special findings, the other for a new trial, are inconsistent, and that by asking the court to sustain the motion for judgment it in effect requested it to overrule the motion for a new trial. This is the view taken by the supreme court of Iowa. *Nixon v. Downey & Wolverton,* 49 Ia. 166; *Pieart v. Chicago, R. I. & P. R. Co.,* 82 Ia. 148; *Schulte v. Chicago, M. & St. P. R. Co.,* 124 Ia. 191. See, also, *Kernan v. St. Paul City R. Co.,* 64 Minn. 312. In *Luse v. Union P. R. Co.,* 57 Kan. 361, a general verdict was returned in favor of the

plaintiff, together with a number of special findings. The defendant filed a motion for judgment on the special findings, and also a motion for a new trial. The court sustained the motion for judgment, and the journal entry recited: "The court is of opinion that the general verdict in this cause is not sustained by sufficient evidence, and is contrary to the evidence; but inasmuch as the motion for judgment on the special findings has been sustained, and for that reason only, said motion for a new trial is overruled." Judgment was thereon rendered on the special findings for defendant, but the point at issue here is not squarely decided. Plaintiff insists on the strength of these decisions that this cause was finally disposed of by the trial court when it rendered judgment for the defendant, and that the motion for a new trial was overruled by implication. On the other hand, the defendant argues that it has a constitutional right to be heard in the court of last resort by appeal, under section 24, art. I of the constitution; that it was not injured until the former judgment was set aside and a judgment rendered upon the general verdict, and not until its motion for a new trial was overruled had it any basis for an appeal. Its position is supported by the cases of *Fisk v. Henarie*, 15 Or. 89; *Brannon v. May*, 42 Ind. 93; *Chicago & N. W. R. Co. v. Dimick*, 96 Ill. 42; *Atchison, T. & S F. R. Co. v. Holland*, 58 Kan. 317; and *Davis v. Turner*, 69 Ohio St. 101. We are convinced that with the constitutional protection to the right of appeal afforded by the article referred to, the views of the latter courts are to be preferred to those of the supreme court of Iowa, and the motion to dismiss the appeal, therefore, is overruled.

Proceeding now to consider the appeal, the former opinion recites at length a number of allegations in the petition and answer, together with the special findings, so that it becomes unnecessary at this time to repeat the statement of the issues involved. The discussion, however, in that opinion was based upon the special findings and pleadings alone, and not upon the evidence in the case,

so that it now becomes necessary to consider further facts shown by the proof material to the controversy.

The deceased had been carrying the noonday lunch to his sons who were working in the packing plant of Swift & Company in South Omaha. About noon on the day he was killed, he was returning eastward on the sidewalk on the south side of Q street in that city. Two switch tracks of the defendant cross this street running nearly north and south and almost at right angles to the street. Close to the railroad tracks, and fronting north on Q street, is situated the two-story office building of Swift & Company. At this time an engine belonging to defendant and moving parallel to the line of the wall of the office building approached the crossing. At the point where the railroad tracks crossed the sidewalk there is a high, tight board fence with high gates of like nature across the tracks which inclose the tracks. The fence is parallel to the tracks. The gates are nearly in line with the north line of the office building, so that when the gates are closed, or when engines or cars are south of the street line, it is impossible for them to be seen by any one walking along the street west of the buildings until close to the tracks. The jury found by their special finding that, when Kafka reached a point five feet west of the west rail of the track on which he was injured, he could have seen an engine approaching on that track for a distance of 100 feet; when he stepped upon the track the engine was about a foot away, and when he was within five feet of the west rail of the track, the engine which struck him was 21 feet away. These findings seem to be supported by the evidence, but other material facts affecting the liability of the defendant appear in the evidence and are settled by the general verdict. The gates, ordinarily, are kept closed, but when it is necessary to take cars in or out of the Swift & Company inclosure they are opened to permit the passage of the engine and cars. The street at the point where the accident occurred is covered by a viaduct for nearly its whole width.

The witnesses for the plaintiff testify in substance that the accident occurred a few minutes after noon, and that there were 100 or more people upon the street close to the crossing at the time; that there are from 900 to 1200 employees working at Swift's; that they stop for dinner at 12 o'clock, and ordinarily there are a large number of people passing between 12 o'clock and half past 12 directly in front of the office building where the tracks cross Q street; that on account of the passage of cars and wagons over the viaduct there is often a great deal of noise at that point; that there was no flagman at the crossing; that cars pass over this viaduct every five minutes; that the street in front of the office is paved with cobblestones.

Mr. Houlabeck testifies for plaintiff that on the 21st of February, 1903, he was working for Swift & Company; that when he first saw Kafka on that day he was going east 15 feet from the corner; that he left the sidewalk about 4 feet from the office building at the gatepost and walked across the street northeast toward a stairway which ascends to the top of the viaduct; that, as he walked, some one called to him and he stopped and turned around; that when they called to him he turned toward the north, and faced west when the engine struck him; that Kafka looked around before he got onto the tracks; that when he was about 2 or 3 feet from the track on the west side the engine that struck him was on the west track running at the rate of about 12 miles an hour; that the gate next to the building over the footpath was closed; that there was no watchman or flagman there; that at the time Kafka was struck there was a street car passing over the viaduct, and that there was a loud roar and rumbling noise under the viaduct at that time on account of this; that he could not say whether a bell was ringing, on account of the noise; that Kafka was about 7 feet from the building at the time he was struck, just off the walk and only about 4 feet from the opening; that he was pushed along after he fell for about 12 feet;

that the fence obscures the view, and that the railroad track at the south curves in toward the building. On cross-examination he says that it was only a few seconds after he saw him until the engine struck him; that he was about 70 or 80 feet from Kafka when he first saw him, and was walking toward him until he was struck. He also testifies that the engine was about 20 to 25 feet from Kafka just before he got to the rail. Mr. Swatek testifies that he saw Kafka when they were taking him out from under the engine, and that just before the injury there were about 100 people on the street in the neighborhood of the crossing at that time. Kafka's daughter testifies that he was continuously employed, and that he earned from $1.75 to $2 a day; that he was a strong man in good health, and was a hard working, industrious man. The testimony of a number of witnesses for the defendant is largely devoted to showing the spot were Kafka was struck, and the distance that an engine could be seen to the south from that point.

The special findings of fact as to the latter point seem to have been based upon this evidence. This renders it unnecessary to consider the same in detail. But there are other facts worthy of note in the testimony of defendant's witnesses. The fireman testifies that the engine was going about 6 miles an hour and was about even with the gate when he first saw Kafka; that he was about 6 or 7 feet from the west rail of the track and about 26 or 27 feet north of the office building; that the engine bell was ringing automatically; the whistle was blown when the engine was 3 car lengths from the crossing; that Kafka was going east with his head down, and that Kafka could have seen the engine if he had looked, but he never raised his head; that the engine started about 180 feet back of the gate. The pilot beam was about even with the gate when he first saw Kafka; that the window between him and Kafka was wide open; that he could have seen Kafka sooner, but the fence was between them, and that as soon as Kafka got beyond the fence he saw him.

The engineer testifies that the cab was about even with the gate when he got the sign from the fireman to stop, and that the engine stopped in about 6 feet; that he did not see Kafka till they took him out. He was asked whether he did not say in the presence of one Koutski that the engine was going at the rate of 12 to 15 miles an hour, but denies that he did so. He also testifies that Kafka was picked up about 25 feet north of the gate.

Mr. Harris, a timekeeper for Swift & Company, was under the viaduct 8 or 10 feet north of the gate into the the Swift plant, which is about 40 feet west of the crossing. He was facing south and Kafka passed by him going east. The witness says he walked probably 40 feet from where he stood and was struck by the engine; that he hollowed at him when he was about 5 or 8 feet from the track; that Kafka did not look up when he hollowed; that he was 15 to 18 feet north of the office building at the time before he stepped on the track, and was about along the south edge of the viaduct. The witness knew the engine was in the inclosure, heard it coming, and saw it as it came opposite the gate. "Q. Now, then, how far had Kafka gone? In other words, how far was Kafka from the rail when you saw the nose of the engine in Q street? A. Well, I guess a step would be about all he would take; I don't know that I could state just how far he had gone." He testifies further that he shouted two or three times; that he could not state what track it was that Kafka was struck on, and that he was under the impression he was on the second track.

Mr. Stewart, a switchman, was in front of the main entrance to the Swift plant standing beside Mr. Harris. He testifies that when he saw Kafka he was near the middle of the street, walking across the track with his hands in his pockets and his head down. Kafka was from 4 to 6 feet from the west rail of the track when Harris shouted, the engine was just coming through the gate, and Kafka was about 15 feet north of the gate. This witness also says that he cannot say whether Kafka

was on the west track or the east track when he was struck; that when the engine was coming and Mr. Harris called he took about 2 or 3 steps, turned and threw up his hands just as the footboard struck him. Other witnesses for defendant testify that Kafka was about 4 or 5 feet from the track when the shouts were given; that he did not look up or pay any attention before he was struck. The impression of several of these witnesses is that he was on the east track when he was struck. This is not material, except to show how easily honest witnesses may be mistaken as to a fact when observed from a comparatively short distance and in a moment of excitement. On rebuttal Mr. Koutski testified that the engineer told him the engine was going 12 to 15 miles an hour when he received the signal to stop.

It will be seen that as to the speed of the engine, the place where Kafka was struck, and whether or not Kafka looked before he crossed the tracks, there is a conflict in the evidence.

We find in the reply brief of defendant what purports to be a copy of the opinion of Hon. W. A. Redick, judge of the district court, in overruling the motion for a new trial, a portion of which seems so apposite that we adopt the language quoted:

"The first question is as to the negligence of defendant; Two witnesses for defendant swore the engine was going 6 miles an hour, a witness for plaintiff said 12 miles, and another witness swore that one of defendant's witnesses had stated on one occasion that the rate of speed was 12 miles an hour. In this state of the record there is sufficient evidence to warrant a finding either way, and in support of the verdict we must assume the jury found the higher rate. It was for the jury to say whether or not, under all the circumstances, such rate was negligence. No other charge of negligence is sustained.

"The next question is whether or not plaintiff's negligence, if any, contributed to the accident. Defendant claims that plaintiff walked upon the track with his head

down and without looking to see whether an engine or train was near—and without listening, but it is altogether probable that he might not hear the engine and signals by reason of the noises made on the viaduct, and other engines or trains passing along. On the question of looking, at least four witnesses for defendant testified that they saw Kafka approach the track; that his head was down and they did not see him look in either direction until some one yelled and he looked up and back, and at this instant was struck by the engine.

"The plaintiff produced one witness, Houlabeck, who first testified that Kafka walked right up to the track until somebody yelled, when he looked up and was immediately struck by the engine; later on, however, he stated that 'he glanced toward the fence and then started off'—'he looked around just as he got about 2 or 3 feet from the track.' 'Just took a look and started across the track.' The witness, Houlabeck, was discredited later on, and if this question is one of law I would have little difficulty in finding for defendant on the great preponderance and weight of the evidence in its favor; but before it becomes a question of law, all reasonable men must agree. Two of defendant's witnesses said Kafka did not turn his head until some one hollored; that he paid no attention to the holloring at first when he was 4 to 6 feet from the track, nor until he was right on the track. Some of these witnesses were back of Kafka 25 to 40 feet and appreciated his danger, although their position was not nearly as favorable for seeing or hearing the engine as was Kafka's.

"I can scarcely conceive of a stronger case of defendant sustaining the burden of proof than this; the plaintiff's whole case in this issue depending alone upon the unsatisfactory evidence of Houlabeck. But, notwithstanding the impeachment of Houlabeck, he may have told the truth in this instance. It is possible that defendant's witnesses did not observe Kafka glance toward the fence. They were behind him quite a distance. They are testifying to a negative. They say he did not turn his

head; and while they were in position to see, he might have done so and they not have observed it or remembered it; while the evidence of Houlabeck is positive and for that reason stronger. The evidence of one credible witness that he saw a certain thing happen is much stronger than that of several witnesses that they did not see it happen, when the event under investigation is the conduct of a third person, and the witnesses speak only from observation and memory."

The judge continued that he was unable to distinguish this case from *Chicago, B. & Q. R. Co. v. Yost*, 56 Neb. 439. We think the distinction is clear. Yost was a trackman working on the railroad. With full knowledge of the fact that trains and engines were frequently passing each way upon the main track, he carelessly stepped close to it in full view of a passing engine and was injured. The negligence of the railroad company in the *Yost* case was not clear, while that of Yost was apparent. He was not walking in a busy street of a populous city where the care required of the railroad company is commensurate with the danger to the public. In this case a crowd of people were passing at the busiest hour of the day, the noise of the approaching engine was apparently drowned by the rumbling of a street car on the viaduct overhead. In that case the place where the accident occurred was at a point where no one had a right to go except employees of the railroad company, and the risk of accidents arising from the ordinary operation of trains was open and obvious. In this case the accident occurred upon a switch track in a crowded street where Kafka had a right to pass, and where the defendant was bound to use special care for the safety of foot passengers.

In this case, too, the engine approached from behind obstructions, and while a person close to the track could have seen it for 100 feet, the special findings establish the fact that when Kafka was within 2 steps of the track and only 4 feet from a point where the projecting footboard of the switch engine would reach, though he might

have seen an engine at a distance 100 feet south, the engine was in fact only 21 feet away. If the engine was running 12 miles an hour, this distance was traversed in a little more than a second. The jury found that the engine went 20 feet after Kafka was within 5 feet of the track before it struck him, hence they must have been convinced that it was going about 12 miles an hour. Considering the time and the place, the crowded street, the noise of traffic overhead, the obstructing building, and the inclosed tracks, the defendant was held to a very high degree of care, and the deceased had the right to believe that this would be exercised. On his part he was held to the exercise of that care which an ordinarily prudent person should exercise when crossing switch tracks in a public street under like circumstances, and whether he so acted or not is for the jury where the evidence conflicts. The jury believed Houlabeck's story that Kafka was in the exercise of due care, and we would not be justified in setting aside their verdict, in view of the gross negligence of defendant in switching in such a place, at such a time, at the rate of 12 miles an hour, or even at the rate of 6 miles an hour, without other precautions than those taken for the safety of the crowds.

Many cases have been cited by defendant's counsel as to the duty of persons crossing a railroad to look and listen, but many of them are not applicable in a case where the tracks are switch tracks from a private inclosure crossing a public street. We adhere to the view that, "if different minds may reasonably draw different conclusions or inferences from the state of facts established by the evidence in a cause, whether such facts show negligence or contributory negligence is not a question of law for the court, but must be submitted to the jury. *Omaha Street R. Co. v. Loehneisen,* 40 Neb. 37, followed." *Chicago, B. & Q. R. Co. v. Pollard,* 53 Neb. 730. *Shirley v. City of Minden,* 84 Neb. 544; *Hair v. Chicago, B. & Q. R. Co.,* 84 Neb. 398; *Crabtree v. Missouri P. R. Co.,* 86 Neb. 33. We, also, adhere to the rule that "a railroad com-

pany operating a train upon a city street, used in common by it and by pedestrians and vehicles, may be required to take precautions against collisions which are not necessary when it is operating trains upon its own right of way." *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790.

It is contended that the damages are excessive. But it is shown that there are three minor children, and that Kafka was frugal and industrious, and devoted his earnings to the support of his family. He was 52 years of age, usually earning $1.75 a day, and apparently in good health. We think a judgment of $3,380 not excessive under these conditions.

The case seems to have been tried with painstaking care, and the instructions fairly present the issues. We find no error in the record prejudicial to the defendant, and are all of the opinion that the judgment of the district court should be

AFFIRMED.

CHARLES H. BALLINGER, APPELLEE, V. OSMYN S. KINNEY, APPELLANT.

FILED JUNE 29, 1910. No. 16,066.

1. **Easements: OBSTRUCTING RIGHT OF WAY: INJUNCTION.** An action will lie at the suit of the owner of a right of way over the defendant's land to enjoin the latter from permanently obstructing such way.

2. ———: **APPURTENANT AND IN GROSS: PRESUMPTION.** It will not be presumed that the grant of an easement is in gross when the right can fairly be construed as appurtenant to some other estate.

3. ———: **RIGHT OF WAY: PASSES BY DEED.** Title to a right of way appurtenant to a tract of land will pass as an incident to a deed for the dominant estate containing no reference to appurtenances.

4. ———: ———: **OBSTRUCTIONS: EXTINGUISHMENT OF RIGHT.** Where an easement is created by an unambiguous written instrument, the estate conveyed thereby will not be cut down by the failure for six years of the owner thereof to compel the proprietor of the servient estate to remove permanent obstructions maintained by him upon the way in violation of the rights of the owner of the dominant estate.

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

John H. Linderman and *E. A. Cook,* for appellant.

George C. Gillan and *Warrington & Stewart, contra.*

ROOT, J.

This is an action to enjoin the defendant from obstructing a right of way which the plaintiff asserts over the defendant's real estate. The plaintiff prevailed, and the defendant appeals.

The plaintiff alleges in his petition that in 1902 one James, the owner of the south 49 feet of lots 7 and 8 in block 45 in the village of Lexington, sold the south 24½ feet thereof to the defendant, subject to a contract between said parties which is set out at length in the petition. By its terms the north wall of a brick building upon the tract conveyed by James became a party wall. The contract further provides: "That the said O. S. Kinney shall have the right to erect and maintain a coal shed, not exceeding six by six feet, on the east end of the tract owned by said James as aforesaid; and that the said James shall have the right of way of egress and ingress, jointly with the said O. S. Kinney, over the east seven feet of the tract owned by said Kinney as aforesaid." The parties further agree that the contract "shall remain in full force, and binding upon the parties hereto, and their successors in title, until * * * canceled or modified by mutual consent of such parties, or their successors, expressed in writing and duly signed and acknowledged as required by deeds to real estate." The plaintiff further charges that he purchased the north fraction of the south 49 feet of said lots in 1906, and thereby succeeded to the easement vested in his grantor; that the defendant has converted said strip of land into a room for the manufacture of ice cream, and obstructs said path by maintaining thereon a gasoline engine, an ice cream freezer and other obstacles, so that it "has become useless

to plaintiff and his tenants, and has thus practically excluded the plaintiff and his tenants from passing over said right of way," etc. The prayer is for equitable relief and an injunction. The defendant, among other things, in his answer expressly denies "that the plaintiff has any interest in, claim to, or right of egress and ingress over the seven feet of ground mentioned in the petition."

1. The defendant contends that the facts stated in the petition are not sufficient to constitute a cause of action in the plaintiff's favor, for the reason that the plaintiff does not allege the use of the way is necessary for the transaction of the business conducted in his building, or that he has been excluded from the way, or that the contract creating the easement is still in force. There is no presumption that the contract has been canceled, and the petition does charge the defendant with permanently obstructing a considerable part of the way. While the pleader does not state that the plaintiff has been irreparably injured by the defendant's acts, the allegations in the petition are sufficient to bring the plaintiff within the protection of the rule announced in *Agnew v. City of Pawnee City*, 79 Neb. 603. Furthermore, the defendant in his answer specifically denies the plaintiff's estate of an easement, and the plaintiff is entitled to have his title thereto quieted and confirmed if any such right exists.

2. It is further argued that the plaintiff did not succeed to James' right of way; that the contract is ambiguous, and the defendant and James by their acts construed the contract so as to give the defendant a right to maintain his engine, freezer, ice box and other obstructions in their present situation. The contract does not contain the word "heirs," but it does create in each party and his successor in title an easement in the lands of the other, and technical words are unnecessary to create an estate of inheritance in lands in Nebraska. Comp. St. 1909, ch. 73, sec. 49.

It is true, as suggested by counsel for the defendant, that no reference is made to appurtenances in the deed

from James to the plaintiff. The contract, however, does not create an easement in gross, but one that may be enjoyed solely in connection with other real estate. Under these circumstances the easement should be considered appurtenant to that land. The easement, being appurtenant, passed by James' deed to the plaintiff notwithstanding said instrument contains no reference thereto. *Smith v. Garbe,* 86 Neb. 91. We are unable to agree with the defendant in his contention that the contract is ambiguous. The agreement is that the parties shall jointly have the right of way for ingress and egress over the east seven feet of the tract conveyed to the defendant. The testimony discloses that the defendant purchased his real estate and granted the easement in 1902. At that time a brick building covered all of the tract except that part subjected to the right of way. The parcel of land to which James retained title was then vacant, but subsequently a building, planned for a business house, constructed upon the greater part of that real estate, was occupied by James for a time as a hardware store, and is still devoted to that purpose by the plaintiff's tenant. The defendant shortly after purchasing his building took possession and still occupies a considerable part of the way in dispute except a strip about 18 inches wide extending the length thereof; he maintains a wall along the south end of the way, and the door by which entrance may be secured thereto cannot be opened from the outside. The litigants before this suit was commenced did not confer at length concerning the situation, but the defendant admits the plaintiff stated his tenant complained and desired the way opened, to which the defendant made no answer. The defendant testifies that, unless compelled to, he will not remove any obstruction from the way. The plaintiff's tenant does not use the way for transporting merchandise to his store, but occasionally travels the path on foot. The obstructions were in their present position at the time the plaintiff purchased his property and the evidence tends to prove that James made no com-

plaint on that score. The contract creating the easement is evidenced by an unambiguous written instrument recorded in the office of the register of deeds. It is our opinion that James' failure to oust the defendant from his unlawful use of the way did not extinguish that easement or narrow the plain meaning of the language used by James and Kinney to define the extent of their respective grants.

The evidence and the law sustain the decree of the district court, and it is

AFFIRMED.

SEDGWICK, J., dissenting.

The real matter in dispute between these parties is whether the defendant must leave the whole 7 feet open for plaintiff's "ingress and egress," or may make such use of this part of his property as will not prevent plaintiff's "ingress and egress." This requires a construction of the contract as to what sort of ingress and egress was intended by the parties. The majority opinion does not discuss this question, and so the real controversy is ignored. By the decree complained of "the defendant and all persons claiming under him be, and are hereby, perpetually enjoined from maintaining on said east 7 feet of said tract owned by him any obstruction or obstructions that *will in any manner interfere with or prevent* the plaintiff or his tenants from the use of the whole said 7 feet, * * * as a right of way." Thus the contract is construed to mean that this 7-foot strip shall be devoted wholly to ingress and egress by the respective parties, one party having no more right to this part of the real estate than the other, virtually making them owners and tenants in common of the said 7-foot strip. It is said there is no ambiguity in the contract. This is the clear and undoubted meaning. Nevertheless, it was said in the opinion that "the obstructions were in their present position at the time the plaintiff purchased his property and the evidence tends to prove that James made no complaint on that score." In 1902 James was the owner of both

tracts and also the store building on the south tract, and at the east end of said store building was the 7-foot strip. James then sold the south tract and store building to Kinney, and retained the north tract and also by the contract reserved the right of "egress and ingress." James had before that time inclosed the south end of the 7-foot strip which opens upon the street and placed a door in said inclosure for "ingress and egress." He had been using this doorway for ingress and egress to the back part of the store building which he then sold to Kinney. It was and is in the interest of both parties that the entrance to this passageway should be controlled from the inside, as it admits persons to the stores of both parties alike. He did not in the transfer to Kinney reserve the whole 7 feet for ingress and egress. He reserved only a right of way over the east 7 feet for that purpose. The right of ingress and egress alone was reserved and that was limited to the east 7 feet.

This action was begun on the 14th day of May, 1908. James sold this property to Kinney on the 2d day of February, 1902. For more than six years these parties have by their actions construed this contract to reserve to James and his grantees the right of ingress and egress, and nothing more. This I think was the necessary construction of the plain language. James built a hardware store on the tract retained by him soon after he sold to Kinney. By the terms of the contract the parties are to have equal joint right of ingress and egress, but they have no joint right in the property except the right to pass through it. Subject to this right to pass through the property, the land belongs to defendant, and he has all the beneficial interest and use of it that does not interfere with the plaintiff's right of ingress and egress. Under this injunction he must remove the inclosure at the south end and keep everything off from this land, so that the plaintiff can not only have ingress and egress thereon, but can go over any part as he may desire. There must be nothing there, no use of the land, that will "in

any manner interfere with or prevent" the plaintiff to pass along the east or center part, if he should tire of passing on the west part. If the agreement is unambiguous, as stated in the majority opinion, its plain meaning is, as above stated, that James and his grantees shall continue to have the right to pass over this land as he could by the passage which he had constructed for that purpose, and was used for that purpose when he sold to Kinney.

It is not a question whether James or his grantees could oust the defendant "from his unlawful use of the way," which seems to be the point decided in the opinion. The question is: What is the lawful use provided by the contract that the plaintiff and defendant are respectively authorized to make? It is said in the opinion that "the defendant admits the plaintiff stated his tenant complained and desired the way opened to which the defendant made no answer." The record shows that the tenant himself was upon the witness-stand and stated under oath that he had never complained to the defendant in regard to obstructions in the right of way, and when questioned he refused to say that he had any further use of a passageway on this land than was already accorded him. There is nothing in the contract from which to determine for what purpose it was intended the plaintiff should use this right of ingress and egress. The real intention and meaning of the contract therefore in this regard should be determined from the circumstances and the practical con struction, if any, that the parties put upon the contract by their conduct after it was entered into. In these respects the petition is deficient, and the evidence is not as satisfactory as it might be. In construing this contract to ascertain the real meaning of the parties thereto we must take into consideration the circumstances and conditions existing at that time and the practical construction that the parties have put upon the contract in the succeeding years. It was of course understood between the parties at that time what sort of business would be

transacted in the north building. This contract was made with reference to that understanding. There is no direct evidence as to what that understanding was, but the fact is that James built a hardware store thereon and he and his tenants have used it ever since for that purpose. These parties have put a practical construction for six years upon their contract, and now it is attempted to compel Kinney to remove this entry way at the south end of the 7-foot strip and to abandon the whole 7-foot strip to the use of Ballinger, without any evidence showing that Ballinger has any need of it or even desired it, except for the purpose of demanding the "pound of flesh."

VILLAGE OF DODGE, APPELLEE, V. WALTER A. GUIDINGER, APPELLANT.

FILED JUNE 29, 1910. No. 16,094.

Occupation Tax: PRACTICING MEDICINE. Village trustees may for the purpose of raising revenue lawfully enact an ordinance levying a tax upon the occupation of practicing medicine within the village limits.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Allen Johnson, for appellant.

F. W. Button, contra.

ROOT, J.

This is an action to recover judgment for an occupation tax. The plaintiff prevailed, and the defendant appeals.

1. The defendant succinctly states the issue: "The question involved in this case is simply whether or not villages in Nebraska may legally lay and collect a tax on the vocation of a physician." The plaintiff is authorized by section 8920, Ann. St. 1909, "to raise revenue by levying and collecting a license tax on any occupation or busi-

ness within the limits of the city or village, and regulate the same by ordinance." Similar statutes have been approved by this court. *Western Union Telegraph Co. v. City of Fremont,* 39 Neb. 692, and cases there cited.

The defendant contends that practicing medicine is neither a business nor an occupation, but a profession; that, since the statute and the ordinance are silent concerning professions, the tax sought to be collected is void. The word "occupation" is a generic term. *Schuchardt v. People,* 99 Ill. 501. An occupation is "that to which one's time and attention are habitually devoted; habitual or stated employment; vocation; calling; trade; business." Century Dictionary. And a vocation is defined in the same dictionary as "employment; occupation; avocation; calling; business; trade; including professions as well as mechanical occupations." In Thesaurus (March) Dictionary of the English Language the word "profession" is defined as "the occupation, if not agricultural, mechanical, or the like, which one follows." See, also, Webster's Dictionary. In our opinion a physician practicing medicine as a business is engaged in an occupation within the meaning of the statute, and the plaintiff under the legislative grant of authority had power to levy and collect a tax upon the defendant's occupation or business. *Lent v. Portland,* 42 Or. 488.

2. The defendant argues that the plaintiff may only license such vocations as it may regulate in the exercise of the police power, and that the practice of medicine is not subject to such regulations. The statute authorizes the imposition of occupation taxes for the purpose of raising revenue. The taxing power, therefore, is the source of the plaintiff's authority to demand from the defendant the tax in question. The power of the legislature to raise revenue by levying a license tax upon occupations is elaborately discussed and definitely determined in *Rosenbloom v. State,* 64 Neb. 342. See, also, *State v. Boyd,* 63 Neb. 829. The question is no longer an open one in this state. The ordinance imposes a uniform tax upon the occupa-

tion of practicing medicine in the village of Dodge. There is no suggestion that the amount is excessive, nor would the record support that contention if made.

There is no error in the record, and the judgment of the district court is

AFFIRMED.

STATE BANK OF CHICAGO, APPELLEE, V. FIRST NATIONAL BANK OF OMAHA, APPELLANT.

FILED JUNE 29, 1910. No. 16,097.

1. **Banks and Banking**: FORGED DRAFT: PAYMENT: RECOVERY. Where the payee of an unaccepted draft to which the drawer's name has been forged, and purporting to have been drawn by a bank in South Dakota upon a bank in Illinois, indorses the instrument generally and sells it for its face value to a Nebraska banker with whom the payee is acquainted, the drawee, after paying the bill, cannot recover back the money unless it pleads and proves that the holder was negligent in purchasing the instrument, or in indorsing it, or withheld from the drawee at the time the bill was paid some information or grounds for suspicion within his knowledge concerning the genuineness of the bill.

2. ———: ———: DUTY OF PURCHASER. In such a case the cashing bank, if it acted in good faith in the transaction, is not required, in order to acquit itself of a charge of negligence in purchasing the bill, to prove that before such purchase it inquired of the drawer whether the instrument was genuine, or communicated with the drawee to learn whether the bill would be accepted.

3. ———: ———: INDORSEMENT. Where such a draft, by reason of the payee's indorsement, is negotiable by delivery, an indorsement by the holder is not a warranty to the drawee that the drawer's signature is genuine.

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

Isaac E. Congdon, for appellant.

Myron Learned, contra.

ROOT, J.

This is an action by the drawee of a forged draft to recover from a holder thereof money paid to satisfy that instrument. The plaintiff prevailed upon the defendant's demurrer to the petition. The defendant appeals.

The plaintiff alleges in its petition that the defendant, through its agent, the Continental National Bank of Chicago, on November 29, 1907, caused to be presented to the plaintiff through the Chicago clearing house a certain draft of which the following is a copy: "$800. The German Bank. No. 9638. Eureka, South Dakota, Nov. 23, 1907. Pay to the order of Chas. Viterna, $800.00, eight hundred dollars. E. Moog, A. Cashier. To the State Bank of Chicago, Chicago, Ill." The instrument was indorsed: "Chas. Viterna." "Pay to the order of Continental National Bank, Chicago, Ill., First National Bank, Omaha, Neb. L. L. Kountze, Cashier." The plaintiff further alleges that, believing the instrument to be the genuine draft of said E. Moog, it accepted the same and paid it to the defendant through the Continental National Bank; "that the defendant, prior to the presentation, acceptance and payment of said draft as hereinbefore alleged, paid to Charles Viterna named in said draft as payee, knowing him to be said Viterna, eight hundred dollars ($800.00), the amount named in said draft, without any knowledge or information as to whether said draft would be accepted or paid by the plaintiff, and without taking any steps to ascertain whether or not said draft was a genuine draft of the above named E. Moog, assistant cashier of the German Bank of Eureka, South Dakota." The plaintiff also alleges the draft was forged, but its true character did not become known until December 12, 1907. Immediately thereafter the plaintiff advised the defendant of said fact and demanded repayment of the $800, which demand was refused. Counsel for the respective litigants stated at the bar that the negotiable instrument statute does not

control this case, and we shall treat their statement as correct for the purposes of this case.

The great weight of authority sustains the proposition that, as between the drawee and a good faith holder of a draft, the drawee bank is to be deemed the place of final settlement, where all prior mistakes and forgeries shall be corrected and settled once for all; and, if not noticed and payment is made, the money cannot be recovered back. *Price v. Neal*, 3 Bur. (Eng.) 1354; *Germania Bank v. Boutell*, 60 Minn. 189. The cases are annotated in a note to *First Nat. Bank v. Bank of Wyndmere*, 10 L. R. A. n. s. 49 (15 N. Dak. 299). Courts and text-writers generally recognize that the preponderance of authority is in favor of the rule, but it seems to conflict with a well-established principle of law that money paid by mistake may be recovered back, and has not been accepted without qualification by all of the American courts. North Dakota refuses to follow *Price v. Neal, supra*, and has held that the principles of equity should control a transaction between the drawee and a holder of a forged check or draft. *First Nat. Bank v. Bank of Wyndmere, supra*. The position assumed by North Dakota is in harmony with suggestions made by many text-writers, but, so far as we are advised, is not sustained by the opinion of any other court. Intermediate the cases adhering to the ancient rule and *First Nat. Bank v. Bank of Wyndmere*, one may find cases qualifying the broad rule promulgated in *Price v. Neal, supra*.

The Massachusetts supreme court hold that the failure of the drawee to detect the forgery at the time the draft is presented and paid will not preclude it from recovering the money from a holder "who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the drawee or induce him to pay the check without the usual security against fraud." *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280. In the cited case the cashing bank received a check from an unknown person payable to bearer, and

without requiring him to identify himself, although there was a local custom requiring identification in such cases. It was held that the negligence of the cashing bank lulled the drawee into a false sense of security and the latter could recover back the money paid. In *National Bank of North America v. Bangs*, 106 Mass. 441, the court hold the drawee should be permitted to recover if the party receiving the money in any manner contributed to the success of the fraud, or to the mistake of fact under which the payment was made.

The plaintiff relies upon our decision in *First Nat. Bank of Orleans v. State Bank of Alma*, 22 Neb. 769. That case was decided upon a statement of facts to the effect that B. R. Claypool maintained a deposit in each of said banks. A stranger presented to the Orleans bank a check upon the Alma bank bearing the name of Claypool as drawer, and payable to A. J. Gype, or bearer. The Orleans cashier compared the signature to the check with Claypool's genuine signature upon the bank's book, and, without requiring the holder to identify himself or to account for the manner in which he secured possession of the check, paid it. In due course, through a bank wherein the litigants each maintained a deposit, the check was paid and charged to the account of the Alma bank, and later was delivered to Claypool, who denounced the instrument as a forgery. We held the drawee should recover the money paid. Some remarks in the argument of our late chief justice, taken apart from the facts in the case, lend color to the plaintiff's argument in the instant one. At the bar it was argued that, since the check on the Alma bank was payable to bearer, identification of the holder was an immaterial fact, and the entire argument in the opinion should be considered with relation to the obligation of the cashing bank to ascertain at its peril that the check was a genuine instrument. The principle underlying the opinion is that the cashing bank was negligent in not availing itself of all means at its command to ascertain whether the check was genuine. Business

men and courts alike recognize that ordinary prudence forbids the purchase of a check from a stranger, regardless of whether the paper was payable to order or bearer. The instrument considered in the Alma case was an ordinary check, not designed for circulation, but for immediate presentment. *First Nat. Bank v. Miller,* 37 Neb. 500. As stated by Judge MAXWELL, the Alma bank did not know but that Claypool had been present when the check was presented by the holder to the Orleans bank, and, had the cashing bank made inquiries concerning the identity of the holder or the manner in which he became possessed of the instrument, the probabilities are he would not have withstood the ordeal, but the fraud would have been discovered. In *Germania Bank v. Boutell, supra,* the duty of the cashing bank to require the holder to identify himself is recognized. The rule stated in the *Orleans* case has been adopted in Massachusetts; in *People's Bank v. Franklin Bank,* 88 Tenn. 299; *Canadian Bank of Commerce v. Bingham,* 30 Wash. 484, 60 L. R. A. 955, and has been recognized in *First Nat. Bank v. Marshalltown State Bank,* 107 Ia. 327.

In *Ellis & Morton v. Ohio Life Ins. & Trust Co.,* 4 Ohio St. 628, a local custom obtained among the banks of Cincinnati requiring the cashing bank, before purchasing a check presented by a stranger and drawn upon another bank, to make careful inquiry concerning his identity, and to ascertain whether the paper was genuine and the holder was the owner thereof. The opinion turns upon the holder's negligence in failing to comply with this local custom.

In the case at bar, Viterna was payee of the forged draft, and was known to the defendant at the time it purchased the bill. The draft purports to be a foreign bill of exchange, an instrument that for many purposes is intended to circulate as money for a limited period of time; the forgery consisted in forging the name of the drawer, and not in raising the amount of a genuine bill, and the drawer maintains its place of business in a neighboring

state. The plaintiff does not plead that any suspicious circumstances surrounded the purchase of the bill by the defendant, that Viterna was not a man of fair character or so situated that the possession and presentation by him of a draft for $800 would excite suspicion in the mind of any prudent banker, nor does the plaintiff charge that at any time prior to the presentation of said instrument the defendant acquired any knowledge or entertained a suspicion concerning the forgery which it withheld from the plaintiff. The plaintiff does charge that the defendant did not take any steps to ascertain whether the draft was genuine or would be paid, but the statement, admitted by the demurrer to be true, must be taken into consideration in connection with the fact that the drawer was in South Dakota, the drawee in Chicago, and the payee was known to the defendant, a resident of Nebraska. It is not pleaded there was an agreement between the litigants that drafts drawn on each other should not be cashed if presented for sale by a payee known to the cashing bank unless it first made inquiry concerning the instrument, or that any such custom obtained in Omaha or Chicago, or that the defendant had any means at hand whereby it could have ascertained the genuineness of Moog's signature. In fact, so skillfully was that signature forged that it deceived the drawee, so that had Viterna been acquainted with the paying teller or other employee or officer charged by the plaintiff with the duty of identifying signatures to its customers' drafts, it is more than probable that it would have cashed the draft if the payee had presented the instrument for payment.

In the *Orleans* case the cashing bank had the drawer's genuine signature to compare with the name attached to the check, and it also had the power to demand that the holder should identify himself; it availed itself of but one safeguard against fraud, and we are entirely satisfied with our opinion holding that under the circumstances the Orleans bank was guilty of negligence. But in the case at bar it is not alleged the defendant had any means other

than the identity of the payee to prove the genuineness of the draft. Until the legislature shall provide that a bank is guilty of negligence in purchasing a foreign draft fair on its face from a known payee, unless it first comunicates with the drawer and the drawee to learn whether the draft is genuine, we do not feel justified in expanding the rule announced in the *Orleans* case, *supra*. Drafts aggregating many billions of dollars in value have been issued, negotiated, accepted and paid by merchants and bankers in reliance upon the rule announced in *Price v. Neal, supra,* and to the general satisfaction of the commercial world. So far as we are advised, in but one state of the Union, Pennsylvania, has the legislature modified that rule. Merchants and bankers in the great centers of the English speaking world have not moved the legislatures to modify this principle of the law merchant, and the courts should hesitate before substituting the philosophy of logicians for a practical rule evolved from the necessities of commerce.

The plaintiff also cites *First Nat. Bank v. First Nat. Bank,* 4 Ind. App. 355, but it should not be seriously considered as an authority in the case at bar because it refers to a forged school order which the learned judge writing that opinion states, at page 363 of the report, is not negotiable according to the law merchant. The court also hold the indorsement "for collection" by the holder of the order tended to divert scrutiny by the drawee of the drawer's signature because such an indorsement would indicate the instrument was not circulating as negotiable paper.

The plaintiff further cites *First Nat. Bank v. Northwestern Nat. Bank,* 40 Ill. App. 640. This case was appealed to the supreme court of that state and is reported in 152 Ill. 296. In that case checks purporting to have been drawn by the Central Union Telephone Company upon the Northwestern National Bank of Chicago, payable in four instances to "F. P. Ross, Manager," and in one case to "C. H. Wilson, A. G. Supt," were received by

the First National Bank through the clearing house. The proof established that the payees were employees of the telephone company, but were not entitled to the checks, knew nothing about them, and their indorsements, as well as the signature of the drawer, had been forged. The court hold that, while the drawee by paying a draft is estopped from thereafter denying the drawer's signature, it does not warrant the signature of any indorser, but the indorser warrants the genuineness of all preceding indorsements; that the parties stood as though the bills were genuine, but the indorsements of the payees forged, and the drawee for that reason could recover the money paid by it to the holder of the paper. The opinion is sound, but has no application to the instant case because there were no forged indorsements upon the bill in question.

Ford & Co. v. People's Bank, 74 S. Car. 180, 10 L. R. A. n. s. 63, is cited by the plaintiff. In that case the plaintiff's drawee paid a forged draft, and charged in his petition to recover back the money: "That the plaintiff paid the said draft upon presentation, upon the faith and credit of the indorsement of the said defendant." A general demurrer to the petition was sustained, and the supreme court of that state hold that a general indorsement of a forged bill by the holder thereof is a representation that the drawer's signature is genuine upon which the drawee may rely, and, in case the instrument is forged, may recover back money paid the holder. The opinion is against the weight of authority, and is not supported by any of the cases cited by that court upon this point, except the case of *Woods & Malone v. Colony Bank*, 114 Ga. 683, and the opinion filed in the last named case cites *National Bank of North America v. Bangs, supra*, in support of the principle announced by it and later by the South Carolina court.

In the Massachusetts case the cashing bank was named as payee in a forged check payable to its order, so the instrument could not become current except by the

bank's indorsement. The court hold that the payee was negligent in taking the check from a stranger without proof of his identity, and, by indorsing the check, gave it currency and standing. In the Georgia case the draft was payable to bearer, and the opinion is sound, based upon the negligence of the cashing bank in not requiring the party from whom it purchased the instrument to identify himself; but so far as it holds upon the reported facts that the indorsement by the holder was a warranty to the drawee that the drawer's signature was genuine, it is unsound in principle and will not be accepted as a correct statement of the law.

First Nat. Bank v. Bank of Wyndmere, supra, cited by plaintiff, does sustain its argument, but we are of opinion that the *Orleans* case, *supra,* commits this court to the doctrine that the drawee must establish the cashing bank's negligence, or bad faith, to justify a recovery. Since the drawee should only recover in this suit in case the cashing bank was negligent or has acted in bad faith, the burden is upon the former to plead such negligence or *mala fides.* The pleader in the instant case in our opinion has not stated in his petition facts sufficient to establish that the defendant was negligent or that it acted in bad faith in purchasing from Viterna the forged draft in question.

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

REVERSED.

STATE, EX REL. J. L. BRANDEIS & SONS, APPELLEE, V. CHRISTIAN A. MELCHER, APPELLANT.

FILED JUNE 29, 1910. No. 16,102.

1. **Schools: BOARD OF EDUCATION: ADOPTION OF RULES.** A rule adopted by the board of education of the city of South Omaha, providing that its committee on teachers and janitors shall annually, after

the organization of the board in May, report the names of teachers and janitors to be selected by the board and the salaries to be paid such employees, and also recommend three competent persons to inquire into the qualifications of applicants desiring to teach in the public schools in said city, is a reasonable exercise of the power delegated to said board by the legislature to enact rules and regulations, is binding upon the board, and contemplates that, except in emergencies, the incoming members shall have the right to participate in employing teachers and janitors for the year next succeeding the new members' election.

2. ———: ———: EMPLOYMENT OF SPECIAL COUNSEL. Section 8430, Ann. St. 1909, does not disable the board of education of the city of South Omaha from employing counsel at the expense of the district in addition to its regular attorney to represent it in litigation.

3. Mandamus: PAYMENT OF SCHOOL WARRANT. But if the treasurer of the district refuses to pay a warrant drawn in payment for legal services rendered the board and a fraction of its members in opposing a suit prosecuted to restrain them from acting in violation of the rules of the board, the writ should not issue unless it clearly appears that the members of the board were acting in good faith with respect to the matters referred to in the injunction suit and according to their rules and the law.

4. Appeal: ERRORS NOT ARGUED IN BRIEFS. Ordinarily an error occurring in the district court will not be noticed on appeal unless the appellant specifically assigns and argues that error in his brief; but where the effect of affirming a judgment may be to improperly dispose of school funds, and error prejudicial to the district appearing in the record is referred to but not specifically assigned in the brief, it will be noticed, although not argued at length.

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

E. R. Leigh and *J. J. Breen,* for appellant.

Baxter & Van Dusen and *John L. Kennedy, contra.*

ROOT, J.

This is a mandamus proceeding to compel the respondent, the treasurer of the school district of the city of South Omaha, to pay a warrant drawn against its funds. The relator prevailed, and the respondent appeals.

On the 4th day of May, 1907, Axel Bergquist, a resident taxpayer of the district, commenced an action in the district court for Douglas county against the board of education and its individual members, charging that the defendants therein, Laverty, Rich and Corrigan, had conspired to enter into contracts, in the name of the board, with teachers, janitors and other employees for a period of time extending beyond the terms of said members and in violation of the rules adopted by said board. Bergquist asked that the defendants be enjoined from proceeding at that time to elect teachers, janitors and other employees. Judge Kennedy issued a restraining order and set the cause down for hearing on the application for a temporary injunction. Thereupon, April 5, 1907, the board made an order, Laverty, Rich and Corrigan voting aye, and the other two members voting nay, that H. B. Fleharty, Esq., and Messrs. Baxter & Van Dusen, practicing attorneys of the Douglas county bar, should be employed to represent the board in resisting said suit. A joint answer for the board, Laverty, Rich and Corrigan, was filed by said attorneys and the regular attorney for the school board April 15, 1907. That same day an amended petition was filed, omitting the name of the board of education from the caption, but no entry was made dismissing the action as to said defendant. Thereupon the same counsel filed the joint answer of Laverty, Rich and Corrigan. April 16, 1907, the suit was dismissed without prejudice to another action. April 18, 1907, the board, Laverty, Rich and Corrigan voting aye, and the other members voting nay, allowed a bill for legal services in the sum of $150 in favor of Mr. Fleharty, and a like bill in favor of Messrs. Baxter & Van Dusen. The relator purchased Mr. Fleharty's warrant for a valuable consideration, and it forms the basis of this suit.

1. School district warrants do not possess the qualities of negotiable paper, and a purchaser thereof takes them subject to all equities existing against the original holder. *School District v. Stough,* 4 Neb. 357; *State v. Cook,* 43

Neb. 318. A writ of mandamus should not issue unless the right of the relator to the relief is clear and no adequate remedy at law exists. *State v. City of Omaha,* 14 Neb. 265; *State v. Cook, supra; State v. Merrell,* 43 Neb. 575; *State v. Bartley,* 50 Neb. 874. We have sustained the district court in granting a writ to compel the payment of a school district warrant. *Leonard v. State,* 67 Neb. 635. Ordinarily the discretion of the district court in granting or withholding the writ will not be overruled unless the record presents a plain error or it is clear that the principles of law controlling the rights of the parties have not been correctly applied.

In 1903 the legislature by chapter 98, laws 1903 (Ann. St. 1909, sec. 8415 *et seq.*), provided that every city of the first class having more than 25,000 and less than 40,000 inhabitants, and such adjacent territory as might be attached to the city for school purposes, should constitute a school district, and its affairs be controlled by a board of education of five members elected by the qualified voters of the district. The board of education is granted the power "to select their own officers, and make their own rules and regulations subject to the provisions of this act and the general school laws." Section 8421. The act further provides: "That said board of education shall have power to elect an attorney for said board, and may enter into a contract with him for a term not to exceed one year. Said attorney shall receive a salary of three hundred dollars per annum, payable in monthly instalments of twenty-five dollars each." Section 8430. By section 16 of the rules adopted by the board prior to April 4, 1907, the committee on teachers and janitors is required to report to the board annually, after the organization in May, the names of competent and eligible teachers and janitors to be elected, and to recommend three competent persons to act as an examining board to inquire into the qualifications of such teachers. Section 21 of the rules requires the attorney for the district to attend all board meetings, inspect and pass upon all contracts, bonds and

legal documents in which the board is interested, to advise the board upon all legal questions concerning the affairs of the district, to take charge of all suits at law "as directed by the board, in which the interests of the school district are involved, and to do such other legal business for the district as the board may direct." Prior to April 4, 1907, the board had selected an attorney, and there is nothing in the record to suggest he was disqualified from appearing for the board in the injunction suit.

2. The respondent contends that, since the legislature has made provision for an attorney to represent the school district, the board did not have authority to employ additional counsel and pay them out of the funds of the district. *Brome v. Cuming County,* 31 Neb. 362, is cited as controlling the instant case. In that action we held the county commissioners had no authority to employ at the expense of the county private counsel to assist the county attorney in legal proceedings brought by the county against several of its *ex* clerks and their bondsmen. The legislature created the office of county attorney and defined that official's duties. By force of the statute then existing the county attorney was given control and charged with the sole responsibility of attending to the county's legal business, and the county commissioners, exercising such authority as the legislature had delegated to them, could not control the county's litigation or bind it to pay for services which the statute directed the county attorney to perform for his official salary. The other authorities cited by respondent's counsel upon this point relate to cases analogous to *Brome v. Cuming County, supra,* and do not in our opinion sustain his argument upon this feature of the instant case. Chapter 98, laws 1903, specifically authorizes school districts of the class to which the district of South Omaha belongs to sue and to be sued in proper cases. Section 33 of the act (Ann. St. 1909, sec. 8447) by reference incorporates into the act so much of the general school law as is not inconsistent with said chapter. The effect of this section is to expand

to some degree the scope of chapter 98, *supra*. *State v. Majors*, 85 Neb. 375. By the provisions of the general school law, school district officers are given authority to protect the district in all suits to which the district is a party or which may affect its interests. In the opinion of Mr. Commissioner EPPERSON in *Bishop v. Fuller*, 78 Neb. 259, may be found a discussion of this subject, and the commissioner reasons that the school district may lawfully expend its funds in litigation affecting its interests but to which it is not a party.

Section 8430, Ann. St. 1909, does not provide that an attorney when selected by the school board shall have control of all litigation in which the district may be interested, nor does the statute create a legal department and devolve upon it complete responsibility for all such litigation. It is declaratory and not restrictive in direct terms or by fair implication of the language used. The school district of the city of South Omaha owns property of great and increasing value. A continuous, rapid increase in population calls for a corresponding expansion in the number of its schoolhouses and teachers. Litigation involving property rights or the public revenue and vitally affecting the school district is likely to arise at any time. We do not believe the legislature intended to authorize a rural school district to employ and pay counsel reasonable fees in all cases affecting its interests, and at the same time to restrict the school district of South Omaha to the payment of an attorney fee for all legal services rendered it during an entire year that in some instances would amount to no more than a respectable retainer. We therefore are of opinion that it was within the power of the board of education, if acting in good faith, to employ counsel to appear in litigation in which the district was interested and to pay such counsel out of the funds of the district a reasonable sum for their services.

3. Although the board had authority to employ attorneys, we are not entirely satisfied that the evidence of the board's good faith is so clear concerning the employment

of counsel to assist their regular attorney in opposing the injunction suit that a writ should issue to compel the payment of the warrant in suit. The legislature has authorized the board to enact rules to govern its conduct. Prior to April 4 the board had exercised that power by providing that its committee on teachers should report annually in May, after the reorganization of the board, the names of teachers and janitors to be employed for the succeeding year by the district. Members of the board of education are elected on the first Tuesday in April. Section 8420, Ann. St. 1909, provides that the board shall hold a regular meeting on the first Monday in each month. The record discloses that the terms of Laverty, Rich and Corrigan expired the first Monday in May, 1907. It is evident, if the rules of the board are given any binding force, that outgoing members of the board of education, except in cases of emergency, have no voice in selecting teachers and janitors for a period extending beyond the retiring members' terms. Where the legislature delegates to an administrative board the power to enact rules to carry out the purposes for which that body was created, a reasonable rule, not in conflict with law, has the force of law within that board's field of action and will be sustained by the courts. *Ives v. Irey,* 51 Neb. 136; *State v. Dunn,* 76 Neb. 155; *State v. Dudgeon,* 83 Neb. 371; *Blue v. Beach,* 155 Ind. 121.

In *Nelson v. City of South Omaha,* 84 Neb. 434, under a statute providing that the rules might be suspended and an ordinance passed in manner other than directed by the act, we held that a vote of two-thirds of the members of the city council in favor of an ordinance would be construed as a vote in favor of suspending the rules. There is nothing in the record to show that the rules of the board of education in the city of South Omaha provided in 1907 for their suspension. From the proof before us it appears that three members of the board, in defiance of its rules, were attempting to forestall the action of their successors in office. It also appears that special counsel were

employed in the name of the board by the solid vote of those members, and over the objections of the other members, to remove the legal obstructions interposed to prevent such unlawful acts. It may be that it was to the interest of the district to defeat a suit prosecuted to restrain a majority of the board from acting in violation of its rules, but there is nothing in the record to warrant such an inference. There is proof that on the 18th of April, 1907, two days after the injunction suit was dismissed, the plaintiff therein brought another action against Laverty, Corrigan and Rich, and Judge Sutton restrained them from electing teachers or janitors. Upon the trial of the instant case the respondent sought to prove that April 16, before the first action was dismissed, Laverty, Rich and Corrigan assured the district court they had no intention of electing any teachers or janitors; that immediately after that action was disposed of they attempted to do the things they stated in open court they had no intention of doing and the second suit was the result of that conduct. This proof was excluded by the district court.

There is no specific assignment of error in the respondent's brief based upon this ruling of the district court, nor is the question of Rich, Laverty and Corrigan's good faith in assuming to act in the name of the board in violation of its rules or in employing counsel to sustain their action argued at length, although reference is made thereto. We have, however, before us copies of the pleadings and of the orders made by Judges Sutton and Kennedy. The purpose of the writ is to compel the expenditure of funds held by the respondent in trust for the benefit of the children of South Omaha, and we think this is a case where we should avail ourselves of the privilege accorded by section 675*c* of the code. We do not care upon the evidence before us to determine the good faith of those men, but are of opinion that the court should have permitted the respondent to introduce evidence tending to prove bad faith on the part of the retiring members of the

board of education, and that upon the evidence received the writ should not have issued. The other arguments presented by the respondent have been examined, but are not thought applicable to the case at bar.

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

REVERSED.

HUGH CRILLY, APPELLANT, V. HENRY RUYLE, APPELLEE.

FILED JUNE 29, 1910. No. 16,104.

1. **Appeal:** REPLY. Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment. *Missouri P. R. Co. v. Palmer*, 55 Neb. 559.

2. **Payment, Plea of:** SUFFICIENCY. A general allegation in an answer that the plaintiff's demand has been paid, if not attacked by motion before trial, is sufficient to permit the introduction of evidence to prove payment.

3. ———: ACCORD AND SATISFACTION: EVIDENCE. If payment is the sole affirmative defense pleaded in an answer, evidence tending to show an accord and satisfaction with respect to the subject matter of the suit should not be received over the plaintiff's objection.

4. **Sales:** AGREEMENT AS TO WEIGHTS. Where a vendor and a vendee agree that live stock shall be weighed by the former and the weights thus ascertained less a shrinkage of 2 per cent. accepted by the latter, the vendee, in the absence of fraud or mistake, is concluded by such weights.

5. **Trial:** AUTHORITY OF AGENT: QUESTION FOR JURY. Where one man's authority to represent another becomes material during the trial of an action at law and the evidence upon that point is conflicting, the issue should be submitted to the jury.

6. **Banks and Banking:** AGENCY. A bank charged with the duty of collecting a draft is the drawer's agent.

7. **Accord and Satisfaction:** UNACCEPTED DRAFT: PARTIAL PAYMENT. The mere payment of part of the face of an unaccepted draft by the drawee, accompanied by a statement that he owes no more than the amount of that payment and will pay nothing further, is

insufficient to support a plea of accord and satisfaction, although the drawer may have accepted the payment; but, if the parties disagree concerning the amount due and the drawee at the time he makes such payment states in effect it is made upon condition that it shall be received in full satisfaction of the drawer's demand, acceptance of the payment will work an accord and satisfaction between the parties.

8. Sales: LIVE STOCK: ACCEPTANCE: AGREEMENT AS TO FEED AND WEIGHTS: QUESTION FOR JURY. Where the vendor and the vendee of live stock disagree as to whether or not the former promised the latter that intermediate the date of the contract and the delivery of the live stock the animals should not be fed alfalfa, and the vendee accepts the stock, he will not be permitted thereafter to renounce his agreement to accept the vendor's weights unless he proves that such feeding worked to his prejudice and he did not know before he accepted the stock they had been so fed; and those facts should be submitted to the jury upon proper instructions.

9. ———: ———: ———: WAIVER. And if the evidence, although in sharp conflict, tends to prove that an agent of the vendee clothed with authority to accept the cattle did accept them with knowledge that they had been fed alfalfa, and made no protest on that score, the vendee will not be heard, after securing possession of the animals, to repudiate the vendor's weights for the reason that the stock had been fed in violation of the terms of the agreement.

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

George Marshall and *W. C. Dorsey,* for appellant.

R. W. Sabin and *A. H. Byrum, contra.*

ROOT, J.

This is an action to recover an alleged balance due upon a sale and delivery of cattle. The defendant prevailed, and the plaintiff appeals.

The defendant is a farmer and live stock dealer. He owns land in Franklin county and in Gage county, but resides near Rockford, in Gage county. The plaintiff in 1907 resided in the village of Campbell, Franklin county,

was engaged in the live stock business, and his feed yards and pasture joined the stock pens of the railway in said village. The latter part of September of said year the defendant and the plaintiff agreed orally that the former should purchase from the latter 36 stock cattle for three different prices according to the sex and grade. The cattle were to be weighed at Campbell, and 2 per cent. of the gross weight deducted as shrinkage. To this point the parties are in accord, but the evidence concerning the remaining details of the contract and their conduct is in conflict. The plaintiff testifies the defendant agreed that his employee, a Mr. James, should assist in weighing and would receive the stock, whereas the defendant testifies that James was to merely assist in weighing and loading the cattle, and that he had no authority to represent and did not represent his master. The defendant testifies that the parties agreed the animals were not to be fed alfalfa, and he produced evidence tending to prove that during the week intermediate the making of the contract and the shipment of the stock they were so fed. The plaintiff testifies there was no such agreement, that the defendant knew the cattle had access to an alfalfa pasture, and that no alfalfa hay was fed to them. The proof indicates that cattle fed upon green or partially cured alfalfa will lose considerable weight during transportation. The cattle were weighed in the presence of Mr. James and shipped to Rockford via Beatrice. At the last named point they were unloaded, rested, fed, watered and then transported to Rockford, eight miles distant. The defendant testifies he weighed the cattle over the railway scales at Rockford, and by comparing the weight thus ascertained with the statement of weights sent him by the plaintiff from Campbell learned that the stock had shrunk, in addition to the 2 per cent. deducted according to the agreement, 3,810 pounds. The defendant contends that, had the cattle been fed according to agreement and accurately weighed at Campbell, there would have been no such shrinkage, and argues that by an accord and satis-

faction and the payment of $750 he has satisfied the plaintiff's demand.

1. The petition recites the contract from the plaintiff's standpoint, credits the defendant with $750, and demands judgment for the balance due according to the Campbell weights. The defendant answers by way of a general denial, admits he purchased cattle from the plaintiff, and charges "that he paid plaintiff the full value of said cattle on the terms and conditions upon which he purchased said cattle from said plaintiff, and that he has fully settled with the said plaintiff for same before the commencement of this action, and that he is not owing the said plaintiff, or indebted to him in any sum whatsoever." To this answer no reply was filed. We are met at the threshold of this case with the defendant's assertion that the plea of payment stands undisputed, and the verdict therefore should be sustained notwithstanding the evidence. The defendant tried the case as though his plea of payment had been traversed. While section 134 of the code provides that every material allegation of new matter in an answer not controverted by a reply shall for the purpose of the action be taken as true, yet a litigant will not be permitted to try his case in the district court as though a reply traversing the allegation in his answer were on file and insist in this court that no reply was filed. *Schuster, Hingston & Co. v. Carson,* 28 Neb. 612; *Pokrok Zapadu Publishing Co. v. Zizkovsky,* 42 Neb. 64; *Missouri P. R. Co. v. Palmer,* 55 Neb. 559; *Minzer v. Willman Mercantile Co.,* 59 Neb. 410; *In re Estate of Cheney,* 78 Neb. 274.

2. The plaintiff argues that the pleader states conclusions, and not facts, with respect to payment, and the answer does not present that defense. The pleading is vulnerable to a motion to make more specific, but, if not attacked in that manner before trial, is sufficient to present the defense of payment. *Keys v. Fink,* 81 Neb. 571; *Swett v. Southworth,* 125 Mass. 417; *Goss v. Calkins,* 164 Mass. 546; 30 Cyc. 1254.

3. Over the plaintiff's objections, evidence was received to prove an accord and satisfaction, and the court submitted that defense to the jury. An accord and satisfaction is predicated upon an agreement between the parties based upon a consideration and fully executed on the part of the defendant, whereby the plaintiff's cause of action is satisfied or discharged. The answer presents no such a defense. *Van Housen v. Broehl,* 58 Neb. 348, 59 Neb. 48; *Coit & Woolsey v. Houston,* 3 Johns. Cases (N. Y.) *243; *City of Rawlins v. Jungquist,* 16 Wyo. 403, 96 Pac. 144; 1 Cyc. 341; Maxwell, Pleading and Practice (4th ed.) 140. We cannot say the evidence upon a second trial will necessarily sustain a plea of an accord and satisfaction. According to the agreement the cattle were to be weighed in Campbell, and, in the absence of fraud or mistake, the defendant should be concluded by those weights. *Colorado Trading & Transfer Co. v. Oliver,* 20 Colo. App. 257, 78 Pac. 308. There is no allegation in the answer that fraud was practised, or mistake occurred, in weighing the cattle at Campbell. The defendant testifies he wrote a letter to the plaintiff November 7, 1907, before the $750 was paid, informing him the cattle arrived in good condition, but the shrinkage was so great the witness would not pay according to the Campbell weights, but had sent the $750 in full satisfaction of the plaintiff's claim. The defendant testifies the letter was placed in the United States mail, but does not state he attached any postage stamps to the envelope. The plaintiff denies having received any such letter. Upon proof of all the facts necessary to create a presumption that the letter was received by the plaintiff, the jury should say whether they believed the plaintiff's denial, rather than the testimony sustaining the presumption. If the defendant did not write the letter, or if it were written but was not received by the plaintiff, the proof is not conclusive he was informed the money had been sent upon condition that it should be accepted in satisfaction of a disputed claim. The defendant argues that the German National Bank at Beatrice was

the plaintiff's agent for the collection of the draft, and, since the money was paid the bank upon condition that the plaintiff should accept that money in satisfaction of his demand, that the defense of an accord and satisfaction is thereby established. Upon this phase of the case, the defense depends upon the statements made to the cashier of the German National Bank at Beatrice at the time the $750 was paid. The proof establishes that the plaintiff drew on the defendant through the bank at Campbell; that bank forwarded the draft to the German National Bank of Beatrice. The Beatrice bank notified the defendant, but retained the draft a few days at Ruyle's request. Subsequently Ruyle paid the Beatrice bank $750, which it transmitted to the Campbell bank with a written statement that the money was a part payment and that Ruyle would write. The Campbell bank wrote to the Beatrice bank to the effect that the $750 would not be accepted unless the remainder of the collection was transmitted. The Beatrice bank answered: "He (referring to Ruyle) says return and will not pay the balance because weights were all wrong." So far as we are advised, no answer was made to this letter, but Crilly kept the money. The defendant testifies that, when he paid the German National Bank $750, he told its cashier, "I paid him that in full payment of the draft," and, in answer to a leading question propounded by his counsel, the witness stated he informed said cashier that, unless Crilly accepted the $750 in satisfaction of his claim, he must return the money. The plaintiff is not entirely clear in his testimony that he knew or did not know the $750 was paid upon condition that it should be received in satisfaction of a disputed account. Since there is no proof that Ruyle directed Crilly to draw through the German National Bank, we should hold the Beatrice bank acted as Crilly's agent. *First Nat. Bank v. Sprague*, 34 Neb. 318. It will be presumed in the state of the record that the Beatrice bank transmitted to its principal whatever information it received from Ruyle concerning the collection. Story,

Agency (9th ed.) sec. 140. However, the evidence of the cashier of the German National Bank was not produced, and the plaintiff in the state of the pleadings was not bound to anticipate the testimony of that witness would be material. If that witness is produced, he may deny that Ruyle informed the bank he would pay the $750 only upon condition that it should be accepted in satisfaction of Crilly's entire claim, or that the money should be returned if not thus accepted. The mere fact that a debtor states that a payment is in full of his account does not make it conditional, so that the creditor cannot accept the money without discharging the account. *Canadian Fish Co. v. McShane*, 80 Neb. 551; *Sampson v. Northwestern National Life Ins. Co.*, 85 Neb. 319; *McKinnon v. Holden*, 85 Neb. 406. If, however, upon an issue of accord and satisfaction the jury shall find upon competent evidence and proper instructions that Ruyle informed the bank he paid the $750 upon condition that it should be accepted by Crilly in satisfaction of the latter's claim, the plaintiff's suit will be defeated. *Slade v. Swedeburg Elevator Co.*, 39 Neb. 600; *Treat v. Price*, 47 Neb. 875; *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334.

4. The plaintiff contends that James represented the defendant in weighing and receiving the cattle, and for that reason the demand became and is liquidated, so that there was no consideration for an agreement to accept from the defendant less than the face of the account. The evidence concerning James' authority is in sharp conflict and we think the issue should have been submitted to the jury. If by reason of fraud or mistake the Campbell weights are not correct, there is a basis for a controversy between the parties, even though James did represent the defendant, and the claim cannot be said to be liquidated so as to leave no opportunity for a binding compromise between the parties. It may not be amiss to state that the defendant and his counsel assume the weights Ruyle testifies to are correct, but there is opportunity for speculation and doubt concerning their accuracy. The plaintiff

had no representative present at the time Ruyle weighed the stock, nor was notice sent to, or opportunity given, Crilly to have an agent on hand to balance the scales or verify the weights. The defendant testifies another man was present when the cattle were weighed at Rockford, but he was not produced or his evidence presented in the trial of the case.

5. The court instructed the jury, in substance, that if they found the parties had agreed the cattle should be fed as testified to by the defendant, and the plaintiff executed this part of the contract, correctly weighed the animals, and there was a balance due him, they should return a verdict for that amount. But the court did not instruct the jury concerning the legal effect of an acceptance of the stock by the defendant with knowledge that they had been fed alfalfa, nor inform the triers of fact that the defendant could not reject the Campbell weights for the sole reason the cattle were not fed according to agreement. If James knew before the cattle were weighed that they had been fed alfalfa, and he had authority to receive the stock, Ruyle, after such receipt, should not be permitted to reject the Campbell weights because the cattle had not been fed according to the contract. Furthermore, if the plaintiff's failure to observe his contract in feeding the cattle did not prejudice the defendant, he should not be permitted to accept the cattle, and also question the Campbell weights because the stock had not been fed according to the contract. We think the court placed too much stress on the item of feed, and failed to instruct the jury concerning the result that should flow from a violation of that part of the contract, if the parties agreed thereto. *Gugler v. Omaha & C. B. Street R. Co.*, 86 Neb. 586.

The judgment of the district court will be reversed and the cause remanded, with permission to the parties to file amended pleadings. A transcript of the bill of particulars and the answer filed in justice court is in the transcript before us, and an examination thereof satisfies us there will be no substantial departure from the issues

in the justice court if the pleadings are amended to conform to this opinion.

REVERSED.

IN RE ARBITRATION OF NELS JOHNSON ET AL.

NELS JOHNSON ET AL., APPELLANTS, V. MONS JOHNSON, APPELLEE.

FILED JUNE 29, 1910. No. 16,095.

1. Appeal: AWARD: PRESUMPTIONS. In reviewing a judgment on an award of arbitrators, every presumption is in favor of the award.
2. Arbitration and Award: FINDINGS. Arbitrators are not required to make their findings more certain than juries.
3. ———: ———: WAIVER. Failure of arbitrators to state the facts found and the conclusions of law, separately, is a mere irregularity which the parties may waive.
4. ———: ———: ———. By failing to ask the court to recommit an award to the arbitrators for corrected or additional findings, a party to the arbitration may waive such irregularities.
5. ———: ———: SUFFICIENCY. A general finding by arbitrators is sufficient, where special findings are not required by the submission or requested by a party to the arbitration.
6. ———: DIVISION OF ESTATE: AWARD FOR MONUMENT. An award directing an executor to expend $300 for a monument is within the terms of a submission asking the arbitrators to determine what, in their judgment, would be a fair, just and equitable division of testator's personalty, and containing an agreement not to contest a will making provision for a monument not costing over $500.
7. Appeal: QUASHING BILL OF EXCEPTIONS: REVIEW OF EVIDENCE. After a bill of exceptions has been quashed the record presents no question as to the sufficiency of the evidence or the effect of incompetent testimony.
8. Arbitration and Award: WILLS: SUBJECTS OF ARBITRATION. The disputed ownership of land included in a devise, the invalidity of a will offered for probate and the distribution of testator's estate, in view of an agreement not to contest the will, are subjects of arbitration under a code declaring that "all controversies

which might be the subject of civil actions may be submitted to the decision of one or more arbitrators." Code, sec. 862.

9. ———: HEIRLOOM. An award that any heirloom found among the personal property of testator shall be appraised at a fair value and sold to any one of the heirs desiring possession of it, *held* not open to the objection of being neither final nor complete.

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

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

George L. Loomis and *H. C. Maynard, contra.*

ROSE, J.

This is an appeal from a judgment confirming and enforcing an award of arbitrators. The submission under which the award was made contained the following provisions:

"This agreement made and entered into this second day of May, 1907, by and between Nels Johnson, Ola Johnson, Mons Johnson, Hannah Nelson and John Sampson, witnesseth: Whereas, John Monson, formerly a resident of Dodge county, Nebraska, died testate therein on the 15th day of February, 1907, being the father of said Nels Johnson, Ola Johnson, Mons Johnson and Hannah Nelson, and the father-in-law of said John Sampson, the surviving husband of a deceased daughter, Mary Johnson; and whereas, said John Monson died possessed of certain personal property, consisting largely of money and notes, and also holding in his own name the legal title to the following described real estate in Dodge county, Nebraska, to wit: The south ½ of the southwest ¼ in section 26, and the northeast ¼ of the northwest ¼ in section 35, all in township 20, range 8 east; and Whereas, said John Monson during his lifetime executed three certain instruments, each described as his last will and testament, and bearing date respectively, October 13, 1887; February 21, 1898,

and September 5, 1906, the last of which said instruments has been filed in the county court of Dodge county, Nebraska, with a petition praying that the same be admitted to probate as the last will and testament of said John Monson, deceased, and that the said Nels Johnson be appointed executor thereof, which said petition is now pending in said court. A copy of each of said instruments is hereto attached; and Whereas, a controversy has arisen between the parties hereto, with reference to the personal property of said John Monson, deceased, and with reference to the said instrument so as aforesaid filed in said county court as his last will and testament, and as to whether the same should or should not be admitted to probate, and also as to the equitable ownership of the real estate above described, and of the actual estate and interest therein of the said John Monson, deceased, and of the true, actual and equitable interest therein, if any, of the said Mons Johnson, who claims to be the equitable and real owner thereof, and that the legal title thereto was held in trust for him by the said John Monson, and as to whether said real estate is in fact a part of the estate of said John Monson, deceased, or whether the same rightfully belongs to said Mons Johnson; and Whereas, said controversy may be the subject of civil actions, and of litigation between the parties hereto, unless same can be otherwise settled and determined: Now, therefore, for the purpose of avoiding all litigation over said real estate and said personal property, and said instrument purporting to be the last will and testament of said John Monson, deceased, it is hereby mutually agreed by and between all the parties hereto, as follows, to wit:

"1. That said controversy and all differences between the parties hereto in reference to said real estate, personal property and instruments shall be, and the same hereby are referred to the following persons as arbitrators, to wit: A. E. Tunberg, John Johnson and John Ring.

"2. Said arbitrators shall consider and determine with reference to said real estate hereinbefore described,

whether the same was in fact owned by said John Monson at the time of his decease in fee, and free and clear from all interest therein, or claim thereto, on the part of said Mons Johnson, or whether said Mons Johnson, during the lifetime of said John Monson, had any rights or interests in said real estate, and if so what they were; and herein they shall consider and determine who furnished the money, or any part thereof, with which said real estate was purchased and paid for, why title to same was taken in John Monson and what, if any, understanding or agreement there was between said John Monson and Mons Johnson as to said real estate and the ownership thereof, how title thereto should be held, and who was the actual and equitable owner thereof, and the true intent and purpose of said parties with reference thereto.

"3. Said arbitrators shall consider and determine with reference to the personal property of which said John Monson died seized, and with reference to said instrument so as aforesaid filed for probate in the county court of Dodge county, Nebraska, as the last will and testament of said John Monson, deceased, whether said instrument provides for a fair, just and equitable disposition of the personal property and estate of said John Monson, between the parties hereto and they shall find and determine what in their judgment would be a fair, just and equitable division of said personal property and estate between the parties hereto in view of all the facts and circumstances, and the rights and equities of said parties in the premises, as the same may be known to them or disclosed by the evidence. And it is agreed by and between all parties hereto that said instrument so filed in the county court of Dodge county shall be admitted to probate as the last will and testament of said John Monson, deceased, and that the property disposed of by said will shall be by the executor thereof distributed and paid over to the several parties hereto in accordance with the findings, determination, and award of said arbitrators, any provision in said will to the contrary notwithstanding; and the said

county court shall, by suitable decree, enforce this agreement and see the same carried into effect.

"4. Said arbitrator shall fix a time and place for the hearing of the aforesaid matters, of which all parties hereto shall have ten days' notice, and shall hear and examine all witnesses and evidence produced by any of the parties hereto and bearing upon the question herein submitted, and upon consideration thereof shall make their award in writing and file the same with the clerk of the district court of Dodge county, Nebraska, within sixty days after the date of the delivery of this agreement to said arbitrators, who shall thereupon docket the same as provided by law. In case of the death, disability or refusal to serve of any one or the arbitrators herein named, the other two shall thereupon select a third who shall act in place of the one so failing to serve, and such selection shall be as legal and binding upon all parties hereto as though the person so selected were named herein as one of said arbitrators. An award signed by two arbitrators shall be as valid as though signed by all three.

"This being largely a family matter, and it being desirous to settle the same in an amicable manner and at as little expense as possible, it is agreed that none of the parties hereto shall employ, or be represented by, any attorney at law or counselor before said arbitrators. All witnesses shall take an oath or affirmation to testify the truth, the whole truth and nothing but the truth, which same shall be administered by one of the arbitrators. None of the parties hereto shall be required to file any pleadings, claim or objections in writing before the arbitrators, but all claims and objections can there be made orally."

The three wills mentioned were attached to the agreement. That part of the award material to the present inquiry is as follows:

"We find that a just and equitable distribution of the estate of John Monson, deceased, be made as follows, and is so awarded:

"First. It appears by testimony that the real estate in question was held in trust by John Monson for his son Mons Johnson, but that from *ex parte* evidence and personal knowledge of the arbitrators John Monson, deceased, did pay for 40 acres of the real estate in question. It is therefore ordered that title in fee simple be given to Mons Johnson to the south half (S. ½) of the southwest quarter (S. W. ¼), in section twenty-six (26) in township twenty (20) range eight (8) east containing 79 acres more or less.

"Second. That the northeast quarter (N. E. ¼) of the northwest quarter (N. W. ¼) in section thirty-five (35) township twenty (20) range eight (8) east is in fact part of the estate of John Monson, deceased.

"Third. We further order that the $1,400 bequeathed by the testator, John Monson, to Mons Johnson revert to the estate of John Monson, deceased, without interest, to be equally divided among the heirs.

"Fourth. That the executor erect a monument over the graves of John Monson and his wife, Elna Monson, the cost not to exceed $300.

"Fifth. That any heirloom found among the personal property of the said John Monson, deceased, be appraised at a fair value and sold to any one of the heirs that desires the possession thereof.

"Sixth. That the proceeds of the residue, after all debts and expenses have been paid, of the estate, both real and personal, of the said John Monson, deceased, be divided equally between Nels Johnson, Ola Johnson, Hannah Nelson, Mons Johnson and John Sampson, heirs of the said John Monson, deceased."

From a judgment entered on this award Nels Johnson, Ola Johnson, Hannah Johnson and John Sampson have appealed. Mons Johnson is appellee.

1. Appellants are asking to have the judgment on the award reversed for a number of reasons. The first is that the arbitrators failed to state the facts found and the conclusions of law, separately. The bases for this contention

seem to be: The arbitration was a statutory one. Code, secs. 862-879. The statutory rules governing referees apply to arbitrators. Code, sec. 867. Referees "must state the facts found and the conclusions of law, separately." Code, sec. 300. It is argued by appellants that these statutory requirements were disregarded. This question must be determined in the light of the general rule that every presumption is in favor of the award. *Sides v. Brendlinger,* 14 Neb. 491. The submission stated fully the matters to be determined, and the arbitrators found as follows, the distribution being omitted: "We find that a just and equitable distribution of the estate of John Monson, deceased, be made as follows."

"It appears by testimony that the real estate in question was held in trust by John Monson for his son Mons Johnson, but that from *ex parte* evidence and personal knowledge of the arbitrators John Monson, deceased, did pay for 40 acres of the real estate in question."

Arbitrators are not required to make their findings more certain than juries. *City of O'Neill v. Clark,* 57 Neb. 760. Failure of arbitrators to "state the facts found and the conclusions of law, separately," is a mere irregularity which the parties may waive. *Burkland v. Johnson,* 50 Neb. 858. In the present case the parties to the arbitration did not intend to require the arbitrators to conduct their inquiries or to make their findings in the formal or precise manner customary in cases where attorneys direct the proceedings and prepare the findings. This is shown by the agreement "that none of the parties hereto shall employ, or be represented by, any attorney at law or counselor before said arbitrators," and that "none of the parties hereto shall be required to file any pleadings, claim or objections in writing before the arbitrators." Appellants' first objection was: "The said award fails to state facts found and conclusions of law, separately." Knowing the contents of the award, they failed to ask the court to recommit it to the arbitrators for additional findings or corrections and therefore waived irregularities of that nature, if any. *State v. Graham,* 23 Neb. 68.

2. It is further argued that the arbitrators did not respond to material matters submitted to them. Under this head it said they failed to "consider and determine who furnished the money, or any part thereof, with which said real estate was purchased and paid for," and "why title to same was taken in John Monson." What shall be done with the real estate is stated in the award after this general finding: "It appears by testimony that the real estate in question was held in trust by John Monson for his son Mons Johnson, but that from *ex parte* evidence and personal knowledge of the arbitrators John Monson, deceased, did pay for 40 acres of the real estate in question."

For anything appearing in the transcript the arbitrators may have considered and determined who furnished the money with which the real estate was purchased and why the title was taken in the name of testator. The legal presumption is that the arbitrators considered all matters submitted to them. *Sides v. Brendlinger,* 14 Neb. 491. Special findings were not required by the terms of the submission. The bill of exceptions was quashed and there is nothing to show that special findings were orally requested. There was no motion to recommit the award for special findings. In this condition of the record the general finding will be held sufficient. *Sides v. Brendlinger,* 14 Neb. 491.

3. The next objection to the award is that "the arbitrators considered and reported upon matters not submitted to them," one being a direction to the executor to erect a monument over the grave of testator at an expense not exceeding $300. The will which the parties agreed should be probated and which was attached to the submission contained the following provision: "I direct that my executor hereinafter named, expend the sum of $500 or so much thereof as is necessary for the purpose of erecting a suitable monument over my grave in the cemetery."

Furthermore, the third paragraph of the submission authorized the arbitrators to determine what, in their

judgment, would be a fair, just and equitable division of the personal property belonging to testator's estate. The expenditure for the monument was fairly within the terms described. The arbitrators also directed "that any heirloom found among the personal property of the said John Monson, deceased, be appraised at a fair value and sold to any one of the heirs that desires the possession thereof." This is another part of the award assailed as foreign to the submission, but it was a proper matter for consideration in determining what would be a fair, just and equitable division of the personal property.

4. Other reasons urged for a reversal are that the award is not sustained by the evidence and that the arbitrators were influenced by incompetent evidence. The record does not present these questions, the bill of exceptions having been quashed.

5. A reversal is sought by appellants on the ground that the third paragraph of the agreement of the parties submitted matters which could not be made the subject of arbitration. In this connection reference is made to language directing the arbitrators to determine whether the will offered for probate "provides for a fair, just and equitable disposition of the personal property and estate." This is denounced as an attempt to permit arbitrators to make a will for a deceased person and to distribute his estate thereunder, and it is contended that such matters could not be made the subject of a civil action and could not, therefore, be submitted to arbitrators. Code, sec. 862. For these reasons, appellants insist the arbitrators were without jurisdiction and that their award is void. The position is untenable. The words, "provides for a fair, just and equitable disposition of the personal property and estate," cannot be detached from the context for the purpose of determining the question submitted. A construction upholding the validity of the submission should be adopted, if consistent with the expressed intention of the parties, rather than an interpretation invalidating their agreement. The words quoted follow pro-

visions which show that the validity of the will offered for probate was in dispute, and that one of the parties to the arbitration claimed title to land which testator attempted to devise to others. Each of these controversies could have been made the subject of a civil action. The expression, "provides for a fair, just and equitable disposition of the personal property and estate," is followed by the words, "in view of all the facts and circumstances, and the rights and equities of said parties in the premises," and must be construed in connection with the submission as an entirety. The arbitrators understood they were not to make a will. The parties agreed that the will offered for probate should not be contested. Under it the property of which testator died seized vested in the parties to the arbitration. The disputed ownership of the land, the legal title to which was in testator, the validity of the will offered for probate, and the distribution of the entire estate of which testator died seized, in view of the agreement which prevented a contest, were subjects of civil actions and consequently of arbitration. These were matters submitted to the arbitrators and the agreement of the parties so indicates.

6. It is finally insisted that the award should be set aside as neither final nor complete for the reason it directs "that any heirloom found among the personal property of the said John Monson, deceased, be appraised at a fair value and sold to any one of the heirs that desires the possession thereof." As already held, this part of the award was within the submission. The duties of the arbitrators ended with the award. They were not required to settle up the estate. It is the duty of the executor to dispose of the heirlooms and to disburse the proceeds. There is no intimation in the record that this cannot be done finally according to the terms of the award.

No sufficient reason for a reversal having been suggested, the judgment is

AFFIRMED.

STATE OF NEBRASKA v. ERNEST MCCOY.

FILED JUNE 29, 1910. NO. 16,517.

1. **Constitutional Law: EX POST FACTO LAWS.** *Ex post facto* laws include enactments which alter the situation of accused to his disadvantage.
2. ———: ———: **PENAL BOND.** An amendatory act increasing the penalty of a bond essential to the suspension of sentence in a prosecution against a husband for abandonment is *ex post facto* as to prior offenses.

ERROR to the district court for Franklin county: HARRY S. DUNGAN, JUDGE. *Exception overruled.*

William T. Thompson, Attorney General, George W. Ayres, George J. Marshall and *E. U. Overman,* for plaintiff in error.

Bernard McNeny and *George W. Prather, contra.*

ROSE, J.

An information was filed in the district court for Franklin county October 4, 1909, charging that on April 1, 1909, defendant unlawfully abandoned his wife and children. The prosecution was dismissed because the trial court was of the opinion that the legislature, between the dates mentioned, passed an amendatory act which deprived defendant of a substantial right possessed by him before its passage, and that the amendment was *ex post facto* as to the offense charged. For the purpose of settling the law, an exception to the ruling below is presented here under section 515 of the criminal code.

The first section of the statute which defendant was charged with violating declares: "That every person who shall, without good cause, abandon his wife and wilfully neglect or refuse to maintain or provide for her, or who shall abandon his or her legitimate or illegitimate child or children under the age of sixteen years, and wilfully neglect or refuse to provide for such child or children,

shall, upon conviction, be deemed guilty of a desertion and be punished by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not more than six months." Laws 1903, ch. 137, criminal code, sec. 212*a*.

When the offense charged was committed, section 2 of the act was as follows: "Provided, however, if after conviction and before sentence, such husband or parent shall appear before the court in which conviction shall have taken place, and enter into bond to the state of Nebraska, in the penal sum of two hundred dollars, to the approval of the court as to surety, conditioned that such husband will furnish said wife with necessary and proper home, food, care and clothing, or that such parent will furnish said child or children with necessary and proper home, food, care and clothing, then said court may suspend sentence therein. Said bond shall remain in force as long as the district judge deems the same necessary; and whenever it shall appear to said court, either by affidavit or otherwise, that such husband or parent is, in good faith, furnishing his said wife, child or children with the necessary and proper home, food, care and clothing, then said court may annul said bond and dismiss the prosecution against said husband or parent." Laws 1905, ch. 196.

After the offense charged was committed and before the case was called for trial, section 2 was amended to read as follows: "If at any time after complaint has been filed in the justice court, or the county court of the county in which the offense shall have been committed, such husband or parent shall appear before the court in which he stands charged and shall pay or secure to be paid to the wife or to the legal representative of the child or children other than the accused such sum or sums of money or property as may be agreed upon, provided that such sum so agreed or required to be paid shall not be less than two hundred dollars nor more than one thousand dollars, then said court may discharge the party accused out of custody on his paying the costs of prosecution. And if

after conviction, and before sentence, the accused shall make settlement with his said wife, or with the legal representative of his said children, in the same manner as herein provided for settlement before conviction and shall enter into bond to the state of Nebraska in the penal sum of not less than two hundred dollars nor more than one thousand dollars to the approval of the court as to surety and as to sum, conditioned that such husband will furnish said wife with necessary and proper home, food, care and clothing or that such parent will furnish said child or children with necessary and proper home, food, care and clothing or will so furnish both said wife and child or children on his paying the costs of prosecution, then the said court may suspend sentence therein. Said bond shall remain in force as long as the district judge deems the same necessary; and whenever it shall appear to said court, either by affidavit or otherwise, that said husband or parent is, in good faith, furnishing his said wife, child or children with the necessary and proper home, food, care and clothing, then said court may annul said bond and dismiss the prosecution against said husband or parent." Laws 1909, ch. 165; criminal code, sec. 212*b*.

The language of the first section has not been changed. At the time of the abandonment charged the second section of the act empowered the district court, in the event of defendant's conviction, to suspend sentence upon his giving bond in the sum of $200 to support his family. This provision was amended in 1909, after the commission of the offense charged and before trial, to authorize the district court, after conviction, to suspend sentence upon his giving bond in a sum not less than $200 nor more than $1,000. In other words, after the commission of the offense charged and before trial, the penalty of the bond to procure a suspension of sentence was increased from $200 to a penal sum not less than $200 nor more than $1,000. The new statute contained no saving clause, nor has attention been directed to one in the criminal code. Was the change *ex post facto* as to the offense charged?

In support of the exception to the ruling of the trial court it is argued that the first section defining the offense and prescribing penalties has never been changed, and that therefore the amendment did not deprive defendant of any pre-existing right. In this connection counsel for the state cite *Hair v. State*, 16 Neb. 601, and *State v. Wish*, 15 Neb. 448. In these cases it is held that an amendatory act which merely reduces the punishment for a crime is not *ex post facto* as to prior offenses. The provisions which first authorized the district court to suspend sentence were in the second section. It was in the form of a proviso, and limited the first section, which defined the offense and fixed the penalties. Both sections were originally parts of the same act. The legislation changing the penalty of the bond from $200 to a penal sum not less than $200 nor more than $1,000 was an amendment of the proviso, and likewise limited the section defining the offense and fixing the punishment. The amendment was a substantive part of the legislation on the subject of abandonment, and cannot be detached therefrom for the purpose of holding that the first section remained unchanged. When the offense charged was committed, defendant was protected by a statute which authorized the district court to suspend sentence, and at that time the penalty of the bond was only $200. He then had a right to go to trial relying upon the terms of that statute to prevent his imprisonment in case of conviction. The proviso authorizing suspension of sentence limited the section prescribing the punishment, and the act amending the proviso changed the limitation. The question then is: Did the change in the law, when applied to the offense charged, deprive defendant of a substantial right within the meaning of that part of the bill of rights which declares that no *ex post facto* law shall be passed?

Ex post facto laws include an enactment "which alters the situation of the accused to his disadvantage." *Medler, Petitioner*, 134 U. S. 160; *Kring v. State of Missouri*, 107 U. S. 221. This interpretation of the constitutional

provision forbidding the enactment of *ex post facto* laws has been accepted generally by the courts and text-writers, and was quoted with approval by this court in an opinion by the present chief justice in *Marion v. State,* 16 Neb. 349. The statutory right to have the sentence suspended upon giving bond in the sum of $200, in the event of conviction, was a substantial one, affording a means of escaping imprisonment. The amendment permitted the court to require a bond of $1,000 as a condition of suspending sentence. It is argued, however, that it was within the power of the court to release defendant on a $200 bond under either statute, and that therefore he was not deprived of a substantial right. This argument does not meet the question. When the case was called for trial, it was within the power of the court to require a $1,000 bond, if the amendment was effective as to prior offenses. Under the new act the exercise of this power depended on the will of the court, and not on the wish or financial ability of the defendant. If he were unable to give bond in excess of $200, when required by order of the court to execute a bond in a larger sum as a condition of having sentence suspended, the change in the statute would deprive him of his liberty in case of conviction. There may be a difference between a statutory right and the mercy of a court. In any event the penalty of the bond was increased. The bill of rights forbids the enactment of *ex post facto* laws. The command of the constitution is directed to the legislature. It applies to legislative enactments, and makes no reference to the judgments of courts. Whether an amendment of the criminal code is *ex post facto* as to prior offenses depends upon the provisions of the new act, and not upon the authority or inclination of the courts to limit its operation to the purview of the statute amended. In conferring upon the court authority to require a bond in excess of $200, the legislature intended that the power should be uniformly exercised without distinction as to prior and subsequent offenses. The lawmakers did not insert a saving clause in the amendatory

act nor otherwise call upon the court to limit its operation, as to prior offenses, to the terms of the original act. The amendment altered the situation of accused to his disadvantage, and to that extent the legislature exceeded its power. The exception to the ruling of the trial court is therefore

OVERRULED.

JAMES JONES, JR., V. STATE OF NEBRASKA.

FILED JUNE 29, 1910. No. 16,537.

1. **Homicide: APPEAL: PREJUDICIAL ERROR.** In a prosecution for murder, a conviction should be reversed for the erroneous admission of irrelevant evidence which is prejudicial to defendant.
2. **Criminal Law: INSTRUCTIONS: COMMENT OF COURT.** In charging the jury in a criminal prosecution, it may be error for the trial court by oral comment or other means to unduly emphasize the fact that part of the instructions are given at the request of defendant, and that the others are given by the court on its own motion.

ERROR to the district court for Chase county: ROBERT C. ORR, JUDGE. *Reversed.*

W. S. Morlan, for plaintiff in error.

William T. Thompson, Attorney General, and *George W. Ayres, contra.*

ROSE, J.

In the district court for Chase county the county attorney filed an information against James Jones, Jr., defendant, charging him with murder in the first degree. A jury found him guilty of manslaughter, and the district court sentenced him to serve a term of six years in the penitentiary. As plaintiff in error he now presents for review the record of his conviction.

Defendant shot and killed Joseph B. Rowley, March 25, 1909, and at the trial for murder resisted conviction on the ground of self-defense. Rowley and defendant had

lived on adjoining farms in Chase county for a number of years. At one time they were on friendly terms and jointly furnished posts and two wires for about 80 rods of division fence on the southern boundary of defendant's pasture. This fence had separated their possessions for six or seven years. When each was keeping a stallion in March, 1908, a barn owned by Rowley was burned. There is proof tending to show: Rowley accused defendant of burning his barn and threatened him with violence. The accusation and threats were communicated to defendant. Rowley organized a vigilance committee of 20 men who waited on defendant at his home April 1, 1908. On this occasion Rowley appeared with a shotgun which he had carried across his saddle in front of him and accused defendant of the barn-burning. The latter indignantly denied the charge and earnestly protested his innocence, but indicated a willingness to test his prowess with his accuser. Violence was averted, but at a subsequent meeting of the committee Rowley proposed to visit defendant's place and shoot up his house. A witness advised Rowley against taking his men there again, and afterward on April 14, 1908, received by mail a note purporting to come from the vigilance committee and warning him to leave the affairs of the mob alone. One house in the neighborhood was shot up. At different times before the tragedy defendant appealed to the county attorney for protection from Rowley and the vigilance committee, but that officer, after having heard complaints from both sides of the controversy, advised against commencing legal proceedings. Defendant also applied to the governor and attorney general for protection, and was referred to the county attorney as the state's prosecuting officer in Chase county.

On the morning of March 25, 1909, without notice to defendant, Rowley hitched a team to a wagon and drove in his own field to the west end of the division fence south of defendant's pasture. He took with him two shotguns, a Winchester rifle and a revolver. He was accompanied by two sons, one named Richard, age 23, and the

other named Henry, age 19. They attached the west end of one of the fence wires to the rear of the wagon and drove the team eastward along the fence, pulling the staples, throwing posts into the wagon, allowing the wire attached to the wagon to drag behind, and leaving the other wire on the ground. When they were thus engaged, defendant, unarmed, approached across his pasture on foot. In describing what followed, Richard testified that after about 40 yards of fence had been taken down he saw defendant coming. His own language, referring to defendant as "Jim," is in part: "Jim come down and says: 'You fellows want a shooting scrape?' Father says: 'No, I want my fence.' Jim says: 'I got a Winchester.' Father says: 'Go get it;' and he went." Henry's testimony was substantially the same. The proofs show without contradiction that the senior Rowley displayed one of the shotguns. Defendant's version of what took place at this meeting is stated in his own words as follows: "I went out there, and he was tearing the fence down; and I hollowed to him to let the fence alone. I went on up there close to him and got within 30 or 35 yards of him, and he grabbed a gun and came towards me, leveled it at me, and came over the fence two or three steps. I says: 'Oh, I guess you want a shooting scrape;' and he said yes he did, to go and get my gun." Other details were given by the witnesses, and, in so far as there is a conflict in the testimony as to what was said and done at the first meeting after Rowley began to take down the fence, the story told by Richard and Henry at the coroner's inquest appears to coincide more nearly with defendant's testimony at the trial than with their own. Defendant left the Rowleys at the work described and went in a northeasterly direction to his house. After they had taken down the fence to a point as far east as a gate near the southeast corner of defendant's pasture, defendant returned in a wagon with his brother Arthur. Richard testified that defendant, when approaching in the wagon, carried his rifle across his knees, came within 150 yards, and got off in

the open on the south side of his wagon; that the Rowleys went behind their wagon box which had been extended in height on the south side by boards used during corn-husking; that defendant shot four times, twice when standing and twice when in a crouching position with his rifle resting on his knee, the first and second shots going over their heads, the third splintering the wagon box, and the fourth killing the senior Rowley instantly. Richard also testified that his father used his rifle and fired the first shot, shooting five times in all, some of the shots being accidental and all going wild, but that he did not shoot until after defendant had raised his gun. Richard, according to his own testimoney, fired twice with a shotgun and once with the rifle after his father was killed. In the main this testimony was corroborated by Henry's. The sum of defendant's story of the shooting is: After the colloquy in the morning defendant went home, hitched his team to a wagon, loaded posts, wire and tools and started out to rebuild the fence which the Rowleys had taken down. Defendant sat in the left end of the seat with the lines in his hands. The gun was in the front end of the wagon-box at the right side, leaning against the posts, with the stock down. Defendant drove southward from his home, followed a road to a point north of the gate where the Rowleys were at work, and turned toward the southwest. When traveling in that direction in the manner described, and away from the Rowleys, they commenced shooting at him from a distance of 100 yards or more. He saw their guns pointed at him and smoke coming out of the barrels. He put his arm up to his face for protection and received a shot in the back of his hand. A bullet whistled over his head when his wagon was in motion, and he immediately threw down the lines, grabbed the rifle, and jumped out of the wagon on the south side, the team moving on and turning to the right. He fired four shots, and was standing when he fired the first three. The first and second were fired over Rowley's wagon, and the third at it. When the fourth was fired

he was in a crouching position with his gun leveled and his arm resting on his knee. This testimony was practically the same as his brother's. He and Arthur rebuilt the fence the same morning, and returned to the house a little after noon. A neighbor who met them when they returned testified there was a shot-mark on the front end of the wagon and a number of shot-marks on the left side of the box near the front end.

Was defendant fired upon in his own field, when lawfully engaged in farm work? Was the deceased Rowley the agressor? Was self-defense a justification for the homicide? Who told the truth? The determination of these questions imposed upon the jury a perplexing duty. Four persons who witnessed the tragedy testified at the trial. Two were sons of the deceased person and one of them participated in the shooting. While admitting their father fired the first shot, they said defendant, when 150 yards away, first raised his gun to shoot. The other eyewitnesses were defendant and his brother, and each testified to having been shot before the fire was returned and before any threatening move had been made by defendant. The four eyewitnesses would naturally feel a keen interest in the result of the prosecution. The testimony is voluminous, and in the brief outline here given no attempt has been made to determine any question of fact or the weight of any item of evidence. Some facts of which there is proof, however, have been narrated for the purpose of determining whether errors apparent on the face of the record were prejudicial.

The following letter was admitted in evidence over the objection of defendant, and the ruling is vehemently assailed as erroneous: "Blanche, Neb., Oct. 20, 1909. Mrs. Rowley: Please keep your boys off my place and away from my haystacks and out of my pasture. I saw them there and I will put up with it no longer. Yours truly, James Jones, Jr." The state of course makes no attempt to justify the admission of this letter as evidence of defendant's guilt, but the attorney general argues that it is

in the handwriting of defendant, and was properly admitted for the purpose of comparison in showing the genuineness of another letter in which defendant acknowledged that Rowley had an interest in the division fence. This reasoning cannot be adopted to justify the ruling of the trial court. Neither the state in offering the letter nor the trial court in overruling the objection to it limited its consideration to the purpose of comparison. It was identified as substantive proof to be considered in determining defendant's guilt, and was read to the jury as such. There was no instruction directing the jury to consider it only for the purpose of showing the genuineness of other letters written by defendant. It was written more than six months after the homicide. It was clearly irrelevant and was erroneously admitted. Was it prejudicial to defendant? Two sons of the deceased Rowley testified that the defendant was the aggressor. This was the vital question when defendant's life was in the balance. Defendant and his brother testified that Rowley was the aggressor. In this situation the jury would look outside of the conflicting testimony of the eyewitnesses to other proofs for defendant's motives and propensities, and would find in the letter quoted, when unexplained, a disposition on his part to be unkind or cruel to the widow and orphans he had made. The logical effect of this irrelevant evidence was to prejudice defendant in the minds of the jury. Under the circumstances of this case, it cannot be said that the error in overruling the objection to the letter was not prejudicial, though such a ruling would ordinarily be harmless error in a different record. Other letters which were likewise irrelevant were also admitted in evidence over the objection of defendant.

Defendant also complains of the manner in which the instructions requested by him were given to the jury by the trial court. For an acquittal defendant relied on self-defense and most of the instructions requested by him related to the law on that subject. He requested 14 instructions, and all of them were given, but the trial court in

reading them introduced each with the following oral statement to the jury: *"At the request of the defendant* I instruct you as follows." After the jury had been thus reminded 14 times that the instruction being given was requested by defendant, the trial court addressed them as follows: "Gentlemen of the jury, *the court on its own motion instructs you.*" Then followed the first instruction given by the court on its own motion. Seventeen more, consecutively numbered, were also given, and each was prefaced by the following remark from the bench: "I further instruct you as follows." Those given at the request of defendant were further distinguished from the others in the presence of the jury by being pinned together in a separate package which was indorsed by the judge, "Requested by defendant." This method of charging the jury and of emphasizing the fact that some of the instructions were given at the request of defendant and that others were given by the court on its own motion is criticised as erroneous and prejudicial. The attorney general's reply to the argument is that defendant himself identified his instructions, and in consequence requested the following which the trial court gave: "The instructions given by the court at the request of the defendant have been examined and approved by the court, as truly stating the law applicable to this case, and it is your duty to give such instructions the same weight and consideration as if given by this court on its own motion." This instruction is no justification for the action of the trial court in introducing those that preceded it with the oral statement: "At the request of defendant I instruct you as follows." Defendant's purpose in requesting the instruction quoted was to give those preceding it equal rank with the instructions given by the court on its own motion, but there is nothing in the record to indicate that it made a greater impression on the jury than the oral announcement which the court repeated from the bench 14 times: *"At the request of defendant* I instruct you as follows." The situation was further complicated by an instruction in which

the jury were directed to "found their verdict solely on the evidence as given on this trial and the *instructions of the court.*" That the jury were in doubt as to the relative importance and dignity of the different instructions is conclusively shown by the record. After they had deliberated 20 hours, without coming to an agreement, they directed the following inquiries to the trial judge: "Can the jurors ask the court for instructions concerning the instructions that we already have got? Are we not to consider all of the instructions and render a verdict therefrom, and no one part?" These questions were answered by the court as follows: "The jury is instructed that they should take and consider all the instructions given them on this trial, in reaching their verdict, and not any part thereof."

For instructions the jury properly look to the court. Did the instructions on the law of self-defense emanate from the court or from defendant who was urging self-defense as a justification for the homicide? Should the instructions given at the request of defendant on that subject be considered? Why should the jury debate these questions among themselves? It is proper to indicate by the record the instructions given at the request of each party, but the better practice forbids the mentioning of such matters to the jury. It is improper for the trial court to emphasize the fact that some of the instructions given were requested by defendant and that others were given by the court on its own motion. The practice followed in this case has often been condemned by reviewing courts. In discussing this question, the supreme court of Illinois said: "The instructions should go to the jury as the instructions of the court, and the better practice is to have nothing appearing on the instructions showing at whose instance they are given." *Aneals v. People,* 134 Ill. 401.

The instructions requested by defendant were in some measure at least discredited by the manner in which they were submitted to the jury, and in the other instructions

the law on the subject of self-defense was not as fully or accurately stated as it should have been. While the manner in which the jury were charged might not amount to error in many cases, the peculiar circumstances of the present case lead to the conclusion that it was error prejudicial to defendant.

For the reasons given, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

CHARITY A. MELVIN, APPELLANT, V. A. G. HAGADORN, APPELLEE.

FILED JUNE 29, 1910. No. 16,092.

1. **Pleading:** AMENDED PETITION: NEW CAUSE OF ACTION. The facts incorporated in the amended petition set out in the opinion examined, and *held* to constitute a separate and independent cause of action from that stated in the original petition.
2. **Limitation of Actions:** AMENDED PETITION: NEW CAUSE OF ACTION. "Where the facts incorporated into a petition by way of amendment constitute a cause of action separate and independent from that stated in the original petition, the statute of limitations against the cause of action pleaded in the amendment runs until the filing of such amended petition." *Buerstetta v. Tecumseh Nat. Bank*, 57 Neb. 504.
3. **Appeal:** REVERSAL. An appellate court will not reverse a judgment simply for the purpose of giving a litigant a remediless right.

APPEAL from the district court for Frontier county: ROBERT C. ORR, JUDGE. *Affirmed.*

C. H. Tanner and *J. L. McPheely,* for appellant.

Morlan, Ritchie & Wolff, contra.

FAWCETT, J.

On August 18, 1906, plaintiff brought this suit in Frontier county to set aside a deed from one Barton and wife

to defendant, and thereby remove what plaintiff alleged was a cloud upon her title to a quarter section of land in said county. On April 15, 1907, plaintiff filed an amended petition praying the same relief as in the first, and in addition thereto that the court reinstate two mortgages which she alleges had been released by her grantor under a mistake of facts, and for an accounting against defendant upon said mortgages. From a decree finding generally for the defendant and dismissing plaintiff's suit, she prosecutes this appeal.

The land in controversy is described as the south half of the northwest quarter, the northeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section 3, township 7, range 28 west, in Frontier county. One Marion Pickenpaugh obtained the land from the United States government. The record is silent as to many of the transfers affecting the title thereto, subsequent to its entry by Mr. Pickenpaugh. From an abstract of title passed up to the court by counsel for plaintiff at the oral argument, and to which we therefore feel at liberty to refer, we find that Mr. Pickenpaugh executed two mortgages to one J. E. Seeley, one of the said mortgages being for $600, and the other for $90. Subsequently Seeley assigned the $600 mortgage to one William W. Smith. Later on, Seeley and his wife, Affa C. Seeley, conveyed the land by quitclaim deed to Abb Craig. This deed was made December 7, 1891. Six days prior to that date (December 1, 1891) Craig and his wife executed a mortgage to the said William W. Smith for $600, and on February 16, 1892, executed another to J. E. Seeley for $90. On the same day they executed to Seeley a quitclaim deed for the land. These two mortgages and the quitclaim deed were all acknowledged by Craig and wife on February 16, 1892. These transfers and dates tend strongly to corroborate the testimony of defendant given upon the trial, to the effect that Craig was only a dummy, taking title from Seeley and giving the mortgages and reconveying the title to him without

consideration. The $90 mortgage executed by Pickenpaugh was released by Seeley May 1, 1891, and the $600 Pickenpaugh mortgage was released by Smith February 23, 1892. After obtaining the two mortgages and the quitclaim deed from Craig, Seeley and his wife, Affa, on June 4, 1892, conveyed the land by warranty deed to R. A. Barton, subject to the two Craig mortgages. On January 16, 1899, Barton and his wife conveyed the land by quitclaim deed to defendant Hagadorn, for a consideration of $50, which deed was not recorded by Mr. Hagadorn until November 23, 1905. October 1, 1902, William W. Smith assigned the $600 Craig mortgage to Affa C. Seeley, wife of J. E. Seeley. On November 30, 1902, R. A. Barton and wife by quitclaim deed attempted to convey the land to Affa C. Seeley, but, on account of an error in the description as to one eighty, a second quitclaim deed was executed by Barton and wife to Mrs. Seeley on April 28, 1904. In each of these two quitclaim deeds it is recited: "This deed is given to convey any interest we may have in said property at this time and no more." On October 13, 1905, Affa C. Seeley, "as executrix of the estate of J. E. Seeley, deceased," released of record the $90 Craig mortgage. On November 13, 1905, William W. Smith executed a release of the $600 Craig mortgage. No release of this mortgage was ever executed by Affa C. Seeley, who had obtained the same by transfer from Smith, as above shown, more than three years prior to the time Smith assumed to release it. November 28, 1905, Affa C. Seeley, widow, conveyed the property by warranty deed to plaintiff. This deed is a plain, ordinary, warranty deed, and makes no reference to any prior mortgages by assignment of the same or otherwise.

In her original petition, plaintiff alleges that at the time of the execution of the quitclaim deed from R. A. Barton to defendant, Barton, being unable to pay two certain mortgages securing the sum of $725, and certain accrued interest, executed and placed in the hands of defendant the quitclaim deed with the name of the grantee

in blank, and with instructions to defendant to deliver the deed to the holder of the said two mortgages upon a release of the same, no further consideration to be required; that defendant paid no consideration whatever for the said deed, and had no authority to deliver the deed except upon compliance with said instruction; that at the time of the delivery of the deed he was instructed to insert the name of the owner of said mortgages as grantee therein; "that subsequent to the execution of said deed so placed in the hands of defendant A. G. Hagadorn, and it being verbally agreed as aforesaid, the said R. A. Barton and wife, for a valuable consideration to them paid by two several conveyances in due form duly executed, acknowledged and delivered, conveyed all of said land to said Affa C. Seeley, being the same conveyances hereinbefore set forth, * * * and as a part of the said consideration for same the said two mortgages were released and canceled of record. At the time of the purchase of said described real estate by the plaintiff, the plaintiff had no notice of any kind or nature of the said deed in blank to said land so placed in the hands of defendant A. G. Hagadorn, and the said defendant receiving information of the purchase of said land by plaintiff, without any authority whatever, fraudulently inserted or caused to be inserted in said deed his name as grantee and without authority caused said deed to be recorded as hereinbefore set forth, he the said A. G. Hagadorn not having in any manner whatever complied with any of the agreements or instructions to him given, when said deed was executed and placed in his hands, and the grantors who executed said deed did not then own or have any interest of any kind or nature in said land. And plaintiff would further allege that he the said A. G. Hagadorn has never been in possession of said premises, either actual or constructive, but now sets up and claims title to said premises against the plaintiff, but refuses to commence an action at law to try his title to the same, and said deed is a cloud upon the plaintiff's title to said premises

and tends to depreciate the value thereof. The plaintiff, therefore, prays that said deed from R. A. Barton and wife Mary A. to A. G. Hagadorn may be set aside, canceled of record, declared null and void, and that the said cloud upon plaintiff's title caused thereby may be removed, and for such other relief as equity may require."

Issues were joined by answer and reply, and plaintiff proceeded to take the deposition, in Colorado, of R. A. Barton. That deposition, when taken, thoroughly disproved the allegations of plaintiff's petition. It showed that the quitclaim deed from Barton to defendant was made in good faith for a cash consideration of $50 above incumbrances; that it was written out by Mr. Barton himself, and that defendant's name was written in the deed prior to its execution and delivery. As a result, evidently, of the taking of that deposition, plaintiff, on March 29, 1907, obtained leave to file an amended petition, and was given 40 days' time in which to file the same. On April 15, 1907, the amended petition was filed. The amended petition starts out by copying all of the original petition down to the prayer, and then further alleges that the two quitclaim deeds from Barton and wife to Affa C. Seeley were recorded long prior to the recording of the deed from Barton to defendant, and that at the time Barton executed the deeds to Affa C. Seeley she, the said Affa C. Seeley, had no notice whatever, either actual or constructive, of the quitclaim deed from R. A. Barton and wife to defendant A. G. Hagadorn. This allegation, as well as the allegation in plaintiff's original petition that she was in possession of the land, are thoroughly disproved by the evidence. The uncontradicted evidence shows that from the time the defendant received his quitclaim deed from Barton in 1899 down to the time of the suit defendant was in the undisputed possession of the land. It shows that he had about 15 acres of it inclosed in a pasture; that he was cultivating from 45 to 50 acres, and that he was cutting the hay off all of the rest of the land available for

that purpose. It is apparent therefore that in all of the transactions between Barton and Mrs Seeley and plaintiff subsequent to the deed from Barton to defendant they had full notice, by reason of defendant's open possession and use of the land, of whatever interest he owned therein.

The amended petition further alleges that "it was a part of the consideration of the said two conveyances or deeds from R. A. Barton and wife to the said Affa C. Seeley that she release of record two certain mortgages thereon owned and held by her, one dated December 1, 1891, securing the sum of $600, and one other certain mortgage dated February 16, 1892, securing the sum of $90, and, having no notice whatever of the existence of the said deed from said R. A. Barton and wife to defendant A. G. Hagadorn, the said Affa C. Seeley by instruments in writing in due form, duly acknowledged, released the two said mortgages and filed same of record, to wit, in the mortgage records of Frontier county, Nebraska, long prior to the time of the recording of said deed to defendant A. G. Hagadorn, and there would now be due on said two mortgages the sum of $1,550;" that plaintiff has entered into a contract in writing for the sale of the lands in controversy to defendant Francis C. Shelley; that she has received $1,000 of the purchase price and is desirous of completing the sale, but is prevented from complying with the terms of her contract by reason of the cloud upon her title and the claim made by defendant. "Plaintiff therefore prays that said deed from R. A. Barton and wife, Mary A., to A. G. Hagadorn may be set aside, canceled of record, declared null and void, and that the said cloud upon plaintiff's title caused thereby may be removed. * * * Plaintiff further prays that for the purposes of the trial and adjustment of the equities between the parties, if the court under the evidence does not cancel the said deed from R. A. Barton and wife to defendant A. G. Hagadorn, that the said two mortgages be restored, and an accounting had of the amount due

thereon, and the defendant A. G. Hagedorn be required to pay the same into court to be disposed of and distributed as the court may order; and for such other relief as equity may require."

For answer to the amended petition, defendants set out the chain of title substantially as above given; allege that the deed from Barton to defendant was in good faith; that defendant immediately took exclusive possession of all of said land and fenced and used the same as above indicated: the recording of his deed as above set out; denies every allegation in plaintiff's petition not specifically admitted, and then pleads the statute of limitations as against the mortgages. Some objection to the form of this plea is made by plaintiff, but it is so clearly without merit that we will not take time to discuss it.

In the decree the court found generally in favor of defendant and against the plaintiff, and adjudged and decreed "that plaintiff's action be dismissed as to defendant A. G. Hagadorn, and that said defendant A. G. Hagadorn go hence without day and recover of plaintiff his costs herein expended taxed at ——— dollars."

Plaintiff assigns two reasons for a reversal: "First. That the plaintiff was entitled to be subrogated to the rights of the mortgages, and the two mortgages reinstated and made a lien on the land. Second. That the decree is not supported by the evidence." Plaintiff must fail in both of these contentions. Even if the evidence appearing in the record were competent and sufficient to show the former validity of the two mortgages in controversy and the release of the same by plaintiff, which we very seriously question, the same evidence shows that the notes which the mortgages were given to secure became due December 1, 1896, and February 16, 1897, respectively. Both mortgages would therefore be barred in ten years thereafter, or on February 16, 1907, there being no evidence in the record to show that any payments of either principal or interest were ever made upon either of them. The amended petition which, for the first time, asserted any

rights under the mortgages was not filed until April 15, 1907. It is argued by plaintiff that the original and amended petitions became one record, and hence that the suit was brought upon the filing of the original petition. As a general proposition, and under certain circumstances, that is true, but that is not the law when the amendment introduces an entirely new cause of action, as was done in the present case. In the original petition, plaintiff asserted that she was the owner of the land, that the deed from Barton to Hagadorn which clouded her title was fraudulent and void, and prayed simply that it should be set aside and removed as a cloud upon her title. After taking Mr. Barton's deposition and discovering that she could not succeed in that suit, she then added a new, separate and distinct cause of action, in which she asserts that the two mortgages in controversy were released by mistake, or rather under a misapprehension of the state of the title, and prays that they be reinstated, and for an accounting thereon. If the mortgages had never been released, they would at that time have been barred by the statute of limitations. Their release by mistake or under misapprehension did not toll the statute. Moreover, even though it were to be conceded that the petition and amended petition must be treated as one record, and that by the warranty deed from Affa C. Seeley to plaintiff, plaintiff became subrogated to the rights of Mrs. Seeley under those mortgages, we could not grant an accounting and a decree of foreclosure of the mortgages in this suit for the reason that the petition fails to allege that no action at law has ever been commenced for the payment of the debt secured by said mortgages or any portion thereof. So that all that we could do would be to set aside the releases of the mortgages on the ground that they were executed by mistake. This would leave them standing as if they had never been released, and would put plaintiff to an entirely new suit for their foreclosure; in which suit the plea of the statute of limitations would have to be sustained. An appellate court will not reverse

a judgment simply for the purpose of giving a litigant a remediless right.

The evidence fully sustains the judgment.

AFFIRMED.

ROOT, J., concurs in the conclusion.

LOUIS W. SCHLOTE, APPELLEE, V. MYRON D. WALKER, APPELLANT.

FILED JUNE 29, 1910. No. 16,107.

Appeal: AFFIRMANCE. Where, in a controversy between parties, the amount involved is within the jurisdiction of a justice of the peace, and a judgment is entered thereon in the county court, and on appeal to the district court a similar judgment is entered, this court, on appeal, finding no prejudicial error in the record, will affirm the judgment of the court below without discussion.

APPEAL from the district court for Pierce county: ANSON A. WELCH, JUDGE. *Affirmed.*

Douglas Cones, for appellant.

J. A. Van Wagenen, contra.

FAWCETT, J.

Plaintiff and defendant, with their respective wives, entered into a written contract for an exchange of farms, the final exchange to take place on the first of the following March. The contract gave plaintiff the right to go upon defendant's land to do fall plowing. Plaintiff availed himself of this right, and plowed 30 acres of land. After the plowing had been done, and about December 1, plaintiff learned that defendant was not going to carry out the contract of exchange. He thereupon called upon defendant and asked him "What about the plowing?" Defendant said he would pay him for the plowing.

Thereupon plaintiff and defendant, together with a third person who was present, went out and measured the plowing, and agreed that plaintiff had plowed 30 acres. Plaintiff thought he ought to have $2 an acre for the plowing. Defendant thought that was high. Plaintiff then offered to take $1.80 an acre. This offer was not accepted. Defendant said he would make inquiry to ascertain the customary value of plowing in that neighborhood, and the parties separated. Just as they were separating, defendant said to plaintiff, "Now, if I come up in two or three days and pay you for this plowing, will you voluntarily turn over the contract?" to which plaintiff replied that he would, "but not before." Defendant did not pay for the plowing, and suit was brought in the county court, where judgment was rendered in favor of plaintiff for the sum of $60. Defendant appealed to the district court. At the conclusion of the trial in that court, plaintiff moved for a directed verdict in favor of plaintiff, and defendant made a similar motion for a verdict in favor of defendant. The court overruled defendant's motion and sustained that of plaintiff. A verdict was returned for $60. Out of an abundance of caution plaintiff unnecessarily remitted $6 from the verdict, so that his judgment would be for the amount of his unaccepted offer before suit to settle for $1.80 an acre. The motion for new trial was overruled, and judgment entered for plaintiff in the sum of $54, from which defendant prosecutes this appeal. The case is too trifling to warrant a discussion in this court. Suffice it to say that we have examined the record and find no prejudicial error therein.

The judgment of the district court is therefore

AFFIRMED.

CARRIE B. COBB, APPELLEE, V. NANNIE C. MACFARLAND, EXECUTRIX, APPELLANT.

FILED JUNE 29, 1910. No. 15,904.

1. **Wills:** ELECTION. No general rule can be formulated defining what acts of acceptance or acquiescence shall be sufficient to constitute an election between a devise in a will and a right inconsistent with the will. There must be an intention to make an election or some decisive act that will prevent restoring the parties affected to the same situation as if such act had not been performed.

2. ———: ———. An attempt to take both the property given by the will and the right inconsistent with the will does not constitute an election; when one is taken and the other rejected there is an election; if one is taken, and the situation of the parties affected is so changed with reference to the property or rights involved that they cannot be restored to their former situation, the election is complete.

3. ———: PAYMENT OF MORTGAGE: PRIOR CONVEYANCE. The provision in a will that the mortgage upon a certain tract of land shall be paid out of the estate is not inconsistent with a former contract by the testator to convey the land to another.

4. **Statute of Frauds:** SALE OF LAND: PAROL CONTRACT: PART PERFORMANCE. The effect of section 6 of the statute of frauds (Comp. St. 1909, ch. 32) is to continue the practice by which at the time of enacting the statute courts of equity compelled the specific performance of parol contract to convey real estate for the purpose of preventing fraud and injustice when there has been a part performance.

5. **Evidence:** STATEMENTS OF DECEDENTS. Testimony as to statements made by a deceased person many years before the testimony is given must be scrutinized closely; but when it appears that the circumstances were such that the parties testifying must have given close attention to the statements when made, and to the exact meaning of the party who made them, and strongly indicate the reasonableness and probability of the statements, and the statements are against the apparent interest of the party making them, such evidence may be sufficient to establish the fact stated.

6. **Statute of Frauds:** SALE OF LAND: PAROL CONTRACT: PART PERFORMANCE. Payment of the consideration for the conveyance of real estate, the purchaser being in possession at the time of

such payment and continuing in possession and making valuable, permanent improvements on the land without any agreement as to the terms of such possession, will be such part performance as to take the contract to convey out of the statute of frauds.

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

Hall, Woods & Pound, for appellant.

Field, Ricketts & Ricketts, contra.

SEDGWICK, J.

On the 5th day of July, 1905, Judge Amasa Cobb died in Los Angeles, California. At the time of his death he held the legal title to 1,040 acres of land in the township of Denton, Lancaster county, Nebraska, and other property. The only heirs to survive him were his daughter, the defendant Mrs. Nannie C. Macfarland, and two grandsons, Frank S. Cobb and Gilbert A. Cobb, children of his deceased son, Moffitt McKinney Cobb, and his son's widow, Mrs. Carrie B. Cobb, the plaintiff herein. He left a will by which he devised to his daughter, Mrs. Macfarland, an undivided one-half of the above mentioned land, and to each of his said grandsons an undivided one-fourth, subject to life estate to their mother, the plaintiff herein. The estate devised to the plaintiff was one-third of the one-half devised to her two boys to be held by her during her life. The defendant Nannie C. Macfarland is the executrix of her father's will. In 1896 Moffit McKinney Cobb was county treasurer of Lancaster county. It was discovered that there was a shortage in his accounts, and he and his sureties were notified of this shortage and required to make settlement. Amasa Cobb was one of the sureties on his official bond. The plaintiff in her petition alleged that the deficit was $48,088.61, and that the said Amasa Cobb as one of said sureties upon said bond was personally liable for the payment of said deficit, and that about this time Moffitt McKinney Cobb died and left poli-

cies of life insurance payable to this plaintiff, and that she collected thereon, together with the proceeds of certain personal property belonging to the plaintiff, an amount aggregating about the sum of $16,000, and that Amasa Cobb, to induce the plaintiff to give to him the said money to meet his liability on the bond of Moffitt McKinney Cobb, "promised the plaintiff he would bequeath and devise unto the said plaintiff, absolutely," the farm which she then occupied, being 800 acres of the land above mentioned; that she let Amasa Cobb have the $16,000 and the same was used by him in settling his liability upon the said bond, and she asked for a judgment "that it be decreed that the said Amasa Cobb was bound to leave by his last will and testament to the plaintiff above named, absolutely," the said 800 acres of land, and that the contract between the plaintiff and the said Amasa Cobb be specifically enforced, and plaintiff vested with the title to said land and the same be quieted in the plaintiff. The trial court found for the plaintiff and entered a decree accordingly, and the defendant appeals.

The principal question presented in the case is as to the sufficiency of the evidence to establish the contract relied upon. The defendant presented several questions of estoppel and election which she insists ought to defeat the plaintiff's claim.

1. The said 1,040 acres of land consist of two tracts, one of 800 and the other of 240 acres. Both of these tracts for several years prior to the death of Moffitt McKinney Cobb were occupied and farmed by him and his wife, this plaintiff. They cannot be said to be adjoining, but they are contiguous, the southeast corner of the smaller tract touching the northwest corner of the larger one. Soon after the death of Amasa Cobb negotiations were begun for the sale of the smaller tract of land, and it appears from the evidence that the plaintiff participated in those negotiations and was anxious that the sale be made. She wrote several letters to the defendant, apparently seeking to promote this sale, and finally, when it was ac-

complished, she and her two sons participated in the proceeds, in accordance with the provisions of the will. It is insisted by the defendant that this action on the part of the plaintiff estops her now to claim adversely to the provisions of the will. It is a fundamental principle of law that one who accepts a beneficial interest under a will thereby adopts the whole will, and renounces every right or claim that is inconsistent with the will. This is a principle of universal application, and it extends so far that, when a testator in his will disposes of property which belongs to a third party and at the same time makes provision for that third party in his will, the party whose property is so wrongfully disposed of cannot accept the provision made for him in the will, without allowing his property to be disposed of as the will provides. *Jennings v. Jennings,* 21 Ohio St. 56. The plaintiff is asking to enforce an alleged contract by which she is to have the 800-acre tract, absolutely, contrary to the provisions of the will. At the same time she has claimed and received under the provisions of the will her portion of the proceeds of the remaining tract of land. There is no doubt that the plaintiff must elect which course she will pursue. She now insists that this action on her part does not amount to an election. She alleges that she was not fully informed of her rights at the time she received the proceeds of the sale of this land, and that before the land was sold she had taken decisive action to enforce this contract upon which she now sues, and has never desisted from her determination to insist upon this contract. She offers to return the money which she received as a part of the proceeds of the sale of the land, and asks that she be allowed to do so, if the court shall find that her action in that regard interferes with her right to elect to enforce the contract she now sues upon. The trial court found in her favor upon this issue, and required her to return the money which she received from the proceeds of the sale of the land. In this finding we think the trial court is right.

It appears that after the death of Amasa Cobb the

plaintiff consulted with Mr. A. E. Harvey, a former partner of Judge Cobb, and a prominent member of the bar of this state, and then a member of the firm of Harvey & Harvey, engaged in the practice of law at Lincoln, Nebraska. In March, 1906, a petition was prepared for plaintiff to begin an action in the district court for Lancaster county to enforce the contract herein sued upon. This petition the plaintiff left with her attorneys, Harvey & Harvey, and she testifies that she supposed that that began the proceedings, and that she did not know that there was anything further necessary for her to do until she was further notified by her counsel, and that she was told by her attorneys that the sale of the 240-acre tract and participating in the proceeds by her would in no way interfere with her enforcement of the contract herein sued upon, and that she never elected nor intended to elect to take what was given her by the terms of the will in lieu of her right to enforce this contract. We think the evidence fully justifies this contention. The deed of 240 acres was signed by some of the parties on the 8th day of June, 1906, and was acknowledged by this plaintiff and others on the 6th day of July, 1906, several months after she supposed she had begun proceedings upon this contract. In the nature of things, no general rule can be formulated defining what acts of acceptance or acquiescence shall be sufficient to constitute an election. In each case presented the question arises whether it was intended to make an election and whether all parties can be restored to the same situation as if the act which it is claimed constitutes an election had never been performed, and these considerations generally control unless such inquiries are precluded by lapse of time or other special circumstances in the case. *Medill v. Snyder*, 61 Kan. 15; *Bierer's Appeal*, 92 Pa. St. 265; *Goodrum v. Goodrum*, 56 Ark. 532. Under the advice of her counsel it may fairly be said that the plaintiff attempted to take both the land given her by the will and the land she claimed to be entitled to under the alleged contract. This was done under

a mistake as to her rights, but if it had been done purposely and intentionally it could not be said to be an election. An attempt to take one and reject the other is an election, but an attempt to take both cannot be said to be. *Huston v. Cone,* 24 Ohio St. 11. The plaintiff cannot be said to have elected to take her share of the proceeds of the sale of the 240-acre tract as given her by the will in lieu of her right to the other tract of land under her alleged contract, unless in taking the proceeds of the sale she acted in full knowledge of her rights and intended by that act to choose the one rather than the other. *Millikin v. Welliver,* 37 Ohio St. 460.

2. It appears that at the time of the death of Amasa Cobb his land in Denton township was subject to a mortgage of $4,000, and after his death the defendant, as executrix of his will, paid the mortgage out of funds in her hands as such executrix, and this she alleges she would not have done had she known that the plaintiff would attempt to enforce her alleged contract for the 800 acres of land. We do not think there is any merit in this contention. The determination of the main question in the case must determine this matter also. If there was a contract that this plaintiff should have the land, it was the land itself that she was to have, and not an equity therein subject to a mortgage. The provision therefore of the will that this mortgage should be paid by the executrix thereof is not inconsistent with the existence of the contract alleged by the plaintiff.

3. The defendant contends that the plaintiff has failed to prove the contract upon which she sues. The first question discussed in this contention is whether the statute of frauds applies. Are contracts to make a will devising real estate within the exception of section 4 of that statute? It is urged that, since under section 4 (Comp. St. 1909, ch. 32) a nuncupative will may dispose of real estate, an agreement to make such disposition is excepted from the statute and may be proved by parol evidence. In many decisions of this court it has been assumed that

a contract to dispose of real estate by will is within the statute of frauds, and cannot be established by parol evidence, unless there has been such part performance as will bring it within section 6 of the statute. That section provides: "Nothing in this chapter contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreements in cases of part performance." By this section the legislature undoubtedly intended to recognize and continue the practice which then obtained in courts of equity to compel the specific performance of oral contracts to convey real estate for the purpose of preventing frauds and injustice where there has been a part performance. Other courts have held that contracts to dispose of real estate by will are within the statute of frauds. *Gould v. Mansfield,* 103 Mass. 408; *Hamilton v. Thirston,* 93 Md. 213; *Hale v. Hale,* 90 Va. 728. In New York a statute similar to ours has been so construed. *Gooding v. Brown,* 35 Hun (N. Y.) 148; *Ludwig v. Bumgart,* 48 App. Div. (N. Y.) 613. We do not find it necessary in this case to review the authorities for the purpose of ascertaining whether this court has been in error in assuming this to be the rule. Does this evidence show that such a contract as alleged was made, and, if the statute applies, that there has been such part performance as to take this case out of the provision of the statute?

One of the parties being prevented from testifying by death, the law forbids the other to testify to any transactions between them. The defendant contends that the plaintiff has not shown that she received more than $10,000 upon her life insurance, nor that more than that amount was necessary to make the settlement with the county in addition to the money which the evidence shows was received from other sources and used for that purpose, and also that the value of the 800 acres of land was greatly in excess of the amount furnished by the plaintiff in making settlement. The plaintiff testified that she received from the Fraternal Aid Association $2,000, from

the American Order of United Workmen $2,000, from the Bankers Life of Des Moines $3,500, from another company, which she thought was the Preferred Accident Association of New York, $5,000, and from the Mutual Reserve Fund Life Association of New York $2,500, amounting to $15,000, besides some other money which she had from other sources, and that the amount that she furnished in making a settlement with the county was something over $16,000. In fact, the plaintiff only received $300 from the Preferred Accident Insurance Company of New York, and upon her cross-examination she was questioned and answered as follows: "Q. Don't you think you are mistaken about the payment of this $5,000 by the Preferred Accident of New York? A. No, sir. Q. You are still sure, are you, that that draft was turned over at General Cobb's office at the same time the draft for $3,500 was turned over? A. Yes, sir, $8,500. Q. Don't you think you might be mistaken? A. No, sir; I don't; because when you turn over that amount of money you know it. Q. You made no memorandum of that? A. It is a thing I could not forget. Q. You made no memorandum of it at all? A. No, sir; I made no memorandum."

The defendant's counsel insist that this positive testimony, which is shown by the record to be incorrect, casts great discredit upon the whole testimony of the plaintiff. We do not so regard it. In her first statement as to the money received from the respective insurance companies she said: "I can give you the amounts, but I would not say I can give the names of the companies just right. * * * We settled with one insurance company for $5,000; if I remember right it was the Preferred Accident of New York," and in this cross-examination it seems plain that she thought it was in regard to the amount of money that she had received that she was being interrogated, and not in particular as to the names of the companies from which she received it. The plaintiff was many times upon the witness stand during the trial of the case, and was questioned at large in regard to the various matters involved,

and, notwithstanding that she was greatly interested in the result of the litigation, her testimony appears to be candid and consistent. No record was kept of the transactions, and it was not to be supposed that she would be able to remember the names of the different companies and the exact amounts she received from each with the same accuracy that she would recollect the amount that it was necessary for her to furnish in order to enable her father-in-law to make the desired settlement, and the amount accordingly paid by her for that purpose. We find nothing in the record to discredit her testimony upon these matters, supported as it is by so many well-established circumstances.

The defendant contends that the whole amount of shortage to be supplied was $36,088.61, while the plaintiff alleges it to have been over $48,000. Mr. McClay was first appointed administrator of the estate of Moffitt McKinney Cobb, and he testifies that the amount of shortage demanded by the county was $46,000, and that afterwards the county made the concession of $2,000, reducing the amount claimed to $44,000; that the amount paid to the county from the sale of the auditorium lots through Mr. Boggs was $13,540.56, and that the sureties on the bond paid $10,730. If these figures are correct, it would leave the sum of $21,724 to be paid from other sources. A part of this was paid from the estate of Moffitt McKinney Cobb. His personal property had been mortgaged to secure this shortage, and the evidence shows that in this mortgage was included property that belonged to this plaintiff. The plaintiff took the mortgaged property and settled with the county therefor. It is perhaps difficult to determine from the evidence exactly how much money the plaintiff furnished from her life insurance and other sources. She had great confidence in Judge Cobb and greatly respected his opinions and wishes. She was manifestly justified in this, as the whole record shows that in the midst of the most trying and embarrassing circumstances he conducted the whole matter with the strictest

integrity, and manifested that he was actuated by the most honorable motives. He was determined that the county should suffer no loss upon his account, nor because of the transactions of his son, and whether or not he promised her as she says, she listened to his advice and was governed by his wishes.

As to the value of the land at the time of the transactions in question, the evidence, as is usual in such cases, is more or less conflicting. It appears that the land is somewhat inferior in quality, and it also appears that in 1896 when the settlement was made there were very few transactions in real estate and sales of farm land were not frequent. The plaintiff called many witnesses who were familiar with these lands and were from experience qualified to give an opinion of their value, and who testified that the land at that time was worth from $12 to $15 an acre. The defendant also called witnesses who were in position to give opinion in regard to the value of these lands, and who generally fixed the value between $20 and $30 an acre. From the whole testimony it may be said that the land was probably at that time worth from $12 to $18 an acre. However, all of the witnesses agree that it was difficult, if not impossible, to sell land at that time for its real value, and if it had been necessary to sell this land to satisfy the demands of the county, it is doubtful whether as much as $15,000 could have been realized from it. It seems clear from the evidence that the amount of money furnished by the plaintiff toward the settlement with the county was not so disproportionate to the actual value of the land as to render the contract which she alleges an unreasonable one.

It is contended that there is not sufficient evidence to prove the alleged promise, nor to prove such part performance on the part of the plaintiff as to take the contract out of the statute of frauds. There is a large mass of testimony as to the negotiations and settlement with the county, and as to the part which Judge Cobb took in the whole of this transaction, and as to his declarations and

statements after he received this money from the plaintiff, and of his promise to her to give her the farm in question in consideration of the money which he had so received. These witnesses were testifying to conversations that took place with the deceased person more than ten years prior to the giving of their testimony. It is always held that such testimony is to be examined very closely. The frailty of human memory is such that it is generally difficult, and frequently impossible, to reproduce the exact meaning intended when the statements were made. We should look at the conditions under which the statements were made, and inquire whether there is anything in the circumstances and the relations of the parties tending to fix the real meaning of the statements in the minds of those who heard them. The evidence shows that this shortage in the accounts of the county treasurer, and his tragic death soon after the shortage had been discovered, and its effect upon his father, who had long been a man of prominence in the state, a general in the army, and for many years a judge of this court, were matters of great importance and of general interest. It also appears from the evidence that it was generally known that it had been proposed and contemplated that this plaintiff should devote her money to the settlement with the county, leaving herself and her two children substantially without support, and many friends of Judge Cobb, his former partner, Mr. Harvey, his family physician, and many others of his intimate friends, men of high character and standing in the community, consulted with Judge Cobb in regard to the matter. These men testify that Judge Cobb assured them that he had no other means with which to make this settlement with the county; that to sell the land for that purpose would be a great sacrifice under the conditions then existing; that the plaintiff had consented to turn over this money to complete this settlement, and that she would lose nothing by it; that in return for this money she was to have the farm on which she lived. To some of these men he said that he had

promised her the farm; to others he said that she and her children would have the farm; to others he said that he had given her the farm. Several of these witnesses testify positively that the amount he so stated to have been furnished by the plaintiff was $16,000. The volume of evidence in this record tending to establish the contract sued upon, together with counter evidence, is so great that we cannot extend this opinion to attempt an analysis of the evidence given by the various witnesses. It is very clear from this evidence that, during and after the time that this settlement was pending, Judge Cobb expected that this plaintiff would have the farm in question, and we think that the whole evidence taken together proves that he promised that she should have it in consideration of the money furnished by her in making the settlement.

It is insisted that the evidence does not show a sufficient part performance to take this contract out of the statute; that the payment of the purchase price alone is not sufficient. Payment of the purchase price and possession by the purchaser under the contract is generally, if not universally, held to be sufficient part performance. This plaintiff and her husband were in possession of this land for many years prior to his death, and after his death she continued in possession. The relation that they sustained to this land does not appear to be the ordinary relation of tenancy, and the evidence is not clear that it was understood and agreed by the parties that the possession of the plaintiff was under the contract sued upon. A contract to dispose of property by will assumes that the promisor is to have the use of the property during his life. The plaintiff made valuable improvements upon the land after the contract in question was made, and was never interfered with or questioned in her management of the property as owner. We think that the circumstances shown, together with full payment for the land, are sufficient under section 6 of our statute of frauds.

It is strenuously and fervidly maintained upon the oral argument that the whole life and character of Judge Cobb,

as reflected in this evidence, were inconsistent with the idea that, after making such a promise to this plaintiff, he could have been induced to make a different provision in his will. Soon after the death of his son he went to California, where his daughter, the defendant, was residing, and finally in 1901 he appears to have made that his permanent home. He was more than 80 years of age, in feeble health, and a man of kind heart and generous disposition. While he was living in Los Angeles with the defendant he gave her a large amount of property, aggregating, according to this evidence, considerably more than $20,000. In the will that was probated he gave her one-half of the 1,040 acres of land in Denton township, and all of the residue of his property, amounting to several thousand dollars.

It is useless to speculate as to the change in his purpose. If he considered at the time that he was merely expressing his intentions as to the future, and that those intentions might be changed, if afterwards upon change of circumstances and environment he should regard his duty in a different light; or if in his advanced years and feeble condition he lost interest in business matters, and did not consider the importance of the transactions in which he participated, the result is the same. The will was not a sudden caprice. He wrote and signed a similar will soon after he began visiting in California, in 1898, and that will appears also to have been preserved. We cannot agree with counsel that if the contract sued upon is established it reflects upon the integrity of Judge Cobb in making the will. No such conclusion is necessary upon this record. It is unnecessary to determine the cause or causes that resulted in the insertion of these ineffectual provisions in the will. It is enough to know that the right to this land was in another, and that the will could not change this right.

The judgment of the district court is right, and is

AFFIRMED.

LETTON and ROOT, JJ., dissenting.

The plaintiff's right to the relief she asks is predicated upon the existence of a contract between her and General Cobb that he would convey the entire tract of land sued for in return for the surrender to him and the sureties of her husband of the money from the life insurance policies of which she was the beneficiary. We are convinced from a careful reading of the testimony that no definite contract has been proved. No one has testified to the terms of the contract declared upon in the petition. The testimony concerning General Cobb's declarations is in many respects proof of testamentary intentions merely. A number of witnesses testify to such expressions as that "he always intended the farm to go to Mrs. Cobb and children;" "he intended the farm for Mrs. Cobb and the boys;" that when he was dead the farm "was to belong to Mrs. Cobb and the boys;" "I have given that farm to Carrie. Then he said something about Carrie and the boys having the farm." While other witnesses testify that, in speaking of the surrender of insurance money by Mrs. Cobb, the deceased said: "She would lose nothing by it. She was to get the farm that he intended Maxey to have." "He intended to give it (the farm) to Mrs. Cobb." "He intended the farm now for Maxey's wife and children." "Mrs. Cobb was going to have the farm and boys to have their share." "I have told her she will have the farm." "The farm goes to Carrie because she has furnished us her life insurance money to help settle with the county." "Carrie turned over her insurance and I gave her Maxey's farm."

It seems to us, upon the entire record, that the mind must remain in doubt as to whether a contract was made, or, if made, whether it contemplated devising or conveying this land to the plaintiff or to the plaintiff and her sons. The evidence fails to prove with any certainty the existence of the contract alleged, and it also fails to point out definitely the specific tract of land to which the language used by General Cobb was meant to be applied.

Furthermore, the declarations of the plaintiff are inconsistent with the existence of such a contract. Shortly before General Cobb's death she acted as his agent in seeking a purchaser for the land. She corresponded with him and gave her views concerning the price for which the general could profitably sell the farm, and fully recognized his right to treat it as his own. She stated at the court house, when the will was read, that General Cobb had promised to leave her one-half of his estate. Her statements to Mrs. Macfarland, at all times before and after General Cobb's death, were with reference to a share of the estate, and at no time till months after General Cobb had passed away did she assert any contractual right to this land.

She sent General Cobb about $800 per annum apparently for the use of the land during the years she occupied it subsequent to her husband's death. In 1905 she wrote she was sorry she had not remitted what she ought to have sent from the farm. It may also be observed that, in the proceedings brought by her to collect from the estate the amount of her claim for money advanced to General Cobb, her counsel, Judge Harvey, was willing to concede a credit of $8,000, which is ignored in these proceedings.

At the time of the payment of the shortage, the land was worth, as near as can be judged from the testimony, from $12 to $18 an acre. It is a matter of common knowledge that following the panic, in 1896, farm lands in eastern Nebraska appreciated rapidly in value. It seems reasonable to believe that when General Cobb by his last will and testament in 1902 gave the boys and the mother one-half of the whole 1,240 acres, he believed that he was doing by them just as he had contemplated and given them to expect.

We have said that where it is sought to set aside the provisions of a will by proof of an oral agreement by which the property which is the subject of the will is otherwise disposed of the agreement must be established,

if at all, by clear, convincing, and satisfactory evidence. *Rau v. Rau,* 79 Neb. 694; *Teske v. Dittberner,* 65 Neb. 167, 70 Neb. 544; *Peterson v. Estate of Bauer,* 76 Neb. 652, 661. This is a sound rule, and the barrier afforded by it to a disposition of estates other than that intended by the owner in his lifetime should not be relaxed. This court has already gone to the limit in changing the disposition of property after the owners of it have passed away and are unable to help themselves. It is not the province of the courts to distribute estates as they think most just and equitable. Their sole function is not to decide what the deceased should have done, but to ascertain what he did in fact do, and in our opinion the quantum of proof required to establish the agreement alleged has not been produced.

THEO MCGREW, APPELLANT, V. RAY V. MCGREW, APPELLEE.

FILED JUNE 29, 1910. No. 15,932.

Divorce: EXTREME CRUELTY: EVIDENCE. In an action for divorce on the ground of extreme cruelty, not only the specific acts of cruelty alleged and proved against the defendant, but conditions caused by defendant which occasion and aggravate such acts of cruelty should also be considered. Cruel conduct is not limited to acts of personal violence.

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

T. J. Doyle and *G. L. De Lacy,* for appellant.

C. S. Wilson, Bernard McNeny and *W. C. Dorsey, contra.*

SEDGWICK, J.

This case was submitted upon the briefs and oral argument on behalf of the plaintiff only. The action is for divorce upon the ground of extreme cruelty. The district

court found for the defendant and dismissed the case, and the plaintiff appealed to this court.

The record is very voluminous. For the most part the specific acts of cruelty charged in the pleadings and evidence are of such a nature as by themselves would seem to justify the conclusion of the trial court. There is, however, proof in the record of conditions that existed prior to the marriage, for which the defendant is himself wholly responsible, that not only aggravate the acts of cruelty alleged and proved, but, as we understand the evidence, were the principal cause of the misunderstandings between the parties, and furnished the real reason for all their troubles. The defendant's condition of which the plaintiff complains, and which furnishes her principal reason for concluding that it is impossible for her to live with him, is, we think, fully established by the evidence. There is the direct and positive evidence of one competent and apparently disinterested witness, and the evidence of another witness to the plain admissions of the defendant, besides the corroborative evidence of the plaintiff herself and of her mother. The defendant directly contradicts this evidence, but his answers to questions, although positive, are somewhat evasive, and he furnished but one witness to support him. This witness appears to be competent, but he makes admissions in his evidence which tend strongly to corroborate the plaintiff's witnesses. The details of the evidence of these various witnesses are not of such a nature as to make it desirable to reproduce the evidence here. It is sufficient to say that we are satisfied from this evidence that the plaintiff has just cause to complain, and that in the light of this evidence the actions of the defendant to the plaintiff, as disclosed by the record, constitute extreme cruelty within the meaning of the statute, and that the plaintiff is entitled to a decree of divorce, as prayed.

There is one child of the parties, which is being cared for by the plaintiff and has been during the pendency of this action, and which should be left to her care and cus-

tody until the further order of the district court, with the provision allowing the defendant to visit the child at suitable times. The evidence shows that the defendant, during the existence of the marriage, owned a house and lot and some other property consisting of bank stock and other securities, and that, being indebted for this property, his father assisted him and has taken over most of the property as security in so doing. The evidence in regard to the financial ability of the defendant is not entirely satisfactory, but according to his evidence his property at the time of the trial was worth about $3,000 net. He is an active man, engaged in business apparently profitable. We think he should pay the plaintiff $1,500, and contribute to the support of the child $25 a month from January 1, 1908, about the time of the commencement of this action, until the further order of the district court. These amounts should be paid as follows: $250 of the said $1,500 within 30 days, together with the accrued amounts of said monthly payments for the support of the child, and $500 within 6 months; $500 within one year, and the remaining $250 within 18 months from the filing of this opinion.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree in accordance with this opinion. All costs will be taxed against the defendant.

REVERSED.

REESE, C. J., not sitting.

GEORGE P. VALERIUS ET AL., APPELLANTS, V. MARTIN C. LUHRING, APPELLEE.

FILED JUNE 29, 1910. No. 16,103.

Brokers: COMMISSION. One who makes a contract with a real estate broker or agent, which complies with the statute in its form and

contents, and in which he represents himself as owner of the land described, cannot avoid payment of the agreed commission on the ground that he is not the owner of the land.

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

Arthur G. Abbott and *O. A. Abbott,* for appellants.

John C. Stevens, contra.

SEDGWICK, J.

The petition alleges that the defendant "entered into a written contract with these plaintiffs to sell for him" certain lands described in the petition. The plaintiffs were real estate agents in Grand Island, Nebraska. An objection was made to the plaintiffs' evidence on the ground that the petition did not state facts sufficient to constitute a cause of action. The objection was sustained, and the plaintiffs elected to stand upon their petition. Their action was dismissed, and they have appealed.

The petition alleged that the "original contract is attached to depositions taken in the lower court and filed herein, and the same is referred to and made a part hereof as though set out at length." There was no objection made to this manner of pleading the contract, and the transcript filed in this court did not contain a copy of the contract. It was urged that the transcript showed upon its face that it was incomplete and did not contain the whole of the petition, and that it did not appear therefrom that the contract complied with the statute in regard to contracts between real estate agents and brokers and the owners of land. The plaintiff was allowed to complete the record by filing a certified copy of the contract, which has been done, and from that it appears that the contract was in writing, and was made by both the plaintiffs and the defendant, and contained a description of the land to be sold and the compensation to be allowed to the agents for their services. The contract appears to be a com-

pliance with the statute referred to, so far as regards its form, but it appeared from the pleadings that the land was owned by the wife of the defendant, and it is objected that the statute has not been complied with because the contract was not signed by the owner of the land. This contract is not *nudum pactum.* The plaintiffs agreed to perform services for the defendant, and the defendant agreed to compensate them for so doing. Each agreement is a consideration for the other. The defendant then entered into a written contract with the plaintiffs as owner of the lands described, and we think that he cannot now be heard to say that he had no interest in the lands and no interest in the contract which he made. If he had sufficient interest in the land to enter into such a contract, we think he is the owner of the land within the meaning of the statute. The object of the statute is to prevent fraud in such transactions. It is not the purpose of the statute to define what shall constitute ownership. It was intended to prevent fraud, and should not be made an instrument to enable the parties thereto to perpetrate fraud on each other.

This appears to be the only point assigned and discussed in the defendant's brief, and we think in this the court was in error. The judgment of the district court is therefore reversed and the cause remanded.

REVERSED.

JOHN L. HAVLIK, APPELLEE, V. ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLANT.

FILED JUNE 29, 1910. No. 16,105.

1. **Insurance:** PROOF OF LOSS: WAIVER: EVIDENCE. If a fire insurance company refuses to receive proof of loss on the ground that the policy was not in force at the time of the destruction of the property by fire, it thereby waives proof of loss, and cannot defend an action on the policy on the ground of false statements as to value or title in such rejected proof of loss, and in such case

evidence that the plaintiff made statements after the policy was assigned to him with the consent of the company, by which he exaggerated his interest in the property, is incompetent.

2. Trial: OFFER OF PROOF. An offer of proof is required for the purpose of making it appear to the court that the question put to the witness calls for competent evidence. Unless it does so without equivocation, it is not error to overrule the offer.

3. ———: SUBMISSION OF PLEADINGS TO JURY. It is not good practice to submit mutilated pleadings to the consideration of the jury, but unless it appears that the party complaining has been prejudiced thereby such action on the part of the court will not require a reversal of the judgment.

4. Appeal: SPECIAL FINDINGS. If the language of special findings of a jury is ambiguous and will reasonably admit of a construction that will make such findings agree with the general verdict, such construction will be adopted rather than reverse the judgment because inconsistent with the special findings.

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

Greene, Breckenridge & Matters, for appellant.

Matt Miller and *J. B. Pospisil, contra.*

SEDGWICK, J.

The plaintiff recovered against the defendant a verdict and judgment upon a policy of fire insurance in the district court for Kearney county, and the defendant has appealed.

One Norlin, who was the owner of a stock of goods in Axtell, sold the same to the plaintiff in May, 1907, and assigned to the plaintiff the policy of insurance issued by the defendant on the stock of goods. The consent of the defendant company to such transfer was indorsed upon the policy. The amount of the policy was $1,000, and there was other concurrent insurance. In August, 1907, the stock of goods was entirely destroyed by fire. In September the plaintiff notified the defendant of the fire and made out and forwarded to the defendant formal proof of loss. In this proof of loss he made the following state-

ment: "I was the owner of the entire property covered by said policy, No. 893." The plaintiff acknowledged the receipt of this notice and proof of loss, and in doing so, among other things, said: "What purports to be a notice and proof of loss was also received. We wish to object to the said proof for the reason that our company is not liable under their policy on account of no notification having been given us as to the real ownership of the property insured, which non-liability you were advised of in my letter of September 2, 1907. We hold the proof subject to your order."

1. The first assignment of error discussed in the brief is that the court erred in striking out a part of the defendant's answer and in refusing proof in support thereof. The answer admits that Norlin was the owner of the goods; the issue of the policy to Norlin; that Norlin sold the property insured to plaintiff and assigned the policy to him; and that the defendant by its duly authorized agents indorsed on the policy its consent to such transfer. The answer then alleges two defenses to the action: First, that at the time of the transfer of the property and insurance by Norlin to the plaintiff the plaintiff "falsely and fraudulently represented" to defendant that he was the sole owner of said stock of goods; and, second, that in his proof of loss he made false statements that he was the unconditional and sole owner of the stock of merchandise destroyed. The motion of the plaintiff was to strike out the last named defense "for the reason that defendant denies that the policy in question was in force, and alleges that the same was not in force at the time of the fire and are (is) therefore precluded from setting up any of the clauses of said policy as a defense to plaintiff's cause of action." Of course, the reason given in the motion is not a good one. A defendant may plead as many defenses as he has, whether legal or equitable, or both. The allegation of false statements in making proof of loss is not inconsistent with the allegation that the policy was not in force at the time of the fire. A defendant does not waive

one defense by pleading another that is consistent with it. The test is whether the evidence necessary to prove one defense would tend to disprove the other. The company can waive a defense; and it is generally held that if it refuses settlement on the ground that the policy was not in force at the time of the fire such refusal relieves the insured from the necessity of furnishing the formal proof of loss. This is upon the theory that if there is no valid policy of insurance on the property it is immaterial, so far as the company is concerned, whether the property was of great or little value or whether the property was or was not in fact destroyed by fire. But this rule of waiver of proof of loss and other defenses relates to negotiations or acts of the parties before suit; it has nothing to do with pleading. When suit has been begun the company may avail itself of the statute and plead as many defenses as it claims. If any of these defenses have in fact been waived this is a matter of reply and proof on the part of the plaintiff. The question then presented by this assignment is whether the defendant has been prejudiced by this action of the court.

Many authorities hold that false statements in the proof of loss will forfeit the policy, whether or not the company is in any way injured by such statement, but a contrary rule has been established in this state. Unless such false statements affect the risk they are not cause for declaring the policy void. *Springfield Fire & Marine Ins. Co. v. Winn,* 27 Neb. 649. It follows from this principle that it must appear that the defendant acted upon such false statements, or was in some manner prejudiced or affected by them. No such allegations were contained in the answer. The allegation is that the proof of loss was "furnished to defendant company" without alleging that it was acted upon or even received by the defendant; and the proof in the record shows without contradiction or attempt or offer of denial that the proof of loss was refused by the company on the ground that no policy was in force, and such proof was therefore unnecessary. Proof

of loss tendered but not received could not prejudice the company; and by refusing the proof it waived the right to rely upon it or its representations. The record upon the presentation and ruling upon the motion shows that the question determined by the court was whether the defendant company by refusing to receive the proof of loss waived the objections thereto which it was seeking to urge by this answer. We do not think that the defendant should now be heard to complain of the formality of the proceeding in which that question was rightly determined.

2. The defendant insisted upon the trial that the plaintiff had made false statements in which he had represented the property to be of much more value than it really was, and had falsely represented his title and interest in the property, and that by reason of these false statements the policy had been forfeited. The court instructed the jury that statements of this kind after the policy had been assigned to the plaintiff with the consent of the company would not invalidate the policy. It is very strongly insisted that this instruction was erroneous. It is argued that "the question is not one of title, but of actual and substantial ownership, and whether Havlik's interest in the stock of merchandise was of such a nature that he would have sustained the whole loss if the property had been destroyed without insurance." The defendant has cited a number of authorities upon this proposition, but we think that he has not argued the real question involved. There is no doubt that one may have the legal title and still not be the sole owner, and in such case his insurable interest may be much less than the value of the property, but this is not the legal question involved in the instruction, when the instruction is taken in connection with the other instructions in the case. The defendant also insisted that the policy was void; that it had been forfeited by the plaintiff because of false statements that he had made in his proof of loss. These false statements relating to the amount of his interest in the property would have avoided the policy if the defendant had re-

ceived the proof and acted upon it; but the court by the instructions complained of, in effect, tells the jury that in this particular case, in which there was no written application for insurance, and in which the plaintiff was not asked for a statement in regard to his interest in the property before he received the insurance, the company, by rejecting the proof of loss and placing their defense upon the invalidity of the policy, waived the objection which it might otherwise have made to the proof of loss, and that statements in the rejected proof of loss or false statements exaggerating the interest of the plaintiff in the property made after he obtained the insurance were immaterial under the evidence in this case, and in this, as we have already seen, the court was right.

3. It is said in the brief that the court erred in excluding proof of representations made by the plaintiff at the time and before he received the insurance to the effect that he was the sole owner of the insured property. As before stated, there was no written application for the insurance and no request of the insured for statements in regard to his interest in the property. It is not necessary for us to determine what the effect of oral statements of this nature to the company's agent prior to obtaining the insurance would be. The company had already introduced the evidence of Mr. Norlin in which he stated that the consent of the company to the transfer of the policy was indorsed thereon "about the same time" that the stock of goods was turned over to the plaintiff, and then when Mr. Warren, the company's agent, was upon the witness stand he was asked whether he had any conversation with Mr. Havlik relative to the ownership of these goods; he answered that he had, and he was asked to state that conversation, which was objected to on the ground that "no time was fixed." He then stated that the conversation was on the 13th day of June, which was more than two weeks after the goods were transferred to the plaintiff, and was more than two weeks after the consent of the company was given according to the date affixed to that

instrument. He was then asked again to state what the conversation was, which was objected to as incompetent because the conversation "took place some time in June." Then the defendant's attorney offered to prove that on the 13th day of June the plaintiff represented to the witness that he was the sole owner of the goods, and in connection with that offer recited "that date being prior to the date when the policy in his possession was delivered." Evidently the court did not understand this to be an offer to prove that the written consent of the company was not in fact delivered on the date that it bears, and that this conversation took place before the actual delivery of the written consent. As we have already seen, statements that he was the sole owner of the goods made after he became the owner of the insurance with the consent of the company would be incompetent, even if false, the right to forfeit the policy on that ground having been waived by the company.

4. When the court made the order striking out the part of the answer above referred to, it was literally stricken by the judge by drawing the pen through the lines of the answer, and the judge also wrote on the margin the words: "Stricken out by the court." The pleadings in this condition were given to the jury when it retired. This action of the court is complained of. This method of submitting cases has been frequently criticised. *Murray v. Burd*, 65 Neb. 427; *Parkins v. Missouri P. R. Co.*, 4 Neb. (Unof.) 1; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578. The issues tried should be plainly stated to the jury, and only the issues that are left to the jury for its determination; but it does not appear that this action of the court affected the verdict in this case. It is insisted in the brief that this proceeding emphasized the fact that the court was acting upon a wrong theory, but it is not pointed out that this action of the court itself prejudiced the rights of the defendant in any way so as to require a reversal of the judgment.

5. The defendant complains of the amount of the re-

covery. The argument is that the whole value of property insured and destroyed was not as great as was collected thereon by plaintiff from concurrent insurance, together with the amount recovered by the plaintiff in this action. The jury found specially "the fair cash value of the property consumed by fire on August 18, 1907, in the store building occupied by John L. Havlik to be $4,450, and the amount of insurance received by the plaintiff from other concurrent insurance on the stock of merchandise in question consumed by fire to be $3,450." The difference of $1,000 with interest for one year and nearly four months would be the amount of the general verdict, $1,092.55. It is urged that, if the value of the fixtures is deducted from the value of the property destroyed as found by the jury, the remainder would represent the value of the stock of merchandise and would be but little more than the amount that the plaintiff has already received from the concurrent insurance on the merchandise as found by the jury. The value of the fixtures does not appear to have been contested by the parties. The only evidence on that point which is pointed out in the briefs is found in the proof of loss prepared by the plaintiff and offered to the company. In that paper it is stated that the value of the "store fixtures" is $930, and the whole value of the goods and fixtures is stated to be $6,455. If we deduct the $930, as the defendant suggests, from the value of the "property consumed by fire," as found by the jury, $4,450, the remaining $3,520 will be only $70 more than plaintiff has already received from concurrent insurance according to the special finding. This reasoning is upon the assumption that the jury intended to find the value of the property burned, including the fixtures, and at the same time, in finding the concurrent insurance collected, intended to consider only the merchandise. Such finding could not be made serviceable in determining the real issues without a further finding as to the value of the fixtures. There was no allegation in the answer of any special agreement between the parties as to concurrent

insurance, or any damage to defendant or advantage to plaintiff arising therefrom. It was not alleged in the answer that the plaintiff had collected any amount whatever on concurrent insurance. There was no evidence, so far as we have observed, as to value of the fixtures, unless the statement above referred to in the offered proof of loss be regarded competent evidence. That paper was not offered for the purpose of proving values, and apparently not considered at the time as furnishing proof of such matters. The policy in suit not covering fixtures, there was no serious contest in regard to the fixtures or the value thereof. The jury were told plainly that, unless the value of the property covered by plaintiff's policy exceeded the amount collected by him from concurrent insurance on the same property, he could not recover, and in no event could he recover more than such excess. The general verdict in favor of plaintiff is equal to the difference between the value of the property and the amount collected on concurrent insurance as found by the jury, together with legal interest thereon. In the light of all these conditions, it seems more reasonable that the jury intended the same property in the one finding called the "property consumed by fire in the store building," and in the other finding "the stock of merchandise in question," than that it was intended to include the fixtures in the one valuation and exclude them from the other, and so leave the necessary conclusion to conjecture. Thus the general verdict and the special findings agree, and both are supported by the evidence.

If these conclusions are justified, there is no error requiring a reversal of the judgment.

AFFIRMED.

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

FAWCETT, J., dissents.