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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

JANUARY AND SEPTEMBER TERMS, 1916, AND JANUARY TERM, 1917.

VOLUME C.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

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SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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AMENDMENT TO RULES OF THE SUPREME COURT

Rule 12, part (1), is amended so as to make the last paragraph read as follows:

"Every reference to an adjudicated case shall be by the title thereof, as well as by the volume and page where it may be found, indicating the tribunal, and the particular edition of any text-book referred to must be given in connection with the cited page or section thereof. Every reference to a statutory provision of Nebraska shall be to the edition of the Revised Statutes published by the state of Nebraska, if the provision is found therein, or to the session laws."

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1916.

JAMES B. NORTHCUTT, APPELLEE, v. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED JUNE 3, 1916. No. 18710.

Costs: ATTORNEY'S FEE. Under the statute making a common carrier liable for an attorney's fee in a suit wherein plaintiff recovers damages for the loss of, or injury to, freight, the supreme court is not authorized to allow plaintiff an attorney's fee for services on appeal. Rev. St. 1913, sec. 6063.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. Motion for allowance of attorney's fee. *Motion denied.*

B. P. Waggener, J. A. C. Kennedy and *Philip E. Horan,* for appellant.

O. E. Leidigh and *C. A. Robbins, contra.*

PER CURIAM.

In the district court for Otoe county plaintiff, a consignee, recovered a judgment against defendant, a common carrier, for the loss of property in transit. Included in plaintiff's recovery was an attorney's fee allowed pursuant to statute. Rev. St. 1913, sec. 6063. Defendant appealed to this court, where the judgment of the district court was affirmed April 15, 1916, without an opinion. By motion plaintiff now asks for the allowance of an additional fee

for the services of his attorney in this court. The motion is resisted on the ground that the supreme court has no authority to make such an allowance. The statute authorizing an attorney's fee in addition to plaintiff's claim for damages for the loss of, or injury to, freight provides: "In the event such claim, which shall have been filed as above provided within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at seven per cent. per annum from the date of the filing of such claim, and shall also be liable for a reasonable attorney's fee to be fixed by the court, all to be recovered by the consignee or consignor, or real party in interest, in any court of competent jurisdiction." Rev. St. 1913, sec. 6063.

May the supreme court, upon affirming a judgment against a common carrier for loss of, or damage to, property in transit allow plaintiff a reasonable attorney's fee for services on appeal in addition to that allowed by the district court? Such an allowance is purely statutory. *Wallace v. Sheldon*, 56 Neb. 55. A party asking for an attorney's fee as part of his recovery must bring his case within the terms of the statute. *Eddy v. German Ins. Co.*, 51 Neb. 291. In the case just cited it was held that a statute directing the court rendering judgment against an insurance company to allow plaintiff a reasonable attorney's fee to be taxed as part of the costs did not authorize the supreme court, in affirming a judgment against the insurer, to allow plaintiff a fee in addition to that allowed by the district court. To the same effect is *Merriam Mortgage Co. v. St. Paul Fire & Marine Ins. Co.*, 97 Kan. 190.

The expression "all to be recovered by the consignee or consignor," as used in the Nebraska statute, seems to indicate that the legislature intended to limit the allowance of the attorney's fee to the court rendering judgment for the items enumerated, namely, damages, interest, and attorney's fee. The statutory power of the district court

to allow plaintiff an attorney's fee upon rendering judgment for plaintiff does not confer upon the supreme court power, in the event of an affirmance, to allow an additional attorney's fee for services on appeal, though plaintiff, by reason of such appeal has been compelled to incur additional expenses for legal services. *Sedgwick v. Dixon,* 18 Neb. 545; *Murray v. Swanson,* 18 Mont. 533; *State v. Thomas,* 76 Kan. 447.

Plaintiff relies upon *Louisville & N. R. Co. v. Dickerson,* 191 Fed. 705. The statute there construed provided, in a suit to enforce an order of the interstate commerce commission awarding reparation to plaintiff: "The petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." 34 U. S. St. at Large, ch. 3591, sec. 5, p. 590. The court held that, upon affirming a judgment in favor of plaintiff, the circuit court of appeals was authorized to allow plaintiff a reasonable attorney's fee in addition to that allowed by the circuit court. The case is distinguishable. The federal statute contemplates the allowance of a reasonable attorney's fee, "if the petitioner shall finally prevail." The term "finally prevail" extends to the circuit court of appeals. If the petitioner shall finally prevail, he is entitled to an attorney's fee therein. The Nebraska statute contemplates that a reasonable attorney's fee shall be allowed as a part of the recovery, and it must therefore be allowed by the court rendering the judgment. An additional allowance in case of an unsuccessful appeal by the common carrier does not appear to have been contemplated by the legislature.

The motion is therefore

OVERRULED.

ELBERT P. SMITH, APPELLEE, V. WILLIAM R. LOHR, APPELLANT.

FILED JUNE 3, 1916. No. 18866.

Contracts: BREACH: REMEDIES. On refusal to perform a contract for the exchange of properties, the injured party may, at his election, treat the contract as terminated and sue for the value of the property he has delivered to the defaulting party.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, Judge. *Affirmed.*

Sullivan, Squires & Johnson, for appellant.

C. L. Gutterson and *Frank Kelley, contra.*

MORRISSEY, C. J.

Plaintiff was the owner of an undivided one-half interest in a merry-go-round, and defendant was the owner of a small house and lot in the village of Merna. They entered into an oral agreement under the terms of which plaintiff was to transfer his interest in the merry-go-round to the defendant, pay him $100 in cash and give him a note and mortgage for $300, and defendant was to convey the house and lot to plaintiff.

Plaintiff alleges that he delivered the merry-go-round to defendant, who took the same into his possession and operated it for two or three weeks, and that plaintiff took immediate possession of the house and lot; that he tendered $100 to defendant, and was ready and willing to execute the note and mortgage, and demanded a deed to the house and lot from defendant, but that defendant failed to execute and deliver the deed; that defendant had not returned the merry-go-round, but, on the contrary, had disposed of the same, and prayed judgment for $800, which he alleged to be the value of his interest in the merry-go-round.

The answer contains the usual formal admissions, with a general denial of the allegations not admitted, followed by the allegations that the merry-go-round was out of repair; that after an inspection he determined not to proceed further with the deal; followed by the specific allegation that defendant never took possession of the property; a denial that plaintiff ever took possession of the real estate, paid the $100 in cash, or executed and delivered the note and mortgage; and pleaded affirmatively that, in due season, defendant had notified plaintiff that he would not make the exchange of property.

The reply was a denial of all new matter set out in the answer. There was a verdict and judgment for the plaintiff for $286, and defendant has appealed.

There are two assignments of error. The first, that the court erred in giving instruction No. 8, which is as follows:

"You are instructed that, if from the evidence and instructions of the court you find for the plaintiff that the trade was agreed upon, and that defendant accepted and took possession of the merry-go-round, then you will find for the plaintiff and assess the amount of his recovery at one-half the fair reasonable market value of the swing at the time of the trade, if you believe a trade was agreed upon, with 7 per cent. interest from June 6, 1913."

First, it is complained that this instruction takes from the jury the question of whether Lohr had appropriated the merry-go-round to his own use. It is said that the answer in legal effect denies that he converted the merry-go-round, and that whether he had taken possession was an issue for the jury to determine, and that this instruction took this question away from the jury. This is a rather technical refinement. The testimony shows that at the time the negotiations were had the merry-go-round was at the town of Stapleton; that defendant, in company with the owner of the other one-half interest, took it out of its place of storage, set it up, operated it for two or three weeks, and retained the proceeds. It is neither alleged

nor shown that it was returned to the plaintiff. It being shown without question or dispute that defendant had gone thus far in taking it into his possession, and no attempt being made to show that he had returned the property to plaintiff, the jury could not have been misled by this instruction on the question of possession.

It is next said that the instruction lays down an erroneous rule as to the measure of damages. It will be noted that by this instruction the jury are left to ascertain the value of plaintiff's interest in the merry-go-round at the time it was taken over by defendant, and assess the damages accordingly. The point sought to be made is that plaintiff has not pleaded a rescission of the contract, and therefore cannot recover the value of the property parted with.

"On breach of contract the injured party has his choice of three remedies in a proper case. He may sue on the contract for the damages he has sustained by reason of the breach; or he may consider the contract terminated by the breach and sue on the *quantum meruit* under an implied contract and recover for his services and the amount expended by him on the contract; or he may have recourse to equity and compel a specific performance of the contract, notwithstanding the breach." 3 Elliott, Contracts, sec. 2095.

In *Thompson v. Gaffey,* 52 Neb. 317, it is said: "Where one party to an express contract is wrongfully prevented by the other party from completing, he may sue upon the contract for a breach thereof, and the measure of his damages will be the value of the part performed as measured by the contract price plus the profits, if any, which would have accrued to him had he completed the contract according to its terms; or he may ignore the contract and declare upon a *quantum meruit* or *quantum valebat,* in which case the measure of his damages will be the fair and reasonable value of what he has done."

The only other assignment relates to the sufficiency of the evidence to support the verdict. The proof is conclu-

sive as to defendant having helped to set up the merry-go-round, helped to operate it for two or three weeks, he selling tickets and receiving the money the greater part of the time, and that he has never returned it to plaintiff. Defendant offered no proof as to the value. There is no dispute on that question, and, indeed, the proof would sustain a verdict for a greater amount.

Judgment is

AFFIRMED.

LOUIS COHN, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JUNE 3, 1916. No. 18885.

1. **Carriers:** DELAYED SHIPMENT: LIABILITY. To entitle the plaintiff to recover for negligent delay in transporting an interstate shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where it was received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose.
2. ———: ———: REFUSAL TO WITHDRAW INSTRUCTION. It is reversible error for the court to refuse to withdraw from the jury a charge of negligent delay in the transportation of live stock, where no competent evidence is introduced to support such a charge.
3. **Evidence** examined, its substance set out in the opinion, and *held* to be insufficient to support the verdict.

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

A. A. McLaughlin, Wymer Dressler and *Lyle Hubbard,* for appellant.

A. L. Timblin and *Charles L. Dundey, contra.*

BARNES, J.

Plaintiff commenced this action in the county court of Douglas county against the Chicago & Northwestern Railway Company to recover damages which he alleged he had sustained to a shipment of horses from LaBeau, South Dakota, to South Omaha, in this state.

On a trial in the county court plaintiff had a judgment, and the defendant appealed to the district court. The case was tried in that court on a petition which alleged, in substance, that the shipment of horses in question was received by the Minneapolis & St. Louis Railroad Company, was transported by that company to Northville, in the state of South Dakota, and there delivered to the defendant company at about 6: 30 p. m. on the 7th day of September, 1909; that the horses were transported from that point to the place of destination at South Omaha, Nebraska; that the distance from Northville, South Dakota, to South Omaha, Nebraska, over the line of defendant's railroad is about 352 miles, and the usual and necessary time for transporting live stock over said road between said points is not to exceed 30 hours, but that said horses did not reach South Omaha until about 6 a. m. on the 12th day of September, 1909, being in excess of 95 hours from the time said horses were received by the defendant for said transportation; that they were confined in the cars on the line of defendant's road for about 78 hours, of which time an excess of 12 hours was consumed in the yards of said company, and an excess of 65 hours running time on said road; that the delay in transportation of said horses occurred at Northville, South Dakota, and at various other points between Northville and South Omaha, the exact location of which points is not known to the plaintiff; that said horses were subjected to rough handling and careless and negligent treatment by the defendant between Redfield, South Dakota, and Huron, South Dakota, and at various other points between Northville and Redfield and between Huron and South Omaha. Plaintiff alleges that such rough handling and careless

and negligent treatment occurred at all points between Northville and South Omaha; that no part of such delay in transportation nor any part of the rough handling and careless and negligent treatment of said horses was in any manner the fault of the plaintiff; that, by reason of such unnecessary and unreasonable delay in transportation and such rough handling and careless and negligent treatment of said horses by the defendant, the plaintiff was damaged to the amount of $801 by reason of the gaunt, stale, bruised and damaged condition of said horses. Plaintiff prayed judgment for said sum of $801.

The defendant, by its answer, admitted that it was a common carrier, and that it received the shipment of horses at Northville, but denied all other allegations of the petition, and alleged that plaintiff accompanied the shipment as a caretaker, under the ordinary contract for that purpose, and that, if the plaintiff's horses were injured by delay or want of proper care, including feeding and watering, the same was not the fault of the defendant company, but was caused by the fault and neglect of the plaintiff, and not otherwise. The reply was, in substance, a general denial.

The cause was tried to a jury. The plaintiff had a verdict for $1,065.31. Defendant's motion for a new trial was overruled. Judgment was rendered on the verdict, and the plaintiff was awarded an attorney's fee of $150. The defendant has appealed.

Appellant, among other assignments of error, contends that the verdict of the jury is not sustained by sufficient evidence. It appears that plaintiff was his own witness and gave the only testimony in the record by which he sought to establish delay and rough handling of the horses in the matter of transportation. His evidence was, in substance, as follows: I had three car-loads of horses at LaBeau. I asked the agent at that point to wire to the defendant to stop its train and take them up at Northville. When I arrived at that point the defendant's train had gone. I hunted up the agent, and he wired the situ-

ation to the defendant company, and the conductor of the train came back from Redfield to Northville with his engine and crew. When they got there they unloaded the horses about midnight and placed them in the yards at that point. They were not fed or watered there. They were reloaded into the cars about noon the next day, and went on to Redfield, which was the next stop. The run from Northville to Redfield was pretty fair. The horses were taken into the train at Redfield and forwarded to Huron, arriving there about 7: 30 p. m. of the same day. The run from Redfield to Huron was a local one. They were unloading fence posts all along the road. They shook my horses up and down every time they unloaded the posts. They jarred them to pieces. They had a gondola car, or open box car. I expect I rode in the caboose. They kept me delayed all the afternoon until night.

Regarding the question of feeding and watering the horses at Northville, the agent of the company and others who assisted in unloading them testified that they were watered; that they pumped the watering trough in the yards full and the horses drank. The testimony also showed that a load of hay was put into the stock-yards so that the horses could eat the same if they desired. The plaintiff admitted those facts upon cross-examination, but insisted that the water was poor and the horses did not drink it.

Regarding the run from Redfield to Huron, the conductor of the train in which the horses were placed testified that the run occupied practically just two hours; that he had no fence posts in the train at all; that his train sheet, made up by himself, on that day, showed "barley, shingles, barley, wheat, wheat, barley, lumber, barley, wheat, lumber, wheat, wheat, wheat, one empty box car, wheat, barley, wheat, barley, wheat, emigrants, lath, three cars horses;" that the three cars of horses were at the head end of the train next to the engine; that he had no company material or posts whatsoever, and did no work between Redfield and Huron on that trip; that they arrived at

Huron at 7 p. m.; that he had no gondola car on the train at all, and had no men or crew whatsoever with him for the purpose of throwing off posts or anything else. The chief train dispatcher for the defendant at Huron corroborated him and testified as to the record of the movement of the train. It appears that the distance from Redfield to Huron is 40.4 miles, and the actual running time of the train in which the horses were transported from Redfield to Huron was 2 hours and 14 minutes. This time included a stop at a railroad crossing just south of Redfield, which would take about five minutes; another crossing stop at Valley Junction to turn a switch and come into Huron on the main line. This would require about five minutes. They stopped at another point and registered, which time required about five minutes. So it was conclusively established that the actual running time for the 40.4 miles was 2 hours, or 20 miles an hour. It is therefore apparent that the defendant's train did not have a load of posts on the run from Redfield to Huron, and there was no delay on said run. It further appears that, when the train arrived at Huron, the defendant had other shipments of freight sufficient to make up a special train if plaintiff's horses were included therein. The train dispatcher desired to make up such a train and run the horses through without stopping. The plaintiff, however, refused to go forward, and insisted that the horses had not been fed or watered at Northville, and so the horses were unloaded at Huron, were placed in the defendant's yards, and were again fed and watered. The next morning they were taken into a train and forwarded to Hawarden, which is the next stop, or the termination of the division. The plaintiff testified that the run from Huron to Hawarden was a local one; that they took off merchandise and made stops according to the dispatcher's orders; that, aside from its being a local, it was a good run; just fair; nothing to brag of. Plaintiff further testified that they stopped in Hawarden only long enough to make up the train, and that they had a good run from

Hawarden to Alton; that they arrived there at 11 o'clock on September 9. At Alton the shipment was delivered to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and handled by that company to Sioux City. The horses were delivered at the Sioux City stock-yards early on the morning of September 10. They were cared for by the stock-yards company during that day, and reloaded and redelivered to defendant at Sioux City at 5 p. m. on September 10, 1909, and arrived at South Omaha at 6 o'clock on the morning of September 11, 1909, which was the usual and proper time for a run between Sioux City and South Omaha. When the horses arrived at South Omaha they were delivered by defendant to the Union Stock-Yards Company at 6 o'clock on the morning of September 11, 1909, and plaintiff did not see them upon their arrival, but saw them for the first time at South Omaha about noon on September 11. They were then in the stock-yard pens. Witnesses for the plaintiff testified that, when the horses were seen at the stock-yards at South Omaha, they were gaunt and looked as though they had had a long, hard run; that eleven head were somewhat badly skinned and bruised. There was no testimony as to what plaintiff paid for the horses when he bought them in South Dakota, and there was no evidence as to what they were worth at that point. There was some evidence as to what they would have been worth had they arrived in good condition at South Omaha, and there was evidence tending to show what they actually sold for. It appears that the only evidence tending to show any rough handling or neglect on the part of the defendant company was plaintiff's own testimony. There is no doubt but that the plaintiff suffered some slight damage in relation to the shipment of horses, but, as we view the evidence, it was clearly insufficient to sustain the amount of plaintiff's recovery. It further appears that plaintiff failed to attend to feeding and watering his horses, and that he obstructed the defendant while it was attempting to per-

form that duty. He was quarrelsome and abusive in his conduct toward the defendant's servants and agents.

The appellant requested the court to withdraw from the jury the question of negligent delay. Its request was refused. Considering the condition of the evidence, we are of opinion that the request should have been granted. The plaintiff's action was based in part on defendant's alleged negligent delay in transporting his horses from Northville, South Dakota, to South Omaha, Nebraska. As we view the record, the plaintiff failed to show any delay caused by unloading, feeding and watering his horses in Northville. On the contrary, the testimony clearly establishes the fact that the shipment reached Redfield in time to be taken by the first train out of that station after they reached Northville on the way to Huron. No delay was shown at either Northville or Redfield, and there was no testimony tending to show any delay in the transportation from Huron to the place of destination, which was South Omaha, Nebraska. In order to recover for such delay, it was necessary for him to introduce some competent evidence tending to show the length of time ordinarily required to transport a shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose. *Johnston v. Chicago, B. & Q. R. Co.*, 70 Neb. 364; *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166. In *Chicago, St. P., M. & O. R. Co. v. Kroloff*, 217 Fed. 525, it was held to be reversible error to refuse to withdraw unsupported charges of negligence from the jury. We are therefore of opinion that by refusing defendant's request the court committed reversible error.

The overwhelming weight of the evidence shows that plaintiff's horses were unloaded into the company's yards at Northville for that purpose about midnight of September 7; that they were fed and watered by persons who testified to that fact and who were wholly disinterested in the outcome of this litigation. It is true that the water was not the best, but it appears that other horses were kept

in the yards and they drank the water. The testimony of the defendant's witnesses was that the horses in question drank when the watering troughs were filled. Again, the plaintiff testified on his direct examination that the horses were not unloaded, fed and watered on the night of the 8th at Huron, South Dakota. He admitted, however, on cross-examination, that he went to the hotel and went to bed before 12 o'clock that night; that he paid no attention to feeding and watering his horses, and insisted that it was up to the defendant to perform that duty, and the only reason he gave for his statement that they were not fed and watered was that he found the horses loaded in the cars ready to go forward the next morning at about 6 o'clock. Witnesses who were wholly disinterested in the result of this suit testified that they assisted in unloading, feeding and watering the horses at Huron. Therefore, that fact was clearly established.

On the question of rough handling, the evidence is not so clear, and it is possible that plaintiff might have been entitled to some recovery on that branch of the case, but the evidence does not sustain the amount of plaintiff's judgment.

As we view the record, the verdict of the jury was excessive. It seems apparent that defendant did not have a fair trial.

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

REVERSED.

SEDGWICK, J., dissenting.

The rule stated in *Johnston v. Chicago, B. & Q. R. Co.*, 70 Neb. 364, that there must be evidence of the length of time ordinarily required in a shipment, does not seem to me to be applicable in this case. The plaintiff alleged that the time usually required was 30 hours. The only answer made to this allegation is a general denial, which, of course, could be made if the time was 31 hours, but would not in such case constitute a defense. The defend-

ant should have alleged the regular time if it was much more than the time alleged by the plaintiff. The defendant in its answer said: "If said consignment of horses encountered any unnecessary delay," etc. This, together with its evasive denial, would in law amount to an admission that the time was at least very nearly as alleged by the plaintiff.

It would appear that this is the only point of law upon which the reversal is predicated. The first paragraph of the syllabus makes this the principal point determined, and it is said in the opinion: "In order to recover for such delay, it was necessary for him to introduce some competent evidence tending to show the length of time ordinarily required to transport a shipment from the place where received to the point of delivery." I suppose the second paragraph is predicated upon the first. The third paragraph simply says that the evidence does not support the verdict. Of course, that is for the reason stated in the first paragraph of the syllabus. As "the length of time ordinarily required to transport the shipment from the place where it was received to the point of delivery" is fixed by the pleadings, I cannot see that the opinion states any ground for reversal.

FAWCETT, J., concurs.

AMOS A. GALT ET AL., APPELLEES, V. CARSON HILDRETH, APPELLANT.*

FILED JUNE 3, 1916. No. 18938.

1. **Compromise and Settlement.** A settlement of a matter in controversy between the officers and directors of a bank on the one hand, and other persons interested as alleged debtors in the transaction on the other hand, where no fraud is alleged or proved, is binding on all parties to such settlement.

*Opinion modified. See opinion, p. 422, *post.*

2. **Banks and Banking:** SALE OF STOCK: CONTRACT: ENFORCEMENT. Where, in making a sale of bank stock, the president of the bank agreed to pay to the purchaser notes held by the bank on a given date amounting to $3,000, to be selected by the purchaser, the contract may be enforced after the purchaser has exercised his right of selection.

3. ———: ———: ———. An agreement on the part of the seller to pay to the purchaser three-fifths of the difference between the profits of the bank for a designated year and $8,000 net profit is an enforceable agreement.

4. ———: ———: PROFITS. In estimating the amount of the net profits, the guaranty fund required by the banking department to be set apart under the banking laws of the state may be deducted from the gross profits.

5. **Judgment:** CONCLUSIVENESS. The defense successfully made by one of the signers and indorsers of a note, if not made on purely personal grounds, will bar a future action by the same plaintiff on the same obligation against another joint defendant.

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

Flansburg & Flansburg, for appellant.

Stewart & Stewart, contra.

BARNES, J.

This was an action brought in the district court for Lancaster county by Amos A. Galt and Reuben P. Galt against Carson Hildreth and the Franklin State Bank, to recover a balance alleged to be due on the following contract: "Carson Hildreth hereby gives the parties of the second part the privilege on January 1, 1913, of selecting notes to the value of $3,000 out of the notes on hand belonging to the bank in the regular loans and discounts on November 10, 1911, and the said Carson Hildreth agrees to pay the bank the face value with accrued interest from November 10, 1911, to January 1, 1913, on said notes. It is further agreed that, if the net profits of the bank for the calendar year 1912 shall not equal $8,000 after allowing salaries to the amount of $3,600, the said Carson

Hildreth shall make good to the said second parties three-fifths of the amount of the deficiency, but if the net profits of the bank exceed $8,000, then the second parties agree to pay to the said Carson Hildreth one-half of the three-fifths of said excess. It is further agreed that the said Carson Hildreth is to be retained as president of the said bank at a salary of $50 per month to the end of the calendar year 1912."

Plaintiffs' amended petition alleged that the liability of Hildreth was to make good three-fifths of the deficit in the net profits of the bank for the year 1912, which was alleged to be $5,000. The plaintiffs further alleged that they had selected certain notes, among which was a note made by one Curtis to the bank for $2,100, which they insisted Hildreth should pay to the bank, and, in order that a recovery might be had in the suit, the Franklin State Bank was named as a party defendant.

To the amended petition the bank filed an answer and cross-petition, by which it adopted the contract between the Galts and Hildreth, which provided for the selection by the Galts of $3,000 out of the notes on hand belonging to the bank in the regular loans and discounts on November 10, 1911, and which Hildreth, by his contract, agreed to pay with accrued interest from November 10, 1911, to January 1, 1913.

The cross-petition alleged that only $514.70 was paid on March 12 and $502.50 on February 5, 1913, on the Curtis note, leaving due the bank $2,301.17 with interest from January 1, 1913, at 7 per cent. per annum. Hildreth by his answer alleged that he paid $514.70 on March 12, 1912, and later on, in a settlement of the Curtis matters with the bank, he took up the note for $2,100, and a note for $152.50, which notes had been selected by plaintiffs under the contract, making in all a payment of $2,767.20, leaving a balance only of $232.80, and that plaintiffs had not selected any note of that amount, but, when so selected, Hildreth by his answer alleged he would pay the same under the contract. By his answer to the bank's first

cause of action, Hildreth alleged that the bank had settled with him in relation to the Curtis transaction. He alleged that the title to the Curtis land was taken to himself for the benefit of the bank to secure the debt of $2,100; that the directors of the bank met on or about February 5, 1913, and agreed to exchange the Curtis land of 280 acres, free and clear of incumbrances, with one Deichen, for a mortgage of $5,000 on said Curtis land to be executed by Deichen to the bank, and a transfer to the bank of the 160 acres of land owned by Deichen at an agreed valuation of $7,000, with a $1,000 mortgage thereon. Hildreth further alleged that he had made advances on account of the Curtis matters, which he estimated at $1,576.46, without interest, and which did not include his personal expenses, admitted that he had received some rents from the Curtis farm, and alleged that it was finally by the directors agreed that he should receive $1,500 for his claim out of the profits of the transaction, and in order to obtain possession of the two Curtis notes, which plaintiffs had requested him to pay to the bank, he paid $502.50 to the bank in settlement of the balance of its claim against Curtis; that the aggregate of its claim, without interest, amounted to $11,502,50; that the proceeds of the Deichen transaction yielded the bank $11,000; that said transaction was completed, and that he paid the bank $502.50 in full settlement of the Curtis account, receiving $1,500 out of the profits from the bank, and thereupon conveyed the premises at the request of the bank to Deichen, and received the Curtis notes for $2,100 and $152.50 uncanceled, while at the same time all of the other Curtis notes were canceled and paid, and the Curtis land which had secured their payment was transferred by him to Deichen; that the settlement was full and complete so far as all of the Curtis notes were concerned.

It was alleged in the cross-petition of the bank that Hildreth, in June, 1909, had guaranteed the payment of the Curtis notes at the time he sold certain of the bank stock to other individuals. As to that guaranty, Hildreth

alleged that he had agreed that, if any loss accrued to the stockholders on account of such notes, he would make their share good to them without loss. He further alleged that at the settlement of the Curtis matter it was estimated that the bank would suffer a loss of $1,000, and that he paid to the stockholders, to whom his guaranty was made, that sum in settlement of their demand.

By the bank's cross-petition it sought to recover from defendant Hildreth for and on account of a note for the sum of $887.75, due July 6, 1904, with interest, which was signed by Carson Hildreth, W. H. Chaney and Thomas Gettle. It was alleged that Hildreth, in violation of his duty, failed to pay that note, but instituted a suit by the bank thereon, causing himself to be sued, together with the other makers; that Gettle and Chaney answered separately for themselves, denying their liability, and setting up as defenses to the action that the note was executed by them without consideration, and, further, that they had been released and discharged by the defendant subject to the execution thereof from all liability thereon. Upon trial, a verdict of the jury was rendered without special findings in their favor, and judgment was rendered thereon by the court. It was further alleged that defendant Hildreth prosecuted an appeal to the supreme court from that judgment, where the same was affirmed; that Hildreth did not answer in that action, but was in default, and therefore the judgment in that case did not release him from his liability for the payment on said note. Answering this cause of action, Hildreth denied that the bank had loaned him any money; admitted the execution of the note; admitted the guaranty indorsed by Gettle, Chaney, Doher and Hildreth; admitted the bringing of the suit in Franklin county in which the liability of Gettle, Doher, Chaney and Hildreth was alleged to be that of joint makers; admitted that Doher, Gettle and Chaney filed answers; admitted the execution and delivery of said note, but alleged that the Franklin State Bank and the other defendants had been interested

as creditors in the management of a brickyard which was turned over to them, the bank to the extent of $1,000, Gettle $500, Chaney $200, and Doher $200, secured by chattel mortgages which were superior to that of the bank; that it was agreed that the mortgages should be released, which was done, the bank agreeing to operate said property and pay the claim of the bank and the other creditors *pro rata* out of the profits. The answer alleged that the Franklin State Bank requested defendants to sign the note in suit as evidence of its interest in said property, and for its convenience; that it was also agreed that said note was of no force or effect except for the convenience of said bank in carrying its interest in said property on its books as a resource expressed in an item as a promissory note, rather than as a resource in an item of personal property; that the defendants received no money or credit, nor did any consideration whatever move from the plaintiff bank to the defendants or any one else for the same, and that the defendants received no benefit or consideration for signing said note.

There was a further plea of the statute of limitation. Replies were filed denying the allegations of the answer, and it was stipulated that the cause should be tried to the court on those issues. A trial was had, and the court by its decree found all of the issues in favor of defendant Carson Hildreth, and against the bank upon all causes of action set out in its cross-petition, "other than the right of said bank to compel specific performance of the condition of said contract for the payment by said Hildreth of certain promissory notes owned by said bank November 10, 1911, and to be designated by plaintiffs. The court finds that said plaintiffs designated the notes of C. P. Curtis, $2,100, F. T. Burnham $500, and Clement Chase $500, of which the $500 Chase note has been by said Carson Hildreth duly paid; and that said bank, as to the $2,100 Curtis note, has by its own act placed it beyond its power to enforce collection thereof. The court finds that it is the right of the plaintiffs to designate $2,500 of notes, includ-

ing the $500 Burnham note, owned by said bank on November 10, 1911, within twenty days from the entry of this decree, and, upon failure of said Carson Hildreth to pay notes so selected by plaintiffs to the said bank, in the amount of $2,500, with interest thereon from November 10, 1911, within forty days from the date of this decree, then defendant Franklin State Bank shall have judgment against said Carson Hildreth for said amount. The court further finds that, by the terms of the contract hereinbefore mentioned, the defendant Carson Hildreth agreed to pay said plaintiffs three-fifths of any deficiency in the net earnings of said bank for the year 1912, under the sum of $8,000. The court finds that the net earnings, as aforesaid, amounted to the sum of $5,562.10, and that plaintiffs are entitled to recover from the defendant Carson Hildreth, on account of such deficit, the sum of $1,607.78." Judgment was entered on the findings, from which Hildreth appeals. Cross-appeals were likewise taken by the Galts and the bank from the decree which found in favor of Hildreth on the other issues.

The cross-appellants, Galt and the Franklin State Bank, each complains of the finding and decree of the trial court that Hildreth was not liable as guarantor for the payment of the Curtis notes. They contend that the finding on that question is not sustained by the evidence. The record discloses that in 1909 Hildreth was the owner of the majority of the stock of the bank, in fact was the owner of the bank. At that time the bank had among its assets the note of C. P. Curtis for $2,100, secured by mortgage on his 280-acre farm. Hildreth had indorsed the note or guaranteed its payment. Curtis was largely indebted to other persons, and as a matter of precaution he was induced to make a deed of the farm to Hildreth, in order to prevent other creditors from obtaining liens thereon. Hildreth took the title to hold for the benefit of the bank. Certain persons had purchased some stock in the bank, and Hildreth at that time guaranteed that he would make good any loss they might sustain by reason of the trans-

action. In November, 1911, the Galts purchased a majority of the stock of the bank, and obtained from Hildreth the guaranty and agreement which is set out in the first part of this opinion. The Galts then took possession of the bank, and thereafter, with the directors, conducted its business. A short time before the meeting of the directors, which was held in February, 1913, an opportunity occurred for the bank to exchange the 280 acres of land, the title to which was held by Hildreth, with one Deichen, for 160 acres of land owned by him, on which there was a mortgage for $1,000, and obtain the difference in value between the two tracts. Curtis and one Mahin, his attorney, went to Franklin, and the exchange was made. Hildreth, acting for the bank, conveyed the 280-acre farm to Deichen, and he executed a mortgage thereon for $5,000 in favor of the bank. The Deichen land was conveyed to the bank at the agreed value of $7,000; there still being a mortgage on the land for $1,000. In order to even up the values, Curtis executed a note for $2,000 to Mahin, which Hildreth guaranteed. When the directors of the bank met on February 3, 1913, the matter of the Curtis deal came up for consideration. The evidence shows that the transaction was approved and adopted. The value of the Curtis land was agreed to be $11,500. Hildreth gave the bank his check for $502.50, and surrendered all claims on the Curtis land, and was exonerated from all charges as to rents which he might have collected while he had possession of it. He was allowed $1,500 for advances made by him on account of the transaction, and the whole matter was closed up. The minutes of the meeting are as follows:

"Special Directors' Meeting, February 3, 1913.

"Meeting held to consider a proposition to trade the farm belonging to the bank near Gaylord, Kansas, to Mr. Deichen for his 160-acre farm near Reamsville, Kansas. It was voted to make the trade along the lines outlined in the option given by Mr. Deichen to the Bank.

"(Signed) R. P. Galt, Secy."

The old notes were then canceled, with the exception of the Curtis note for $2,100, and the small note for $152.50. Those notes were not canceled, and Hildreth took possession of them without objections by any one. Hildreth testified to the foregoing facts, and his evidence was corroborated by the testimony of the directors, and in part by the Galts themselves. We are therefore of opinion that the evidence was sufficient to sustain the finding of the trial court on that issue.

Appellant Hildreth contends that the court erred in allowing the cross-appellants to select notes, other than the Curtis notes, to the amount of $3,000 and require him to pay the same. On this question it may be said that the contract hereinbefore referred to does not mention any particular notes. It is an agreement on Hildreth's part to pay notes held by the bank on January 1, 1912, to the amount of $3,000, with interest thereon. The Curtis notes having been paid in the manner above stated, the Galts were at liberty to select other notes to the amount which Hildreth had agreed to pay. We are therefore of opinion that the court was right in its judgment on that question.

Hildreth also contends that in estimating the net profits of the bank for the year 1912 the court erred in deducting the sum of $723.06, which was the guaranty fund charged by the state against the bank under the existing banking laws. This sum was required to be set apart and segregated from the funds of the bank. The bank held it as a reserve fund for the payment of assessments under the provisions of the law, the state requiring it to be kept on hand at all times subject to call. This being so, we are unable to say that it was error for the court to deduct that amount from the profits of the bank. The parties on both sides are strenuous in their contentions as to the question of what should be considered as net profits for the year 1912, but, after considering all of their claims and the evidence contained in the record, we have concluded to adopt the finding of the trial court on that question.

This brings us to the consideration of the question of the liability of Hildreth to pay the bank the disputed items of the so-called brickyard notes.

It appears that the bank commenced an action on one of the brickyard notes, making Hildreth and all of the other joint makers defendants. The other defendants filed answers setting up as their defenses that there was no cause for the note; that the bank had taken over the brickyard and had conducted it for a time; that the enterprise had failed, and the bank had made certain payments on the notes out of the profits of the transaction, and therefore they were relieved from liability on the note. Hildreth filed no answer, but gave testimony on the trial which, if believed by the jury, would have authorized a judgment in favor of the bank. The jury found for the defendants, and judgment was rendered in their favor on the verdict. The bank appealed to this court, where the judgment was affirmed. *Franklin State Bank v. Chaney,* 94 Neb. 1. The bank then brought another action on one of the notes against another of the signers, and the same defense was pleaded. The jury found for the defendants, and judgment was rendered on the verdict. The bank appealed, and again the judgment was affirmed. *Franklin State Bank v. Gettle,* 96 Neb. 60.

It is contended by the bank that the judgment in those cases did not release Hildreth's liability on the notes because he did not answer in those cases. There is some conflict in the authorities, but in *Chase v. Miles,* 43 Neb. 686, it was said: "A judgment rendered by a court which had jurisdiction of the parties and of the subject-matter, as between such parties, conclusively settled all questions litigated."

In *Upton v. Betts,* 59 Neb. 724, it was held: "A matter in issue covered, either generally or specifically, by the decree of the court cannot be again litigated without a modification or vacation of that decree."

In the cases of the bank against Hildreth and others, no judgment was rendered against him. If Hildreth was

an indorser and guarantor, that is, if he was an indorser with enlarged liability, the bank could not now sue him because the prior and subsequent indorsers were released by the jury and the judgments of the court in the actions on these notes. We are therefore of opinion that the district court was right in holding that the bank was not entitled to a judgment for the balance of the brickyard notes.

Without further discussion of the issues involved in this suit, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

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

FIRST NATIONAL BANK OF SIDNEY, APPELLEE, V. J. C. BALDWIN ET AL., APPELLEES; J. M. SWENSON, APPELLANT.

FILED JUNE 3, 1916. No. 18941.

1. **Bills and Notes**: NEGOTIABILITY. A clause in a promissory note which reads as follows: "The makers and indorsers hereof waive demand, notice, and protest, and all defenses on the ground of any extension of the time of payment that may be given by the holders to them or either of them"—does not render the note non-negotiable.
2. ———: ACTION: PARTIES. A payee who indorses such a promissory note as follows: "I hereby guarantee payment of the within note and waive demand and notice of protest on same"—thereby assumes the liability of an indorser, and may properly be sued with the maker in the same action.
3. **Appeal**: FINDINGS BY COURT. The finding of a court in a law action based on conflicting evidence is entitled to the same weight as the verdict of a jury.

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

C. Petrus Peterson, R. W. Devoe and *J. M. Swenson,* for appellant.

Wright & Mothersead, B. A. Jones and *Miles & McIntosh, contra.*

BARNES, J.

This is an appeal from the judgment of the district court for Cheyenne county. The action was brought by the First National Bank of Sidney, Nebraska, against J. C. Baldwin, J. M. Swenson and M. Radcliff on a promissory note which reads as follows:

"$1,000. Sidney, Nebraska, Dec. 29, 1910.

"June 26, 1911, for value received, we jointly and severally promise to pay to the order of J. M. Swenson, of Sidney, one thousand and no/100 dollars at the First National Bank of Sidney, Nebraska, with interest at the rate of ten per cent. per annum from maturity until paid.

"The makers and indorsers hereof waive demand, notice, and protest, and all defenses on the ground of any extension of the time of payment that may be given by the holders to them or either of them. (Signed) J. C. Baldwin.
"M. Radcliff.

"No. 5605. Due June 26, 1911."

The note bore the following indorsement: "J. M. Swenson." There was also another indorsement as follows: "For value received I hereby guarantee payment of the within note and waive demand and notice of protest on same when due. (Signed) J. M. Swenson."

By agreement the cause was tried to the court, and resulted in judgment for the plaintiff and against Baldwin and Swenson. Swenson alone has appealed.

The answer admitted the execution, indorsement and delivery of the note to the plaintiff, but it was alleged by appellant that, subsequent to the maturity of the note, the plaintiff, without the knowledge and consent of the defendant, and for a valuable consideration, extended the time of payment thereof to the makers, by reason of

which he was released and discharged from the liability imposed upon him by his contract of guaranty. Swenson further alleged that, before the date of the maturity of the note set out in plaintiff's petition, to wit, June 26, 1911, and before any extension was made by the plaintiff for the time of payment of said note, he notified the plaintiff not to make any extension whatever for the payment thereof; that on the same day the maker of the note, T. C. Baldwin, applied for an extension in the time of payment for a period of six months; that, the plaintiff being desirous of granting an extension of time for a period of six months, it was then and there agreed by and between the plaintiff and this defendant, for and in consideration of this defendant's consenting to an extension for that length of time, that no further extension of time for payment of said note should be made by the said plaintiff to the makers thereof, after the expiration of six months, without the consent of the defendant; that, relying upon the terms of said contract, this defendant consented that the time of the payment of said note might be extended for a period of six months from June 26, 1911, and that thereupon this defendant indorsed his consent to said extension on the back of said note in words and figures followed, to wit:

"June 26, 1911.

"Please extend the within note for six months from this date. (Signed) J. M. Swenson."

The reply of the plaintiff was in effect a general denial.

The appellant contends that the note was not a negotiable instrument, and authorities from a few states are cited in support of his contention. On the other hand, it seems clear that a majority of the more recent authorities, and especially those under the present negotiable instruments law, clearly hold to the contrary. The clause waiving all defenses on the ground of extension of time has been held not to destroy the negotiability of the note. *First Nat. Bank v. Buttery,* 17 N. Dak. 326; *National Bank of Commerce v. Kenney,* 98 Tex. 293; *Jacobs v. Gibson,* 77 Mo.

App. 244; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123; *Farmer, Thompson* and *Helsell v. Bank of Graettinger*, 130 Ia. 469; *Stitzel v. Miller*, 250 Ill. 72; *Navajo County Bank v. Dolson*, 163 Cal. 485; *Missouri-Lincoln Trust Co. v. Long*, 31 Okla. 1; *De Groat v. Focht*, 37 Okla. 267; *Longmont Nat. Bank v. Loukonen*, 53 Colo. 489.

By section 5323, Rev. St. 1913, it is provided: "An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: * * * Third—waives the benefit of any law intended for the advantage or protection of the obligator." We therefore hold that the note in question was a negotiable instrument.

It is further contended by the appellant that there was a misjoinder of causes of action, in that the appellant could not be sued jointly with the makers of the note.

Again, this precise question was ruled on in *Weitz v. Wolfe*, 28 Neb. 500. In that case the payee of a note, when selling the same, indorsed it as follows: "I guarantee the payment of the within note, waiving demand and notice of protest." It was there held that the liability of the defendant was not that of a mere guarantor who could not be joined in the same action with the maker of the note, but, like the appellant in this case, was an indorser with an enlarged liability. Therefore the action was properly brought against the appellant and the makers of the note.

Appellant also contends that he had the right to forbid the bank from giving any extension of time for payment, and it is argued that no consent to any extension of time can be found in the clause waiving all defenses by reason of an extension. It is further argued that the defendant Swenson had the right at any time to prevent an extension being given. However, on the question of the extension the evidence is conflicting. The plaintiff testified that Swenson never notified him not to give any further extension of time on the note. Under the rule often an-

nounced by this court, where a cause is tried to the court without the intervention of a jury, the findings and judgment of the court are of the same effect as the verdict of a jury.

From an examination of the record, we find no reversible error, and the judgment of the district court is

AFFIRMED

LETTON, J., not sitting.

ENTERPRISE PLANING MILL COMPANY, APPELLANT, V. METHODIST EPISCOPAL CHURCH OF STERLING ET AL., APPELLEES.

FILED JUNE 3, 1916. No. 18646.

1. **Appeal in Equity:** TRIAL DE NOVO: CONFLICTING EVIDENCE. On appeal in an equity case, this court tries the case *de novo*; but where the witnesses appear in person before the district court and their testimony is conflicting, the conclusions reached by that court as to the credibility of the testimony are entitled to consideration.
2. **Liens:** BURDEN OF PROOF. The burden of proof is upon one who seeks to establish an equitable lien on real estate to produce facts sufficient to authorize the interposition of a court of equity.

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

Boehmer & Boehmer and *Hugh La Master,* for appellant.

S. P. Davidson, contra.

LETTON, J.

This is an action in equity for the purpose of establishing an equitable lien on certain church property in Sterling on the ground that the officers of the church induced plaintiff to refrain from filing a mechanic's lien by promising to pay the debt if such lien was not filed. It is also

alleged that by reason of the promise the lien was not filed, the time for filing has expired, defendant refuses to pay the debt, and that unless a lien is allowed plaintiff will lose the amount due. The vice-president of plaintiff corporation testified that a promise and agreement was made by two members of the building committee of the church that if he would not file a lien they would see the debt was paid or furnish security for its payment. That such a promise or agreement was ever made was denied by the men by whom it was said to be made, though the fact that they did not desire a lien filed and had so stated to the officer mentioned was admitted, and that he had requested payment or security. It is shown that the account was left with them in order to consult the third member of the committee, who was absent, and that six days before the time for filing the lien expired it was returned to the plaintiff with the words: "O. K. as to lien, but not as to amount due from L. A. Schlosser, contractor." This was signed "C. E. Zink, Stanley Ostrander, and E. Ross Hitchcock, Committee." The vice-president testifies that, when the paper thus indorsed was returned to Lincoln, he showed it to his partner, who said in effect that this made them safe now, and that this was his idea also, and therefore no lien was filed. The paper was received by plaintiff on the 7th of April, and the time for filing a lien expired on April 13.

The district court, which had the witnesses before it, found for the defendant. It evidently believed the testimony of the members of the committee that they refused to give security as requested and sent back the account marked "O. K. as to lien" to indicate they had no objections to a lien being filed, and that this was done promptly so as to allow the lien to be filed within the time allowed. It is clear from the testimony on behalf of plaintiff that, on account of a mistake being made by its officers as to the force of the memorandum written on the account, it failed to file a lien. No deceit or fraud is shown on the part of the committee. The church paid the contractor

more than was due him for labor and material before the account was presented to the committee. The committee then had no power to mortgage or bind the church property.

Plaintiff has not sustained the burden of proof as to the disputed fact. Under such circumstances there is no ground for the interposition of a court of equity. The conclusion reached by the district court was right under the proofs, and its judgment is

AFFIRMED.

MORRISSEY, C. J., and ROSE, J., dissenting.

JAMES W. RADCLIFFE, APPELLANT, V. ED A. LAVERY ET AL., APPELLEES.

FILED JUNE 3, 1916. No. 19009.

Action: JOINDER. In order that causes of action may be united, it is essential under section 7658, Rev. St. 1913, that they must affect all the parties to the action.

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

H. D. Rhea, for appellant.

A. J. Shafer, George C. Gillan, George W. Ayres, E. A. Cook and *D. H. Moulds, contra.*

LETTON, J.

This is an action by a taxpayer of Dawson county to enjoin the board of county commissioners of Dawson county, the board of county supervisors of Phelps county, and the state engineer from carrying out certain contracts made with J. E. Doty and Thomas Gass for the construction of two bridges and approaches across the Platte river, one at Lexington and the other at Overton, upon the

grounds that the money on hand in the bridge fund of Dawson county, together with 85 per cent. of the current levy for bridge purposes, was not sufficient to authorize the county commissioners to enter into the contract; that the contract for the Overton bridge was not entered into by the board of county supervisors of Phelps county, but only by three members of the board; that there were no roads leading to the site of the proposed bridges; and several other grounds unnecessary to mention at this time. The prayer was that the defendants be enjoined from carrying out the contracts, and that the county boards be enjoined from expending any money under the same.

The defendants Doty and Gass demurred separately to the petition upon the ground that there was a misjoinder of causes of action. The demurrers were overruled, and they refused to plead further. The county officers of both counties answered, admitting that the contract for the Overton bridge was let to defendant Doty, and for the approaches thereto to defendant Gass, by the county boards acting jointly and with the state engineer; that the contracts for the Lexington bridge and approaches were let by the board of Dawson county and the state engineer to the same parties. The other allegations of the answer allege particularly the amount of money on hand in the several funds, and the legality of the proceedings. The state engineer made a like answer.

At the final hearing the court found the facts generally in favor of the defendants; found also that there was a misjoinder of causes of action. The restraining order which had been issued was dissolved, and the action dismissed at plaintiff's cost. From this judgment he has appealed.

The plaintiff brings the action as a resident and taxpayer of Dawson county. The county board of Phelps county is not a party to, and is not concerned with, the contracts for the Lexington bridge and approaches. They have no common or joint interest in the subject-matter of

that contract. A cause of action with respect to a contract in which the county board of Phelps county is not a party cannot be joined with another cause in which it is jointly interested with the county board of Dawson county. Section 7658, Rev. St. 1913, requires that, in order that causes of action may be united, they "must affect all the parties to the action."

The demurrers to the petition should have been sustained. At the close of the trial the court practically announced that the ruling upon the demurrers was wrong, and found that there was a misjoinder. The plaintiff making no request to sever, the action was properly dismissed as to Doty and Gass. They were indispensable parties to an action to set aside the contracts. No supersedeas bond was given. It was stated at the argument that the contracts had been substantially performed. The case is therefore practically a moot one, and we find it unnecessary to consider the other questions presented.

The judgment of the district court is

AFFIRMED.

FARMERS CO-OPERATIVE CREAMERY & SUPPLY COMPANY, APPELLEE, V. HENRY S. MCDONALD ET AL., APPELLANTS.

FILED JUNE 3, 1916. No. 19587.

1. **Taxation: BOARD OF EQUALIZATION: INCREASE OF ASSESSMENT.** A county board of equalization, since 1903, may without application or complaint by a taxpayer and upon its own initiative add omitted property to the assessment list of an individual or increase the valuation of his property, but in such case some complaint, charge or specification should be framed by the assessor, or by the board or some member of it, advising the person interested of the proposed change, and the assessment may not be increased until such person or his agent shall be previously notified, if found in the county.

2. ———: ———: SESSIONS. A county board of equalization may hold a session of not more than 20 days for the purpose specified in section 6437, Rev. St. 1913, but it may adjourn from day to day or from time to time within the period fixed by sections 6437, 6442, Rev. St. 1913.

3. ———: ———: INCREASE OF ASSESSMENT: INJUNCTION. Where an assessment is increased by the county board of equalization without jurisdiction, a tax based upon the increased valuation is illegal and void, and its collection may be restrained by injunction.

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

George A. Magney and *Ray J. Abbott,* for appellants.

R. M. Switzler, contra.

LETTON, J.

Action to enjoin the collection of a portion of a tax for the reason that the board of equalization was without authority to increase the valuation over that returned by the assessor. Judgment for plaintiff. Defendants appeal. One phase of this case has previously been presented to this court, 97 Neb. 510.

After the cause was remanded, an amended petition was filed. Additional allegations were made to the effect that the board of equalization held its first meeting on June 10, and remained in session as such board of equalization by adjournment from day to day until July 1, and that the increase in the assessment was made without sufficient or proper notice and without any complaint being filed; that the assessment made by the assessor consisted of a large number of items separately valued, and that the increase made was in bulk or in gross without reference to the separate items; that the increase was made arbitrarily and without evidence, and the action of the board was taken on the 21st day after its session began, and after the limit fixed by the statute.

The defense is that as to time the matter was decided on the first appeal; that the plaintiff should have appeared

before the board at the time specified to make its defense; and that plaintiff had an adequate remedy at law by appeal to the district court.

The district court correctly found from the evidence that the assessment was increased on the 21st day of the session of the board, without complaint; that the increase was not made by separate items; that no witnesses were sworn and no testimony taken. It found as a matter of law that the action of the board in increasing the assessment was irregular and void, and enjoined the collection of the portion of the taxes based upon the increase.

Previous to the time the revenue laws of 1903 took effect, the county board was without power to change the assessment of an individual except "on the application of any person considering himself aggrieved or who shall complain that the property of another is assessed too low" (Comp. St. 1901, ch. 77, art. I, sec. 70), and it was uniformly held that the judgment of the assessor as to the valuation of property was presumed to be correct and no authority existed in the board of equalization to increase it except upon a complaint filed and notice given to the interested party. *State v. Dodge County*, 20 Neb. 595; *Dixon County v. Halstead*, 23 Neb. 697; *Grant v. Bartholomew*, 57 Neb. 673; *Bankers Life Ins. Co. v. County Board of Equalization*, 89 Neb. 469.

By the act of 1903 (Laws 1903, ch. 73) the following clauses were added to section 70 of the former law (section 121 of the new act) directing the board to: "(4) Adjust assessments for the county by raising or lowering the assessment of any person as to any or all the items of his assessment in such manner as to secure the listing of property at its actual value and the assessment of property at its taxable value. But in no case shall the assessment of any person be raised by the board until such person, or his agent, shall be previously notified, if such person or his agent be found in the county. (5) Also add to the assessment rolls any taxable property not in-

cluded therein, assessing the same in the name of the owner thereof as the assessor should have done, but no personal property shall be so added unless the owner thereof is previously notified, if he be found in the county." Sections 122–124 (Laws 1903) were also added. Section 122 provides, in substance, that when the board of equalization shall have reason to believe that any person has not listed all of his property, or that any property has not been fairly valued or assessed, it may call such person before it in person, with books, records and papers, if necessary. By section 123 the board may issue process to compel the attendance of any person to answer questions. By section 124 appeals may be taken from any action of the board of equalization within 20 days after its adjournment, and "the court shall hear the appeal as in equity and without a jury, and determine anew all questions raised before the board which relate to the liability of the property to assessment, or the amount thereof."

Decisions as to the power of the board rendered in controversies arising before the act of 1903 took effect are not controlling with respect to the new provisions. The board of equalization may, as it could under the former statute, act upon the application of any person who may deem himself aggrieved or any person who shall complain that any other is assessed too low, but since 1903 it may also on its own motion raise the assessment of any person after having notified such person or his agent, if he be found in the county. Whether this can be done without notice if the person or his agent be not found in the county, *quære.*

Since the district court upon appeal can only consider "questions raised before the board which relate to the liability of the property to assessments, or the amount thereof," it is evident that, if no taxpayer complains, a complaint or specification of some sort should be framed by the assessor, or by the board or some member of it, advising the person interested of the change proposed to be made

in his assessment, and due notice be given of the time and place of hearing.

In *Western Union Telegraph Co. v. Douglas County,* 76 Neb. 666, it appeared that the county board caused a notice to be served on plaintiff that its assessment was too low, and requiring it to appear and show cause why it should not be raised. No written complaint was filed. The taxpayer appeared and made no demand for a complaint or objection to its absence. It was held that under such circumstances it had waived the irregularity, the board had jurisdiction, and the remedy was by appeal.

In *Bankers Life Ins. Co. v. County Board of Equalization,* 89 Neb. 469, the assessor added property said to be omitted from the schedule. No notice of the increase was given, but the taxpayer became apprised of the change and appeared before the board of equalization to protest. This was held to confer jurisdiction. It is said in the opinion that the change in the schedule should have been treated as a complaint by the assessor to the board, and notice given, but, the insurance company having appeared, it could not afterwards challenge the jurisdiction. *State Bank v. Seward County,* 95 Neb. 665; *Brown v. Douglas County,* 98 Neb. 299.

While the board may adjust the assessment by raising, if necessary, the valuation of the taxpayer's property, it can only be done after notice has been given to the taxpayer of the proposed change, and a question or issue raised by notice or complaint, however informal, before the board, from which an appeal may be taken. The proceedings need not be conducted with the preciseness or formality of a court, yet the rights of the individual safeguarded by the Constitution require that, even in tax proceedings, due process of law as prescribed in and suitable to such proceedings must be had.

Upon the former appeal of this case the question presented was whether a demurrer to a petition which alleged that the board regularly convened "on June 10, 1913, for the purpose of equalizing the valuation of the personal

property of the county, and on July 1 following the said board, acting as a board of equalization, raised the assessed valuation of the personal property of the plaintiff," should have been overruled. There was no allegation in the petition, as there is in the amended one now under consideration, that the board convened on the 10th day of June "and remained in session as such board of equalization, by adjournment from day to day, until the 1st day of July." The question considered was whether a board could act at all to increase assessments after 20 days' time, including Sundays, had expired, after June 10. The court was of opinion that it was unnecessary for the board to sit in continuous session; that it could adjourn from day to day or for intervals of several days, so long as the equalization was finished so that the county assessor was able to prepare the abstract of the assessment as equalized, and forward it to the state board of equalization on or before the 10th day of July, as required by section 6442, Rev. St. 1913, and that the mere allegation that the board acted on July 1 failed to show it had lost jurisdiction.

In *Sumner & Co. v. Colfax County*, 14 Neb. 524, under a former statute, it is said: "The power of the board of county commissioners to sit as a board of equalization, rectify the returns of assessors, and change the assessments of property, is limited by the express language of the statute to a term of time not exceeding ten days in any year, commencing on the third Monday of June, and in the nature of things ceases on or before the 10th day of July of each year, when by law it is the duty of the county clerk to make out and transmit to the auditor an abstract of such assessments."

We adhere to our former opinion on this point. It is settled by a number of decisions that, after the board has held sessions for 20 days, it has become *functus officio*, and its powers have ceased, and this fact is now disclosed by the petition and the evidence.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

ROBERT B. HOWELL, APPELLEE, V. BEE PUBLISHING COMPANY ET AL., APPELLANTS.

FILED JUNE 3, 1916. No. 18882.

Injunction: PUBLICATIONS. The publication of political matter in a newspaper cannot be enjoined merely because it is false or misleading, such relief being forbidden by the following constitutional provisions: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Const., art. I, sec. 5.

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

Rosewater & Cotner and *W. J. Connell,* for appellants.

Brome & Brome, contra.

ROSE, J.

This is a suit in equity to enjoin the publication of an article relating to the candidacy of plaintiff for the office of governor of Nebraska. At the primary election August 18, 1914, plaintiff aspired to be the republican nominee, but before becoming a candidate he had made and published the following statement:

"I have felt very much complimented by the suggestion of my name for governor, and as much as I should like to serve this state in that honorable capacity, yet I am more strongly inclined to carry on the work of public ownership in this city. As a result I will not be a candidate at the coming primary, but will devote my energies to the water plant and to a campaign for lower electric rates through the development of a public lighting and power plant under the control of the Metropolitan Water District.

"Omaha, June 16, 1914. R. B. HOWELL."

Afterward plaintiff departed from the purpose thus announced and became an active candidate. August 17, 1914, the day before the primary election, the statement quoted, including the date, "June 16, 1914," was reproduced in the Omaha Evening Bee, under the following head-lines:

"HOWELL WILL NOT RUN.
"HIS ANNOUNCEMENT EXPLAINING WHY HIS
"FRIENDS SHOULD NOT CAST THEIR
"VOTES FOR HIM."

Defendants are the publisher and the editor of the Omaha Evening Bee, a daily newspaper. On plaintiff's petition they were restrained by the district court August 17, 1914, as follows:

"It is hereby ordered that the defendants, and each, be and they hereby are restrained and enjoined from printing, publishing, circulating, delivering or mailing any newspaper or other publication to the voters of Nebraska, or to any person or persons within said state, or copy or edition of said newspaper containing any notice or statement of any kind or nature whatsoever, the publication of which states or declares that the plaintiff is not a candidate for the republican nomination for governor of the state of Nebraska, at the primary election to be held August 18, 1914, until the further order of the court."

On appeal defendants take the position that the censorship thus exercised by the trial court is forbidden by the following provisions of the state Constitution:

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Const., art. I, sec. 5.

Was the restraining order properly granted? The answer depends on the meaning of the Constitution. The freedom of the press was not a liberty enumerated in the Magna Charta, but was a subsequent growth of several

centuries. After the printing press became a means of disseminating information and opinions relating to the church and the state, all printed matter was subjected to censorship or supervision. This power was first exercised by the church and afterward by the crown. A printer was required to obtain a license. For publishing seditious opinions such punishment as mutilation, whipping, imprisonment, banishment and death was inflicted. The practice of supervising manuscripts in advance of publication was finally abandoned, but the press was subsequently restricted by vigorous prosecutions for libel and by cruel interpretations of the law on that subject. The doctrine that the truth was no justification for its publication originated in the Star Chamber. Trials for seditious libels became a reproach to the Anglo-Saxon civilization. The use of governmental power in England to limit the activity of the press extended to the American Colonies. In replying to an inquiry by English commissioners concerning the condition of Virginia in 1670, Governor Berkeley said:

"I thank God there are no free schools, nor printing; and I hope we shall not have, these hundred years; for learning has brought disobedience, and heresy, and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both."

The use of the printing press in Virginia was prohibited or restricted until Revolutionary times. In New England official licensers exercised a censorship over the press in the seventeenth century, and in Massachusetts printing was hampered by legal restraints until a few years before the Declaration of Independence. The evils calling for a different attitude toward printing were fresh in the public mind when the first American Constitutions were framed. The first amendment of the Constitution of the United States contains the provision that congress shall make no law abridging the freedom of the press. The powerful agency of the press in the evolution of just

and efficient government and the indefensible restrictions imposed upon publishers were understood generally when provisions similar to those quoted from the Nebraska Constitution were inserted in the fundamental law of many of the states. In the light of history, some of the leading purposes disclosed by the language of the Constitution cannot be misunderstood. The power to exercise a censorship over political publications, as formerly practiced, is taken away. The exercise of censorship by a court of equity through the writ of injunction is no less objectionable than the exercise of that function by other departments of the government. The truth when published with good motives and for justifiable ends, contrary to the doctrine of the Star Chamber, is a defense in an action for libel, either civil or criminal. It follows that a court cannot use its equity powers to prevent the publication of political matter merely on the ground that it is untruthful or misleading, its truthfulness and its publication for good motives and for justifiable ends being a defense in an action at law.

The power of a court of equity to protect from improper publications the administration of justice and property, contract, personal or other rights guaranteed by either the state or federal Constitution, is not presented or decided.

The restraining order should not have been granted.

REVERSED AND DISMISSED.

HAMER, J., not sitting.

SEDGWICK, J., concurring.

The majority of the court declare in the syllabus: "The publication of political matter in a newspaper cannot be enjoined merely because it is false or misleading," because the Constitution provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published

with good motives, and for justifiable ends, shall be a sufficient defense." The opinion does not define what is "political matter," and does not say why the fact that it is a defense in an action for libel to prove that the publication was for good motives and for justifiable ends should prevent a court of equity from interfering. I do not recall any more important proposition than the one that is so decided in this opinion. No provision of our Constitution has been more litigated and discussed by the courts than the provision that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." The discussion started in the courts before our Constitution was adopted, and, in fact, long before the federal Constitution was adopted, it was much discussed in the courts of England. I suppose that it is the intention of the opinion in this case to hold that publication in a newspaper will not be enjoined under any circumstances because every person may freely speak, write and publish on all subjects. Several hundred years ago this was announced as the law in England, but the English courts have entirely abandoned the doctrine, and at the present time the courts of England deal with injury to personality by writing and publishing in the same manner that they deal with any other torts. There has been a most remarkable growth in this country in the same direction. In *Francis v. Flinn,* 118 U. S. 385, the supreme court of the United States announced the dictum that "in the eyes of the law" damages are an adequate remedy for all publications; but a very few years later in the famous case of *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, that court sustained an injunction restraining the defendants "from printing, issuing, publishing, or distributing" certain matters which were alleged to be injurious to the plaintiffs. This shows a remarkable growth in the direction of requiring courts of equity to restrain wrongdoing when there is no other remedy to prevent it, and this does not seem to me to be a violation of the Constitution. Those who

publish are "responsible for the abuse of that liberty," and it is the abuse of the liberty that is enjoined, and not the liberty itself.

There are other reasons given in the brief for reversing the judgment in this case which seem to call for reversal. I am not satisfied with the discussion in the majority opinion, nor with the statement of the law in the syllabus.

GEORGE MILLER, APPELLEE, v. SWIFT & COMPANY, APPELLANT.

FILED JUNE 3, 1916. No. 18854.

Appeal from Justice Court: TRIAL DE NOVO. In the trial in the district court to a jury of an action appealed from justice court, it is error to admit in evidence, over the objection of the appellant, a transcript from the justice containing detailed findings of fact and the judgment of such justice.

APPEAL from the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Reversed.*

Gurley, Woodrough & Fitch, for appellant.

Jamieson & O'Sullivan, contra.

FAWCETT, J.

From a judgment for plaintiff, in justice court in Douglas county, for personal injuries, defendant appealed to the district court, where plaintiff was again successful, and defendant has appealed to this court.

Plaintiff alleges that he was told by his foreman to carry two panes of glass, each 40 by 46 inches in size, from the first floor to the second. In order to do so he was required to ascend a flight of stairs which the evidence shows was about four feet wide and without any turn. He carried the first pane up safely, but, in carrying the second pane, when he reached the head of the stairs and turned

to go east, the glass broke. One of the broken pieces struck him on the hand and made a bad cut which resulted in a loss of 27 days' time and an expenditure of $11 for surgical treatment, and caused him more or less suffering. In entering the judgment, the justice made findings of fact on which he based the judgment. On the trial in the district court plaintiff testified in his own behalf, and then offered the entire transcript from the justice court. Over defendant's objection the transcript was received in evidence. The transcript contained the following findings by the justice:

"I find that plaintiff, while in the employ of defendant on Sept. 8, 1913, was ordered, by the foreman in charge of him to carry a pane of glass from the first floor to the second floor; that he remonstrated, but nevertheless proceeded to carry said pane of glass from first floor to second floor; that said pane of glass was defective, which was known both to the said foreman and this plaintiff; that as he reached the top step of said stairs and turned east the said pane of glass broke and cut plaintiff's hand, thereby necessitating his being out of work for a period of 27 days and causing him mental pain and suffering; that said injury was caused through carelessness and negligence; that a reasonable compensation for the injury so received is $125. Wherefore I give judgment for the plaintiff for $125 and costs of suit taxed at $3.40."

The reason given by the trial court for admitting the transcript was that "it is part of the files in the case." So were the allegations in plaintiff's petition, but no one would contend that plaintiff could introduce them as evidence of his right to recover. Counsel say the transcript was material for the purpose of showing upon what issues the case was tried before the justice. The transcript may be used for that purpose, but it must be so used with the court. The jury has nothing to do with determining the issues upon which the case is presented to them. The introduction of the findings and judgment of the justice as evidence was peculiarly prejudicial in this case, where

plaintiff was relying upon his own testimony, which upon the most material points was in conflict with the testimony of the foreman, introduced by defendant. It is argued that plaintiff has recovered in two courts and this court ought not to set aside the recovery. We recognize the force of this contention, and under ordinary circumstances it would prevail, but in the case at bar the error is too plain to be ignored.

REVERSED AND REMANDED.

THOMAS RODEN, APPELLEE, v. PARIS A. WILLIAMS, APPELLANT.

FILED JUNE 3, 1916. No. 18868.

1. **Contracts:** PAROL EVIDENCE. "Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and, in the absence of fraud, mistake or ambiguity of expression in the contract itself, parol evidence is inadmissible to change or vary its terms." *Apking v. Hoefer*, 74 Neb. 325.

2. **Vendor and Purchaser:** OUTHOUSES. Buildings, such as corn cribs, cattle sheds, hog sheds, and other customary outhouses, situated upon a farm, are of the general class which a prospective buyer inspecting the farm would have a right to assume are part of the freehold. They are not such as to put him upon inquiry in reference thereto, even though he may then know that the farm is occupied by a tenant.

3. ———: REMOVAL OF OUTHOUSES: LIABILITY OF VENDOR. And where the owner of such a farm sells the same and enters into a written contract of sale thereof, without reserving such buildings, and such contract is finally consummated by the payment to him by the purchaser of the full agreed consideration for such farm, the seller will be liable to the purchaser for the value of such improvements, if owned by the tenant and removed by him without the consent of such purchaser.

4. **Appeal:** 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." *First Nat. Bank v. Hedgecock*, 87 Neb. 220.

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

W. C. Dorsey, for appellant.

George Losey and *J. C. McReynolds, contra.*

FAWCETT, J.,

This action was brought in the district court for Franklin county, to recover damages which plaintiff claims to have sustained by reason of a breach of certain conditions in a contract, entered into between plaintiff and defendant, for the sale by the latter to the former of a quarter section of land. Plaintiff recovered, and defendant appeals.

The evidence fairly establishes the following facts: In the fall of 1912, defendant listed the land for sale with one Myers, a real estate agent. Myers negotiated a sale of the land to plaintiff for $9,000, and prepared a contract of sale for execution by the parties. The contract provided that the consideration should be paid, $300 cash, $1,000 on or before December 16, and the balance of $7,700 on or before March 1, 1913, "less $2,600 mortgage at 5 per cent. interest," and that plaintiff was to take the property subject to the taxes for 1912 and subsequent taxes. The contract was signed by defendant and left with his agent, Myers, for execution by plaintiff. A few hours later plaintiff called at the office of Myers and the contract was submitted to him. He objected to assuming the taxes for 1912 and refused to sign unless there were inserted the words "Taxes of 1912 paid." Myers said he would make such change, with the understanding that the deal would not go through unless defendant agreed to it. Plaintiff agreed to that arrangement and Myers then changed the contract by in-

serting those words. Thereupon plaintiff signed the contract and paid Myers the $300 cash payment. Some two or three hours later in the day Myers met defendant and told him what had been done. He testifies that he told defendant that plaintiff refused to buy the place unless the taxes were paid by defendant; that defendant "looked it over and said it was all right, that he wouldn't let the taxes stop the sale, and I asked him then if it was a go, and he said, 'Yes.' Q. If I understand you, Mr. Myers, Mr. Williams agreed finally to the contract as it was amended? A. Yes, sir." Defendant admits having stated to Myers, "Well I don't know as I would let the taxes spoil the contract," but says that afterwards he considered the matter and, as he "had been on a deal with a man for the farm for $10,000,"and plaintiff had "jewed us down" $600, he made up his mind that he would not stand for the taxes at all. He did, however, accept the $300 which plaintiff had paid. The above facts present the first question to be determined, viz.: Did defendant by what he said to Myers after Myers had changed the contract, and by the acceptance of the $300, ratify and confirm the contract which he had signed, as changed by Myers? We agree with the jury that he did. On December 16 the parties met for the purpose of adjusting the second payment of $1,000 provided by the contract to be paid on that date. This appears to have been the first time plaintiff and defendant had met. Defendant then insisted that plaintiff must pay the taxes for 1912 and the interest on the mortgage from the last interest payment, viz., June, 1912. The evidence is in conflict as to whether or not plaintiff agreed to that demand. It would sustain a verdict either way. The verdict for plaintiff must therefore stand.

A further controversy arose between the parties, subsequent to the execution of the written contract, with regard to certain improvements which defendant's tenant, then in possession of the farm, had placed upon it. The improvements consisted of a granary, inside of and boarded up to the corncrib; a "big" shed that was built up a-

gainst the barn; a cattle shed, 16 by 14, which had been built in the cattle yard; a hog shed and a privy. The right of defendant, or his tenant, to remove these improvements must be determined by the terms of the written contract. In that contract no reseveration is made by defendant of the improvements in controversy. The improvements were of a class which any one inspecting the farm would have a right to assume were a part of the freehold. They were not such as to put a prospective purchaser upon inquiry in reference thereto, even though he knew the farm was then occupied by a tenant. They were of such a class as to impose upon the seller the duty of advising the prospective purchaser of the fact that they belonged to the tenant and not to the freehold. It is true, the parties had some conversation in relation to the improvements at their first meeting on December 16, which was a month after the execution of the contract. Nothing then said could release defendant from his liability for the value of the improvements if removed by him or his tenant, unless the plaintiff then agreed to release him from such liability. The evidence upon this point is in conflict. The jury found for plaintiff upon sufficient evidence to sustain their finding, and it is conclusive.

The contract required the final payment to be made on or before March 1, 1913. Defendant deposited with the bank at Riverton his copy of the contract, and also a deed to the land, to be held until the final payment was made to the bank for him, when the deed was to be delivered. It is urged by defendant that, when plaintiff made the final payment on February 28, he had been told by defendant that he (defendant) would not make him a deed to the land unless he paid the 1912 taxes, and the interest on the mortgage from the last interest payment date in June, 1912; that he knew when he had made such payment that the improvements in controversy had been removed by the tenant. In support of this contention defendant says that plaintiff made the final payment with full knowledge of the facts and without duress or fraud;

that he thereby acceded to the demands of the defendant, and, whether such demands were well founded or not, the final payment made by him under such circumstances was a voluntary payment and cannot be recovered back, wholly or in part. We are unable to concur in defendant's view of the law applicable to the facts shown by the record. This court has settled the rule applicable to such facts. "Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and, in the absence of fraud, mistake or ambiguity of expression in the contract itself, parol evidence is inadmissible to change or vary its terms." *Apking v. Hoefer,* 74 Neb. 325. In the opinion (p. 328) we said: "Even if the defendant agreed orally, after the contract was executed, that the plaintiffs might have a few days after July 10 to meet the payment maturing on that date, it was a naked promise, without consideration, and could not be enforced. It follows therefore that the court erred in the admission of oral evidence to vary the terms of the written contract. It is clearly apparent from the written contract that time was of the essence of it, and that the failure of the plaintiffs to meet the payment maturing on the 10th day of July, 1902, gave defendant the option to forfeit the contract and declare it at an end." That such a contract as the one involved here manifests an intention to make time of the essence of the contract is also held in *Cadwell v. Smith,* 83 Neb. 567. When plaintiff appeared at the bank on February 28 to make his final payment and obtain his deed, he had only one more day remaining in which to comply with the terms of his contract as to the making of such final payment. Had he failed to make his final payment on that day or the next, defendant, by the terms of the contract, would have been released from all liability thereunder, and plaintiff would have lost his bargain, and would, probably, have had difficulty in obtaining a return of the $1,300 which he had paid thereon.

All of the points in controversy, above referred to, were properly submitted to the jury by the instructions of the court. The verdict returned under those instructions has sufficient evidence to support it. Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

M. T. HIATT ET AL., APPELLANTS, v. HENRY W. TOMLINSON ET AL., APPELLEES.

FILED JUNE 3, 1916. No. 19339.

County Officers: REMOVAL FROM OFFICE. Actions under section 5698, Rev. St. 1913, to remove county officers from office are highly penal in their nature, and the evidence must be clear and satisfactory. The language, "for habitual or wilful neglect of duty" and "for wilful maladministration in office," involves more than oversight, carelessness or mistake. To justify removal of a county officer on such grounds, it must be clearly shown that the action of such official was prompted by some evil intent or legal malice, or at least without sufficient grounds to believe that he was properly performing his duty.

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

H. M. Uttley, for appellants.

J. A. Donohoe and *J. J. Harrington, contra.*

FAWCETT, J.

This action was instituted by plaintiffs, as taypayers and citizens of Holt county, under the first and sixth subdivisions of section 5698, Rev. St. 1913, to remove defendants from their offices as supervisors of such county. From a judgment dismissing the action at their costs, plaintiffs appeal.

The petition contains two paragraphs. The first simply alleges that plaintiffs are taxpayers and citizens of Holt county. The second is divided into 16 subdivisions. The sixteenth subdivision has been abandoned by plaintiffs in their brief. The first, second, fourth, fifth, sixth, seventh, eighth, tenth, twelfth and fifteenth were stricken by the court. In the motion for a new trial plaintiffs do not assign any error of the court in striking out these subdivisions, and for that reason defendants had not given them any attention in their brief, although plaintiffs argue them. Defendants were justified in paying no attention to those subdivisions in this court. Plaintiffs, by failure to assign error as to them in their motion for a new trial, waived error, if any, in relation thereto. This leaves subdivisions 3, 9, 11, 13 and 14 to be considered.

The third subdivision complains of the defendants for allowing pay for clerks in the offices of the county attorney, sheriff, and county assessor, for the reason that such action was not allowed by law; that the board had not, prior to paying the salaries, found as a matter of fact that any clerks were necessary, and that no clerks were necessary in any of the said offices. The record shows that as to each of the three officers named the matter was taken up in advance by them with the board or with members of the board. In the case of the county attorney and sheriff the application for help was not made in writing; in the case of the assessor it was, but the action of the board was not specific. Here is the record: "To the Hon. Board of Supervisors. Gentlemen: I do hereby make application for sufficient help in the office of county assessor for the year 1914. T. J. Coyné, county assessor. On motion petition was granted." We think this point is settled adversely to plaintiffs' contention by *Lancaster County v. Green,* 54 Neb. 98; *Berryman v. Schalander,* 85 Neb. 281; *Gage County v. Wright,* 86 Neb. 436; and *Emberson v. Adams County,* 93 Neb. 823.

Subdivision 9 alleges that the defendants, during the years 1913 and 1914, allowed claims, and drew warrants

in payment thereof, for the building of bridges and culverts and for material furnished therefor, when the persons presenting such claims had never been employed by the board to build such bridges or furnish material therefor, and that this allegation applies to practically every claim allowed by the board and paid therefor by warrant during the two years named.

By subdivision 11 it is complained that the defendants, during the two years named, unlawfully failed and neglected to comply with chapter 111, Laws 1911, being section 2956, Rev. St. 1913. In reference to the letting of contracts for bridges, the cost of which exceeded the sum of $500, and failed to require bills for labor performed and material furnished for such bridges to be made out and filed in the manner required by statute, and failed and neglected to procure and keep records of bridges built.

Subdivision 13 complains that defendants, during the year 1914, failed, neglected and refused to make any contracts for the purchase of supplies, such as books, blanks, etc., for the county, as required by sections 1089, 1090, Rev. St. 1913.

Subdivision 14 complains that defendants did during 1914 unlawfully pay out a large amount of county money, levied and collected for the purpose of the expenses of Holt county for the year 1914, for bills filed, supplies furnished, and work and labor done during the year 1913, and prior thereto, without having included such claims or bills in the estimate of expenses made by them as required by law at the first meeting in January, 1914, among which were bills to the Western Bridge & Construction Company, amounting to $18,000, or more; bills to the Klopp-Bartlett Printing Company, amounting to $1,000, or more; bills to George A. Miles, to an amount to plaintiffs unknown; and to others whose names were unknown to plaintiffs; that all of these acts were wholly, entirely, and directly in violation of the statutes. The large amount paid to the Western Bridge & Con-

struction Company, referred to in subdivision 14, was for bridge work rendered necessary by the washing out of some bridges and damage to others, which stopped travel in some cases, and rendered it dangerous in others. The evidence we think fairly shows that the commissioners in this instance advised with the lawyers at O'Neill and also with the district judge, all of whom it is claimed, and tacitly admitted by plaintiffs, advised the commissioners to go ahead and have the work done. In none of the cases is there pointed out any fraud or fraudulent intent on the part of the commissioners. It is not claimed that in the making of any of these purchases, or in having any of the work done, the commissioners entered into fraudulent collusion with any one; nor is there evidence to show that the commissioners have ever received any money or thing of value to which they were not entitled.

Some contention is made that in certain instances *per diem* was allowed to commissioners for special work done on committees, or where certain work, such as supervision of bridge construction and road work, and like matters, was delegated by the board to some individual member of the board, and that the board met with greater frequency than was necessary. But we have been unable to find in the record evidence of fraud or evidence to show that the defendants, representing the county, ever paid out any of the county's money for which the county did not receive a fair equivalent.

That the members of the board had an erroneous idea as to the manner in which their duties should be performed, and that they did many things contrary to the method prescribed by statutes, is established by the record. Many of the things they did and some of the contracts they entered into would have been promptly enjoined by the courts if application had been made by the plaintiffs, or any other taxpayers, for such relief; but no such action was taken.

Section 5698, Rev. St. 1913, upon which the case at bar is based, reads thus: "All county officers, including justices of the peace, may be charged, tried and removed from office for official misdemeanors in the manner and for the causes following: First, for habitual or wilful neglect of duty. * * * Sixth, for wilful maladministration in office."

Section 1*a*, ch. 71, Comp. St. 1911, reads as follows: "Any county attorney or prosecuting officer, sheriff, police judge, mayor, police officer, or police commissioner or other officer who shall wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce shall thereby forfeit his office and may be removed therefrom."

To our mind, these two sections of the statute are equally drastic in their provisions, are each highly penal in their nature, and a construction of one would apply to the other. The latter of the two sections was under consideration in *State v. Donahue,* 91 Neb. 311. In the sixth paragraph of the syllabus we held: "Prosecutions under this statute are highly penal in their nature, and the evidence must be clear and satisfactory. To wilfully fail, neglect or refuse to enforce a law involves more than oversight or carelessness or voluntary neglect. It must be prompted by some evil intent, or legal malice, or at least be without sufficient grounds to believe that he is performing his duty." This holding is well sustained by authority. "Doing or omitting to do a thing 'knowingly and wilfully' implies not only a knowledge of the thing, but a determination with an evil intent to do it or to omit doing it." *Felton v. United States,* 96 U. S. 699.

"What is the meaning of 'wilful misconduct' as that phrase is here employed? Manifestly it is not applicable to every case of misconduct, nor to every mistake, or every departure from the strict letter of the law defining the officer's duties, but only to wilful wrongs or omissions on his part. The word 'wilful,' like most other words in our language, is of somewhat varied signification according

to its context and the nature of the subject under discussion or treatment. Frequently it is used as nearly or quite synonymous with 'voluntary' or 'intentional,' and evidently this is the interpretation given it by the trial court in the case before us. But when employed in statutes, especially in statutes of a penal character, it is held with but few exceptions to imply an evil or corrupt motive or intent." *State v. Meek,* 148 Ia. 671.

"The word 'wilfully' in the provision of the Penal Code (section 639), declaring that 'any person who wilfully or maliciously displaces, removes, injures or destroys * * * a pipe or main for conducting water or gas * * * is punishable by imprisonment,' means not simply a voluntary and intentional act, which is in fact wrongful, but one done with a wrongful purpose, with a design to injure another, or from mere wantonness or lawlessness." *Wass v. Stephens,* 128 N. Y. 123.

"For the plaintiff it is contended that the term *'wilfully,'* as here used, signifies no more than *voluntarily* or *purposely*—thus distinguishing the act of obstructing made penal, from one which may be said to have been *accidental,* which last alone it was the design of the statute not to punish. The word *'wilfully,'* as used to denote the intent with which an act is done, is undoubtedly susceptible of different shades of meaning or degrees of intensity according to the context and evident purpose of the writer. It is sometimes so modified and reduced as to mean little more than plain *intentionally,* or *designedly.* Such is not, however, its ordinary signification when used in criminal law and penal statutes. It is there most frequently understood, not in so mild a sense, but as conveying the idea of legal malice in greater or less degree, that is, as implying an evil intent without justifiable excuse." *State v. Preston,* 34 Wis. 675, 683.

"The word *'wilfully,'* in the ordinary sense in which it is used in statutes, means not merely 'voluntarily,' but with a bad purpose." *Commonwealth v. Kneeland,* 20 Pick. (Mass.) 206, 220.

"We are of opinion that under the statute an official act done or omitted cannot be said to have been wilful unless the officer knew or believed that it was his official duty to do or omit the act, and with such knowledge or belief obstinately, perversely, and with intent to do wrong acted or failed to act." *State v. Alcorn,* 78 Tex. 387.

In *State v. Scates,* 43 Kan. 330, 335, an action to remove an officer, the decision concludes: "As the majority of the court do not find that any of the acts complained of were done by Scates corruptly, or with the intent to defraud the taxpayers of Seward county, judgment will be rendered in his favor and against the plaintiff."

"When proceedings under section 7459 of the Revised Statutes are brought to remove a county officer, and the court finds that such officer acted honestly in making such charges against his county, and honestly believed at the time he presented his claim for allowance, and when he collected the same, that such charges were legal, it is error to remove him from office, and enter judgment against him for the penalty provided by said section." *Ponting v. Isaman,* 7 Idaho, 581.

In *People v. Therrien,* 80 Mich. 187, 195, it is said: "The right to hold this office is just as sacred in the eyes of the law to Metevier as the right to hold the property he has earned. It is a property right, and one of which he can only be divested by a strict conformity to the statute. * * * The people of Mackinac county have rights also, as well as the accused. They have the right, under the Constitution, to elect their county officers, and to have such officers serve out the terms for which they were elected. It was not contemplated by the Constitution that such officers should be removed but for grave reasons."

The holding of the trial court is in harmony with the law as announced in the above cases, and is also well within our holding in *State v. Hastings,* 37 Neb. 96.

In reaching the conclusion that the judgment of the district court should be affirmed, we have not been able to shut our eyes to the fact that the defendants, in trans-

acting the business of the county, have so frequently acted contrary to the method of procedure pointed out by statute that plaintiffs are not entirely without justification in instituting the present action. We are impressed with the conviction that they also have acted in good faith.

In such a case, who should bear the costs of this litigation?

We think such costs should be taxed to the parties whose carelessness in the discharge of public duties caused the making of such costs. Such a course will prevent such carelessness on the part of the defendants in the future, and will also be a salutary admonition to the commissioners of other counties in the state to discharge their duties in accordance with the requirements of statutes enacted for their guidance.

The judgment of the district court is therefore affirmed in so far as it dismisses the action, but reversed in so far as it taxes the costs to the plaintiff, and the cause is remanded to the district court, with directions to tax all costs in the action to the defendants; defendants to also pay the costs in this court.

JUDGMENT ACCORDINGLY.

LETTON, J., not sitting

ROSE, J., dissenting.

I dissent from the decision of the majority on three fundamental grounds:

1. This is a civil action, and a preponderance of the evidence is sufficient to establish any issue in such a case. *Patrick v. Leach,* 8 Neb. 530; *Search v. Miller,* 9 Neb. 26; *Kopplekom v. Huffman,* 12 Neb. 95; *Altschuler v. Algaza,* 16 Neb. 631; *Dunbar v. Briggs,* 18 Neb. 94; *Stevens v. Carson,* 30 Neb. 544; *First Nat Bank v. Goodman,* 55 Neb. 409; *Western Mattress Co. v. Potter,* 1 Neb. (Unof.) 627; *Schmuck v. Hill,* 2 Neb. (Unof.) 79; *Link v. Campbell,* 72 Neb. 307; *Kramer v. Weigand,* 91 Neb. 47. To make "clear and satisfactory" evidence essential to a finding against

defendants in a civil suit to remove county officers for violating statutes is to confuse terms, and to require more than a preponderance of the evidence.

2. Statutes authorizing the removal of county officers for violating official duties are not "highly penal," but are remedial in their nature, and should be liberally construed to suppress mischief and advance the remedy. *Buckmaster v. McElroy,* 20 Neb. 557, approving Sedgwick, Construction of Statutory and Constitutional Law (2d ed.) p. 309; 2 Wharton, Criminal Law (10th ed.) sec. 1582.

3. The intentional violation of an official duty is sufficient to justify the removal of an officer, under a statute so declaring; evil intent or malice not being essential. *State v. Sheldon,* 10 Neb. 452; *Highway Commissioners v. Ely,* 54 Mich. 173; *People v. Herlihy,* 72 N. Y. Supp. 389; *Louisville & Jeffersonville Ferry Co. v. Commonwealth,* 104 Ky. 726; *People v. Brooks,* 1 Denio (N. Y.) 457; *Commonwealth v. Green,* 1 Ashm. (Pa.) 289; *Tracy v. Commonwealth,* 76 S. W. (Ky.) 184; *People v. Draper,* 63 Hun (N. Y.) 389.

Adhering to these well-established principles, founded as they are in justice and reason, I am compelled to dissent from the opinion of the majority.

H. M. UTTLEY ET AL., APPELLANTS, v. T. D. SIEVERS ET AL., APPELLEES.

FILED JUNE 3, 1916. No. 19371.

1. **Statutes:** MODIFICATION: CONSTITUTIONAL PROVISIONS. "Changes or modifications of existing statutes as an incidental result of adopting a new law covering the whole subject to which it relates are not forbidden by section 11, art. III of the Constitution." *De France v. Harmer,* 66 Neb. 14.

2. **Counties:** CLAIMS: VERIFICATION. Section 35, ch. 19, Laws 1866, examined in connection with section 37 of the act of March 1, 1879

(Laws 1879, pp. 353, 366), and *held*, that the former act was superseded and repealed by the later act; that by such repeal section 2461, Rev. St. 1913, is no longer in force, and that section 965, Rev. St. 1913, prescribes the verification required to be attached to all claims filed against a county.

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

H. M. Uttley, for appellants.

J. A. Donohoe, contra.

FAWCETT, J.

Plaintiffs instituted this action in justice court in Holt county, under the provisions of section 2461, Rev. St. 1913, to recover, for the state of Nebraska, the sum of $50, which it is alleged defendants should forfeit to the state for having, as the county board of supervisors, allowed the claims of two of its members for *per diem* and disbursements without requiring from them the verification prescribed by such section. From a judgment in favor of the defendants, plaintiffs appealed to the district court, where a like judgment was entered, and plaintiffs have brought the case to this court for review.

The case turns on the question as to whether or not section 2461 or section 965, Rev. St. 1913, governs. The case was submitted on a stipulation of facts in which it is admitted by the parties that the claims appearing in the record are true copies of the original claims as allowed; that the affidavit mentioned in section 2461 was not made in connection with such claims; that such affidavit has never been required or made in connection with any or like claims in Holt county since the county was organized, and that claims similar to the ones in controversy have been filed and allowed by every county board of that county since its organization; that the form of claim in controversy "is in the same form and the verification is the same as that used in every other county in the state of Nebraska."

It will be seen from this stipulation that the justness of the claims in controversy is not assailed, nor the honesty of the defendants as commissioners called in question; that the action is based solely upon the ground that the defendants, as commissioners, allowed the claims upon a verification prescribed by section 965, *supra,* found in the act entitled "Counties and County Government," instead of section 2461 appearing in the act entitled "Fees and Salaries." Defendants contend that section 2461 was repealed by an independant act of the legislature, approved March 1, 1879, which became effective September 1, 1879. Section 2461, upon which the action is based, was adopted in 1866, and appears as section 35, ch. 19, Laws of that year. This chapter will also be found in Rev. St. 1866, p. 157; section 35 being found on page 172. This section has been carried in the statutes of the state down to and including Revised Statutes 1913, in which it appears as section 2461. The act of March 1, 1879, is entitled "An act concerning counties and county officers." It is a comprehensive act of 154 sections. It proceeds in great detail to define the powers and duties of county officers of various kinds, the filing of claims against the county, the issuance of warrants, etc., and by section 37 provides: "Before any claim against a county is audited and allowed, the claimant or his agent shall verify the same by his affidavit, stating that the several items therein mentioned are just and true, and the services charged therein, or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount claimed is due and unpaid after allowing all just credits." Section 153 expressly repeals certain enumerated chapters and sections of other chapters, and concludes: "And all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." By the concluding section it is provided that the act should take effect and be in force from and after September 1, 1879. Section 37 has never been repealed or amended, and now appears as section 965, Rev. St. 1913. This was an in-

dependent act, complete within itself, and it is now claimed that as it is squarely in conflict with section 35, ch. 19, Laws 1866, it repeals such former act by implication, and that by reason of such repeal section 2461, Rev. St. 1913, is obsolete and of no force and effect.

Plaintiffs cite and rely upon the authorities that the repeal of a statute by implication is not favored, and it is only where two statutes relating to the same subject are so repugnant to each other that both cannot be enforced that the last one enacted will supersede the former and repeal it by implication. There is no doubt as to the soundness of that rule. It has been frequently applied by this court. But there is another rule equally well established in this court and clearly announced in *De France v. Harmer*, 66 Neb. 14, viz.: "Changes or modifications of existing statutes as an incidental result of adopting a new law covering the whole subject to which it relates are not forbidden by section 11, art. III of the Constitution." This holding is reaffirmed in *Wilkinson v. Lord*, 85 Neb. 136. See, also, *Brome v. Cuming County*, 31 Neb. 362, and *State v. Benton*, 33 Neb. 823.

Does the fact that section 2461 appears in the act entitled "Fees and Salaries," while section 965 appears in the act entitled "Counties and County Government," in any manner change the rule? We think not. As said by counsel for plaintiffs, at the time section 2461 was adopted in 1866, and until the enactment of 1879, there was no provision in the statute requiring general claims for work and labor, material furnished, etc., to have any affidavit or proof attached thereto; the only requirement of a verification of a claim being the one upon which plaintiffs now rely. There were many other questions relating to counties and county officers which during those years were indefinite and incomplete. This condition of affairs doubtless led the legislature to pass the act of 1879. In 1866 there were comparatively few counties in the state. In 1879 the number had greatly multiplied. Conditions in the state had greatly changed. The sub-

ject of counties and county officers had become an important one, and, in order to secure a comprehensive and clear definition of the rights of counties and the powers and duties of county officers, the legislature went fully into the subject and passed a new, independent and comprehensive act settling all those matters. Section 2461, as it then existed, required only a verification of claims presented by officers whose salary was in the nature of a *per diem,* and it only required a verification as to the number of days in which such officer was necessarily engaged in the duties of his office. He was not required by that section to make oath to any of his disbursements made in the discharge of his duties, such as mileage, or other expenditures which he might properly make in the discharge of his duties. The legislature by section 37 of the new act covered the whole ground, and he is now required, before his claim against the county can be audited, to make the same verification as that required of all other persons. He must verify his claim by affidavit, stating that the several items therein mentioned are just and true, "and the services charged therein, or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount claimed is due and unpaid after allowing all just credits." This is a comprehensive act which not only adds new requirements in the verification, but also covers the requirements which had previously existed under the act of 1866.

We therefore hold that the act of 1879 superseded and repealed section 35, ch. 19, Laws 1866, and that section 2461, Rev. St. 1913, from and after the passage of the act of 1879, was without force or effect, and should have been dropped from the statute, and that the case at bar is governed by section 965, Rev. St. 1913. In thus holding, we are harmonizing the law with the construction that has been placed upon it in every county in the state, and are placing the verification of claims against counties in substantial accord with the verification of claims against the state, as provided by chapter 65, Laws 1895, which

verification is the one now in use as to claims of all kinds against the state, for the payment of which warrants are drawn by the auditor on the state treasurer. To hold otherwise would be to compel the counties to require two vouchers from each official of the county whose salary is in the nature of a *per diem;* one for his salary, and the other for his disbursements.

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

AFFIRMED.

ROSE, J., dissents.

LETTON, J., not sitting.

NEMAHA VALLEY DRAINAGE DISTRICT, APPELLEE, V. NEMAHA COUNTY, APPELLANT.

FILED JUNE 3, 1916. No. 19554.

1. **Drainage Districts:** DEPOSITS: INTEREST. Interest received from depository banks, by a county treasurer, upon funds in his custody as *ex officio* treasurer of a drainage district, is the money of such district and should be credited by the treasurer to its account and not to the general fund of the county.

2. ———: FEES. Under the provision of section 1858, Rev. St. 1913, requiring a drainage district to pay the fees of all court and county officers who may by virtue of the act render service to said district, the county in which the drainage district, or the chief portion thereof, is situated, is entitled to retain, as a part of its general fund, the fees fixed by statute, for all taxes and special assessments collected by the county treasurer of such county in his official capacity as such treasurer and by him paid into such general fund.

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

Neal & Armstrong, for appellant.

Kelligar & Ferneau, contra.

FAWCETT, J.

Plaintiff, which will be called the drainage district, is a public corporation organized under the provisions of sections 1797–1865, Rev. St. 1913. Defendant, which will be called the county, is also a public corporation and one of the political subdivisions of the state. The petition sets out two causes of action. The issues tendered thereby present questions of law only, the facts having been stipulated. The first presents the question of the liability of the county to account for interest collected by the county treasurer, and credited to the general fund of the county, on the funds of the district, deposited by the county treasurer, together with other funds in his hands, in the several depository banks of the county, under the provisions of the statute requiring the deposit of all funds collected by him. The second presents the question of the liability of the county for collection fees charged by the county treasurer, and credited to the general fund of the county, on the taxes levied by the district and certified to the county clerk of defendant county and extended by him on the tax rolls of the county, and thereafter certified by him and delivered to the county treasurer of defendant county for collection. Plaintiff recovered on the first cause of action, and defendant recovered on the second. Each party appeals.

We will first consider defendant's appeal from the judgment on the first cause of action. Section 6660, Rev. St. 1913, provides that the county treasurer shall deposit "the amount of moneys in his hands collected and held by him as such county treasurer." In the next section, providing for the manner in which the money shall be kept, it is termed "public funds on deposit," "public moneys," and "public moneys of the county," and it was provided that "all interest on such moneys be credited by the

county treasurer directly to the account of the general fund of the county." In the next section the fund is spoken of as "moneys of the county." Section 6663, Rev. St. 1913, prohibits the making of profit, directly or indirectly, out of any money in the county treasury belonging to the county, the custody of which the treasurer is charged with, and it is made his duty "to use all reasonable and proper means to secure to the county the best terms for the depositing of the money *belonging to the county* consistent with the safe-keeping and prompt payment of the funds of the county when demanded." (Italics are ours.) By succeeding sections the power is given to county boards, city councils, school boards and township boards to direct the county treasurer to invest the sinking funds of such corporations in his hands in the warrants issued by each respectively.

In ordinary cases when money is collected by a county treasurer for the benefit of a separate public corporation, the county holds the money as trustee until drawn out by the treasurer of the district, village or city. At the time the depository law was passed, no drainage district corporations, of which the county treasurer was *ex officio* treasurer, were provided for by statute. If he collected funds for a drainage district then existing, it was his duty to pay it to the treasurer of the district on demand. As in the case of the funds belonging to a school district, or other public corporation, the treasurer of the district might preserve the interest for the benefit of his district by drawing the money from the county treasury and taking it within his own control. But, when a later statute made the county treasurer *ex officio* treasurer of drainage districts of the class then made possible, it became beyond the power of the district to protect itself by withdrawing the money from the county treasury and placing it within the district treasury. If we take the view that this is a county fund, the district will lose the interest, and the county will reap where it has not sown. We will not presume that it was the intention of the legislature to

discriminate against the owners of land within the drainage district, by the special assessment of whose property the fund was created, by taking from them for the benefit of other taxpayers the accumulations of this fund. The money of such a drainage district as this, as soon as collected, passes automatically from the county treasurer, in his capacity as collector, into his custody as *ex officio* treasurer of the district. It is the general rule, where there is no statute to the contrary, that interest becomes a part of the fund by whose investment it was produced, and hence the interest belongs to the drainage district. It may be said that, while the statute does not require the treasurer of the drainage district to give a bond, it would seem that the bond required from the county treasurer should be sufficiently large to guarantee the safety of all moneys in his hands, whether he holds it merely and purely as county treasurer, or whether, by virtue of his office, he holds the same for the drainage district. This, evidently, was the idea of the county board, when it required an increased bond to cover the further liability. The county received its compensation for this by the collection fees provided for by statute, as later appears in this opinion. The district court properly found that the drainage district was entitled to the interest obtained by the county from the fund in the hands of the treasurer as *ex officio* treasurer of the district.

We come now to a consideration of the second cause of action. The levies made by the district, which were certified to the county clerk and by him to the county treasurer for collection, were made on two different dates, the first being for $213,124.41, and the second for $30,718.46. When he collected these taxes and assessments the county treasurer from time to time charged the regular collection fees, amounting in the aggregate to $5,363.59, all of which he credited to the general fund of the county. The agreed statement of facts shows that the county treasurer never qualified as an officer of the drainage district by taking the oath of office and by giving bond to plaintiff

for the safe-keeping of its funds; that by reason of his control of the plaintiff's funds his bond was increased $100,000 and the expense of the premium on such bond was paid by the county; that the compensation of the county treasurer of defendant county had been fixed at $2,000 and certain deputy and clerk hire; that the fees and charges for the collection of the regular taxes levied by the county, state and other subdivisions, authorized to levy taxes, paid all the fees of the office and deputy and clerk hire, and left a surplus without taking into consideration the collection of the special assessments and levies made by plaintiff.

Section 1855, Rev. St. 1913, makes the treasurer of the county "in which the drainage district, or the largest portion thereof, is situated," *ex officio* treasurer of said drainage district, "for the purposes of collecting and disbursing tax or assessments, and the treasurers of the counties in which the smaller parts of the district shall be situated shall pay over to him any and all funds collected and paid over to them for the benefit of the drainage district." Section 1858 provides: "The board of supervisors (of the district), except where otherwise provided, shall, by resolution, at the time of hiring or appointing, provide for the compensation for work done and necessary expenses incurred by any officer, engineer, attorney, or other employee, and shall also pay the fees of all court and county officers who may by virtue of this act render service to the district." We think this provision of the statute clearly sustains the judgment of the district court in favor of the county on plaintiff's second cause of action. The provision seems to be clear and unambiguous that the district shall pay the fees of all court and county officers who may by virtue of the act render service to the district. That the county, through its county clerk and county treasurer, rendered a large amount of valuable service in extending the taxes and assessments of the district upon the tax rolls and in the collection of the same, to say nothing of the expense which the county incurred in wise-

ly increasing the bond of the county treasurer in a large sum, and in paying the expense incident to the obtaining of such bond, must be conceded. That services of this character are worth the amount of the fees charged by the county has been determined by the legislature, which fixed the amount of such fees. It seems to us that further comment on this branch of the case is unnecessary.

For the reasons above given, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

FRANCES A. RANKIN, APPELLEE, v. ELIZABETH KOUNTZE REAL ESTATE COMPANY, APPELLANT.*

FILED JUNE 3, 1916. No. 18846.

1. **Landlord and Tenant:** REPAIRS: INJURY TO TENANT: LIABILITY. Where the janitor of a building used for rental purposes is also charged with the duty of making such light repairs from time to time as seem to him to be needed, and repairs the threshold of a room in one of the apartments of such building, occupied and to be occupied by a tenant, he will be regarded as the servant of the proprietor of the building in the making of such repairs, and, if the same are negligently made, and as a result of such negligence a tenant is injured, the proprietor of the building will be liable therefor.

2. ———: ———: ———: ———. Where such repairing of the threshold was done in a way so careless and negligent that its use resulted in a nail, invisible and concealed in a board, entering the plaintiff's heel and wounding her when she stepped upon the threshold without knowledge of the dangerous condition of the same, the proprietor of the building will be held liable for wrongfully maintaining such threshold in such dangerous condition if the same would not have been seen and avoided by an ordinarily prudent person under like circumstances.

3. ———: ———: ———: ———. Where the tenant had been promised by the agent of the defendant that he would put the premises

*Reversed and dismissed on rehearing. See opinion, 101 Neb. ——.

in good tenantable condition and keep the same in repair, it was the duty of the defendant to put said premises in good repair, and the tenant had a right to expect that the premises would be in good condition so that she might walk safely from one part thereof to another, and anywhere in the apartment which she occupied without wearing shoes.

4. ———: ———: ———: ———. Where the threshold of a door in an apartment used by a tenant is, by coming in contact with many feet, worn down in the center so as to leave it in a concave condition, and the owner of the building, by his servant, causes a thin and elastic board to be nailed across the top of the threshold and a nail is driven down through the unsupported part of the board into the bottom of the threshold or the floor upon which it rests, and by reason of such use the head of the nail is broken off, leaving a sharp point which does not protrude through the threshold but remains concealed therein or in said board, but when the threshold is stepped upon the board sags and causes the nail to be projected above the surface thereof, thereby rendering the threshold defective and dangerous, and a tenant, without knowledge of such defective condition of the threshold, and within a few hours after entering into the occupancy of such premises, steps upon the threshold and is injured by the penetration of such pointed nail into the foot, an action will lie in favor of the tenant and against the owner of the building for such injury.

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

Duncan M. Vinsonhaler, for appellant.

Benjamin S. Baker and *Charles H. Marley, contra.*

HAMER, J.

This is an appeal from the judgment of the district court for Douglas county. The plaintiff and appellee, Frances A. Rankin, leased from the defendant, the Elizabeth Kountze Real Estate Company, a corporation, a certain apartment in a building containing six apartments. The apartment which she rented was on the first floor and on the south side of the building. On the north side of the same floor was another apartment. Between the two apartments was a hall extending east and west. It was a common hallway for the use of the two

apartments, and led to a toilet room which was also for the use of the occupants of both apartments. There was no direct connection with the toilet room from either of these two apartments. Access to the toilet room from the apartment leased by the plaintiff was through a door which led from the kitchen into the hall. The lease was obtained by the plaintiff from the defendant through its agent, Payne & Slater Company. It was an oral lease and included the use of the hall and toilet room. As a part of the terms of said lease, the defendant, through one Porter, acting on behalf of Payne & Slater Company, agreed with the plaintiff to put said premises in repair and in good tenantable condition, and to keep the same in such repair during the term of the lease. On the 1st day of January, 1911, the plaintiff moved into said apartment. About 9 o'clock in the evening of the same day, and after having removed her shoes, she started to go to the toilet room through the door communicating from the kitchen of said apartment with the said hall. In doing so she stepped with her left foot on the threshold of the door. She had only just moved in and was not familiar with the premises. This threshold had been repaired by placing a board lengthwise over the same and nailing it fast to the original threshold, which was worn away in the central part, leaving a concave space which the board covered. This board was elastic and springy, and there was no support under its center, and the board would go down as pressure was placed upon it and would spring back again when the pressure was removed. The nail used to repair said threshold had been driven through said board near the center and went down into the threshold and the floor which was underneath said board. The head of the nail was broken off so that it left a sharp point on the upper end of the nail, and when the weight of a person was placed upon said board the board would spring downward and then, coming back, would cause the nail to work up and down through the hole in the board and to extend above its surface. This condition existed at the

time the plaintiff rented the apartment. It was not known to the plaintiff at the time that she moved into the apartment nor was it known to her at any time until she received the injury. On the evening when she moved into the apartment, the plaintiff stepped upon this board, which was a part of the threshold, and when she did so the nail came up above the surface of the board and the point thereof ran into the plaintiff's heel the distance of about a quarter of an inch. The defendant had not advised any person of the condition of said threshold prior to the injury received by the plaintiff, but negligently and carelessly permitted the dangerous condition of said threshold to remain, and neglected to put the same in repair or in a safe condition, and wholly failed and neglected to notify the plaintiff of the condition of said threshold. The plaintiff testified that she saw Mr. Porter, an employee of of Payne & Slater Company, and asked him if he would put the place in good repair so that it would be fit to live in, and he said that he would fix everything up in good repair for her. He also stated that he would keep it fixed up. He fixed some boards in the floor and papered and painted two rooms. There was a janitor in this building named Norlen. He was under instructions to make ordinary repairs. He was to receive his rent free. He put the board over the threshold through which the nail worked that injured the plaintiff. He made ordinary repairs without submitting the matter to anybody. Norlen testified that he moved out of the apartment into which Mrs. Rankin moved, and went down into the basement, which had formerly been occupied by Mrs. Rankin. They appear to have exchanged apartments late in the afternoon of the same day. He said that, as far as he knew, there was a carpenter there every spring to set up the screens and do a little repairing. Norlen seems to have done whatever repairing was necessary to be done, at least he so testified. "Q. In the threshold leading from the kitchen to the hall there was a board placed on the original threshold. Tell the jury who put that board on there.

A. I put one board on there myself." Later Norlen testified that he put the board along the threshold shortly after he moved in, and that the board was there until he moved out, and that that was the time when Mrs. Rankin moved out of the basement and moved upstairs into the apartment occupied until that time by Norlen. He further testified that there was a big space, and he put the board there because the cold weather began, perhaps in November. It was a strip of board which rested on the floor or threshold, he could not say which. "Q. How far did that extend? Did it go clear across the door? A. Clear across, from one jamb to the other. Q. Did that piece that you put down rest on the floor clear across? A. It rested on the floor or threshold, I could not say which. I do not remember which way I put it. * * * Q. Did it extend above the bottom of the door? A. In one side it did, at one corner of the door. The door is kind of sagged; the door was not level. It was open underneath in one corner about an inch space, and on that corner it was flush with the threshold. Q. Where this fitted up against the jamb, was the end sawed off square? A. Yes, sir. Q. And extended the full width of the—from jamb to jamb? A. Yes, sir. Q. And how did you fasten that down, Mr. Norlen? A. With nails."

Norlen put this dangerous board with the concealed nail in it over the threshold. The threshold, when repaired, was not such a thing as a competent carpenter would have constructed. Norlen knew, or should have known, what he had there. He was in the apartment a year and two months after he repaired the threshold. Norlen testified that he could not say whether the board over the threshold was in a condition to move up and down if anybody stepped on it, when he was questioned he said: "I could not say. I never noticed it. I did not pay any attention to it." This answer was somewhat evasive. The jury saw the witness and heard what he said, and they were in a position to judge understandingly about his testimony. When Norlen, as the servant of the owner

of the property, drove the nail through the board which he placed over the cavity in the threshold, so that it went down through the board and into the solid body of the threshold, leaving the upper part of the nail so that the board would play up and down upon it, exposing the sharp end of the nail to the danger and risk of injury to any one stepping upon the threshold, he knew, or should have known, that the strange and unusual thing which he constructed was dangerous, and that the threshold after he undertook to repair it was uncouth and a wicked sort of trap full of threatening destruction to any one who might step upon it. The danger was concealed because the nail was invisible. It only protruded when the board was pressed upon, and then it rose above the surface.

Mr. Slater testified that it was an old building, but they aimed to keep it up in a good state of repair; that he did not have charge of the leasing, but he remembered that Mrs. Rankin was at their place, and that she made a change, and that the rent was paid to the firm of Payne & Slater Company. Slater testified that Porter represented his firm, the Payne & Slater Company. He was asked who was janitor down there, and testified: "A. Yes; we had a man. I forget his name. He was down there occupying one of the apartments. Q. Do you know his name? A. No; I forget his name. Q. Was it Norlen? A. Norlen, I think that was his name. Q. And for his work in and about the premises was his compensation anything more than the rent free? A. No; he received his rent free. * * * Q. What were Mr. Norlen's duties there? A. Mr. Norlen was put down there mainly because we had had a lot of trouble with the water pipes freezing out, especially at night when there wasn't any water drawn off, and the water would stand still, and so his duties were to shut the water off at the base of the supply line in the basements and then turn it on in the morning. His duties, also, were to notify our office of any vacancies, and to collect the keys and take care of the keys down there. * * * Q. As a matter of fact Mr. Norlen did do some

repairs on the sidewalk and look after the yard, and do some repairs in the house? A. I do not know of them. He may have done some repairs. I think that he looked after the yard, and mowed the grass, if there was any, and mowed weeds and something like that. * * * Q. Did I understand you that Mr. Norlen received his authority from Mr. Porter, or your firm? A. Yes; I think he was at that time working under Mr. Porter. Q. And what he did was for your firm? A. Yes. Q. And Mr. Porter was representing the firm? A. Yes, sir."

C. A. Appleby testified that he knew Mrs. Rankin; that he lived in the same place; that he knew about the threshold of the door leading from the hall into the kitchen; that "the threshold had worn down, as any board will do by constant walking over it." He saw the original board. "It was a rude piece of construction. It was a very weak piece of board. * * * When I went across there I noticed a slight give in it (the board), and I stopped to think what a rude piece of construction and repairing was done on that door." He knew that Norlen was accustomed to making repairs.

Mrs. McElhinney testified that the board had been laid lengthwise of the threshold so that it extended over the worn place where the threshold had been eaten out by coming in contact with many feet. As the nail had been driven through a springy board, when the board was stepped on it slipped down the nail as far as the weight upon it compelled it to go, and then, when released from the weight which pressed it down, it would immediately spring back to its former position. In time this wore the head from the top of the nail, or it broke off, and the top of the nail became sharper and sharper as the board worked up and down upon it. To the casual observer the nail was invisible. Any one stepping on this board was likely to be cut by an invisible lancet carrying great power to injure by reason if its concealment. She indicated how far the nail would project when stepped upon, and said, "When you stepped on the threshold there was a nail.

The head of the nail looked like it had been worn off. The head had been worn off with the nail projecting through the threshold about a quarter of an inch, I judge. Q. Extending above it? A. Yes, sir."

Mrs. Rankin, the plaintiff, testified that she first occupied the apartment in the basement on the south side, and then she went up immediately over that apartment into the next apartment on the south side. She made arrangements for the second floor with Mr. Slater, of the firm of Payne & Slater Company, the latter part of 1910, the last week in December. She first talked with Mr. Porter, who collected the rents of the building, and then talked with Mr. Slater over the telephone, and he said he would send Mr. Porter down, and she could move upstairs. She exchanged apartments with Mr. Norlen. Porter came down from Payne & Slater Company, and told Mrs. Rankin that they said she could exchange with Mr. Norlen. She then moved upstairs, and Norlen moved down into the apartment which she had just occupied. She was to pay $10 a month as rent for the apartment which she took upstairs. They had some papering and carpenter work done for her. "Q. What did you say to him, and what did he say to you concerning what was to be done in case you leased it? A. Well, I asked him (Porter) if he would put the place in good repair so that it was fit to live in, and he said they would fix everything up in good repair for me. Q. What about keeping it in repair? A. Yes; keep it up. Q. And what did he do in pursuance of that, what was done in pursuance of that? A. He fixed some boards in the floor and painted and papered two rooms. Q. And when was this done, this work done, with relation to the time you went in? A. Well, it was the first days in January."

The street seems to have been filled so that the second floor became the first floor. She testified that she got her injury on the second floor, that is, the floor to which she moved; that she paid rent for the room that she occupied where she was injured; that her sister went and paid the

rent and took a receipt for it; that the toilet on the floor to which she moved was for two apartments, one on the south side, and one on the north side; that Mrs. Appleby occupied the one on the north side, and she occupied the one on the south side.

Mrs. Rankin testified to the manner of receiving her injury: "Well, I was very tired after moving, and I removed my shoes, and as I stepped out from the kitchen. * * * Q. Tell what happened? A. As I stepped out I got my heel on the threshold and stepped on a nail which went into the large part of my heel."

The plaintiff testified that she was an experienced nurse, but that she is unable to follow her business as a nurse since receiving the injury. She had taken instructions in nursing in Oklahoma City, and was also employed in the Clarkson Hospital in Omaha. She had about 20 years' experience.

Porter testified that he was at the building every day while his company had charge of it. Porter promised the plaintiff, according to her testimony, to keep up the repairs; but he denied it. Norlen seems to have had authority to make repairs. At least he made them when he saw fit. Porter made such repairs as he thought proper. Norlen and Porter were therefore engaged in looking after the building and in making repairs upon it. As Porter was the secretary of the Payne & Slater Company, which was the agent of the defendant company, he was not the servant of the defendant company, but an agent, while Norlen, who lived in the building, was the servant of the defendant company. He was the janitor and, like other janitors, lived in the basement of the building without paying rent.

The plaintiff's brother, Victor Snygg, was present when she was injured. He looked for the nail that inflicted the wound and could not find it. He could not spring the board down with the mere weight of his hand, but finally did it with the weight of his body resting on his knee. He said the nail would protrude a quarter of an inch.

The testimony of the witness Mrs. Anna Brown shows horrible suffering upon the part of the plaintiff. The doctor had removed the bones inside of the heel so that the witness could almost put her fist in the cavity. They would remove the bandage and pull the gauze out of the cavity. The last operation was more severe than those preceding it. "They dug into the bone still more, and I saw where they scraped it out until the red blood would come, too."

Dr. Mack testified that the wound was about a quarter of an inch deep, inflamed, and that there was a considerable discharge from it; that it was extremely tender, and that the plaintiff complained of severe pain; that he inserted a probe into the wound and found it to be about a quarter of an inch deep, and probably about an eighth of an inch in diameter; that blood poisoning had developed at the time of his examination; that when he opened the wound he cleansed the part as antiseptically as he could, and then put a little knife in carbolic acid and in alcohol and opened the wound with it; that he removed the tissue which was sloughing; that he then cauterized the wound, that is, burned it with carbolic acid; that after burning it out he applied antiseptic dressing; that the next day he removed the dressing and applied another antiseptic dressing; that the tissue was degenerating, that it was dying; that the next morning after that he was telephoned to come, and that he went to see her and found the foot badly swollen, and that she was suffering intensely, and he then took her to the hospital; that when they arrived at the hospital he immediately took her to the operating room and gave her an anaesthetic and opened the foot and gave it a thorough cleaning out; that he made an incision an inch and a half long in the heel and probably an inch in depth until he thought he had gotten beyond the area of infection; that this was on the 8th day of January, and on the 9th of January he dressed the foot, and again on the 10th of January, and found that the sloughing or dying of the tissue had gone

on beyond; that he operated on the foot again on the 10th; that the foot was opened still further and deeper and was cleaned out again; that he dressed her foot every day until the 22d of January, when she was operated on again, this time going still deeper and making the opening still larger; that he dressed the foot every day until the 17th day of February, when she was again given an anaesthetic and a very extensive operation was made; that the bone in the heel called the os calcis had completely degenerated, and it was removed, and practically all of the tissue within the heel was removed because of its sloughing; that he dressed the foot regularly until the 1st day of April, when the plaintiff was dismissed from the hospital; that each day he would pack into the wound a strip of gauze a yard long and about two and one-half inches wide; that he removed the packing and irrigated the foot with an antiseptic solution, using about two quarts of the same; that there were four operations, and that these operations were necessary; that the condition was the natural and probable result of the penetration of the nail into the foot producing the puncture which he found.

Dr. Mack testified that, because of the injury which she had received, the plaintiff would be unable, after walking a block or two, to stand on her foot; that there was no question but that there was a permanent injury of the nervous system beyond the removing of the bone. "Q. What would you say, in her condition, knowing all about the duties of nurses, whether or not she would ever be able to continue that calling of nursing? A. She will never be able to do general nursing. Q. She will never be able to do that? A. She will not." He also testified that she had been a good nurse; also, that she had received for her work $20 and $25 a week.

Mrs. McElhinney testified that she knew Mrs. Rankin to be very strong when she was a girl, and in perfect health before she was injured. She went to see Mrs. Rankin in the hospital every day for three months. She testified: "I saw Dr. Henry split her heel open clear to the bone,

turn it back and scrape it and take part of the bone away, and sew it up again."

We have carefully read all the evidence. The plaintiff was so injured that witnesses testify she will be unable to continue her occupation. The bones in the heel appear to have been removed. Apparently she is likely to be a cripple all her life.

In the sixth instruction the following language is complained of: "In considering the question as to whether the defendant knew of the condition of the threshold, you are instructed that the law charges the defendant with such knowledge as was actually brought to its attention, or such knowledge as it would have had, had it exercised ordinary care with respect to the premises." This cannot be prejudicial to the defendant, because if the defendant's servant had exercised ordinary care he would have known, and his knowledge must be the knowledge of the defendant. He was on the ground and what he did he did on behalf of the defendant.

The seventh instruction contains the idea that the defendant was only required to act as any ordinary person would have done under like circumstances, and, if the jury believe that the defendant so acted, then the defendant is not liable. We find nothing prejudicial to the defendant in this.

In *Young v. Rohrbough,* 84 Neb. 448, the law appears to be laid down that, where the landlord leased premises defective in construction and an injury occurs on account of such defective construction, then the landlord is liable for such injury, if he knew, or under all the circumstances ought to have known, of such defective condition. The plastering fell off the walls of the room and killed a lady member of one of the fraternal societies which rented it. The building was constructed by the Rohrboughs, but they afterwards sold and transferred it to the Commercial Building Company. In the suit brought by the administrator, the Rohrboughs and the Commercial Building Company were each made defendants. On the

trial of the case in the district court it was held that the Rohrboughs were not liable, but there was a verdict and judgment against the Commercial Building Company. It appealed. There was a contention made that, if the Rohrboughs were not liable, then the Commercial Building Company was not liable. This court held that the judgment was properly rendered against the Commercial Building Company. On a rehearing a new trial was granted, *Young v. Rohrbough,* 86 Neb. 279; but the rule laid down in the former *Rohrbough* case was left unmodified and unchanged, although the former judgment of this court was vacated and the judgment of the district court was reversed, yet it was for a new reason not before considered in the case, and based upon the doctrine that, "where all the defendants are by the court's instructions placed in the same relation with respect to the plaintiff, a verdict in favor of two defendants and against another, based upon conflicting evidence which is the same as to all of the defendants, will not be permitted to stand." In the body of the opinion it is said: "For the reasons above stated, our former judgment of affirmance is set aside, the judgment of the district court reversed as to the defendant Commercial Building Company, and the cause remanded for further proceedings." The opinion cites *Gerner v. Yates,* 61 Neb. 100, where it was held: "A verdict in favor of one defendant and against another, based upon conflicting evidence which is the same as to both defendants, cannot be permitted to stand as to either."

In the instant case the landlord specifically agreed, according to the evidence, to put the premises in good repair for occupancy and to keep them so. The threshold was in a dangerous condition at the time of making the lease, and at the time the plaintiff took possession of the premises, and it was made dangerous by the servant of the defendant, Norlen, and it was maintained in its dangerous condition by the defendant.

In *Carson v. Godley,* 26 Pa. St. 111, the landlord was held liable for injury resulting to the plaintiff in the

fall of the building in which poor material had been used, and which was poorly constructed. It was stated in the opinion: "Such is the eagerness of capitalists for large rewards that, when they undertake to build for the profits of rents, the temptation is strong to cheapen and slight the work. The safety of life and property is lost sight of in the dazzling prospect of a large rent from a small outlay. Foundations are put down and walls run up in such haste and with such materials as to be wholly inadequate for the purposes designed. * * * But where, as in the case before us, it is found, on abundant proof, there was no negligence either in the tenants or the plaintiff, it is a salutary rule of law that holds the owner answerable for his gross neglect in constructing and renting an insecure building."

As the defendant agreed with the plaintiff to put said premises in good tenantable condition and to keep the same in repair, the defendant is liable for the damages that resulted because of the breach of the contract which was made. The law should be so applied that the blame for the maintenance of the trap which Norlen constructed should be properly borne.

"If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured." *Edwards v. New York & H. R. Co.*, 98 N. Y. 245.

This case is widely different from *Davis v. Manning*, affirmed in 97 Neb. 658, and reversed and overruled on rehearing in 98 Neb. 707. The plaintiff in that case alleged that a part of the floor of the kitchen near the stove was in a dangerous and defective condition; that the "under portion of the boards of the floor were rotted, leaving but a thin upper part solid and apparently strong; that the floor at said place was near the ground; that the defendants, and each of them, knew, and should have known by the exercise of reasonable diligence, of the dangerous and

defective condition of said floor at said place;" that they apparently failed to notify the plaintiff; that Manning constructed the building in about 1875 and lived in it many years; that he knew that the floor was near the ground and that under parts would rot; that the plaintiff was preparing her breakfast and was standing before the stove and was about to step from the stove to the pantry; that she was standing on the said rotten and defective floor when "a part of one of the floor boards broke through, causing a hole 7 by 2½ inches in size, into which the heel and a portion of plaintiff's left foot passed, thereby throwing plaintiff, while the heel of her foot remained in said hole, onto the floor on her left side, * * * and fracturing and breaking her left thigh bone, and fracturing two of the lower ribs on her left side."

The main difference between the instant case and the case cited is that in the case cited the plaintiff had a much better opportunity to know the facts than the plaintiff in this case. In the case cited the sloping ground which would carry the water under the house was visible. That there was no ventilation could also be seen. That the house had been constructed a long time was apparent by looking at it; that there were cracks in the floor that had been covered with tin, and which showed that the floor had rotted out and was in a very defective condition. In the case cited, of course, all of these things were visible to the plaintiff. In the instant case the sharp, pointed nail was concealed. The operation of the springy board was unknown. The plaintiff had no reason to know anything about it.

The opinion on the rehearing in *Davis v. Manning, supra,* does not demand the reversal of the judgment of the district court in this case. The verdict is for $8,750 in favor of the plaintiff. It is fully sustained by the evidence, and does not seem to be excessive when the injury done is considered. We are unable to say that there is

error in the proceeding of the district court, and the judgment appears to be right.

The judgment of the district court is

AFFIRMED.

LETTON and ROSE, JJ., dissenting.

SEDGWICK, J., not sitting.

CUSHMAN C. HALL V. STATE OF NEBRASKA.

FILED JUNE 3, 1916. No. 19451.

1. **Constitutional Law:** SALE: CHOLERA SERUM. Section 2, ch. 170, Laws 1915, providing: "No person, firm, or corporation shall sell, barter, exchange, carry, give away, ship or deliver for shipment any anti-hog cholera serum or virus within the state of Nebraska unless such person, firm, or corporation shall first hold an uncanceled, unexpired United States government veterinary license, issued by the United States Department of Agriculture, and a permit from the Live Stock Sanitary Board"—is an attempted restriction on the power of the citizen to buy and sell anti-hog cholera serum, and is unconstitutional, for the reason that any person has the right to adopt and follow any lawful industrial pursuit which is not injurious to the community.

2. **Monopolies:** ACT IN RESTRAINT OF TRADE. Such act, in effect, gives a monopoly to the serum-manufacturing plant, because it is the plant that is licensed under the federal act, and section 2 of the Nebraska act gives the right to sell, barter, exchange, carry, or give away to the person holding an unexpired and uncanceled United States Veterinary license issued by the United States Department of Agriculture; such person being the only person allowed to hold a permit from the Live Stock Sanitary Board.

3. ———: ———: ———. It is provided in 37 U. S. St. at Large, ch. 145, pp. 832, 833: "That from and after July 1, 1913, it shall be unlawful for any person, firm, or corporation to prepare, sell, barter, or exchange, * * * or to ship or deliver for shipment from one state or territory * * * to any other state or territory * * * any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product intended

for use in the treatment of domestic animals." It is also provided that no person, firm, or corporation shall prepare, barter, exchange or ship such virus, serum or toxin unless and until the same shall have been prepared under and in compliance with regulations prescribed by the secretary of agriculture and at an establishment holding an unsuspended and unrevoked license issued by the secretary of agriculture. As it is only an establishment of this kind that is permitted such a license, section 2 of the Nebraska act confines the right to sell, barter, exchange, carry, give away, ship or deliver for shipment such anti-hog cholera serum to the *plant* holding such license, and no *person* may have such permit under the Nebraska act, for only a *plant* is licensed.

4. **Constitutional Law:** ACT IN RESTRAINT OF TRADE. Section 9, ch. 170, Laws 1915, provides: "No person, firm, or corporation shall give or accept a rebate or commission on any anti-hog cholera serum or virus that is sold or offered for sale within the state of Nebraska"—and also provides a punishment for the violation of the act. This is an additional bar preventing the farmer from purchasing serum with which to treat his own hogs, and preventing the veterinary surgeon from purchasing serum with which to treat the hogs belonging to his employers. Because of the bar of this provision, section 9 of the state law is unconstitutional and void.

ERROR to the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed and dismissed.*

Arthur F. Mullen, for plaintiff in error.

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

HAMER, J.

The plaintiff in error, Cushman C. Hall, seeks to review the judgment of the district court for Douglas county. He was fined $50 and costs. The first count in the information charges the unlawful selling by the defendant on the 6th day of August, 1915, to Frank C. Mitchell of 500 cubic centimeters of anti-hog cholera serum for the sum of $12; that the defendant at the time of the sale did not hold an uncanceled, unexpired United States veterinary license issued by the United States Department of Agriculture, and did not hold a permit from the Live Stock Sanitary

Board of the state of Nebraska to sell anti-hog cholera serum; that said defendant had not given a bond to the said sanitary board in the sum of $5,000 prior to the sale of the said serum; and that said defendant unlawfully and knowingly sold said serum without having complied with any of the provisions of chapter 170, Laws 1915. The second count charges that at the time of the said sale there was no price marked on the bottle containing said serum, and therefore that the sale was unlawful and in violation of the provisions of said chapter. The third count charges the receipt by the said defendant of a rebate of $1 paid by the said Mitchell, and that the same was so received by said defendant wilfully, knowingly, and unlawfully. The three offenses charged are all alleged to arise out of the same transaction. The defendant demurred to each count in the information, and each demurrer was overruled. At the conclusion of the introduction of the evidence, the defendant moved that the court find him not guilty. This motion was overruled.

It is claimed by the defendant that the district court erred in holding that the law under which the prosecution is brought is constitutional. Laws 1915, ch. 170. In the brief of the attorney general it is said that "The state is compelled to concede that the act contains provisions that are inconsistent, and that the law as passed does not answer satisfactorily the purpose for which it was enacted."

Section 2 of the state law is as follows: "No person, firm, or corporation shall sell, barter, exchange, carry, give away, ship or deliver for shipment any anti-hog cholera serum or virus within the state of Nebraska unless such person, firm, or corporation shall first hold an uncanceled, unexpired United States government veterinary license, issued by the United States Department of Agriculture, and a permit from the Live Stock Sanitary Board." Laws 1915, ch. 170.

The Department of Agriculture, realizing the losses that were resulting to the hog raisers of the country from the promiscuous manufacture and distribution of anti-hog cholera serum, secured the enactment of a law intended

to regulate the preparation, sale and distribution of such serum. The act provides that after July 1, 1913, it shall be unlawful to prepare, sell, barter or exchange in the District of Columbia, or in the Territories, or in any place under the jurisdiction of the United States, any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product intended for use in the treatment of domestic animals; also, that no person, firm, or corporation shall prepare, sell, barter, exchange, or ship any virus, serum, toxin, or analogous product manufactured within the United States and intended for use in the treatment of domestic animals *unless and until* the said virus, serum, toxin, or analogous product shall have been prepared under and in compliance with regulations prescribed by the Secretary of Agriculture at an establishment holding an unsuspended and unrevoked license issued by the Secretary of Agriculture. The act further prohibits the importation into the United States of any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product. The Secretary of Agriculture is authorized to cause the Bureau of Animal Industry to examine and inspect all viruses, serums, and analogous products imported into the United States, or offered for importation, and the same are denied entry if it appears that they are worthless, dangerous or harmful. The Secretary of Agriculture is also authorized to prepare such rules and regulations as may be necessary to prevent the preparation, sale, barter, exchange, or shipment of any such worthless, dangerous, or harmful virus, serum, or toxin. He is also authorized to issue permits for the importation into the United States of viruses, serums, toxins, and analogous products for use in the treatment of domestic animals. Each license is to be issued on condition that the licensee shall permit the inspection of such establishment, and of such product and the preparation of the same, and the Secretary of Agriculture is authorized to suspend or revoke any permit or license issued under authority of the act after an opportunity for hearing has been granted to the licensee or importer; also,

any officer, agent, or employee of the Department of Agriculture is authorized by the Secretary of Agriculture to enter and inspect any establishment licensed under the act where any virus, serum, toxin, or analogous product is prepared for sale, barter, exchange, or shipment. Violation of the act is to be deemed a misdemeanor, and conviction is to be punished by a fine not exceeding $1000, or imprisonment not exceeding one year. 37 U. S. St. at Large, ch. 145, pp. 832, 833.

It will be seen that the act provides that plants shall be licensed, and that they may not prepare this serum for shipment unless they are licensed. A United States veterinary license does not appear to have been provided for the use of a *person,* but for the use of manufacturers of the serum. *The license is to the plant.* The Nebraska act seeks to give to those manufacturers the exclusive right to sell the serum, and it denies to the citizen of Nebraska the right to sell it. The manufacturing plant, under the federal act, gets a United States veterinary license issued by the Department of Agriculture. The provision of section 2 is that there shall be no permit from the Live Stock Sanitary Board, except to one who holds a license from the United States Department of Agriculture. The effect of this is that no person may have a license, and a license can only be issued to the manufacturing plant, which alone may sell. This provision contained in section 2 creates a monopoly, because it confines the sale of the serum to the plant which manufactures it.

The attorney general says: We are compelled to concede that the law as passed contains inconsistent provisions as already pointed out, and we do not argue for the approval of the law in its present form. He then declines to "discuss particularly the constitutional questions so extensively considered in defendant's brief." The license issued is to those engaged in the manufacture of serum. The federal permit is designated a "United States government veterinary license." We do not understand that the federal government undertakes to regulate those

who sell serum after it has been disposed of by the manufacturer. The act of 1915 undertakes to prevent the citizens of this state from buying and selling serum unless they have a United States government veterinary license. As the United States government does not issue such a license, except to the manufacturer, the effect of the Nebraska act is that no one has a right to sell serum except those who manufacture it. This creates a monopoly. Of necessity it must be wrong. The legislature does not have the power to deprive its citizens of the right to sell serums that are up to the standards prescribed by law and which have been manufactured in establishments approved by the federal government.

Section 3, art. I of the Constitution, provides: "No person shall be deprived of life, liberty, or property, without due process of law."

Section 9, ch. 170, Laws 1915, provides, among other things: "No person, firm, or corporation shall give or accept a rebate or commission on any anti-hog cholera serum or virus that is sold or offered for sale within the state of Nebraska. Any person, firm, or corporation, violating any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum, not less than ten dollars ($10) and not more than five hundred dollars ($500)."

This is an additional bar preventing the farmer or veterinary surgeon from purchasing serum with which to treat hogs.

"While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation." Cooley, Constitutional Limitations (7th ed.) p. 504.

A person living under the protection of the United States government has the right to adopt and follow any

lawful industrial pursuit, not injurious to the community, which he may see fit, and, as incident to this, the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, and to inherit, purchase, lease, sell and convey property of all kinds. The enjoyment or deprivation of these rights and privileges constitutes the essential difference between liberty and oppression. These principles have been fully recognized and announced in many decisions of the supreme court of the United States, and other courts. *Yick Wo v. Hopkins,* 118 U. S. 356.

In *Braceville Coal Co. v. People,* 147 Ill. 66, 22 L. R. A. 340, the question of the right to enter into contracts by which labor may be performed in such a way as the laborer may deem beneficial to others to employ such labor was considered. The legislature passed an act requiring a regular payment of wages by certain classes of corporations. The court held that this was arbitrary and unconstitutional; that the employer and employee had a right to make lawful contracts regarding the time of payment. In discussing the right to enter into contracts, the court said: "The fundamental principle upon which liberty is based, in free and enlightened government, is equality under the law of the land. It has accordingly been everywhere held that liberty, as that term is used in the Constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare." *Commonwealth v. Perry,* 155 Mass. 117, 14 L. R. A. 325; *People v. Gillson,* 109 N. Y. 389.

In *Commonwealth v. Perry, supra,* it was said: "Article I, sec. 10 of the Constitution of the United States, provides, among other things, that no state shall pass any 'law impairing the obligation of contracts.' The right to acquire, possess, and protect property includes the right to make

reasonable contracts, which shall be under the protection of the law. * * * The right to employ weavers, and to make proper contracts with them, is therefore protected by our Constitution; and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right which are expressly recognized in our Constitution."

Adair v. United States, 208 U. S. 161, and *State v. Sperry & Hutchinson Co.,* 94 Neb. 785, support the views here expressed. The act creates a combination in restraint of trade. It permits the manufacturers of serum to monopolize the entire business of selling it in the state. It also makes it unlawful for any other person than the makers of serum to sell or vend it.

If this law is permitted to stand, it means that the serum plants in Nebraska which have received a United States government veterinary license have a monopoly of the right to sell anti-hog cholera serum. The law not only seeks to give these serum plants a monopoly on the right to sell serum, but it attempts to fix the price by requiring the manufactures to mark on the outside of the bottle the price at which it is sold, and then provides further that it is a misdemeanor for any one to give or accept a rebate or commission on any serum sold. It creates a monopoly of the right to sell, and then requires those who have the monopoly to fix the price, and then it makes it unlawful for them to change the price.

It is provided in section 1, art. XIV of Amendments to the Constitution of the United States: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We are of the opinion that the second and ninth sections of the act are unconstitutional, and that there is no law justifying the imposition of the fine sought to be imposed.

The judgment of the district court is reversed, the case dismissed, and plaintiff in error discharged.

REVERSED AND DISMISSED.

LETTON and ROSE, JJ., dissent.

SEDGWICK, J., dissenting.

The defendant was found guilty of selling anti-hog cholera serum without complying with the statute. Laws 1915, ch. 170. He has brought the case to this court, and insists that the statute is unconstitutional and wholly void. The majority opinion appears to so hold. In the first paragraph of the syllabus it is said that section 2 of the act is void, "for the reason that any person has the right to adopt and follow any lawful industrial pursuit which is not injurious to the community." The second paragraph of the syllabus says: "Such act," meaning, I take it, the above cited statute, "in effect, gives a monopoly to the serum manufacturing plant." And the third paragraph says: "No person may have such permit under the Nebraska act, for only a plant is licensed." In the opinion it is said: "The Nebraska act seeks to give to those manufacturers the exclusive right to sell the serum. * * * A license can only be issued to the manufacturing plant, which alone may sell. This provision contained in section 2 creates a monopoly, because it confines the sale of the serum to the plant which manufactures it." This idea is repeated several times in the opinion, and it seems that the intention is to hold the entire act void because of the construction that is put upon section 2 of the act. The attorney general concedes that section 2 of the act, construed literally, is inconsistent with other provisions of the act, and contends that the section should be construed in the light of the other provisions, and so render the meaning plain as the legislature intended. This sugges-

tion of the attorney general is not discussed nor even mentioned in the opinion, and so it appears that the whole act is rendered unconstitutional by the use of the word "and," instead of the word "or," in one section of the act, although in a similar provision in another section (section 9) the legislature has clearly expressed its meaning, and has even used the proper conjunction in so doing.

Congress had undertaken to regulate the manufacture and sale of "virus, serum, toxin, or analogus product" in the territories and in interstate commerce. The object of our statute was to regulate the manufacture and sale of the serum within the state. The intention was to require a state license in those cases that were not, and under the provisions of the Constitution could not be, regulated by the federal government, and so this statute was enacted to supplement the act of congress. It was intended that any one properly authorized by the act of congress to manufacture and sell the serum should be recognized by this statute as authorized to do so, and that other persons might be authorized to manufacture and sell the same within the state. The intention of the legislature was to recognize those who were duly authorized by act of congress as being fully authorized, and to require others who were not governed by that act to obtain a license from the state.

It is stated in the title of the act that the purpose of the act is: "To empower the State Veterinarian, Deputy State Veterinarian, through the Live Stock Sanitary Board, to permit the manufacture, sale, distribution, and to report on application of anti-hog cholera serum and virus, as provided in this act." The first section of the act prohibits the sale, etc., of the serum "as hereinafter provided," and by section 9 of the act no one is to sell the serum without the license of the state, or the Department of Agriculture, or both. Section 6 of the act provides that section 1, which is the section which makes it unlawful to sell the serum, except as provided in the act, "shall not apply to persons, firms, or corporations who

have complied fully with the regulations and orders of the Live Stock Sanitary Board, and shall have received a permit to sell serum or virus in this state." This is a direct provision that it shall not be unlawful for persons who have a permit from the state to "sell, barter, exchange, carry, give away, ship or deliver for shipment, any anti-hog cholera serum or virus within the state of Nebraska." Section 2 of the act, which is now held to invalidate the whole act, provides that no person, firm, or corporation shall sell, etc., the serum, within this state unless he is authorized by the act of congress *and* has a permit from the state. The purpose of the act and all of its provisions construed together indicate that this section should be construed as though it read, "Any person, firm, or corporation who shall hold a government license and any person who shall hold a permit from the state may sell," etc. This meaning would be given to the statute if the conjunction "or" had been used in place of the conjunction "and," and where it is so manifest that that is the intention, such intention being plainly expressed, as we have seen in the title and other sections of the act, it is always held permissible to read the conjunction "or" in place of the conjunction "and." There can be no possible doubt that this was the intention and meaning of the legislature.

That the manufacture and sale of this serum in this state is a proper subject of regulation within the police power of the state cannot be doubted, and the act of the legislature, which appears to be necessary and proper legislation in all other respects, ought not to be held invalid for the inadvertent use of the wrong conjunction in one of the sections. The fourth paragraph of the syllabus says that section 9 of the state law "is an additional bar preventing the farmer from purchasing serum with which to treat his own hogs, and preventing the veterinary surgeon from purchasing serum with which to treat the hogs belonging to his employers," and "because of the bar" section 9 is void. I do not think that this section calls

for such discussion and criticism; but, as the whole act is declared void, and it is doubtful if effective regulation of the subject is possible under the majority opinion, I will not discuss this ninth section.

HERMAN STEINKUHLER V. STATE OF NEBRASKA.

FILED JUNE 23, 1916. No. 19585.

1. **Intoxicating Liquors**: SALES TO MINORS. "In a prosecution against a saloon-keeper for selling intoxicating liquors to a minor, it is no defense that accused acted in ignorance of the minor's age and without any intent to violate the law." The mere fact of selling intoxicating liquors to a minor constitutes the entire offense. *Seele v. State*, 85 Neb. 109.
2. ———: ———: SALES BY EMPLOYEES. In the sale of intoxicating liquors to minors, the owner or keeper of a saloon is responsible for the acts of his servants and employees, and a sale by an employee or bartender of a saloon-keeper is, in law, a sale made by the saloon-keeper himself, unless such sale is made in defendant's absence and in violation of his orders.
3. ———: ———: QUESTION FOR JURY. If sales are made to any minors by a saloon-keeper's bartenders, without his authority and against his will, contrary to his instructions and when he was not present, he would not be responsible in a criminal prosecution for such sales; but whether instructions not to sell to minors are given by the saloon-keeper to his bartenders in good faith with the expectation that they will be obeyed, and with the intention that they should operate as a limitation upon the authority of such bartenders to make sales to minors, is a question of fact to be determined by the jury.
4. ———: CONVICTION: SUFFICIENCY OF EVIDENCE. The bill of exceptions examined, and *held* that the evidence was sufficient to sustain the conviction.

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

JAY C. MOORE, for plaintiff in error.

Willis E. Reed, Attorney General, Charles S. Roe and *S. P. Davidson, contra.*

BARNES, J.

Herman Steinkuhler was tried by the district court for Johnson county on an information containing 20 counts, each of them charging him with having sold intoxicating liquor to minors. To the information Steinkuhler pleaded not guilty. A jury was impaneled, the evidence was taken, and the court instructed the jury, among other things, to find the accused not guilty on the eighth count of the indictment. After deliberation the jury returned a verdict of guilty on the other 19 counts of the indictment. A motion for a new trial was filed and overruled, and the accused was sentenced to pay a fine of $25 on each count, together with the costs of the prosecution. He has brought the case to this court by a petition in error, and hereafter the defendant in error will be designated as the state, and Steinkuhler will be called the defendant.

It is defendant's contention that the evidence was not sufficient to sustain the verdict, and he argues that no fair-minded man could say that he was guilty of the offense charged beyond a reasonable doubt. This point, however, is not pressed with much vigor, and indeed we think it could not have been seriously relied on for a reversal of the judgment. The testimony fairly shows that the defendant had been engaged in the sale of intoxicating liquors in Sterling, Nebraska, for several years; that he was well acquainted with the young men and boys in that vicinity; that he saw them frequently in his saloon, and his bartenders served them whenever they ordered intoxicating liquors, without objection or even reproof on his part; that he had sometimes served them with such liquors himself. The testimony also shows that the persons mentioned in the indictment as minors, to whom intoxicating liquors had been sold, were well known by the defendant and his bartenders to have been less than 21 years of age. The evidence contained in the bill of exceptions was amply sufficient to sustain the verdict on each count of the indictment.

Defendant's second contention is that the court erred in giving the jury instruction No. 8 on his own motion. That instruction reads as follows: "If you find from the evidence beyond a reasonable doubt that a sale of intoxicating liquor was made by the defendant to any of the persons, minors, as alleged in the indictment, then it is not necessary for the state to prove the intent or motive of the defendant in making such sale. Neither is it necessary for the state to prove that such sale was made to the minor knowingly. A liquor dealer is bound to know that the person he sells liquor to is not a minor, and ignorance of the age of the person to whom the liquor was sold is no excuse, and, irrespective of good faith and honest intention, the mere fact of selling liquor to a minor constitutes the entire offense."

This court has spoken upon the above question in *Seele v. State*, 85 Neb. 109, where it was said: "In a prosecution against a saloon-keeper for selling intoxicating liquors to a minor, it is no defense that accused acted in ignorance of the minor's age and without any intent to violate the law." We adhere to the rule there announced, and the defendant's second contention is therefore overruled.

It is next contended that the court erred in refusing to give instruction No. 1, requested by the defendant, which reads as follows: "You are instructed that a sale of intoxicating liquor made by a servant without the express or implied authority of his master is not a sale by the master. And if you should find from the evidence in this case that a sale of liquor was made to a minor as alleged in the indictment by the servants of defendant Steinkuhler, and being against his express instructions, and not with his knowledge or consent and in violation of his orders, the defendant would not be responsible for such sale and your verdict should be not guilty."

The record discloses that the court was justified in refusing to give this instruction.

Instruction No. 11, given by the court on his own motion, reads as follows: "In the sale of intoxicating liquors to

minors the owner or keeper of a saloon is responsible for the acts of his servants and employees, and a sale by an employee or bartender of a saloon-keeper is, in law, a sale made by the saloon-keeper himself, unless such sale is made in defendant's absence and in violation of his orders." This was followed by instruction No. 12, which reads: "If sales were made to any minors as alleged in the indictment by the defendant's bartenders, without defendant's authority and against his will, and contrary to his instructions, and when he was not present, such sales would not be the defendant's acts and he would not be responsible in a criminal prosecution for such sales. But whether instructions not to sell to minors were given by the defendant to his bartenders in good faith with the expectation that they would be obeyed and with the intention that they should operate as a limitation upon the authority of such bartenders to make sales to minors is a question for you to determine from the evidence."

The rules contained in the instructions just quoted were approved by this court in *Moore v. State*, 64 Neb. 557, and in *In re Berger*, 84 Neb. 128. It thus appears that the instructions given by the court avoided the necessity of giving the requested instruction.

Having answered all of the defendant's assignments, and finding no reversible error in the record, the judgement of the district court is

AFFIRMED.

BANKERS SURETY COMPANY, APPELLEE, V. JABEZ S. CROSS, APPELLANT.

FILED JUNE 23, 1916. No. 18957.

Indemnity: COUNSEL FEES. A saloon-keeper's surety which has procured from a third person indemnity against all suits, charges, and expenses, including costs and counsel fees, by reason of such

suretyship, may recover from the indemnitor necessary counsel fees and expenses paid in defending an action on the saloon-keeper's bond against the principal and the surety, where the latter had reasonable cause to believe and did believe that such action on its part was necessary, though the principal had employed competent counsel to make a defense.

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

I. J. Dunn, for appellant.

W. C. Fraser, contra.

ROSE, J.

This is an action by plaintiff, the Bankers Surety Company, to recover $437.70 on a contract of indemnity executed by defendant. Plaintiff became surety on the bond of John R. Hauber, a saloon-keeper in Nebraska City, but, before doing so, procured from Jabez S. Cross, defendant, a contract in the penal sum of $5,000, indemnifying plaintiff "against all suits, actions, debts, damages, demands, costs, charges, and expenses, including costs and counsel fees," by reason of plaintiff's suretyship. Subsequently Hauber and the Bankers Surety Company, surety on his bond, were sued for damages on account of the sale of intoxicating liquors. Hauber employed an attorney to defend the suit, and the surety company by its own attorney filed a separate answer and joined in the defense. After the trial had been commenced a compromise was effected. The present action was instituted to recover from Cross, the indemnitor, counsel fees, expenses and costs paid by the surety in defending the former action. The jury rendered a verdict in plaintiff's favor for $381.12, and from judgment thereon defendant has appealed.

The indemnitor contends that the evidence is insufficient to sustain a verdict in favor of the saloon-keeper's surety, under the instructions of the court. The court instructed the jury that, if the surety had reasonable cause to believe that it would suffer loss unless it employed an attorney

to assist in the defense, it would be entitled to recover the reasonable value of the attorney's fees and the amount of expenses and costs paid. It is insisted there is no proof that the surety had reason to believe that it was necessary to employ counsel in addition to that furnished by Hauber, the saloon-keeper. There was evidence tending to show that when the former action was commenced Hauber's attorney notified the surety of the suit. No answer was filed on behalf of the surety except by its own attorney. The surety's attorney conferred with Hauber's attorney in reference to the trial of the case and also interviewed the witnesses for the defense. Some of the necessary witnesses lived in Iowa and refused to attend the trial without payment of their fees in advance. Hauber refused to advance the fees, and his surety did so. The evidence seems to justify a finding in favor of the surety on this issue.

It is also contended that, since Hauber had employed counsel and since the indemnitor was financially responsible, the surety was not justified in employing additional counsel. The indemnity contract provided:

"If the above bounden J. S. Cross, his executors or administrators shall, at all times hereafter, save harmless and keep indemnified the said the Bankers Surety Company, its successors and assigns against all suits, actions, debts, damages, demands, costs, charges, and expenses, including court costs and counsel fees at law or in equity, and against all loss and damages whatever, that shall or may at any time hereafter happen or accrue to the said the Bankers Surety Company, its successors or assigns, for or by reason of the suretyship of the said the Bankers Surety Company, as aforesaid, then this obligation to be void and of no effect, otherwise to be and remain in full force and virtue in law."

The surety was a codefendant in the suit against Hauber on his bond. The indemnity contract was the obligation of Cross, the indemnitor, and not that of Hauber. It indemnifies the surety against all suits and against all loss and damages, including counsel fees and expenses.

That Hauber had employed competent counsel did not necessarily prevent his surety from taking necessary steps to defend itself against liability in an action in which it was answerable as a codefendant. *American Surety Co. v. Vinsonhaler,* 92 Neb. 1, is relied upon by indemnitor, but that case is distinguishable. The language used in the opinion supports the position of the surety. In the opinion it was stated: "No doubt under this contract the surety ought to be protected against all necessary expenses incurred in defending itself against liability on these bonds, and should be allowed to exercise a reasonable discretion as to necessary measures of defense; but the allegations of this petition indicate that the expenses sued for were unnecessary, and there is no allegation of circumstances showing any necessity for such expense, or even that the surety regarded such expense necessary."

In the present case the evidence justified a finding that the surety believed, and had reasonable cause to believe, that the expenses incurred were necessary. The judgment is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

ANNA SCHMINKE, APPELLANT, V. DORA SINCLAIR ET AL., APPELLEES.

FILED JUNE 23, 1916. No. 18967.

1. **Wills:** DEVISE: CONSTRUCTION. While a limitation repugnant to a devise of the fee is void, a subsequent clause disposing of the property on the death of the devisee may be considered an indication of the testator's intent, by means of the previous clause, to devise a life estate only, where such previous clause does not clearly and unequivocally devise the fee.
2. ———: ———: ———. A devise to testator's widow "so long as she shall continue my widow and unmarried," the property, in the event of her marriage or death, to be divided equally among the testator's children, vests in the widow a life estate only.

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

George W. Berge and *L. F. Jackson,* for appellant.

Paul Jessen and *Livingston & Heinke, contra.*

ROSE, J.

This is an action for the construction of the will of Paul Schminke, who died in Otoe county, December 25, 1892. Plaintiff is his widow, and defendants are his heirs. The will provided:

"(1) I devise and bequeath all the estate and effects whatsoever and wheresoever, both real and personal, to which I may be entitled or which I may have power to dispose of at my decease unto my dear and beloved wife, Anna Schminke, so long as she shall continue my widow and unmarried; and in the event of her marriage or death I devise and bequeath the same to my children, to be divided between them as nearly as may be possible in equal shares, except as follows:

"(2) I devise and bequeath to each of my sons, D. William Schminke and Charles Schminke, an additional sum of one thousand ($1,000) dollars in cash.

"(3) And to my daughters, Mrs. Dora Sinclair and Augusta Schminke, an additional sum of five hundred ($500) dollars in cash to each of them."

From a judgment of the district court decreeing that plaintiff took a life estate only, she has appealed.

Plaintiff contends that the will vested in her a fee simple estate, subject to remarriage. She invokes the statute providing that every conveyance shall pass all the interest of the grantor therein unless a contrary intent appears. Rev. St. 1913, sec. 6192. She argues that the first clause devised a fee, subject to remarriage, and that the subsequent limitation was void as being repugnant to the fee. *Little v. Giles,* 25 Neb. 313.

The contention of plaintiff is answered in *Loosing v. Loosing,* 85 Neb. 66, 74, wherein it is said: "The intent

of a testator must control, and will be ascertained from the language of the will aided somewhat by a consideration of the facts and circumstances surrounding the testator as reflected from the evidence, but that intent will not be inferred in flat contradiction to, and in violation of, well-established rules of law. We are committed to the principle that, if a testator in his will devises an estate in fee simple, a subsequent clause attempting to devise over any part of that estate is void. *Spencer v. Scovil,* 70 Neb. 87. We are satisfied with the principle stated in the cited case. The difficulty arises in applying the rule to the facts in the particular case. The rule does not of necessity apply merely for the reason that the first clause considered by itself might be construed as conveying a fee simple. The later clause, or clauses, may be read in connection with the first one for the purpose of advising the court whether it actually did transfer the fee, and if it does not in itself clearly and unequivocally do so, and by a comparison thereof with the remaining parts of the instrument the court is convinced that the testator did not in fact intend to vest the greater title in the first taker, the instrument will be construed accordingly."

The intention of the testator as expressed in his will as a whole was to give his widow an estate which should terminate in the event of her marriage or death. In other words, he intended that, upon her death, or sooner in case of her marriage, the estate should be divided equally among all of his children. The intention to give his children a share of his estate is manifest. General and equivocal words in the first part of the will which, standing alone, might vest the fee in plaintiff are to be considered as limited by the subsequent clauses evidencing an intent to devise only a life estate.

The judgment of the district court is therefore

AFFIRMED.

WILLIAM E. WHITTIER, APPELLEE, V. LORRIN J. RILEY, APPELLANT.

FILED JUNE 23, 1916. No. 18884.

Replevin: RIGHT OF ACTION. Where a contract of sale of a stock of merchandise provides that the seller shall retain possession of the stock until he has been paid from the sales thereof all above a stated sum, and that the purchaser shall take charge of and manage the business and out of the proceeds retain a sufficient sum to pay the actual running expenses of the business, and the profits on stock sold, over and above the invoice price plus 8 per cent. for freight, and the parties both enter into possession of the stock and business under such agreement, each party will be held to be in possession of the entire stock, jointly with the other, but for different purposes, the purchaser for the purpose of conducting the business and the seller for the purpose of protecting his security by taking the money received from sales under the terms of the contract until the stock has been reduced to the amount of the purchaser's stipulated interest; and replevin will not lie at the suit of either to disturb the possession of the other.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Reversed and dismissed.*

Hoagland & Hoagland and *E. A. Cook,* for appellant.

George C. Gillan and *Munson & Munson, contra.*

FAWCETT, J.

Plaintiff commenced this action in replevin in the district court for Dawson county, to recover possession of a stock of hardware and farm implements, then in the possession of defendant. Plaintiff prevailed, and defendant appeals.

On February 25, 1913, plaintiff and defendant entered into a written contract, by the terms of which defendant agreed to convey to plaintiff a tract of land in Phillips county, Colorado, for an agreed consideration of $6,250, in addition to a trust deed, standing against the land, in

the sum of $3,750, which plaintiff assumed and agreed to pay. Plaintiff, in exchange for defendant's equity in the land, agreed to sell and transfer to defendant a stock of hardware, implements, etc., situated in two certain buildings in the city of Gothenburg, in this state. Defendant was to take the stock at wholesale cost plus 8 per cent. to be added for freight, and was also to take the fixtures at cost of the same to plaintiff. The contract recited that it was known to the parties that the stock would invoice more than $6,250, and provided that plaintiff should keep and retain possession of the stock until enough had been sold to reduce the same, together with the fixtures, to $6,250; that plaintiff, in retaining the receipts from sales until the stock was reduced, should allow defendant, out of the receipts, a sufficient amount to pay the actual running expenses of the business. The profits on stock sold, over and above the invoice price plus 8 per cent., were to belong to defendant. The stock was to be reduced by May 10. It was not reduced by that date, and the time was extended to May 17. The stock not having been sufficiently reduced by the latter date, a controversy between the parties arose, and each attempted to lock the other out of the building. Defendant gained possession, and on August 28 was ousted by injunction, which was subsequently set aside and defendant restored to possession. September 8, 1913, plaintiff obtained exclusive possession under the writ in the present action. After the contract was entered into, an inventory of the stock was taken; whereupon defendant executed and delivered to plaintiff a deed to the Colorado land, and took the management and control of the business at Gothenburg. Upon the trial the district court, by request of the parties, construed the contract. The construction made by the court appears in the record. By that construction, the court found the transaction to be as above stated, and further found: "Riley (defendant) is in possession to manage and run the business. He bears the running expenses and the rent of the building. As consideration for the expenses and

rent, Riley gets the profit in all goods sold above invoice price and 8 per cent. added for freight. Whittier (plaintiff) is in possession of all the stock, as security for the difference between $6,250 and the invoice value of the stock."

The evidence sustains the construction of the court that defendant was in possession to manage the business; that he was to bear the running expenses and the rent of the building; and that plaintiff was in possession as security for the difference between $6,250 and the invoice value of the stock. It appears from the evidence that after the invoice was made defendant took charge of the business and thereafter conducted it in his name. The letter-heads and other stationery were in his name. New goods were purchased in his name and charged to his account. This being the status of the parties, could either maintain replevin against the other? We think not. Each party was in possession of the entire stock, jointly with the other, but for different purposes. Defendant was in possession for the purpose of conducting the business, and plaintiff for the purpose of protecting his security by taking the money received from sales, less the cost of conducting the business. Neither party had the right to disturb the possession of the other. Without pursuing the matter further, we think the court erred at the conclusion of the trial in not dismissing plaintiff's action, as it is clear, under the very wording of the contract itself, and still more so when taken in connection with the evidence, that if plaintiff is entitled to relief of any kind it is not by an action in replevin.

The judgment of the district court is reversed and plaintiff's action dismissed, all at plaintiff's costs.

REVERSED AND DISMISSED.

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

LORRIN J. RILEY, APPELLEE AND CROSS-APPELLANT V. WILLIAM E. WHITTIER, APPELLANT AND CROSS-APPELLEE.

FILED JUNE 23, 1916. No. 18934.

1. **Partition:** PERSONAL PROPERTY. A court of equity has jurisdiction to decree partition or, if necessary, a sale of personal property owned in unequal shares by two parties each of whom has a right of possession.
2. **Evidence** examined, and *held* sufficient to sustain a suit for an accounting and for the partition of personal property.

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

George C. Gillan and *T. E. Munson,* for appellant.

E. A. Cook and *Hoagland & Hoagland, contra.*

FAWCETT, J.

From a decree of the district court for Dawson county, ordering a partition of the stock and fixtures of a hardware and implement business, in the city of Gothenburg, and stating an account of the interests of the parties therein, defendant appeals, and plaintiff presents a cross-appeal.

February 25, 1913, plaintiff and defendant entered into a contract whereby plaintiff sold to defendant a tract of land in Phillips county, Colorado, the consideration being $6,250 and the assumption by defendant of a mortgage of $3,750. The consideration of $6,250 was to be paid by the transfer to plaintiff of defendant's stock of hardware and implements at Gothenburg. It was known at the time that the stock would invoice more than $6,250, and it was provided that defendant should retain possession of the stock until it was reduced to $6,250. Plaintiff was to conduct the business. Actual expenses were to be paid out of the receipts, but were not to be charged against defendant's share of the stock. It was also agreed that plaintiff should pay rent upon the building occupied by the

stock from April 1, 1913. The stock was not reduced by May 10, 1913, as provided in the original agreement, and the time was extended to May 17, 1913. The stock not having been sufficiently reduced by that time, a controversy between the parties arose, and each attempted to lock the other out of the building. Plaintiff gained possession of the building, and on August 28, 1913, was ousted by injunction, which was subsequently set aside and plaintiff restored to possession. September 8, 1913, defendant obtained exclusive possession in an action of replevin and has since retained such possession. That action was appealed to this court, and, at the present sitting, the judgment was reversed and the action dismissed. *Whittier v. Riley, ante,* p. 104. June 18, 1914, plaintiff commenced this suit. The petition alleges the facts above narrated, sets out the contract, and prays the court to adjust the equities between the parties and partition the property. The trial court made findings as to the interest of each party, prescribed several methods by which the parties might adjust the matter between themselves, and decreed that, in the event of their failure to adopt any of such methods, J. M. Alexander, as referee, should make a division of the stock in accordance with the findings of the court.

The principal contention of defendant is that the petition does not state a cause of action. The argument is that the contract entered into February 25, 1913, constituted a chattel mortgage and not a partnership, and that partition of the personal property could not be had. From an inspection of the contract and a consideration of the object sought, it is evident that the parties did not intend to enter into the relationship of mortgagor and mortgagee. It is not now necessary to decide what is the correct name for the situation created by the contract. The relation is rather one of a common ownership, in disproportionate shares, of a mass of unlike and unequal property, each party having a right of possession of the whole. The stock originally invoiced $15,169.90; $11,479.89 at the commence-

ment of the replevin action, and $10,112.27 when the present suit was instituted. Joint possession as contemplated by the contract had proved unsatisfactory. Neither party was entitled to the exclusive possession of the property. Under these circumstances partition is a proper remedy. In *Pickering v. Moore,* 67 N. H. 533, 31 L. R. A. 698, it is said: "A tenant in common of personal as well as real property has a right to partition if partition is possible, and, if not, to a regulation of its use equivalent to partition or to a sale. Coke Lit. secs. 164*b*, 165*a*; *Stoughton v. Leigh,* 1 Taunt. (Eng.) 402, 411, 412; *Morrill v. Morrill,* 5 N. H. 134, 135; *Crowell v. Woodbury,* 52 N. H. 613. On partition he is entitled to no particular part of the property, but only to his due proportion in value and quality of the whole. When it consists of chattels differing in quality and value, an appraisal of the value and a consideration of the qualities of the several chattels are essential to an assignment to each of his just share. In this case, as in that of a single indivisible chattel, if the parties cannot agree upon the use, sale, or division, judicial intervention is necessary. Until an adjudication of their rights, neither can assert a title in severalty to any portion of the property." This is the general rule. *Smith v. Dunn,* 27 Ala. 315; *Godfrey v. White,* 60 Mich. 443; *Tinney v. Stebbins,* 28 Barb. (N. Y.) 290; *Neal v. Suber,* 56 S. Car. 298; 6 Pomeroy, Equity Jurisprudence, sec. 705; Freeman, Cotenancy and Partition (2d ed.) sec. 426.

Barr v. Lamaster, 48 Neb. 114, and *Phillips v. Dorris,* 56 Neb. 293, relied upon by defendant, relate to partition of real estate, and do not hold that a court of equity cannot, under any circumstances, decree partition of personal property.

Upon the cross-appeal plaintiff contends that the trial court erroneously charged plaintiff with items and credited defendant with other items. A review of the interests of the parties will be less complicated by a consideration of the matter from defendant's standpoint. In the first invoice in March, 1913, the fixtures and stock were appraised

at $15,169.90. The contract provided that defendant was to keep and retain possession of the stock until enough was sold to reduce the value of the remainder to $6,250. Expenses were to be borne by plaintiff, and the business was to be conducted by him. It was further provided that defendant should "receive the difference between the invoice price of the said stock and fixtures and $6,250." A fair construction of the contract is that defendant should receive the difference between the invoice value, $15,169.90, and $6,250, or $8,919.90. In order to reduce the stock, auction sales were first held, but this practice was abandoned. It was necessary to purchase some additional stock to keep the trade. Most of the running expenses were paid out of the proceeds. Defendant, to September 8, 1913, the date of the commencement of the replevin action, had received $2,704.01 out of the proceeds of sales. He had, however, out of his own money, paid obligations of plaintiff aggregating $864.03, viz.: Judgments for goods furnished while the business was conducted in plaintiff's name, $150.19; interest on the Colorado mortgage and delinquent taxes on the land, $160.59; taxes on the stock of goods, plaintiff's share, $68.25; rent owing to defendant for five months, $485. He is entitled to deduct this sum from the amount received, leaving $1,839.98, as the net sum received by him. His share of the stock, at the commencement of the replevin action, was therefore $7,079.92. Other items of credit claimed by defendant are disallowed, since the payments were made out of the proceeds of goods sold, and not from the net proceeds with which he is charged. Costs of the replevin action are not allowed in this suit, but will follow the judgment in that action. At the commencement of the replevin action the stock invoiced $11,479.89. Defendant's share was $7,079.92. Plaintiff's share was $4.399.97, less $855.61, indebtedness for goods purchased by him, making his net share $3,544.36. The book accounts outstanding at the commencement of the replevin action belonged to plaintiff, in addition to his share in the stock. The amount of this

item seems to have been $1,500, but it is not clear that all the accounts accrued after he took charge of the business in March, 1913, nor what part of the accounts he has collected. This item must therefore be left for ascertainment by the district court. At the commencement of the replevin action the stock was invoiced and was delivered to defendant and has been in his charge since that time. The invoice September 8, 1913, when defendant took charge, was $11,479.89. At the commencement of the present suit the invoice was $10,112.27. Unpaid accounts for goods purchased since March, 1913, amounted to $1,009.35. At the commencement of this suit the net assets were $9,102.92. Plaintiff's interest was $3,544.36. Defendant's interest was $5,558.56. The difference between the net assets when defendant took charge September 8, 1913, and June 18, 1914, the date of the commencement of this suit, was $1,521.36. Defendant had charge of the property, conducted the business, and collected the proceeds of sales. The decrease in the net assets should be charged against him and not against plaintiff. The decrease of $1,521.36 deducted from $7,079.92, his interest September 8, 1913, leaves $5,558.56, due him, and $3,544.36, due plaintiff at the commencement of this suit.

Plaintiff complains because the trial court taxed the costs of the receivership proceedings against him. The receiver was appointed on his application, but was later discharged because he failed to furnish bond. The costs were properly taxed against him.

Both parties are to blame for the situation in which they now find themselves. We are unable to say which is the more in fault. That they cannot carry out their contract of February 25, 1913, is clear. It is therefore the duty of the court to settle the controversy. We concur in the holding of the district court that this is a proper case for partition, but the decree is modified in the following particulars:

The interest of plaintiff in the property in controversy, at the time of the commencement of this suit, is found to

be $3 544.36, and the interest of defendant on that date $5,558.56. It is ordered and adjudged that, within 30 days from and after the filing of the mandate of this court in the district court, defendant pay to plaintiff the amount of plaintiff's interest as herein found, viz., the sum of $3,544.-36, with interest at the rate of 7 per cent. per annum from the date of the commencement of this suit; that upon such payment being made defendant's ownership and possession of the entire stock and fixtures shall stand quieted and confirmed in him, and all rights of plaintiff to the use of said building shall thereupon become and be terminated; that defendant shall pay all outstanding indebtedness for goods purchased, and shall also account to plaintiff for the book accounts outstanding at the time of the commencement of the replevin action; that, in the event of defendant's failure to make such payment to plaintiff within said time, the referee, appointed by the decree of the district court, shall take possession of said building, stock, and fixtures, and proceed to sell first the stock, and, if necessary, next the fixtures, under the direction of and in the manner which may be ordered by the district court, and apply the net proceeds arising from such sale to the payment to plaintiff of the said sum of $3,544.36, with interest at 7 per cent. from the date of the commencement of this suit to the dates of the payment by such receiver of any amounts paid to plaintiff hereunder; that, when the full sum of $3,544.36, with interest, shall have been paid to plaintiff, the residue and remainder of such stock, fixtures, and book accounts, after accounting to plaintiff for the book accounts outstanding at the commencement of the replevin action, shall be delivered to defendant and the receiver discharged. It is further ordered that all costs in this proceeding, except those taxed to plaintiff, as hereinbefore approved, shall be divided equally between the parties hereto, and be so taxed.

As herein modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

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

HOME SAVINGS BANK OF FREMONT, APPELLEE, v. A. C. SHALLENBERGER, APPELLANT.

FILED JUNE 23, 1916. No. 19366.

Appeal: LAW OF THE CASE. When this court upon appeal determines the law of the case, the trial court is bound thereby, and its judgment accordingly will not under any ordinary conditions be disturbed upon another appeal.

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

J. G. Thompson, Flansburg & Flansburg and *John Everson,* for appellant.

John L. Rice, contra.

SEDGWICK, J.

This is the third time this case has been before this court. 82 Neb. 507; 95 Neb. 593. Twice the case was submitted to the jury, and the jury found in favor of the defendant. Upon this last trial the court, supposing it was following our former decision in this case, instructed the jury to find for the plaintiff. The facts are sufficiently stated in the former opinions. The defendant has complicated the case somewhat by changing his position from time to time. He has filed at least four different answers.

The defendant now insists in the brief that there was sufficient evidence that Shelly-Rogers Company misrepresented matters to him when he signed the guaranty of payment of the note, so that that question should have been submitted to the jury. In the last of the former opinions in this case it was said that "the charge of fraud committed by the Shelly-Rogers Company was not sustained and it is unnecessary to inquire what effect proof of fraud on its part would have upon the rights of plaintiff." That is to say, Shelly-Rogers Company was offering to sell this note to the plaintiff bank, and the bank would

not take the note unless this defendant would continue to guarantee the payment. Therefore Shelly-Rogers Company procured the defendant to guarantee the payment, and the bank then took the note. The opinion holds that the guaranty is an absolute one, and that it goes with the note, so that an innocent purchaser of the note would take it with the guaranty, and would not be responsible for the manner in which some prior owner of the note had procured the defendant to guarantee the note. This, by the former opinions, has become the law of the case. If this case is ever going to be ended, it will have to be done by the court, since the questions are questions of the law of negotiable paper with which the jury is not supposed to be familiar. It is clear that this bank purchased this note in the regular course of business, without notice of any defense, and relying upon the guaranty of the defendant, and under the law of the case as settled in our former decision is entitled to recover.

The trial court followed our decision, and its judgment is

AFFIRMED.

LETTON, J., concurring.

I concur for the reason that even if, as the amended answer now pleads, defendant had been released as a guarantor of a former note by its extension without his consent, the additional extension of time granted to the maker of this note by reason of the execution of this guaranty is sufficient consideration to bind him, even though a stranger to the instrument.

MORRISSEY, C. J., dissenting.

This is the third time this case has been before the court. The first opinion is found in 82 Neb. 507, and the second in 95 Neb. 593. In 1901 defendant was in the banking business at Alma, Nebraska, and Shelly-Rogers Company was in the live stock commission business at South Omaha. Cattle belonging to the Shelly-Rogers Com-

pany were sold to one W. P. Summers through the agency of defendant and another. Summers was then living at Lamar, Nebraska. Summers executed a note in the sum of $830, dated October 21, 1901, due June 6, 1902, in payment for the cattle, and also executed a chattel mortgage covering the cattle to secure the payment of the note. Defendant indorsed or guaranteed this note and delivered it to Shelly-Rogers Company. There was some profit or commission realized by defendant; the amount not being shown by the record.

The note was not paid at maturity, but a renewal note was taken June 6, 1902, falling due December, 1902. December 9, 1902, the original note and mortgage were surrendered and the mortgage released of record. December 16, 1902, Summers executed a renewal note and mortgage, which Shelly-Rogers Company sold to plaintiff, December 20, 1902, but with the promise, however, that they would procure the guaranty of defendant on said note. On the same day Shelly-Rogers Company wrote defendant, so he testifies, that Summers desired to make a renewal of the note which defendant had previously guaranteed; that they were willing to make the renewal provided he would sign the guaranty, which they inclosed, and which is set out at length in the former opinions. He also says they inclosed a slip giving a list of cattle covered by the mortgage which showed that the note was amply secured; that, relying on their statement, and believing that this was a renewal of the note dated October, 1901, on which he was liable as a guarantor, he signed the guaranty which is now in suit; that the note which he had guaranteed had been fully released and his liability thereon discharged in June, 1902; that the note taken in June, 1902, had also been renewed and the new note sold and delivered to plaintiff at the time they made these representations to him, but these facts were concealed, and he was induced to sign on the representation that the note which was being renewed was the one executed in October, 1901, and on which he was liable as indorser or guarantor; that he would not have

signed the guaranty had the truth not been concealed from him, and that there was no consideration for the guaranty which is in suit. On each of the other trials the jury found for defendant, but on the last trial the court directed a verdict for plaintiff, and defendant has appealed.

Appellee contends that all of the issues involved were determined by our former opinions in this case. The district court must have taken the same view; but appellant maintains that there were new issues raised by the amended answer, namely, that the signature to the guaranty was procured without consideration, by concealment of the true facts, and by falsely representing to him that he was guaranteeing the renewal of a note which he had once guaranteed, and on which he was then liable, and that his signature to this guaranty would work an extension or renewal of this old note, and that without this new guaranty this renewal would not be taken, while in truth and in fact the note which he had previously guaranteed had been surrendered, and his liability thereon had ceased; that this guaranty would not, and did not, procure the extension of time, or renewal of any note, but that this renewal had already been effected, that the new note had been given 14 days before, and had been sold and delivered to plaintiff 10 days before defendant executed the guaranty; and that "had defendant been advised of the actual state and condition of the said Summers note, he would have refused to sign said slip."

The correctness of the court's ruling depends on whether there was any question of fact, not previously determined, for the jury to determine from the evidence. The first opinion, so far as material here, reiterated the rule that "the extension of time of payment to a principal debtor is a sufficient consideration to support a new contract of guaranty made after the date of the renewal of such obligation, especially when the guarantor at the time of making such guaranty is still liable as guarantor for the payment of the debt renewed."

This was reiterated in the second opinion, and a number of other questions determined. The law laid down in these opinions is nowhere questioned on this appeal. On the last trial defendant by amended answer alleged, in substance, that this guaranty was procured by fraud. Defendant's testimony supports this allegation of the answer. It is true that there are many things in the record to raise an issue on this question. The answers filed on the former trials are incorporated in the bill of exceptions, the correspondence between the parties is shown, and excerpts from the briefs heretofore filed by appellant are set out in the brief of appellee. From these it is argued that defendant guaranteed the renewal note given by Summers in June, 1902, and was still liable thereon when he executed the guaranty in suit, in December of that year. This guaranty was mailed to defendant by Shelly-Rogers Company, but the letter accompanying it was not produced. Defendant testified that he did not guarantee the renewal note taken in June, 1902, and did not know that a new note was taken in June until the second trial of this case, and had no knowledge whatever that the note had been extended or that he had been released. There is testimony for the plaintiff showing that the defendant had guaranteed the note executed in June, and that his liability still existed. Indeed, there is a sharp conflict in the evidence on this question, and different minds may draw different conclusions therefrom. This is a question that has not been determined on either of the former trials, and is a material question of fact which ought to have been submitted to the jury.

The material questions presented were: (a) Had defendant already been released from liability on his original guaranty at the time he executed the guaranty in suit? and (b) was he induced to sign this guaranty by the false representations made by Shelly-Rogers Company at the time his signature was procured? On the record a verdict might be sustained for either party. Such being the case, it was error to instruct a verdict for the plaintiff. Defendant was entitled to have these questions submitted to the

jury. They did not fall within "the law of the case," because they were then presented for the first time.

HAMER, J., dissenting.

As I understand it, the defense made in this case at the last trial in the district court had never been made before, and the district court was in no way bound either by the judgment of this court or by any rule of law or precedent. I think the judgment of the district court should be reversed, and I dissent from the majority opinion.

ORA ROOKSTOOL, APPELLANT, V. CUDAHY PACKING COMPANY ET AL., APPELLEES.*

FILED JUNE 23, 1916. No. 18647.

Master and Servant: INJURY TO SERVANT: LIABILITY. If the employment of a child under the age of 14 years is the proximate cause of an injury to such child while in such employment, then the employer is liable in damages for the injury sustained.

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

Murphy & Winters, for appellant.

Gurley, Woodrough & Fitch, contra.

HAMER, J.

This action was brought in the district court for Douglas county by the plaintiff, Ora Rookstool, through his next friend, his mother, Lillian Sheets, to recover damages claimed to have been sustained by him while he was in the employment of the Cudahy Packing Company. He was in the hog-killing department of the packing plant operated at the time of the injury in South Omaha. The plaintiff was 13 years of age. On the 22d day of May, 1910,

*Judgment of district court affirmed on rehearing. See opinion, p.—, *post.*

after he had finished his day's work, he was about to leave the packing house. He stood at the entrance of the elevator shaft, intending to board the elevator for the purpose of leaving the plant. To find out the position of the elevator he looked into the elevator shaft, and it suddenly decended and struck him on the back of the head, tearing the top of his scalp loose and knocking out his teeth.

The above facts were set up in the plaintiff's petition. In its answer the defendant admitted that the plaintiff was in their employ, and that he had received an injury by thrusting a part of his body into the elevator shaft, but charged that the injury was caused by the negligent act of the plaintiff in placing part of his body within the elevator shaft so that the same was struck. A jury was impaneled and the evidence was taken; and at the conclusion the defendant moved the court to direct a verdict in favor of the defendant or discharge the jury, and to enter judgment for the defendant. This motion was sustained by the court, and the jury were discharged, and the cause was dismissed at the cost of the plaintiff. There was a motion for a new trial, plaintiff claiming that the decision was not sustained by sufficient evidence, that it was contrary to law, and for errors of law occurring at the trial, and because the court erred in discharging the jury and in rendering judgment for the defendant.

The testimony of the plaintiff was to the effect that he was injured while working in the killing department, breaking jaws and trimming pigs' feet; that he had been working at the packing house about six months when he was hurt; that he had had no other packing house experience. On the day he was hurt, at about half past 5 o'clock in the afternoon, he went up to the dressing room and changed his clothes, and stopped by the elevator and stood there, and then looked into the elevator shaft to see where the elevator was. He had used this same elevator almost every day. It was his means of leaving the plant. Besides knocking his teeth loose, his scalp was peeled up over his head. He was in the hospital nearly three weeks. Dur-

ing the time that he waited for the elevator and up to the time when he was struck there was no warning of any bell or gong, or warning of any kind. He had not been talked to about the danger of being around the elevator; he had not been warned against looking into the elevator shaft. While his head was in the elevator shaft down came the elevator from above. There was a bell on the floor where the plaintiff was, but the defendant did not ring it. The elevator was not supposed to move until the bell sounded.

The plaintiff testified: "No, sir; there wasn't no gong rang at all." It appears that no one instructed the plaintiff concerning the danger of being about the elevator. "Q. During the six weeks of your employment with the company, did any person, foreman, or subforeman say anything to you concerning the danger of being about and around the elevator? A. No, sir; they did not. Q. Did any foreman or subforeman caution you against looking into the elevator shaft? A. No, sir.

Clyde Hague, a witness for the plaintiff, testified that he worked in the same department with the plaintiff, and that he went with him to the elevator; that he never thought that the car would move without the bell rang beforehand.

The plaintiff's mother testified: "Ora was 13 years old, going to be 14 the 26th day of June, and he was hurt the 22d day of May. Q. What was his health prior to that injury? A. Why, he was a big, husky boy; he did a man's work; he was a lively boy and smart, and of course you can see the condition of him today." She further testified: "Well, since that injury, he is just sluggish, he can't work, that is all; he is a boy that can't work."

The defendant's motion for a directed verdict was based upon the contention that the plaintiff was guilty of contributory negligence, and that there was no negligence on the part of the defendant company. It is alleged that the court erred in holding that the defendant was not guilty of negligence. It is also alleged that the court erred in

holding that the plaintiff was guilty of contributory negligence; also that the court erred in not sustaining the plaintiff's motion for a new trial; also that the court erred in sustaining defendant's motion for a directed verdict.

Under the statute, no child under the age of 14 years shall be employed, permitted or suffered to work in, or in connection with any theater, concert hall, mercantile institution, store, office, hotel, laundry, manufacturing establishment, bowling alley, passenger or freight elevators, factory or work shops, or as a messenger or driver therefor, within this state. Rev. St. 1913, sec. 3575 *et seq.*

Under section 3576, this inhibition as to the various employments mentioned in section 3575 is made to apply to children between 14 and 16 years of age, unless the person or corporation employing the child procures and keeps on file and accessible to the truant officers of the town or city, the state commissioner of labor, and his deputies, and the members of the state board of inspection, an employment certificate as prescribed by statute, and also keeps two complete lists of all such children employed therein, one on file and one conspicuously posted near the principal entrance of the building in which such children are employed.

If the employment of an infant under the age of 16 years, contrary to the provisions of the statute, is the direct cause of an injury to a child, his master is liable therefor.

In *Hankins v. Reimers,* 86 Neb. 307, it is held, as stated in the syllabus: "If the employment of an infant under the age of 16 years, contrary to the provisions of the statute, is the proximate cause of an injury to the child, his master is liable therefor." In that case it is stated in the petition that the deceased was under the age of 16 years at the time of his death; that he was ignorant of the dangers incident to the work in which he was employed, and that because of his immaturity he was incapable of appreciating the dangers attendant upon said work; that the defendant unlawfully, wrongfully and negligently directed said ser-

vant to work in a cave where the work was dangerous to life and limb. In the body of the opinion it is said: "If an infant is injured as the proximate result of engaging at his master's request in a vocation which the legislature has forbidden an infant of that age to follow, the master is liable." This court cited with approval: *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. St. 311; *Platte v. Southern Photo Material Co.*, 4 Ga. App. 159; *Starnes v. Albion Mfg. Co.*, 147 N. Car. 556; *Leathers v. Blackwell Durham Tobacco Co.*, 144 N. Car. 330.

It is competent for the legislature in the exercise of the police power to fix an age below which children may not lawfully be employed in dangerous occupations. *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. St., 311; *Stehle v. Jaeger Automatic Machine Co.*, 220 Pa. St. 617; *Fortune v. Hall*, 122 App. Div. (N. Y.) 250, affirmed, 195 N. Y. 578; *Casteel v. Pittsburg Vitrified Paving & Building Brick Co.*, 83 Kan. 533; *Strafford v. Republic Iron & Steel Co.*, 238 Ill. 371, 128 Am. St. Rep, 129; *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 139 Am. St. Rep. 389; *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509; *Smith's Adm'r v. National Coal & Iron Co.*, 135 Ky. 671.

In a note to *Louisville, H. & St. L. R. Co. v. Lyons*, 155 Ky, 396, in 48 L. R. A. n. s. 667, where the cases are collected, upon the question of the defense of contributory negligence where the plaintiff was a minor employed contrary to a child labor statute, it is said: "As shown in the earlier notes upon the subject presented by the title to the present note, there is considerable conflict of opinion. The same conflict is also shown in the later cases, although it may be said that the view is apparently growing that neither contributory negligence nor assumption of risk can be relied upon by the master as a defense to an action for injuries to a child who is employed under the statutory age."

In the case cited it is said in the body of the opinion: "The child, in accepting employment, does not knowingly violate any law or purposely do any wrong, but the em-

ployer does, and, between the two, the employer, for the benefit of the child, should bear all the burden, and the child none. In other words, the employer should be required, so far as compensation can do it, to put the child in the same condition as he would have been except for the wrongful employment which caused his injury. We therefore hold that neither the doctrine relating to assumed risk or fellow servants or contributory negligence has any place in the application of this statute. The employer takes all the risk, the child none. It is true this construction makes the employer an insurer of the safety of the child, and so he should be. The lives and limbs of children are too valuable to be sacrificed in dangerous employments, and if an employer, in violation of the statute, engages the services of a child in such an employment, he must see to it that no harm comes to him, or, if it does, he must compensate him, in so far as money can do, for the injury inflicted. * * * But the child labor statute prohibits the employment of children. It is unlawful to employ them, and the fact that it is unlawful to employ them is the reason why the employer who violates the statute should not be permitted to shield himself from his own wrong by setting up a defense that the child and not himself caused the accident. Except for his unlawful act in employing the child he could not have been injured, and the employer should not be permitted to take advantage of his own unlawful act by putting the consequences on an innocent party."

In the following cases it is held that, where a minor has been employed in violation of the statute, the master so employing him cannot rely upon assumption of risk as a defense. *Mueller v. Jordon Shoe Co.*, 143 Ill. App. 332; *Fortier v. The Fair*, 153 Ill. App. 200; *McNally v. Standard Railway Equipment Co.*, 165 Ill. App. 371; *Madden, Son & Co. v. Wilcox*, 174 Ind. 657; *Pinoza v. Northern Chair Co.*, 152 Wis. 473.

There is a contention in this case to the effect that plaintiff cannot rely upon the statute because the case was

tried in the district court on the theory of a common law liability, and that the plaintiff cannot change his theory of the case. The petition alleged that the plaintiff was less than 15 years of age, and that, being a minor, he was not familiar with the dangers incident to the operation of said elevator and did not appreciate or understand the same, and did not know of the danger that might come to him by looking into the elevator shaft; that, according to the usage and custom covering the operation of said elevator, it was not to pass from an upper floor to a lower floor without first sounding an alarm or a gong warning persons that said elevator was about to approach from above; that said elevator was operated by defendant. The defendant's answer admitted plaintiff's employment and that he received the injury, and alleged that he carelessly and recklessly placed his body within the elevator shaft.

It appears that the plaintiff pleaded his age to be less than 15 years when injured, and his age was proved by him and also by his mother to be one month less than fourteen years. His employment is shown to have been in violation of the statute. It is also shown that he was not instructed concerning the danger attendant upon the use of an elevator. In the petition plaintiff alleges that he was a minor, and not familiar with the dangers incident to the operation of an elevator; that he did not appreciate the dangers belonging to the operation of said elevator, and did not understand or appreciate the specific charge of looking into the elevator shaft; that he was not warned concerning the same, and was not told of the danger of being caught by the descending elevator while looking into the shaft. There could have been no purpose in the allegation touching the plaintiff's age, except to show that his employment was forbidden by law. The same is true touching the testimony concerning his age. There could have been no purpose in the plaintiff pleading the fact that he was a minor, and that he was not familiar with the dangers incident to the operation of an elevator, except to

show that he was a child and in danger because of his immaturity. Neither could there have been any purpose of procuring testimony touching his age, except to show that there was a violation of the statute. At this point it may be proper to state that there are two classes of children. The employment of those under 14 years of age is prohibited absolutely, while the employment of those between 14 and 16 years of age is not prohibited if certain restrictions are observed. The petition in this case alleges that the plaintiff was "less than 15 years of age," and the testimony shows that he was under 14. The section relating to the matter reads: "No child under the age of 16 years shall be employed in any work which by reason of the nature of the work, or place of performance, is dangerous to life or limb, or in which its health may be injured or its morals may be depraved." Rev. St. 1913, sec. 3587.

What was said by Judge Day about the boy putting his head in the elevator shaft shows that the district court held that the plaintiff should exercise the same care and prudence that would be required of a grown person. The district court seems to have overlooked the fact that the defendant's liability depended upon the wrongful employment of one whose age prohibited such employment.

The facts set up in the petition allege a liability because of the fact that the plaintiff was a minor and did not know and appreciate the dangers incident to the operation of the elevator in the packing house, or understand the danger of looking into the elevator shaft, and that he had not been warned or instructed by the defendant company concerning the matter; that he was caught between the floor of the descending elevator and the gate or guard rail over which he was leaning. It is also alleged in the petition that the plaintiff was engaged in the hog killing department at the time of his injury, and that he was less than 15 years of age. There appears to have been no objection to the testimony of the plaintiff and his mother that he was really less than 14 years of age.

The plaintiff to maintain a case was bound to plead and prove facts tending to support a verdict and judgment and sufficient to sustain the same. When he shows that his employment was forbidden under the child labor statute, and that he was injured while engaged in such employment, and because of the same, he has shown enough to sustain a verdict and judgment. If these facts have been shown and a defective charge of negligence has also been made, and there is also insufficient proof to sustain it, the verdict and judgment must have stood anyway, if there had been a verdict and judgment based upon evidence, because they would rest upon the forbidden employment and the injury. But in this case facts are stated which tend to show that the defendant incurred a liability for negligence under the common law, and also a liability because the plaintiff's employment was forbidden under the child labor law by the sections of the statute referred to. The district court determined that there was no common law liability, but the judge did not undertake to determine whether there had been a violation of the child labor law. If the plaintiff had two reasons entitling him to recover, he was not obliged to rest upon one of them. If the reasons did not conflict with each other, then he had a right to stand on both of them. There was no motion to compel the plaintiff to elect. There was no submission of the facts concerning alleged negligence of the defendant in failing to ring the gong before the elevator started down. Of course, if the plaintiff was entitled to a verdict of the jury as to whether he was wrongfully employed by the defendant, there should have been a hearing before the jury on that question, and their verdict should have been taken, and judgment rendered upon it.

Upon the question of proximate cause, it is said in *De-Soto Coal Mining & Development Co. v. Hill*, 179 Ala. 186: "Nor is it necessary that injury must result as the proximate cause of some act or omission of the minor in the discharge of the duty assigned him, but the right of action arises if the injury resulted from the employment and was

incident to any of the risks or dangers in and about the business. Of course, there would be no causal connection if the boy got sick or was injured in some way foreign to the master's work or business, although in or near the mine; but if the injuries are produced while the boy is at the forbidden place—that is, in or about a mine by some cause not foreign to the master's mine or business—there is such a causal connection with the forbidden employment as would render the master liable."

In *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. St. 311, it is said in the body of the opinion: "The exact question raised by this appeal is whether this common law rule was modified or changed by the statutory regulation. The injured boy was under 15 years of age, and if the appellee company employed him for the purpose of oiling machinery it did so in violation of the statute. Is it, therefore, in position to set up in this case the rule which presumes a boy over 14 to be capable of appreciating danger so as to apply the rule of contributory negligence to his acts, when the legislature in express terms provided that an employer shall not engage a person under the age of 15 years to perform this dangerous work? After full consideration we are unanimously of the opinion that the legislature, under its police power, could fix an age limit below which boys should not be employed, and, when the age limit was so fixed, an employer who violates the act by engaging a boy under the statutory age does so at his own risk, and, if the boy is injured while engaged in the performance of the prohibited duties for which he was employed, his employer will be liable in damages for injuries thus sustained. This rule is founded on the principle that when the legislature definitely established an age limit under which children should not be employed, as it had the power to do, the intention was to declare that a child, so employed, did not have the mature judgment, experience and discretion necessary to engage in that dangerous kind of work. A boy employed in violation of the statute is not chargeable

with contributory negligence or with having assumed the risks of employment in such occupation."

In *Madden, Son & Co. v. Wilcox,* 174 Ind. 657, it was held, as stated in the syllabus: "Answers to interrogatories showing that the plaintiff was engaged to learn upholstering, that he was ordered to operate a towpicker, and that his hand became entangled in the machine, and he thereby sustained injuries, do not overthrow a general verdict for plaintiff, where the complaint alleged that the plaintiff, under 16 years of age, was incapable of appreciating the dangers of the machine, and that he was knowingly ordered outside the scope of his duties to operate such machine."

A right of action will lie against one who participates in the employment of the child, where the same is forbidden by law, and the employment is the proximate cause of the injury. *Marino v. Lehmaier,* 173 N. Y. 530, 61 L. R. A., 811; *Strafford v. Republican Iron & Steel Co.,* 238 Ill. 371, 20 L. R. A. n. s. 876.

It is a matter of common knowledge that boys are full of the activity of youth and not inclined to reflect very much. They cannot exercise control over themselves with certainty. In *Perry v. Tozer,* 90 Minn. 431, 101 Am. St. Rep. 416, the court held that proof of the violation of the statutory provisions in the employment of a boy or girl, followed by injury in such employment, makes a *prima facie* case for the recovery of damages, and that the plaintiff cannot be charged in such case with contributory negligence or with having assumed the risk of such injury.

Section 3575, Rev. St. 1913, prohibits the employment of any child under 14 years of age "in connection with any theater, concert hall, or place of amusement, or any place where intoxicating liquors are sold, or in any mercantile institution, store, office, hotel, laundry, manufacturing establishment, bowling alley, passenger or freight elevator, factory or workshop, or as a messenger or driver therefor." Section 3587, Rev. St. 1913, prohibits the employment of any child under 16 years of age in any work which by

reason of its nature or place of performance is dangerous to life or limb, or in which its health may be injured, or its morals depraved.

If the defense of contributory negligence may be successfully interposed to defeat an action brought to recover damages because of the injury done to a child of tender years entitled to the protection of the statute on account of its age, then the action of the legislature becomes futile and the statute itself is rendered nugatory. Persons of immature years are incapable of properly appreciating the danger and of protecting themselves against it. The statute was made for the protection of such persons as the boy injured in this case.

"A concrete sewer located beneath the surface of a street is a 'structure' within Labor Law (Consolidated Laws, 1909, ch. 31) section 18, providing that a master engaging another to perform labor in the erection of a structure shall not furnish any unsafe stay or mechanical contrivance, and sheathing, shoring, and bracing used to hold back the earth out of the excavation are stays; a 'stay' meaning that which holds, restrains, or supports." *Armenti v. Brooklyn Union Gas Co.*, 142 N. Y. Supp. 420.

"In an action for the death of a servant killed by the caving in of an excavation for a sewer, the complaint, among other acts of negligence, charged that defendant failed to properly shore and support the excavation. *Held* that, while the complaint did not plead Labor Law (Consolidated Laws, ch. 31) section 18, providing that a master shall not furnish a servant engaged in the erection of a structure with any insufficient stay, yet as this is a general statute, which need not be pleaded, the complaint was sufficient to charge the master with liability thereunder; evidence that the caving in was caused by the insufficient stays being admissible." *Armenti* v. *Brooklyn Union Gas Co.*, 142 N. Y. Supp. 420.

"Where plaintiff is nonsuited at the close of his evidence, *every* question which can be fairly raised upon the record may be urged on appeal; the rule that a party cannot

change his theory of action on appeal not applying." *Armenti v. Brooklyn Union Gas Co.*, 142 N. Y. Supp. 420.

In the body of the opinion it is said: "Finally, it is urged upon us that the complaint is not so framed as to charge defendant with liability under this statute, and that in the trial court no attempt was made to invoke its provisions. The complaint is certainly very general, and almost every conceivable ground of liability is asserted therein. But among other allegations of the cause of the subsidence from which the death of plaintiff's intestate resulted is 'that said defendants failed to properly shore, support, and secure the excavation and the ground contiguous thereto.' This is sufficient to allow the evidence that this was the physical cause of the 'cave-in.' If, when that fact is established, legal liability follows under the statute, the complaint cannot be successfully attacked for insufficiency; for the statute, being a general one, need not be pleaded. *Haggblad v. Brooklyn Heights R. Co.*, 117 App. Div. (N. Y.) 838, 102 N. Y. Supp. 1039. Nor is it fatal that this point was not called to the attention of the trial court. It may be that when a case has been submitted to a jury upon a particular theory it is too late for a plaintiff, who has been unsuccessful upon the issue tendered, to inject into the case on appeal another distinct element adding to the liability of the defendant, and which he has never been called upon to meet (*Rager v. Delaware, L. & W. R. Co.*, 64 App. Div. (N. Y.) 134, 71 N. Y. Supp. 851); but in the case of a nonsuit a different rule applies. 'Every question is open to the plaintiff which can fairly be raised upon the record.' "

In support of this last proposition the court cites: *Clemence v. City of Auburn*, 66 N. Y. 334; *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Pratt v. Dwelling House Mutual Fire Ins. Co.*, 130 N. Y. 206.

In *Clemence v. City of Auburn, supra*, it is held, as stated in the syllabus: "A party to an action tried by jury, who has not, by treating the questions in the case as purely legal, and by acquiescence in their disposal by the court as such,

assumed that there was no disputed question of fact for the jury, but who has been nonsuited upon the motion of his adversary over his objection and exception, may insist, upon appeal, not only that the judge at circuit erred in the application of the law to the facts as found by him, but that he erred in his conclusions of facts, or that there were disputed questions of fact which should have been submitted to the jury; he is not concluded by an omission to request the court to submit the whole case or any particular question of fact therein."

In *Train v. Holland Purchase Ins. Co., supra,* it is held, as stated in the syllabus: "Where the court at circuit nonsuits plaintiff on the whole case, and an exception is taken, to enable him to present the exception to an appellate court for review, it is not necessary that he should ask permission to go to the jury upon the whole case or upon any question therein."

We think that the defendant is entitled to a jury trial upon the question of the violation of the statute. He is not barred upon the theory that only common law liability of the defendant may be considered. In reversing the judgment nonsuiting the plaintiff the defendant is not deprived of a jury trial. He may make a defense to such charge, and when the case is remanded he will have a full opportunity to present his theory. The case should have been presented to the jury upon the evidence under proper instructions. If the case ought to have been considered under section 3587, Rev. St. 1913, as also under the other sections above quoted, it was for the court to correctly construe the law and to instruct the jury so that a proper consideration of the facts might be made under the statute, and such a conclusion reached as the evidence warranted.

Counsel for the appellees make the contention that "the language of the act shows it was clearly the intention of our legislature to place the responsibility of inquiring into the age, physical and mental fitness of a child upon the officers and authorities provided for by law, and it also seems to have been the clear intention of the legislature

that an employer having complied with the law in requiring a certificate has the right to reply upon same and assume the authorities and officers of the law have done their duty, and not take upon itself the duty to make further inquiry." It is time enough to discuss this question when it is fairly raised and the instructions of the court and the evidence require its solution by this court. Children under 14 years of age may not be employed in such a business because of the prohibition of the statute, but between 14 and 16 they may be employed if a proper certificate has been procured. Of course, the good faith touching the issuance of the certificate might not necessarily be disregarded by the court and jury. Perhaps we ought not to be unmindful of the struggles existing in the several states of the Union touching the employment of child labor and the protection of the young from physical, mental and moral injury.

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

REVERSED.

SEDGWICK, J., not sitting.

LETTON, J.

I concur in the reversal. Even if the presentation of a certificate such as is required by the statute in the case of children over 14 and under 16 years of age would excuse the employer or permit the defense of contributory negligence to be made, there is no competent or satisfactory proof in the record that such a certificate was ever procured, tendered to, or examined by the employer.

The principle applies that, if an employer takes a child in violation of a statute for his own profit, he should not be allowed to set up the defense that the child is guilty of contributory negligence. Careless conduct is to be expected of a child, and, but for the wrongful act of the employer in hiring him, he would not have been placed in the position of danger.

Under the statute and the evidence as it now stands, I am of opinion that contributory negligence is not a defense to the action.

LEWIS L. YOUNIE, APPELLANT, V. FRED SPECHT ET AL., APPELLEES.

FILED JULY 1, 1916. No. 18850.

OPINION on motion for rehearing of case reported in 99 Neb. 621. *Rehearing denied.*

PER CURIAM. Under the statute authorizing the district court to order service by publication after hearing the application of plaintiff showing that defendants cannot be found in this state, and that the residence and place of abode of such defendants are unknown to plaintiff and to his attorney, and that by reason thereof personal service cannot be had, an order for service by publication and a judgment based thereon are not void on the ground that the application did not state the nature of the action or that it was an action in which service by publication was authorized by statute. Rev. St. 1913, sec. 7640, subd. 6; section 7641.

REHEARING DENIED.

CHARLES WURDEMAN, APPELLANT, V. CITY OF COLUMBUS ET AL., APPELLEES.

FILED JULY 1, 1916. No. 19508.

1. **Municipal Corporations: STREET IMPROVEMENTS: ESTIMATE OF COST.** In making an estimate of the cost of street pavement, a city engineer is not required to separately estimate the cost of each item going to make up the completed whole.
2. ———: ———: CONTRACTS: COMPETITIVE BIDDING. A contract for street pavement is not in violation of the statute relating to competitive bidding merely because it requires the use of a patented top coating.
3. ———: ———: ———: DISCRETION. The duty of city officers in awarding a contract for street paving is not merely ministerial, but partakes of a judicial character requiring the exercise of discretion.

APPEAL from the district court for Platte county: GEORGE H. THOMAS and FREDERICK W. BUTTON, JUDGES. *Affirmed.*

A. M. Post and *C. N. McElfresh,* for appellant.

Albert & Wagner, Reeder & Lightner and *W. H. Bailey, contra.*

MORRISSEY, C. J.

Plaintiff, a taxpayer within paving district No. 1 of the city of Columbus, brought this action to enjoin the officers of the city from proceeding under a paving contract entered into with a contractor for the laying of paving within the district, and from levying assessments against the property within the district, and from issuing, registering, or negotiating bonds for the purpose of meeting the expenses of the paving. There was a finding and judgment for defendants, and plaintiff has appealed.

Columbus is a city of more than 5,000 and less than 25,000 inhabitants, and the public improvement under con-

sideration falls within section 4887, Rev. St. 1913, requiring the city engineer to make estimates of the cost of labor and material when the amount thereof exceeds $200, and submit the same to the city council, and that no contract shall be entered into for any work or improvement for any price exceeding the estimate, and, "in advertising for bids for any such work, the council shall cause the amount of such estimate to be published therewith," and also provides that "such advertisement shall be published at least ten days in some newspaper of general circulation published in the city."

The contract which plaintiff seeks to enjoin calls for the laying of bitulithic pavement. The plaintiff contends that this is without warrant under the statute, "for the reason that no estimate of the cost thereof was made by the city engineer." The engineer did in fact make and submit an estimate of the cost of bitulithic pavement, as well as a separate estimate of the cost of four other kinds of pavement, and bids were asked on each of these. True, he made no separate estimate of the cost of the different items required to make up the completed whole, but this is not required by the statute.

The statute does not require the estimate to be itemized so as to cover the probable cost of the different items to be used in the work. Its language is plain and simple, and the most that can be said of it is that it calls for an estimate of the gross expense. It does not matter so much to the property owner or taxpayer what the expense of each item entering into a given pavement may be, as it does what will be the sum total of its cost and the service it will render, nor does the statute provide by what method the engineer shall arrive at his estimate. There are a number of items to be taken into account in determining the probable cost of a job of paving. It is for the city engineer to make an estimate of the sum total of these items. The bidders will figure the items. One contractor may calculate the cost of grading at one price and another at a different price. One may figure the cost of material

at a different price from another, and so it is with each separate item of the improvement. The estimate fell within the provisions of the statute and error cannot be predicated upon the ruling of the court thereon.

This bitulithic pavement is patented, or at least the process by which it is manufactured is patented, and for that reason is controlled by one firm, Warren Brothers Company, of Boston, and, according to plaintiff's theory, competition for furnishing this kind of pavement was impossible, and therefore the contract is in violation of that section of the statute providing that contracts of this character shall be let to the lowest responsible bidder. There is a diversity of holdings among the courts. In the instant case, as in every other case that has been brought to our attention where this patented article was called for, the manufacturer stood ready and willing to deliver the article to all contractors at the same price. Attached to the plans and specifications was an offer by the patentee to furnish the bitulithic mixture, but the space left in the printed blank for the price at which it would be furnished had not been filled in, and the published invitation for bids did not contain a price stated from the patentee for this mixture. There is testimony that on the day of the letting inquiry was made of the city clerk regarding terms exacted by the patentee, and that the clerk informed the inquirers that the blank offer was the only paper received. It appears, however, that the patentee had in fact caused to be delivered to the clerk an offer, open to all bidders alike, agreeing to furnish the mixture at $1.35 a cubic yard.

As was said in *Whitmore, Rauber & Vicinus v. Edgerton*, 149 N. Y. Supp. 508: "It must be understood that this bitulithic substance is merely a two-inch coating, or top dressing, and forms a very small portion of the entire pavement. The contractors were obliged to use bitulithic for this top dressing, but as to the remainder of the work—the excavations, foundations, curbing, gutters, catch-basins, and the large element of labor—there was no restriction of

any kind imposed in the specifications, and contractors had a right to purchase these other commodities wherever they chose, for there was nothing in the specifications which required them to get these materials from any particular contractor or manufacturer."

The patentees of the article are among the best-known manufacturers of paving materials in the United States. Its offer to sell to any successful bidder was on file with the city clerk, and, although the city clerk by inadvertence had mislaid the offer stating the definite price, the offer without the price stated was on file, and this was notice to all that the patentee stood ready to furnish the mixture. Any contractor desiring to bid might easily have ascertained the terms and price by communicating with the patentee, but the record fails to disclose any effort on the part of any person to do so. In due season the patentee sent to the mayor an offer to furnish the mixture with the price stated. The mayor delivered this offer to the city clerk, who carelessly mislaid it, but there is an utter absence of any showing that either fraud or favoritism entered into the letting of the contract.

Unless we are to hold that by the use of a patented process competition is forbidden, plaintiff's claim of error in this regard must be disregarded. While true that a number of courts hold that the use of a patented article makes competition impossible, yet we think the better reasoned cases hold that, where the patentee is ready and willing to furnish the mixture to all bidders alike, its use is not prohibitive of competition. "The fact that a street is directed to be paved with a patented article does not necessarily prevent competitive bidding." *Whitmore, Rauber & Vicinus v. Edgerton, supra.* In *Saunders v. City of Iowa City,* 134 Ia. 132, and in a note to *Johns v. City of Pendleton,* 46 L. R. A. n. s. 990 (66 Or. 182) may be found exhaustive discussions of this subject, but we refrain from quoting therefrom because it would run this opinion to an unnecessary length.

Plaintiff also claims that an excessive price was awarded as a result of a conspiracy, and he offered some testimony calculated to show that the price asked for the mixture is excessive, but the record discloses that this mixture, or compound, was open to all bidders at the same price, and that it entered into competition with four other and different kinds of pavement. While it is claimed by plaintiff that bitulithic pavement and asphaltic concrete pavement are substantially the same, an examination of the record shows there is a substantial difference between the two. Nothing on which to base a charge of conspiracy or design on the part of any one to favor any particular contractor is shown; but, on the other hand, it appears that the officers of the city exercise their honest judgment in the selection of the material to be used, and that the contract was awarded to the bidder submitting the lowest bid.

"In determining who is the lowest responsible bidder, or the lowest and best bidder, the duty of the board or officer is not merely ministerial, but partakes of a judicial character, requiring the exercise of discretion and judgment." 2 Dillon, Municipal Corporations (5th ed.) sec. 811.

As a concluding assignment of error, plaintiff says it was error on the part of the trial court to deny his request to amend his petition so as to allege the invalidity of the patent held by Warren Brothers Company. The court held that the issues tendered by the proposed amendment were immaterial and insufficient to constitute a cause of action. Surely the validity of this patent could not be tried in this action.

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

AFFIRMED.

SEDWICK, J., concurring.

When the use of a patented article greatly increases the cost of an improvement, the officers and the property owners interested will not use such articles unless they are very certain that because of the superiority of the im-

provement the additional expense is money well invested. Undoubtedly it rests with them to determine that question, and not for the courts. I do not think that we ought to compel the property owners affected and the public officers to adopt our notions as to the advisability of using a patented article in paving their streets. It appears, however, that some of the bidders were not aware of the fact that this patented article could be obtained at a regular price uniform to all desiring to use it, and that competition was affected by that fact. Although the officers appear to have acted in good faith and without fraud, it is not so clear that the successful bidder did not get a larger price for the work than he could have obtained if the price he paid for the mixture had been known to all bidders and they had the unequivocal information that they could obtain the mixture at the same price. I am not satisfied that there must be positive evidence of fraud to invalidate this contract.

ROSE, J., dissenting.

Is the paving contract in controversy valid under a city charter declaring that the manner of procuring pavements shall be "by contract with the lowest responsible bidder?" Rev. St. 1913, sec. 4941. The purpose of the statute is to protect those upon whom the cost of paving falls. To this end competitive bidding is required. Can there be competitive bidding in good faith, within the meaning of the statute, where the greater part of the total expense of the completed pavement must be incurred for a patented article controlled by a monopoly? The contract requires "bitulithic pavement"—a patented article controlled by the patentee. The cost of the bitulithic material is more than half of the entire expense of the paving. The owners of the patented material offered to furnish it to all bidders at the rate of $1.35 a square yard. This price is arbitrarily fixed by the patentee, and is not determined nor affected by competitive bidding among paving contractors. Other items, such as grading, curbing, concrete base, and

labor, may be subjects of competition, but their cost is only a minor part of the total expense. It seems to me the substantial competition demanded by the statute is defeated where the principal item entering into the contract price and representing the greater part of the total expense of the paving is patented and controlled by a monopoly. *Allen v. City of Milwaukee,* 128 Wis. 678, 5 L. R. A. n. s. 680; *Fineran v. Central Bitulithic Paving Co.,* 116 Ky. 495, 3 Am. & Eng. Ann. Cas. 741; *Pollock v. City of Kansas City,* 87 Kan. 205; *Siegel v. City of Chicago,* 223 Ill. 428. The courts deciding these cases took a view at variance with the majority in the present case and adopted a better rule. If defendants are dissatisfied with the city charter, the remedy is different legislation rather than judicial construction.

FAWCETT, J.

The courts of other states are hopelessly divided on the principal point involved in this case. The majority opinion follows one line of authorities and the dissenting opinion the other.

I think the cases cited by Judge Rose are based upon better reasoning and safer grounds than those relied upon in the majority opinion.

WILLIAM J. MARQUIS, APPELLANT, V. POLK COUNTY TELEPHONE COMPANY, APPELLEE.

FILED JULY 1, 1916. No. 19312.

1. **Municipal Corporations: PUBLIC UTILITIES: REGULATION OF RATES.** Unless expressly authorized and empowered by the legislature so to do, a municipal corporation has no power by contract to deprive the state of the right of regulation of rates of a public service corporation.

2. **Telephones:** RATES: REGULATION. A contract or agreement made in a franchise ordinance by which the maximum rates to be charged by a telephone company for the use of telephones by the inhabitants of the city are determined is made subject to the right of regulation.

3. ———: ———: ———. Since the adoption of the constitutional amendment creating the state railway commission and the passage of the law specifying the duties of said commission, that body has power to regulate the rates charged for the use of telephones in cities of the second class.

4. **State Railway Commission:** DECISIONS: APPEAL. The statute provides that, in appeals from the decision of the railway commission in the matter of rates or charges, such a decision is *prima facie* evidence that the rates fixed are just and reasonable, and such rates shall remain until annulled, modified or revised by the commission, or until finally adjudged to be unreasonable and unjust in a court of competent jurisdiction. Sections 6128, 6139, Rev. St. 1913.

5. **Telephones:** RATES. Evidence examined, and *held*, that the rate of $2.50 a month allowed by the state railway commission to be charged for the use of a telephone for business purposes in the city of Stromsburg has not been shown to be unreasonable and unjust.

APPEAL from the State Railway Commission. *Affirmed.*

V. E. Wilson, for appellant.

King, Bittner & Campbell and *Mills & Beebe, contra.*

LETTON, J.

This is an appeal from a ruling and order of the state railway commission.

In 1902 the city of Stromsburg passed an ordinance granting a right of way to the Golden Rod Telephone Company and its assigns through the streets of that city for telephone and telegraph purposes, and it was further provided "that the real value or use of any telephone in any public office or place of business in said city shall not at any time exceed the sum of one and 50/100 ($1.50) dollars per month, or in any private dwelling-house the sum of one ($1.00) dollar per month, and that the city

of Stromsburg, Nebraska, shall have the use of three telephones, during the life of this ordinance, free of rental charge or any charge whatever." It was also provided that the telephone company "shall at all times permit their poles to be used for the purpose of placing and maintaining thereon any wires which may be necessary for the use of the police or fire department for the use of the city." The defendant is the successor and assignee of the Golden Rod Telephone Company. The complainant is the user of a business telephone. He charges that on April 1, 1913, without the consent of the city of Stromsburg, the respondent arbitrarily increased the charge made by it for the use of business telephones to the sum of $2.50 a month.

For a second cause of action, it is alleged that the respondent's charge for a residence telephone is $1 a month in the city and $1 a month for the farm lines; that the service is poor and defective; that the charges for the use of a business telephone are unreasonable, unjust, excessive and discriminatory, and that a just and reasonable charge for the business telephones is not more than $1.50 a month. Respondent pleads the adoption of the constitutional amendment creating the state railway commission; that the rates of which complaint is made were filed with and approved by that body; it denies that the lines, equipment or service are faulty; and alleges that the rate of $1.50 a month for a business telephone is insufficient to justify carrying on the business; that to have continued to carry on the business at such rate would have bankrupted the defendant; and that $2.50 a month is a fair charge.

The railway commission, after a hearing, dismissed the complaint, but made certain orders as to maintenance and repairs, the validity of which is not in issue.

Complainant admits that the city of Stromsburg had no express authority from the state to grant a franchise or to enter into an agreement fixing telephone rates, but he contends that the city had implied power to do so by reason of its ownership and control of the streets, alleys and public grounds, and by reason of power to contract conferred

upon it by statute. In the ordinance granting the franchise, the city contracted in its own behalf for the use of the poles of the grantee for carrying wires of the city for fire and police purposes, and also contracted for its free use of certain telephones. These considerations moved directly to the city. The real question is whether the city had power to contract in behalf of telephone users in such a manner that the right of regulation at that time inherent in the legislature was taken away. Unless the legislature by its own act specifically parted with the power to regulate and conferred it upon the municipal corporation in direct terms, such a power could not exist in the city, and whatever contract or agreement was made between it and the telephone company in behalf of telephone users within its limits was, and must necessarily have been, made subject to the legislative right of regulation. Indeed, to hold that an implied power to contract exists from the right to control the streets, and that contracts so made might not be impaired, might prove exceedingly detrimental to the public welfare. The progress of invention in the cheapening of processes has been so startling in recent years that a rate which is fair to both parties now may, in the case of gas, electric light, power, transportation, or like companies, yield in a few years an excessive profit on the capital invested. In such a case, the public might be powerless to impair the obligation of the contract.

The courts, therefore, will not hold that the exclusive power to contract exists unless plainly and expressly granted. *State v. Wyandotte County Gas Co.*, 88 Kan. 165, affirmed on error to the supreme court of the United States under the title, *Wyandotte County Gas Co. v. State of Kansas*, 231 U. S. 622; *Home Telephone & Telegraph Co. v. City of Los Angeles*, 211 U. S. 265; *Benwood v. Public Service Commission*, 75 W. Va. 127, L. R. A. 1915C, 261, and note, p. 264; *Milwaukee Electric Ry. & Light Co. v. Railroad Commission*, 153 Wis. 592; *City of Kenosha v. Kenosha Home Telephone Co.*, 149 Wis. 338.

This court has held in a number of cases that contracts made by public service corporations are made with the right of regulation as a part of the contract, and that the power to lower excessive rates or to increase inadequate rates still rested solely in the legislature until by virtue of the constitutional amendment the same power was extended to the state railway commission. *McCook Irrigation & Water Power Co. v. Burtless,* 98 Neb. 141, and cases cited. The fact that at the time the franchise ordinance in question was passed the railway commission was not in existence is not material. That body was given power to regulate the rates of common carriers, and by section 6124, Rev. St. 1913, the term "common carrier" is expressly made to include telephone companies.

There is a distinction between the cases cited by the complainant and the conditions here. In some of these cases there were constitutional or statutory provisions which were controlling, in others the contract provisions of the franchises under consideration did not relate to the fixing of rates. But, even if these authorities were to the contrary, we believe that the reasoning of the cases cited is more persuasive.

It is next contended that the commission erred in requiring the complainant to assume the burden of proof; in fixing too great an amount as the present value of the property of respondent; in fixing too great an amount which the telephone company is permitted to earn in the future for the purpose of maintenance and depreciation and for dividends, and in finding that the new rate does not discriminate unjustly against the users of business telephones.

Section 6128, Rev. St. 1913, provides that, in any appeal prosecuted from a decision in which the charges of a common carrier are involved, such decision shall be received in any appeal "as *prima facie* evidence that the rates therein fixed are just and reasonable." By section 6139, Rev. St. 1913, it is provided that the order of the commission "shall be in force and effect from and after

the date fixed by the commission and shall so remain until annulled, modified or revised by the commission, or until finally adjudged to be *unreasonable and unjust* in a court of competent jurisdiction." We must consider these complaints bearing in mind these legislative directions.

So far as the record shows, the complainant voluntarily assumed the burden of producing evidence to support the allegations of his complaint. His brief states that "he was required to open the hearing," but he has pointed out no such order or a request for a different order of proceedings, and we have found none in the record.

With respect to the value placed upon the property by the commission, a physical examination of the property was made by an expert in the service of the commission, and its books and accounts were likewise examined by the expert accountant of the commission. The value fixed by the commission is placed at the sum of $79,925. To obtain this result, the commission took into consideration the amount of money put into the plant by the Golden Rod Company, the purchase price paid for it by the respondent, the fact that services were performed for some time in the organization and engineering for which no compensation in excess of $1,000 had been paid, the amount of money borrowed, stock issued in lieu of cash dividends, the money having been actually used in the construction of the physical property, as well as other items. By this valuation, the average cost of each subscriber's station is something less than $60. After considering all the evidence and the principles of law which have been laid down by the courts in the valuation of public service corporations, we are satisfied that this is not an unreasonable value. While no fixed standard of valuation has yet been evolved by the courts and each case must be determined upon its own facts, there are certain general principles which have been deduced. One of the latest expressions is that made by Mr. Justice Hughes, writing the opinion of the United States supreme court in *Simpson v. Shepard,* 230 U. S.

352, 434. He says: "The basis of calculation is the 'fair value of the property' used for the convenience of the public. *Smyth v. Ames,* 169 U. S. 466, 546. Or as it was put in *San Diego Land & Town Co. v. National City,* 174 U. S. 739. 'What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public.'" See, also, *San Diego Land & Town Co. v. Jasper,* 189 U. S. 439; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 15 Am. & Eng. Ann. Cas. 1034.

The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts. The scope of the inquiry was thus broadly described in *Smyth v. Ames,* 169 U. S. 466, 546: "In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

It is impossible within the limits of this opinion to set forth at length the history of the construction and operation of the respondent's system or the details of its property. It was shown that owing to the facts that the system of bookkeeping formerly used was defective in detail, that no charge was made for much of the organization and engineering work, and for other reasons it was

difficult to arrive at the actual cost of the property. It has not been claimed that any false or padded accounts have been kept. Taking the valuation of the engineer, the expenditures admitted by the complainant and all of the facts in evidence, we think that, though there is room for a difference of opinion as to the present value, the amount named by the commission is not unreasonable.

Did the commission allow too high a rate for depreciation and maintenance? The opinion of the commission recites: "The physical condition of the property is below standard requirements and considerable reconstruction is necessary. This condition, however, is not due entirely to the lack of revenue, as consideration must be given to the amount of money distributed to the stockholders in the way of dividends. It is apparent that a greater amount has been taken from the earnings for this purpose than was warranted by the requirements for a reasonable return." Continuing, it is said that when the company began its operations a strong competitor was already in the field. Keen competition resulted here as elsewhere in Nebraska, and the investment was in reality hazardous. That since dividends were paid in excess of the actual earnings, if a proper allowance had been made for maintenance, this necessitates the reduction of dividends until the plant is placed in a normal condition, and 10 per cent. of the cost of the property is ordered to be set aside annually for that purpose. It is also stated that the income is now less than formerly, and that even if the property had been kept up, the revenue derived under the former rate would not be sufficient to furnish a fair return. The excess amount retained to restore the plant is to be obtained, not by overcharging the telephone user, but by reducing dividends until the cost of this work has been paid. The evidence seems to bear out these conclusions. The expert for the commission testifies from the result of his investigations that the depreciation for the 110 months during which the plant has been in operation amounted annually to about 6 per cent., but that if the patrons of the company

desire service fully up with modern requirements it should be estimated in the future at about 9 per cent., and that in any event the depreciation is apt to be greater in the future on account of the age of the property; that the present plant is obsolete and good telephone service cannot be had until the present system is changed to a common battery system. There are only 127 business telephones to which the increased rate applies, and the annual revenue derived from the entire number of business telephones is $1,524. Deducting this amount from the present revenue and allowing 10 per cent. for maintenance and depreciation, not more that 4 per cent. would now be available for dividends. This places the increased outlay to restore the plant on the stockholder, where it properly belongs.

As to the claim of unjust discrimination between rates charged for business telephones, and for residence and farm lines, it is difficult to establish a criterion as to a proper difference in rates. It is apparent that the number of calls which an operator at the switchboard will have to answer for a business telephone will ordinarily largely exceed the number of calls for a residence telephone and the cost of operation thus be increased. It would be exceedingly difficult, however, to ascertain the actual facts in this connection. The custom of telephone companies generally is to charge a greater amount for such telephones, and this custom seems to have been universally acquiesced in and not found unreasonable. The complainant has furnished no evidence tending to show that the difference in the rate charged by the respondent is unreasonable, unjust or excessive as compared with that charged for other telephones.

To conclude, it has not been shown that the rate established by the commission, which is *prima facie* valid and reasonable, is unreasonable and unjust. If experience demonstrates that the rate is excessive, the books of the corporation, now required by the commission to be kept in a more accurate and fact-disclosing method, will readily

furnish evidence of unusual profits or exorbitant charges, and in such case any person injuriously affected, including complainant if he is in that class, may apply for a reduction of rates.

The finding and order of the state railway commission are not found to be unreasonable and unjust, and are therefore,

AFFIRMED.

MORRISSEY, C. J., not sitting.

OSCAR PETERSON ET AL., APPELLANTS, V. CLARENCE M. ANDERSON ET AL., APPELLEES.

FILED JULY 1, 1916. No. 19546.

1. **Schools:** COUNTY HIGH SCHOOL: DE FACTO BOARD: TAX LEVY. Two *ex officio* members of the board of regents of a county high school appointed a third member to fill a vacancy, afterwards the three members acting as a board filled the other two vacancies. *Held*, that the three members acting together constituted a *de facto* board. Their action in filling the vacancy was valid. An estimate made by the full board furnished sufficient authority for the county board to levy a tax for the support of a county high school.

2. ———: TAXATION: ESTIMATE. The fact that the estimate made by the board was communicated in a somewhat informal manner to the county board is a mere irregularity and is not a jurisdictional defect. *State v. Wise*, 12 Neb. 313.

3. **Taxation:** LEVY. A tax levy, otherwise valid, is not void for want of jurisdiction where it is shown that it was levied at the proper time and place by the majority of the county board, even though the record erroneously recites that it was made by the board of equalization.

4. **High Schools:** ESTABLISHMENT: STATUTORY PROVISIONS. Chapter 252, Laws 1913, was not repealed either directly or by implication by the passage of chapter 120, Laws 1915.

5. **Taxation:** CONSTITUTIONAL PROVISION: COUNTY HIGH SCHOOLS. The constitutional inhibition against county authorities assessing taxes, the aggregate of which shall exceed $1.50 per $100 valuation, does not apply to taxes levied for county high school purposes; the county high school district being a separate and distinct entity.

6. **Statutes:** VALIDITY. A provision for the free tuition of all pupils in the county cannot be enforced so far as it applies to pupils residing in districts which bear no part of the burden of taxation for the support of the county high school; but this provision was not the inducement to the passage of the act, and can be omitted without interfering with its purpose, namely, the furnishing of means to obtain an education sufficient to prepare students to enter the state university without compelling them to leave the county of their residence.

7. **Taxation:** INJUNCTION. Unless a tax is levied for an illegal or unauthorized purpose, its collection cannot be stayed by injunction.

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

A. A. McLaughlin and *J. A. Douglas,* for appellants.

H. J. Miller and *George W. Ayres, contra.*

LETTON, J.

The plaintiffs, who are taxpayers of Rock county, bring this action for themselves and all others similarly situated. The purpose of the action is to restrain the county of Rock and its treasurer from collecting or attempting to collect any portion of a three-mill tax levied by the county board for the support of a county high school in that county.

It appears that the county board of that county, acting under the authority of the statute applying to counties not having organized within their boundaries a twelfth grade high school accredited to the state university, called a meeting of the directors of the various school districts in the county to elect three members of the board of regents of the county high school. The directors met at the time specified, June 25, 1915, but failed to elect, and adjourned the meeting until September 20, 1915. On July

12, 1915, the county treasurer and county superintendent of public instruction, who are by virtue of the statute *ex officio* members of the board of regents of a county high school, under the written advice and direction of the state superintendent of public instruction, appointed a member to fill one of the vacancies, and on the next day, the three acting as the board of regents, appointed two other members to fill the board. In August the board as thus constituted let contracts for the purchase of supplies, employed teachers, and afterwards caused a high school to be opened which has been attended by 50 pupils. A detailed estimate of the funds necessary for school purposes was made by this body, and in accordance with a request communicated to the county board by the secretary on the 18th day of August, the last day of its sitting as a board of equalization, the board of equalization, as the record shows, levied the three-mill tax recommended, which was spread upon the tax books and its collection begun.

This action was begun on November 29, 1915. The district court found that the equities of the case were with the defendants and dismissed the action.

It is admitted in the record that on June 26, 1915, there was no high school in Rock county accredited to the state university, and that when the law of 1915 was adopted there were only ten counties in the state which did not have a twelfth grade high school. It is also admitted that the three-mill levy for a county high school was not spread upon the tax list covering property in school district No. 18, which is the school district of Newport. It is shown that a high school of eleven grades was in existence in that district at that time; that a county high school has been maintained in Bassett since September 20, 1915; that indebtedness has been incurred; that 50 pupils are enrolled and 49 in attendance; that no suit was brought to restrain the action of the board of regents nor to restrain the collection of the levy until this action was begun, though a taxpayer protested to the board at the time of the levy. No protest was ever made to the board of regents

with respect to letting of contracts, the hiring of teachers, or expenditure of money. It is also admitted that the plaintiff, the Chicago & North Western Railway Company, had no notice of any of these proceedings until September, 1915, and that the notice then came to them from an independent taxpayer of that county.

It is contended that there was no board of regents having power to act. Acting under the advice and direction of the state superintendent, a third member was appointed by two *ex officio* members, and the three acting as the board of regents filled the vacancies. When the three members assumed to act under the authority of the statutes as construed by the state superintendent, and did act, they constituted at least a *de facto* board and had the power to fill the vacancies. *Bishop v. Fuller,* 78 Neb. 259. There was therefore a qualified board of regents existing which had power to act and make an estimate of expenses. The fact that the estimate made by the board was communicated in a somewhat informal manner to the county board is a mere irregularity and is not a jurisdictional defect. *State v. Wise,* 12 Neb. 313.

So also as to the complaint that the tax was levied by the board of equalization. It is shown that the levy was made by a majority of the members of the county board. The fact that from a misunderstanding of the statute the county assessor and the county clerk also took part in the proceedings should not vitiate the levy. The statute (Rev. St. 1913, sec. 6456) provides: "The county board of equalization shall adjourn from time to time until the action of the state board of equalization and assessment shall have been had and certified to the county clerk, and, on the last day of sitting as a board of equalization, the county board shall levy the necessary taxes for the current year, including all * * * school district * * * taxes required by law to be certified to the county clerk and levied by the county board." The language of this section is peculiar and is enough to mislead the county board into the idea that the levy must be made by the county board

while sitting as a board of equalization, especially since the two bodies were identical until by the new revenue law the county assessor and the county clerk were added to the board. The mere fact that the record of the county board shows that the levy was made when the board was sitting as a board of equalization is an irregularity which does not vitiate the tax nor afford ground for an injunction.

To determine the next point presented requires a statement of the legislation pertaining to county high schools. In 1907 the legislature passed an act (Laws 1907, ch. 122) the purpose of which was to permit the establishment of county high schools. The act applied to all counties in the state, and the establishment of the school depended upon a petition to the county board and the result of an election called to determine whether a county high school should be established. In 1911, 1913 and 1915 this law was amended. In 1913 an independent act was also passed entitled "An act to provide for the organization of county high schools in *counties not having a twelfth grade high school.*" Laws 1913, ch. 252. This act provided: "The county board of any county in this state that does not have organized within the borders of such county a twelfth grade high school accredited to the state university, shall be deemed authorized and it shall become their duty on the first Monday of June to call a meeting of all the directors of the several school districts in the county to meet at the county seat to elect a board of regents, in accordance with the provisions of law governing boards of regents for county high schools, and which provisions shall apply to a school organized by the county commissioners or supervisors the same as if organized as now provided for by law. The county high school herein provided for by law shall be located at the county seat of such county." The provisions of the former act relating to the organization of county high schools established by petition were thus adopted and carried forward into the new act. In 1915 an act (Laws 1915, ch.120) was passed amending sections 6819, 6833, Rev. St. 1913, and also repealing sections 6820, 6821 and

6834. The first section of this act purports to amend the first section of the 1907 act by making the establishment of a county high school mandatory in counties in which "there is not now located a twelfth grade high school accredited the state university," and the second section pertains to the right to vote bonds of the district. The sections repealed related to the holding of an election, the declaration of the result by the county board, and the right to vote on the site for the school. None of these sections includes the act of 1913, and no reference to that act is made. The act of 1915 does not repeal the act of 1913 by implication since its provisions are not inconsistent therewith; and, even if void for the reasons asserted by plaintiffs (which we do not decide), it affords them no aid in invalidating the tax levy.

It is also contended that the tax exceeds the constitutional limitation which prohibits county authorities from assessing taxes the aggregate of which shall exceed $1.50 per $100 valuation. We think the objection is not tenable. The county high school district is a separate corporation, and the tax levied is not assessed and levied for county purposes, but by the county board acting for the high school district.

It is said the statute permits the exclusion from the tax levy of any district which certifies to the board of regents on or before the 15th day of June of each year that a course of study beyond eight grades has been prescribed for the school for the ensuing year, and provides that tuition shall be free to all pupils residing in the county, and therefore that the tax is not uniform, but discriminates in favor of the taxpayers of such a district and against those outside of its boundaries and is void. While the means to attain the object are not felicitous, the effect of the provision is the same as if the legislature had in so many words declared that all portions of a county outside the limits of school districts in which "a course of study beyond the first eight grades has been prescribed for the school for the ensuing year" shall constitute a high

school district. There can be no question of its power to make such a distinction. The trouble is with the provision that any such district shall not be taxed if its officers so certify in any year on or before the 15th day of June. Is there any constitutional inhibition against allowing a district to separate from the county high school district by increasing its course of study and so certifying? We think not. The method may be clumsy, but it is not for the court to set it aside. With respect to the provision for free tuition of all pupils in the county, we are satisfied this provision cannot be enforced so far as it applies to pupils residing in districts which bear no part of the burden of taxation for the support of the county high school. *High School District v. Lancaster County,* 60 Neb. 147. But this defect is a minor one. It could not have been the inducement to the passage of the act and can be so construed without interfering with the purpose of the act, viz., the furnishing of means to obtain a high school education sufficient to prepare students for entrance to the state university without compelling them to leave the county of their residence. The purpose of the act is laudable, and the court should not lightly set it aside if by any reasonable means it can be so construed as to uphold its validity. Furthermore, there is nothing in the record to show that any pupil from the omitted district has attended the county high school, or that any portion of the taxes levied against the plaintiff or any other taxpayer in the county had been or will be devoted to the education of any pupil from that district. It is a well-established rule that no one can complain that a statute is unconstitutional unless he is injuriously affected thereby, and that the courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future.

It is argued that a county high school has never been established by the board of county commissioners; that the board has made no finding that a twelfth grade high

school accredited to the state university was not organized within the boundaries of the county, and that, prior to the levy, school district No. 18 of the county had organized such a high school which is now being maintained and was in process of organization at and prior to June 26. We are of opinion that the legislature established a high school district, and not the board; that when the fact was patent to all it was unnecessary for a formal finding to be made by the county board; and the fact that it made the call for the meeting of the school directors was sufficient evidence *prima facie* that no such school existed. The allegation that, prior to the levy, there was an accredited high school in the county is absolutely unsupported by the evidence.

The local conditions in Rock county are such as to demonstrate that the law may not always operate fairly and satisfactorily to the people of a county, and that under its provisions it is possible for the inhabitants of the county seat town to shift the burden of maintaining the local high school from their own shoulders to those of the people of the county at large. This is a matter for legislative consideration. The court is not authorized to remedy ill-considered or defective legislation, if any there be.

We are unable to see that this tax is levied for an illegal or unauthorized purpose, and therefore no injunction to restrain its collection should be granted.

The judgment of the district court is

AFFIRMED.

FAWCETT and HAMER, JJ., dissenting.

ERBA J. PHILLIPS, ADMINISTRATRIX, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JULY 1, 1916. No. 18762.

1. **Master and Servant:** INJURY TO SERVANT: ASSUMPTION OF RISK: PLEADING. "If the assumption of a risk not usually and ordinarily incident to the service is relied on as a defense in an action against the master for negligence, such assumption of risk must be specially pleaded." *Maxson v. Case Threshing Machine Co.*, 81 Neb. 546.
2. **Damages.** A verdict for $16,000 in an action under the federal employers' liability act on behalf of a widow for damages for loss of support by reason of the death of her husband, a conductor, who was earning $113 a month and who had an expectancy of 34 years, plaintiff being younger, *held* not so large as to indicate that the verdict was the result of passion or prejudice, nor so clearly excessive as to justify interference by the court.
3. **Jury:** CHALLENGE. "It is the duty of the trial court to decide as to the fact of qualification of a juror challenged for cause from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The trial court in determining the fact of qualification is not confined to the answers of the juror alone, but may consider his appearance and general demeanor while undergoing the examination." *Bemis v. City of Omaha*, 81 Neb. 352.
4. ———: ———: REVIEW. "In such a case the ruling of the trial court in deciding a challenge for cause will not be disturbed unless an abuse of discretion is shown." *Bemis v. City of Omaha*, 81 Neb. 352.

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

Edson Rich, A. G. Ellick and *B. W. Scandrett,* for appellant.

Devoe & Swenson and *Wilcox & Halligan, contra.*

FAWCETT, J.

From a judgment in favor of plaintiff, in an action brought under the federal employers' liability act (35 U. S. St. at Large, ch. 149, p. 65), defendant appeals.

Plaintiff is the administratrix of the estate of her deceased husband, Ray C. Phillips, who was killed March 14, 1913, while employed as a conductor on a freight train being operated by defendant between Cheyenne, Wyoming, and Sidney, Nebraska. While Phillips' train was waiting on a siding about 11 miles west of Sidney, it was run into by a following freight train. Phillips and the rear brakeman, Charles M. Cradit, were in the caboose at the rear of Phillips' train and were killed. A judgment in favor of Cradit's administrator was recently affirmed by this court. *Hadley v. Union P. R. Co.*, 99 Neb. 349. The present action rests upon practically the same evidence. Except as to the question of damages, the evidence in this case was read from testimony given in the *Hadley* case. The evidence is quite fully detailed in the opinion in that case, and it will not be repeated here. Under these conditions, the questions of defendant's negligence, and assumption of risk are controlled by the case cited. New questions presented by this appeal relate to the giving and refusing of instructions, the damages, and the competency of jurors.

Complaint is made of the instructions given by the court. With one or two exceptions the instructions are the same as those given and approved in the *Hadley* case. We find no error in the additional instructions given.

Complaint is also made of the refusal of the trial court to give instructions requested by defendant. Except in regard to the question of assumption of risk, identical instructions were requested and refused in the *Hadley* case, and the rulings of the court approved. Instructions were requested to the effect that Phillips assumed all dangers and risks which were open, apparent, known, and appreciated by him prior to the wreck, whether such dangers and risks resulted from the negligence of defendant or not. The trial court on its own motion gave a proper instruction relating to the assumption of ordinary risks. Risks arising from the employer's negligence are not ordinary, but extraordinary, risks. *Chicago, R. I. & P. R.*

Co. v. McCarty, 49 Neb. 475; *Grimm v. Omaha Electric Light & Power Co.,* 79 Neb. 387. The defense that plaintiff assumed the risks of defendant's negligence should have been specially pleaded. *Evans Laundry Co. v. Crawford,* 67 Neb. 153; *Maxson v. Case Threshing Machine Co.,* 81 Neb. 546.

It is contended that the verdict and judgment are excessive. The verdict was for $16,000. At the time of his death Phillips was 30 years of age. His expectancy, according to the table of mortality, was about 34 years. His widow was younger. She testified that for two years preceding his death he had earned an average of $113 monthly. He used $25 in paying his expenses while away from home at his work. The remainder was used in supporting himself and his wife and in buying and furnishing a home. On cross-examination she testified that she did not know what his pay checks were for any month in 1912 or 1913. Part of the year he was employed as a brakeman, and for this work his salary was considerably less than when he worked as a conductor. There was no evidence by defendant tending to show that his earnings were less than indicated by plaintiff's testimony. The verdict has been approved by the trial judge. A recovery of $13,500 was allowed in the *Hadley* case where the decedent was earning from $85 to $100 monthly. The verdict cannot be said to be so large as to indicate that it was the result of passion or prejudice, nor can we say that it is excessive.

It is contended that the court erred in overruling defendant's challenges to jurors. One of the acts of negligence relied upon by plaintiff was the operation of trains during the storm. Chief complaint is directed against a ruling of the trial court overruling defendant's challenge to a juror who, when examined in chief, expressed the opinion that it was unsafe to operate trains during the storm. The juror was examined by counsel for defendant and plaintiff and by the court, from all of which it was developed that his opinion was based largely upon his observations of the storm at his home, about 20 miles

southeast from the place of the wreck. In answer to questions by the court, we have the following: "Q. Do you feel that your opinion or impression of the storm as it was at your place would influence you in your judgment from the evidence of the storm at the point of the wreck? A. No. sir; it would not." While the trial court might properly have sustained the challenge, abuse of discretion has not been shown. The rule is:

"It is the duty of the trial court to decide as to the fact of qualification of a juror challenged for cause from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The trial court in determining the fact of qualification is not confined to the answers of the juror alone, but may consider his appearance and general demeanor while undergoing the examination.

"In such a case the ruling of the trial court in deciding a challenge for cause will not be disturbed unless an abuse of discretion is shown." *Bemis v. City of Omaha,* 81 Neb. 352.

Abuse of discretion in deciding the challenges for cause has not been shown. Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

THERESA HAUTH ET AL., APPELLEES, V. JOHN SAMBO ET AL., APPELLANTS.

FILED JULY 1, 1916. No. 18886.

1. **Intoxicating Liquors: ACTION FOR DAMAGES: PARTIES.** Persons engaged in selling intoxicating liquors under a license are jointly and severally liable for all damages arising from such traffic, to the causes of which they have contributed, and such liability extends to the sureties upon their bonds. All such persons and

their sureties may be joined as defendants in a single action to recover damages.

2. ———: BONDS OF LICENSEES. The obligation assumed in a liquor license bond is not purely contractual, but must be interpreted in the light of the provisions of the law regulating the liquor traffic. It is not a bond primarily given to indemnify a private party, though by its terms private parties may avail themselves of its provisions. It is a public bond given to the state as a condition precedent to engaging in the liquor traffic.

3. ———: ———. While, under the law of suretyship, a bond is, as a general rule, recognized to be purely a contract which, when privately given without any qualifying laws, is to be strictly construed and not extended beyond the scope of the obligation according to its express terms, still a statutory bond to the public, given for the observance of a law authorizing a business only permitted under specified conditions and regulated under the police power of the state, is not in the same sense strictly contractual in its nature. *Andresen v. Jetter*, 76 Neb. 520, and *Sullivan v. Radzuweit*, 82 Neb. 657, distinguished and limited.

4. **Witnesses:** IMPEACHMENT. Where a party takes the deposition of a witness, and such witness appears at the trial, and, when called to the witness-stand, surprises the party calling him, by testifying at variance with his testimony as given in his deposition, the party calling him may, after interrogating him as to the statements previously made, use the deposition, previously taken, for the purpose of showing such inconsistent statements.

5. **Intoxicating Liquors:** ACTION ON BOND: LIABILITY. In an action upon a liquor license bond by a widow and minor children, for damages alleged to have been caused by the death of their husband and father, who, while in a state of intoxication, caused by liquors furnished him by the principal in such bond, was upon a railroad track, or in such close proximity thereto as to be struck by a locomotive and killed, the question of negligence on the part of the railroad company, or contributory negligence on the part of the decedent, is immaterial.

6. **Torts:** JOINT TORT-FEASORS: SETTLEMENT: RELEASE. "Settlement with one of several joint wrongdoers and payment of damages is not a defense to an action against another, unless it was agreed between the parties to the settlement that such payment was in full of all damages suffered. If the settlement is in writing, oral evidence is competent to show the intention of the parties thereto in an action against one not a party to the settlement." *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393.

7. **Intoxicating Liquors:** CIVIL ACTION: VERDICT: JUDGMENT. The rule announced in *Bergmann v. Koehn*, 99 Neb. 525, that, in an action against a saloon-keeper and his sureties for damages, in which the jury has returned a verdict against both defendants for a sum in excess of the penalty stipulated in the bond, the trial court has power to render judgment against the principal defendant for the full amount of the verdict, and may also render judgment against the surety for the sum stipulated in the bond, is reaffirmed and declared to be the settled law in this state upon that point.

8. **Appeal:** HARMLESS ERROR. Other assignments of error, set out in the opinion, *held* insufficient to warrant interference with the judgment.

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

A. S. Ritchey, W. R. Patrick and *I. J. Dunn,* for appellants.

W. W. Slabaugh, John W. Battin and *A. E. Langdon, contra.*

FAWCETT, J.

Action by the widow and minor children of Joseph Hauth, deceased, to recover damages for his death, which it is alleged was contributed to by intoxicating liquors furnished him by defendant Sambo during the night immediately preceding his death. Sambo was a retail liquor dealer in the city of Omaha, and defendant Illinois Surety Company was surety on his bond. The action was instituted and service obtained upon the surety company in Sarpy county, and summons sent to and served upon Sambo, the principal, in Douglas county. The jury returned a verdict against both defendants for $11,400. Judgment was entered against the principal for the full amount of the verdict, and against the surety for $5,000, being the amount of the penalty fixed in the bond. Defendants appeal.

A number of errors are assigned, which will be considered in the order in which they are argued in the brief.

Is the verdict sustained by the evidence? The evidence as to whether or not Hauth had been drinking in Sambo's saloon during the night preceding his death, when considered in connection with the circumstances shown, cannot be called conflicting. The period of time covered by the evidence is from about 8 o'clock in the evening of September 21, 1912, until early in the morning of the next day. Plaintiff testified that Hauth was in Sambo's saloon about 8 o'clock in the evening; that others were in there drinking, and Hauth was there with them. She does not testify positively that she saw her husband drink, but she saw beer on the bar at the time, and a fair inference from her testimony is that she saw the others drinking, Her testimony further shows that about 10 o'clock her husband returned to the house, which was within sight of the saloon, got his gun, and returned to the saloon, with the declared intention of going hunting early in the morning; that when he left home at that hour he was not drunk; that he looked all right to her. The evidence clearly establishes the fact that from the time Hauth returned to the saloon at 10 o'clock until 2 or 3 o'clock in the morning, when he, in company with John Drabeck, Sambo's bartender, and one Dan Kennedy, started on their hunting trip, Sambo's saloon was the scene of a drunken carousal, and that during all of that time Hauth was a member of the party; that some time during the night he and one Veit became involved in a controversy which they adjusted by a fight outside of the saloon. The story told by some of defendants' witnesses on the stand, that Hauth was sober when he and his two companions started on the hunting trip at 2 o'clock in the morning, is too incredible, in the face of the facts shown, for any jury to believe. As we view the evidence, and as the jury unquestionably viewed it, it clearly establishes the fact that Hauth was intoxicated when he was struck and killed by the locomotive; that this intoxication was produced by liquors obtained in Sambo's saloon, and was the cause of his losing his life.

The second point argued is that the court erred in overruling the demurrer of each of the defendants on the ground of misjoinder of causes of action. The contention is that there was one cause of action stated against the defendants jointly on the bond, and an additional one against the defendant Sambo upon his liability as a retail liquor dealer, fixed by statute, regardless of and in addition to his contract obligation set forth in the bond. Section 3849, Rev. St. 1913, is as follows: "No person shall be licensed to sell malt, spirituous, and vinous liquors, * * * unless he shall first give bond in the penal sum of five thousand dollars, payable to the state of Nebraska, * * * conditioned that he will not violate any of the provisions of this chapter, and that he will pay all damages, fines and penalties and forfeitures which may be adjudged against him under the provisions of this chapter. * * * Any bond taken pursuant to this section may be sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed or by his agent or servant."

This section of the statute is clear and unambiguous. It makes the furnishing of the bond a condition precedent to the obtaining of a license to sell intoxicating liquors. It is, in every sense of the word, an integral part of the application for a license. The surety, who signs such a bond, knows at the time of doing so that the filing of the bond is one of the necessary conditions which must be complied with before the license is issued. The surety is, therefore, in every true sense of the word, a party to the application. He is charged with knowledge of the fact that the signing of this bond renders him subject to be sued upon it for the use of any person, or his legal representative, who may be injured by reason of the selling or giving away of any intoxicating liquors by the person so licensed, or by his agent or servant. He knows that the bond is conditioned that his principal will not violate any of the provisions of the chapter of the statute relating

to the issuance of such licenses, and that the principal will pay all damages, fines, penalties and forfeitures which may be adjudged against him under the provisions of this chapter. He therefore agrees that, to the amount stated in the bond, he will stand liable to pay all such damages, fines, penalties and forfeitures which may be adjudged against his principal, and this, too, without any condition or reservation that his principal must be first proceeded against. He, in fact, to the amount stated in the bond, makes himself a joint and several principal as to all persons who may be injured by reason of the selling or giving away of any intoxicating liquors by his principal himself, or by such principal's agent or servant. It will be seen from this that a surety on a liquor bond occupies a different relation to such a bond than that occupied by a surety upon ordinary bonds, and the rules applicable to an ordinary bond cannot be applied to a liquor bond with the same strictness with which they are applied to ordinary bonds.

We concede that under the rules governing recovery in actions on ordinary bonds a judgment in excess of the penalty of the bond would be erroneous. In *Andresen v. Jetter,* 76 Neb. 520, and *Sullivan v. Radzuweit,* 82 Neb. 657, the implication is that an action upon a saloon-keeper's bond is governed by the same principles as one upon an ordinary bond. In those cases, however, it will be seen that the distinction under consideration here was not presented or discussed. Where the distinction has been considered, we think the courts are generally holding that the rule in an action on ordinary bonds does not apply in actions upon liquor bonds. In the opinion by Maxwell, J., in *Jones v. Bates,* 26 Neb. 693, it is said: "The bond is merely a mode of securing satisfaction for the injury. In other words, the bond is given as a means of indemnifying persons who may be injured by the saloon-keeper furnishing intoxicating liquors to another." In *Wardell v. McConnell,* 23 Neb. 152, we held that principals and their sureties upon license bonds are liable to an action for damages jointly with the principals and sureties upon

other bonds of a like character, and that sureties upon the bond of a licensed vendor of intoxicating liquors are liable, not only for the damages resulting directly from the acts of their principals, but for all damages to which such acts contribute. On page 159 it is said: "We recognize this as a radical departure from the general law governing principals and sureties, but that it is in accordance with the provisions of the chapter referred to, we entertain no doubt." In *Horst v. Lewis,* 71 Neb. 365, we held that persons engaged in selling intoxicating liquors under a license in this state are jointly and severally liable for all damages arising from such traffic, to the causes of which they have contributed, and that such liability extends to the sureties upon their bonds; that all such persons and their sureties may be joined as defendants in a single action to recover damages. In the opinion, by Mr. Commissioner Ames (p. 367), it is said: "Defendants in such cases are treated both by the statute and by the foregoing decisions as joint wrongdoers, but the statute also creates a right of contribution among them, an element unknown to the common law relative to joint tortfeasors." (p. 368) "But Smith's sureties are obligated for his entire obedience to the law, and are liable, not only for his several or separate breaches of it, but for such breaches thereof, or liabilities thereunder, as he may have committed or incurred jointly with other licensees under the liquor act. They, therefore, to the same degree as their principal, had an interest in the action adverse to the plaintiffs, were proper parties to the action, and were properly served in any county in the state to which a summons was issued." In *Kramer v. Bankers Surety Co.,* 90 Neb. 301, we held: "The sureties on a bond given under the provisions of section 6, ch. 50, Comp. St. 1909, are not merely nominal parties in an action on the bond, but have such an interest in the action that an action on the bond may be brought against them in any county where they reside or may be found and, under section 65 of the Code, a summons properly issued to any other county for service on their principal." In Black,

Intoxicating Liquors, sec. 281, it is said: "The action given under the civil damage laws is entirely statutory, and hence must be governed wholly by the provisions of the statute." In *Squires v. Miller,* 173 Mich. 304, it is held: "The obligation is not purely contractual, but must be interpreted in the light of the provisions of law regulating the liquor trade." In the opinion, on page 311, it is said: "This is not a bond primarily given to indemnify a private party, though by its terms private parties may avail themselves of its provisions. It is a public bond given to the commonwealth as a condition precedent to engaging in the liquor traffic, a business which, as a matter of public policy, is regulated and restricted under the police power of the state." Again, on page 312, it is said: "While, under the law of suretyship, a bond is, as a general rule, recognized to be purely a contract which, in its nature, when privately given without any qualifying laws, is to be strictly construed and not extended beyond the scope of the obligation according to its express terms, still a statutory bond to the public, given for the observance of a law authorizing a business only permitted under specified conditions and regulated under the police power of the state, is not in the same sense strictly contractual in its nature. Its characteristics are also, and perhaps to a greater degree, statutory. It is to be read and construed and enforced in connection with and according to the statute pursuant to which it is given, and should be interpreted according to the purpose, intent, and meaning of the legislative enactment."

In order that there may be no doubt in the future as to the rule in actions on liquor bonds, the rule announced in the *Jetter* and *Radzuweit* cases will be considered as limited to actions on ordinary bonds.

In *Bergmann v. Koehn,* 99 Neb. 525, we held: "In an action against the saloon-keeper and his surety for damages, in which the jury has returned a verdict against both defendants for $9,000, the trial court has the power to render a judgment against the principal defendant for

the full amount of the verdict, and may also render judgment against the surety for the sum of $5,000, which is the amount for which the surety company is liable on its bond." A motion for rehearing was filed in that case, which we have held until the question there decided could be re-examined in the case at bar, which had been argued and submitted at the time such motion for rehearing had been filed. Under the authorities above cited, and after a careful re-examination of the question, we now reaffirm the above holding in *Bergmann v. Koehn* and announce it as the settled law upon that point in this court.

The third assignment is that the court erred in giving instruction No. 8, which defines the term "intoxication." While the definition of the term is not quite as explicit as it might be, it could not have prejudiced the jury, for the reason that the evidence of intoxication was so strong that the jury could not have been misled by the definition given.

The fourth assignment assails instruction No. 5, given by the court, which told the jury that the liability of a surety upon the bond of a liquor dealer is coextensive with that of the principal, and that their verdict with respect to the surety company should be the same as their verdict as to the principal. The surety company cannot complain of this instruction, for the reason that, to the extent of the penalty named in the bond, its liability was coextensive with that of the principal, and the court in entering judgment limited its liability to that sum. Defendant Sambo cannot complain, as his liability was not limited by the bond.

The fifth assignment challenges instruction No. 10, given by the court, in which the jury were told that it was not material whether the employees of the railroad company were negligent or not, or whether or not the railroad company was liable for damages, if any, sustained by plaintiff; that the question for the jury to determine was whether the deceased was intoxicated at the time of his death, and whether the defendant Sambo furnished the

intoxicating liquor, or some part thereof, and whether in consequence of such intoxication Hauth lost his life. It is claimed that this instruction was not applicable to the case, and that the case of *Cornelius v. Hultman,* 44 Neb. 441, from which the instruction was taken, was an entirely different case from the one at bar. It is said this instruction was an invitation to entirely disregard the defense set up in the answers of the defendants that plaintiff had made claim against the railroad company and had received full settlement and satisfaction for all loss and damage sustained by her by the death of Joseph Hauth. We think the instruction was proper. As stated by counsel for plaintiff in their brief, the question is whether the liquor furnished Hauth contributed to his injury and death; that it is immaterial whether he was guilty of contributory negligence in relation to the railroad, or whether the railroad was negligent. We think that, if Hauth's getting upon the railroad track, or in such close proximity to it as to receive the injury which caused his death, was the result of intoxication from liquors obtained in Sambo's saloon, the question of negligence or contributory negligence is, as the court stated, immaterial.

In the sixth assignment instruction No. 17 is complained of. It told the jury that if they found for the plaintiff they would determine the amount of the damages to which plaintiff was entitled under the evidence, and deduct from said amount the sum which the evidence shows had been paid plaintiff by the Chicago, Burlington & Quincy Railroad Company, to wit, the sum of $1,100, and render a verdict for the remainder. The complaint to this instruction is that but one injury resulted in this case, viz., the death of Hauth; that plaintiff was entitled to only one satisfaction for the loss sustained by his death, and that she obtained that satisfaction from the railroad company. There can be no controversy over the rule of law invoked, but we think it is not applicable here. The contract of settlement between plaintiff and the railroad company is before us. It shows upon its face that it is a compromise

settlement made by plaintiff in the face of a probably well-grounded denial by the railroad company of all liability. On this kind of a settlement plaintiff accepted from the railroad company $1,100. The agreement nowhere recites that plaintiff released other joint tort-feasors, or that the amount for which she compromised her claim with the Burlington road was the full amount of her damages. This point is ruled adversely to defendants' contention in *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393.

The seventh assignment is that the court erred in refusing to direct a verdict for defendants. In the light of what has been said, nothing need be added here.

The eighth and ninth assignments relate to the witnesses Fox and Veit, who on the trial testified directly at variance with the testimony which they had given a short time prior thereto in depositions. They were interrogated as to their contradictory statements in the depositions, and either denied making them or said they "did not remember." Counsel for plaintiff were then permitted to show this difference in their testimony by calling the stenographer who took the depositions. These two assignments involved the question of the right of the court to permit a party, who has been taken by surprise on the trial by having a witness whom he has introduced testify contrary to statements made by such witness to counsel prior to the trial, to impeach his own witness. It is contended that this cannot be done. Many authorities, in addition to those cited, could be found showing that to be the general rule; but, like all general rules, it has its exceptions. The exception to the rule is well sustained in *Selover v. Bryant*, 54 Minn. 434, and in the note to the case in 21 L. R. A. 418, and in *Doran v. Waterloo, C. F. & N. R. Co.*, 170 Ia. 614.

The tenth assignment assails the refusal of the court to give instruction No. 9, requested by defendants, by which the court was requested to tell the jury that, if they found from all the circumstances and evidence in the case that the accident which caused the death of Hauth would have happened whether he was intoxicated or sober, and that

the liquor furnished by defendant Sambo, if any was furnished, did not contribute to the accident, then their verdict should be for the defendants. The first point in this instruction called for speculation on the part of the jury, and the second point is properly covered by the instructions given by the court.

The eleventh assignment complains of the refusal of the court to give instruction No. 6, requested by defendants, as follows: "You are instructed that the plaintiffs are not entitled to recover damages for the loss of the society and companionship of the husband and father, nor for injuries to the feelings and sentiments caused by the intoxication and drunkenness of the husband and father, nor can damages be allowed by way of compensation for grief, wounded feelings and disappointed hopes." By instruction No. 16, given by the court on its own motion, the jury were correctly told just what things they might consider in determining the amount of the damages to be awarded in case they found for plaintiff, and concluded with this statement: "But in no event can the amount of damages exceed the value to plaintiffs of the support of deceased, which was lost to them through his death." No claim is made in the petition for damages on any of the grounds stated in the requested instruction. The instruction was properly refused.

The final assignment assails instructions 4, 10 and 14, given by the court, on the ground that they are contradictory, misleading and inconsistent. We are unable to agree with counsel upon this point.

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

AFFIRMED.

HAMER, J., not sitting.

JOSEPH R. DOHNER, APPELLEE, V. JOHN M. BARR, APPELLANT.

FILED JULY 1, 1916. No. 18889.

Appeal: CONFLICTING EVIDENCE. "Where the evidence is conflicting and the judgment is supported by competent evidence, it will not be disturbed, even though a different conclusion might have been reached." *Burwell Irrigation Co. v. Lashmett*, 59 Neb. 605.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

R. O. Williams, for appellant.

W. C. Frampton, contra.

FAWCETT, J.

Action to recover a balance of $50 for money loaned. Plaintiff recovered, and defendant appeals.

The errors assigned are that the court by its instructions to the jury eliminated defendant's plea of payment; that the court refused to give certain instructions requested by defendant; that the court neglected to give any instruction covering defendant's theory that the money had been paid; and that the verdict is not sustained by sufficient evidence. The evidence is in sharp conflict. It would have sustained a verdict either way. The jury accepted the testimony offered by plaintiff, and an experienced district court, who saw the witnesses upon the stand and heard them testify, approved the verdict by entering judgment upon it. This must be held conclusive on the question of the sufficiency of the evidence.

We have examined the instructions given by the court, also those requested by defendant, and are unable to discover any error either of omission or commission. The defendant's plea of payment was properly submitted. Everything requested by defendant in instructions refused,

which was proper to go to the jury, was covered by the court's instructions. The instructions we think fairly covered defendant's theory that the money had been repaid.

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

AFFIRMED.

SEDGWICK, J., not sitting.

W. H. LATHAM ET AL., APPELLEES, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES; DAVID C. BALLANTINE ET AL., INTERVENERS AND APPELLANTS.

FILED JULY 1, 1916. No. 18905.

1. **Parties:** INTERVENERS. "To authorize a party to intervene, he must have an interest of such a direct and immediate character that he will either gain or lose by the direct legal operation of and effect of the judgment. This interest must be one arising from a claim to the subject-matter of the action or some part thereof, or a lien upon the property or some part thereof." *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 137, 142.

2. **Drainage Districts:** OBJECTIONS TO ORGANIZATION: INTERVENTION. Upon the hearing of objections to the organization of a drainage district by the district court, owners of lands outside of the proposed district who have not been made parties to the proceeding, who refuse to become members of the district, and whose lands are not subject to assessment for the cost of the proposed improvements, cannot intervene and object to the organization of the district on the ground that the construction of the drainage improvements will injure their lands which adjoin a stream below the outlet of the proposed drainage ditch. Rev. St. 1913, sec. 1799.

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

J. A. Williams, for appellants.

Byron Clark, W. H. Latham and *L. H. Cheney, contra.*

FAWCETT, J.

Plaintiffs, who are owners of Swamp and overflowed lands traversed by Medicine creek, filed with the clerk of the district court for Frontier county articles of association for the organization of a drainage district. Rev. St. 1913, secs. 1797–1865. Summons was served upon the Chicago, Burlington & Quincy Railroad Company and upon Frontier county, the other owners of land within the proposed district. A number of owners of lands below the proposed drainage ditch intervened and challenged the right of plaintiffs to form the proposed district. After a hearing, the district court authorized the formation of the drainage district, and the interveners have appealed.

In the district court plaintiffs challenged the right of interveners to oppose the formation of the drainage district. Interveners are not the owners of real estate within the proposed district, and their lands will not be assessed to pay the cost of the drainage. Though requested to do so, they have refused to join with plaintiffs in the organization of a drainage district. Medicine creek flows eastward and southerly in a tortuous channel through the lands of plaintiffs and on through the lands of interveners. The proposed drainage ditch, including the lateral, is two and a half miles long. It taps the creek on lands of plaintiffs and returns to the creek before leaving their lands. The ditch has the same carrying capacity as the creek, but shortens the distance about one-half. Interveners challenge the right of plaintiffs to organize a drainage district on the ground, among others, that the straightening of the channel will so accelerate the flow of the water in the creek as it crosses interveners' lands that it will wash and overflow the same, and also deprive them of the benefits of subirrigation. Are interveners entitled to object to the formation of the drainage district on the alleged ground that the construction of the drainage ditch will be to their damage as owners of land adjoining the creek below the outlet of the ditch? Interveners contend that their action is authorized by the statute, which provides:

"Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences." Rev. St. 1913, sec. 7609.

This section must be read in connection with the provisions of the drainage act. The act provides for the filing of articles of association showing, among other matters, the boundaries of the proposed district, the names of owners signing the articles, and a description of the real estate within the proposed district, and the names of owners of real estate within the district benefited by the proposed construction who refused to sign the articles. Rev. St. 1913, sec. 1797. Notice of the proposed organization must be given to all owners of land within the district who have not signed the articles of association. Rev. St. 1913, sec. 1798. The statute further provides:

"All owners of real estate situated in the proposed district who have not signed the articles of association and who may object to the organization of the drainage district, after having been duly summoned shall, on or before the second day of the term of court to which they have been summoned to appear, file their objection or objections in writing, if any they may have, why such drainage district should not be organized and declared a public corporation of this state, and why their land will not be benefited by drainage, and should not be embraced in the drainage district and liable to taxation for draining the same; and all such objections shall be heard by the court in a summary manner, without any unnecessary delay, and, in case such objections are overruled, the district court shall, by its

order duly entered of record, duly declare the drainage district a public corporation of this state. * * * And in case any owner of such real estate shall satisfy the court that his real estate, or a part thereof, has been wrongfully included in the district, and will not be benefited thereby, then the court may exclude such real estate as will not be benefited, and declare the remainder a district as prayed for." Rev. St. 1913, sec. 1799.

The intent of the statute is that upon the hearing by the district court the proceedings shall be "in a summary manner, without any unnecessary delay." Provision is made for hearing the objections of owners of real estate within the district. The statute does not contemplate that the question of the rights and liabilities of the district to third persons shall be determined in such proceeding. It is not intended that landowners without the district who will not be assessed for the cost of the improvements shall prevent the organization of a drainage district by landowners consenting to be assessed for the cost of the improvements. The drainage act does not contemplate that the question of damages raised by third persons shall be decided at the hearing upon the application for the formation of a district, and the statute permitting intervention is not applicable. "To authorize a party to intervene, he must have an interest of such a direct and immediate character that he will either gain or lose by the direct legal operation of an effect of the judgment. This interest must be one arising from a claim to the subject-matter of the action or some part thereof, or a lien upon the property or some part thereof." *Kansas & C. P. R. Co. v. Fitzgerald,* 33 Neb. 137, 142.

Zumbro v. Parnin, 141 Ind. 430, and *State v. Board of County Commissioners,* 98 Minn. 89, relied upon by interveners, were decided under drainage laws containing different language. Whether the construction of the ditch would wrongfully damage interveners as alleged is a question to be decided in other proceedings. The statute provides that the district may be sued, and that it "shall be

liable for all injuries and damages caused by the construction of said drainage improvements arising by virtue of contract or tort." Rev. St. 1913, sec. 1864. The district is given the power of eminent domain to acquire rights of way whether within or without the district. Rev. St. 1913, secs. 1816, 1817. Rights of landowners without the district may be protected in proper proceedings. The trial court properly found against interveners. Owners of real estate within the district are not opposing the formation of the district, and questions presented by interveners relating to the legality of the organization need not be decided on this appeal.

The judgment of the district court is therefore

AFFIRMED.

SIDNEY G. JOHNSON, APPELLANT, V. CHARLES C. LANE, APPELLEE.

FILED JULY 1, 1916. No. 18936.

1. **Appeal:** CONFLICTING EVIDENCE. "Where the evidence is conflicting and the judgment is supported by competent evidence, it will not be disturbed, even though a different conclusion might have been reached." *Burwell Irrigation Co. v. Lashmett*, 59 Neb. 605.
2. ———: HARMLESS ERROR. "To warrant the reversal of a judgment, it must affirmatively appear from the record that the ruling with respect to which error is alleged was prejudicial to the rights of the party complaining." *Dobry v. Western Mfg. Co.*, 58 Neb. 667.

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

Sutton, McKensie & Cox, for appellant.

John J. Sullivan and *W. R. Mitchell, contra.*

FAWCETT, J.

From a judgment of the district court for Douglas county, for damages claimed by plaintiff to have been suffered by reason of fraudulent misrepresentations of the defendant with respect to certain real estate in the states of Kansas and Oklahoma, for which plaintiff exchanged a stock of implements owned by him in Clifton, Kansas, plaintiff appeals.

Defendant was a real estate broker, and as such was representing the owners of the Kansas and Oklahoma lands. He negotiated the exchange for his principals with plaintiff. The transaction was completed and the properties duly exchanged. Plaintiff now complains that the lands were not of the quality, quantity and value represented by defendant, and prays for damages by reason thereof in the sum of $11,000. The answer is a general denial. More than 20 witnesses were examined at the trial. Their testimony is set out in a bill of exceptions of over 300 pages. On every material point in the case it is in sharp conflict. A careful examination of it shows that it is ample to have sustained a verdict either way. In arriving at a verdict either way, the jury would be compelled to entirely discredit many of the witnesses on one side or the other. This was clearly the province of the jury who saw 13 of the 22 witnesses upon the witness-stand and heard them testify. We must accept their judgment on this point.

Complaint is made of some of the instructions given by the court. The action is grounded on alleged fraudulent misrepresentations of the defendant. The jury found for the defendant. By that verdict they have said that the defendant is not guilty of having made the fraudulent misrepresentations charged. In reaching this conclusion they have accepted the testimony of the witnesses offered by defendant as true. This fact being established, then, when the instructions are applied to that evidence, they contain no prejudical error.

Complaint is especially made of instruction No. 7, given by the court. By this instruction the court told the jury that one Jesse T. Parker was the agent of plaintiff and acted as such in assisting to consummate the transaction between plaintiff and the owners of the property represented by defendant, and that it was the duty of an agent to communicate to his principal every fact affecting a transaction, entrusted to his care, which comes to his knowledge in the course of and during its performance. "and, unless it is shown that the agent, with the knowledge of the adverse party, has acted fraudulently under such circumstances as to apprise the latter that facts communicated to the agent have not been, and probably will not be, communicated by him to his principal, or the adverse party is in some way implicated with the default of the agent, this duty, in an action between the principal and the adverse party, the agent is conclusively presumed to have obeyed." It is contended that this instruction was prejudicial, for the reason that no restriction of any nature was named therein. We do not deem it necessary to enter upon a discussion of the instruction. We are relieved of that burden by what is stated by plaintiff in his brief. It is there said: "There is nothing in the record to indicate that Mr. Parker was employed by the defendant to inspect and place a value upon the property which plaintiff was to receive. In fact, the principal himself was taken to view the property and made the inspection for himself." In the light of this admission, we are not surprised that the jury found for the defendant on the question of fraudulent misrepresentations by defendant as to the character, value and quantity of the lands which plaintiff was to receive in the transaction. Having made the inspection himself, and there being no claim that he was not shown the land involved in the proposed exchange, the instruction given was without prejudice.

Complaint is made of the refusal of the court to give three instructions requested by plaintiff. All three of these instructions related to the question of the measure of

damages in the event that the jury found for plaintiff. The jury having found for defendant, error, if any, in the refusal to give these instructions would be without prejudice.

We have gone over appellant's brief three times, and have made a careful examination of the record for the purpose of satisfying ourselves that no fraud was committed by defendant. In the light of that examination, we concede that another jury *might* reach a different conclusion from that reached by the jury which heard the case, but that is not sufficient to justify us in ordering a new trial. In order to do that, we must be able to say that the verdict was clearly wrong. This we cannot say.

AFFIRMED.

SEDGWICK, J., not sitting.

ETHEL M. KRIEBS, APPELLEE, V. NICHOLAS KRIEBS ET AL., APPELLANTS.

FILED JULY 1, 1916. No. 18937.

Appeal: QUESTIONS REVIEWABLE. "When a bill of exceptions has been quashed, no question can be considered, a determination of which necessarily involves an examination of the bill of exceptions." *Reed v. Rice*, 48 Neb. 586.

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

Amos E. Henely, for appellants.

Montgomery, Hall & Young and T. M. *Zink, contra.*

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, in an action for alienation of the affections of her husband, defendants appeal.

Defendants failed, for more than eight months after the adjournment of the term of court at which judgment was entered, to settle a bill of exceptions, and on motion of plaintiff it was quashed. The case is therefore before us upon the transcript alone. The defendants are the parents of plaintiff's husband. The petition alleges, in detail, most inexcusable conduct on the part of the defendants toward plaintiff in the presence of her husband, and while she and her husband were living with the defendants in their home. At the trial the jury returned a verdict in favor of plaintiff for $5,000, upon which the court, after overruling separate motions for a new trial, entered judgment. The answer of defendant Nicholas was a general denial. The answer of defendant Ida was a general denial, followed by a third paragraph which alleged that, in all of her conduct, statements, acts and doings toward plaintiff and her husband, the answering defendant acted without any ill will or malice toward plaintiff, and had only advised and done that which she fairly and honestly considered to be to the best interests of her said child.

The first assignment of error is based upon instruction No. 1, which stated the issues. In this statement the court correctly set forth the answer of defendant Nicholas, and also correctly set forth the substance of the answer of defendant Ida, with the exception that it failed to state the substance of paragraph 3 of the answer above referred to, and concluded thus: "And these are the only material allegations in defendants' answers." It is contended here that this instruction failed to set forth "the affirmative defense of the answer of the defendant Ida Kriebs." If the evidence in any manner tended to sustain the allegations in paragraph 3 of defendant Ida's answer, the failure to state it as one of the material issues in the case would have been error on the part of the court; but, if the evidence clearly failed to establish such allegation, its omission from the statement of the issues was justifiable and would not be error. The evidence is not before us. If it came anywhere near sustaining the allegations of out-

rageous treatment of plaintiff by the defendants, as set forth in the petition, it would completely destroy any claim on the part of defendant Ida that she acted without ill will or malice and had only done that which she fairly and honestly considered to be to the best interests of her son. In the absence of the bill of exceptions, we must assume that the evidence was sufficient to sustain the court in not submitting that issue to the jury. The same must be said of all other instructions complained of in the brief.

We see no way in which we can give defendants any relief on this appeal. The pleadings are ample to sustain the instructions given by the court and the verdict returned by the jury.

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

CITY OF LINCOLN, APPELLEE, V. LINCOLN GAS & ELECTRIC LIGHT COMPANY, APPELLANT.

FILED JULY 1, 1916. No. 18405.

Taxation: OCCUPATION TAX: DISCRIMINATION. When there are several public service corporations engaged in furnishing heat, light and power to the people of a city and occupying the streets, alleys and public places of the city, with their apparatus for that purpose, under franchise granted by the city, the fact that one furnishes heat, light and power by electric current conveyed by wires and the other by gas conveyed by underground mains does not furnish a sufficient basis for classification to justify levying an occupation tax upon one of such companies and not upon the other. A tax so levied is void for unjust discrimination.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Reversed and dismissed.*

Strode & Beghtol, for appellant.

C. Petrus Peterson, contra.

SEDGWICK, J.

In November, 1906, the city of Lincoln by ordinance No. 432 provided that no gas company should "charge, exact, demand or collect * * * more than the sum of one dollar net per 1,000 cubic feet," and in December of that year the defendant city by ordinance No. 439 imposed an occupation tax on all gas companies of 2½ per cent. of the gross receipts of the company. Afterwards, on the 27th day of December of that year, this defendant began an action in the circuit court of the United States, district of Nebraska, alleging that both ordinances of the city were invalid, and asking for an injunction against their enforcement. In May, 1908, the city of Lincoln began this action in the district court for Lancaster county to recover the occupation tax provided for in the aforesaid ordinance. This action was not finally determined in the district court until in July, 1913, when that court entered a judgment against the defendant.

One of the objections to the ordinance imposing this tax is that it "denies to defendant the equal protection of the laws, and is unjust and discriminatory in its classification." The ordinance imposes a tax of 2½ per cent. on "all gas companies manufacturing and furnishing gas to the inhabitants of the city of Lincoln." The defendant furnishes gas for heat, light and power purposes, and there is at least one other company whch has a franchise from the city, occupying streets and public places in the city as the defendant does, and furnishes heat, light and power by electric current as a public service corporation. There is no just basis of classification which will allow the imposition of an occupation tax upon one of two companies so organized with such privileges and not upon the other, when both companies are engaged, and competing as public service corporations, in furnishing the public generally with heat, light and power. The fact that the companies use different modes of conveying their product and supplying the de-

sired accommodations is not a sufficient basis for discriminating in exacting an occupation tax. In the action brought in the circuit court of the United States for this district by this defendant to restrain the enforcement of the so-called "dollar gas" ordinance, that court considered that it was necessary to determine the validity of the ordinance involved in this case, and in its opinion said: "The occupation tax of 2½ per cent. for the year 1907 would have amounted to $4,484.15. This occupation tax I think invalid, as violating the Constitution of the state of Nebraska, requiring it to be uniform upon persons and property. In my judgment, an electric plant, which furnishes to the public light, heat, and power, should be classed the same as a gas plant, which furnishes to the public light, heat, and power. The fact that one furnishes the light, heat, and power by means of an electric current—the other by a current of gas—does not, in my judgment, justify a difference in classification. So far as the patrons are concerned, it is results that are sought for, and it is results which the respective parties furnish the public." The opinion was filed March 20, 1909. That court then enjoined the enforcement of this ordinance. *Lincoln Gas & Electric Light Co. v. City of Lincoln*, 182 Fed. 926. An ordinance passed in March, 1906, levied an occupation tax of 2 per cent. on the business of manufacturing electric current. In December, 1909, after the said decision in the "dollar gas" case, an ordinance was enacted repealing both of the former ordinances and levying an occupation tax of 3 per cent. on the manufacture and sale of gas and electric current. We think the federal court was right in holding the first ordinance invalid, and it follows that the plaintiff can have no right of action thereunder. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

LETTON, J., dissenting.

I am unable to concur in the view of the majority. The opinion holds, without citing a single authority to

sustain the position, that there is not sufficient difference between a gas company and an electric light and power company to classify them as different occupations for the purpose of imposing a business tax, and that such a tax imposed upon one of these occupations and not upon the others is void for that reason. The general principle as to such cases is clearly stated in 37 Cyc. 732, as follows: "The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the legislature from taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons *pursuing the same avocation.*" No provision of either statute or constitution has been pointed out to justify the conclusion reached, and I think none can be found.

The real question is whether there is any such difference in the occupation of manufacturing and selling gas and that of producing and selling electricity as to afford room for classification. It seems to me there is no room for doubt here. An electrician carries on an entirely different occupation from that of a gas-maker, and makes a different product, though it may be used for some similar purposes. There is no more resemblence between them than between a Christian Science healer and a physician of the most rigid allopathic school; or between a surgeon and an osteopath or chiropractor. Can it be said that an occupation tax upon physicians is invalid because no tax is imposed upon mental healers, osteopaths or Christian Science practitioners? Yet, all these classes attempt to perform the same function, that of healing bodily ills. A baker and a butcher and a grocer all sell food. Is there no distinction between them for the purpose of taxation? Steam laundries and poor washerwomen perform exactly the same service. Under the law as laid down in the opinion, an occupation tax cannot be levied upon steam laundries unless it also includes

within its terms the poor woman, or the Chinese laundryman, because the product of their labor is the same. But the question involved has repeatedly been decided in this state. As recently as in *Norris v. City of Lincoln*, 93 Neb. 658, it was held that the business of loaning money upon chattel security might be taxed, though the business of loaning money on every other kind of security or without security was exempt. The contention was made in that case, as in this, that the tax was discriminatory and void. The subject is lucidly discussed by Judge Barnes in the opinion, and the conclusion expressed in the syllabus that, "When a city charter authorizes a municipality to require by ordinance a license tax of persons engaged in any occupation, trade, or business carried on within the corporate limits of the city, the municipal authorities may by ordinance classify the different occupations for taxation, and impose different taxation in different amounts upon the different classes; and a classification made by such authorities will not be interfered with by the courts, unless it manifestly appears that it is unreasonable and arbitrary." Up to this time this has been settled law in this state.

In *State v. Insurance Co. of North America*, 71 Neb. 320, an occupation tax which discriminated as to insurance companies between those whose domicile was in a state the laws of which discriminated against outside companies, and those whose domiciles were in states which had no such laws, was held to be valid. Yet, both were selling insurance.

In *Rosebloom v. State*, 64 Neb. 342, it was held that there was such a distinction between peddlers who sell their own products and those who sell the productions of others that the legislature may make this a basis of classification for the purpose of taxation, and said: "The real test of the validity of defendant's objection to this statute is not whether the classification is wise and just, but whether the legislature acted arbitrarily,

whether, without an adequate determining principle, it made a division of peddlers into two classes, and then sought to deprive one class of their constitutional right to the equal protection of the laws. If there is a genuine and substantial distinction between persons who go from house to house, and place to place, vending their own products, and those who sell in the same manner the productions of others, the classification is founded in the nature of things, and is therefore upon a basis everywhere recognized as lawful." See, also, *Magneau v. City of Fremont,* 30 Neb. 843; *Aachen & Munich Fire Ins. Co. v. City of Omaha,* 72 Neb. 518; *Western Union Telegraph Co. v. City of Fremont,* 39 Neb. 692.

Section 1, art. IX of the Constitution, provides: "The legislature * * * shall have power to tax peddlers, auctioneers, * * * in such manner as it shall direct by general law, uniform as to the class upon which it operates."

Mr. Dillon says, in 4 Municipal Corporations (5th ed.) sec. 1410: "Such constitutional provisions do not preclude the classification of occupations for purposes of taxation, and their requirements are satisfied if all the persons in a particular class of business are taxed alike or upon the same principle, although other and distinct vocations and businesses are not taxed or are taxed at a different rate." This is the doctrine formerly adopted in this state, but set aside by the majority opinion.

The tax imposed upon the defendant is for revenue purposes. "An ordinance having no element of regulation, and showing on its face that the sole purpose of the city authorities in adopting it was to raise revenue, is a tax ordinance, even though the right to engage in the business or calling taxed is made to depend upon paying the tax and obtaining a license." *State v. Boyd,* 63 Neb. 829.

An occupation tax may be unjust and discriminatory; it may tax a few occupations and leave scores of others untaxed; but, as long as there is a reasonable basis for classification and it acts uniformly upon the class or occupation of persons taxed, it is not invalid under the Constitution, and the courts should not interfere.

ROSE, J., not participating.

CITY OF LINCOLN, APPELLEE, V. LINCOLN GAS & ELECTRIC LIGHT COMPANY, APPELLANT.

FILED JULY 1, 1916. No. 18406.

1. **Corporations:** CHARGES: VALIDITY OF OCCUPATION TAX. An occupation tax against a public service corporation, if valid, so directly affects the question of rates of service that in determining whether a rate is remunerative or confiscatory the validity of an alleged occupation tax must necessarily be considered and determined.
2. **Abatement.** An action in the state courts to recover an occupation tax against such corporation, begun while an action is pending in the courts of the United States to determine whether another ordinance regulating the rates of service of such corporation is confiscatory, should be abated until the action in the federal court is finally determined.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Reversed, with directions.*

Strode & Beghtol, for appellant.

C. Petrus Peterson, contra.

SEDGWICK J.

This action was begun in December, 1910. The first petition alleged an ordinance, No. 732, enacted in December, 1909, levying an occupation tax of 3 per cent. on gross receipts of "every person or corporation engaged in the business of selling electricity or gas in the city of

Lincoln, Nebraska." The petition asks for accounting, general equity, and judgment. The petition was afterwards amended. In the last amendment there is an additional allegation that in 1908 an ordinance, No. 570, was enacted, levying an occupation tax on the business of furnishing electric current, and that the ordinance of December, 1909, repealed the ordinance No. 570 of 1908; that the said ordinance of 1908 was in "full force and effect from the 15th day of April, 1908, to the 15th day of January, 1910, when it was repealed" by the said ordinance of 1909, No. 732, and that "said repealing ordinance specifically reserved all right of the city of Lincoln to commence or prosecute any actions or proceedings for the collection of any tax levied in the ordinance so repealed." It seeks to recover the occupation tax which accrued while that ordinance was in force.

When this action was begun, the action in the federal court begun by this defendant against this plaintiff and its officers, more fully considered in *City of Lincoln v. Lincoln Gas & Electric Light Co., ante, p.* 182, had been decided by the circuit court, and the occupation tax perpetually enjoined. The amended complaint in the said action in the circuit court of the United States asked for an injunction *pendente lite,* enjoining the enforcement of an ordinance, No. 432, being an ordinance regulating the price of manufactured gas. The complaint asked for no injunction *pendente lite* enjoining the occupation tax ordinance, but contained a prayer for "such further or other relief in the premises as the nature of the circumstances of this case may require." The trial court found that the occupation tax ordinance was void and entered a judgment enjoining its enforcement. It found that the "dollar gas" ordinance was valid and refused to enjoin its enforcement. It appears to be conceded that the validity of the occupation tax ordinance was involved in that litigation, since such tax, if valid, would directly affect the net receipts of the company and so would be an important factor in determin-

ing a remunerative and just rate. The gas company appealed to the supreme court of the United States, and that court (223 U. S. 349) reversed the judgment of the circuit court and entered a judgment in which it recited the decree of the district court, including the finding of that court, as follows: "The court further finds that the ordinance of the city of Lincoln, levying an occupation tax against the complainant, violates the Constitution of the state of Nebraska, and is, for that reason, illegal and void, and that the enforcement of the same as to complainant should be perpetually enjoined. It is therefore adjudged and decreed that a permanent injunction be, and the same is hereby, granted, perpetually enjoining the city of Lincoln from enforcing said occupation tax ordinance." The supreme court entered the following as a part of its judgment: "And it is further ordered that this cause be, and the same is hereby, remanded to the district court of the United States for the district of Nebraska, with directions to refer the case to a competent and skilled master, to report fully his finding upon all of the questions raised by either party, separately, and with leave to both parties to take any additional evidence they may wish within a time to be fixed by that court, and that that court, upon such report, proceed as equity shall require." One of the questions raised was as to the validity of the occupation tax ordinance, and this order of the supreme court requires the master to take evidence and "report fully his finding" upon this question, and the judgment of the supreme court continued: "It is further ordered, adjudged, and decreed for the protection of all parties that the injunction granted in the court below continue in force until final decree there."

The question whether the judgment of the supreme court reversed the decree of the lower court, which adjudged the occupation tax to be void, or only reversed the judgment so far as it was against the defendant company, since that company alone appealed, is dis-

cussed in the briefs, but that question seems to be immaterial so far as the point here involved is concerned, since the supreme court recited the judgment of the lower court, which enjoined the enforcement of the occupation tax, and directed that the validity of the occupation tax should be investigated and reported upon by the master, and that the injunction granted by the court against the enforcement of the occupation tax should be continued until the final determination of that case. Counsel for the city contends that the validity of the occupation tax depends upon the Constitution and laws of this state, and that the decision of the federal courts upon such question is not binding upon the courts of this state. The federal courts will not entertain cases that are purely local and depend entirely upon the proper construction of the laws of the state; and, while the state courts seldom disregard the opinions of that high tribunal even upon local laws, still such decisions are not absolutely binding as precedents upon the courts of the state. But when the force and construction of the law of the state are involved, although incidentally, in litigation in the federal courts, the decision of that court is conclusive between the parties in that litigation, and the question so involved, if necessarily decided by the court, is *res judicata* between the parties thereto.

The dollar gas ordinance and the occupation tax are so closely related that the former cannot be adjudicated without a consideration of the validity of the latter. The federal courts have so regarded it, and have assumed jurisdiction to determine the validity of the occupation tax ordinance, and we are not prepared to say that it was beyond their jurisdiction so to do. It follows that the plea in abatement in the lower court should have been sustained.

The judgment of the district court is reversed and the cause remanded, with instructions to continue the

case until the final determination of the litigation in the federal courts.

REVERSED.

ROSE, J., not participating.

LETTON, J., dissenting.

These ordinances were not involved in the issues in the case in the United States court. I think the state court should determine the validity of the ordinances, and that there is no valid reason for declining to pass upon the merits of this appeal.

ARCHIBALD L. JOHNSTON, ADMINISTRATOR, APPELLEE, v. FREDERICK A. DELANO ET AL., RECEIVERS, APPELLANTS.

FILED JULY 1, 1916. NO. 18869.

1. **Railroads:** ACTION FOR DEATH: CONTRIBUTORY NEGLIGENCE. "The act of a party in going upon a railroad crossing without first listening and looking for the approach of a train, without a reasonable excuse therefor, is such as permits of no other inference than that of negligence; and if such failure to look and listen contributes to the party's injury he cannot recover." *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627.
2. ———: ———: ———. When two persons of equal authority are riding in a vehicle which is driven upon a railroad track in front of an approaching train in full unobstructed view, it is immaterial which of the parties is driving, since, if either party looked and listened, he must have seen the approaching train.
3. ———: ———: ———. A railroad company may run its train whenever necessary in the conduct of its business, and travelers at a private crossing are guilty of negligence if they assume to know when the trains will be run, and so fail to look and listen before crossing.
4. **Negligence:** ORDINARY CARE: PRESUMPTION. There is no presumption of ordinary care induced by the instinct of self-preservation when there is evidence of negligence.

5. **Railroads:** ACTION FOR DEATH: CONTRIBUTORY NEGLIGENCE. If the circumstances and conditions proved are such that one who looked and listened before driving upon the tracks must necessarily have seen an approaching train, the conclusion necessarily follows that in attempting to cross the tracks he did not observe those precautions, and was guilty of negligence.

6. **Negligence:** "LAST CLEAR CHANCE." The rule of the "last clear chance" is based upon the idea that, when any person is in a place of danger, whether negligent or not, one who knows, or who might know, and under the circumstances ought to know, of the danger, must use every precaution to avoid injuring him.

7. **Railroads:** ACTION FOR DEATH: "LAST CLEAR CHANCE." In the absence of proof of opportunity to avoid injuring such person after his danger was discovered, or ought to have been discovered, there is no reason for the application of the "last clear chance" doctrine.

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

John L. Webster and *James L. Minnis,* for appellants.

Earl R. Ferguson, C. R. Barnes and *Harry W. Shackelford, contra.*

SEDGWICK, J.

Ralph Johnston and his father's hired man were crossing the defendants' railroad with a team and wagon, and the wagon was struck by an engine and both the occupants of the wagon were almost instantly killed. The plaintiff brought this action, as administrator of the estate of his son, Ralph Johnston, in the district court for Douglas county, and recovered a judgment, from which the defendants have appealed.

Extensive briefs have been filed by both parties and many questions are presented and discussed, but it seems that there are two controlling questions upon which the decision of the case must depend. The defendants contend that the plaintiff cannot recover because of the negligence of the deceased. The deceased, about 13 years of age, and Andy Johnson, a man of middle age, who was in the employ of the father of the deceased,

went with a team and wagon across the tracks of the defendants to a slaughter-house and obtained a load of fresh meat. Returning with it, they drove by the usual way along the line of the defendants' track about 300 feet to a private crossing, where the accident occurred. There was a fence between the way they took and the railroad track, and when they came to the private crossing they turned through a gate in the fence and drove about 50 feet upon the railroad track, and the wagon was there struck by the train. The train had just passed through the little town of Blanchard, and approached this crossing at a speed of about 45 or 50 miles an hour.

It seems to be conceded that there was no building or other obstruction which would interfere with a free view of the track upon which the train was approaching for a distance of over a quarter of a mile from the crossing where the accident occurred, except two trees, which could not wholly obstruct the view of an oncoming train, and which were about 40 rods from the crossing. "The act of a party in going upon a railroad crossing without first listening and looking for the approach of a train, without a reasonable excuse therefor, is such as permits of no other inference than that of negligence; and if such failure to look and listen contributes to the party's injury he cannot recover." *Omaha & R. V. R. Co. v. Talbot,* 48 Neb. 627.

The plaintiff contends that the deceased was not guilty of contributory negligence, because "Ralph and Andy, driving north along the lane to the crossing, would be going directly against whatever wind was blowing, the natural tendency of which would be to cause their eyes to water and impair their vision. Turning into the driveway, and looking down the track, they would be looking almost directly into the sun, the reflected glare of which from the snow which covered the ground would be blinding. The train was running an hour and a half behind its regular schedule time. The

steam and frost which almost enveloped the train would tend to make it almost invisible against the background of newly fallen snow. The fact of the snow being on the ground would tend to muffle the sound of the approaching train, and this sound would be further retarded by the fact that whatever wind there was, was blowing directly against it. The fact that the I. & S. W. engine had been for an hour or more switching cars back and forth in the yards near the rolling mill and depot would tend to cause confusion as to the identity of the train, even if it could be seen in the distance. The steam exhaust escaping from the rolling mill across the track would tend to further obscure the train. The rumbling of the mill and the sound of the exhaust would tend to confuse the hearing and make it difficult to distinguish the sound of an approaching train."

The rolling mill and depot referred to were more than a quarter of a mile from the crossing. If the steam and frost enveloped the train, and was approaching in a mass at the rate of 45 miles an hour, that of itself would suggest danger. It is incredible that, if either of these parties had seen such a condition, he would have failed to know and declare the danger. That the cold wind in their faces or the glare of the sunshine upon the snow should prevent them from seeing the approaching train is likewise incredible. The train was running directly against the wind, and it is, of course, impossible that its own steam and smoke should precede the train and hide the approaching engine.

There is some evidence tending to show that it is probable that the hired man was driving the team; but that seems to be immaterial. If either party had looked and listened, and had given the natural warning, the accident would have been avoided. The train was late an hour or more, and this may have added to their feeling of security, and may have been one of the causes inducing their negligent conduct. But the defendants might run their train whenever necessary in the conduct

of their business, and travelers at a private crossing are guilty of negligence if they assume to know when the trains will be run and so fail to look and listen. There is no presumption of ordinary care induced by the instinct of self-preservation when there is evidence of negligence. The evidence shows that they recklessly drove upon the track without any precaution, because, under the circumstances and conditions shown to exist at the time, if they had looked and listened, they must have observed the approaching train. They were therefore guilty of contributory negligence which was the direct cause of the accident.

There is not room for the application of the "last clear chance" doctrine. That rule of law is based upon the idea that, when any person is in a place of danger, whether negligent or not, one who knows, or who might know, and under the circumstance ought to know, of the danger, must use every precaution to avoid injuring him. These parties were driving along the farther side of a fence which marked the limits of the company's right of way. There was no indication that they would attempt to cross the track in the way of the oncoming train, until they turned through the gate, which was about 50 feet from the crossing. There is no evidence that the engineer or fireman saw them during the short time that they were driving these 50 feet, or that they were in a position where they ought, if using due care, to have seen them. In the absence of clear evidence of opportunity on the part of the engineer to avoid injuring them after their danger was discovered, or ought to have been discovered, there is no reason for the application of the "last clear chance" doctrine.

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

REVERSED.

LETTON, J., dissenting.

This action is brought to recover for the killing of a boy not quite 13 years of age. The majority opinion holds

"that there are two controlling questions upon which the decision of the case must depend." The first is whether the deceased was guilty of contributory negligence, and the second apparently is the "last clear chance" doctrine. The conclusion is drawn that "the evidence shows that they (referring to Andy Johnson, a man about 50 years old, and the deceased) recklessly drove upon the track without any precaution, because, under the circumstances and conditions shown to exist at the time, if they had looked and listened they must have observed the approaching train. They were therefore guilty of contributory negligence which was the direct cause of the accident."

I cannot take the view that, as a matter of law, the deceased was shown to be guilty of contributory negligence. The train was running at a speed of 45 to 50 miles an hour. Defendants admit in their brief: "The wagon was struck by a north-bound passenger train running at a speed of *about* 55 *miles an hour.*" It is said in the opinion "that there was no building or other obstruction which would interfere with a free view of the track upon which the train was approaching for a distance of over a quarter of a mile from the crossing where the accident occurred, except two trees, which could not wholly obstruct the view of an oncoming train, and which were about 40 rods from the crossing." The trainmen, therefore, could have seen that distance. At the rate the train was moving, the team must have been approaching the track at a right angle when it was a quarter of a mile away. If the train were running at a speed of 45 miles an hour, it would only take about one-third of a minute to run a quarter of a mile.

The deceased was large for his years, but his judgment, care and discretion should be measured by the fact that he was in the sixth grade at school, which is the ordinary grade for a boy of his age. There is no presumption that a child 14 years of age has such discretion, care and prudence as an adult. *Ittner Brick Co. v.*

Killian, 67 Neb. 589. And the question whether a child has been guilty of contributory negligence is ordinarily one to be determined by the jury. *Breedlove v. Gates,* 91 Neb. 765. There is no rule of law which will impute to a child of 13 the negligence of an elderly man, who the jury had the right to infer continued to drive the team. We think it cannot be said that this boy was engaged in a joint enterprise with Johnson, who was driving the team when last seen, and who was employed by the father of the child. We have held that, if ordinary care requires the giving of signals by a railroad engineer on approaching a private crossing, it is negligence not to give them. *Chicago, B. & Q. R. Co. v. Metcalf,* 44 Neb. 848.

The train was late, and was running at an unusual rate of speed. The fireman testifies that he stopped ringing the bell when he left the mill crossing, and was engaged in putting in a fire until after the accident occurred, so it is clear no bell was ringing for 1,620 feet before the accident. He also said he based his answer that he rang the bell upon the fact that on approaching crossings that was his habit. He ceased to look out when he stopped ringing. The last whistle was blown at the depot, which was about 2,300 or 2,400 feet to the south of the crossing, the wind blowing from the north. The engineer testified that from the time he left the mill crossing until he reached the private crossing he would not be able to see persons driving along the lane on the left-hand side, and could not see anything on that side until it came almost directly in front of the locomotive. It is apparent, therefore, that all vigilance ceased at the mill crossing.

In this state of facts I think the views expressed by the supreme court of Iowa in the case of *Johnston v. Delano,* an action brought by the father of deceased to recover for the same death, reported in 154 N. W. (Ia.) 1013, are correct. There is a difference in the applicable law of the two states in this: That in Iowa

there is a presumed incapacity for contributory negligence in a child under the age of 14, while in this state the rule is as before stated. This, however, does not affect the conclusion. In my view, the case involves disputed questions of fact which required submission to the jury.

MORRISSEY, C. J., concurs in this dissent.

ROY ROBERTS V. STATE OF NEBRASKA.

FILED JULY 1, 1916. No. 19199.

1. **Criminal Law**: PUBLIC TRIAL. The statute requires criminal trials to be held in the court-room provided by the county board. Rev. St. 1913, sec. 1162. The law requires that trials be public, but this requirement is satisfied by admitting those who could conveniently be accommodated in the court-room where the law requires such trials to be held, without interrupting the calm and orderly course of justice.

2. ———: PLACE OF TRIAL. It is not proper to adjourn a criminal trial for a capital offense from the regular court-room to the stage of a public theater, without sufficient cause for so doing, the theater itself being filled with people, and under some circumstances may be so prejudicial to defendant as to require a reversal.

3. ———: SEPARATION OF WITNESSES. The separation of the witnesses in a criminal trial is ordinarily a matter within the discretion of the trial court, but when requested, especially in a trial for felony, it is seldom denied. When the witnesses for the prosecution are near relatives, or are or have been recently so associated that it is not improbable that some of them may be under the influence of another witness who is interested in the prosecution, it is erroneous to allow such witnesses to be present and hear each other's testimony, against the objection of the defendant.

4. ———: ATTORNEY AS WITNESS. It is improper to allow one who testifies as a witness to the principal facts in the case to also as attorney conduct the trial in the examination of witnesses and argument to the jury. But the judgment will not necessarily be reversed because an attorney at law, who is a witness in the case, is allowed to assist the prosecuting attorney in the preparation and in the details of the trial.

5. **Witnesses:** COMPETENCY OF INFANT. When a child seven years of age is offered as a witness, it is the duty of the court to examine her, alone if necessary, as to her competency, and the sound judicial discretion of the court in allowing or refusing to allow her to relate to the jury the facts within her knowledge will not ordinarily be interfered with by this court. It is erroneous to take the unsworn statements of an interested party as to the qualifications of such witness and exclude her testimony without examination by the court.

6. **Criminal Law:** MISCONDUCT OF JURY. In a trial for felony, if the bailiff in charge of the jury, with the help of some of the jurors and without the order of the court, removes a quantity of miscellaneous articles, of which some as exhibits have been received in evidence, and some have not, from the court-room to the jury-room, and such articles are there examined and considered by the jury in arriving at their verdict, such conduct will vitiate the verdict, and a new trial should be awarded.

ERRORS to the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed.*

James T. Keefe, for plaintiff in error.

Willis E. Reed, Attorney General, Charles S. Roe and *George N. Gibbs, contra.*

SEDGWICK, J.,

Defendant was convicted in the district court for Lincoln county of murder in the first degree. The jury fixed the penalty at death, and he prosecuted error to this court. He is charged with having killed Vernon Connett on August 2, 1914. Connett was a young farmer whose home was at Bird City, Kansas. Mrs. Connett had not been in robust health, and her physician advised that she live in the open air. Accordingly the Connett family left their home in Kansas and drove across the country, living in a covered wagon, and intending to visit some relatives in this state. They arrived at North Platte July 31, 1914, where, by chance, they met defendant. A friendship appears to have rapidly developed between the two men. Defendant's mother and her husband, Charles Clayton, were employees on a ranch

situated about five miles northwest of the city of North Platte. Defendant, together with Connett and his wife and baby, drove to this ranch, arriving about 5 o'clock in the evening. They camped there for the night, and the next day Connett determined to seek work in the neighborhood and to send his wife and baby to their people by rail. Defendant and the Connett family drove to the city of North Platte, where Mrs. Connett and the baby took the train for Mason City. Defendant and Connett then returned to the ranch. They remained there that night and until some time the following afternoon. So far there seems to be no conflict in the evidence. Connett was killed, and this defendant disposed of Connett's property, and did other things and conducted himself generally so as to leave no doubt that he had a part in the tragedy that resulted in the death of Connett. Defendant was about 22 years of age at the time of the alleged crime. He had been convicted of robbery and sentenced to an indeterminate term in the penitentiary, but prior to the date charged in the information, had been released from the penitentiary on parole. Clayton was also a paroled convict, and the defendant's mother had been living with Clayton for several years as his wife. Clayton and his wife were at first arrested for the crime, but, so far as the record shows, they were not prosecuted. The questions to be tried were whether the crime committed was premeditated murder to obtain the property that Connett had with him and calling for the death penalty, or whether the killing was done in a quarrel and the appropriation of Connett's property was an after-thought so that the crime was of a less degree. Was the crime committed by this defendant alone, or was the fatal blow struck by Clayton, making him the principal and his wife and the defendant accessories thereto? According to the testimony for the state, defendant and Connett drove away from this ranch about 4 o'clock Sunday afternoon, saying that they were going to the neighborhood of

Hershey, where they expected to find work, and Connett was never again seen alive.

The evidence, if true, would relieve Mr. and Mrs. Clayton from suspicion. The defendant's testimony was that while they were at the ranch an altercation arose between himself and Connett which resulted in Connett's knocking defendant down, and while Connett was continuing his attack and was leaning over defendant attempting to choke him, upon defendant's cries for help, Clayton rushed to the scene and struck Connett several blows upon the head which caused his death. He says that Clayton first removed the body, and afterwards he and Clayton planned the disposition of the body and the property of Connett. Defendant disposed of the property, and says that he divided the proceeds with Clayton. He is to some extent corroborated in this. It is shown that he received gold coin for some of Connett's property. Clayton testified that he did not receive any of the property or the proceeds thereof, and also testified that he had not had any gold coin from any source. There was some evidence that soon after Connett's disappearance Clayton paid a $5 gold coin for liquor at a saloon.

When such a crime as this is committed, so dangerous to the safety of society, it is of the highest importance to ascertain the truth of the case, to establish the real character of the crime, and fix the responsibility upon the guilty party. Unfortunately for the interests of humanity it is not always possible to do this. The greatest criminal is often able to divert attention from himself, and to turn the vengeance of the public against one who may not be free from guilt, but who is less guilty than himself. It too often happens that the one least guilty, or perhaps even entirely innocent of the crime, is made to bear the punishment therefor, and so satisfy the sense of justice of the community, too readily convinced in the eager and laudable desire to see the crime properly punished. For these reasons, the

Constitution and laws have provided certain regulations for the trial of persons charged with crime intended to prevent the terrible mistake of allowing the guilty to escape punishment through a mistaken belief on the part of the public and the authorities that justice had been done. According to the defendant's testimony, there were four living witnesses to the crime besides the defendant himself, Mr. Clayton, his wife, Mrs. Clayton's little girl, and a boy about 17 years old named Jones. Clayton and the boy testified to the essential facts relied upon as fastening the guilt upon the defendant. Mrs. Clayton was called only in rebuttal to explain an incident which it was claimed indicated her participation in the crime. The little girl was offered as a witness by the defendant, but was excluded by the court. And so we do not have the evidence of either Mrs. Clayton or the little girl, both of whom were present and witnessed the crime, according to the defendant's version.

The court removed the trial from the court-room to the theater, and stated as a reason therefor: "By reason of the insufficiency of the court-room to seat and accommodate the people applying for admission, and also by reason of there being some question as to the safety of the building crowded to its full capacity as it is, it is by the court ordered that the further trial of this cause be had at the Keith Theater, and thereupon the court was adjourned to Keith Theater, where trial proceeded." The stage was occupied by court, counsel, jury, witnesses, and officers connected with the trial. The theater proper was crowded with curious spectators. Before the trial was completed it was returned to the court-room and concluded there. At the adjournment of court on one occasion the bailiff announced from the stage: "The regular show will be tomorrow; matinee in the afternoon and another performance at 8:30. Court is now adjourned until 7:30." The court manifested no disapproval of this announcement. The defendant now insists that such proceedings were pre-

judicial to the calm consideration of his cause to which he was entitled.

The law requires that trials shall be public, but this requirement is satisfied by admitting those who could conveniently be accommodated in the court-room where the law requires such trials to be held (Rev. St. 1913, sec. 1162), without interrupting the calm and orderly course of justice. This young man was already a convict. Did the jury infer from these, and other similar transactions, that it was immaterial in what manner the defendant was tried; that it was not necessary to take great pains in weighing the evidence against a convict who by his own admissions had violated the law? It is not clear that the defendant was not prejudiced by these proceedings.

The defendant demanded that the state's witnesses be separated so as not to hear each other's testimony. In some jurisdictions this is a matter of right. 1 Greenleaf, Evidence (16th ed.) sec. 432, says: "This order, upon the motion or suggestions of either party, is rarely withheld." *Binfield v. State,* 15 Neb. 484. In our state it has been considered to rest in the discretion of the trial court. This court has said that the practice of so separating the witnesses "is a good one, as it tends to elicit the truth and promote the ends of justice." *Chicago, B. & Q. R. Co. v. Kellogg,* 54 Neb. 138, 141. So far as we now recollect, the court has never suggested what would amount to an abuse of discretion in that regard. To have separated these witnesses would seem to have been peculiarly appropriate in this case. It was urged that the witness Johnny Jones was of weak mind and under the influence and control of Clayton, with whom he worked. Clayton testified to a condition which would relieve himself of all guilt and place the awful responsibility for this crime upon the young man. The boy Jones reiterates the story of Clayton in all its details, and so the evidence of Roberts is overborne, and it is supposed to be established beyond a reason-

able doubt that Roberts is alone responsible for the death of Connett. Such conditions call for the separate examination of the witnesses, and this court has never held that it is not an abuse of discretion to deny the request under such conditions. The reason given by the court for refusing to separate the witnesses was stated upon the record: "The temperature ranging about zero, and by reason of the fact that there is no place where witnesses can be kept, for the want of proper and suitable conveniences, the application is denied." There were no conveniences at the theater to enable the court to conduct the trial in the regular and ordinary manner. The rights of the defendant were prejudiced, and this was made necessary principally because of the unauthorized removal of the trial from the court-room.

Edward G. Maggi, of the state board of pardons, who is also a member of the bar, was appointed by the court to assist the county attorney in the prosecution. Mr. Maggi was active in obtaining evidence and was an important witness in the case. Ordinarily it is not expected that the attorney in the case will be also a principal witness. Trial lawyers of experience hesitate to act as witnesses and active counsel in the trial unless under unusual circumstances it becomes necessary to identify some writing or supply some formal proof of a matter peculiarly within the knowledge of counsel as such. To discuss in argument the reliability and weight of one's own evidence is embarrassing to counsel, and sometimes confusing to jurors. In this case, however, the part taken by Mr. Maggi in the trial does not seem to have been inconsistent with his position as a witness or his interest as an officer of the state.

The little girl offered by the defendant as a witness was a little less than seven years of age. The defendant asserts that if she were allowed to testify her evidence would satisfy the jury that Clayton and his wife, who were first arrested for the crime, were the prin-

cipal criminals; that they directed him in disposing of Connett's property and shared in the proceeds. The court, without himself examining the little girl, left it substantially to Mrs. Clayton to determine whether she be allowed to testify, and it is urged that Mrs. Clayton, not being under oath, and having reasons to fear that the evidence offered would convict her of crime, advised that the girl was not competent. The judge then informed the jury:

"Gentlemen, this is a child. She has not reached the age of seven years. She has not gone to school to exceed three months. We all know that at that immature age children get ideas from suggestion. To the court's mind it would be cruelty to attempt to force a child of that immature age; she doesn't know or understand any of the obligations of the oath, and therefore the court will not permit her to be put upon the stand, because of her immature age and because of her inability to understand and know the obligation of an oath. The child is of that immature age that as soon as the suggestion is made that she come upon the stand, even though accompanied by her mother, she breaks down and cries through fear, and this takes place in the court's presence and hearing."

A little child is generally supposed to be likely to tell the truth, and the trial court will not usually reject her evidence without first examining her as to her intelligence and understanding. To examine another person who may have the strongest motive to prevent the child from telling the jury just what took place, and to exclude the child's evidence because of the say-so of the interested person so examined, is not the usual practice. It is not strange that the child was frightened. She was perhaps not accustomed to taking part in a state performance before a theater full of curious and excited people. If she had been encouraged by the court in the quiet and order of the usual trial court-room, separate and apart from the other witnesses, and free from

fear of those interested parties who for their own protection may have tried to overawe her in advance, she might possibly have convinced the court that she had a clear remembrance of the whole transaction in question, and that she could relate it in such a way as to greatly assist the jury.

After the case had been submitted to the jury, and in the absence of the judge, and without his order or knowledge, the bailiff permitted some of the jurors to leave the jury-room, and go to the court-room, and there, with the help of the bailiff, they gathered exhibits including as it is alleged, "a certain skull, a jaw-bone, the partial skeleton of a hand or some fingers, several shirts, a hat, cap, two or three pairs of trousers, a pair of shoes, belt, a post card one photograph of the alleged place where the alleged body was supposed to have been found, one white dress and a skirt belonging to Mrs. Clayton, * * * one bed comforter, together with some alleged human hair, and a suit case, and a photograph purporting to be a family photograph of the Connett family," of which some had been received in evidence, and some had not, and took them to the jury-room, and there discussed the bearing of these promiscuous articles upon the probability of guilt of the defendant. This transaction requires no discussion. It is universally held that such misconduct requires a reversal.

It is also complained that a juror had before the trial stated his positive opinions as to the guilt of defendant, but denied upon his *voir dire* examination that he had formed or expressed any such opinion; that one of the jurors in the jury-room stated important matters as facts, and drew a "map" of the locality of the crime, which showed different measurements and distances than those testified to by the witnesses, and otherwise misled his fellow jurors; that the bailiff talked with the jurors while they were considering their verdict. But these, and some other matters complained

of, will not be likely to affect another trial, and it seems unnecessary to discuss them at length. The defendant has been unfortunate in his home life, or rather in his lack of a home, and in his vicious surroundings. His mother was living with Clayton, a convict of mature years, as his wife. If defendant is not guilty as charged, this man Clayton was the cause of Connett's death. It is of the highest importance to determine, if possible, the truth of the matter. At all events, in view of the manifold errors indicated, this court cannot say that there has been a trial as the law requires, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

ROSE, J. I concur in the reversal of the conviction on two grounds: (1) There was prejudicial error in the transferring of the place of trial from the court-house to the opera house and in the resulting conduct at the latter place. (2) Failure of the trial court to interrogate the child offered as a witness on behalf of defendant and the order preventing her from testifying without a proper inquiry into her capacity to testify require a new trial.

MORRISSEY, C. J., dissenting.

According to the testimony for the state, defendant and Connett drove away from the ranch about 4 o'clock Sunday afternoon, saying that they were going to the neighborhood of Hershey, where they expected to find work. The following morning defendant drove Connett's team and wagon to a livery stable in Hershey. He there sold the team and wagon for $250, executed a bill of sale therefor, and signed thereto the name "Vernon Connett." He received in payment a check made payable to "Vernon Connett." He wrote the name "Vernon Connett" thereon and cashed the check at a local bank. He then went to the post office and

wrote a postal card, directed to "Mrs. Connett, Mason City, Neb." On this card he wrote: "Dear girl. Glad you are all right. Roy went to South Dakota. I am going to do some hauling. Don't write for 3 or 4 days, I won't be in town. V. C." He mailed this card to Mrs. Connett. Taking the trunks and personal baggage belonging to Connett that were in the wagon, he hired a conveyance which conveyed him and this baggage to North Platte. He there took a train to Lincoln, called on the secretary of the state prison board, made his monthly report as was required under his parole, then went to the penitentiary and reported to the warden, and after staying around the city of Lincoln a day or two returned again to the ranch where his mother was living, paid a short visit to the family and again departed. Soon thereafter a search was instituted for Connett; the postal card which defendant had mailed was discovered to be a forgery, the team was located, and it was generally understood that Connett had met with foul play. Defendant's parole was revoked and he was again placed in the penitentiary. His mother and stepfather were arrested, but, so far as the record discloses, no formal complaints were filed against them. They told a number of conflicting stories, but finally gave information which led to the discovery of Connett's body in the bed of the Platte river near the town of Hershey, in Lincoln county, January 13, 1915. Decomposition had progressed to such a degree that the body could not be identified by the features, but it was identified beyond question by the clothing, teeth, and other marks. Three puncture fractures were found in the skull, one in the frontal bone and one on either side, and the testimony shows that any of these might prove fatal. There is no direct proof as to how these fractures were produced, nor by what hand the blows were struck. The case, so far as the state is concerned, rests on the testimony of Charles Clayton, the stepfather, and Johnny Jones, a 17-year-old boy

who worked on the ranch, corroborated by the conduct of defendant and supported by his conflicting stories. Clayton and Jones testify that defendant and Connett left the ranch together on Sunday evening, August 2, the evening before defendant sold Connett's team in the town of Hershey.

The defendant, testifying in his own behalf, admitted meeting Connett and family in North Platte, and all the incidents as shown by the state down to Sunday afternoon. His story as given on the trial is that during the afternoon he and Connett engaged in a quarrel; that Connett knocked him down and was in the act of choking him when he called for help; that his stepfather, Clayton, rushed out with a hammer, struck Connett on the head, felled him to the ground, and then struck him two or three blows with the hammer, and that Connett instantly died. He then says that Clayton, Mrs. Clayton, defendant's mother, and defendant carried the body 75 or 100 yards and hid it in a clump of weeds; that later they carried the body back again, put it in a wagon, and that he drove away with this body, with directions from Clayton to hide it so as to conceal the crime, and to then proceed to Hershey and sell the team and wagon; that, pursuant to these instructions from Clayton, he took the body to the point where it was later found in the river bed; made the sale of the team, wrote the postal card, and went to North Platte, where he divided the proceeds of the team with Clayton.

This entire story is denied by Clayton. It is also denied by Jones. Jones is referred to by counsel for defendant as an idiot, and it is strenuously insisted that his testimony is not worthy of belief. Although 17 years of age, he had never advanced beyond the fourth grade in school, and he seems to be subnormal mentally. Nevertheless he tells a straightforward and convincing story. He was cross-examined at length without his testimony being shaken in the least, and

there is nothing to indicate that he had any disposition to depart from the truth.

A number of assignments are directed to the admission of exhibits. These exhibits relate to matters which the defendant later admitted in his own testimony. This was properly a part of the state's case, and their admission could not have been prejudicial.

During the trial the court, on its own motion, made the following finding: "By reason of the insufficiency of the court-room to seat and accommodate the people applying for admission, and also by reason of there being some question as to the safety of the building crowded to its full capacity as it is, it is by the court ordered that the further trial of this cause be had at the Keith Theater, and thereupon the court was adjourned to Keith Theater, where the trial proceeded"—and transferred the trial from the Lincoln county courthouse to the Keith Theater in the city of North Platte. There the court, attorneys, witnesses, and jury were seated on the stage, and the body of the house was filled with spectators. Defendant's counsel objected to the transfer of the trial, and also objected to the seating of the witnesses for the state on the stage, and asked that they be excluded from the room during the trial. His objections and motion were overruled; the court saying that there were no adequate accommodations for the witnesses elsewhere.

During the progress of the trial the court bailiff made the following announcement from the stage of the theater as court was about to take a recess: "The regular show will be tomorrow; matinee in the afternoon and another performance at 8:30. Court is now adjourned until 7:30." This announcement of a show did not refer to the trial, but to an exhibition to be given by a troupe of professional actors, and it seems to be conceded that the arrival of this show troupe necessitated the surrender of the theater, and that thereafter the trial was conducted in the courthouse.

The administration of justice ought not to be confused or confounded with shows and entertainments. The trial ought to have been conducted in the courthouse with the decorum becoming a judicial investigation where a defendant is on trial for his life. However, after carefully reading all of the testimony, I find the evidence of defendant's guilt so strong that I cannot concur in an opinion that sets aside the verdict of the jury merely because the court, in this respect, turned aside from the beaten path of judicial procedure.

In addition to the witnesses who testified for the state, there were present at the ranch on that Sunday afternoon defendant's mother and his half-sister, Nellie Roberts, a child then just past six years of age. Defendant's mother was not called as a witness by either side as to what occurred at the ranch, but defendant asked to have the little girl called as a witness. Thereupon the court interrogated the little girl's mother, but without putting her under oath, and elicited the information that the child had gone to school two or three months, and that she had attended Sunday school "part of the time," and then, turning to the jury, the court said: "Gentlemen, this is a child. She has not reached the age of seven years. She has not gone to school to exceed three months. We all know that at that immature age children get ideas from suggestion. To the court's mind it would be cruelty to attempt to force a child of that immature age; she doesn't know or understand any of the obligations of the oath, and therefore the court will not permit her to be put upon the stand, because of her immature age and because of her inability to understand and know the obligation of an oath. The child is of that immature age that as soon as the suggestion is made that she come upon the stand, even though accompanied by her mother, she breaks down and cries through fear, and this takes place in the court's presence and hearing."

Thereupon counsel for defendant offered to call witnesses and have them examined relative to the competency of the child, but the offer was denied. He then offered to prove by the child that a fight occurred at the ranch substantially as detailed by the defendant. This offer was also denied, and the ruling of the court is assigned as error.

"No fixed rule can be laid down as to the age a child must be to entitle it to testify as a witness in a court of justice. The question of competency of a person to be a witness must be left to the sound legal discretion of the trial judge, leaving to the jury to determine the credit that ought to be given to the testimony." *Davis v. State,* 31 Neb. 247, 255.

The court has made a specific finding as to the appearance and conduct of the child, and in the exercise of that sound legal discretion which is vested in the trial judge has excluded the testimony. The mother of the child was present and might have been called to prove the same matters sought to be proved by the child. It nowhere appears that she was unfriendly to the defendant, nor is any reason given for not calling her. It was suggested in argument that she might conceal the truth in order to protect her husband, but we can hardly indulge the belief that this woman, who was then living with her third husband, would conceal the truth to protect the husband, when its concealment might send her son to the electric chair.

Of the court's refusal to exclude the witnesses from the stage of the theater, it may be said that the instant case is peculiar in that the major portion of the testimony is undisputed. The usual danger of a witness being influenced by the testimony of another witness where he is permitted to remain in the courtroom and hear the examination was not present, and under the circumstances the court was not

guilty of such an abuse of discretion in this regard as calls for a reversal of the judgment.

After the jury had been instructed and retired to the jury-room, they called upon the bailiff for exhibits that had been offered in evidence. The bailiff then permitted a number of jurors to go into the court-room proper, where the exhibits had been left, and he, together with these jurors, gathered up the exhibits and carried them to the jury-room. Among these exhibits was deceased's skull, and a shirt which was found on the body when it was discovered. In support of a motion for a new trial, defendant set out an affidavit of a juror, in which it was alleged that the jurors, after having procured these exhibits, attempted to fit the shirt over the skull, and so arranged it as to bring a hole in the shirt over a hole or fracture in the skull, and that from their experiments with these exhibits they reached the conclusion that, as deceased was disrobing and had his shirt pulled over his head, he was struck and killed by the defendant, thus disproving his story of the fight at the ranch. The exhibits had been offered and received in evidence. The defendant by his own story had sufficiently identified them. The skull is shown to have been found in the river bed where defendant testified he put the body of deceased. The marks it bore were such as corresponded to his theory of the killing, and the issues had been narrowed down to the point where the jury were left with practically nothing to determine but the time, place, and person who did the killing, was it at the ranch in the afternoon, and were the blows struck by Charles Clayton, or was it some time during the succeeding night, and were the blows struck by the defendant. An examination of the exhibits could not work to his prejudice.

When we consider the numerous conflicting stories told by the defendant, stories which he now admits

to be untrue, together with his disposition of the deceased's property, the writing of the postal card to the widow, and the unreasonableness of the story he told at the trial, it seems to the writer that his guilt was fully proved. A heinous crime has been committed; all the facts and circumstances bearing on its commission have been submitted to a jury; defendant was represented by able and zealous counsel; a verdict in harmony with the evidence has been returned; a judgment that fits the crime has been pronounced; and that judgment ought not to be set aside for technical errors that do not affect the substantial rights of the defendant.

BARNES, J. I concur in this dissent.

HAMER, J., dissenting.

The witness Johnny Jones testified that on Sunday the defendant, Roy Roberts, and the deceased, Vernon Connett, hitched up the team and drove away together. That was the last time that Johnny Jones saw Connett. A peculiar thing about Connett and the defendant going away together is, that the defendant just before they went kissed his mother and little sister good-bye. It looks as if this starting away together was the beginning of the journey of the deceased to his grave. Mrs. Connett appears to have sufficiently identified the body of her husband, who was buried not far from Sutherland, by his clothing and his teeth. The clothing was also identified by R. H. Connett, the brother of the deceased. The defendant appears to have succeeded in getting the deceased to go to the Sund ranch with him. His stepfather and his mother and little sister resided there.

On the 3rd day of August the defendant appears to have executed a bill of sale for the team, harness and wagon. He signed the name "Vernon Connett" to the bill of sale. The bill of sale is made to one W. H. Jenkins. Oliver H. Ireley, a banker residing at Hershey,

Nebraska, made out the bill of sale, and he identified the defendant as the man who signed it. The consideration was $250. This witness testified that he saw the instrument delivered to the defendant, who was then claiming to be Vernon Connett. The defendant was recognized by Mr. Ireley. Jenkins paid for the team and wagon with a check on the Bank of Lincoln County. The check was presented to the bank by the defendant claiming to be Vernon Connett, and was cashed by the bank; the defendant receiving the money. The payment was in gold. The horses, wagon and harness all belonged to the deceased. The defendant testified to being sentenced to the penitentiary for 15 years. The trial was at Grand Island. He was paroled. He also testified that his sister is in the reform school. The stepfather appears to be a convict paroled from the Nebraska penitentiary.

On Friday morning at North Platte the defendant first met the deceased, and visited him so industriously that by 2 o'clock in the afternoon they started for the Sund place. There were in the wagon the deceased, Connett, and his wife and baby, and also the defendant. Sund's place is described as about four or five miles northwest of North Platte. On their way out there a burr dropped off the axle of the wagon. They were unable to find it. With more or less trouble, because the wheel would not stay on, they finally succeeded in driving to the Sund place. That evening the defendant visited with his mother and little sister, but the deceased's wife cooked supper by a fire that was built near the wagon, and the defendant ate supper with the Connetts. That night the defendant's mother loaned him some bed clothes and he made a bed on the ground not far from Connett's wagon. In the morning the defendant visited with his stepfather a short time, and then spoke to his mother and little sister, but after that he went back to the wagon, and when the Connetts got breakfast ready he ate with them. Defendant stayed continuously with Connett. Mrs. Connett borrowed a wash-boiler and wash-board of the de-

fendant's mother. She then did her washing at the southwest corner of the house. The defendant borrowed his stepfather's razor and made some lather and shaved Connett. They appear to have had a good dinner together, because two chickens were killed and cooked, and there were noodles. Then they hooked the team up to one of Mr. Sund's wagons and took Mrs. Connett to the Union Pacific depot in North Platte. It was from there that she started to Mason City. This then left the defendant alone with Connett, so that nobody might disturb him. For the last time Mr. Connett kissed his wife and baby good-bye. Then he and the defendant started for Sund's place. Arriving there, they unhitched the horses and went into the house. The defendant went with Connett and helped him to take the blankets out of his wagon and to hang them up so that they might dry. Then they had a lunch together by themselves—just these two. The defendant appears in the evening to have entertained Connett by acting the part of a ghost and scaring young Jones, who had gone into the cornfield to wait until the snipes would drop into the bag which he held. This sort of performance enabled the defendant to divert and amuse Connett. The defendant and Connett slept in Connett's wagon that night. In the morning the defendant and Connett both ate breakfast with the defendant's mother. Their clothes had been drawn out of shape by the rain of the day previous, and the defendant borrowed a flat-iron of his mother. He pressed a pair of pants for Connett, and also a pair for Clayton, and one pair for himself. The defendant testified that while they were there Mr. Harding came, and that they all conversed with him as to whether he knew where Connett could find employment such as working in the hay-field with the team. From and including this testimony it is well to inquire how many of the alleged facts were manufactured by the defendant for himself for his own personal benefit. But defendant testified: "We were speaking of people in general, that is, fellows

that we had associated with, and as to their character and different things of that sort, and it seems as though Clayton wanted to leave the impression with Harding that he was quite a rounder. He said several things in regard to his ability as a bad man; even spoke of riding bad horses in Cheyenne, Wyoming, and at one time there a man cut the 'let-go,' I believe he called it, of his saddle, and after cutting the let-go of his saddle, which he claimed at that time would have meant that he would have won the championship, if it hadn't been cut, of the frontier day at that time, he claimed, that after the let-go broke he was carrying, I believe, a 45 Colt's revolver, which, after the let-go broke and threw him, he immediately pulled out." This is apparently the beginning of the defendant's plan of presenting Clayton as a violent and vicious sort of man. After Harding went away Clayton, Connett and the defendant went back to Connett's wagon, so defendant testified, and they sang some songs. After that they went into the house and had dinner. The defendant testified that after dinner was over he and Clayton got into an argument in regard to the defendant's mother, and that Clayton said that if the defendant's mother ever left him, or did him as she had others, he would shoot her. Then the defendant says that he told Clayton that if he (Clayton) did anything of that kind he "would have to shoot me on sight, and he said something about he didn't think that would be hard to do; and I don't remember just exactly what I said, but I said something to the effect that I had a notion to hit him then, and I think I called him a name, I am not just exactly positive, and Mr. Connett stepped up and said, 'If there is any fighting to be done here, I will do it.'" The defendant further testified that he turned around to Connett and said to him, "What are you butting in for?" and that Connett then said he thought he had a right to butt in; and the defendant then testified that he said to Connett, "You ———, I'll hit you in the nose."

This story up to this point is unnatural and improbable in the extreme. Connett, according to the story, had been invited into the house with the defendant, and they had eaten their breakfast and dinner together in the house. There had been no sort of controversy. Besides, if the deceased, Connett, was friendly to the defendant, as he appears to have been, and very much dominated by him, which seems to have been the fact, he would not have wanted to do anything contrary to the will of the defendant. But the defendant goes right along with his improbable story: "Just about that time Connett knocked me down, and after knocking me down he put his left knee in my stomach and both hands around my neck, and while down there I told him that I had enough, that I didn't want to fight." Let us analyze that. Why should Connett have been attacked when there was no reason whatever for attacking him? And as Connett does not appear to have been struck in the nose, did he have any reason to knock the defendant down? It is unnatural that he should have done so until he was actually struck. The statement that he put his left knee on his stomach and that he put both hands around his neck is an improbable story. Defendant had the deceased put himself in an uncomfortable and untenable attitude. Men do not fight by putting their knees in each other's stomachs and then putting their hands around the neck. It cannot be done. It is true that he could have put his knee in his stomach, but he could not have put his knee in his stomach and choked him at the same time. He might have choked him at one time, and put his knee in his stomach at another time, but never could he take the position described by the defendant. This part of the story was invented for the express purpose of reducing the degree of the offense charged. That fact is still further apparent by what happens, according to the defendant: "And while down there I told him that I had had enough, that I didn't want to fight. He wouldn't quit choking me." This is an unnatu-

ral thing that he would not quit choking the defendant after the defendant told him that he had had enough, and that he did not want to fight. Men do not choke one another under those circumstances. But the last part of this unnatural story puts on it the climax of its improbability. The defendant puts himself in the position of one calling for help, and then Clayton, instead of interfering as men do interfere by taking hold of Connett with his hands and pulling him off, is represented as picking up a hammer and running over and pounding Connett on the head with it until he is dead. That is the worst part of this piece of fiction. He testified: "Mr. Clayton was standing right near the milk-house, and he picked up a hammer and ran over to where Mr. Connett was, and he hit him in the head with this hammer, and after he fell down he hit him two or three more times." Assuming that Clayton is like other men, it is fair to presume that, if there had really been a fight and that he had seen it, he would have run over and would have taken hold of the contestant who had the best of it. Instead of doing that, according to his story, he pounded him in the head with a hammer, and, to make sure that he was good and dead, he hit him two or three times after he was down. Assuming that Clayton was a natural man, he would have been appalled at once when he struck Connett with the hammer and Connett fell down, and he would have been doing everything that he could to revive him. Then the defendant was himself perfectly helpless. He says that Clayton came over to where he was, "and my legs were under the body of Vernon Connett, and he pulled me out by the shoulders. Oh, possibly three feet he moved me, after getting me out from under Mr. Connett's body, and after that I began to sit up, and Clayton says, 'What will I do?'" In the mind of the author of this piece of unreal literature the defendant was to be shown to be utterly helpless, and the big body of a man of ordinary size was lying upon him, and he had to be pulled out from under the body. But

that is not all. Right here this piece of literature proceeds to put the blame of killing the man all on Clayton, and Clayton begins to wonder what he is going to do, and he asks the defendant. He says Clayton rolled the body of the dead man over onto the blanket, and then said, "Take hold of the bottom end of that," and then they carried the body 75 or 100 yards east of Mr. Sund's house and put it into a pile of weeds. Then he draws a picture of his little sister standing near the corner, that she had a little bob-tailed dog with her, and that he took hold of her hand and led her into the house, and then the mother inquired, "What has Charlie done?" whereupon the defendant told her that Charlie had "killed that man." He then tells that Clayton called to him from the barn, and that he went to the barn, and that Clayton began to ask him what he was going to do, and that Clayton said to him, "You are going to help me, ain't you?" and that Clayton also said, "It is possible that I will have you sent back to Lincoln on your parole, and maybe a murder charge put against you; maybe I will do otherwise." He says that Clayton threatened him if he did not help him, and then that he finally said "All right." Then they led the team out of the barn and hooked them onto the wagon and took the endgate out, and then that his mother joined them at the corner of the house and from there they walked to where the body of the man was in the weeds, and "mother and Clayton took hold of the head end of the man and I took hold of the foot end of the man, and we carried him back to the wagon, and after carrying him back to the wagon we laid him down." It seems that they then put him in the wagon, according to the story, and that they had the blanket or skirt, or whatever it was, wrapped around his shoulders and head, and then he says that Clayton gave him certain directions; that Clayton told him: "After you lay this man out and bury him, or wherever you want to put him go to Hershey, Nebraska, and there sell the team if you can. After selling the

team I will meet you in North Platte." He says also Clayton told him to write the postal card to Mrs. Connett and what to put in it. He then describes his drive to the graveyard at Sutherland, and then going to the Platte river and taking the endgate from the wagon and carrying the man just down over the bank and there laid him down, "and I took hold of this blanket or cover or skirt, or whatever it was, and I pulled it out from in under his head, and I laid this into the wagon, and I put the endgate into the wagon."

Another unreasonable thing to this story is that he has Clayton asking him what shall be done, and then Clayton does not go with him and does not in any way participate in burying the body. According to the story, the trouble was Clayton's trouble, and he should therefore have hauled the body away to hide it. Then the defendant kept the property and got the money for it when he sold it.

In the light that the defendant testified to an unreasonable and improbable story having no discoverable foundation in fact, and resting only upon a basis of fiction, formulated to deceive the jury and to reduce their verdict from murder in the first degree to manslaughter or murder in the second degree, I see no particular error in the refusal of the court to allow the little girl to testify to a story which was transparent and unreasonable fiction. If the alleged facts concerning the killing of the deceased with a hammer by Clayton never happened, then the little girl could not have truthfully told the story related by the defendant, and so the defendant did not suffer when she failed to recite this Munchausen tale. The mother was probably not called as a witness to the main facts because the defense knew that there was no truth in the story which it had put up, and did not want to subject her to the dangers of a cross-examination.

When Johnny Jones saw Connett and the defendant driving north toward the railroad tracks together, the defendant was taking Connett for his last drive. The

man who had taken possession of Connett and who had zealously kept such possession, was going to kill and bury him. And he was going to keep the team and the harness and the wagon until he could realize their value. This was to be the pay for his trouble and his crime.

Charles Clayton testified that the defendant had said he wanted Connett's team; that on a Sunday afternoon the defendant kissed his mother and little sister goodbye, and Connett shook hands with Mrs. Clayton; that then the defendant and Connett got into the wagon and started for Hershey to work in the hay-field, so they said; that Johnny Jones was there and saw them start; that defendant was sitting on the left side and driving the team, and Connett was on the other side. When defendant came back a week afterwards he told the story that Connett had gone to South Dakota on a teaming job. Defendant at that time seemed to have plenty of money.

Clayton fixed the time when Roy Roberts and Connett and his wife and baby came to the Sund place as Friday, July 31. He also said that Roberts and Connett were there until the next Sunday afternoon, when they went away together. Clayton did not see Connett after that. When the defendant came back he talked to Clayton in such a way as to induce him to believe that there was something wrong. After that he told Clayton that he had been mighty lucky in getting out of a murder case. While Clayton himself had entered a plea of guilty to cattle stealing, there seems to be no credible evidence connecting him with the crime, and that defendant sold the team, wagon and harness while he was gone corroborates Clayton and the story of the crime.

There could be no prejudicial error in excluding the testimony of the little girl, defendant's sister, if the story about to be told was clearly highly colored fiction. The district judge was on the ground and he had the opportunity to examine conditions surrounding this trial and to judge of them. I am unwilling to condemn what he did in excluding the testimony of the little girl.

As to the action of the district court in adjourning the trial from the court-house to the theater, he probably did it with the implied or expressed approval of the county commissioners. Besides, in this country the court is an institution of the people and for their benefit. The writer looks upon the publicity of the court proceedings among the people as a good thing and much to be encouraged, except, of course, a trial should not be produced as a drama, and nothing should be added which converts the facts into a tragedy.

While I realize that the opinion of the court presents a criticism of the proceedings not entirely without some foundation, it does not follow that the things complained of are so prejudicial to the rights of the defendant as to justify a reversal of the judgment of the district court and the increased burden and expense of a new trial. While the strictest enforcement of the more technical rules of the criminal law may possibly sustain the present views of this court as set forth in the opinion, there is a growing tendency among the people, the bench and the bar to let well enough alone. In this case I am not quite able to agree with the views of the majority.

The law presumes the defendant to be innocent until his guilt is established by the evidence beyond a reasonable doubt, and this court will not affirm the judgment of the district court based upon a verdict of guilt unless the defendant has had a fair trial, and the inquiry concerning the defendant's guilt has been conducted without prejudicial error. Unwarranted injury might be done to the defendant by taking the case away from the courthouse to the theater if the theater should be filled with a hostile and demonstrative audience seeking the conviction of the prisoner. Whether the refusal of the court to let the defendant's little sister testify was based upon a sufficient reason we may not know as well as Judge Grimes, who saw the little girl cry and who perhaps heard some of her conversation. Besides, Judge Grimes conversed with the mother, and the mother appears to have given certain rea-

sons for not letting the little girl testify. I desire most earnestly to say nothing that shall in any way be prejudicial to the defendant. His connection with the case and his criminal liability are shown by the majority opinion, in which it is said, among other things: "Defendant and the Connett family drove to the city of North Platte, where Mrs. Connett and the baby took the train for Mason City. Defendant and Connett then returned to the ranch. They remained there that night and until some time the following afternoon. So far there seems to be no conflict in the evidence, Connett was killed, and this defendant disposed of Connett's property, and did other things and conducted himself generally so as to leave no doubt that he had a part in the tragedy that resulted in the death of Connett."

With this statement contained in the majority opinion, I am unable to see how the discussion of the case contained in this dissent can in any way be prejudicial to the defendant. I am unable to coincide with the views of the law expressed in the majority opinion, and I therefore feel called upon to insist upon this dissent.

PHILIP S. RINE, APPELLEE, v. JOHN A. RINE, ADMINISTRATOR, ET AL., APPELLEES; LOUISE STEINACKER ET AL., APPELLANTS.

LAURA RINE, APPELLEE, v. JOHN A. RINE, ADMINISTRATOR, APPELLEE; LOUISE STEINACKER ET AL., APPELLANTS.

LAURA RINE, APPELLEE, v. LOUISE STEINACKER ET AL., APPELLANTS.

FILED JULY 1, 1916. No. 19523.

1. Wills: ORAL CONTRACT: SPECIFIC PERFORMANCE. "Where a party orally contracts to devise and bequeath to another certain real es-

tate and money in consideration that the beneficiary shall assume a peculiar and domestic relation to the promissor, and render him services of a character to make it practically impossible to estimate their value by any pecuniary standard, and the beneficiary, in reliance upon the oral promise, in good faith assumes the relation and fully performs her part of the agreement, she will be entitled, in the event of a breach of the contract by the promissor, to a specific performance of the same as made." *Lacey v. Zeigler*, 98 Neb. 380.

2. **Witnesses:** COMPETENCY. Counsel for plaintiff are not disqualified as witnesses under section 329 of the Code (Rev. St. 1913, sec. 7894), since neither of them has a "direct legal interest."

3. ———: ———. A witness is not disqualified merely because of the fact that he is the son of a party. Relationship to the adverse party may affect his credibility but not his competency as a witness.

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

S. L. Geisthardt, for appellants.

Frank Dolezal and *E. P. Smith, contra.*

HAMER, J.

Carl Hembeck, a resident of Dodge county in this state, and in his lifetime an owner of considerable real and personal property therein, died in 1904, leaving no widow and without issue surviving him. He made a will which was duly probated, and which, after setting aside $2,250 in trust for the payment of specific legacies, which were to be paid after the death of his wife, Bertha Hembeck, gave her the income from the sum put in trust and made her as well his residuary legatee. The said sum of $2,250 was to be divided evenly between Louise Steinacker, William von Gahlen, and William Grunewald, the niece and nephews of the testator, and residents of Germany. This will was executed in 1896, Mrs. Hembeck, the wife of the testator, died about a year prior to the death of her husband.

Action was begun by Philip S. Rine in 1904, in the nature of a bill of interpleader, alleging that he was the owner of certain land in Dodge county upon which Carl

Hembeck, deceased, had held a mortgage, and alleging that the administrator of said Hembeck's estate claimed the mortgage and its proceeds, and that Laura Rine claimed to own the mortgage by virtue of a contract with the said Hembeck, and praying that defendants interplead and establish their right to the mortgage. Laura Rine answered, claiming the mortgage by virtue of a parol agreement with the said Hembeck to the effect that she should look after and take care of the said Hembeck and his wife, and look after their comfort during the lives of each of them; that she should receive the entire estate of the said Carl Hembeck upon the death of the survivor of the said Hembeck and his wife. Service by publication was had upon the defendants Steinacker, von Gahlen, and Grunewald, and upon default the case went to decree June 27, 1904, a decree being entered in favor of Laura Rine, and finding that she was the owner of the mortgage in question by virtue of the contract. On June 24, 1909, the defendants von Gahlen, Grunewald, and Steinacker answered and asked to have the decree set aside. In *Rine v. Rine,* 91 Neb. 248, we decided that the decree should be set aside and the defendants named permitted to make their defense. Upon a trial of the issues raised by their answers, the district court has again found in favor of Laura Rine upon the alleged contract, and the defendants have challenged the correctness of that finding by this appeal, and now allege that there is not sufficient competent evidence to support the decree.

The other cases involved herein concern the title to real estate owned by the said Hembeck. The cases were tried together and decrees rendered in all of them in favor of Laura Rine upon her alleged contract. In determining whether such a contract as that alleged was made by the parties, it is proper to consider the relations existing between them. Laura Rine was the niece of Mrs. Hembeck. Mr. and Mrs. Hembeck through the greater part of their lives were childless, no child surviving infancy. Laura Rine's mother, a sister of Mrs. Hembeck,

died when Laura Rine was a child about ten years of age. From that time until she reached maturity and married, her home was made with the Hembecks. This period was about ten years. Shortly after her marriage the Hembecks retired from the farm and moved into the city of Fremont. This was in 1875 or 1876. From this time until 1889 Mrs. Rine and her husband resided on a farm. Mr. Rine was extensively engaged in farming and in the stock business. During this period the relationship between the families seemed to have been as intimate as possible under the circumstances. Whenever the Rines went from the farm to Fremont the Hembeck house was made their home. Philip S. Rine testified: "Well, we drove there every time anybody came in, the first thing we drove there. * * * They would not let us go anywhere else. We made it our home when we came to town. I would put my horses in the livery barn and we would always take dinner there. Q. In the way of bringing in supplies from the farm, what was done by you folks? A. Well, whenever we came in we brought them things to eat. When we butchered I took them in a lot of meat, sausages, I always made a lot of sausages. Of course, we gave them anything we had." The Hembecks treated Mrs. Rine as their child and referred to her as their girl.

Such a contract as the one involved may be enforced when the services which are the basis of the contract have been rendered and the value of them cannot be accurately measured, and it would be unjust not to enforce the contract. Many decisions of this court have recognized this rule. *Kofka v. Rosicky,* 41 Neb. 328; *Moline v. Carlson,* 92 Neb. 419; *O'Connor v. Waters,* 88 Neb. 224; *Lacey v. Zeigler,* 98 Neb. 380.

In the case last cited, it is said in paragraph 2 of the syllabus: "Where a party orally contracts to devise and bequeath to another certain real estate and money in consideration that the beneficiary shall assume a peculiar and domestic relation to the promissor, and render him services of a character to make it practically impossible to

estimate their value by any pecuniary standard, and the beneficiary, in reliance upon the oral promise, in good faith assumes the relations and fully performs her part of the agreement, she will be entitled, in the event of a breach of the contract by the promissor, to a specific performance of the same as made."

It is required, however, in such cases as those which we have cited, that the evidence in support of the contract shall be clear and convincing. It is contended by appellants that no such proof has been furnished in support of the contract. A number of witnesses were sworn who testified to conversations had with the deceased Hembeck and his wife. Frank Dolezal, attorney for Mrs. Rine, testified to the substance of the testimony of a Mrs. Gortz, a witness who was deceased at the time of the present trial, but who testified at the trial in 1904. The substance of her testimony is that in a conversation with Mr. Hembeck about an improvement which he was making to part of the property involved herein she, Mrs. Gortz, had said to Hembeck that the improvement ought to be extended; that Hembeck told her he would not do it, that the property was Mrs. Rine's after his death, and if she wanted to complete the improvement she could; that there was an arrangement that it was Mrs. Rine's property after he died. This conversation occurred after the death of Mrs. Hembeck.

John A. Rine, the son of Philip and Laura Rine, testified to the friendly relations existing between the Hembecks and his mother; that his mother was very frequently in their home, attended them continually, "and whenever they were sick she would be down there continually and would not be home at all;" that Mr. Hembeck told him of their affection for his mother as a little girl, and "when in later years she got married they would come to town and how they longed for their girl and tried to get her to move to town to look after and take care of them and be close to them, and how my father at the time did not want to come to town and how he ob-

jected and how finally they induced him to come. They promised him that Laura would be recompensed; that when they died their property would go to her. * * * I think he said that when they moved to town here they were alone, their girl—they referred to Laura as their girl—was out in the country, and they wanted to have her near them, and they tried to get them to move to town. Father didn't want to, but finally they induced my mother to come to town so they would be taken care of, and they promised that when they died she would have the property when they died." Other conversations of a similar character are related by the witness.

A. N. Yost tells of conversations he had with Mr. and Mrs. Hembeck, the substance of which was that they had induced Mr. and Mrs. Rine to move to town; that Mrs. Rine took good care of them, and that she understood that she was to have the property after their deaths. Philip Rine's testimony is of the same purport. It is further shown that, at the time Mr. and Mrs. Rine left the farm, Mr. Rine was conducting an extensive farming and stock business which was abandoned by reason of the change. It clearly appears that Mrs. Rine was faithful to the Hembecks in all things, and that she gave them the care and attention which they desired.

It is objected, however, that the witnesses Dolezal, John Rine and Philip Rine are incompetent witnesses to the conversations with Mr. Hembeck under section 329 of the Code. Dolezal is an attorney for Philip Rine in the action to determine the ownership of the mortgage, and for Mrs. Rine in her actions to quiet title to the real estate. This does not disqualify him as a witness. He has no "direct legal interest." He testified that he had no such interest in the result of the trial. His testimony touching what Mrs. Gortz had testified to on the former trial was not of a transaction between the witness and a deceased person.

John A. Rine has no "direct and legal interest" in the result of the controversy. As the son of Mr. and Mrs.

Rine, a recovery by either of them vests no title in him. It is likewise difficult to see how, as administrator, he has an interest which disqualifies him. Relationship to the parties interested, while a proper subject to consider as affecting the credibility of a witness, does not affect his competency. Jones, Evidence (2d ed.) sec. 778: "Relationship to the adverse party, if without interest in the result of the suit, affects the credibility but not the competency of a witness testifying as to transactions or communications with deceased or incompetent persons."

Objection is made to the competency of the testimony of Philip Rine upon the ground that as the husband of Laura Rine he has an interest in the real estate which disqualifies him. Without determining whether this objection is well taken, it is enough to say that he had no such "direct legal interest" in the disposition of the personal property, the mortgage, as to disqualify him, and his testimony was properly received. In any event there is sufficient proof without his testimony to sustain the findings of the trial court, so that its admission, if error, is error without prejudice.

The Hembecks were elderly people at the time Mr. and Mrs. Rine moved to Fremont. Mr. Hembeck is shown by the evidence to have been about 74. His wife was somewhat younger. Laura Rine stood to them much as a child. It was very natural for them to want her near them. No circumstance, except the making of the will, tends to dispute the claim of Mrs. Rine, nor is that circumstance so inconsistent with her claim as at first appears. The testator doubtless expected his wife, who was younger than he, to survive him. The devise to her was consistent with the agreement that Mrs. Rine was to have the property after their deaths. The bequest to his niece and nephews represented no very considerable proportion of his estate. In any event the contract is clearly established and was faithfully performed by Mrs. Rine.

The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

GEORGE L. HANLEY, APPELLEE, v. UNION STOCK YARDS COMPANY, APPELLANT.

FILED JULY 25, 1916. No. 19713.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: PETITION. The petition for compensation under the workmen's compensation act should set out "the injury in its extent and character" (Laws 1913, ch. 198, sec. 39), and the judgment should conform thereto determining plainly the extent and character of the injury, whether the disability is total or partial, and whether temporary or permanent; it should state definitely the time for which periodical payments must be made.

2. ———: ———: MODIFICATION OF ORDER. If the time so found by the court during which periodical payments are to be made does not exceed six months, the order is final; that is, so far as that court is concerned there is no power to modify or change such order. If the time so fixed by the court during which periodical payments are to be made exceeds six months, then, after that time has elapsed, either party may show to the court that conditions have so changed that the order should be changed also. There is no provision in the statute for any application to the district court of any nature until after the six months have elapsed.

3. ———: ———: ———. If the time limited for periodical compensation exceeds six months, no application to modify the order can be entertained until six months after the order is made.

4. ———: ———: ———. Compensation is for disability and ends when disability ends, but the court must find whether there is disability total or partial—temporary or permanent. And if that court finds that there is disability that will not continue for more than six months and fixes the compensation therefor and renders judgment accordingly, it cannot at a subsequent term change that judgment.

5. ———: ———: DISABILITY. If the workman is disqualified to continue his regular employment, the fact that he may procure temporary employment in a different occupation for a few days at equal or greater wages would not be conclusive that his disability had ceased.

6. ———: ———: APPEAL. If the time limited is not more than six months, the trial court has no continuing jurisdiction over the case, and upon appeal from such order the bill of exceptions must be settled with reference to the term at which such order is made.

7. ———: ———: ———. In such case if the bill of exceptions is not so settled, and motion is made to quash it for that reason, this court upon appeal cannot consider such bill of exceptions for the purpose of reviewing the original order.

8. ———: ———: MODIFICATION OF ORDER. In this case an application was made at a subsequent term to change or construe the order, and the trial court properly dismissed the application because it was made before the six months from the time of making the order had expired.

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

Mahoney & Kennedy and *Guy C. Kiddoo,* for appellant.

R. J. Greene, contra.

SEDGWICK, J.

In the district court for Lancaster county compensation was awarded to the plaintiff, under the workmen's compensation law of 1913 (Laws 1913, ch. 198, Rev. St. 1913, sec 3642 *et seq.*), for an injury sustained in the employment of the defendant. Afterwards the defendant made application to the court for an order "relieving it from the payment of any further compensation to the said George L. Hanley * * * and for such other relief as to the court may seem equitable and just." The court denied the application, and the defendant has appealed.

The first order granting compensation was made January 26, 1916, and, omitting the formal parts, was as follows: "That there is due and unpaid from the defendant to the plaintiff as compensation, in accordance with the terms of the workmen's compensation law, the sum of $92.75; that compensation is ordered to be paid by the defendant to the plaintiff under the terms of the workmen's compensation law at the rate of $8.75 per week from this day during the period of compensation covered by the statute; and that plaintiff recover from the defendant the costs of the action. It is therefore ordered, adjudged and decreed by the court that the plaintiff have and recover of and from the defendant the sum of $92.75; that the de-

fendant pay to the plaintiff periodically in accordance with the method of payment of the wages of the plaintiff at the time of his injury compensation in the sum and amount of $8.75 per week during the period of compensation; and that plaintiff recover of the defendant his costs herein." The defendant contends that the meaning of this order is that the weekly payments are to continue during disability, and that the evidence shows that plaintiff's disability was terminated, and that the court should therefore have discharged the defendant from further liability.

Section 3682, Rev. St. 1913, provides: "All settlements by agreement of the parties and all awards of compensation made by the court, except those amounts payable periodically for six months or more, shall be final and not subject to readjustment." And the following section provides that, at any time after six months from the date of the award, it may be modified upon the application of either party under certain specified conditions.

The plaintiff contends that the above quoted order awarded periodical payments for more than six months, and therefore no application could be heard to modify or change it until the six months have expired. The application was made in April, 1916, not quite three months from the date of the original order. Upon this application the trial court found that "the order heretofore made herein was for a period greater than six months, and that this application is prematurely made," and for that reason denied the application. It will be seen that both parties are depending upon technicalities derived from different constructions of the original order of the trial court. This is unfortunate. The statute is remedial in its nature, its purpose was to do justice to workmen without expense, litigation and unnecessary delays.

The petition should set out "the injury in its extent and character" (Laws 1913, ch. 198, sec. 39), and the judgment should conform thereto determining plainly the extent and character of the injury, whether the disability is total or partial, and whether temporary or permanent; it

should state definitely the time for which periodical payments must be made. If the time so found by the court during which periodical payments are to be made does not exceed six months, the order is final; that is, so far as that court is concerned there is no power to modify or change such order. If the time so fixed by the court during which periodical payments are to be made exceeds six months, then, after that time has elapsed, either party may show to the court that conditions have so changed that the order should be changed also. There is no provision in the statute for any application to the district court of any nature until after the six months have elapsed.

No doubt, compensation is for disability and ends when disability ends, but the court must find whether there is disability total or partial—temporary or permanent. And if that court finds that there is disability that will not continue for more than six months and fixes the compensation therefor and renders judgment accordingly, it cannot at a subsequent term change that judgment.

The judgment that compensation shall continue "under the terms of the workmen's compensation law, at the rate of $8.75 per week from this day during the period of compensation covered by the statute," is, of course, indefinite and unsatisfactory.

The plaintiff, however, alleged in his petition that he was disabled permanently. The court found "generally in favor of the plaintiff and against the defendant." Neither party asked that the judgment be made more definite. The court in the order dismissing the application has definitely construed the first order to require periodical payments for more than six months. If it was for a shorter time the first order should have so found and should have definitely fixed the limit of periodical payments. The evidence shows that the plaintiff on two occasions obtained employment, for a few days, as a carpenter and received wages therefor larger than he had been accustomed to receive at his regular employment before his injury. But, if he is disqualified to continue his regular employment, the fact that he

may procure temporary employment in a different occupation for a few days at equal or greater wages would not be conclusive that his disability had ceased. There was in the original trial considerable expert evidence tending to prove that plaintiff's disability was temporary, but no bill of exceptions upon this evidence was settled within the time limited for settling the same upon an appeal from that judgment. This appeal is treated and must be considered as an appeal from an order made at a subsequent term denying the application to modify that judgment.

The six months from the entering of the compensation order will expire during the current month, and the trial court will then entertain an application to modify the order. If it appears upon careful investigation that plaintiff's disability has ceased wholly or partially, the trial court will so find and make the proper order accordingly.

There are no periods of compensation specified in the statute for less than six months. If the disability is temporary, and the court does not fix a period of more than six months, it has no power to change it at a subsequent term, and no application for such change is allowed in any event until after six months.

We cannot say that the court erred in refusing this application, and the judgment dismissing the application is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

JOSEPH MAUCHER, APPELLEE, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 22, 1916. No. 18721.

Carriers: LIABILITY. The contracts pleaded as a defense examined, their substance set out in the opinion, and *held* not to relieve defendant from liability under the facts shown by the record.

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

W. D. McHugh, W. H. Herdman and *John M. Kelley,* for appellant.

Mahoney & Kennedy, contra.

MORRISSEY, C. J.

Plaintiff brought this action against defendant to recover damages for personal injuries alleged to have been sustained in a rear-end collision on defendant's line of railroad August 12, 1913. There was a verdict for $12,500, which on motion for a new trial was reduced to $10,000, and defendant has appealed.

Defendant was, and is, a railroad company engaged in general railroad business, both intrastate and interstate. At the date of the injury plaintiff was an employee of a circus company known as "Barnum and Bailey Shows," but owned by Ringling Brothers, a copartnership. The day preceding the injury the circus company gave a performance in the city of Lincoln, Nebraska, and on the evening of that day loaded its cars with its circus equip-

ment, baggage, and paraphernalia, and its employees. The cars belonging to the circus company were attached to a locomotive engine and way-car belonging to defendant. The engine crew and train crew were made up of the regular employees of defendant. As thus made up, this circus train started for Atlantic, Iowa, where the circus company was to give an exhibition the following day. The train passed eastward over defendant's tracks and passed South Bend, an open telegraph station. Richfield, about twelve miles farther east, was the next open telegraph station, and the stretch of track between these two stations constituted a "block." Shortly after the circus train left South Bend one of defendant's regular passenger trains arrived at that station, and received a "block" restriction card, which required the engineer to proceed at no greater speed than would permit a complete stop at any time within the range of track which was open to his vision. This "block" has a number of cuts and curves. The engineer failed to obey the restriction order and, as a consequence, ran his engine into the rear end of the circus train as it pulled onto a sidetrack at Richfield. As a result of this collision plaintiff received severe and perhaps permanent injuries.

There is practically no dispute as to the facts, but defendant denies liability, relying upon certain contracts set out at length in the pleadings. One of these is a contract between the circus company and defendant, whereby defendant undertook to transport the property of the circus company, consisting of its cars and other equipment, from point to point along its line of road, including the transportation from Lincoln, Nebraska, to Atlantic, Iowa, on special time schedules and at reduced rates. The employees of the circus company were to be conveyed in the cars of the circus company in the same train with the baggage, paraphernalia, and other equipment. This transportation was to be made by defendant furnishing to and for the use of the circus company the necessary locomotives, the fuel therefor, the engine and train

crews and other necessary employees, and granting the right to use defendant's tracks. Among other stipulations contained were the following:

"It is expressly agreed and understood that this agreement is not made by the first party as a common carrier, but only as a hiring of said locomotives, engines and employees, and the use of its railroad to the second party, for the purpose of enabling the second party to move said train between said points; that all of the said cars, coaches and trains shall be operated under the management, directions, orders and control of the second party or its agents.

"It is expressly understood and agreed that all engineers, firemen, conductors, brakemen, train dispatchers and other operators and employees, furnished by the first party, are, in the operation and movement of said cars, coaches, and trains, exclusively the employees of the second party, but all of said cars, coaches, and trains shall be run according to the rules, regulations and time cards of the first party.

"It is expressly understood and agreed in consideration of the first party hiring the use of its railway and furnishing the motive power and employees to handle the second party's cars, coaches, paraphernalia and employees, as aforesaid, and for less than it would receive if it handled said circus cars, paraphernalia, menagerie and employees, as regular freight and passengers upon its cars, and in consideration of the privilege of stopping over at the points hereinbefore designated, that the first party shall not be responsible or liable to the second party, or to any other person, partnership or corporation for any delay of any cars or trains, however caused, and whether or not arising in any way from any one's fault or negligence, of or for any loss, damage or injury to the property or person of the second party or of any one employed by the second party, or being upon any trains or cars, hauled under this agreement or being upon any premises of the first party or connected in any way with said circus,

caravan or menagerie, or with the business of the second party, or for any loss of or damage or injury to the property or person of any one else, or of any partnership or corporation whatsoever, whether or not any such loss, damage or injury arises in any way from, or is in any degree attributable to, any fault or negligence of the first party or any of its officers, agents or employees, in or about the performance of this agreement, or the performance of the first party's general business or in connection with the railroad or property or any duty whatsoever of the first party.

"The second party further agrees and undertakes, as a further consideration hereof, that in case of delay, loss, damage or injury, to the person or property, either of the second party or any other persons, association of persons or corporation, carried or to be carried upon any of the cars or trains herein specified or employed on or about or in connection with the same on the business of the second party, it, the said second party, will release and does hereby release the first party from all liability or claim therefor for loss, damage or injury to itself or its business or property, will indemnify and forever save harmless the first party from all claim, demand, actions, causes of action, costs, judgments, and expenses, including attorney's fees, resulting from or growing out of such delays, loss, damage, or personal injury, the second party hereby assuming and agreeing to defend at its own cost all such claims, demands and actions, and to satisfy and pay the same, and the second party further undertakes and agrees to inform by personal notice, to each thereof, all of the persons permitted by the second party to be carried on any of said cars, coaches, and trains, under the terms of this agreement, and to advise and notify all such persons, and each thereof, that they are carried by the second party and not by the first party, and that the first party has not assumed, with respect to them or their baggage or other personal property, any of the duties and responsibilities of a carrier of passengers.

"It is a further consideration of this agreement, and the parties hereto agree, that the second party is to have sole charge of every person and of all animals and property on any car, coach or train hauled under said agreement, and the first party does not assume, and shall be under no responsibility for the safety of any of the cars, coaches, persons, animals or property on said cars, coaches, and trains, in charge of the second party, or of advance agents, from any cause whatever, and the second party agrees to, and does hereby, indemnify and save harmless the first party against all loss, damage or injury on account of strangers, tramps, or others riding on said cars, coaches or trains, and being injured or killed, or on account of strangers, tramps or other persons being injured or killed in the operation of said cars, coaches or trains, or in the handling, loading or unloading of cars, and will protect the first party from damages, and cost incident thereto, suffered by any one from wild, tamed or domesticated animals escaping from cars or custody, and protect the first party against all loss, damage and cost for and on account of the spread or transmission of any disease to persons or animals from unloading offal or otherwise, and against any fine or penalty arising therefrom, which may be imposed against the first party by any state, municipality or other competent authority."

This contract was made in the state of Illinois, and is claimed to be valid under the laws of that state.

At the time of the injury plaintiff was an employee of the circus company, and, as such employee, was riding on this circus train without having paid, offered to pay, or intending to pay, any transportation whatever, and his right to be thereon was due to his employment, under a contract which he had with the circus company. The train was being moved and operated over the track of defendant in pursuance of the contract heretofore partially set out.

Before entering the employment of the circus company, to wit, June 9, 1913, plaintiff had entered into a

contract in writing with the circus company, containing the following stipulations: "Now, therefore, for valuable consideration, and in consideration of this employment, and the furnishing by first party to second party of transportation and board of the kind customary and usual in the circus business, and in consideration of special personal benefits and advantages beyond the scope of employment inuring to second party herein, the second party accepts and assumes the increased hazard of railroad travel and circus service in all particulars and circumstances, and hereby exempts and releases first party from all claims for injuries, accidents, sickness and damages of whatsoever nature sustained in said service, whether due to negligence (including gross negligence) of first party, their employees, agents or bosses, or the negligence of any employee or agent of any railroad company transporting first party, when said second party is traveling on or using transportation furnished by any railway company under contract with first party; and second party, recognizing said privity in railroad transportation, hereby renounces his rights as 'passenger' in traveling on any railroad line while in said service, and releases all such railroad companies from claim on his part for any damage or injury whatsoever; and second party agrees to protect, indemnify and hold harmless first party and to pay the first party (and when notified to personally assume payment of) all sums which first party may be subject to pay in consequence of any claim by, or injury, sickness or death to, second party; and second party hereby releases first party from any claim he may in the future have due to or growing out of any injury received in said service either as against first party or any railroad company, hereby binding himself, his heirs, executors and assigns firmly by these presents."

Defendant pleads this contract, together with its contract, heretofore partially set out, with the circus company, and alleges that they are valid and binding upon plaintiff, and a full, adequate and complete defense to

his cause of action, alleges that the transportation furnished was interstate transportation, and that the contract and its construction and effect are to be determined solely by the legislation of the United States, and the public policy thereof respecting interstate carriers and interstate transportation, and defendant pleads, and relies upon, as a defense to this action, the contracts pleaded and the laws and policies of the United States in relation to interstate transportation and the carriers thereof.

Defendant further says that the engine and train crews operating the circus train on which plaintiff was riding were the employees of the circus company and not the employees of the defendants, and points out and relies on the clause of the contract between defendant and the circus company which provides:

"The first party agrees to furnish to and for the use of the second party * * * the engineers, firemen and other employees * * * for the transportation of said circus, menagerie, employees and equipment of the second party by train * * * from * * * Lincoln, Neb., to Atlantic, Ia.

"It is expressly understood and agreed that all engineers, firemen, conductors, brakemen, train dispatchers and other operators and employees, furnished by the first party, are, in the operation and movement of said cars, coaches and trains exclusively the employees of the second party, but all of said cars, coaches, and trains shall be run according to the rules, regulations and time cards of the first party."

Defendant follows this with an allegation of negligence on the part of the engine crew and train crew of the circus train in failing to observe and obey rule 99 for protection against rear-end collisions such as occurred in this case, and alleges that plaintiff's injury is due to such negligence, and alleged that plaintiff by his contract made with the circus company had fully released both the circus company and the defendant from any liability for injuries he sustained.

By reply plaintiff admitted signing the contract pleaded, but alleged that he did not receive a copy or duplicate thereof, and that when he signed the same he was not aware that he was executing a release from liability of any railroad company upon whose lines he might have occasion to travel. He alleges that the contract, in so far as it undertakes to relieve the defendant from liability for the injuries he received, is against public policy and is void.

The assignments of error are subdivided many times; but the real contention of defendant is that under the contracts set out defendant is relieved of liability; that the court ought to have instructed a verdict in its behalf; and that it was error for the court to submit instruction No. 3, which, after reciting the substance of the contracts pleaded, concluded as follows:

"In this behalf you are instructed that, in so far as the first contract herein mentioned provided that the agents, servants and employees furnished by the defendant to the circus company and engaged in the operation and movement of said train and cars in the transportation of said circus company's property and employees, at the time referred to, were to be regarded as exclusively the employees of the circus company, except the said cars and train should be run according to the rules, regulations and time card of said defendant, the same may be considered by you as valid and binding between the parties, in so far as this particular action is concerned, and you may therefore assume as a fact conclusively established that the employees aforesaid were, at all times referred to, the servants and employees of the said circus company exclusively and not those of the defendant, and that therefore their acts while so employed in the management, operation and control of said circus train, would be the acts of the circus company and not those of the defendant herein, and any negligence, if any there was on the part of the said agents or employees of said circus train, will not be attributable to the defendant railway company"—and lastly that the judgment is excessive.

It may be noted that in the contract between plaintiff and the circus company plaintiff renounces his rights as a "passenger," but the contract also recites that plaintiff has knowledge that the circus company has contracted with the railroad companies over whose lines they travel to hold them harmless even for their gross negligence, and that this stipulation applies especially to the plaintiff. It is also recited that such railroad company is acting as a private carrier. When we consider the language of this contract wherein plaintiff purports to recognize the railroad company as a "private carrier," and also to renounce his claim as a "passenger," it would appear that he was releasing only such claims as he would have if the railway company were rendering service as a common carrier and he was being transported as a passenger. The trial court took the view that liability arose independently of the relation of carrier and passenger. Conceding that the train on which plaintiff was riding was operated by the employees of the circus company, and that the train crew was then in the employ of the circus company and not in the employ of the railroad company, yet the evidence clearly shows that passenger train No. 6, which, in violation of the rules of the company, ran into the circus train and caused the injury to plaintiff, was a train operated and controlled by the defendant company. Neither plaintiff nor any of the crew of the train on which he was riding are shown to be guilty of negligence, while the grossest negligence may be attributed to the crew of passenger train No. 6. The trial court took the view that the crew of the circus train might be regarded as the employees of the circus company, and charged the jury that plaintiff could not recover unless his injuries were due to the negligence of the crew operating the other train. By his instructions he denied plaintiff the right to recover under the law of Nebraska fixing the liability of a common carrier to a passenger. Without deciding that the contract may be given this broad and liberal construction, suffice it to say, that in

view of the verdict rendered and the condition of the record neither party has been prejudiced. Independently of plaintiff's rights as a passenger, if any he had, he was lawfully upon defendant's tracks and was injured by its negligence. The trial court gave the contract full force in that it recognized defendant's claim to the private character of the transportation and plaintiff's renunciation of his rights as a passenger, and limited the recovery to an affirmative showing of negligence upon the part of the passenger crew.

Contracts whereby an employee is induced to waive or sign away his rights under the law should always be strictly construed. Under the construction placed upon it by the trial court, plaintiff waived his rights as a passenger and consented that the train on which he rode might be considered as a private conveyance, but "that in so far as said contracts aforesaid, or either of them, undertakes to exonerate and release the defendant herein from its acts of negligence in or about the performance of the defendant's general business in the operation of its roads and trains, and to exempt and relieve defendant from any liability for personal injury to any employee of the circus company, and particularly to the plaintiff herein, resulting from the negligence of the defendant as to the proximate cause thereof, the same is void and of no effect." Instruction No. 4.

The jury were told that, unless the train crew in charge of the passenger train No. 6 were guilty of negligence in running that train into the circus train, plaintiff could not recover. It will be seen that, while the contract was not held void *in toto*, the court did hold, and we think properly so, that the contract did not give the defendant company the right to wantonly maim the plaintiff. He was lawfully on its right of way, if not as a passenger, he was at least a licensee.

It is the contention of the appellant that the circus train constituted an interstate shipment, and therefore these contracts must be governed by the federal law. If

governed by the federal statutes at all, they must fall within what is commonly known as the Carmack Amendment to the Elkins law. 34 U. S. St. at Large, ch. 3591, pp. 593-595. This statute expressly provides that "no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." By another provision of the act it is provided the shipper may for a valid consideration limit the value of his freight, but he is not permitted to release the railroad entirely from liability for its negligence. The act nowhere provides that a railway company may exempt itself from liability for negligently maiming or killing any person.

"That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. * * * The rule of the common law did not limit his liability to the loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported." *Adams Express Co. v. Croninger,* 226 U. S. 491.

If the contracts fell within the federal statute they are void because they undertake to exempt the carrier from all liability, but this was not a contract for the transportation of a mere piece of inanimate freight. It was a contract for the transportation of a person in whose life and safety the state has an interest, and a contract which would undertake to permit his wanton destruction would be against public policy and void. It does not appear,

however, that the liability of the defendant is to be governed by the federal statute. Congress has legislated on interstate shipments as applied to freight, but the act does not reach the questions herein involved, and in the absence of action by congress the questions must be determined by the law of Nebraska. There is no federal legislation touching the liability of railroads growing out of interstate transportation of persons. Such being the case, the law of Nebraska must be held to govern. *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1; *Southern P. R. Co. v. Schuyler*, 227 U. S. 601; *Savage v. Jones*, 225 U. S. 501; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613.

Having found that the federal act does not apply, and that the law of Nebraska governs, let us see what law of Nebraska applies to the facts in this case.

"Railways heretofore constructed, or that may hereafter be constructed, in this state are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited." Const., art. XI, sec. 4.

"Every railroad corporation shall give to all persons and associations reasonable and equal terms, facilities and accomodations for the transportation of merchandise, produce, commodities and other property of every kind and description upon any railroad owned, leased or operated within the state, and reasonable and equal terms, service, facilities and accomodations for terminal handling of all property and commodities whatsoever." Rev. St. 1913, sec. 5978.

The Constitution declared railroads to be public highways and vested in the legislature authority to regulate

their operation. Under the provisions of the statute quoted every railroad is bound to give transportation on equal terms, and when it undertook to transport this train it engaged in the undertaking, not as a private carrier, but as a common carrier, and would have been bound to render similar service to any other shipper that might make the demand for such transportation. By sec. 6124, Rev. St. 1913, the legislature gave a definition of the term "common carrier:"

"The term 'common carrier,' as used herein, shall be taken to include all corporations, companies, individuals and association of individuals, their lessees or receivers, appointed by any court whatsoever, that may now or hereafter own, operate, manage or control any railroad, interurban or street railway line, operated either by steam or electricity or any other motive power, or part thereof, or any express company, car company, sleeping car company, freight and freight line company, telegraph and telephone companies and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire."

Perhaps the defendant company might have declined to accept the shipment in the form in which it was offered, but, having accepted it and undertaken its transportation, it automatically became a common carrier under the law of this state, and it cannot by private contract exempt itself from the obligations imposed under the Constitution and statutes. *Atchison & N. R. Co. v. Washburn,* 5 Neb. 117.

A common carrier cannot limit his liability so as to cover his own or his servant's negligence. *Farnham v. Camden & A. R. Co.,* 55 Pa. St. 53.

"A railroad company operating a line of railroad in this state is a common carrier, and cannot, under the provisions of the Constitution, limit its liability as such by special agreement with a shipper." *Missouri P. R. Co. v. Vandeventer,* 26 Neb. 222.

"The liability of railroad corporations as common carriers shall never be limited." Const., art. XI, sec. 4.

"A railroad company, in the carriage of goods, is subject to the liability of a common carrier, and must answer for all losses not occasioned by the act of God or the public enemy, and cannot in this state by special contract limit or relieve itself from this liability." *St. Joseph & G. I. R. Co. v. Palmer,* 38 Neb. 463. See, also, *Chicago, B. & Q. R. Co. v. Curtis,* 51 Neb. 442; *Chicago, R. I. & P. R. Co. v. Collier,* 1 Neb. (Unof.) 278; *Union P. R. Co. v. Metcalf & Wood,* 50 Neb. 452, and *Omaha & R. V. R. Co. v. Crow,* 47 Neb. 84. Under the Constitution and the statutes as construed by an unbroken line of decisions of this court, the defendant must be held to be a common carrier in the transportation of the circus train.

The question as to the validity of the contract between the circus company and plaintiff is not altogether a new one in this state. In *Ault v. Nebraska Telephone Co.,* 82 Neb. 434, it is said that an employer "cannot by a direct contract to that effect escape liability for negligence is well settled; such contracts being against public policy. The state has an interest in the lives and healthy vigor of its citizens, which it will not allow the master to endanger by contracting against liability for his negligently endangering them." This case was followed and approved in *Olson v. Nebraska Telephone Co.,* 83 Neb. 735. Guided by these cases, we are led to the conclusion that if the contract under consideration were made in this state it would be utterly void. This leads us then to inquire what effect is to be given to a contract valid where made, but contrary to the public policy of this state, although intended to be performed herein. In *Chicago, B. & Q. R. Co. v. Gardiner,* 51 Neb. 70, this court had before it an Illinois contract, the same state in which this contract was made, that limited the liability of the railway company, and was valid in the state where made. The court said:

"The power by contract in this state to restrict the liability of a common carrier does not exist. The statement that such a restriction is illegal in this state is, therefore, a mere truism. To ask that the law of this state, on principles of comity, shall give way to the law of Illinois is to ask that the courts of this state shall sanction what by the Constitution has been declared illegal and against the public policy of this commonwealth."

Again our court has said: "Our courts, as an exercise of comity, will not enforce a contract resulting from the transaction of business within this state violating the public policy thereof." *Henni v. Fidelity Building & Loan Ass'n,* 61 Neb. 744.

In *Coleman v. Pennsylvania R. Co.,* 242 Pa. St. 304, the supreme court of Pennsylvania had before it a contract essentially the same as the one before us, and in disposing of the case said: "The general rule that no contract, condition, or limitation will relieve a carrier from liability to a passenger for the consequence of its own negligence, or the negligence of its servants, is not open to question, and we need not delay to cite cases in which such contracts have been held to be void as offending against public policy." See, also, *Davis v. Chesapeake & O. R. Co.,* 122 Ky. 528, 5 L. R. A. n. s. 458, and *Texas & P. R. Co. v. Fenwick,* 34 Tex. Civ. App. 222.

Whether plaintiff were a passenger within the common acceptation of that term or not, one thing is clear, he was in a place where he had a right to be. Defendant was a common carrier and was rendering the service usually rendered by a common carrier in his transportation, and the contracts pleaded will not avail to exempt it from liability for its negligence.

Finally, we are asked to set aside this judgment because the verdict is excessive. Plaintiff suffered internal injuries, his abdomen being so severely crushed as to cause him to lose consciousness. He was removed to a hospital, where he was treated by defendant's

surgeon, who after an examination deemed an immediate operation imperative, and made an abdominal incision. No rupture of any vital organ was discovered, but the crushing had been so severe that the blood vessels and the membranes had been torn and lacerated. The incision was sutured and sewed up, but plaintiff continued to suffer, and vomiting continued for a period of weeks. Whether his vomiting and suffering were due entirely to the injury received or whether the operation contributed thereto may not be definitely determined, but he was confined to his bed for some time, and during that period was able to take but little nourishment. After being released from the hospital he obtained a clerical position and attempted to do light work, but on account of nausea and vomiting was compelled to abandon his employment. The wound did not heal properly, and, at the time of the trial, he had a weakened and debilitated system. According to the testimony of eminent surgeons it would require a further operation before he would be able to perform manual labor. That his suffering was severe and protracted is not questioned. As to whether he will ultimately recover his former vigor, there is serious question. It is said in the brief of appellee, and unchallenged by appellant, that he has already been subject to two surgical operations; he has been unable to work for any but exceedingly short periods, and is threatened with the necessity for a third surgical operation. After seeing him upon the witness stand and hearing the testimony of the surgeons, the jury fixed his damages at $12,500. This award was reduced to $10,000 by the trial court. At the time of his injury he was a strong, robust man, 32 years of age, with a life expectancy of more than 33 years. During the summer season while traveling with the circus he received his board and lodging and salary of $40 a month. During the balance of the year he claims to have earned $120 a month, and it is claimed that his earnings averaged about $100 a month. When we consider the serious character of his injuries, the probability of his being permanently disabled, and the

severe suffering he has undergone, we cannot say that the judgment is excessive, and it will not be disturbed.

AFFIRMED.

SEDGWICK, J., concurring.

The plaintiff concedes, at least for the purpose of this case, that the circus train and its attaches, including the plaintiff, were being transported by the circus company and not by the defendant, and therefore that the plaintiff was not a passenger of defendant, and that the plaintiff has the burden of proof of negligence of defendant as the proximate cause of the injury. There is no dispute between the parties as to the meaning and construction of the contract. The decision of this case depends upon the question whether the plaintiff's contract to relieve the defendant from liability for its own gross negligence is valid and enforceable. Can a common carrier exempt itself from liability for its own neglegence? The act of congress does not allow contracts of that kind, and the conclusion of the majority opinion is therefore right, but I do not concur in all that is said in the lengthy and, to my mind, unnecessary quotation and discussion of the contract.

JAMES CROGHAN, APPELLEE, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 22, 1916. No. 18722.

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

W. D. McHugh, W. H. Herdman and *John M. Kelley,* for appellant.

Mahoney & Kennedy, contra.

MORRISSEY, C. J.

This is an action growing out of the same wreck discussed in *Maucher v. Chicago, R. I. & P. R. Co., ante,* p.

236. Plaintiff was an employee of a circus company. He had entered into a contract similar in all respects to the contract made between Maucher and the circus company, and it is agreed by all parties that with the single exception of the amount of recovery the cases are substantially the same, and the ruling in one may stand as the ruling in both.

There was a verdict and judgment for $15,000, and defendant insists that this is grossly excessive. At the time of the accident plaintiff was 31 years of age, with a life expectancy of more than 33 years. He had been employed by the circus company but a short time, and for that service was getting $15 a month, with his living furnished. It is claimed, however, that the opportunity to travel and visit many of the places of interest in the United States was a consideration inducing him to take this employment, and that prior to taking this engagement he had been earning, as a carpenter, $1,200 to $1,500 a year.

There is little dispute as to the serious character of his injuries. There was an iron rod driven through his knee, his head was cut in several places, his body bruised and lacerated, and his suffering must have been intense. He was confined in the hospital for several weeks, where he was attended by the defendant's surgeon, a man eminent in his profession, who testified as a witness for the plaintiff. There is also the testimony of other eminent surgeons, and from their testimony we gather that plaintiff's knee is seriously crippled. He is suffering from atrophy of the muscles of one shoulder. Dr. Summers, defendant's surgeon at the time of the accident, testified that plaintiff had been under his care from the date of the accident to the date of trial, a period of about six months; that, in addition to the injuries already stated, he was then suffering with a tumor of the left hip. "He has a tumor in the covering of the bone. I would say the upper part of the thigh bone just before it enters into the formation

of the hip joint, that part that we call the tuberosity of the femur or thigh bone. He has a tumor there, the exact nature of which I am not positive about. * * * I think it is a tumor of the periosteum or sarcoma, what is known as sarcoma. We generally speak of sarcoma as malignant because carcinoma or cancer does not attack the bone. I believe it is a malignant tumor secondary to the injury of the upper part of the thigh bone." He further testified that he believed this growth to be malignant or cancerous in its nature, and, while he said that he still had hope of saving the leg, yet he made it clear that it might be necessary to remove the leg at the hip joint. "Q. Taking the situation as it is today, Doctor, although you would still try to bring about a beneficial result by treatment other than a removal of the leg, I would like to have you state whether the prospects of succeeding with such treatment are more or less than the prospects of failure? A. Less. Q. That is, the probability is less on the side of the treatment being successful than against it? A. Yes, sir."

This testimony was corroborated by that of other eminent surgeons, from all of which it quite clearly appears that it would probably be necessary to amputate plaintiff's leg at the hip, and even with this heroic treatment the surgeons expressed grave doubt of his ultimate recovery. In this state of the record, we cannot say that the verdict is excessive, and the judgment is

AFFIRMED.

NEILS JOHNSON ET AL., APPELLANTS, V. LEROY T. PETERSEN ET AL., APPELLEES.

FILED SEPTEMBER 22, 1916. No. 18896.

1. **Limitation of Actions: TRUSTS.** "The statute of limitations begins to run in favor of a trustee *ex maleficio* of a constructive trust from the time of the discovery of the wrong or fraud, for the prevention of which the trust is imposed; but the statute does not begin to

run in favor of the trustee of a resuling trust until such trustee, by some act or declaration, clearly repudiates his trust." *Hanson v. Hanson*, 78 Neb. 584.

2. **Trusts: EVIDENCE: DECLARATIONS.** In a suit to declare a trust in lands, the declarations of the ancestor through whom the defendants acquired title, without the payment of a monetary consideration, may be received in evidence against the defendants who stand in the place of the ancestor.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed, and decree entered.*

Weaver & Giller and *L. W. Housel,* for appellants.

J. O. Detweiler, contra.

MORRISSEY, C. J.

This is an appeal from a decree in equity and involves the title to two lots in the city of Omaha. Plaintiffs are the heirs of one Lena Petersen, who died in 1875. She left surviving her a husband, Soren T. Petersen, who, about two weeks after her death, received, in due course of mail, from Denmark, a draft for $500 payable to his wife. This draft represented the wife's interest in the estate of a deceased aunt. Mrs. Petersen left no children surviving her, and these plaintiffs are her sole and only heirs. Under the statute then in force the husband took no interest in the wife's personal estate. On receipt of this draft, and without the knowledge of the plaintiffs or anybody having an interest in his wife's estate, Soren T. Petersen forged the name of his deceased wife to the draft, cashed the same, and with the money thus received purchased the lots in controversy. September 25, 1876, he conveyed the lots to Maren Magrethe Thompson, and four days later Petersen and Miss Thompson were married. They lived together as husband and wife until December, 1892, when a decree of divorce was entered. The defendants in this action are the children of this union. When Mrs. Petersen filed her suit for divorce, she alleged that she was

the owner of these lots, but that Petersen had for a long time been in possession and collected the rents and profits therefrom, and that he was also possessed of about $40,000 worth of property. The record of this divorce case is incorporated in the bill of exceptions, and it appears that the property differences of the parties were amicably arranged. Mrs. Petersen was awarded alimony in the sum of $5,000, and the decree provided that the title to these lots should be conveyed to the children; Mrs. Petersen to collect the rents during the minority of the children. In compliance with this decree, Petersen and his wife executed a deed of conveyance to the property conveying the title to these defendants.

In 1912 Petersen made what plaintiffs denominate a death-bed confession. He wrote a letter to the plaintiff, Neils Johnson, in which he acknowledged the receipt of the draft payable to the deceased wife; that he signed her name thereto, and that with the proceeds he purchased these lots. He had this letter placed in an envelope and sent to his brother in Denver to be forwarded to the plaintiff after the death of the writer, and his instructions were carried out. The receipt of the draft, its conversion, and the facts and circumstances surrounding the purchase of the property were unknown to the plaintiffs until after the receipt of this letter. The defendants, by answer, plead the statute of limitations; allege that the property was conveyed by Petersen to his second wife in consideration of marriage, and the transfer to the defendants herein by direction of the court. The court entered a decree finding the defendants were the owners of the property in controversy, and confirming title in them.

Appellants make three assignments of error. First, that the court erred in holding that the statute of limitations had run; second, that the court erred in finding that defendants were the owners of the property; third, that the findings and decree of the trial court are not supported by sufficient evidence, and are contrary to the evidence and the law. The court made no specific find-

ings, but the general finding does not indicate that he held that the statute of limitations had run. The plaintiffs moved in due season after receipt of Petersen's letter, which was the first notice they had of the transaction.

"The statute of limitations begins to run in favor of a trustee *ex maleficio* of a constructive trust from the time of the discovery of the wrong or fraud, for the prevention of which the trust is imposed." *Hanson v. Hanson,* 78 Neb. 584.

The two remaining assignments may be considered together. Defendants undertook to show that the letter alleged to have been written by Petersen was a forgery, but the proof is so clear and convincing that it was written by Petersen that no question of its genuineness can be raised. There is also the testimony of Emma Petersen, the third wife, which corroborates the statements made in the letter, and also contradicts the testimony of the second wife, Maren Magrethe Petersen, that the property was deeded to her in consideration of marriage and for $1 in cash. Emma Petersen testifies that Maren Magrethe Petersen told her that Petersen had given her a conveyance of the property to protect himself from law suits. "She told me that his first wife had inherited some money, and that he had bought the lots with the first wife's money."

The evidence conclusively shows that the property was purchased with the proceeds of this draft, but it is argued that, Petersen having conveyed away the property, his declarations were inadmissible. This is the general rule where a party has taken title to real estate in good faith and for a valuable consideration. It is also said by the appellees that marriage is a valuable consideration, and that Petersen conveyed this property to the second wife as a consideration for her entering into the marriage relation with him, and that the title which she took cannot be impeached or overthrown by his subsequent declarations.

We are not, however, bound to accept her story and believe that the conveyance was made solely for the purpose of inducing her to enter into the marriage relation. The testimony of the third wife, heretofore quoted, shows an entirely different purpose. Then, again, the allegations of her divorce petition show that Petersen continued to collect the rents and profits and treated the property as his own, and this is at variance with her claim of absolute ownership. The court granted her a decree of divorce, awarded her $5,000 alimony, and decreed that this property be conveyed to the children; she to have its use during their minority. This decree seems to have been entered by mutual consent, and indicates that the property was then regarded as Petersen's, and not as the property of the wife. These defendants parted with no consideration. They hold title, not by virtue of purchase and payment, but because of their relationship to Petersen. He acquired title because he took the money which belonged to these plaintiffs and invested it in this property in fraud of plaintiffs' rights. The testimony is sufficient to show that the defendants hold the property in trust for plaintiffs.

The judgment of the district court is reversed and set aside, and the plaintiffs are adjudged and decreed to be the lawful and rightful owners, and the title is confirmed and quieted in them free and clear of any and all claims of defendants in and to said lots, namely, lots thirteen (13) and twenty (20), in Nelson's addition to the city of Omaha, Douglas county, Nebraska; and plaintiffs shall have and recover their costs.

JUDGMENT ACCORDINGLY.

LETTON and SEDGWICK, JJ., not sitting.

WILLIAM F. BELK, APPELLANT, v. CAPITAL FIRE INSURANCE COMPANY, APPELLEE.

FILED SEPTEMBER 22, 1916. No. 18945.

Bills and Notes: PAYMENT. When a banker has in his hands a special deposit of money, the property of the maker of a promissory note, sufficient to pay the note, and also holds the note for collection, and upon demanding payment of the maker is directed to take the requisite amount out of the special deposit, and thereupon he says to the maker of the note, "Your note is paid," and thereafter holds it subject to the order of the maker until it is finally delivered to him, payment will be held to have been made at the date of the conversation.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE, *Reversed.*

L. C. Burr and *R. J. Greene,* for appellant.

George E. Hager, contra.

MORRISSEY, C. J.

From a judgment directing a verdict in favor of defendant, plaintiff has appealed. Plaintiff insured his threshing machine, against loss by fire, with the defendant, giving his note in payment of the premium. The policy provided that, if the note was not paid when due, the policy should lapse and liability thereunder cease so long as the note remained unpaid. The note was made payable August 1, 1913, at the office of the company in Lincoln, Nebraska, but on the margin is found a notation directing that it be sent to the State Bank at Grafton for collection. Some time prior to the maturity of the note it was sent to the Grafton State Bank for collection. August 4, 1913, while the note was still in the possession of the Grafton State Bank, the property insured was totally destroyed by fire. Defendant refused payment,

claiming that the note was past due and unpaid. Plaintiff testified that prior to the maturity of the note the banker at Grafton called plaintiff on the telephone and informed him that he had this note for collection. At that time there was in the hands of the banker money belonging to the plaintiff. This money was not on general deposit, and plaintiff was not carrying a bank account in the bank, but parties for whom plaintiff had done threshing had left the money at the bank for delivery to the plaintiff. When plaintiff was notified by the cashier that he held the note for collection, he directed the cashier to pay the note out of his money which was then in the cashier's hands. The cashier then said, "All right. Your note is paid." Continuing the conversation, the cashier asked plaintiff what he should do with the note. Plaintiff directed him to hold the note at the bank until such time as he would call for it. The cashier testified that he does not remember the conversation, but he does not deny it, and in the state of the record we must assume that it took place as testified by plaintiff.

Assuming then that this is true, we have this situation. The bank is holding money belonging to plaintiff. This money is not deposited and mixed with the funds of the bank, but the bank is acting as bailee. The bank is the agent of the defendant in the collection of this note. Plaintiff authorizes the bank to take an amount sufficient to pay the note out of his money. The banker says: "Your note is paid. Shall I mail it to you or will you call and get it?"—and thereafter holds the note subject to the order and directions of the plaintiff. While the note was thus held, but before the banker had remitted the money to his principal, the property was destroyed. After the fire plaintiff called at the bank, asked for his note, and it was delivered without the payment of any money, or the giving of a check. For the purpose of collecting this note the banker was the agent of the defendant. He had in his hands the money of the plaintiff.

He was directed to apply this money on the note. This he agreed to do, in fact he did do when he said the note was paid, and thereafter held it subject to the order of the plaintiff. It will not be disputed that, if plaintiff had called at the bank and demanded and received his money and then had passed that money back again to the banker with directions to apply it on his note, that would have constituted payment. Under the circumstances this would be a useless piece of business. The case differs from one where the agent is indebted to the maker of the note and undertakes to pay the note in payment of his own debt. The bank was not indebted to plaintiff, but it was the bailee of his money. It was also the agent of the payee of the note. It acquiesced in his direction to pay the note, told him that it was paid, held the note subject to his order, and finally delivered it upon demand. In this state of the record, it would appear that the note was paid on the date this telephone conversation was had, which, being before the destruction of the property, would entitle plaintiff to recover. What is said here is not intended to conclude the court on another trial as to whether this conversation and agreement actually took place. We are merely assuming this from the record that stands before us. It is a matter to be submitted to a jury, and for this reason the case is

REVERSED AND REMANDED.

SEDGWICK, J., not sitting.

CHARLES E. SANDALL, APPELLEE, v. MORITZ N. OTTO ET AL., APPELLANTS.

FILED SEPTEMBER 22, 1916. No. 18976.

1. **Evidence:** HYPOTHETICAL QUESTIONS. In propounding a hypothetical question, a party may assume the existence of facts in accordance with his theory, if there is evidence in the record to sustain it, notwithstanding there may be a conflict of evidence on the point raised.

2. **Appeal:** ESTOPPEL. A party cannot complain of a hypothetical question asked witnesses of the adverse party where the questions asked his own witnesses were of the same nature and assumed substantially the same state of facts.

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

Burkett, Wilson & Brown, for appellants.

B. F. Good, contra.

MORRISSEY, C. J.

This is an appeal from a judgment of the district court for York county, wherein plaintiff was awarded a judgment for $9,565 for services rendered as an attorney. The defendants are the sons of one William Otto, who was the owner of property worth approximately $600,000, and consisting principally of farm lands. May 17, 1911, William Otto, the father, conveyed all of his property to these defendants to the exclusion of his other three children, namely, Waldo L. Otto, Minnie E. Wiseman, and Emma Faustman. The daughters, Mrs. Wiseman and Mrs. Faustman, upon learning of these conveyances, instituted proceedings in the district court for York county, acting as next friend for their father, praying to have the conveyances set aside because of the alleged mental incapacity of their father, and alleging that these defendants had exercised undue influence over the father

and that the conveyances of the property, both real and personal, were obtained by fraud and intimidation. There was also a prayer for an accounting of the rents and profits of the property for seven years immediately preceding. The petition set out in detail the age and mental condition of the old gentleman and the relationship of all the parties to the suit.

There is a dispute as to the exact date when the plaintiff in this case was consulted or employed by the defendants herein, who were also the defendants in that action, but the exact date of his employment is not very material. Certain it is that he was employed sometime in the month of October, 1913, and, although he had the assistance of other counsel who were also employed by the defendants, yet he did the major portion of the work of preparing the case for trial and in bringing about the final settlement. The real question which was there presented was the competency of the old gentleman, William Otto, to make the conveyances which were attacked. If he were competent to make the conveyances, it follows that the entire $600,000 worth of property which he possessed had been transferred to these two sons. If, on the other hand, he was incompetent to make a valid conveyance, and the conveyances were set aside, these defendants would become divested of the title to this large amount of property, but as the heirs of William Otto, provided he remained incompetent to transact business until his decease, they would inherit two-fifths of the property. The brother Waldo L. Otto was not a party to that litigation. That suit was filed October 4, 1913. Plaintiff claims to have been employed by the defendants to conduct the defense thereof on the 7th of October following, while the defendants contend that his employment did not begin until the latter part of that month, and allege that immediately following the filing of the suit they employed an attorney of Omaha, who drew the first answer. That the Omaha attorney did draw the first answer prepared in the case is undisputed, but the case

did not go to trial on this answer, but on an answer prepared and filed by this plaintiff. Subsequently another attorney was called in who assisted plaintiff in the trial and management of the case and was paid for his service by the defendants.

Appellants well say that the issues presented in this action are: (a) The time that the plaintiff's retainer took place; (b) the amount and the nature of the services which he performed; (c) the value of such services. The first two are material only in so far as they throw light upon the third. After studying the evidence, we cannot see that it matters very much whether plaintiff was employed on the 7th of October, as he alleges, or sometime thereafter, as contended for by defendants. Certain it is that one of the defendants discussed the case with him about the date he alleges he was employed. He was then transacting other business for the defendants, and when they discussed this suit with him it is fair to presume that they meant to retain him, and that he thereafter understood that he was retained. Surely he would not have felt free to have accepted a retainer from the other side of the controversy, and we think the subsequent conduct of all the parties leads irresistibly to the conclusion that from the date of his first consultation with one of the defendants he considered himself employed, and defendants well knew that he so understood their conversation.

It is alleged that following this employment he devoted the major portion of his time to the preparation and trial of the case until its settlement the following February. This claim was disputed before the jury, but we think it is fairly sustained by the evidence, although we cannot see that a few days more or less spent in interviewing witnesses and preparing for trial can be said to make any material difference. In the preparation of a case for trial a lawyer must be given more or less latitude, and be left free to determine the steps to be taken in order to fully protect his client's interests

and prepare the case. The relation of attorney and client contemplates this very thing. When a litigant employs an attorney he cannot determine with any degree of certainty how much time it may be necessary for the attorney to expend in the preparation of his case, but he has a right to expect that the attorney will spend such time as may be necessary to protect his client's interests. A failure to do this may be regarded as a breach of good faith on the part of the attorney, but, like the client, the attorney cannot always tell in advance what work may be necessary to do or how much time it may be necessary to expend, and this must be left to his good judgment. The record shows that plaintiff interviewed a great many witnesses, took a great many depositions, procured a number of affidavits, drew the necessary pleadings, and, in short, did the work which appeared to him as necessary and proper to be done. After the case had been on trial a number of days a settlement was reached, and by the payment of approximately $79,000 the defendants procured a dismissal of the suit, a settlement of all the claims of their sisters, and had quieted in them whatever interest these sisters might have had in their father's estate.

After a settlement of that litigation plaintiff herein instituted this action to recover for his fees in the sum of $20,000. The testimony of several witnesses was taken, and they answered a hypothetical question which, in substance, related the nature of the litigation in which the services were rendered, the amount of the property involved, the consideration for the settlement, and assumed that plaintiff had devoted the major portion of his time from his employment in October, 1913, until February 28, 1914, in the service of defendants in that case. The testimony offered on behalf of plaintiff fixed the value of his services at from $10,000 to $20,000. This testimony was given by a number of men eminent in their profession. The verdict is fully sustained by the evidence.

Appellants say that the chief error complained of is permitting the several witnesses for the plaintiff to answer the hypothetical question propounded to them. The question is subdivided many times, and each subdivision is argued at length in the brief. The question is very long, and we do not deem it expedient to set it out in full. It was propounded to the witnesses at the taking of the depositions prior to the trial of the case, and it undertook to state the facts as plaintiff expected to develop them on the trial. Defendants also took the depositions of a number of witnesses, and the hypothetical question which was propounded to their witnesses was, in substance, the same as that of which complaint is made. The language is so nearly identical as to suggest that each party had reached the same conclusion as to the facts. It may be said, from an examination of all the evidence, that the hypothetical question fairly reflected the case as made by plaintiff, and that this is all that is required. *Ward v. Ætna Life Ins. Co.*, 82 Neb. 499; *Hamblin v. State*, 81 Neb. 148. In propounding a hypothetical question a party may assume the existence of facts in accordance with his theory, if there is evidence in the record to sustain it, notwithstanding there may be a conflict of evidence on the point raised. Under any other rule it is seldom a hypothetical question could be submitted at all. There is generally a dispute as to the facts, and this can be settled only by the jury.

Again, on the cross-examination of defendants' witnesses, counsel for plaintiff, in substance, propounded his hypothetical question again and again and secured answers thereto. On the trial plaintiff declined to read this cross-examination. Defendants then voluntarily read the cross-examination making the testimony their own. In doing this, of course, they not only made the answers their own but the question itself. *Krier v. Milwaukee N. R. Co.*, 139 Wis. 207.

By way of conclusion, appellants say there is no competent evidence to sustain the verdict. This point, we

think, we have already fully covered. It is also said that the court erred in its refusal to submit special findings to the jury, and in its refusal to give certain instructions requested. All disputed questions of fact were submitted to the jury under proper instructions given by the court on its own motion. To quote from defendants' brief, "The court gave a correct general instruction." This being true, it was not error to refuse the instructions requested. No error is found in the record, and the judgment is

AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL., DEFENDANTS.

FILED SEPTEMBER 22, 1916. No. 19539.

1. **Carriers:** MAXIMUM RATE STATUTE: INJUNCTION. When, on an application for a writ of injunction to restrain a railroad company from violating a maximum rate statute, the record shows that from the time the statute became effective, over a long term of years, the defendant has obeyed the provisions of the statute, and on the hearing makes a positive showing of its intention to continue so to do, and there is a total lack of proof of intention or design on the part of the defendant to depart from the policy it has theretofore pursued, the application will be denied.
2. **Courts:** JURISDICTION. When, on application to this court for a writ of injunction, it appears that the federal court for this state has theretofore taken jurisdiction of the subject-matter and that the matters in controversy are then on hearing in that court, the writ will be denied.

Suit for an injunction. *Injunction denied.*

Willis E. Reed, Attorney General, for plaintiff.

Byron Clark, E. P. Holmes, A. A. McLaughlin, Edson Rich, B. P. Waggener, R. A. Brown and *J. A. C. Kennedy, contra.*

MORRISSEY, C. J.

This is an original action wherein the state, through its attorney general, prayed for a writ of injunction against the defendants forbidding them and each of them from violating section 6074, Rev. St. 1913, known as the "mileage book" statute, and section 6067, Rev. St. 1913, known as the "two-cent rate" statute, and forbidding defendants or any of them from taking any steps to restrain the state or its officers from enforcing the provisions of said statutes.

Before the petition herein was filed the defendants, Chicago, Rock Island & Pacific Railway Company and Missouri Pacific Railway Company had sued out in the federal court for this state injunction orders against the officers of the state, restraining the enforcement of these statutes. The federal court having acquired jurisdiction of the subject-matter, this court refrained from issuing an order as against these two defendants, but issued its restraining order, as prayed, against the other defendants. The defendants Union Pacific Railroad Company and St. Joseph & Grand Island Railway Company took removal orders to the federal court. We thereby lost jurisdiction of them, and they will be considered no further.

It is alleged in the petition that the defendants Chicago & Northwestern Railway Company and Chicago, St. Paul, Minneapolis, & Omaha Railway Company and Chicago, Burlington & Quincy Railroad Company were conspiring and confederating with the other defendants with the intention of violating the provisions of the two statutes mentioned, but on a hearing these defendants submitted the affidavits of their managing agents and officers specifically denying these allegations of the petition, and disclaiming any intention of violating the provisions of these statutes. These statutes were passed in 1907, and became effective in that year, and from that time to this these defendants have observed their provisions. Having obeyed these statutes for so many years, and now positively denying any intention to violate them, without any

showing on the part of the state that they have made any move looking to their violation, we can see no cause for granting an injunction against them, and as to them the application will be denied.

No doubt, the attorney general, learning that the Chicago, Rock Island & Pacific Railway Company and Missouri Pacific Railway Company were taking steps to prevent the enforcement of the statutes, felt in duty bound to bring in all of the railroads in the state and enjoin them against the violation of the statutes, or require them to submit showings to the effect that they intended to obey the statutes. He may be commended for his vigilance, but the roads that have made a proper showing ought not to be held in court, and are entitled to a dismissal.

There has been some suggestion that, because the actions brought by the defendants, Chicago, Rock Island & Pacific Railway Company and the Missouri Pacific Railway Company in the federal court were brought against the attorney general and the railway commission, while this suit is brought in the name of the state, the controversy may proceed in both courts at the same time. This point is not briefed by either party. Before action was taken on this petition the federal court had acquired jurisdiction of the subject-matter, testimony is now being taken in that court, and the attorney general is there protecting the interests of the state. There is no necessity to determine the question of concurrent jurisdiction or to duplicate the work that is being done in the federal court. That court has jurisdiction over the subject-matter of this action, so far as the Chicago, Rock Island & Pacific Railway Company and the Missouri Pacific Railway Company are concerned, and, having first acquired jurisdiction, it will retain it, and the application as to these defendants is denied.

INJUNCTION DENIED.

ROSE, J., not sitting.

MARTIN WIIG, APPELLEE, V. GIRARD FIRE & MARINE INSURANCE COMPANY, APPELLANT.

MARTIN WIIG, APPELLEE, V. AMERICAN INSURANCE COMPANY, APPELLANT.

FILED SEPTEMBER 22, 1916. Nos. 18781, 18782.

Insurance: POLICY: CONSTRUCTION. A policy of insurance contained the provisions: "Lightning Clause. This policy shall cover any direct loss or damage caused by lightning, * * * meaning thereby the commonly accepted term lightning, and in no case to include loss or damage by cyclone, tornado or wind storm." "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The insured frame building had been struck by lightning and had begun to burn when all of the edifice above the floor of the first story was lifted by a tornado and deposited about 200 feet away, where it continued to burn until wholly destroyed. *Held*, that the fallen building clause did not apply, and that the insurer was liable.

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

Stout, Rose & Wells, for appellants.

Byron G. Burbank and *E. R. Leigh, contra.*

LETTON, J.

Action on policy of fire insurance. Plaintiff recovered. Defendant appeals. The policy contains the following provisions; "Lightning Clause. This policy shall cover any direct loss or damage by lightning, * * * meaning thereby the commonly accepted term lightning, and in no case to include loss or damage by cyclone, tornado or wind storm." "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

The answer denies that the building was destroyed or damaged by fire or lightning, and alleges that it "was blown down and totally destroyed by tornado and wind

on the 23d day of March, 1913, so that the said building fell, not as a result of any fire, but solely as a result of said tornado and wind; and there was no loss or damage by fire or lightning to said building prior to the time that the said building was blown down." It is also alleged that the insurance immediately ceased the moment the building fell.

A motion was made at the close of the testimony for a peremptory instruction directing the jury to find for the defendant. This was overruled, and this action is assigned as error. Defendant insists that the evidence shows conclusively that the building did not fall as the result of fire and lightning, but did fall as the result of the tornado; that the defendant's liability under the policy was limited to the damage done by lightning and fire before the building fell; that the plaintiff failed to show the amount of this damage, and that, therefore, there was no evidence upon which a verdict for any amount could be rendered.

A witness was standing at the south window of the kitchen in a restaurant which she and her husband conducted in the village of Ralston. The insured building stood about 100 feet away in a southwesterly direction. While standing there, she saw lightning strike the insured building and saw smoke and flame come from it. She remained at the window scarcely a moment, then went into the dining room, and the next thing of which she was conscious, was that she was sitting in a pile of rubbish, a tornado having struck and wrecked the house. She was severely injured, and was unable to tell how long she had been unconscious. Other testimony showed that all the buildings nearby were torn down and wrecked by a tornado. The superstructure of the insured building was blown away down to the lower floor. It seems that the upper part of the store building was carried by the wind about 200 or 250 feet north and totally consumed by fire. Part of the walls were standing at that place so that one could have gone inside if it had not been on fire. There

was no fire at that time at the original site. No other building in the village was burned.

The jury found specially that the building was struck by lightning and was on fire before its destruction by the tornado; that the fire that consumed the portion on the hill was the same fire, and that the building was wholly destroyed thereby.

It is undisputed that the building was set on fire by lightning and that this fire continued until it was consumed. If the building had remained upon the original site and had there burned down, defendant would have been liable. Does the fact that after the fire began the building was removed a short distance by *vis major* operate to defeat recovery on the policy? If after a fire begins a building is wholly consumed by reason of insufficient fire protection or defective appliances, is the insurer liable? There is nothing in the record to show that the fire could have been extinguished with the existing appliances if the building had remained upon the original site. If, while burning, the position of a building is changed by explosion or some other outside force without the intervention of the insured, will this render the fallen building clause operative? We cannot so hold. Had it not been for the fire which was in the building when struck by the tornado, the partially demolished structure would still have been in existence. Under the fallen building clause, if the building had been blown down, or had fallen before fire was communicated to it, there would be no liability on the part of the insurer, but *contra* if the fire was burning before the building fell. *Transatlantic Ins. Co. v. Bamberger, Bloom & Co.*, 11 Ky. Law Rep. 101. It is held in *Friedman Co. v. Atlas Assurance Co.*, 133 Mich. 212, that the fallen-building provision in a fire policy is a condition subsequent, and that the burden is upon the insurer to prove as a defense that the building fell before the fire started. The opinion quotes at great length from *Western Assurance Co. v. Mohlman*

Co., 28 C. C. A. (U. S.) 157, 40 L. R. A. 561, which holds to the same effect.

In *Insurance Co. v. Crunk*, 91 Tenn. 376, the facts were that before the fire destroyed the building it had been partially wrecked by a tornado. The roof of the two front upper rooms had been blown away, the rafters, ceiling and part of the walls remaining. There was evidence to show that before this some fire had been blown upon the floor by a current of air passing through a room, which was the probable cause of the burning of the building. The court said: "This was evidence sufficient to justify the verdict that the fire commenced before the fall of any part of the building. Of course, if it commenced before the fall, though the entire building fell subsequently, the insurance company would be liable. 2 May, Insurance (3d ed.) sec. 401."

Defendant insists that it is only liable for such damage as occurred before the building was moved by the tornado, and that, since there is no evidence on this point, there can be no recovery. The contention seems to be well answered in the following quotation: "When the fire begins to burn the property insured, the thing insured against has happened, the liability has begun, some loss has become inevitable. It is true that it might happen that a fall occurring during a fire would prevent it from being put out, and thus cause greater loss than would otherwise have been suffered, and the insurer might wish to contract for exemption in such a contingency. But in such a case it would be practically impossible to make an intelligent division, separating the loss occurring before the fall from that occurring afterward. No person owning goods would be willing to make such a contract and assume the burden of such a division, if he understood its effect. If it was the intention to provide for the case of the falling of a building after a fire had attacked the goods and to exempt the insurer from liability for the goods burned after the fall took place, while holding him for that which occurred before, surely more explicit language would have been

used." *Davis v. Connecticut Fire Ins. Co.*, 158 Cal. 766, 772.

We agree that, if it was the intention to place the burden of proof on the insured to show what proportion of the total loss accrued before a building falls and after a fire has begun therein, the policy provision should have been more explicit. The Nebraska flood cases cited are not applicable, since no contract of indemnity was involved, and the burden was on the claimant to prove the extent of his damage, while under a valued policy law a different rule prevails.

Complaint is made with respect to instructions given by the trial court, but, since there is no dispute as to the facts, the instructions could not have been prejudicial. Error is assigned on the refusal to give defendant's instruction No. 8, which, in substance, states that the jury must confine their verdict to actual damages done by lightning and fire to the building on its original site, and that "You cannot give a verdict for the damage done by the tornado." In instruction No. 6 by the court the jury were told, "You must not allow any damages done by the tornado." The remainder of the instruction was properly refused under the facts and the law.

The evidence justifies the verdict, and the judgment of the district court is

AFFIRMED.

HERBERT J. UNDERWOOD, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.*

FILED SEPTEMBER 22, 1916. No. 18949.

1. **Appeal: REVIEW.** A cause will be determined upon appeal upon the same theory upon which it was tried in the district court, and, where both parties have tried the case as if a certain, essential element was proved, this court will not reverse the judgment for the lack of evidence of such fact.

*See opinion, p. 507, *post*.

2. **Evidence**: INJURIES TO LIVE STOCK: PROOF. In order to recover damages for an alleged shrinkage in the weight of cattle, alleged to have been caused by delay in their transportation on the part of a common carrier, the fact that there was a shrinkage of weight must be proved by competent evidence, and cannot be established by mere opinion evidence.

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

A. A. McLaughlin, Wymer Dressler and *Lyle Hubbard,* for appellant.

Sutton, McKenzie, Cox & Harris, contra.

LETTON, J.

Action to recover damages for delay in the shipment of cattle. The plaintiff on the evening of June 23, 1913, loaded six cars of cattle at the station of Dumfries, Iowa, on the line of the Wabash railway, for transportation over that line and the line of the defendant to Chicago. The cars were transported to Council Bluffs on the line of the initial carrier, and there delivered to defendant for transportation to Chicago. Two cars reached Chicago in time for the market on June 25. The cattle in four cars, consisting of 74 head, were unloaded and fed by defendant at Clinton, Iowa, and did not reach Chicago in time for the market on June 25, but were sold the next day. Plaintiff claims damages for extra shrinkage upon these cattle, for a decline in the market price, and for the feed bill at Clinton which he was compelled to pay, amounting in all to $374.36. The defendant admitted that it received the cattle for shipment, denied any negligence or delay in their carriage, and pleaded a contract that no claim for damages should be allowed unless presented within ten days. The jury returned a verdict for the full amount claimed, and from a judgment thereon defendant appeals.

There is no proof that the claim was not presented within the time limit. Furthermore, defendant received the claim without objection on this score, and offered to pay

a part of the plaintiff's claim. The evidence shows that no delay occurred until after the train reached Boone, Iowa. The manner in which the two cars which reached Chicago in time for the first day's market were entrained or hauled is not clearly shown, but it is fairly inferable that the six cars were in the same train as far as Boone, and that at that station the shipment was divided. The four cars reached Clinton an hour and a half later than the scheduled time of the train, and, since it took nine hours further time to cover the distance to Chicago, the local inspector for the defendant, believing that to send the cattle through without unloading would violate the United States statute (34 U. S. St. at Large, ch. 3594, p. 607), providing that cattle should not be held in cars more than 28 hours without food or water, unless by request of the owner, when the time may be extended to 36 hours, ordered them unloaded and fed. This delay caused their arrival too late for the market on Wednesday.

Defendant now contends that the 28-hour provision of this statute applies, and that a through shipment could not have been made within that time. There was no direct evidence of a request by plaintiff for confinement of the cattle in the cars for 36 hours. The instructions requested by defendant and some of the questions propounded its witnesses show that the case was tried by both parties on the theory that such a request had been made. This court will take the same position on appeal, and hence there is no merit in this contention.

No good reason has been shown by defendant why two cars went through and four cars were delayed. Plaintiff lost by the falling of the market, and was compelled to pay a feed bill of $24 at Clinton. He also claims a loss of 30 pounds a head for extra shrinkage caused by the delay. The evidence on this point is vague and unsatisfactory. Plaintiff testifies that the cattle were not weighed when shipped, but he thought they would weigh more than 1,400 pounds. It is stipulated that the selling weight was 103,620 pounds, which is an average weight of a little over

1,400 pounds. Several stock shippers testified that the extra shrinkage of cattle when held over one day is from 30 to 50 pounds a head, and one testified that on a through shipment 1,400-pound steers will usually fill from 50 to 70 pounds a head. The net weight of the cattle before filling was shown to be 98,880 pounds; deducting this from the conceded selling weight, it appears that the cattle filled a little over 65 pounds a head on an average. The statement is made in a letter offered in evidence by plaintiff that the cattle in the other two cars filled an average of 57 pounds each. The jury evidently allowed a shrinkage of 30 pounds a head on the four cars, since in their verdict they adopted the plaintiff's estimate of loss exactly. The proof does not establish the item of shrinkage, but does support the other claims.

The judgment is therefore reversed, unless plaintiff within 40 days remit $194.93 of the judgment, being the amount allowed for shrinkage.

AFFIRMED ON CONDITION.

FAWCETT, J., not sitting.

EXCHANGE BANK OF ONG, APPELLANT, V. CLAY CENTER STATE BANK, APPELLEE.

FILED SEPTEMBER 22, 1916. No. 18596.

1. **Contracts: LEGALITY: ENFORCEMENT.** An agreement between two banks that notes should be transferred by the one to the other for the purpose of making it falsely appear to the bank examiner that the bank so transferring the notes has not violated the law by making excessive loans is illegal and unenforceable.

2. **Evidence: PAROL EVIDENCE.** In such case, if notes are so transferred, and in order to make it falsely appear that the transferee is the owner of the notes they are indorsed, "without recourse," and the transaction entered upon the books of the respective banks as a sale and purchase of the notes, such indorsement and such entries will not be conclusive evidence in favor of either party to

such illegal contract that the transaction was a sale of the notes. The original illegal contract may be proved by the written correspondence between the banks, and oral evidence is competent to prove that the notes in question were transferred pursuant to such contract.

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

Rinaker & Kidd, M. L. Corey and *Paul E. Boslaugh,* for appellant.

A. C. Epperson and *C. H. Epperson, contra.*

SEDGWICK, J.

Upon the first trial of this case in the district court for Clay county, the plaintiff recovered a judgment for the full amount of its claim, and the judgment was reversed upon appeal to this court. 91 Neb. 835. Upon another trial the defendant was successful, and the plaintiff has appealed.

The facts in the case are sufficiently stated in the former opinion. From that opinion it appears that the action was brought upon an open account which the plaintiff bank had in the defendant bank. That account included the amount of a certain note and interest. The plaintiff was the payee named in the note, and transferred it to the defendant, and the note when transferred was indorsed, "without recourse." The plaintiff contends that this indorsement constitutes a written contract which cannot be explained or contradicted by parol evidence.

The only controversy was as to this item. From the written evidence in the form of letters, which are set out in the former opinion, it appears that the plaintiff bank had been loaning money to various parties and had more money invested in the notes so taken than it was supposed that the bank examiner would approve, and, in order to deceive the bank examiner, the plaintiff proposed to transfer some of these notes to the defendant bank, and that the transaction should be so executed and so carried upon the books of the respective banks as to

make it appear that the defendant bank was the owner of the notes so transferred, whereas it was understood between the banks that these notes in fact should remain the property of the plaintiff bank and should be protected by it. The evidence of this arrangement is in writing, and oral evidence of various witnesses as to what took place when the notes, or some of them, were transferred from the plaintiff bank to the defendant bank shows that the notes were so transferred in pursuance of this understanding. It is contended that the note in question was the individual property of the cashier of the plaintiff bank and that the plaintiff is not responsible for the contract of the cashier in that regard. It is true in the first letter of the cashier he says, "I have a few excess loans, and I may want to send you some of them," but he immediately adds, "Until after we are examined I don't want any excess loans, when examiner is here," and then states at length the terms of the proposed arrangement, all of which would be ridiculous if the notes belonged to the cashier individually, since the bank examiner would have nothing to do with the private property of the cashier. This letter, then, as well as all of the written and oral arrangements show conclusively that the transaction was on behalf of the plaintiff bank, and that the note, which was taken in the name of the bank, was its property. This agreement was in violation of the banking laws, and as against innocent parties would be construed as far as possible against the parties participating in it; but, in an action by one of these banks against the other involving matters included in this unlawful agreement, the plaintiff bank, which was a party to the agreement, ought not to be allowed to recover upon the technical construction of a written indorsement which was contemplated in this unlawful agreement and was in fact a part thereof. If an agreement of this kind contemplates formal writings, such writings, being a part of the unlawful agreement, cannot avail either party.

It is strenuously argued that our former decision should not be regarded as the law of the case because, it is alleged, there are some inaccurate expressions in it, and, also, in the case of *Norman v. Waite,* 30 Neb. 302, which is in that opinion cited as authority. It is not necessary to discuss these alleged inaccuracies in those opinions. In our former opinion it was held that the writings therein recited were competent in evidence, as was the oral evidence which shows that the notes were transferred pursuant to those writings, and we adhere to this conclusion. Under the competent evidence in this case, no other judgment could have been entered than the one complained of, and it is not necessary to discuss the alleged errors of law occurring at the trial.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF BROCKWAY.

CHARLES BOON, APPELLANT, V. ESTATE OF BROCKWAY, APPELLEE.

FILED SEPTEMBER 22, 1916. No. 18921.

1. **Brokers:** CONTRACTS: VALIDITY. An oral contract for the sale of lands between the owner of the lands and a broker or agent cannot be enforced by the broker or agent. Rev. St. 1913, sec. 2628.
2. ———: ———: ———. In an oral contract by a broker to assist in finding and purchasing specified personal property, a provision that certain real estate, at a specified price, shall be used as part payment for the personal property so purchased, will not make the contract one "for the sale of lands," within the meaning of section 2628, Rev. St. 1913.
3. ———: ACTION ON CONTRACT: HEARING. In an action upon such oral contract to recover commission alleged to have been agreed upon, if the contract as alleged is denied, and the defendant alleges that the contract with the broker was for the sale of specified real estate, the court should hear the evidence and determine the real nature of the contract.

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

Alfred Pizey, for appellant.

Frank P. Voter, contra.

SEDGWICK, J.

A. L. Brockway, a resident of Cedar county, died in November, 1912. About nine months afterwards this plaintiff filed a petition in the county court of that county, alleging that the relatives of the decedent had neglected for more than 30 days to apply for administration, and alleging that the plaintiff was a creditor of the said decedent, and asking that administration of the decedent's estate be had. Upon the hearing in the county court, that court made a finding against the plaintiff as follows: "The court, being fully advised in the premises, by the pleading filed and the proofs offered, finds for the objector, Scott A. Brockway, and his coheirs, upon the issues joined, and against the claimant, Charles Boon, to all of which the petitioner, Charles Boon, duly excepts." From this finding and the order thereon the plaintiff appealed to the district court. In that court a motion was made to dismiss the cause, "Because it appears from the petition herein that the pretended claim of the petitioner against said estate is based upon an oral contract for the sale or exchange of real estate situated in Nebraska; that said contract is void under the laws of Nebraska, and said alleged claim based thereon is invalid and unprovable." The motion was sustained, and the plaintiff has appealed to this court.

In his petition for administration the plaintiff alleged that the estate of the decedent was of the estimated value of $10,000; that the widow and next of kin have neglected for more than 30 days after the death of the decedent to apply for administration, and stated his claim against the estate as follows: "That on or about the 1st day of October, 1912, the said A. L. Brockway, theretofore hav-

ing been in the hardware business at Crofton, Nebraska, and having lost his stock by fire, entered into an oral contract with your petitioner in the city of Sioux City, in Woodbury county, state of Iowa, whereby said A. L. Brockway promised and agreed that, if your petitioner would procure for him a hardware stock and business, real estate owned by him at Laurel, Nebraska, to be put in as payment or part payment, at a valuation of $2,000, he would pay your petitioner the sum of $300 for the service in procuring such stock, business and exchange of properties; that your petitioner performed the service to be rendered by him under said contract, and procured for the said A. L. Brockway a hardware business and stock of hardware at Bancroft, Nebraska, owned by Altschuler, putting said real estate into the deal as part payment at the said value of $2,000, and the said A. L. Brockway took over said business and stock, paying therefor the sum of $7,000." He alleged also that the sum of $85.67 was paid him by the decedent as part payment of the amount due him, and that no more has been paid.

There was an answer filed to the petition, in which the alleged contract was denied, and in which it was alleged that the contract, if any such was made, was for the sale of real estate, and was void under our statute. The statute provides: "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." Rev. St. 1913, sec. 2628.

In *Nelson v. Nelson,* 95 Neb. 523, the contract was in writing, and yet it was said that a contract for an exchange of land and property would not fall within the terms of the statute, as that statute relates only to the sale of lands. This statement, so broadly made, was not necessary in that case, and appears to be dic-

tum, and, without approving or disapproving it, it must be considered that the contract in this case is not a contract for the exchange of lands, and the language in the *Nelson* case does not apply.

The petition in this case alleges a contract on the part of the plaintiff to assist the decedent in finding and purchasing a stock of hardware, that the plaintiff did so assist him in accordance with the contract, and that, availing himself of that assistance, the decedent did purchase a stock of goods and paid therefor the price of $7,000. The allegation that a part of the purchase price was paid by the transfer of title to real estate would not be conclusive that the contract between the parties was for the sale of real estate. The denial of the plaintiff's allegation as to the contract and the allegation of the answer that the contract was for the sale of real estate presented an issue of fact, which as the contract was oral, was a subject of proof. The county court heard the evidence, and upon the pleadings and evidence together determined the issue presented. The district court was clearly wrong in determining the matter upon the record alone and without hearing the evidence.

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

REVERSED.

LUVINA SMITH ET AL., APPELLANTS, V. THOMAS GOODMAN, ADMINISTRATOR, APPELLEE.

FILED SEPTEMBER 22, 1916. No. 19545.

1. **Appeal:** EFFECT: NEW TRIAL. Appeal to this court from a judgment in an action does not deprive the district court of jurisdiction to grant a new trial of that action.

2. **New Trial:** TIME FOR APPLICATION. If the court upon appeal affirms the judgment of the lower court, the time allowed for applica-

tion for a new trial under the statute begins from the date of the judgment in the district court. If this court upon appeal directs the district court to enter a different judgment than the one appealed from, the time runs from the entering in the district court of the judgment so directed.

3. ———: NEWLY DISCOVERED EVIDENCE: PETITION. The petition for a new trial under section 8207, Rev. St. 1913, must show that the grounds alleged could not, with reasonable diligence, have been discovered during the term in which the verdict was entered or decision made. The alleged newly discovered evidence must relate to the issues joined in the original case, and the petition for a new trial must set out the newly-discovered evidence and show how it is related to the issues presented. The evidence must be material and not merely cumulative. It must be of such a substantial nature as to make it appear that, if such evidence had been received in the original trial, the judgment must probably have been different.

4. ———: ———: RECORDS. Public records will rarely be admitted as newly discovered evidence, and, if records and written documents are relied upon as newly discovered evidence, such writings should be so described, and so much of them set out in the petition for a new trial that the court can determine whether they furnish such material evidence as to require another trial of the cause.

5. ———: ———. The allegation that a witness who testified upon the original trial will now vary his testimony, or even that he will contradict his former testimony upon material facts, furnishes no ground for a new trial.

6. ———: PETITION: DEMURRER. The allegations of the petition for a new trial, the general character of which is indicated in the opinion, are *held* insufficient to show an abuse of discretion by the trial court in sustaining the demurrer to the petition.

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

L. W. Colby and *S. P. Davidson,* for appellants.

Burkett, Wilson & Brown, Ralph P. Wilson and *Jay C. Moore, contra.*

SEDGWICK, J.

The district court for Johnson county entered judgment pursuant to the decision of this court in *Goodman v. Smith,* 94 Neb. 227, and thereupon the defendants at the

same term of court filed a motion for a new trial on the ground of newly discovered evidence. The district court overruled the motion, and the defendants appealed to this court. Upon the motion of the plaintiff, the appeal was dismissed, and the defendants began this action in the district court for a new trial under section 8207, Rev. St. 1913. After a demurrer to the petition had been sustained the plaintiffs filed an amended petition, and a general demurrer was also sustained to the amended petition and the action dismissed, and the plaintiffs have appealed.

The original action was in equity, and under the statute this court is required to try such actions *de novo* without reference to the findings of the trial court. For this reason, it is contended that the district court had no jurisdiction to grant a new trial for any reason, as the judgment of that court had been reversed by this court and a new judgment entered pursuant to the findings and judgment of this court. It is said that, this court having directed specifically what judgment should be entered in the district court, this court alone would have jurisdiction to entertain a motion for a new trial. Appeal to this court from a judgment in an action does not deprive the district court of jurisdiction to grant a new trial of that action. *Hellman v. Adler & Sons Clothing Co.*, 60 Neb. 580. This practice has been frequently recognized by this court. We do not think that this objection is well taken. While this court upon appeal tries equity causes *de novo*, it tries them wholly upon the record presented and the evidence taken in the trial court, and determines what judgment should have been entered by the lower court. The judgment directed by this court is predicated upon the evidence already taken, and if that judgment is induced by perjury in the record, or if new evidence is discovered of such a nature as would require the district court to grant a new trial in ordinary cases of judgment in that court, there seems to be no reason why the district court might not entertain jurisdiction in the one case as well as in the other.

It is also contended that, when the new evidence is discovered during or before the term in which the final judgment is entered in the district court, the application for a new trial must be by motion, and that in such a case no action for a new trial under section 8207, Rev. St. 1913, can be entertained by the district court. In the appeal to this court from the order of the district court overruling the motion for a new trial, the motion in this court to dismiss the appeal alleged only the following grounds for such dismissal: "That the decree appealed from was entered pursuant to the mandate of this court giving special direction to the court below as to the decree to be entered." In the order of this court dismissing the appeal, no reason is stated for so doing. It may have been dismissed for other reasons than those stated in the motion. At all events, under the circumstances, without determining whether the decision of that motion and the dismissal of that appeal constituted a bar to this action, we have concluded to examine the petition demurred to and determine whether the facts alleged in the petition would justify the granting of a new trial if regularly and properly presented.

The petition demurred to is very elaborate. It sets out in full the pleadings in the original action, and then alleges at large the grounds relied upon for a new trial by the defendants in the original case, who are the plaintiffs in this case. The petition for a new trial under the statutes must show that the grounds alleged could not, with reasonable diligence, have been discovered during the term in which the verdict was entered or decision made. The alleged newly discovered evidence must relate to the issues joined in the original case, and the petition for a new trial must set out the newly discovered evidence and show how it is related to the issues presented. The evidence must be material, and not merely cumulative; that is, it must be of such a substantial nature as to make it appear that, if such evidence had been received in the

original trial, the judgment must probably have been different.

It will be remembered that after the death of Thomas Phippin, Mrs. Goodman's father, her mother became the wife of one Worthy Luce, who at the time of his death, shortly before the original action was begun, held the legal title to the property in question. After his death his children by his marriage with Mrs. Phippin, Mrs. Goodman's mother, claimed all of the property as the heirs of Worthy Luce, and Mrs. Goodman began the original action to establish an interest in the property as the heir of her father, Thomas Phippin.

A vital question in the original case was whether Thomas Phippin, Mrs. Goodman's father, did, in his lifetime, purchase the 40 acres of land in Wisconsin and pay for the same. The petition alleges that, before the trial of the original case in the district court, these petitioners, as defenders in that case, "employed competent legal counsel and made diligent efforts to secure proper evidence to establish the facts in said action under the issues therein, and as defendants alleged them to be in their said answer and cross-petition." They name a well-known and able counsellor of this court as the attorney so employed, and allege that he made the most thorough and careful investigation of all the evidence, including the known witnesses and the public records from which any evidence could be obtained, and that they made use of the evidence so obtained upon the original trial. They allege that one of the plaintiffs, who was a defendant in the original action, "made a trip to the state of Wisconsin and made diligent inquiries among the former neighbors, friends and acquaintances of said Thomas Phippin and said Worthy Luce, and caused the public records in Waukesha and Milwaukee counties in said state to be examined in search of proofs in support of the allegations in said defendants' answer and cross-petition, and also made diligent inquiries from all those then living who seemed to be liable to have any knowledge upon said sub-

ject in search of such proofs; and these petitioners further caused S. P. Davidson, their attorney, at great expense to them, to make two separate trips to Waukesha county, Wisconsin, in search of such proofs, and said S. P. Davidson made said two trips for such purpose, and made diligent search in said state for such proofs and any and all evidence which would have a bearing upon the issues in said action, by consulting former acquaintances and neighbors of said Worthy Luce and of said Thomas Phippin, and by consulting a local attorney in the city of Waukesha, Wisconsin, to aid in such search, and said S. P. Davidson also made further diligent search and inquiries among the neighbors and acquaintances of said Worthy Luce in the state of Nebraska for such proofs and for evidence in support of the allegations set forth in the defendants' answer and cross-petition in said action, and for any and all evidence that would throw any light upon the issues in said case; but, notwithstanding the said efforts on the part of the said Luvina Smith and of these petitioners and their said attorney, they were each and all unable to obtain any other proofs or evidence on their behalf than those presented in the trial of said action in the district court, as shown by the bill of exceptions allowed therein, and were unable to show by competent evidence or discover witnesses who would testify to the facts set forth in defendants' answer and cross-petition," and that, after the trial and final decision in the district court pursuant to the mandate of this court, these petitioners, defendants in that case, employed another lawyer, not alleged to be more competent than the first, "and renewed their efforts and search at great expense to discover proofs and evidence in support of the defense and of the allegations set forth in their answer and cross-petition, and caused L. W. Colby to go to the state of Wisconsin and make inquiries of public officers," and to do various other things quite similar to those things performed by the first attorney.

It seems from the allegations of the petition that the second attorney discovered some matters that had escaped the diligent search of the first. These matters are of more or less importance, and would in some respects, perhaps have added some additional evidence, but it does not appear from the allegations that he discovered and could produce any official record that would necessarily have required a different decision of the original case. It is alleged that the plaintiffs have discovered evidence since the final decision in the district court "that said Thomas Phippin was not the owner nor in the possession of, in lifetime or at his death, of the forty-acre tract of land in Waukesha county, * * * and did not at any time purchase the same from Henry Redford or any other person;" that they "will be able to prove the foregoing facts of ownership and possession by the custodian and the records of Milwaukee county, in the territory of Wisconsin, and by the custodian and records of said territory in the land office at Madison, Wisconsin, and by an ancient document, purporting to be a land officer's receipt, dated in 1847, and discovered by these petitioners among certain old papers and rubbish formerly in the possession of Worthy Luce at his old farm and residence in Johnson county, Nebraska, found since the judgment, decree and findings entered in the district court for Johnson county." Such allegations of new evidence and what they would be able to prove thereby are altogether too indefinite. They should allege what the documents are, setting out so much of them as will show their authenticity and what they would establish if received in evidence, so that the court can judge from the documents themselves whether the evidence they furnish would probably require a different judgment from the one already entered. There are many other allegations of the same general nature, to which the same objections apply. To analyze all of these would too greatly extend this discussion.

It is alleged in the petition for a new trial that the plaintiff in the original trial introduced the testimony of one Ira Redford, who testified that Thomas Phippin traded for the land and "obtained the title and possession thereof from his brother, Henry Redford, and held such possession from the date of said trade till the time of said Thomas Phippin's death." It then alleges reasons for supposing that the evidence of Redford was not reliable, and continues, alleging a large amount of other evidence introduced by the plaintiff in that action which was material to the issues there presented, and then alleges "that all of said evidence and testimony and each and every part thereof was at the time of its introduction, as hereinbefore set forth, and is, false and untrue." The allegation that a witness who testified upon the original trial, will now vary his testimony, or even that he will contradict his former testimony upon material facts, furnishes no ground for a new trial. If a new trial should be had because of his change of testimony, and a different judgment entered, he might then again change his testimony and still another trial would be required.

Records showing that the title to the Wisconsin land was never in the name of Thomas Phippin is not new evidence. It appeared upon the former trial that no deed was made until after the death of Phippin, and the deed was then made to his wife, the mother of Mrs. Goodman. That the mother of Mrs. Goodman had possession of the land and exercised acts of ownership over it at and before her marriage with Worthy Luce is not material evidence, and is not inconsistent with the evidence upon the former trial.

Upon the former trial Mrs. Goodman testified that she never knew that her interest in these lands was denied, or that the title was not held in trust for her under mutual understanding by all parties interested, until very shortly before her action was begun in the district court. This evidence was very important to take her action out of the statute of limitations, and was apparently

not denied upon the former trial. It is now alleged in the petition for a new trial that on several occasions, once as early as 1874, and other occasions more than ten years before the action was begun, Mrs. Goodman insisted upon her interest in the land, and that the parties holding the legal title denied that she had any interest, and absolutely rejected her claims. If this was true, the statute of limitations would have run against Mrs. Goodman's action long before she commenced the same, which would have required a judgment for the defendants in that action. It is alleged in the petition for a new trial that these facts can be proved now by John Rutter, who resides at Oneida, Kansas, and by Lydia Horn, who resides in Lincoln, and by the testimony of other competent witnesses not named. The petition does not show who John Rutter is, nor why his evidence could not have been procured upon the original trial. It is alleged that Mrs. Horn is the widow of Henry Horn, who was the brother of Ann Luce, Mrs. Goodman's mother. It is alleged that they attempted to get the evidence of Mrs. Horn, and for that purpose wrote her a letter, "requesting her to make a statement of her knowledge of the facts," but received no answer, and that they did not know that those facts were within her knowledge. It seems that a personal interview with Mrs. Horn elicited all the knowledge she had in regard to the matter, and if these plaintiffs knew that she was a sister-in-law of Mrs. Luce, and had reason to suppose that she might be able to give testimony, it seems strange that no personal interview was had before the original trial. Mrs. Goodman died before the original action was finally determined, and we do not think that the trial court erred in refusing to grant a new trial for the purpose of taking the testimony of these two witnesses upon a matter that does not go to the merits of the case under the circumstances in this case. If Mrs. Goodman was still living, and could meet these witnesses in court, and these plaintiffs had shown due diligence to discover the evidence

of these two witnesses, the conditions would be quite different.

It appears from the petition that this plaintiff, Luvina Smith, "resided in the state of Indiana during all the time that Worthy Luce lived in Johnson county," and that "George Luce and Mary Luce did not reside with Worthy Luce, and had no means of knowing * * * what the facts were in regard to the ownership" or the sale of the Wisconsin land or the investment of the proceeds thereof, and, as suggested in the former opinion, Mrs. Goodman and her mother and stepfather had no quarrels, and apparently had complete understanding of their business matters, and now, after the death of all the parties directly interested, these heirs of Worthy Luce, relying upon the fact that the parties interested in the property allowed the title to remain in the name of Worthy Luce, and that they would inherit directly from him, while Mrs. Goodman does not, attempt to deprive Mrs. Goodman and her heirs of Mrs. Goodman's interest in the property. The law does not favor new trials because of alleged newly discovered evidence after all the parties interested in the judgment already entered have died; and in all cases those who seek for another trial upon such grounds are required to make strict and satisfactory proof that new evidence has been discovered that could not have been found before the original trial by due diligence, and that such evidence is of such a character that the court can see from the proposed evidence itself and the nature of the case that if it had been introduced upon the former trial a different judgment would probably have been entered. It may be that if another trial is had these plaintiffs would be able to defend against the claims of Mrs. Goodman so as to require a judgment in their favor, but the allegations of this petition are not such as to require this court to hold that the trial court abused its discretion in sustaining the demurrer and dismissing the petition.

The judgment of the district court is

AFFIRMED.

JOSEPH H. MILES, EXECUTOR, ET AL., APPELLANTS, V. RICHARDSON COUNTY, APPELLEE.

FILED SEPTEMBER 22, 1916. No. 18928.

1. **Counties:** BRIDGES: LIABILITY. In constructing and maintaining a bridge for public use, as part of a county road, the county is not limited in its duty by the creation of a structure sufficient for the passage of ordinary vehicles, but it is required to provide for what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which may be pursued in the locality where it is situated, including the driving of cattle to and over the bridge and its approaches. *Seyfer v. Otoe County*, 66 Neb. 566.

2. ———: ———: ———. Where the approach to the bridge was constructed by nailing planks to the piles which supported it and then filling earth in the frame work, and the earth was partly washed away on one side of the approach so that there was a visible hole down through the approach on that side surrounded by a thin crust on the surface, and the plaintiff's steer fell through while being driven along the highway at this point, by the plaintiff, with his other cattle, and was greatly injured thereby, the plaintiff should be allowed to prove his damages in an action brought by him for that purpose against the county; the county having failed to repair the approach after a reasonable lapse of time, and was therefore properly presumed to know the condition of the same and to be derelict in the discharge of its duty to the public.

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

Edwin Falloon, for appellants.

J. E. Leyda, contra.

HAMER, J.

Appeal from the district court for Richardson county. An action was brought to recover the value of a steer injured by falling through the approach to a bridge. It was so injured that it became necessary to kill the steer. The defendant county had a verdict and judgment, and the plaintiffs have appealed.

The appellants contend that the verdict is not sustained by the evidence. The evidence shows that the bridge in question is constructed over Contrary creek, a stream of water which maintains a constant flow, that the piles on which the bridge rests are within the bed of the stream, and that an approach to the bridge has been constructed by nailing plank to the piling and nearly to the surface of the water, and then by filling in to this framework with dirt. The waters of the stream had washed under a portion of this dirt approach and had carried it away, leaving a hole showing in the approach, and which hole was surrounded by a thin crust. As the cattle of the plaintiff were being driven to market across this bridge, one of them stepped into the hole, or was pushed into it, or was pushed onto the thin crust which surrounded the hole. The hole in the approach had made the condition of the bridge dangerous for a considerable period of time. The witnesses fixed the time at from two weeks to a month.

That the bridge was reasonably safe for travel with a team and wagon did not relieve the county of its duty to make it reasonably safe for the passage of cattle. We are convinced that it was not safe for that purpose. The requirements of a bridge are that it shall be reasonably safe for such use as the public may make of it. *Kovarick v. Saline County,* 86 Neb, 440. In the case cited the bridge was insufficient to support a traction engine and threshing machine. This court quoted, with approval, *Seyfer v. Otoe County,* 66 Neb. 566. In that case it was stated in the syllabus: "In constructing and maintaining a bridge for public use, a municipality is not limited in its duty by the ordinary business use of the structure, but is required to provide for what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which, from time to time, may be pursued in the locality where it is situated." The passage of cattle across a bridge is certainly a use to be anticipated where the bridge forms a part of a country road.

The dangerous condition of the bridge had been apparent for such a length of time as to charge the county with notice of its condition. It was the duty of the county to have the bridge reasonably safe for the passage of cattle. The injury occurred because it was not so. Under the circumstances we think that the verdict and judgment should be set aside.

The judgment of the district court is

REVERSED.

LETTON and SEDGWICK, JJ., not sitting.

JAMES MUNDY ET AL., APPELLEES, v. WILLIAM MEYER, APPELLANT.

FILED SEPTEMBER 22, 1916. No. 18963.

Appeal: CONFLICTING EVIDENCE. Where the verdict of the jury is based upon conflicting evidence, it will not be disturbed, unless it is clearly wrong.

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

Courtright, Sidner & Lee, for appellant.

Albert & Wagner, contra.

HAMER, J.

James Mundy and Anton Bauman, Jr., the appellees, were partners in the real estate business at the time of the transaction recited in the evidence. The appellant, William Meyer, at the time of the transaction recited, was the cashier of the Dodge County Bank, which is located at Hooper. He also had land for sale as an agent. Peter Eberhardt was the owner of 240 acres of land in Dodge county, Nebraska. He was heavily in debt, and his land was incumbered by mortgages. The Dodge

County Bank was one of his creditors. This action was brought by the appellees to recover from Meyer upon an alleged promise made to Bauman to pay a commission if a purchaser should be found who would pay $34,000 for the land. The appellees, James Mundy and Anton Bauman, Jr., claimed to have found such a purchaser. There was a trial to a jury upon their claim, and a verdict was returned in their favor for the amount of the commission, which was fixed at $850, without interest. Judgment was rendered on this verdict, and the defendant appealed.

The errors assigned are: First, that the court should have directed a verdict for appellant as requested by the appellant at the conclusion of the testimony; second, that the court erred in excluding evidence offered by the defendant; third, that there is not sufficient evidence to sustain the allegations of the petition; fourth, complaint is made of one instruction.

The first and third contentions may be considered together. It is a sufficient answer to them to say that the evidence was conflicting. The verdict should not have been directed. It cannot be set aside, because, where there is a conflict of the evidence, the question should properly be submitted to the jury. *Smith v. Chicago, St. P., M. & O. R. Co.*, 99 Neb. 719; *Holmvig v. Dakota County*, 90 Neb. 576.

The rulings of the court on the exclusion of the evidence arose during the direct examination of defendant's witnesses. We do not see anything prejudicial in the rulings of the court, nor can the appellant complain.

The instruction complained of is as follows: "If you find that such contract was made, it would be the duty of the plaintiffs to produce a purchaser for the land in question who was able, ready and willing to buy said land and to pay the purchase price therefor, upon the agreed terms; and if the plaintiffs have convinced you by a preponderance of the evidence that they did produce such a purchaser who was able, ready and willing to buy the said land, for the price and upon the terms specified, and who

afterwards did buy the land, and if you are satisfied from a preponderance of the evidence that the contract above referred to was entered into by plaintiffs and the defendant, then your verdict should be for the plaintiffs. But if you are not so satisfied by a preponderance of the evidence, or if the evidence be evenly balanced or preponderates in favor of the defendant, then your verdict should be for the defendant."

We think that this instruction correctly states the rule. The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

STATE, EX REL. WILLIS C. CROSBY, APPELLANT, V. HARLEY G. MOORHEAD, ELECTION COMMISSIONER, APPELLEE.

FILED OCTOBER 3, 1916. No. 19731.

1. **Statutes:** CONSTITUTIONALITY. An act complete in itself is not unconstitutional because it incidentally modifies, changes or destroys the effect of existing statutes.
2. ———: EFFECT: INCORPORATION OF EXISTING LAWS. The effect of the act providing that "the county attorney shall perform all of the duties enjoined by law upon the county coroner and the county attorney shall be *ex officio* county coroner" is to incorporate in the new law the existing laws defining the duties of the coroner. Laws 1915, ch. 224, sec. 1; Rev. St. 1913, secs. 5662-5684.
3. ———: CONSTITUTIONALITY: AMENDMENTS. The act requiring the county attorney to perform the duties of coroner is complete in itself, and does not violate the constitutional provision relating to the amendment of laws. Laws 1915, ch. 224; Const., art. III, sec. 11.
4. **Coroners:** POWERS AND DUTIES. The powers and duties of the coroner are not judicial, within the meaning of the constitutional provision dividing the powers of government into three departments. Const., art. II; Rev. St. 1913, secs. 5662-5684.

5. **Constitutional Law:** STATUTE: ADMINISTRATIVE AND JUDICIAL POWERS. The act requiring the county attorney to perform the duties of coroner is not unconstitutional as clothing an administrative or executive officer with judicial power. Const., art. II; Laws 1915, ch. 224.

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

R. M. Switzler, for appellant.

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

ROSE, J.

This is an application for a peremptory writ of mandamus to compel respondent, as election commissioner of Douglas county, to place upon the official ballot for the election to be held November 7, 1916, the name of relator as a candidate for coroner. The application was resisted on the ground that the legislature of 1915 imposed upon the county attorney the duties of coroner. From a dismissal of the proceeding relator has appealed.

The question presented is the validity of an act entitled:

"An act to provide that the county attorney shall be *ex officio* county coroner, that he may delegate certain duties to the sheriff and county clerk, and to repeal all acts and parts of acts in conflict herewith." Laws 1915, ch. 224.

The legislation contains two sections, which are as follows:

"Section 1. On and after the first Thursday after the first Tuesday in January, 1917, the county attorney shall perform all of the duties enjoined by law upon the county coroner and the county attorney shall be *ex officio* county coroner. The county attorney shall receive no additional fees for performance of duties prescribed by statutes for county coroner, but shall be reimbursed for all actual necessary expenses incurred by him in the performance of such duties. The county attorney may delegate to the

county sheriff that part of the coroner's duties as now prescribed by statute which relate to viewing dead bodies and serving papers, except that in cases where there may be occasion to serve papers upon the sheriff the county attorney may delegate such duty upon the county clerk.

"Section 2. All acts and parts of acts in conflict herewith are hereby repealed."

Relator contends that the legislature violated the constitutional provision: "No law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." Const., art. III, sec. 11.

It is argued that the act is void as an unconstitutional attempt to amend the statute defining the duties of the county attorney and the law requiring the election of a coroner. The act purports to be a new and independent one covering the entire subject to which it relates. Both the title and the body of the act disclose a legislative intent to impose upon the county attorney the statutory duties formerly exercised by the coroner and to repeal acts in conflict with the new legislation. Though the new act changes the law requiring the election of a coroner and imposes new duties upon the county attorney without attempting in direct terms to amend the statutes relating to those subjects, the enactment is not necessarily void for that reason. It is familiar law that an act complete in itself is not unconstitutional because it incidentally modifies, changes or destroys the effect of existing statutes. *Van Horn v. State,* 46 Neb. 62; *Pacific Express Co. v. Cornell,* 59 Neb. 364. In discussing a similar constitutional provision Judge Cooley said:

"The act before us does not assume in terms, to revise, alter or amend any prior act, or section of an act, but by various transfers of duties it has an amendatory effect by implication, and by its last section it repeals all inconsistent acts. We are unable to see how this conflicts with the provision referred to. If, whenever a new statute is passed, it is necessary that all prior statutes, mod-

ified by it by implication, should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the state would require to be republished at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. If, because an act establishing a police government modifies the powers and duties of sheriffs, constables, water and sewer commissioners, marshals, mayors and justices, and imposes new duties upon the executive and the citizen, it has thereby become necessary to re-enact and republish the various laws relating to them all as now modified, we shall find, before the act is completed, that it not only embraces a large portion of the general laws of the state, but also that it has become obnoxious to the other provisions referred to, because embracing a large number of objects, only one of which can be covered by its title." *People v. Mahaney,* 13 Mich. 481, 496.

The reasoning of Judge Cooley was adopted in *De France v. Harmer,* 66 Neb. 14. See, also, *Lake v. State,* 18 Fla. 501. Relator's position that the act amends former statutes in violation of the Constitution is therefore untenable.

It is also argued that the act is not complete in itself. This point seems to be based on the proposition that the duties imposed upon the county attorney are not defined in the new act nor made a part of it by re-enactment. The new act declares: "The county attorney shall perform all of the duties enjoined by law upon the county coroner and the county attorney shall be *ex officio* county coroner." Laws 1915, ch. 224, sec. 1.

The effect of these provisions was to incorporate in the new act the law defining the duties of the coroner. For that purpose it was not necessary to embody in the new act the literal terms of the old. This was properly done by reference. *Nebraska Loan & Building Ass'n v. Perkins,* 61 Neb. 254; *Shull v. Barton,* 58 Neb. 741; *People v. Mahaney,* 13 Mich. 481; *Lake v. State,* 18 Fla. 501.

Another argument is directed to the proposition that the act imposes upon the county attorney, an administrative or executive officer, duties of a judicial nature in violation of the constitutional provision declaring:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Const., art. II.

In requiring the county attorney to perform the duties of coroner, did the legislature clothe an executive officer with judicial powers in violation of the Constitution? Relator insists that the coroner's powers in relation to inquests are judicial. If there is reason to suppose the death of a person was caused by unlawful means, the statute authorizes the coroner to make an investigation. To that end he is authorized to issue a warrant for the summoning of a jury; to issue subpœnas for witnesses; to conduct an investigation; to receive the verdict; to issue a warrant for the arrest of the suspect, who shall be taken before a justice of the peace for examination; to return to the district court the inquisition and papers connected therewith. Rev. St. 1913, secs. 5662-5684. The power to investigate, including the summoning and examining of witnesses, is not a peculiar function of the judiciary, but is often properly exercised by both the legislative and executive departments of government. *In re Fenton,* 109 N. Y. Supp. 321. A coroner's inquest conducted according to the terms of the present statute is not a judicial proceeding within the meaning of the Constitution. *Cox v. Royal Tribe,* 42 Or. 365; *Queatham v. Modern Woodmen,* 148 Mo. App. 33. The act of a coroner in issuing a warrant of arrest is not the exercise of a power limited exclusively to the judiciary. *Ex parte Gist,* 26 Ala. 156; *State v. Nast,* 209 Mo. 708. The trend of judicial opinion, based upon reason and authority, is that the duties imposed by the act of 1915

upon the county attorney are not "judicial" within the meaning of that word as used in the constitutional provision relating to the division of powers. Const., art. II. It follows that the writ of mandamus was properly refused.

AFFIRMED.

SEDGWICK, J., concurring.

If the office of coroner still exists, the plaintiff has a right to be a candidate for that office.

The plaintiff contends that the office of coroner still exists in this state, and the defendant contends that there is now no such office, it having been abolished by the act of 1915. The plaintiff contends that the former statute which creates county offices and prescribes the duties thereof cannot be amended by implication; that to abolish the office of coroner is to amend the former statute which establishes that office as a distinct office as other county offices are established.

The defendant answers that the act of 1915 is "complete in itself." If we consider that the purpose to abolish the office of coroner and to impose the duties of that office upon another officer is a complete subject of legislation, the defendant's reasoning is unanswerable. But, if the complete subject of legislation is the creation of county offices and prescribing the duties thereof, the plaintiff's position is sound. If the former statute creating county offices had been amended, and the office of coroner omitted, the duties of that office being devolved upon another officer, the legislation would have been regular within the constitutional provision. The letter of the Constitution seems to require that method of changing the law. I cannot see that the purpose of the constitutional provision has been thwarted in this case. The course pursued could not invite surreptitious legislation, nor confuse the law by the changes introduced by implication. I therefore do not consider that it is my duty to dissent from the conclusion of the majority.

ANNA RICKERT, ADMINISTRATRIX, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 17, 1916. No. 18763.

1. **Railroads:** NEGLIGENCE. The erection and maintenance of convenient structures for the use of the patrons of a railroad at a public station is not negligence under ordinary circumstances. This rule applies to one who is entirely familiar with the situation.

2. ———: ———: FINDING: SUFFICIENCY OF EVIDENCE. Testimony of witnesses that they did not hear the bell rung, or the whistle sounded, on an engine approaching a public crossing, will not sustain a finding by the jury that such signals were not given, where such witnesses testified that they were not paying any particular attention to that occurrence, and that such signals might have been given without their knowledge, where other witnesses testified positively that signals were given.

3. ———: ACCIDENT AT CROSSING: CONTRIBUTORY NEGLIGENCE. A traveler upon a public highway, who attempts to cross a railroad track in front of an approaching train, if he knew, or ought to have known, of its approach, is guilty of contributory negligence which will prevent a recovery for resulting injuries, if the approaching train was in such close proximity to the crossing that a reasonably prudent person could not fairly expect to cross in safety ahead of it.

4. ———: ———: ———. It is the duty of such traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear, and if he fails, without reasonable excuse to exercise such precautions, no recovery can be had for his death caused by a collision with a passing train.

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

Edson Rich, A. G. Ellick, B. W. Scandrett and *Albert & Wagner,* for appellants.

Reeder & Lightner, contra.

BARNES, J.

The plaintiff, as administratrix of the estate of Carl Rickert, her deceased husband, commenced this action in the district court for Platte county against the Union Pacific Railroad Company, Thomas Campbell, Hugh Branson, George McQuade, N. J. Buzza and C. C. Covingtor to recover damages for the alleged negligent killing of her husband. A trial to a jury resulted in a verdict and judgment for $10,000 against all of the defendants except C. C. Covington. A motion for a new trial was overruled, the defendants excepted, and have brought the case to this court by appeal.

The appellants' first contention is that the trial court erred in refusing to permit the Union Pacific Railroad Company to remove the case to the federal court. It is fairly inferable from the record that the individual defendants were sued jointly with the railroad company in order to prevent a removal of the cause, but we find that the case may be determined without regard to that assignment of error, and therefore it will not be further considered.

The record discloses that the accident, which resulted in the death of Carl Rickert, occurred on the 29th day of October, 1912, at the village of Benton, in Platte county, where the through trains of the defendant railroad company are not scheduled to stop; that plaintiff's decedent who was driving an automobile on a public road, ran against the engine of the second section of defendant railroad company's train No. 9 at a crossing. The train was a through train carrying mail and express matter over defendant railroad company's line of road. After describing the buildings, the equipment of the railroad company, and the surroundings at the place where the accident occurred, the petition alleged that the buildings, structures and box cars were negligently and carelessly so placed as to completely obstruct the view of defendant railroad company's track to the east from any one traveling on the public road referred to; that, on the day

when the accident occurred, Carl Rickert, the deceased, was proceeding west along the public highway above described, driving an automobile, and observing due care; that train No. 21 stood on the side track; that unknown to said Rickert, but known to the defendants N. J. Buzza, George McQuade and C. C. Covington, the second section of train No. 9 was approaching said crossing at a high rate of speed; that it was the duty of defendants to let train No. 21 stand at the depot until train No. 9 had passed, but, in reckless disregard of such duty, they carelessly and negligently began to move said train forward, and while Carl Rickert was proceeding westward upon said public highway, as aforesaid, said train No. 21, under the control of the defendants, was carelessly and negligently moved westward parallel with him, making a great deal of noise, and completely obstructing the view to the east and northeast; that the defendant C. C. Covington, acting as a switchman, stood at a switch upon the railroad crossing; that, notwithstanding the dangerous nature of said crossing, it was entirely unguarded, except by the said switchman, and it was his duty to warn persons approaching said crossing of their danger; that, when said Carl Rickert reached the corner of the public road, he turned north and approached said track; that he was running his motor at a moderate rate of speed, not more than 10 or 15 miles an hour; that he was in plain sight of the conductor and engineer, above named, and of said switchman; that as he approached said track the engine of train No. 21 was 70 or 80 feet east of him, and still running at a very low rate of speed, so that said deceased had ample time to cross the tracks ahead of it; that said switchman, conductor and engineer on No. 21, above named, were aware of the danger which threatened the deceased, and, although it was their duty to warn him of such danger, they carelessly and negligently failed and refused to do so; that at the same time, on the north main-line track, the second section of train No. 9, operated by the defendants Thomas Campbell and Hugh Branson, was carelessly

and negligently and in violation of the law approaching said crossing at a rate of speed of more than 60 miles an hour; that, by reason of the situation above described, said train No. 9 was completely concealed from decedent's view, and such noise as it made was drowned by the noise of the local train; that it was impossible for decedent to see or hear it, and he did not see or hear it until it was almost upon him; that under the circumstances he had a right to believe that the defendants N. J. Buzza and George McQuade and C. C. Covington, or one of them, would warn him if another train was approaching from the east, yet he received no warning; that upon seeing said train from the east he immediately applied his brakes, but before the said car could be stopped said section of No. 9, so approaching him, at an excessive rate of speed, as aforesaid, ran into his said car, completely destroying same and instantly killing the said Carl Rickert. The plaintiff prayed for a judgment of $30,000.

The answer of the railroad company, after denying each and every allegation in said petition contained, not expressly admitted in said answer to be true, denied that its buildings were so located as to obstruct the view of defendant railroad company's tracks, and admitted that plaintiff's decedent was instantly killed by coming in contact with its train No. 9. The answer then alleged that the death of Carl Rickert and the destruction of his automobile were due solely to his carelessness and negligence, and not to any carelessness or negligence on the part of defendant railroad company. The answers of the other defendants were identical with the answer of the defendant railroad company. The reply of the plaintiff to the several answers of the defendants was a general denial.

We have carefully stated the substance of the pleadings because of the conclusion announced by the opinion.

It is the defendants' contention that the verdict and judgment are not sustained by the evidence. The record

discloses that defendants' railroad, where it passes through Benton, consists of two main-line tracks a sufficient distance apart to maintain a passing track between them. They are laid on a grade about four feet above the level of the surrounding country. The village is almost wholly south of the tracks, and between the town and the south main-line track is a street or public highway, called "Front street," which runs westerly until it passes the depot, where it turns north across the tracks at a distance of 137 feet from that structure. After crossing the tracks it runs westerly along the right of way. The depot is 60 feet long, and is 24.5 feet south of the south main-line track. At a short distance east is a small toilet room about 9 feet square, and 137 feet east of the toilet room is a coal shed about 60 feet long. A considerable distance east of the coal shed there is an elevator called the "Hord" elevator. Some distance farther east is another elevator. The east-bound trains of the defendant railroad company use the south main-line track, and the west-bound trains are run on the north main-line track. About the time the accident occurred defendant railroad company's train No. 21 had arrived at the depot from the east, had discharged its passengers and baggage, and, according to the rules of the company, had backed down to the east and stood on the passing track in order to allow the second section of train No. 9 to pass on the north main-line track.

Plaintiff's witness, John Rickert, testified, in substance, that the deceased at the time of his death was 29 years old; that his health was good, and he was capable of earning $1,000 or $1,500 a year; that deceased's hearing and eyesight were both good; that he lived on a farm in plain sight of defendant railroad company's tracks; and that he had no children.

Henry Hoppe, one of plaintiff's witnesses, testified, in substance, that he was living in Benton in October, 1912, and was within 125 feet of the point where Rickert was killed; that when he first saw Rickert he was stand-

ing by his automobile; that he had difficulty in getting his car started, and when he got it started he turned around and traveled westward. Witness was a little west of the point where the wagon road turns north across the tracks. He testified that, while traveling west toward the corner where he made the turn, Rickert was going from 12 to 15 miles an hour; that he saw Rickert's car as he proceeded north over the tracks, and that as Rickert was traveling north the engine of train No. 21 was about 75 feet from the place of the accident. Witness said he paid no attention to this train as to whether it was in motion or not. He stated that the wagon road is not less than four feet lower than the railroad tracks, and that as it turns north it starts to raise to the level of the railroad grade from 30 to 35 feet from the track. When witness saw Rickert turn north to cross the tracks, he called to him and warned him. When he called to Rickert his head was turned toward the northeast. The wind was blowing from the northwest, and witness was located close to and west of Rickert. Witness was talking with Henry Heible when he saw Rickert go by. Witness saw train No. 9 when he saw Rickert turn north. When he first saw second No. 9 it was very far east of the elevator and was within his vision for about a mile. When he first saw Rickert, he saw the train, which was east of him possibly a mile or more. A person at the point where the wagon road turns north and from there to the railroad track could not see No. 9 approaching under conditions that day. Witness could not see Rickert's car as it struck the train. The engine of the car was still running after the accident and the machine appeared to be out of gear. Witness testified that he did not hear second No. 9 blow any whistle or give any warning of its approach to the crossing, but on cross-examination he said: "Q. You are not prepared to say that they did not whistle? A. No, sir. Q. You are not prepared to say that No. 9's bell wasn't ringing, either? A. No, sir. * * * Q. Were

you paying any particular attention as to whether the train was whistling or ringing the bell, or not? A. No, sir; I was not." Witness further testified that trains passed through Benton at all hours of the day as fast as they go any place. Second No. 9 passed through there at about that time every morning. It is a fast train and does not stop at Benton. No. 21 frequently side-tracks at Benton for No. 9 to pass.

Witness Heible's testimony was, in substance, the same as that given by witness Hoppe.

George McQuade, called for plaintiff, testified, in substance, that he was the engineer on train No. 21 on the day of the accident; that the train consisted of three coaches and two baggage cars. The coaches were about 60 feet long. One of the baggage cars was 50 feet long. The engine and tender together were between 70 and 75 feet long.

M. C. Cassin testified, in substance, that he sold the automobile in question to Rickert; that the car, when running at 10 or 12 miles an hour, could be very easily stopped in 10 or 15 feet.

The plaintiff's testimony related solely to the fact that she was the widow of Rickert, and as to the amount of his earnings per year. She stated that deceased sometimes went to Benton once a week, and sometimes not that often; that when she went with him they went over the main road which leads to Benton, which is the road on which the accident occurred; that trains could be seen from their home, passing over the Union Pacific railroad tracks.

John Saalfeld, Sr., testified that he was unloading a corn sheller and gasoline engine from the box car standing west of the Hord coal shed. Before the accident he saw Rickert going west. Prior to that he had seen him standing in front of John Smith's store. When driving up to the box car, witness saw train No. 21, but did not know where Rickert was then. The engine of train No. 21 was coming out from behind the Hord coal shed. When

he saw Rickert going west across the sidewalk in front of the saloon, No. 9 was pulling in. He did not hear the whistle or the bell. On cross-examination he further testified that he did not say that No. 9 did not whistle, and could not say whether No. 9 was ringing the bell or not. When he saw No. 9 passing, he said to the boys: "I am afraid Mr. Rickert is going to get hit by No. 9." He testified that he got down and ran around the west end of the depot.

John Smith, Sr., testified that he saw Rickert traveling west on the road south of the railroad track; that his place of business is about 500 feet from the place of the accident; that he could see the crossing from his place of business, and saw the car come in contact with the engine of No. 9; that while Rickert was going west he was proceeding at the rate of 15 or 20 miles an hour; that he turned to go north over the crossing, and was running slower. Witness testified that he saw second No. 9 north from where he was standing; saw No. 21 when Rickert was traveling west on the road south of the railroad; did not hear the bell on No. 9; did not know that it was No. 9 until it was close to where Rickert was struck; his attention was drawn up there when he was driving that way, and he paid no attention to No. 9; he knew it was coming by the action of the train crew there, and the way they had been switching; he heard the noise of No. 9 when they got close there; could not swear that the bell was not ringing, nor that the whistle was not sounded

A. L. Branson, the engineer of second No. 9, testified, in substance, that his engine was traveling at the rate of 40 miles an hour as it went through Benton. The schedule time through Benton was 44 miles an hour. The train was not making schedule time through the town on the day of the accident because, when approaching Benton, he thought No. 21 was standing at the depot, and so slowed down, because, under the rules, he was not allowed to pass a passenger train while it was standing

at the depot; but, when he found that No. 21 was away from the depot, he started on again.

The foregoing is the substance of the testimony introduced by plaintiff on which she sought to recover.

George McQuade, when called as a witness for defendant railroad company, stated that he was an engineer on the Union Pacific railroad for 16 years, and was engaged in railroading for 27 years; was the engineer on engine No. 21 on the day of the accident; was due to arrive at Benton at 11:38, but arrived there four minutes ahead of time; pulled the train onto the passing track and up to the depot. After remaining at the depot long enough to unload and load the baggage and passengers, he then backed down east to where the tool house is on the north side of the track; backed down there because second No. 9 was about to pass them, and under the rule of the company they could not pass them while their train was standing at the depot. This is done because, when the passenger train is standing still, passengers are continually getting on and off, and they aim to have a waiting train moving when another train passes, so that the passengers are quiet on their own train and out of the way of the other train. Witness first noticed the automobile approaching the track when it was about on the grade of the road leading up to the track. Everything happened so quickly that he could not tell the speed of the automobile, but thought it was running about 20 miles an hour; thought the automobile struck the engine right back of the cab. When second No. 9 approached, he could see the steam rising from the engine four times, which indicated to him that it was whistling for the crossing, but did not hear it because he was inside of his engine and the air pump and blower were going. When it passed him he heard it whistle for the crossing, two long and two short blasts of the whistle—the regular crossing whistle.

N. J. Buzza, conductor for the Union Pacific Railroad Company for 23 years, and who was the conductor on

train No. 21 on the day of the accident, testified, in substance, that after doing the station work at Benton his train backed down to a point where it was about opposite the tool house, remaining there three or four minutes. When second No. 9 got within about 100 yards of his train, they started to move westward; heard second No. 9 whistle for the station one long blast of the whistle; heard it whistle for the crossing just before the accident occurred, two long and two short blasts of the whistle, when it was about a quarter of a mile east; could not tell if the bell was ringing, because after hearing the crossing whistle he went inside of his train and closed the door, but heard second No. 9 whistle again for the crossing just as it passed his train. When No. 9 passed it was making lots of noise by the working of the engine.

John P. Waylander, a fireman for the Union Pacific Railroad Company for seven years, testified that he was fireman on No. 21 at the time of the accident; that, after doing station work at Benton, the train backed up to a point opposite the west elevator; did not hear No. 9 whistle for the station or crossing because he had the blower open on his engine and was putting in coal; also moved westward slowly when second No. 9 passed; did not see the accident.

C. C. Covington, for the defendant, testified that he was brakeman for the Union Pacific Railroad Company for four years; was on No. 21 at the time of the accident; that he went to the crossing for the purpose of opening the switch west of where the accident occurred; heard second No. 9 whistle one long blast of the whistle for the station at Benton; heard second No. 9 whistle for the crossing west of the depot; heard it whistle for the crossing again when he was at the switch; the first time second No. 9 whistled for the crossing it was east of the rear of train No. 21; when they whistled for the crossing the second time, it was between the engine of No. 21 and the depot; when the crossing whistle was blown the second time he was in the act of unlocking the switch; saw Rickert's auto-

mobile as it struck the gangway of the engine of second No. 9. Witness testified that just as Rickert got up to the engine he made an effort to turn the steering gear of the front wheel; the bell was ringing on second No. 9 at the time; first heard the bell ringing when the engine whistled for the crossing; it was ringing as it approached the crossing; the weather was clear at the time of the accident.

A. L. Branson for the defendant testified that he was the engineer on second No. 9 on the day of the accident. He testified that he went by the station depot at Benton at 11: 42 a. m.; blew the station whistle for Benton at the whistling post, which is not quite a mile east of the depot; blew the whistle for the crossing west of the depot at the crossing whistling post, which was about 80 rods from the crossing, being two long and two short blasts of the whistle; blew the whistle for the crossing again when he was near the tool house; No. 21 was at the side of him then; blew the whistle for the crossing the second time because he saw the brakeman walking ahead, and wanted to call his attention to the fact that second No. 9 was coming, for fear he might step out; did not see Rickert approaching the crossing in his automobile. Witness further stated that he started to ring the bell, which is operated automatically, down by the whistling post; the bell rang continually until he passed over the crossing; that the bell on his engine weighed 200 pounds and made lots of noise. It was in good condition and could be heard a long way. He further testified that he first knew that there had been a collision when the fireman spoke to him about it; that his train was a fast mail and express train, and passes through Benton about that time every morning; that after the collision he examined the engine tender and saw marks on it which indicated that the automobile struck the front edge of the tank. He stated that it broke off the gangway step leading into the cab and the box cover on the front truck of the tender of the tank and knocked some of the steps off of the first car back of the engine; that the pilot of the engine

had no marks on it at all. Witness testified that the fireman he had with him on that day died about three weeks before the trial. When he was passing through Benton on that day the fireman was sitting on the box seat on the left hand side of the engine, looking out westward ahead of the train.

The brakeman on second No. 9 on the day of the accident testified that the engine bell on his train was rung and the whistle was sounded for both the station and the crossing at Benton. The conductor of that train testified that the warning signals were given as the train approached the station and the crossing in question. He also described the place where the automobile struck the engine and the speed of his train as it passed through Benton. Others testified that the speed was 41.2 miles an hour. The record also shows the number of trains per day which pass that station. It is conceded that second No. 9 was not scheduled to stop at Benton. Many other witnesses testified that they distinctly heard the warning signals of the train given as it approached the crossing. Among those testifying was Miss Emma Ketchmark, who had no interest in the controversy. She testified that she distinctly heard the warning signals given. In fact, it appears from the record that every one at and about the station and that part of the village knew that the train in question was coming for a considerable time before it reached the crossing.

It appears that the tool house spoken of is 660 feet east of the crossing where the accident occurred.

The foregoing is a fair statement of the evidence introduced by both plaintiff and defendants. As we view the record, it contains no testimony tending to establish negligence on the part of defendant railroad company or its employees. The erection and maintenance of the depot and other structures situated on or near the defendant railroad company's tracks in the village of Benton are much the same as those found at like stations on all railroads, and were evidently constructed for the use and convenience of

the patrons of the road. They had been maintained in the same condition for many years, and were entirely familiar to the plaintiff's decedent. No witness gave evidence tending to establish negligence on the part of the trainmen of train No. 21. It clearly appears that those in charge of second No. 9 exercised every reasonable effort to give warning of the approach of the train. As to the signals, the evidence of persons who did not hear the crossing whistle or the ringing of the bell of second No. 9, and who testified that they were not paying attention to the sounds, and that they might have been given without their knowledge, was not sufficient to carry the case to the jury on that allegation of negligence, for the reason that it was not sufficient to contradict the positive testimony of the many witnesses who heard the whistle sounded and the bell rung. *Hajsek v. Chicago, B. & Q. R. Co.*, 5 Neb. (Unof.) 67; *Chicago, R. I. & P. R. Co. v. Sporer*, 69 Neb. 8; *Brown v. Chicago, B. & Q. R. Co.*, 88 Neb. 604; *Zancanella v. Omaha & C. B. Street R. Co.*, 93 Neb. 774; *Hoffard v. Illinois C. R. Co.*, 138 Ia. 543; *Ives v. Wisconsin C. R. Co.*, 128 Wis. 357; *Rich v. Chicago, M. & St. P. R. Co.*, 149 Fed. 79.

It is contended by appellants that Rickert's death was caused by his own contributory negligence. As we read the record, one of two things occurred, either of which defeats plaintiff's action. If Rickert saw second No. 9 approaching from the east when he started his automobile in front of the bank, and sought to beat it to the crossing, then plaintiff is not entitled to recovery. If Rickert failed to look and listen for the approaching train, which he might have seen and heard, and refused to heed or understand the warnings given him by others, he carelessly and negligently drove his automobile to his death. In that event, the plaintiff must also fail in her action.

It seems clear to us that, if Rickert had looked to the east when he started his automobile, he must have seen second No. 9 approaching from that direction, and, if he had been paying any attention to his own safety, he must have heard the approach of the train in time to have pre-

vented the accident which cost him his life. It appears that, as he turned north to cross the railroad tracks, he was looking to the east from where second No. 9 was approaching, and at that instant he was warned of its approach by those standing at the turn of the road. Again, if he had been looking out for his own safety, he had ample opportunity to see the approaching train from several points along his route from the bank to the crossing. If it be conceded that there was some actionable negligence on the part of the defendant railroad company, or its servants, still the plaintiff could not recover.

A traveler on the highway who, being aware of an approaching train at a railroad crossing, attempts to beat the train over the crossing must suffer the consequences of his own experiment. *Koester v. Chicago & N. W. R. Co.*, 106 Wis. 460; *Thomas v. Central of G. R. Co.*, 121 Ga. 38; *Chicago & E. I. R. Co. v. Chancellor*, 165 Ill. 438; *Storrs v. Grand Trunk W. R. Co.*, 142 Mich. 375; *Lake Erie & W. R. Co. v. Pence*, 24 Ind. App. 12.

It is the duty of a traveler at a railroad crossing to assume a present danger which includes the immediate approach of a train within a dangerous distance. The duty of due care is not discharged unless the traveler looks and listens at a place where looking and listening will be effective, unless a reasonable excuse exists for failing so to do. *Chicago, B. & Q. R. Co. v. Yost*, 61 Neb. 530; *Harrington v. Rutland R. Co.*, 89 Vt. 112.

In *Chase v. New York C. & H. R. R. Co.*, 208 Mass. 137, the court say that it is far more incumbent on the driver of an automobile to exercise control over his conveyance than it is upon the driver of a horse-drawn vehicle. The same rule was applied in *Gage v. Atchison, T. & S. F. R. Co.*, 91 Kan. 253, *Glick v. Cumberland & W. E. R. Co.*, 124 Md. 308, and *Fort Wayne & N. I. T. Co. v. Schoeff*, 56 Ind. App. 540.

In the case at bar, as in *Chicago, B. & Q. R. Co. v. Munger*, 168 Fed. 690, the physical facts conclusively show that either Rickert did not look and listen for the approaching

train or that, if he did so, he undertook to cross in front of an eminently threatening danger which he must have both heard and seen. In the one case he was guilty of inexcusable negligence, and in the other of inexcusable recklessness. In either event, according to the well-settled authorities, he was guilty of such contributory negligence as precludes recovery in this action.

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

REVERSED.

PETER M. PLAMONDON ET AL., APPELLEES, v. LLEWELLYN L. LINDSEY, APPELLANT.

FILED NOVEMBER 17, 1916. No. 18961.

Injunction: BREACH OF CONTRACT. "A valid agreement in restraint of trade must be established by clear and satisfactory proof to warrant a court in restraining its breach by injunction." *Roberts v. Lemont*, 73 Neb. 365.

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

F. M. Tyrrell and *J. H. Walker*, for appellant.

E. P. Holmes, contra.

BARNES, J.

This is an application for an order to enjoin defendant from violating an oral agreement with plaintiffs not to operate a public bath-house. Defendant denied making such an agreement. From an order granting a permanent injunction, defendant has appealed.

For a number of years prior to 1912 plaintiffs operated a public bath-house in the basement of the Savoy Hotel in Lincoln. Defendant was the owner of the hotel

and leased to plaintiffs a part of the basement. Disputes arose, and plaintiffs commenced two suits against defendant for damages, and defendant brought an action in forcible entry and detainer and obtained a judgment. March 22, 1912, after considerable negotiation, a stipulation was drawn up and signed by the attorneys for the parties, in which it was agreed that execution should not issue upon defendant's judgment until July 1, 1912; that plaintiffs should vacate the premises by June 1 of that year; plaintiffs agreed to dismiss their actions brought against defendant; and that all rents due from plaintiffs to April 1, 1912, should be canceled. This agreement was performed by plaintiffs and defendant. Plaintiffs moved their bath-house to another building a short distance away. Subsequently defendant commenced to operate a public bath-house in the rooms vacated by plaintiffs, and this action was instituted.

Plaintiffs contend that the stipulation was signed and the premises vacated upon defendant's oral promise that he would not permit a bath-house to be operated in the basement to be vacated by plaintiffs. Defendant contends that the evidence does not sustain the finding that such an agreement was made, and that parol evidence to prove such agreement was inadmissible, since it tended to vary, modify and contradict the term of the written stipulation.

In support of their contention plaintiffs introduced evidence to show that, during the negotiations for the settlement of the law suits, defendant complained that the heating apparatus used in the bath-house caused annoyance to his hotel guests, and that he stated he did not want a bath-house in the basement. Plaintiffs' attorney then told him that, if it was understood that he would not permit a bath-house in the basement, matters could be adjusted. The stipulation above referred to was later drawn up. While it was signed by the attorneys, plaintiffs' attorney stated that this part of the agreement was not included in the stipulation, because he did not think this was necessary. Defendant denied that he ever promised or inti-

mated that he would not permit a bath-house in the basement. There was also testimony upon this point by one of the plaintiffs, but his testimony was not clear, and was in answer to leading questions in the form of conclusions of law.

This is an appeal in equity. The rule is: "A valid agreement in restraint of trade must be established by clear and satisfactory proof to warrant a court in restraining its breach by injunction." *Roberts v. Lemont,* 73 Neb. 365. *Hall's Appeal,* 60 Pa. St. 458; *Klaff v. Pratt,* 117 Va. 739.

The finding upon appeal is that plaintiffs have not shown by clear and satisfactory proof that they are entitled to the relief sought in this action. The judgment is therefore

REVERSED AND DISMISSED.

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

STATE, EX REL. MAY WOOKEY, APPELLEE, v. OWNIE L. ELIFRITZ, APPELLANT.

FILED NOVEMBER 17, 1916. No. 18984.

1. **Divorce:** CUSTODY OF CHILDREN: DECREE: EFFECT. Where, upon granting a divorce, the court in its judgment assigns the custody of the children to one of the parties, such disposition will control until the judgment making it is modified by the court upon proper application, and cannot be disregarded in a subsequent proceeding by habeas corpus to obtain possession of the children.
2. **Habeas Corpus:** CUSTODY OF CHILDREN. In a proceeding in habeas corpus to obtain the custody of minor children, if it appears that when the application for the writ was made the children were not detained by the respondent, but were in the custody and control of the juvenile court, no judgment should be rendered against him.

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

Frederick Shepherd, for appellant.

Adams & Jeary, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Lancaster county in a habeas corpus proceeding brought, on the relation of one May Wookey, to obtain the custody of Valda and Oreta Elifritz, minor daughters of the relator and respondent, Gwnie L. (sometimes called Joy) Elifritz.

The record discloses that the relator and respondent were divorced by a decree of the district court for Nuckolls county rendered on February 8, 1913, in which the relator herein was plaintiff and the respondent herein was the defendant. The decree gave the custody of the children to the father, and the district court retained control of them for further orders, in compliance with section 1578, Rev. St. 1913.

It appears that, after the expiration of six months from the date of the decree, respondent was married to a Miss Fairbanks, with whom he is living as a present wife; and the relator, about the same time, was married to one Wookey, with whom she was residing at the home of his father near Fairbury at the time when this cause was tried.

It also appears from the record that the foregoing decree of divorce remains in full force and effect, is unreversed and unmodified, and no appeal was taken therefrom. It is thus shown by this collateral proceeding that the trial court in effect partly set aside and held for naught the decree of the district court for Nuckolls county, and changed the custody of the children named in that decree from the father, who was without fault, to the custody of the relator, who was found by that decree to be unfit to have the care and custody of them.

It is contended by the respondent that this was reversible error; that the district court of one county should

give full faith and credit to the decrees of the district courts of other counties until they are set aside in proper proceedings, and that such proceedings is not habeas corpus.

In *Hoffman v. Hoffman,* 15 Ohio St. 427, it was said: "Where a court of common pleas, on rendering a decree of divorce, further decree the 'custody, care, and control' of the minor children of the marriage to one of the parties, a probate court, while such decree remains in force, cannot, as between the parties to the decree, legally interfere with the custody so decreed, either by habeas corpus or letters of guardianship."

"Where, upon granting a divorce, the court, in its judgment, assigns the custody of the children to one of the parties, such disposition of the children will control, until the judgment making it is modified by the court, upon proper application, and cannot be disregarded in a subsequent proceeding by habeas corpus, to obtain possession of the children." *Williams v. Williams,* 13 Ind. 523. *Sullivan v. Learned,* 49 Ind. 252.

In *Jennings v. Jennings,* 56 Ia. 288, it is said: "Where the decree in an action for divorce awards the custody of a child to one parent, it cannot be transferred to the other in a collateral action, but only by a change in the decree, obtained by direct proceedings for that purpose."

In *McNees v. McNees,* 30 S. W. 207 (97 Ky. 152), it was held: "An action by a divorced wife against her former husband, to recover for the care of a child given into her custody by the order granting the divorce, should be brought in the court in which such order was made."

In *Karren v. Karren,* 25 Utah, 87, it was held: "Subsequent changes may be made in a decree for divorce in respect to the disposal of the children or the distribution of the property. *Held,* that such changes can only be granted in the action in which the divorce decree was granted."

In *Leming v. Sale,* 128 Ind. 317, it was held: "The decree in a divorce suit awarding the custody of a child to

one of the parties, fixes the status of the child as between the parties until modified or set aside for cause shown by some subsequent, or supplemental, proceeding in the same cause."

Other authorities to the same effect are *Culwell v. Franks,* 3 Ind. T. 548; *Jordan v. Jordan,* 4 Tex. Civ. App. 559; 14 Cyc. 810; *Lee v. People,* 53 Colo. 507; *Norval v. Zinsmaster,* 57 Neb. 158; *Eckhard v. Eckhard,* 29 Neb. 457.

While there may be some isolated cases holding to the contrary, we are of the opinion that the views expressed in the foregoing cases from which excerpts have been given are correct.

It is contended on the part of the relator that there has been such a change in conditions since the rendition of the decree of divorce that the trial court was justified in rendering the judgment appealed from. If such is the case, that fact should have been alleged and shown in an application to the court which rendered the decree.

It is further urged that it was inconvenient for the relator to go to Nuckolls county to present her application; but it may be said that it was just as inconvenient for her to come to Lancaster county from her home in Jefferson county to make the application in this case as it would have been for her to go to Nuckolls county to obtain a modification of the decree.

The respondent further contends that at the time when the relator filed her petition for the writ of habeas corpus, and when the case was tried, he had neither the possession of his children nor their custody, and therefore the writ should not have been awarded. The facts, as shown by the record, are that the relator had the custody of the children before the writ was issued; that the respondent had demanded that she return them to him, which she had refused to do; that she had placed them in the detention home at Lincoln, Nebraska, under the order of the district court, where they were when the judgment complained of was rendered. In such case they could not be taken by habeas corpus.

We decline to discuss the merits of the case so far as they relate to the welfare of the children, for that question should be determined by the court which rendered the decree of divorce, on an application to modify the same.

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

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

STATE, EX REL. P. R. HALLIGAN, COUNTY ATTORNEY, APPELLANT, V. M. P. CLARY ET AL., APPELLEES.

FILED NOVEMBER 17, 1916. No. 19045.

Counties: CHANGE OF BOUNDARIES. Where it has been attempted to change the county boundary of an unorganized county by a void act of the legislature, and the adjoining county has taken over that portion of territory excluded by the void act, and has exercised jurisdiction over such territory for many years without any attempt being made to prevent it, has levied and collected taxes thereon, organized voting precincts where the votes of the inhabitants have been cast and counted by its officers, organized school districts and conducted schools since its organization, has exercised all of the functions of county government within the disputed strip, and the state government has recognized the line fixed by the void act for more than ten years, the court, in the exercise of sound public policy, will refuse to change such boundary line.

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

Wilcox & Halligan and *P. R. Halligan,* for appellant.

H. J. Curtis, F. E. Williams and *R. F. Williams, contra.*

BARNES, J.

This is an appeal from the judgment of the district court for Garden county in a proceeding in *quo war*

ranto by which the county attorney of Arthur county sought to have the state oust the officers of Garden county from exercising jurisdiction over a strip of land lying between the twenty-fifth degree of longitude west from Washington and the range line between ranges 40 and 41 west of the sixth P. M., which the legislature of 1895 (Laws 1895, ch. 23) defined as the west line of Arthur county, said strip of land being about 3 miles in width and 24 miles long. The trial court found for the defendants and dismissed the proceeding. The plaintiff has brought the case to this court for review.

Appellant contends that the district court erred in the holding that the boundary line between Garden county and Arthur county was the range line between ranges 40 and 41 west of the sixth P. M. This contention is based largely on the proposition that the legislative act of 1895 defining the boundaries of Arthur county is unconstitutional. The fact that the act of 1895 was a void act may be conceded; but, notwithstanding that fact, it appears that in 1887 the legislature passed an act creating Arthur county and defining its boundaries. At that time Arthur county was unorganized territory, and was attached to McPherson county for election, judicial and revenue purposes. On the 16th day of August, 1913, Arthur county was duly organized under the provisions of an act passed by the legislature of that year. The record shows that in 1888 Deuel county was created out of the east part of Cheyenne county, and the twenty-fifth degree of longitude west from Washington was defined as the east boundary line of Cheyenne county. It further appears that at that time the twenty-fifth degree of longitude west from Washington had not been surveyed, marked out, or established upon the ground, but the range line between 40 and 41 was thought to be such meridian line. Garden county was formed out of the east part of Deuel county, and, at the time Arthur county was created and

its boundary defined, the twenty-fifth degree of longitude west from Washington was an unknown and imaginary line. No attempt was made by anyone to have it surveyed, determined and marked upon the ground until about the year 1912, when the county of McPherson, to which Arthur county had been attached for revenue, judicial and election purposes, caused the survey to be made and marked by monuments, which survey established the location of the twenty-fifth degree of longitude west from Washington. At the time McPherson county had the twenty-fifth degree surveyed and marked, it claimed to embrace within its own boundaries the entire county of Arthur as a part and parcel of itself, and the monuments placed to indicate the exact location of that line upon the face of the earth were marked on the west side of the unorganized territory attached to McPherson county. This survey was made at the instance of McPherson county, and that county furnished the monuments. That was the first step by the state, or any one, to establish and mark the twenty-fifth degree of longitude upon the face of the earth, and was taken in April, 1912, 17 years after the passage of the act of 1895, and 24 years after Arthur county was created by the legislature and its boundaries defined. Before this line was surveyed and marked, no person traveling westward through Arthur county could tell where that county ceased and Cheyenne, Deuel and Garden counties, in their succession, began, and, while that knowledge was wanting, the legislature, in 1895, sought to remedy the difficulty by redefining and fixing the west line of Arthur county as the line between ranges 40 and 41 west of the sixth P. M., and, whether the act was legal or not, it was sensible and practical, and a recognition by one of the coordinate branches of the state government of that line as the west boundary line of Arthur county and the east boundary line of Deuel county. After the passage of the act of 1895 the state recognized the range line as the west line of Arthur county and the east boundary of Cheyenne,

Deuel and Garden counties. This is evidenced by the fact that the department of public lands and buildings caused the state school lands within the strip to be surveyed, and caused the commissioners of Deuel county to appraise those lands for rental purposes. On August 9, 1899, section 36, in township 17, range 41, was leased, and this lease was transferred to L. F. Fairchilds on November 16, 1908, according to the transcript of the records of Deuel county made for Garden county after its organization. The record of that section of school lands also applies to section 36, township 18, range 41, and section 36, township 19, range 41, and section 36, township 20, range 41, which were leased, and the rentals on the leases were paid in Garden county after its organization and remitted to the commissioner of public lands and buildings. These school lands were reappraised by the board of commissioners of Deuel county, and the appraisement returned to the commissioner of public lands and buildings in November, 1907. When the legislature passed the act of 1895, it recognized the range line as the boundary line between these counties, and every time the legislature has spoken upon the question since that time it has given recognition to it as the boundary line. Again, the commission created by the legislature of 1911 to revise the laws of Nebraska recognized the range line as the boundary line in its report upon revision of the laws, and the legislature in adopting the report approved that recognition. The persons authorized to compile the statutes recognized the act of 1895 as giving the true west boundary of Arthur county, and every volume of the statutes compiled and annotated since 1895 will show that fact. The state treasurer has accepted from Garden county state taxes assessed against property on the strip of land in controversy. The state auditor has certified to the clerk of Garden county each year the lands in the disputed strip which have become subject to patent and thereby taxable. In fact, there is no evidence that the state, or any officer of the state, ever in any way recog-

nized either McPherson or Arthur county as having any jurisdiction over the territory in question.

Conceding the act of 1895 to have been unconstitutional, it appears that it was for years treated as a valid act, and Garden county, under color of law, after its organization, proceeded to collect the taxes assessed against the inhabitants residing on the strip of land in controversy. School districts have been organized and schools conducted thereon as school districts of Garden county; deeds, contracts and mortgages given to and by the inhabitants residing on the strip have been recorded in Garden county by the county officers; voting precincts have been organized and the votes cast by the residents on that strip have been returned to and counted by the public officers of Garden county. It would lead to needless expense and confusion and would be against public policy to now hold that the twenty-fifth degree of longitude west from Washington is the boundary line between Arthur and Garden counties. To so hold would dismember farms and place parts of them in different counties, and that without regard to section lines as established by government surveys, without any substantial benefit to the public or the inhabitants of Arthur county. It therefore seems clear that the district court did not err in its finding and judgment. *State v. McLean County,* 11 N. Dak. 356; *People v. Maynard,* 15 Mich. 463; *Jameson v. People,* 16 Ill. 257; *Rumsey v. People,* 19 N. Y. 41; High, Extraordinary Legal Remedies (3d ed.) sec. 686.

In *State v. City of Des Moines,* 96 Ia. 521, 31 L. R. A. 186, it was held that the equitable claim of a city to jurisdiction over territory which a void statute has declared to be annexed to it will not be disturbed at the instance of the state without any suggestion of anticipated benefits by so doing, where for more than four years the city has exercised authority over such territory.

In *People v. Alturas County,* 6 Idaho, 418, 44 L. R. A. 122, which was an action in *quo warranto* to exclude

Blaine county from the exercise of municipal powers within the boundary fixed by the act creating such county, it was held that the people residing within the territory embraced within Blaine county having repeatedly recognized the existence of the county, held general elections therein, participated in by the electors generally, elected county and precinct officers, levied and collected taxes, assumed debts of its predecessors, funded a large indebtedness, brought suits as a county against other counties, and recovered large sums, and exercised all the powers and functions of a county government for a period of nearly four years, under such circumstances the court would decline to examine into the manner of the passage of the act creating the county.

It is therefore apparent that the trial court was not without authority for its findings and judgment, of which the appellant complains. It is true that the record discloses that some few persons residing on the disputed territory paid taxes to the authorities of McPherson county, and that sometimes the question of the jurisdiction of Arthur county over the territory in dispute was discussed; but the great weight of the testimony shows that nearly all the inhabitants residing on the disputed strip fully recognized the authority of Garden county over that territory.

We therefore conclude that the judgment of the district court was right, and it is in all things

AFFIRMED.

SEDGWICK, J., not participating.

ABRAHAM SLIMMER ET AL., APPELLANTS, V. P. K. HOFFMAN, APPELLEE.

FILED NOVEMBER 17, 1916. No. 19082.

Judgment: RES JUDICATA. Where a second action for conversion is brought on the same facts declared on in a former suit between the same plaintiffs and one of the defendants in the former case, a judgment in the former suit in favor of all the defendants and against the plaintiffs is a complete bar to the prosecution of the second action.

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

Muldoon & Gibbs, for appellants.

Wilcox & Halligan, contra.

BARNES, J.

This action was commenced in the district court for Lincoln county against the defendant to recover the damages which plaintiffs alleged they had sustained by the conversion of certain cattle on which plaintiffs had two unpaid mortgages securing two promissory notes given for the purchase price of the cattle above mentioned. The petition was in the usual form and stated a cause of action. The defendant, by his answer, alleged that plaintiffs had commenced an action for the conversion of the same identical cattle described in the mortgages, and in his petition, in the instant case, against the defendant, and had joined with him as co-defendants one John H. Nagel, John Doe, whose real name is unknown, and Clay Robinson & Company; that in the former action issues were joined and a trial was had to a jury in the district court for Lincoln county. It was further alleged in defendant's answer that upon the evidence and the instructions of the court in that suit the jury returned a verdict for this defendant and all of his codefendants; that judgment was duly

rendered for the defendants on the verdict; that plaintiff's motion for a new trial was overruled, and no appeal was ever taken; that the judgment thus rendered remains in full force and effect, unsatisfied and unmodified in any respect. Other matters were pleaded in defendant's answer, which need not be referred to in this opinion. In the instant case defendant filed a motion for a judgment in his favor on the pleadings. The motion was sustained, and judgment was so rendered. The plaintiffs have brought the case here by appeal.

The appellants contend that this was a different cause of action, and the judgment in the former case is not a bar to their right to maintain the present suit. The question to be determined on this appeal requires an examination of plaintiffs' petition and the record in the former suit, which is set forth in full in the defendant's answer. From an examination of this record it seems clear that the petitions in the two cases are identical, with the exception of the date of the alleged conversion. In the former case the same cattle are described, the same mortgages and notes are set forth, and the only difference alleged is in the dates when the alleged conversion took place, by the defendants herein, John Doe and Clay Robinson & Company, while in this suit it was alleged that the defendant alone was guilty of the conversion, which is alleged at a subsequent date for the evident purpose of avoiding a plea of former adjudication. From reading the proceedings which are set forth in full in defendant's answer, it appears that in the former suit the same issues were presented as those in the present case. Upon those issues the jury were fairly instructed, and thereupon they returned their verdict for all of the defendants. The rule in such case is that where the second suit is upon the same claim or demand as the first, and between the same parties, the judgment in the former is conclusive in the latter as to any issues which were tried, or which might have been presented, in the former suit. *Schlemme v. Omaha Gas Mfg. Co.*, 4 Neb. (Unof.) 817; *Battle Creek Valley Bank*

v. Collins, 3 Neb. (Unof.) 38; *Yates v. Jones Nat. Bank,* 74 Neb. 734; *Trainor v. Maverick Loan & Trust Co.,* 92 Neb. 821; *Agnew v. Montgomery,* 72 Neb. 9.

In *Blondin v. Brooks,* 83 Vt. 472, it was said: "It is no objection to the application of the rule of *res judicata* that the parties to the former action include some who are not joined in the subsequent action, nor the converse, as the rule is applicable to all who were parties to both actions."

After a careful examination of the record, we conclude that the finding of the district court was right, and the judgment complained of is

AFFIRMED.

LETTON, J., not sitting.

STATE, EX REL. J. F. VANNATTER, APPELLANT, V. KENNETH W. MCDONALD, APPELLEE.

FILED NOVEMBER 17, 1916. No. 19610.

County Attorneys: PROSECUTIONS. It is not the duty of a county attorney to appear and prosecute one who is charged with an alleged violation of a village ordinance, where the prosecution is not based on the violation of any law of the state.

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

F. E. Williams, for appellant.

Kenneth W. McDonald, pro se.

BARNES, J.

This was an application for a writ of mandamus to require the respondent, as county attorney of Morrill county, to prosecute one Anton Cernak for an alleged violation of the provision of ordinance No. 10 of the village of Bridgeport, in said county. The district court allowed

an alternative writ, and on the return thereto, after a hearing, the court rendered judgment for the respondent and dismissed the relator's petition. The relator has appealed.

The ordinance alleged to have been violated provides that it shall be unlawful for any person or persons to disturb the peace and good order of the village of Bridgeport by making any loud or unusual noise within the limits of said village, or fighting or threatening to fight, or by offensive or indecent exposure of the person, or by being intoxicated on any street or other public place, or in any private place, or by using any obscene, loud or profane language in any street or other public place in said village, to the annoyance of any person therein. It also provides that any person or persons guilty of violating any of the provisions of the ordinance shall, upon conviction thereof, be fined in any sum not less than $1 or more than $10 and costs of prosecution, and shall stand committed until such fine and costs are paid.

In disposing of the case the trial court made the following finding: "(6) The court further finds that it is not a duty imposed upon the defendant as county attorney to prepare, sign, verify and file such complaint as demanded by the plaintiff, and to appear and prosecute the same in the name of the state of Nebraska in a court having jurisdiction thereof for the violation of said ordinance, or any ordinance of the said village of Bridgeport, and that the defendant was justified in refusing to prepare, sign, verify and file said complaint under the ordinance of the said village of Bridgeport, and therefore finds that the peremptory writ of mandamus should be refused, and that the petition of the relator should be dismissed at his cost."

This finding of fact correctly disposes of the relator's contentions. The ordinance in question is no part of the general laws of this state, but is a municipal regulation adopted by the village of Bridgeport to conserve the peace and good order within the village limits. It provides no punishment for its violation other than a fine, and cannot

be said to be one of the public criminal laws of the state. Neither the state nor the county is liable for the costs incurred in the prosecution for its violation. *Sutton v. McConnell,* 46 Wis. 269; *Chafin v. Waukesha County,* 62 Wis. 463; *State v. Grove,* 77 Wis. 448; *State v. Lee,* 29 Minn. 445; *State v. Robitshek,* 60 Minn. 123, 33 L. R. A. 33. It appears by the notes to *State v. Robitshek,* 33 L. R. A. 33, that the great weight of authority sustains this view.

The relator contends that because Cernak was claimed to have been intoxicated within the limits of the village, under the provisions of section 3872, Rev. St. 1913, he was guilty of a misdemeanor, and the respondent was required to appear and prosecute the case. The answer to this contention is that it was sought to compel the respondent to appear and prosecute for a violation of the village ordinance, and not for a violation of section 3872, *supra.*

It is further contended that under the law announced in *City of Brownville v. Cook,* 4 Neb. 101, it was the duty of the respondent to prosecute Cernak. As we view that decision, but two questions were there considered: (1) Had the village of Brownville the power to pass the ordinance under which the prosecution was commenced? (2) Should the prosecution have been conducted in the name of the municipality or in the name of the people of the state of Nebraska? The question here presented was not considered in that case.

Section 5597, Rev. St. 1913, provides: "Each county attorney shall appear on behalf of the state before any magistrate, and prosecute all complaints made in behalf of the state of which any magistrate shall have jurisdiction, and he shall appear before any magistrate and conduct any criminal examination which may be had before such magistrate and shall also prosecute all civil suits before such magistrate in which the state or county is a party or interested." The duty to prosecute, as prescribed by the section above quoted, relates to cases where

the charge is a violation of the public laws of this state, and in our opinion does not require the county attorney to appear and prosecute in proceedings for a violation of village ordinances.

The judgment of the district court was right, and is

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

G. A. CRANCER COMPANY, APPELLANT, V. PARIS G. COOPER, APPELLEE.

FILED NOVEMBER 17, 1916. No. 19643.

Sales: DESCRIPTION OF PROPERTY: SUFFICIENCY: QUESTION FOR COURT OR JURY. Whether the description in a contract of conditional sale, together with the other inquiries which the contract itself suggests, is sufficient to enable third persons to identify the property is ordinarily a question of fact for the jury; but, where only one conclusion can reasonably be drawn from the evidence, it is a a question for the court.

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

Field, Ricketts & Ricketts, for appellant.

Earl McDowell and *Fisher & Rooney, contra.*

BARNES, J.

When this case was before us the first time, the judgment appealed from was reversed and the cause was remanded. *Crancer Co. v. Cooper,* 98 Neb. 153. The syllabus is as follows:

"1. In a contract of conditional sale duly filed of record, a description which will enable a third person, aided by inquiries suggested by the instrument itself, to identify the property is sufficient.

"2. The public filing of a contract of conditional sale, in the county wherein the purchaser resides, protects the

seller, though the former removes the property to another county."

When the case came on again for trial, by stipulation of the parties, it was submitted to the court without a jury on the same record and the same evidence adduced on the first trial. The court found for the defendant and rendered his judgment accordingly, and the plaintiff has prosecuted a second appeal.

It is now contended that the court below erred in his finding and judgment because all of the questions involved in the controversy were conclusively settled by our former opinion, which has become the law of the case. By referring to our opinion, we find that we said, after passing on the sufficiency of the record to establish constructive notice of the plaintiff's ownership of the piano which was replevied that this was a question for the jury. The statement that the question was one for the jury was perhaps misleading as applied to the facts of this case. The correct rule which it was intended to invoke is stated in *Iowa Savings Bank v. Dunning & Hartson*, 37 Neb. 322, cited in the former opinion: "Whether the description of property in a chattel mortgage and the other inquiries which the mortgage itself suggests are sufficient to enable third persons to identify the mortgaged property is a question of fact for the jury." But, like all issues of fact, where but one conclusion can reasonably be drawn from the evidence, the question is one for the court.

In the case at bar, the evidence showed conclusively that the piano replevied was the one sold by plaintiff to the Springers; that plaintiff never sold them any other piano; and, with the single exception of the factory number of the instrument, it was correctly described in the conditional sale note given for a renewal of the original one, which contained the correct number. Both notes were filed and recorded in the records of Cheyenne county, where the Springers were living at that time. It follows that, this court having held that the record in the former appeal was sufficient constructive notice of the plaintiff's

rights, there was but one thing for the trial court to do, which was to find for the plaintiff, and render his judgment accordingly. For this reason, the judgment of the district court is reversed, with directions to render judgment for the plaintiff.

REVERSED.

IN RE ESTATE OF LOGAN ENYART.

KATHERINE ENYART, APPELLEE, V. ALBERT F. ENYART ET AL., APPELLANTS.

FILED NOVEMBER 17, 1916. No. 18966.

1. **Appeal:** ADMISSION OF EVIDENCE. The admission of incompetent evidence in a case tried without a jury does not furnish ground for the reversal of a judgment, provided that there is sufficient competent testimony in the record to convince this court that the judgment of the trial court is right.
2. **Husband and Wife:** ANTENUPTIAL CONTRACTS. Courts will rigidly scrutinize an antenuptial contract apparently unjust, especially where it deprives the wife of her interest in the husband's estate without providing for her in case she survives him.
3. ———: ———: VALIDITY: BURDEN OF PROOF. The burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife was fairly procured.
4. ———: ———: ———. In view of the close and confidential relation existing between affianced persons, it is the duty of the prospective husband to make a full and fair disclosure of all material facts relating to the amount, character and value of his property, so that the prospective wife may have sufficient knowledge upon which she may exercise her judgment whether she will enter into such a contract.
5. ———: ———: ———: BURDEN OF PROOF. Where the provision made for the intended wife by an antenuptial contract is grossly disproportionate to the interest in the prospective husband's estate which the intended wife would acquire by operation of law in case a marriage took place, the burden rests upon those claiming the

validity of the contract to show that a full and fair disclosure was made to her before she signed it of the extent and value of the property, or that she was aware to all intents and purposes of the nature, character and value of the estate which she was relinquishing if the marriage took place.

6. ———: ———: ———. The mere fact that an intended wife who signs an antenuptial contract knows in a general way that the husband is reputed to be a wealthy man and to own farms and an interest in banks is not sufficient to meet the requirements of the equitable rule of fair disclosure, or charge the wife with such knowledge of the nature and value of his property as to render an unfair contract binding upon her.

7. **Parol Evidence:** ADMISSIBILITY. Where a contract is uncertain and ambiguous in its terms, facts may be received in evidence to show the construction placed upon it by the parties.

8. **Witnesses:** COMPETENCY: PRIVILEGED COMMUNICATIONS. Where checks paid to the wife and receipts signed by her for annual payments provided for in an antenuptial contract have been received in evidence on behalf of the representatives of the deceased husband, the widow may testify to facts with reference to the same transactions.

9. **Wills:** ELECTION. A statute fixing the time within which a widow must elect whether to take the provisions made for her in his lifetime by her husband or to recover her dower or other provisions made for her by statute pertains to the remedy, and, if the widow made her election in conformity with the statute in force at the time of her husband's death or the filing of her election, this is sufficient.

10. **Husband and Wife:** ANTENUPTIAL CONTRACT: INVALIDITY. Under the facts in this case, *held*, that the antenuptial contract in question is invalid for the reasons set forth in the opinion.

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

Jesse L. Root, L. F. Jackson, George W. Berge, Matthew Gering, John C. Watson, W. W. Wilson and *D. W. Livingston,* for appellants.

Paul Jessen, B. F. Good, William H. Pitzer and *Edwin Zimmerer, contra.*

LETTON, J.

Appeal from a judgment of the district court which affirmed an order of the county court of Otoe county awarding Katherine Enyart, the widow of Logan Enyart, an allowance of $200 a month pending the settlement of the estate of her deceased husband. The appeal is taken by the administrator and the heirs and devisees of Logan Enyart, deceased. The question as to whether such allowance should be made has been made by the parties to depend upon the validity of an antenuptial agreement entered into by the parties. The estate of the deceased is a valuable one, and, while the amount involved in the present issue is comparatively small, the decision in the case is of great importance, as it affects the disposition of much valuable property. The contract is as follows:

"State of Nebraska. 1898 A. D.

"This article of agreement made this 2d day of April, 1898, by and between Logan Enyart of Otoe county, state of Nebraska, being the party of the first part, and Katherine Richardson of Otoe county and state of Nebraska, being the party of the second part, witnesseth:

"That the aforesaid parties above named have this day mutually agreed to enter into a marriage contract for their betterment, for their own social happiness during their natural lives, until death separate them, to be solemnized by marriage. This agreement shall be construed both in law and equity as a marriage contract, to govern both parties. It is made in lieu of any dower interest, claim or rights of whatever name, kind or nature that might arise by law or equity from a marriage between the parties above named, as full consideration of the second party's interest.

"The party of the first part has agreed to pay to the party of the second part, to her only, the sum of $10,000 (ten thousand dollars) in installments of ($500) five hundred dollars annually upon the anniversary of this agreement. It is further agreed that the party of the second

part shall sign all deeds or conveyances requested by the party of the first part.

"Now it is expressly understood by both parties, that the above sum is all that the party of the second part shall ever claim off of the party of the first part or his estate from marriage.

"This agreement shall not prevent the first party from giving anything by check, deed or bequest that he may desire to the party of the second part, for kindness, love and affection.

"In witness whereof the said parties have set their hands and seals the day and year first written.

"The words 'to her only' means to herself.

"Logan Enyart. (Seal)
"Katherine Richardson. (Seal)

"Witness as to the signatures:

"J. H. Catron.

"Geo. W. Hawke."

This contract was acknowledged before Mr. Hawke, who was a notary public.

Objections to the claim were filed in the county court by the appellants, which set forth the antenuptial contract and pleaded that it was valid; that the contract was entered into in contemplation of marriage, for the purpose of making settlement of all property rights; that $7,500 has been paid on the contract; that Enyart gave to his wife in money and real estate before his death under the last clause of the agreement property of the value of $90,000; and gave about $40,000 worth to her daughter and grandson.

By reply Katherine Enyart denies that the conveyance and gifts to her were made under and in pursuance of the contract; denies that she ever received or retained any benefits under it; alleges that she had no knowledge of Enyart's business affairs or property at the time of marriage more than that he was able to comfortably provide for her, and that, being ignorant of her rights, and having no information as to the amount and value of his

property, she signed the contract; that at the time, Enyart was worth nearly $300,000 and by reason of the facts she was defrauded of her marital rights; that afterwards her husband contended that the contract relieved him of any obligation to support her and other members of her family; that the contract is contrary to public policy and void; that the money paid to her by Enyart during his life had been spent for the support and maintenance of the family and the furnishing and supplying his home; that deeds to certain real estate delivered to her which were placed for safekeeping in a bank at Nebraska City were altered by inserting a clause that they were made in lieu of dower in Enyart's estate, which clause was inserted subsequent to delivery, and without her consent; that she has refused to accept the deeds or to claim title thereunder with said clause therein. She tenders these deeds to the administrator "until the validity of the clause which was placed in said deeds, without her knowledge or consent, can be determined." She also tenders a note for $10,000, signed by Enyart, payable to herself, and found with his papers after his death.

A number of assignments of error are relied upon for a reversal of the judgment of the district court. The first six of these relate to the alleged errors in receiving incompetent evidence. The remaining assignments are practically embraced within the contention that the decree upon the evidence should have been for the appellants.

The assignments of error with regard to the introduction of testimony must be overruled. We have repeatedly held that in a trial before a judge the admission of incompetent evidence does not furnish ground for the reversal of a judgment, provided that there is sufficient competent testimony in the record to convince this court that the judgment of the trial court is the judgment which should have been rendered upon the evidence. *Smith v. Garbe,* 86 Neb. 91; *Clark Implement Co. v. Wiltfang,* 87 Neb. 796; *Kemmerling v. State,* 89 Neb. 98; *Smith Bros. v. Wood-*

ward, 94 Neb. 298. This is practically conceded in the brief of appellants.

Does the evidence justify the decree? The record is very voluminous, consisting of nearly 2,000 typewritten pages. The printed briefs cover 369 pages. Yet, the principles which determine the case are few and simple. We think it unnecessary to set out more of the evidence than its substance as to the incidents preceding the execution of the contract, since in our view the contract itself, when considered in connection with all the circumstances of its execution, furnishes sufficient data wherewith to test its validity.

In 1898, at the time of the marriage, Logan Enyart was a man of large means, owning several farms and a great deal of other property in this and other states. It is stipulated that at this time he was worth about $225,000. His first wife died in March, 1896. He was 68 years of age, and had no children. It was his custom when he visited Nebraska City, near which the farm upon which he resided was situated, to make his headquarters at a certain hotel. The appellee, then Katherine Richardson, was living at this hotel, where her husband had deserted her. She was about 34 years of age, and had a daughter about 15 years old. It was necessary for her to support herself and child. She assisted in the work in the hotel, and was treated practically as one of the family of the proprietor. She lived in the hotel for about two years after her husband deserted her, and during this time procured a divorce. Part of the time she was employed in a millinery store and in a dressmaking shop, but she worked at the hotel mornings and evenings. Enyart and the hotel proprietor were intimate friends, and when he came to the hotel he often was served at the family table, where Mrs. Richardson also sat. About a year before the marriage the parties became acquainted. After several months time, during which she often met Enyart at the hotel, Mrs. Richardson went to Auburn to act as housekeeper for a family there. She was gone about six months, and was visited by Enyart twice while there.

She came back to the hotel from Auburn about a week or two before the marriage, announced her engagement, and lived at the hotel until the marriage took place.

Two days before the marriage Enyart, using a form book in part, dictated to Mr. Catron, a business associate and confidential friend, who reduced it to writing, the essential features of the contract. On the same day, at Enyart's request, Mr. Catron went to the hotel for Mrs. Richardson and brought her to his own home, where Enyart was waiting with Mr. Hawke, the notary, who was also a close friend of his. The proposed contract was read, either by her or to her, and it was there signed by both parties.

The contract was kept by Mr. Enyart, and was filed for record in December, 1902, in the office of the register of deeds of Otoe county. Enyart died on November 9, 1912. He made two wills and also left a large amount of valuable property undisposed of by will. One will disposed of certain property in Colorado and other states in which he had a partnership interest with his brother, A. F. Enyart. The will gave the brother all of this except $5,000, which was directed to be paid to the widow. The other will gave his interest in a cattle company owning 2,840 acres of land in Nebraska to six persons, Hazel R. Black, Mrs. Enyart's daughter, being one of them.

Whether an antenuptial contract, by virtue of which one party to an intended marriage, for a legal consideration, parts with marital rights in the property of the other, may may be valid and a bar to dower has been settled in this state. *Rieger v. Schaible,* 81 Neb. 33. In fact, most courts now support antenuptial contracts if fairly made. Such instruments frequently tend to peace and happiness by settling questions concerning rights of property which, especially in the case of marriage of people in later life having children of a former marriage, often furnish grounds of irritation and friction which may defeat the very purpose of the union.

Considering the facts properly in evidence, was the antenuptial contract entered into between Logan Enyart and

Katherine Richardson, at the time it was made, fair, just, reasonable, and such a one as the courts, in view of all the circumstances of both parties at that time, should recognize and enforce?

In *Rieger v. Schaible*, 81 Neb. 33, 49, after a careful examination and review of many cases, it is said: "We think the rule deducible from the authorities under review is that in equity an antenuptial contract, in consideration of marriage and the release by each party of all interest in the property of the other, is based upon a sufficient consideration as to both parties, when each is the owner of an estate in which the other would acquire an interest by reason of the marital relations but for the antenuptial agreement, and is sufficient, *when equitable and fair in its terms and entered into in good faith*, to constitute an equitable bar to dower." The opinion quotes 21 Cyc. 1249: "An antenuptial agreement wherein the intended wife releases 'all claims against the estate of the intended husband although valid when fairly made, will be most rigidly scrutinized, and, if the circumstances show that she has been deceived, it will be set aside.'" The contract was held under the facts in evidence to be valid, but the court say: "In this respect, however, and before passing from this branch of the case, it might be well to state that a court of equity, when called upon to consider an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding that particular case, and enforce or annul the agreement according to the facts disclosed in the case before it. No arbitrary rule can be laid down which would apply to all antenuptial agreements." This is the proper rule, to which we adhere.

While there are decisions of courts of high authority which hold that marriage alone furnishes a full and sufficient consideration for the release by an intended wife of her rights of dower and of all other rights she would obtain by virtue of the marriage relation, even when no provision is made for her support and welfare after the death of the husband, yet we are convinced that the better

rule is laid down in *Rieger v. Schaible, supra.* This is the doctrine laid down in the following cases, and others that could be cited: *Murdock v. Murdock,* 219 Ill. 123; *Mines v. Phee,* 254 Ill. 60; *Simpson v. Simpson's Ex'rs,* 94 Ky. 586; *Tilton v. Tilton,* 130 Ky. 281; *Slingerland v. Slingerland,* 115 Minn. 270; *In re Estate of Pulling,* 93 Mich. 274.

It is also a well-established rule that, in view of the close and confidential relation existing between affianced persons, it is the duty of the prospective husband to make a full and fair disclosure of all material facts relating to the amount, character and value of his property, so that the prospective wife may have sufficient knowledge upon which she may exercise her judgment whether she will enter into such a contract. The general principle was laid down in *Kline v. Kline,* 57 Pa. St. 120, 98 Am. Dec. 206, by Judge Sharswood, and has been adopted and applied in many cases. *Pierce v. Pierce,* 71 N. Y. 154; *Lamb v. Lamb,* 130 Ind. 273; *Murdock v. Murdock, supra; Warner v. Warner,* 235 Ill. 448; *Simpson v. Simpson's Ex'rs, supra; Slingerland v. Slingerland, supra; Rankin v. Schiereck,* 166 Ia. 10.

Where the provision made for the intended wife by an antenuptial contract is grossly disproportionate to the interest in the prospective husband's estate which the intended wife would acquire by operation of law in case the marriage took place, the burden rests upon those claiming the validity of the contract to show that a full and fair disclosure was made to her before she signed it of the extent and value of the property, or that she was aware to all intents and purposes of the nature, character, and value of the estate which she was relinquishing if the marriage took place. *Murdock v. Murdock, supra; Warner v. Warner, supra; Mines v. Phee, supra; Warner's Estate,* 207 Pa. St. 580. These principles, though not universally accepted, seem to us to be based upon sound reason, and to be most consonant with the trend of judicial thought, more particularly in the western states. 14 Cyc. 940; 21 Cyc. 1250.

The evidence is convincing that Mrs. Richardson knew before the marriage that Enyart was a wealthy man owning farms and interests in banks and other property, but that she was informed with any degree of definiteness as to his actual possessions and their value is very doubtful indeed. It appears that a large part of Enyart's wealth lay in other states, and there is no proof that the intended wife had any knowledge of this, other than that he had an interest in a ranch in Colorado. The mere fact that she knew in a general way that Enyart was reputed to be a man of means is not sufficient to meet the requirements of the equitable rule of fair disclosure, or to charge her with such knowledge of the nature and value of his property as to render such a contract binding upon her. On this point appellants have not sustained the burden of proof. *Murdock v. Murdock, supra; Warner v. Warner, supra; Mines v. Phee, supra.*

At the time the contract was entered into Enyart's expectancy of life is shown to have been 10.23 years, and that of Mrs. Richardson to be 31.68 years. In all probability it was to be expected that she would survive him, and would also survive the expiration of the annual payments to be made under the contract. If she should live the period of her expectancy, she would receive nothing from the estate for more than 11 years before her decease.

The agreement is to pay $10,000 at the rate of $500 annually on April 2 of each year. This is equivalent to the payment of the annual interest on $10,000 at 5 per cent. for 20 years. At the end of this time Enyart or his estate would still have the $10,000 having merely parted with the usufruct. For the income of $10,000, therefore, for 20 years, which is more than 10 years less than her expectancy, Mrs. Richardson surrendered not only all interest in Enyart's real estate, but further agrees "that the above sum is all that the party of the second part *shall ever claim off of the party of the first part* or his estate from marriage." Such a provision was so disproportionate to the wealth of Enyart as to require those asserting its validity

to sustain the burden of proof that it was entered into with full knowledge on the part of Katherine Richardson of the nature, extent and character of Enyart's estate. Without this knowledge she could form no adequate idea of the problem before her, whether it were better to marry for a home and a pittance, or to refuse to marry unless provisions were made appropriate to her condition in life as the wife of a man of wealth, standing and importance in the community. We are satisfied this burden has not been met.

Furthermore, the contract is ambiguous in its terms. It is left to conjecture whether "all that party of the second part shall ever claim off of the party of the first part from marriage" means, shall claim during his lifetime after proper marital and legal support and maintenance have been provided for her by the husband. It is uncertain whether the annual payment is to be in addition to her reasonable maintenance, or is intended to limit the amount of maintenance to be supplied her. If it means that this sum is to furnish maintenance and support, pay for clothing, household furniture, and necessities, then the prospective wife gets practically nothing, for marriage imposes the duty of so providing on the husband. The meaning being uncertain, the construction placed upon contract by the parties themselves may be looked to in order to make clear that which is doubtful. *Becker v. Linton,* 80 Neb. 655. A vast amount of evidence on this point is in the record, and it is clearly established that Enyart intended that out of the annual payments his wife should pay for her own clothing and other necessaries, that he considered that much of the expense for proper furnishings for the home should be defrayed from this annuity, and that he often deducted the amount of bills he paid for such purposes from the amount for which the receipt was given. Receipts signed by Mrs. Enyart for some of these payments were received in evidence for the appellants. This opened the door for Mrs. Enyart to testify as to how the payments were made. *Cline v. Dexter,* 72 Neb. 619. While it appears

that Katherine Richardson desired to marry for a home for herself and daughter, and it is very probable that, even if fully informed as to Enyart's estate, she still would have signed it, the contract, construed as Enyart intended it to mean, is unconscionable, not in accordance with the duties which the law imposes upon a husband in the marital relation, and its terms are such that it ought not to be enforced. *Isaacs v. Isaacs,* 71 Neb. 537.

After marriage Mr. and Mrs. Enyart lived together for 15 years, and in his later days Mr. Enyart showed his appreciation of his wife by generous gifts to her and to her daughter and grandchild. He was generous also with several of his own relatives and others. While his estate was depleted to some extent by these gifts, there is still a fortune left to be disposed of.

It is claimed Mrs. Enyart is estopped to claim any share in the estate for two reasons: (1) That she has accepted and retained provisions made for her under the contract and under the will of Mr. Enyart; (2) that she failed for more than one year after his death to signify her desire to take under the law, and not by will. As to the first point, Mrs. Enyart has been paid $500 a year for 15 years, and of this money a large portion has been devoted to the purchase of articles it was the duty of Enyart to supply. There is no proof of investments made with it and now held by her, but, even if there were, the amount invested would perforce be small as compared with his estate. Furthermore, she has refused to accept the provisions made by will, and a note for $10,000 payable to her found among her husband's effects after his death. She is clearly not estopped by ratification as to the money received by her under the contract, the legacy, and the note. As to the deeds made in his lifetime there is nothing to show that they were made in pursuance to the contract or in contemplation of it, except by inference. It is as easy to infer that these gifts were made to her prompted by sound, generous motives as the valuable gifts that were made to his own relatives and others. The gifts to her daughter

and grandson, members of the household, are attributable to like impulses, and there can be no estoppel on Mrs. Enyart's part by reason of these gifts and their acceptance by the donees.

We come, now, to the contention that it was the duty of the claimant to elect within one year after her husband's death, under the statute in force at the time of the contract, whether she would take under the will or under the law. There is no vested interest in a statute, and a change in the manner of disposition of estates of deceased persons may be made by the legislature at any time. The law at the time of death determines the right and manner of disposition, and not the former law. The statute referred to (Ann. St. 1903, sec. 4918) provided that the widow should be deemed to have elected to take under the provisions made for her by jointure or other provision, unless within one year after her husband's death she commence proceedings for the recovery of dower. The statute (Rev. St. 1913, sec. 1272) now provides that she shall be held to take such provisions unless she file in the county court within one year after letters testamentary are issued a refusal in writing to take real estate or other provisions made for her. This was done by Mrs. Enyart by filing a written refusal so to take on September 3, 1913, within one year after Enyart died.

In this case it is to be remembered the intended wife had no property, and the intended husband had a great deal of property and had no children. In cases where each party was the owner of property, the release of all marital rights in the property of the other furnished an additional consideration or incentive to that of marriage for the making of the contract. Each case must be determined on its own peculiar facts, and an analysis of many of the cases cited by appellants shows such a different state of facts from those in this case that they afford no aid in its determination. Other cases seem to hold that the status of wedlock to be conferred upon a woman justifies an unconscionable surrender by her, in advance of the marriage, of the rights

and privileges which law and custom has conferred upon a wife. We prefer to follow the line of cases cited in this opinion.

We believe the judgment of the district court is the proper one on the facts, and it is, therefore,

AFFIRMED.

ROSE, J., dissents.

JOSEPH SADT, APPELLEE, v. SUNDERLAND BROTHERS COMPANY, APPELLANT.

FILED NOVEMBER 17, 1916. No. 19031.

Master and Servant: INJURY TO SERVANT: APPEAL: REVIEW. In this an action by a servant to recover for personal injuries sustained by the alleged negligence of the master, the evidence is examined, and *held* to sustain the verdict, and no error is found in the giving or refusing of instructions.

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

Gurley, Woodrough & Fitch, for appellant.

Mahoney & Kennedy, contra.

LETTON, J.

Action for damages for personal injuries. Plaintiff recovered judgment. Defendant appeals.

The plaintiff, who is a Syrian, was employed as a day laborer by the defendant, who is a dealer in building materials and maintains yards in the city of Omaha. While plaintiff and another Syrian, named Ebdouch, were shoveling sand out of a car, defendant's foreman attempted to move another car, loaded with sand, which was standing upon the same track about 200 feet from that in which the men were at work. The track sloped downward from where the car stood to the car which the men were un-

loading. The negligence charged is that the defendant negligently set in motion the loaded car and caused it "to be suddenly and violently precipitated against the sand car on which plaintiff was busily engaged as before-described," whereby plaintiff was thrown down and severely injured.

The foreman testified that before he started the car he looked at the brake shoes, which were apparently set against the wheels. He climbed on the car, taking a pick handle with him to use as a brake stick to put in the wheel to give more leverage. He then called to the man who had the lever or jack to start the car while he kept the brake on to try it. This was to test the brakes. He testifies, then "I got down and *removed the blocks from under the wheels.* I got back on the car, and told him to push, * * * to use his jack." He says that he released the brake when the car was started, and that after the car had advanced five or six feet he tried the brake again and it would not hold; that there was only one way to try the brake, and that was to wind it up, which he did, and it refused to work. He then called to Mr. Hurt, the superintendent of the yard, and told him the car was going. Hurt put boards under the wheels to try to stop the car, without success. They both shouted to the men near and about the car to look out. The car continued to move rapidly until it struck the car in which the plaintiff and Ebdouch were standing. Ebdouch saw the car coming, braced himself, and was not hurt; but plaintiff, probably engrossed with his work, did not hear the alarm in time, and when the collision took place was thrown down and quite severely injured. When Hurt saw he was unable to stop the car, he ran to where a team was tied to a car beyond the car in which the plaintiff was working, untied the team, and got it away before the collision occurred. Several bystanders testify that they heard Hurt and Eastman shouting. Ebdouch testified that when he first saw the run-away car it was standing on the track about a block away, that when he next saw it it was within six

feet of the car in which he was working, and coming rapidly. Plaintiff also testified that he did not see the car at all, and was not aware of its presence until Ebdouch called to him, and that moment the car was struck. There is some conflict as to how the plaintiff faced while at work. Some witnesses say he was looking west to the approaching car. He says he was looking south and east until Ebdouch called, and he then looked west.

The court left it to the jury, by its instructions, to say whether the defendant's foreman had used proper and reasonable care in the starting of the car, in the methods and manner employed for moving the car and controlling its progress, and in notifying plaintiff of the movement of the car. It refused to give an instruction to the effect that "the undisputed evidence shows that the car in question was inspected and started and handled in the usual and customary way of inspecting, starting and handling cars under similar conditions, and in like businesses as that of the defendant. And you are therefore instructed that the evidence fails to show that the defendant was guilty of negligence." The giving of the first and the refusal to give the second of these instructions is complained of. We are satisfied that there was no error in these rulings. The foreman's own evidence shows that the wheels of the car were blocked when he ordered the man with the jack to start the car in order to see if the brakes held. The question of negligence was one for the jury, and the evidence justified a finding that proper care had not been exercised in inspecting and testing the brakes. The instruction refused, by its terms, virtually took the case away from the jury, and was properly rejected.

It is complained that the amount of damages awarded is grossly excessive. The jury returned the verdict in favor of plaintiff for the sum of $5,275. Plaintiff is a common laborer 52 years of age. There is testimony that he had worked off and on for the Omaha Gas Company for about two years, but that he was discharged in December,

1913, because he was in such physical condition that he was unable to do the work of the other men in the gang, and that while working he had complained of pain in his side. He was in St. Joseph's hospital from January 8, 1914, until February 16, for treatment for a growth on his lip and other minor troubles. The injury complained of was received on June 11, 1914. The medical testimony in his behalf showed that immediately after the accident he seemed to be suffering from shock. He was taken to the hospital, where he remained about six weeks. For some time he could retain nothing upon his stomach without suffering pain; even liquids were distressing to him. He passed bloody urine, and there was blood present in his vomit, indicating a rupture of the blood vessels in the lining of the stomach. The nerves of the right shoulder were injured so that the muscles have shrunken to a noticeable degree, and he has suffered intense pain. The X-ray showed a clot of blood in the region of the left kidney. The doctor who attended him says that he thinks he will never permanently recover from the injuries. He usually earned $2 a day. It is shown that at the age of 52 an annuity payable annually, at current rates, costs $1,340 for each $100. The plaintiff testifies that he is unable to work on account of pain in his side and shoulder, and there seems to be no proof to the contrary. His testimony in some minor and collateral matters seems not to be strictly in accordance with the facts. This may be on account of lack of full understanding of the English language and inability to express himself in it clearly. But, conceding the inaccuracy, there seems to be little or no dispute as to the cause or the nature of the injury. After his medical and hospital bill are paid he will have about $5,000 left, which is not so excessive a recovery as to justify interference with the verdict.

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

ROBERT O. GRAYSON, APPELLEE, V. MARYLAND CASUALITY COMPANY, APPELLANT.

FILED NOVEMBER 17, 1916. No. 19038.

Insurance: VERDICT: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* insufficient to sustain the verdict.

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

Montgomery, Hall & Young, for appellant.

F. A. Mulfinger and *Robert J. Webb, contra.*

LETTON, J.

Action to recover on policy of burglary insurance. Plaintiff recovered, defendant appeals.

The policy was issued to one Rogers, a liquor dealer in Omaha, and was afterwards assigned by him to plaintiff when the latter purchased the saloon. The policy is for $500. It contains the provision that the insurer shall not be liable "for loss of money * * * from a combination fire and burglar-proof safe, or from a burglar-proof safe, containing an inner steel burglar-proof chest, unless the same shall have been abstracted from the steel or so-called burglar-proof chest contained within the safe, after entry into said chest has been effected by the use of tools or explosives directly thereupon."

The evidence on the part of the plaintiff is substantially to the effect that he left his saloon about 7:30 p. m. on May 13, 1913. He came back a few minutes before 9. The window and show case were broken, the room in disorder, and the window sash raised. He telephoned to the police station, and within a few minutes two policemen came. He afterwards opened the outer door of the safe, put some money in, but not in the steel inner safe, and locked it. The next morning he opened the outer door, took the money out, when he saw that the inner safe had been opened. He

noticed a drill mark and some abrasions on the inner door. There were two fifty-dollar bills in the money chest, and $500 in gold, which was all taken. The combination was the same as when he received the safe from Rogers. On cross-examination he said he noticed no mark on the dial when the insurance adjuster went with him to examine the safe; first saw it a week or ten days afterwards; that the saloon was open when he left, and that his employees were still there; that the closing hour was 8 o'clock. A witness who testified to being an expert locksmith and safe expert, and who examined the same only on the day of the trial, testified to seeing a drill mark on the dial about a thirty-second of an inch deep and one-quarter of an inch wide, and a mark or abrasion just above the dial; that the drill mark had nothing to do with opening the inner door; that in his opinion the knob had been struck with a hide-faced mall so as to bend the shaft or spindle and allow the combination to be manipulated so as to open the door. One of the policemen testified that he could not remember whether he saw any marks on the safe that night. The other was not called. A number of safe experts were called by the defendant, who examined the safe in 1914, and found the drill mark, but no other marks or indications of the use of a hammer. They agreed that the shaft or spindle was not bent; that, if the combination had been turned far enough so as to throw the tumblers, the drill mark on the door could not affect the lock at all. Defendant's adjuster testified that he examined the lock carefully in plaintiff's presence on the morning of June 5, 1913; that he found no marks of any kind on the safe or on the door; that he asked plaintiff if he saw any marks, and he said he did not, and that "they must have found the combination." He then showed plaintiff the clause in the policy that made indemnity payable only when the steel chest had been opened by tools or explosives. He examined the safe again in December, 1914, and found the little drill hole in the dial. Another witness who examined the safe during the trial, and after plaintiff's expert had

examined it, testified there was a glaze finish on the inner door, and that there were no marks upon it other than the drill mark. On rebuttal plaintiff denied saying the safe was opened by the combination.

The evidence is unsatisfactory and it does not sustain the verdict on the point that entry into the inner chest had "been effected by the use of tools directly thereupon." Under the contract this is essential to a recovery.

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

REVERSED.

SEDGWICK, J., not sitting.

ANDREW VETTER ET AL., APPELLEES, V. NATHAN BROADHURST, APPELLANT.

FILED NOVEMBER 17, 1916. No. 19315.

1. **Eminent Domain.** The right of eminent domain cannot be exercised for a purely private purpose.
2. ———: DISMISSAL OF PROCEEDINGS. Where, in an appeal from the dismissal of certain condemnation proceedings, it appears that the purpose of the proposed condemnation is to take a part of the land of A against his will as a site for a reservoir from which to irrigate the land of B, the proceedings being brought for B's sole benefit, a judgment of the district court dismissing such proceedings will be upheld.

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

J. E. Porter, for appellant.

E. D. Crites and *F. A. Crites, contra.*

LETTON, J.

This is an appeal from a judgment of the district court dismissing certain condemnation proceedings brought by

the applicant, Broadhurst, to obtain a reservoir site on the lands of defendants for irrigation purposes.

The petition to the county judge stated, in substance, that applicant was the owner of 160 acres of land, and that defendants owned an adjoining 160-acre tract; that a creek flows through the land of both, and that during the winter season and during freshets in the summer a large amount of unappropriated water of the creek goes to waste; that by its storage and conservation the same can be used in the irrigation of the lands of the applicant; that he had procured a permit from the state board of irrigation to store the flood waters; that the construction of the dam will cause water to cover five acres of land belonging to defendants, and defendants have refused to permit him to use the land for reservoir purposes or to agree as to the amount of damages. Objections were made in the county court by motion and answer, on the ground that the purpose of the applicant was to impound the water for his own private use and not for a public purpose, and for other reasons. The objections were overruled. Appraisers were appointed who viewed the premises and awarded defendants compensation in the sum of $420. An appeal was taken to the district court, where a motion was made to dismiss the proceedings on the same grounds which was at first overruled, but during the trial leave was given to renew the motion which was then sustained and the proceedings dismissed.

The sections of the statutes under which applicant asserts the right to take defendants' property are section 3444, Rev. St. 1913, which provides in part as follows: "Every person, corporation or association intending to construct and maintain a storage reservoir for irrigation or any other useful purpose, shall make an application to the state board of irrigation, highways and drainage as hereinbefore provided. * * * Upon the approval of such application the applicant shall have the right to impound any and all waters not otherwise appropriated and any appropriated water not needed for immediate use, to con-

struct and maintain necessary ditches for the purpose of conducting water to such storage reservoir and to condemn land for such reservoir and ditches in the same manner as is provided by law for the condemnation of rights of way for other ditches"—and sections 3428, 3430, 3431, Rev. St. 1913, which specify the manner of obtaining rights of way for other ditches.

The principal ground set forth in the motion, and that upon which the district court acted, is that the attempted appropriation and condemnation is not for a public purpose but for a private purpose, being for the sole benefit and advantage of the applicant, and the power of eminent domain cannot be exercised to take defendants' property for private use. Is the proposed taking for a public use? It is pointed out in 10 R. C. L. p. 25, that though some courts hold that "anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, contributes to the general welfare and the prosperity of the whole community, and, giving the Constitution a broad and comprehensive interpretation, constitutes a public use," yet other courts have held, and the common law rule and the generally accepted doctrine is, that in order to constitute a public use the property taken must be placed within the control of the public, or of a public agency or instrumentality, and its use or the rates charged for its use be subject to public control, or it must be within the right of the public to use and enjoy. A citation of cases holding to each of these views may be found in 10 R. C. L., notes, p. 22. A full and able discussion of the whole subject may be found beginning on page 24 of the same volume, and in 1 Wiel, Water Rights (3d ed.) sec. 606. The proper limits of this opinion lead us to refer the reader to these articles and the authorities cited therein. One of the clearest statements justifying the doctrine that a public advantage or benefit—the gen-

eral welfare, to use another term—may justify the taking of private property against the consent of the owner is given in the opinion by Mr. Justice Peckham in the case of *Clark v. Nash,* 198 U. S. 361, 4 Am. & Eng. Ann. Cas. 1171. In that case it was held by the supreme court of Utah that on account of the peculiarly arid climate of Utah, where agriculture is practically impossible without irrigation, the use of water, even by a private owner, for agricultural purposes was a public use, and was of such value to the commonwealth that a statute permitting condemnation of the right of way for a ditch for the use of a private individual was not unconstitutional. This was upheld by the supreme court of the United States. The opinion, after saying that probably in most states the contention of plaintiff in error would be sound, proceeds: "Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious, and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them." And again: "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having

reference to the conditions already stated, we are of opinion that the use is a public one."

It is practically on the same principle that the Maine, Massachusetts, New Hampshire, and Connecticut mill-dam statutes were held to be constitutional, although there is no doubt that these decisions were largely influenced by the facts that such legislation had been in force in the colonies long before the Revolution, and that the Constitutions of those states must have been adopted in view of the ancient customs and general state policy as shown by former and existing statutes.

Tested by the criteria laid down in the Utah case, is there such a peculiar condition of the soil or climate, or is there any other peculiarity of circumstances in Nebraska, which would justify the taking of the land of one farmer for the benefit of his neighbor. There is a vast difference between the physical configuration and the climatic conditions of the state of Utah, of other states in the arid region of the United States, and of the rocky New England states, and the physical configuration, climate and soil of the state of Nebraska. According to the United States census report of 1910, that part of Utah in which the heaviest rainfall prevails has about the same amount of precipitation as the very driest and most arid portion of the state of Nebraska, viz., 16 inches per annum, while in the driest portion of Utah only about 7 inches of rain falls in a year. The rainfall in Nebraska varies from over 32 inches in the extreme southeastern portion to about 16 inches in the extreme western portion. The general feature of the state is that of a rolling plain, sloping upward from the Missouri river to its western boundary. The elevation above the sea level varies from 842 feet in Richardson county in the southeast to over 5,000 feet in the extreme northwest corner of the state. In the eastern portion of the state the public welfare requires the construction of drainage ditches to carry off the surplus waters, while in the valleys of the extreme western portion irrigation is necessary to agriculture.

Taken as a whole, the state of Nebraska is one of the richest agricultural states in the Union. Its crops are shown by official reports to be of such magnitude that many million dollars worth are exported every year. It is "a land flowing with milk and honey," far surpassing the land shown the messengers from Israel. In 1915 the state produced over 71,000,000 bushels of wheat, over 73,000,000 bushels of oats (Bulletin 33, Nebraska Department of Labor), and over 230,000,000 bushels of corn and other grain. This vast yield was produced upon 15,293,335 acres of cultivated land, of which only 230,848 acres were under irrigation. Bulletin 166, Nebraska Board of Agriculture. The argument from necessity fails in the face of such facts.

But similar questions have already been adjudicated in this state. This court has held that condemnation cannot be availed of to take the property of another for a private road, so as to permit one whose lands are wholly inclosed or surrounded by the lands of others to have access to a public highway. *Welton v. Dickson*, 38 Neb. 767. It has also been held that a statute providing that not less than three owners of wet lands may form a corporation to drain the same, and providing for condemnation of a right of way for a ditch, for such purpose, was unconstitutional, the opinion saying: "Any number of persons, not less than three, being the owners of wet and overflowed lands, whenever it is for their interest, may locate a ditch across the lands of others. There is no requirement in the act that the corporation shall act only in cases where the public welfare would be advanced. And there are no conditions upon which their right to locate a ditch depend, except that they are the owners of wet or overflowed lands. A ditch may be located and opened across the lands of individual owners merely to subserve private interests. Three individuals, by forming a corporation, may locate and open a drain across the property of others without their consent, and compel them to bear the burden of constructing the same. This is an infringement of the right of private property, and is

unauthorized and void." *Jenal v. Green Island Draining Co.*, 12 Neb. 163, 167. In *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co.*, 45 Neb. 884, it was declared: "Public use, in a constitutional sense, may be confined to the inhabitants of a restricted locality or neighborhood, but the use must be common, and *not to a particular individual.*"

Furthermore, the statute under which the applicant asserts the right to take his neighbor's land allows condemnation for other purposes than irrigation. If this section is valid, then any one who desires to use water for power to run a private factory, or for any other private use, may condemn the land of his neighbor for a reservoir site and for ditches. In *Traver v. Merrick County*, 14 Neb. 327, the status of water grist-mills in this state was examined, and, upon a consideration of the statute allowing such mills the right to flow the lands of others, it was held that, since the tolls charged by such mills were subject to public control, such mills were works of internal improvement under the statute allowing counties to vote bonds in aid of such works.

In *State v. Adams County*, 15 Neb. 568, it was held that bonds could not be voted in aid of a steam grist-mill, and it was said: "But for the provisions of the statute authorizing the exercise of the power of eminent domain in behalf of water-mills, and thereby placing their regulation under legislative control, they would not be held to be works of internal improvement."

The right of eminent domain is thus held to rest on the right to control of rates by the public. But we are not alone in this view. In *Ryerson v. Brown*, 35 Mich. 333, in an interesting and able opinion by Chief Justice Cooley, the earlier cases in this country, are reviewed, and it is held that a statute permitting the exercise of the right of eminent domain to flow lands of others for water-power purposes for private use is unconstitutional and void.

The operation of a general statute covers the state. The taking of property for the use of another cannot be

lawful and proper in the western portion of the state, and unlawful and wrongful in the eastern portion. There is no condition, there is no necessity, there is no prevailing public opinion or sentiment or demand over the greater portion of the state for any such invasion of the right of private property. Even if it should be held that a great and general public advantage may in some cases constitute a public use, we take judicial notice of the fact that neither climatic, agricultural, industrial or social conditions in this state indicate that any such advantage will accrue by permitting such a taking as this statute authorizes.

It may be thought to be rather an artificial distinction to say that an irrigation district, or a canal company created to furnish water to landowners for agricultural purposes for compensation, may exercise the right of eminent domain, but that a private owner of a single tract of land may not have such a privilege. But this difficulty rests on the nature of the matter. Such agencies are in a sense common carriers of water, and the right of control and of regulation of rates exists in the public, so that all courts would agree that such agencies are formed for a public purpose. If a carrier of goods only carries one package of goods, but offers to carry for all, the public is interested, but if he carries for himself alone the public has no concern with his business.

It is not intended by this opinion to declare that the sections of the statutes mentioned are null and void *in toto* as in violation of the Constitution, but only to declare that they cannot, with due regard to the right of private property, be applied to circumstances in which a merely private interest is subserved.

The taking of defendants' property against their will under such proceedings is without due process of law and cannot be justified. The judgment of the district court is therefore

AFFIRMED.

FAWCETT, J., not sitting.

STATE, EX REL. JOHN DIEMER, APPELLANT, V. THEO. A. FRYE ET AL., APPELLEES.

FILED NOVEMBER 17, 1916. No. 19496.

Schools and School Districts: ORGANIZATION OF DISTRICTS: AUTHORITY OF COUNTY SUPERINTENDENT. The proviso to the third subdivision of sec. 6703, Rev. St. 1913, is not in conflict with the preceding portion of the subdivision, and confers authority upon the county superintendent of schools in a county in which territory lies which was not then a part of any school district to organize such territory into new districts or to attach the same to adjoining districts without petition or notice.

APPEAL from the district court for Grant county: JAMES R. HANNA, JUDGE. *Affirmed.*

Daniel F. Osgood, for appellant.

A. D. Fetterman, contra.

LETTON, J.

The purpose of this action is to detach from school district No. 3 of Grant county certain territory annexed thereto by the county superintendent of schools in January, 1910. The relator insists that the addition of this territory to the district was made without jurisdiction or authority on the part of the county superintendent, for the reason that no petition was presented to change the boundaries of the district, or to attach any portion of the territory thereto; that no notice of any kind was ever given containing a statement of what changes were proposed in the district boundaries, and of the time and place where the petition would be presented to the county superintendent; that the petitioner is a heavy taxpayer in the district, and that the district board are threatening to spend moneys of the district within the territory so attempted to be attached; that a petition and notice were necessary to authorize the county superintendent to attach unorganized territory to the district. It is admitted

that no petition praying for the annexation of the disputed territory to the district was presented, and that no notice was given.

The relator relies upon the case of *State v. Compton,* 28 Neb. 485, which holds that a county superintendent of schools has no jurisdiction to detach the property of a part of a school district and attach it to an adjoining district without a petition in writing, and without notice being given of the time and place where a hearing should be had in the matter. At the time the facts in that case arose, section 4, subd. 1, ch. 79, Comp. St. 1887, was in force. The third subdivision of this section provided: "The county superintendent shall not refuse to change the boundary line of any district, or to organize a new district when he shall be asked to do so by a petition from each district affected, signed by two-thirds of all the legal voters in such district." It also required that notice be given of the contents of the petition and when it would be presented to the county superintendent. Afterwards a provision was added that he should not refuse to annex unorganized territory to an existing district on petition signed by two-thirds of the district and of the territory proposed to be attached, and notice of this was required. At the legislative session of 1909 this section was amended by adding the following provision: "Provided that on January 2, 1910, any territory which is not then a part of any school district shall, by the county superintendent of the county in which such territory lies, either be organized into new districts, or attached to one or more adjoining districts." Laws 1909, ch. 117, subd. 3. The relator contends that this proviso does not operate to affect the third subdivision requiring petition and notice, citing the decision in *School District v. Coleman,* 39 Neb. 391, to the effect that a proviso should be considered as referring to that which immediately precedes it only. Conceding this, the proviso in the amendment of 1909 immediately follows that part of the third subdivision of the section which provides that the county superintendent shall not refuse "to

annex to an existing district any territory not organized into districts when asked to do so by petitions signed by two-thirds of the legal voters of the existing district and the territory proposed to be attached," and providing for a notice. Laws 1909, ch. 117. The proviso affected that portion of the law immediately preceding it.

There is no inconsistency between it and the remainder of the section. The proviso did not become effective until January 2, 1910. The statute went into effect July, 1909. The legislative purpose evidently was to allow about six months during which the residents of unorganized territory might present petitions to the county superintendent either asking the formation of a new district or indicating the district to which they desired to be attached. If at the end of that time they had indicated no preference, the county superintendent was directed to proceed upon his own initiative and either organize the territory into new districts or attach it to one or more of the adjoining districts. This is what was done in Grant county. The statement of facts shows that five similar annexations of unorganized territory to other districts were made and one new district was created upon the same day, thereby placing within organized districts all the previously unorganized territory within the county. The county superintendent being vested with authority to make this annexation, the plaintiff has no cause of action.

The judgment of the district court is

AFFIRMED.

JOHN CASPER v. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1916. No. 19754.

1. **Evidence** examined, and *held* to support a verdict finding plaintiff in error guilty of larceny from the person.
2. **Instructions** examined, and *held* sufficient to describe the essential elements of that crime.
3. **Criminal Law:** TRIAL: INSTRUCTIONS. Where the evidence of the commission of a crime is direct and is supported by corroborative testimony, the defendant is not entitled to an instruction that, if the evidence is reconcilable with innocence upon any reasonable hypothesis, the defendant is entitled to a verdict of acquittal.
4. **Larceny:** CONVICTION: PROBATION. By the provisions of section 9148, Rev. St. 1913, one who has been convicted of larceny from the person may not be placed under probation by the district court.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed, with directions.*

D. W. Livingston, for plaintiff in error.

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

LETTON, J.

The defendant was charged with robbery, and was convicted of larceny from the person under instructions permitting this to be done if no force was used. Sentence was suspended by the court, and defendant placed upon probation.

It is first argued that it is reversible error to submit instructions as to a crime charged, but entirely unsupported by the evidence. There can be no question of the soundness of this proposition. Its applicability here depends on whether the evidence is sufficient to establish the crime of larceny from the person, of which defendant was convicted. In substance, the evidence is as follows: Jacob Pabin, the complaining witness, is a resident of North Da-

kota. He formerly lived near Talmage in this state. A few days before Thanksgiving he returned to Talmage upon a visit. Thanksgiving Day he spent with a number of his former intimates. He visited several saloons, where he imbibed to some extent. That night he met John Casper, the defendant, whom he had previously known. Pabin testified that he was at a pool hall that night, and went from there to a garage, where he met defendant about 11 o'clock. He had not arranged for a sleeping place, and he inquired of Casper where one Watham lived, intending to spend the night there. Casper volunteered to show him where Watham lived. As they passed a vacant building Casper asked him to go inside. There was no light in the building, and he therefore refused to enter, when Casper pulled him inside. He fell, and while on the floor Casper reached into his pocket and took from him his pocketbook with a five-dollar bill and $4.50 in silver in it, and a memorandum book and some papers. After Casper let him up he went back to the pool hall, which was about a block away, where he tried to find an officer. The proprietor of the pool hall testified that Pabin was there about 9 or 10 o'clock, and that night he returned there about half past 11, looking for an officer. The sheriff testified that after Casper was arrested he took him to the building where Pabin said he was robbed to look for papers, and they found none; that afterwards defendant suggested they go back and look again; that Casper then picked up from the floor near some machinery a memorandum book and papers, which were identified by Pabin as having been taken from him. The sheriff also testified that he saw a condition indicating a scuffle upon the floor; that they then went back to the pool hall, where Casper offered to give Pabin the amount of money that had been taken from him, but Pabin refused it, unless he would admit that it was the same money he had taken, which defendant refused to do.

For the defense, defendant testified that it was about 8 o'clock in the evening when he met Pabin in the garage

and offered to show him Watham's house; that he went with him a little over a block to a point where they could see a light in the Watham house, and then left him and went home, a distance of about a mile, which he reached about 9 o'clock; that he had not been in the building Pabin described that day. Defendant's mother testified that he came into the house that night between 9 and 10 o'clock. She had gone to bed, and she gave no reasons or criteria for fixing this as the time of his arrival.

Pabin is corroborated by the keeper of the pool hall as to the time he left there to go to the garage where he met Casper, and as to the time that he returned there looking for an officer. Defendant admits he left the garage with Pabin and went near the old building with him. The marks found by the sheriff on the floor and the finding in the building by defendant of the memorandum book and papers taken from Pabin support his evidence that the money was stolen at that place. The jury had a right to consider the actions and appearance of the witnesses upon the stand and to give credence to those whose testimony they believed. They evidently disbelieved defendant. The evidence indicates that Pabin was intoxicated in some degree, but it failed to convince the jury that there was any intent to rob him by putting him in fear or overcoming him by force. There is sufficient evidence to support the verdict finding defendant guilty of larceny from the person.

It is complained that the court failed to instruct as to the essential elements of the crime of larceny from the person. The jury were told, in the words of the statute: "Whoever steals property of any value by taking the same from the person of another without putting said person in fear by threats, or by the use of force and violence, shall be deemed guilty of grand larceny." In another instruction the court said: "The putting in bodily fear with the use of force and violence is not a necessary element in the crime of larceny from the person, but the feloniously carrying away from the person with the intent of converting the property to his own use and against the owner's

consent is necessary." These instructions sufficiently describe the elements of the crime.

Misconduct on the part of the county attorney prejudicial to defendant during the argument is charged. We find no prejudicial error in this respect. One of the objections made by the defendant to the argument was overruled, the other was sustained, and the jury were instructed to disregard any statement made not borne out by the evidence. The first statement was apparently made in response to something said by counsel for defendant.

Since the evidence in this case was direct and was supported by corroborative testimony, the defendant was not entitled to an instruction that, if the evidence is reconcilable with innocence upon any reasonable hypothesis, he is entitled to a verdict of acquittal, as in a case where the evidence is circumstantial only. 2 Thompson, Trials (2d ed.) sec. 2504.

It is urged that the court was without authority to enter the judgment which it did. There is merit in this contention. The court suspended sentence and placed the defendant upon probation. The act of 1913 (Rev. St. 1913, secs. 9145-9151), providing for the appointment of probation officers, the suspension of sentences, and placing the accused on probation, does not apply to persons convicted of certain crimes described in section 9148. Among these is "robbery or larceny of (from) the person." We find no other section of the statute conferring such power upon the district court in such a case. The order made by the court was therefore erroneous. We are reluctant to reverse the order of probation in this case, but feel compelled to obey the statute. The facts justified the order, if the law did not prohibit the exercise of such clemency by the district court in a case of this kind.

Since we find no prejudicial error previous to this order, the judgment of the district court is reversed and the cause remanded, with directions that sentence be pronounced upon the verdict, in accordance with law.

REVERSED.

MARANVILLE DITCH COMPANY ET AL., APPELLANTS, V. KILPATRICK BROTHERS COMPANY, APPELLEE.

FILED NOVEMBER 17, 1916. No. 18954.

Waters: IRRIGATION: APPROPRIATION: ADVERSE USER. To the extent that a landowner, under a prior appropriation, uses water of a river for irrigation when actually needed, diversions by upper appropriators using water for the same purpose are not adverse.

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

P. W. Scott, for appellants.

Hazlett & Jack and *Charles W. Meeker, contra.*

ROSE, J.

Plaintiffs brought this suit in equity in the district court for Chase county to protect alleged priority of rights to the use of waters of the Frenchman river for irrigation. The statutory appropriations of the parties are as follows: Defendant, December 23, 1890, 64.86 cubic feet of water a second; plaintiff Maranville Ditch Company, December 8, 1894, 6 cubic feet of water a second; plaintiff Inman Ditch Company, February 28, 1895, 6.43 cubic feet of water a second. Plaintiffs are upper proprietors. They assert prior rights alleged to have been acquired by prescription or by adverse user for more than the statutory period of ten years. The district court decreed that defendant had a prior right to use 24 cubic feet of water a second. Plaintiffs have appealed.

It is contended that the evidence does not justify the finding below. There is testimony tending to show that by means of two dams, two and five miles, respectively, above defendant's headgate, plaintiffs have for more than ten years diverted to their irrigation ditches the entire flow of the river at those places. Owing to the peculiar nature of the basin of the stream, however, the river, be-

fore reaching defendant's headgate, accumulated considerable water which defendant used for irrigation. Defendant owns 2,000 acres of land under its ditch. One of its officers testified that it annually irrigated from 1,500 to 2,000 acres of its own, in addition to 160 acres which it did not own. To the extent that defendant, under its prior appropriation, used water, when actually needed for irrigation, the diversions of plaintiffs were not adverse. 2 Kinney, Irrigation and Water Rights (2d ed.) sec. 1050; *Faulkner v. Rondoni,* 104 Cal. 140; *Talbott v. Butte City Water Co.,* 29 Mont. 17; *Featherman v. Hennessy,* 42 Mont. 535; *Davis v. Chamberlain,* 51 Or. 304; *Henderson v. Goforth,* 34 S. Dak. 441. Under these circumstances plaintiffs were required to prove that they had deprived defendant of the use of a definite quantity of water to which it was entitled under its prior appropriation. *Hayes v. Silver Creek & Panoche Land & Water Co.,* 136 Cal. 238; *Logan v. Guichard,* 159 Cal. 592. In this situation the trial court found that, while the testimony was not as certain, unequivocal and definite as it should have been, defendant had irrigated annually approximately 1,680 acres, a use of water, according to the statute, equivalent to 24 cubic feet a second. The finding on appeal is the same. This conclusion makes it unnecessary to consider other questions argued.

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

MARY K. ERICKSON, APPELLEE, V. AURELIA CROSBY ET AL., APPELLANTS.

FILED NOVEMBER 17, 1916. No. 19003.

Adverse Possession. Title may be acquired by adverse possession, though the claim of ownership was invalid and the occupant believed he was asserting legal rights only.

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

A. H. Byrum and *L. H. Blackledge,* for appellants.

W. C. Dorsey, contra.

ROSE, J.

This is an action to quiet in plaintiff title to the north half of the northwest quarter of section 25, township 3, range 13 west, in Franklin county. The title was in Ruth Fay Stull, who died September 28, 1898. She had devised the land to her mother. In 1894 the latter adopted plaintiff. The devisee died before testatrix. The will was probated, and it seems to have been assumed by those interested that plaintiff succeeded to the rights of the devisee. Rev. St. 1913, sec. 1314. Desiring to sell the land, plaintiff commenced this suit against David Stevens, a brother of testatrix. After the filing of the petition Stevens died, and his heirs were made defendants. From a decree quieting in plaintiff title acquired by adverse possession, defendants have appealed.

Defendants contend that plaintiff's possession was not adverse or hostile to Stevens. They argue that plaintiff claimed only under the will, a claim based upon a mistaken belief that the adopted child acquired the interest which would have vested in her foster-mother had the latter survived the testatrix. Plaintiff held possession, claiming under the will. *Pettit v. Black,* 13 Neb. 142. If her title was defective, she nevertheless held under a claim of title. *Lantry v. Wolff,* 49 Neb. 374. In the latter case it was said: "It is not essential that the claim of right or title to the land by the adverse occupant be a valid legal claim in order that the statute may run in his favor."

Assuming that plaintiff believed she was asserting legal rights only, and assuming that her claim of title was defective, her possession could nevertheless ripen into title by adverse possession. *Zweiner v. Vest,* 96 Neb. 399;

Daily v. Boudreau, 231 Ill. 228; *Cole v. Parker,* 70 Mo. 372.

In *Andrews v. Hastings,* 85 Neb. 548, it was said: "It is true, as argued by plaintiff, that we have consistently held, since *Horbach v. Miller,* 4 Neb. 31, that occupation of real estate will not ripen into title unless that possession is adverse to the true owner and with the intent and purpose of the occupant of asserting ownership to the land. See *Ryan v. City of Lincoln,* 85 Neb. 539. But possession may be adverse without any declaration of hostility to the true owner. *City of Florence v. White,* 50 Neb. 516. The occupant's intention at the time he took possession is not necessarily a controlling factor. It is sufficient if possession is taken and the premises held for ten years under a claim of right or of ownership. *Fitzgerald v. Brewster,* 31 Neb. 51."

It is further insisted that plaintiff never made an actual entry on the land. The evidence shows that the tenant of testatrix attorned to plaintiff and paid to her the rent. This fact and plaintiff's claim of ownership were known to Stevens. Under these circumstances the possession of the tenant was the possession of plaintiff.

Defendants contend that plaintiff did not by adverse possession acquire title to the entire tract, the evidence showing that the land was unfenced and without improvements, that only 60 acres were cultivated, and that the remainder was hay land. The entire tract was leased and used by the tenant of testatrix, and he attorned to plaintiff. Under these circumstances plaintiff acquired title to the entire tract.

The judgment of the district court is

AFFIRMED.

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

JAMES CAMPBELL, APPELLEE, v. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 17, 1916. No. 19035.

Railroads: ACCIDENT AT CROSSING: QUESTION FOR JURY. Whether enginemen rung the bell or blew the whistle of a locomotive continuously for 80 rods before crossing a public highway as required by statute is a question for the jury, where witnesses who were in such position and condition that they would probably have heard the signals, if given, testified that they did not hear the whistle or the bell, and other witnesses testified that the whistle was blown and the bell rung. Rev. St. 1913, sec. 6023.

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

Edson Rich, A. G. Ellick and *T. F. Hamer,* for appellants.

H. D. Rhea and *Edward B. McDermott, contra.*

ROSE J.

This is an action in the district court for Buffalo county against the Union Pacific Railroad Company and one of its engineers to recover damages in the sum of $15,030 for injuries sustained by plaintiff in a collision with a freight train at a public crossing near Odessa. From a judgment in plaintiff's favor for $5,500, defendants have appealed.

Plaintiff charged defendants with negligence in failing to give the signals required by the following statute:

"A bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed such road or street." Rev. St. 1913, sec. 6023.

Defendants denied the negligence charged, and pleaded that plaintiff was guilty of gross negligence in failing to

look and listen before going upon the railroad track. At the close of the testimony defendants requested a peremptory instruction in their favor on the grounds that negligence on their part was not proved, and that plaintiff was guilty of contributory negligence which was more than slight in comparison with the negligence imputed to them. The failure to direct a verdict for defendants presents the principal questions for review.

On the morning of December 30, 1913, plaintiff occupied a covered seat on the front end of an oil wagon, while driving a four-mule team westward on a public highway north of and parallel to the Union Pacific railroad in Buffalo county. When 50 feet or more from the railroad, he turned south toward a crossing about 300 feet east of the station at Odessa, where there were three tracks. A westbound freight train, consisting of a locomotive and eight or ten cars, struck the wheel-mules while they were on the north track. As a result of the collision plaintiff was injured. He testified that before turning south toward the railroad he thought he heard a whistle and stopped; that he looked back through an opening in the curtain of the wagontop, but neither heard nor saw a train; that he drove forward and looked both to the east and to the west; that there was a dense fog which obstructed his vision beyond 450 feet; that when the leaders were on the railroad he saw the engine 150 feet away, but was unable to get the team off the track in time to prevent a collision.

Defendants insist that plaintiff was guilty of gross negligence in failing to look and listen before going upon the railroad, and they argue that his testimony that he did not hear the train approaching shows he did not listen, since, had he exercised ordinary care in doing so, he would have heard the rumble of the train and a highway signal consisting of two long and two short blasts. In this connection reference is made to testimony tending to prove the following facts: At the time of the accident plaintiff wore a cap pulled down to his ears and a duck coat with the collar turned up. The road was rough and the ground

was frozen. Earlier in the morning, when 2½ miles from Odessa, he had heard a freight train 80 rods south of him. At a place a block south of the station the train which collided with plaintiff was heard by witnesses when it was more than a mile away. Two long and two short blasts of the whistle were given about 1,400 feet east of the crossing. The fireman pulled the bell cord and the engineer started the automatic bell. While defendants are correct in asserting that the record contains the proofs thus outlined, there is also candid and substantial testimony tending to show that neither the coat nor the cap worn by plaintiff covered the lobes of his ears. There is no evidence of the length of the train, which he heard at a distance of 80 rods, or of its speed. It is not shown that the situation and conditions which enabled witnesses to hear the approaching train a mile away were substantially the same at the crossing. There is no direct testimony that the bell was rung or that the whistle was blown continuously for 80 rods before the train crossed the highway. Defendants' witnesses did not state that a bell was rung continuously for 80 rods. It is not intimated that the whistle was blown continuously for that distance. The jury were not bound to find that a highway signal was given about 1,400 feet east of the crossing. Disinterested witnesses who were in such situation and condition that they would probably have heard the statutory signals, if given, testified that they did not hear them and that they did not hear a highway signal. Proof that plaintiff stopped before driving on the tracks is corroborated by the engineer. Plaintiff testified that he looked and listened, and that he did not see nor hear the train in time to prevent the collision. It may fairly be inferred from the testimony that the giving of the statutory signals would have prevented the collision. The evidence is sufficient to sustain findings that plaintiff exercised ordinary care before driving onto the track, that he was not guilty of contributory negligence, and that the failure to give the statutory signals was the proximate cause of his injury. *Wallenburg v. Missouri*

P. R. Co., 86 Neb. 642. The law applicable to the evidence may be stated as follows: Whether enginemen rung the bell or blew the whistle of a locomotive continuously for 80 rods before crossing a public highway as required by statute is a question for the jury, where witnesses who were in such position and condition that they would probably have heard the signals, if given, testified that they did not hear the whistle or the bell, and other witnesses testified that the whistle was blown and the bell rung. *United Railways & Electric Co. v. Crain*, 123 Md. 332, 10 N. C. C. A. 571, and note.

The record indicates that the rulings of the trial court are in harmony with the views here expressed, and that there is no prejudicial error in the instructions, though some of them are criticised by defendants.

One of the assignments of error is misconduct of an attorney for plaintiff in making his argument to the jury. The complaint is that he made prejudicial assertions of fact having no support in the evidence. What counsel said was not taken down by the official stenographer, but was reported by affidavit only. The statements ascribed to plaintiff's counsel were assailed by counter-affidavits as inaccurate. Counsel was admonished by the trial court to confine his remarks to the evidence, and the jury were directed to consider proofs only. The presiding judge observed what took place, and its effect upon the jury, if any. He considered the affidavits on both sides of the controversy and overruled this assignment of error in the motion for a new trial. The jury's finding in favor of plaintiff is sustained by competent evidence, and it does not appear that defendants were prejudiced by the misconduct of which they complain, or that there was an erroneous ruling in regard to it.

Complaint is also made of the amount of the recovery, but there does not seem to be a substantial ground for interfering with the award of the jury. Plaintiff was severely shocked and suffered greatly. The evidence is sufficient to sustain a finding that his left arm was per-

manently stiffened at the elbow as the result of a compound denuded fracture, and that he was otherwise injured. His earning capacity was permanently impaired.

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

ALBERT S. DAGGETT ET AL., APPELLEES, v. DRAINAGE DISTRICT, APPELLANT.

FILED NOVEMBER 17, 1916. No. 18726.

1. **Appeal:** HARMLESS ERROR: TESTIMONY OF EXPERTS. The question of the competency of an expert witness is largely within the discretion of the trial court, and, while an appellate court will correct any prejudicial error arising from abuse of that discretion, a judgment will not be reversed for a technical omission in laying the foundation for expert evidence unless it affirmatively appears that the party complaining has been substantially prejudiced thereby.
2. ———: REVIEW: OBJECTION TO EVIDENCE. A general objection to a hypothetical question as to value as "not containing proper elements on which to base an opinion" will not be regarded upon appeal unless it appears that the attention of the trial court was drawn to the omission of some substantial element of value, or that the omission was of such importance that it must have been considered.

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

Kelligar & Ferneau and *A. R. Keim,* for appellant.

C. F. Reavis, contra.

SEDGWICK, J.

The improvement designed and undertaken by the defendant contemplated the construction of artificial channels to straighten the course of the stream of water on which the plaintiff's mill was located. Proceedings were

begun in the county court of Richardson county asking for the appointment of appraisers of the damages to the plaintiff's property caused by the diversion of the waters from the site. Appraisers were appointed and made an award from which appeal was taken to the district court. In the district court the case was tried upon the proceedings in the county court, and resulted in a verdict and judgment for the plaintiff for the sum of $7,000. From that judgment the defendant has appealed.

The questions presented in the brief relate entirely to the rulings of the trial court in the admission of the evidence of expert witnesses. The evidence of E. G. Hurd, D. D. Price, and S. P. Gist is referred to. Mr. D. D. Price was examined by the plaintiff, and, after attempting to lay the foundation for his testimony, he was asked: "Taking the Salem mill with the equipment you discovered there when you made the examination in January of this year, and by that equipment I mean the electric light plant, and its service and disbursements, the dam and the waterwheel, and supposing that it was capable with the water developed by the river, and that equipment was capable of operating the flour portion of the mill, and the meal and grinder portion of the mill, and the electric light plant ten and a half months out of the year, would you know a fair market value of that plant under such circumstances, with the flow of water uninterrupted down the river in December 1912? Objected to as immaterial, irrelevant, and incompetent, and no proper foundation laid, and the witness not showing himself qualified to answer."

The principal discussion in the brief is as to the testimony of Mr. Price. It is contended that, while the witnesses were shown "to have some knowledge of water power," there is no testimony to show that the witnesses "had any knowledge of or acquaintance with electric light property or its value, or knowledge of or acquaintance with milling machinery or its value." Mr. Price testified that he was state engineer, and had been "three years this coming April," and that before he was state engineer he was

assistant state engineer for two years, and that the office of state engineer "has charge of all the water rights for irrigation and water-power purposes, and we have to look over and examine the water-power plants make a report of them, and look over their plans and estimates and see if they are all right." To the question, "How frequently have you been called upon to perform that service as state engineer?" he answered, "There is work of that kind coming up practically every day more or less." This would seem to be sufficient *prima facie* to show that his evidence would be of some value. The general objection to the witness "not showing himself qualified to answer" might have been misleading to the court. It is generally considered that the decision of the trial court as to the competency of an expert witness is largely in the discretion of the court, and, while the appellate court will correct any prejudicial error arising from any abuse of the discretion, the judgment will not be reversed for a technical omission in laying the foundation for the question unless it affirmatively appears that the parties complaining have been substantially prejudiced thereby. If the objection to this question had suggested that the value of the electrical and milling machinery were included in the valuation of the entire property, and that the witness had not sufficiently shown his knowledge of the value of those articles, further evidence might have been introduced as to the witness' qualifications in those particulars, or his answer might have been limited to the value of the property, excluding those articles. In the condition of this record, we do not feel required to reverse the judgment of the trial court upon this objection. The objection to the evidence of the other witnesses is quite similar, and not more serious. Further discussion of the question seems unnecessary. It does not appear that the amount of this judgment is extravagant under the evidence, and the verdict of the jury is well supported.

The judgment of the trial court is

AFFIRMED.

JOHN HUTTON, APPELLEE, v. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED NOVEMBER 17, 1916. No. 18835.

1. **Railroads:** INJURY TO TRESPASSERS: CONTRIBUTORY NEGLIGENCE. Where the plaintiff appears from his own testimony to have gone upon the side of the defendant's railroad track, where he lay down upon the ballast with his head about a foot from the rail, with his body alongside of the rail and next to it, and with his hands crossed over his head, and was so lying awake looking at the train as it approached from a distance some 1,500 feet away, he will not be justified in remaining in his dangerous position until the train arrived and he was struck by it and injured, although he testified that he did not hear the noise of the train, or its bell or whistle, and did not get out of the way because he did not hear them.

2. ———: ———: ———. In such case, the cause of the injury would seem to be the plaintiff's wilful negligence in lying down upon the track and neglecting to get up and go away, and for which the railroad company was in no degree liable.

3. ———: ———: ———. The plaintiff was a trespasser upon the defendant's track. When he saw the train coming, he apparently hesitated to make the exertion required to roll off the track, or to get up and walk away. In any event, he would be guilty of contributory negligence, unless it should be shown by a preponderance of the evidence, which it is not, that the defendant's engineer carelessly and negligently ran him down. *Held*, no recovery could be had. *Hooker v. Wabash R. Co.*, 99 Neb. 13.

4. **Negligence:** EVIDENCE: PRESUMPTION. There is no presumption of ordinary care, induced by the instinct of self-preservation, when there is evidence of negligence on plaintiff's part not controverted. *Johnston v. Delano*, *ante*, p. 192.

5. **Evidence** examined, and found to be insufficient to sustain the verdict.

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

B. P. Waggener and *J. A. C. Kennedy*, for appellant.

Lambert, Shotwell & Shotwell and *E. Simon, contra.*

HAMER, J.

The defendant appeals from the judgment of the district court for Douglas county. This action was brought to recover damages for an injury suffered by the plaintiff. The plaintiff alleged he was lying on defendant's right of way, and close to the west rail of defendant's railroad track, his head and hands being in close proximity to the rail; that the track was unobstructed, and that he could have been easily seen; that, while the plaintiff was lying on the defendant's railroad track, a freight train came along and ran down upon him without warning, having failed to ring the bell or sound the whistle; that the train ran over the plaintiff and severely injured him, which could have been avoided by the exercise of ordinary care; that the train ran over the right hand of the plaintiff and severely cut and bruised the same so that it was necessary to amputate it at the wrist joint; that from the impact the plaintiff's right and left arms were broken between the shoulder and elbow; that the plaintiff was under the care of a doctor for more than two months, and was totally incapacitated from doing any work for a period of about four months; that said injuries have incapacitated him from doing any kind of work except small jobs like chores, and that the plaintiff has been rendered unable to earn a livelihood for himself, and his earning capacity has been permanently impaired; that prior to the injuries received by the plaintiff he was able to earn from $25 to $30 a month as a farm hand, and was 56 years old.

The defendant admitted that the plaintiff received an injury to his right hand, but alleged he was familiar with the dangers and risks necessarily incident to being upon defendant's right of way, and near defendant's railroad track, and that the plaintiff assumed all of the risks and dangers that were incident to his being there upon defendant's right of way at the time that he was injured; that there was no occasion for plaintiff being upon defendant's right of way; that plaintiff was guilty of gross negligence;

and that the defendant railroad company was wholly without negligence.

There was a verdict and judgment against the defendant for $1,500. Plaintiff contends that the place where he was lying on the defendants railway bed was at a point about 60 feet south of a public crossing; that while he was lying there defendant's servants should have seen him and should have controlled the train which ran down upon him and injured him; that he was lying about 60 or 70 feet south of a crossing, and that the defendant did not ring the bell nor sound the whistle. That the plaintiff had a right to obstruct the defendant's use of its railway track by lying down upon it or against it need not be conceded.

It is first objected by the defendant that the verdict is not sustained by sufficient evidence.

The plaintiff testified to his name, age, and occupation, and to living wherever his hat was off; that he was going from Nebraska City to Auburn; that it was a sunshiny day; that he got on the railroad track at Paul, 6 or 7 miles from Nebraska City; that he found the wagon road was muddy; that he was below Paul and about a mile above Julian; that this was about 60 feet south of the first road crossing north of Julian; that he was tired and lay down to rest on the west side of the track west of the west rail; that his feet were to the northwest and his head about a foot from the track with his hands crossed over his head; that he was lying on the ballast; that he lay down where he did because the rest of the places were wet and muddy; that when he got down to the crossing he lay down about 60 feet south of the crossing; that about 60 feet north of the crossing the track begins to curve; that he was lying next to the rail and on the inside or west side of the curve; that from the crossing he could see up the track for half a mile; that there was a bank on the east side of the track where he was lying, and the track was built up; that there was no bell or whistle; that he did not hear any noise of the train coming; that the cowcatcher struck his right hand and shoulders and broke his hand; that he lost his

little finger and two other fingers next to the forefinger; that the engineer hollered at him; that when he raised up the engine struck him again and knocked him off the side of the track onto the dump; that the tail end of the train was about a quarter of a mile down the track when it stopped; that the train was going about 35 or 40 miles an hour; that they stopped and backed up and took the plaintiff to Julian to a doctor; that it was between 2 and 3 o'clock in the afternoon when he was struck, and was sunshiny; that they took him to Auburn that night to Anderson's hotel, where they got a doctor, who took his hand off at the wrist; that his shoulders and arms were both broken; that the fingers of his left hand are stiff, and he can only raise his arm up a short distance; that he stayed about a week and a half at Auburn, and then went to Nebraska City, where he stayed more than a month; that he was then taken to the poorhouse; that before he was injured he had the full use of both arms and was able to work right along, and got $2 a day in the rock quarry, and $35 a month on the farm; that he has not yet done a day's work since he was injured; that before he was injured his fingers were in good condition and his health was all right; that now both his arms pain him and his hand hurts him very much; that he went to the ground with Mr. Simon and Mr. Shotwell, and took the same position on the railroad track that he had when he was injured; that when he was struck by the train he fell over on the side of the road on the dump; that from where he got hurt he could see up the track clear above the whistling post 1,500 feet; that from the whistling post he could see up the track for a mile; that from where he was lying he could see up beyond the whistling post; that there were no trees or anything else close to the track to obscure the view; that he was dressed at that time as he was when he testified, except that he had a black coat on then; that the ballast was white rock; that it was an extra freight, and he could not tell how many cars; that he did not hear any sound of any character before the train

struck him; that there was a wagon road crossing the track near where he was lying.

On cross-examination he testified that he was awake; that his feet were to the northwest and his head to the southeast; that the train came from the north; that he could see it for 1,500 feet; that the reason he did not get up out of the way was that he did not hear it; that they did not make any whistling or noise, and there was no bell; that he did not hear the train or the bell or whistle; that there was nothing to obstruct his view for 1,500 feet to the north; that in the direction from which the train came the engineer and fireman could not help seeing him; that he could see the engine for 1,500 feet, and that he was awake. The fact that the plaintiff testified that he saw the train coming when it was 1,500 feet away, and that he remained lying along side of the rail until the engine reached him makes this a case for careful consideration.

He further testified that when he went onto the track at Paul he had not bought a ticket, and did not say anything to the agent, and the agent did not say anything to him; that he went onto the right of way without the permission of the railroad company, although he knew that the trains ran there during the daytime; that he saw the curve of the track start about 60 or 70 feet north of the wagon road; that the cattle guards were between him and the engine coming from the north; that the ground slopes from the end of the ties down toward the ditch; that exhibit 1 is a fairly correct picture of the cattle guards that were north of him when he got hurt; that he was south from the south cattle guard; that when the engine came along and hit him it knocked him a little way, and then came along and hit him again and rolled him over on the side of the dump; that when it first hit him it knocked him about 8 or 9 feet; that he was lying about 60 feet south of the south cattle guard; that the road was muddy; that he could see after it knocked him off that the train went between a quarter and half a mile before

it stopped; that it was a bright, clear day; that he had a cane or a stick, and it was resting on the west rail, and his head and hands were on the stick; that he intended to get out of the way *before the train came.*

Miss Vera L. Wilson testified that she went out with Mr. Shotwell, Mr. Simon, Mr. Hutton, and Mr. Taylor, her brother-in-law; she went to examine the ground and the track; that it was a clear, sunshiny day about 2 o'clock in the afternoon; that the general direction of the road at that point was north and south; that there was a little bend in the track north of the crossing; that Mr. Simon, Mr. Shotwell, Mr. Taylor, and the witness went up as far north as the whistling post; that when they were at the whistling post Mr. Hutton was lying in the position he says he was in when the train hit him; that he was just south of the crossing on the west side of the track, which would be on the inside of the curve; that he was in that position when the witness and the others were up at the whistling post; that when she was up there she looked down the track to where Mr. Hutton was then lying; that she could see an object on the track, but could not say whether it was a man or not; that when she got to the crossing she looked up and could see clear up to a point which she imagined was over a mile beyond the whistling post; that she stood where Mr. Hutton was lying and could see clear to the curve, beyond the whistling post; that there was a curve north of the whistling post a mile or a mile and a half; that there was a curve to the south of the whistling post; that if she had been lying where Mr. Hutton said he was lying, the wings of the cattle guard would be between her and the engine; that Hutton was lying on the track south of the cattle guards right close to the track and next to the ties; that the railroad was ballasted with gravel or cinders.

Dr. S. J. Grudupe testified that he was a practicing physician living at Julian, Nebraska; that he was called to the depot about a year ago and saw the plaintiff; that

he looked the man over and saw no effects of alcohol; that he seemed shocked and dazed.

On being recalled the plaintiff testified that the night before he was injured he stayed at the depot at Nebraska City, and did not have anything to drink on the day of the injury.

Edward Simon testified that he lived in Omaha and was a practicing lawyer; that, after the accident, Mr. Shotwell, Miss Wilson, Mr. Taylor, and Mr. Hutton went with the witness to investigate the place where Hutton was hurt; that they went to the road crossing near where Hutton was hurt, and got there about 2:30 p. m.; that they had Mr. Hutton take the position he was in at the time he was hurt; that from the whistling post the witness looked down to the place where Hutton was then lying; that he could see an object lying there, but could not distinguish what it was; that he then measured the distance from the whistling post to the crossing by stepping it, and found it to be about 500 paces of 3 feet each; that the general direction was north and south; that from where Hutton lay you could see the track for about a mile; that there was another crossing about half a mile from the crossing where they stood; that there was nothing to obstruct the view from the whistling post; that Hutton was on the inside of the curve, which was on the right going south; that the photograph, exhibit 1, truly represents the cattle guards. The plaintiff offered in evidence exhibit 1, which shows the track at the cattle guard. Simon further testified that the middle of the curve would be about half way between the whistling post and the cross road; that when the witness made his observation he knew that Mr. Hutton was lying on the track.

When the witness had finished introducing his evidence counsel for the defendant moved the court for a directed verdict for the defendant. This motion was overruled. The grounds of the motion were that the evidence failed to show any negligence on the part of the defendant; that the plaintiff was a trespasser on the defendant's right

of way; that the evidence failed to show any knowledge on the part of the defendant company of the presence of the plaintiff on its right of way; that the evidence showed the plaintiff was fully familiar with the fact that he was lying down on the right of way of defendant company's railway, and that if he did not remove himself from the position he would be hurt; that the evidence showed that the plaintiff assumed the risk of being on the defendant company's right of way and in close proximity to defendant company's railroad track.

On behalf of the defendant, C. M. Hysell testified that he was the engineer operating the train; that he was about 200 feet from Hutton when he first saw him; that the instant he saw him he put on the emergency to get the air on the emergency brake and make a good stop; that the train was about 1,200 to 1,300 feet in making the stop; that there were 38 freight cars, an engine, and a caboose on the train; that the tonnage back of the engine was 10,000 tons; that the train was running south on a down grade at about 30 miles an hour; that the witness was sitting on his seat in the engine in the ordinary lookout to see that there was nothing on the track, any obstruction or anything; that Hutton was lying right next to the cattle guard on the right-hand side of the track; that he was on the inside or west side of the curve and close to the cattle guard; that his head was toward the cattle guard, his shoulders upon the ties, and his feet hanging down over the ballast; that there was one cattle guard south of the roadway and one on the east side; that there are crossbars on each side of the tracks in connection with the cattle guards; that outside of the cattle guards there is a fence and post and the wing of the fences; that exhibit 1 is a fair reproduction of the curve of the track; that from the whistling post to the crossing is about 1,300 feet; that the whistling posts along the Missouri Pacific Railway are located a quarter of a mile from the crossing, which would be 1,320 feet.

On cross-examination this witness testified that the crossing in question is about one mile north of Julian; that there is another crossing a half a mile north of that; that whistle signals were given as the train approached the crossing; that there were two long and two short whistles; that they were given at the whistling post a quarter of a mile north of the roadway; that the whistle was the only signal given; that the emergency air brake was working, and the witness slapped it on immediately; that the train was then about 200 feet north of the road; that the day was cloudy; that the eyesight of the witness was good at that time; that the distance he can see ahead depends upon where he is; that his position was on the right-hand side of the engine; that this was 100-class engine, engine 30; that from where the witness sat in the engine to the ground was about 8 feet; that immediately in front of the witness was an opening so that he could look straight ahead, and that there was nothing to obstruct his view; that he could see the track from that crossing down to the other crossing; that he was looking down the track, but did not see Hutton; that he could stop the train in about 1,200 to 1,300 feet.

On redirect examination the witness testified that the train could not have been stopped on that grade going at 30 miles an hour with 10,000 tons back of the engine in a distance of 800 feet; that the cattle guard interposed between the vision of the witness and where Hutton was lying, and that he could not have seen him earlier than he did; that this was because there were two cattle guards, one on each side of the roadway; that Hutton was lying by the south cattle guard, and to the south of the roadway; that the north cattle guard prevented the witness from seeing him until he got within 200 feet of him.

F. B. Dejarnette testified that he was the conductor in charge of the train that struck Hutton; that he went back to where Hutton was lying; that Hutton was then about 10 or 15 feet south of the line of fence, and about 10 or 15 feet from the main line of the track, lying south

and west from the cattle guards; that the tonnage of the train was 10,000 tons; that the engine operated the very best it could operate.

C. H. Bresler testified on behalf of the defendant that he was one of the brakemen on the train that hit Mr. Hutton; that he noticed the train coming to a quick stop; that the air and brakes worked well and stopped the train immediately; that the witness did not think that the train could be stopped within less than about 800 feet.

W. A. Loomis testified that he was the fireman of the train; that he observed the air brake and it worked well; that he did not think that a train with 10,000 tons back of the engine on that grade could have been stopped in a shorter space than approximately 1,300 feet.

C. M. Hysell was recalled for further cross-examination, and testified that he could not see the cattle guards at the crossing where Hutton was injured.

At the conclusion of the evidence the defendant renewed its motion for a directed verdict. The motion was overruled.

The only duty of a railroad company to a trespasser who enters upon its right of way without its knowledge or consent, not within a highway crossing, and uses its road bed and track as a sleeping place, is not wantonly, wilfully, or carelessly and negligently to injure him.

In *Hooker v. Wabash R. Co.*, 99 Neb. 13, it was said in the body of the opinion: "The rule of law is that, where a man walking upon the track is a trespasser, and is negligent in failing to keep a lookout for approaching trains up to the time of the accident, and there is nothing to prevent him from getting out of the place of danger by stepping off of the railroad track, the defendant company is not liable, unless its engineer is guilty of a want of reasonable care under all the circumstances." We think this view is sustained by *Shults v. Chicago, B. & Q. R. Co.*, 83 Neb. 272.

In *Langenfeld v. Union P. R. Co.*, 85 Neb. 527, where the plaintiff, who was walking in the yard of the defendant

company, and was a helper in a necessary part of its business, and therefore was rightfully walking in the path between two main tracks, met a train coming on one of the tracks, and, with a view of avoiding danger, stepped over to the other track on which there was a standing train of box cars, and put his shoulder in between the ends of two of the cars, and immediately the standing train was moved by a switch engine, and the ends of the cars, coming together because the bumpers were gone and the cars were fastened together with chains, pinched plaintiff's shoulder and injured the same, it was declared by this court that there was no liability of the defendant because the plaintiff had space in which he could have continued to walk (5 feet), and he could have crossed the track on which the train was coming in, and ahead of the train, and could so have avoided danger, and the defendant company was under no obligation to keep the bumpers on the box cars in anticipation that the plaintiff would attempt to use the cars as he did. This court then laid down the doctrine, as stated in the syllabus: "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure." It was also said: "When plaintiff stepped out of the beaten way between the cars, the only duty owing to him by the defendant was to exercise proper and reasonable care not to injure him, as soon as it acquired knowledge of his dangerous position." The defendant had no knowledge of his danger and no reason to anticipate that a stranger to the operation of the train would, while the cars were in its private yards, place himself in such a position.

This view is in entire harmony with the principle laid down in *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645: "A railroad company does not discharge its whole duty by refraining from wantonly injuring a trespasser upon its tracks after observing his position. It is bound

in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way." The opinion is sustained by *Chicago, B. & Q. R. Co. v. Wilgus,* 40 Neb. 660, and other cases cited.

The engineer of the train testified that the train ran at the rate of 30 miles an hour. We are unable to say that the evidence shows that the speed of the train was excessive. The engineer fixes his distance from the plaintiff at the time he first saw him at about 200 feet. No one disputes the testimony of the engineer concerning the distance that the train was from the plaintiff when the engineer first saw him. The moment the engineer saw the plaintiff he applied the emergency brakes. He did what he could to stop the train within the shortest period of time and in the least space. The plaintiff's witnesses, when they were as far away as the whistling post, 500 paces, could not distinguish that Hutton, then lying at the place where he claims to have been injured, was a human being. As they went from the point toward the crossing they had to proceed to a point about 800 feet from Mr. Hutton, to be able to make out that the object in sight was a human being, although then knowing that Hutton was then lying there. If witnesses on the ground were unable to ascertain that Hutton then lying on the ground was really a human being, there could have been no duty upon the part of the engineer to perform an impossible task. The train that was coming up to Hutton was a long freight train. It had lots of rumble and roar. It made a noise that could be heard for a long distance, but Hutton was lying still on the ground. According to his conduct, he was unwilling to be disturbed. There does not appear to be any virtue which in any way tends to lead to the conclusion that greater care upon the part of the engineer would have saved the plaintiff from injury. We are unable to conceive of a man with ordinary intelligence and ordinary sobriety lying down and inviting the train to

come and run over him. No one could have acted in a more lawless manner than he.

There is no evidence that the engineer saw the plaintiff in time to have stopped the train before the plaintiff was reached. The jurors found a verdict for the plaintiff. It was clearly within their right to do this if there had been any evidence upon which to base their verdict, but all the evidence tends to show that the plaintiff was so sheltered behind the wings of the cattle guards as to be invisible to the engineer until he was within 200 feet of him. He was therefore justifiable in running the train as he did. The plaintiff was not helpless. He was in duty bound to look for any train that might come along. It was his duty to look so that he might protect himself from the train that was coming. He testified that he did look and that he saw the train. The engineer testified that he was keeping a lookout, but that he did not see the plaintiff until he was within 200 feet of him, and that that was too close to enable him to stop his train. To let the plaintiff recover is to let him do so in spite of his negligence and in spite of his refusal and neglect to get up or to roll over out of the way.

The duties of the plaintiff and the engineer were, to a certain extent, reciprocal, but to let the verdict stand puts all the burden upon the defendant and requires the engineer to accomplish an impossible feat. He could not see through the wings of the cattle guards, and there is no good reason why he should have been expected to do so.

On cross-examination the plaintiff admitted that he was lying on the track when he saw the train coming at a distance of about 1,500 feet. Apparently he hesitated to make the exertion required to roll off the track, or to get up and walk away, as he might readily have done. Unless the defendant's engineer carelessly ran the plaintiff down, of which there is no evidence, no recovery should be had. It cannot be said that the defendant's engineer had an opportunity for actual knowledge concerning the position of the plaintiff and his condition. The case is one where

the plaintiff enters upon the defendant's close and lies down upon its track because it suits him to do so, and then he sees the train coming and refuses to get up or to roll out of the way, and yet insists that the railroad company shall bear the burden of his self-imposed injury.

We refer to the following additional authorities: *Chesley v. Rocheford & Gould,* 4 Neb. (Unof.) 768; *Burtis v. New York C. & H. R. R. Co.,* 143 N. Y. Supp. 145; *Newell v. Detroit, G. H. & M. R. Co.,* 187 Mich. 697.

In *Krummack v. Missouri P. R. Co.,* 98 Neb. 773, this court held: "Where the evidence shows that the switching-yards of a railway are close to a large public school building and playground, that young children have long been in the habit of playing on or near the cars and tracks, ordinary care demands that in switching cars due regard should be paid to these conditions, and a failure to inclose the tracks and a neglect on the part of those engaged in switching to observe whether children are on the cars or tracks when a train is being backed in, from the lack of which precautions a trespassing child is injured, may constitute actionable negligence." It will be noted that this is one of those cases where the supposed trespasser has not arrived at years of discretion. Besides, in this case the injured man was behind the wing of the cattle guard, and therefore could not have been seen. The doctrine laid down in this case cannot well be held to apply to the instant case, because young children are not trespassers of mature age, and they should not be held responsible during their immaturity and lack of judgment.

The motion of the defendant for a directed verdict should have been sustained, because the evidence is insufficient to sustain the plaintiff's case. The judgment of the district court is reversed and the case remanded.

REVERSED.

SEDGWICK, J., not sitting.

ROSE, J. I concur in the conclusion.

LETTON, J. The Plaintiff, a man of full age and apparently of sound mind, was a trespasser upon the right of way. He lay down to rest, close to the railroad track, was struck by a train and severely injured. He testifies that he did not see nor hear the train coming, but admits he may have been in a doze when he was struck. The train was running at the usual and ordinary rate of speed.

Under the admitted facts, he was guilty of the grossest negligence. The burden is upon him to establish that the engineer in the exercise of his duty to keep a lookout on the track could have seen him in time to avoid striking him. Unless this has been proved, there is no cause of action. The evidence does not establish this fact, and there can be no recovery. I concur in the conclusion.

STATE BANK OF OMAHA ET AL., APPELLEES, v. WILLIAM L. HUFFMAN, APPELLANT.

FILED NOVEMBER 17, 1916. No. 18895.

1. **Evidence** examined, and found to support the findings and judgment of the district court.
2. **Bills and Notes**: ACTION: DEFENSES. A controversy between two joint indorsers of a note as to whether one of them is an accommodation indorser for the benefit of the other may not be interposed as a defense as to the holder and owner of the note, who will be entitled to a judgment against both indorsers in an action against them.
3. **Appeal**: CONFLICTING EVIDENCE. Where, in an action brought by the State Bank of Omaha against Walter Moise and William L. Huffman, who signed as indorsers a note given by the Omaha Motor Car Company to said bank for the sum of $5,000, there was a contention between Moise and Huffman as to whether Moise was primarily liable to the plaintiff on the note set forth in the petition, and there was conflicting evidence tending to establish the claim of each defendant touching the matter in controversy, the finding of the court in favor of one of the defendants and against the other will not be disturbed.

4. ———: ———. Where, in an action at law, the case is submitted to the trial court upon conflicting evidence concerning whether one of two indorsers indorsed the note as an accommodation to the other indorser, and there is sufficient evidence to sustain the finding of the court in favor of one of the indorsers and against the other, this court will not reverse the judgment, even if there was sufficient evidence to have sustained a finding in favor of the opposite party. *Waters v. Hardt*, 87 Neb. 636.

5. ———: TRIAL TO COURT: FINDINGS. In an action at law tried to the judge of the district court, his findings and judgment are entitled to the same weight and consideration as is the verdict of a jury. *National Bank v. Cooper*, 86 Neb. 792.

6. **Bills and Notes:** ACCOMMODATION MAKER. "An accommodation maker is one who executes commercial paper without consideration in order to enable the payee, or holder, to thereby obtain credit." *Peoria Mfg. Co. v. Huff*, 45 Neb. 7.

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

Byron G. Burbank, for appellant.

Brown, Baxter & Van Dusen, W. J. Connell and *Ellery H. Westerfield, contra.*

HAMER, J.

This is an action by the State Bank of Omaha against Walter Moise and William L. Huffman. The petition alleged that on the 6th day of June, 1913, the Omaha Motor Car Company, a corporation under the laws of Nebraska, for a valuable consideration made and delivered to the plaintiff, the State Bank of Omaha, its promissory note as follows:

"Omaha, June 6, 1913. No. 572. Due Dec. 6, $5,000. Six months after date we or either of us promise to pay to the State Bank of Omaha or order five thousand and no/100 dollars, value received, at the State Bank of Omaha, Nebr., with interest at the rate of 6 per cent. per annum from maturity until due, payable annually. If this note is not paid at maturity, principal and interest shall draw

interest at the rate of 10 per cent. per annum from maturity until paid. Omaha Motor Car Co.,
"By W. L. Huffman, Sec. and Treas."

The petition further set forth that the names W. L. Huffman and Walter Moise were indorsed on the back of said note; that prior to the delivery of said note, and as a part of the consideration for the loan of $5,000 as alleged therein, the defendants, W. L. Huffman and Walter Moise, indorsed their names upon the said note as joint makers; that said note was duly presented for payment at maturity, but was not paid, and thereafter was duly protested for nonpayment, and notice was duly served as provided by law upon said W. L. Huffman and Walter Moise, informing them of the dishonor of the said note, and that they would be held for payment of the same; that the costs of said protest and notice was the sum of $2.59; that no part of the said note or interest or protest fees has been paid, and that there is due and owing from the defendants to the plaintiff the sum of $5,002.59, with interest thereon at the rate of 6 per cent. per annum from the 6th day of December, 1913. The plaintiff prays for judgment against the defendants, W. L. Huffman and Walter Moise, in the sum stated, with interest and for the costs. The Omaha Motor Car Company, whose name appears on the note as the maker, was not sued.

By answer and cross-petition, William L. Huffman submitted to the court a controversy with his codefendant and comaker of the note, Walter Moise, as to which one of the two was primarily liable on the note. It is contended by the bank that it had no notice of a controversy between Huffman and Moise. A jury was waived, and the district court held both defendants, Huffman and Moise, to be primarily and severally liable on the note and entered judgment against them. It is contended by the bank that neither defendant claimed at the trial that the bank had agreed to look to either defendant more than to the other for the payment of the note. It is claimed on behalf of the bank that it was entitled to a joint and several judg-

ment against both defendants, and that, if there exists a valid contract between Moise and Huffman wherein only one was security for the other on the note, then that contract is enforceable in a separate suit brought for that purpose, but that it cannot be enforced in this suit by having a judgment entered other than that which a joint contract between them and the bank would justify. This court is asked to reach a different conclusion from that reached in the trial court.

Huffman contends, as appellant, that the judgment is not sustained by the evidence, and that it is against the clear weight of the evidence, and that it should have been in favor of the appellant, William L. Huffman, and against Walter Moise, the appellee. It is contended by Huffman that the judgment should have found Walter Moise primarily liable to the plaintiff on the note set forth in the petition, and should have directed execution to issue first against him before any liability could be enforced against appellant. It was claimed that the court erred in not finding that the appellant was an accommodation indorser on the note set forth in the petition, and at the request of Walter Moise, the appellee.

The defendant Huffman filed a long answer and cross-petition in which he set up that the defendant Walter Moise entered into a contract with D. W. Henry, himself, W. A. Gordon, and the Omaha Motor Car Company to loan the company $15,000, the same to be secured by a bill of sale covering certain furniture and fixtures owned by the corporation, and all material, machinery, fixtures, and other personal property owned by said company, including two automobiles. There was a recital in the agreement that all of the parties were stockholders in the Omaha Motor Car Company, which was engaged in the manufacture of automobiles; that pursuant to the agreement a certain bill of sale was executed by the Motor Car Company, and delivered to the defendant Walter Moise, and which was for his security; that on June 7, 1912, Moise took a note signed by the Motor Car Company for the sum

of $5,000, due December 6, 1912, to the Merchants National Bank of Omaha, and indorsed the same; that said Moise caused $5,000 to be paid by the Merchants National Bank to the Omaha Motor Car Company; that the $5,000 note became due, and that to obtain money to pay the same said Walter Moise obtained the note of the said Omaha Motor Car Company for $7,000, and indorsed the same; that the defendant Huffman also indorsed the same; that the sum of $7,000 was obtained from the State Bank of Omaha, and that there was paid to the said State Bank of Omaha the sum of $2,000 of the said $7,000; that said Moise agreed to pay said note when it became due, but failed to do so, and that $5,000 thereof was renewed by a new note, while $2,000 was paid on the said sum of $7,000; that said notes made by the Omaha Motor Car Company were placed in the hands of the said Walter Moise to enable him to carry out his agreement of furnishing $15,000 for the use of the company; that the defendant Huffman indorsed said notes for the purpose of enabling the said Walter Moise to obtain said money, and that what Huffman did was done for the accommodation of Moise and without other consideration; that Moise was to pay the notes and save the defendant Huffman from all liability. Judgment was asked by Huffman to the effect that as between the defendant Huffman and Walter Moise the court should find that Moise was first liable for the payment of said note and interest, and that execution should first issue upon said judgment against said Moise, and that said judgment should be collected from him, the said Moise.

Moise answered the cross-petition of Huffman setting forth that the bill of sale was made to protect him, said Moise, from loss or damage by reason of advances of money to said Omaha Motor Car Company, and to protect him, said Moise, from any liability which he might incur by signing or indorsing notes on behalf of the said Motor Car Company; that said Moise admitted that the note signed by the Omaha Motor Car Company for the sum of $5,000, due Dec. 6, 1912, to the Merchants National Bank of

Omaha was indorsed by him, said Moise and also by D. W. Henry and the defendant W. L. Huffman, but there was a denial that Huffman signed for the accommodation of the defendant Moise, or to enable the defendant Moise to perform his alleged agreement of obtaining the said $15,000; and it was alleged that the said Huffman signed the same by reason of his direct interest in the said Omaha Motor Car Company, and to enable it to continue business; that the said Omaha Motor Car Company made another note for $7,000, which was indorsed by all of the said parties the same as the said note for $5,000 and for the same purpose, and that $5,000 out of the said $7,000 was used to pay the $5,000 note due at the Merchants National Bank, and that the additional $2,000 of the $7,000 note was paid to the said Omaha Motor Car Company to enable said company to meet certain alleged expenditures of the company and to enable it to continue in business; and Moise denied that he agreed to pay said note when it became due; that there was a denial that the note was indorsed by the defendant Huffman at the request of the defendant Moise, or for his benefit. It was also alleged that when the $7,000 note became due the sum of $2,000 was paid thereon, one-half by the defendant Moise out of his own money, and one-half by the defendant Huffman out of his own money, and that the remaining sum of $5,000 was renewed by a new note; that each of the defendants were bound and required to pay one-half of the said $5,000 note.

The district court found for the bank as against the defendants Huffman and Moise, but found for Moise as between Moise and Huffman.

"Where, in an action at law, the cause is submitted to the trial court upon conflicting evidence, and there is sufficient to sustain the finding of the court hearing the cause, this court will not reverse the judgment, even if there was sufficient evidence to have sustained a finding in favor of the opposite party." *Waters v. Hardt,* 87 Neb. 636.

"A finding of fact made by a jury upon conflicting evidence will not be disturbed unless manifestly wrong." *Stevenson v. Omaha Transfer Co.*, 87 Neb. 794.

"A fact determined by a jury upon conflicting evidence is conclusive on appeal, unless the finding is manifestly wrong." *First Nat. Bank v. Golder*, 89 Neb. 377. In the body of the opinion it was said: "The judgment is also assailed as erroneous because the evidence, from the standpoint of defendant, establishes the fact that he signed the note for the accommodation of plaintiff at the request of plaintiff's cashier, relying upon the latter's statement that Golder, the maker, was solvent, and upon an agreement that he assumed no liability. Defendant adduced testimony tending to establish this defense, but the material proof in support of it is directly contradicted by plaintiff's cashier."

"A verdict upon conflicting evidence will not be set aside, where there is sufficient evidence to support it." *Wenninger v. Lincoln Traction Co.*, 84 Neb. 385. In the body of the opinion it is said: "Had the jury found a verdict in favor of the defendant, the evidence would have sustained it, but we cannot grant a new trial for that reason, since there is sufficient evidence, if believed, to support this verdict."

"This court will not weigh conflicting evidence." *Fischer v. Kram*, 63 Neb. 241. In the body of the opinion it is said: "The evidence in the record is quite conflicting. That adduced by the defendant fully sustains his contention, while the evidence on behalf of plaintiff is ample to sustain the finding of the jury."

"An accommodation maker is one who executes commercial paper without consideration in order to enable the payee, or holder, to thereby obtain credit." *Peoria Mfg. Co. v. Huff*, 45 Neb. 7. In the body of the opinion it is said: "The facts, as testified to by the defendant, bring the transaction clearly within the foregoing definition, and it was the province of the jury to determine the question of his credibility as a witness, and their finding,

bearing as it does the approval of the trial judge, should not be disturbed in this proceeding."

"In an action at law tried to the judge of the district court, his findings and judgment are entitled to the same weight and consideration as is the verdict of a jury." *National Bank v. Cooper,* 86 Neb. 792.

In a law case, where the evidence is conflicting, the judgment will not be set aside by a reviewing court unless it is clearly wrong.

While we are perhaps not bound to follow the findings and judgment of the district court, we have not been shown any good reason for disregarding the same. The trial judge appears to have been careful in his rulings and in his consideration of the case. There is plenty of evidence to sustain his judgment.

The judgment of the district court is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

WILLIAM HORN, APPELLANT, v. LYSLE I. ABBOTT, APPELLEE.

FILED NOVEMBER 17, 1916. No. 18952.

1. **Evidence** examined, and found to sustain the finding and judgment of the district court as to the appellee, Lysle I. Abbott.

2. **Corporations:** SALE OF BONDS: FRAUD. Where a suit in equity was brought against certain defendants in the district court for Douglas county alleging misrepresentations as to the value of certain bonds in a corporation, and the evidence showed that these defendants were all stockholders, directors and officers of the corporation, and that the representations were made to induce the purchase by the plaintiff of said bonds of the corporation owned by one of these defendants, and that the sale was made by the owner of said bonds and the bonds delivered, but there was no evidence that the appellee had made any representations to the plaintiff concerning the

value of the property of the corporation or the value of the bonds, and he had no interest in the sale, he will not be held liable, although he had been elected president of the company; there being no showing that he was in any way derelict in his duty.

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

Carroll J. Lord, for appellant.

I. J. Dunn and *Ray J. Abbott, contra.*

HAMER, J.

Appeal from the judgment of the district court for Douglas county against the plaintiff, William Horn, and in favor of Lysle I. Abbott, in a suit in equity in which said William Horn was plaintiff and Lysle I. Abbott, Fritz Jaeggi, Arnold Koenig and the Niobrara Investment Company were defendants. There was a judgment in favor of the plaintiff, William Horn, and against Fritz Jaeggi, Arnold Koenig and the Niobrara Investment Company.

The defendants, Jaeggi, Koenig and the Niobrara Investment Company did not appeal. The plaintiff in his petition alleged that Lysle I. Abbott, Fritz Jaeggi and Arnold Koenig were the directors and officers of the Niobrara Investment Company, of which Lysle I. Abbott was then alleged to be president, and Arnold Koenig vice-president, Fritz Jaeggi secretary and treasurer. It was also alleged in said petition that the said Niobrara Investment Company was a corporation; that on the 20th day of January, 1911, the said plaintiff, William Horn, was induced to purchase five $1,000 first mortgage gold coupon bonds of the Niobrara Investment Company from the said corporation; that the said plaintiff relied upon the general representation of the officers and directors of said corporation, and the printed statements contained in a prospectus issued and circulated by said corporation, and which it is contended undertook to state that the said bonds were amply secured by a first mortgage upon several thousand acres of the finest Nebraska farm land

owned by said company at that time; that, as a matter of fact, the corporation did not own any farm land in the manner represented by the directors of said corporation and as contained in its printed prospectus; that, as a consideration for the purchase of said bonds, said plaintiff paid to the corporation aforesaid in cash $1,000, and entered into a written contract to convey to said corporation by a good and sufficient deed a quarter section of land situated in Kimball county, Nebraska, and then belonging to the plaintiff; and that the said bonds, when said contract was entered into and at the time of bringing said suit, were without value of any kind. The plaintiff prayed that the entire contract between himself and the Niobrara Investment Company should be rescinded; that the contract for the transfer of the land in Kimball county to the corporation be set aside and held to be null and void; and that the plaintiff recover judgment against each of the defendants for the sum of $1,000, paid to said corporation, together with interest thereon from the date of payment.

The defendants Lysle I. Abbott, Fritz Jaeggi, Arnold Koenig and the Niobrara Investment Company each filed separate answers, admitting the existence of said corporation, the names of those composing its board of directors, and the officers of said corporation, and that a contract was entered into between the plaintiff, William Horn, and the corporation, the Niobrara Investment Company. There was an admission of the issuance of a prospectus by the said Niobrara Investment Company. The answer of the defendants denied that the plaintiff, in the purchase of the bonds, relied upon the statements contained in the prospectus, and each defendant separately alleged that the plaintiff made the purchase on his own independent inquiry and judgment.

The plaintiff filed a reply to each of these answers, in which he alleged that he purchased the bonds relying solely upon the statement contained in the prospectus issued by the corporation, the Niobrara Investment Company, and

upon the representations made by the directors and officers of such corporation as to the assets of the said company.

On the trial, the court entered up a decree finding that the plaintiff was entitled generally to relief as prayed for in his petition against the defendants Arnold Koenig, Fritz Jaeggi and the Niobrara Investment Company, but that the said plaintiff was not entitled to any relief as against the defendant Lysle I. Abbott; that the entire contract be rescinded and held for naught; and that the costs be taxed against the defendants Fritz Jaeggi, Arnold Koenig and the Niobrara Investment Company.

Counsel for the defendant, Mr. I. J. Dunn, makes the contention that the suit is brought in equity to rescind a contract made between the plaintiff and the defendants other than Abbott. Abbott testified that he drew the articles of incorporation as a lawyer; that up to that time he knew nothing of the Niobrara Investment Company; that Koenig and Jaeggi came to his office together to have him draw the articles of incorporation, and that he knew nothing of the proposed corporation; that he had been Koenig's attorney for a long time; that he (Abbott) took the legal steps necessary to organize the corporation; that Koenig said that he had never paid Abbott anything for his services and wanted to pay him in stock of the company. Abbott testified that he had given the corporation no consideration, except what was necessary to draw the papers, and that he knew nothing about the corporation. He appears to have known nothing about the proposed corporation, except what Koenig and Jaeggi told him. He said that he had not had anything to do with preparing the facts and statements that went into the prospectus, and had no information, except as he had received it from Koenig and Jaeggi. Abbott testified that he did not have anything to say to Mr. Horn, the plaintiff, and had no personal acquaintance with him. He did not know Mr. Horn, and did not know that he had any intention of investing in the company. This does not seem to be denied. Abbott testified that he had not attended to the

printing of the prospectus, and that Mr. Jaeggi attended to it and furnished the money. Jaeggi knew that the company held contracts for the purchase of the land. Horn testified that he met Mr. Koenig at the La Salle hotel, Chicago, and that Koenig told him that everything was going fine, and said that if he (Horn) knew anybody that would like to invest in the Niobrara Investment Company he would like to meet him; that thereupon he and Koenig went to see the president of the Standard Underground Cable Company, a fifty-million dollar concern, and that he introduced Koenig to the president of the company; that the gentlemen then talked about their work, and that Koenig then talked of the big feature of the Niobrara Investment Company, that they owned the land, that they had it under contract, that they would develop water power for electricity; that Mr. Koenig also talked to a Mr. Klein along the same line; that Mr. Klein said to him (Horn) that the way Koenig talked Horn could not make a mistake in investing his money in the company; that Koenig then said to Klein that the company owned the land under contract; that the increase in value over the price paid should go into a power proposition and into the banking business, hotels, and such assets as might accrue out of the surplus of the land holdings. Horn appears to have testified that he introduced a Mr. Heidbrink to Mr. Jaeggi, and that Jaeggi then said that he would attend to the business. A letter dictated by Mr. Jaeggi and signed by Mr. Horn with the name of the Niobrara Investment Company and addressed to Mr. Heidbrink at Stayes, South Dakota, was introduced in evidence. Exhibit 23, offered by plaintiff, Horn. Heidbrink was the last person they tried to interest in the company. Exhibit 23 shows that Horn was no infant, and that he had a seductive way about him that might have won a most wary capitalist. The charm of the letter is its apparent clearness of vision and knowledge of the conditions of the venture obtained at first hands. Horn seems to have known all about the certainty of the enterprise, and therefore

did not need to obtain information from Abbott, or to rely upon any sort of assurance that Abbott's name as president might carry with it. He invites Heidbrink to "look into matters thoroughly." He wants Heidbrink to "take part in the development of this country"—only wants Heidbrink "to join us in this great undertaking with the small amount of $20,000." He is also willing that, in addition, Heidbrink shall "take interest in the national bank which we are going to build in Niobrara." He predicts that he and Heidbrink in two years "will be members of the biggest concerns in the West," and winds up by saying that "our undertaking has even created interest in the commercial clubs of Nebraska, and we are sure of their support." Horn shows up as a promoter. Horn swore in an affidavit in the case of Irene Horn against himself that he did not have $1,000 in the bank; "that the only bank he does business with is the City National Bank, Omaha, in which he has not to exceed the sum of $43; and that affiant has no cash or other property, real or personal, or other income, except as herein stated." Afterwards in this case he testified that he swore to this affidavit without knowing what was in it; that he had not read it or any part of it. On cross-examination, as we understand it, he admitted that he had $1,000 in the bank. This testimony is perhaps immaterial, except as it tends to discredit the defendant and to establish the fact that he is unworthy of belief. Of course, he may have been attempting to place some property beyond the reach of his former wife. She had a judgment against him. This affidavit is not commendatory of Mr. Horn. It leaves him liable to the charge that his hands are unclean and contains a suggestion that he should keep out of court. *Coppell v. Hall,* 7 Wall. (U. S.) 542; *McMullen v. Hoffman,* 174 U. S. 639.

The mere fact that Abbott was president of the corporation did not bind him to so manage the corporation as to make money for the stockholders or for the company itself. Nor is there any liability attaching to Mr. Abbott because his name appears as president of the corporation.

Nunnelly v. Southern Iron Co., 94 Tenn. 397, 28 L. R. A. 421.

The representations to Horn concerning the ownership of the land at the time of the deal with Horn were made by Jaeggi and Koenig. Abbott said nothing and was not present when they talked to Horn. If the representation that they had bought 2,500 acres more was made by Jaeggi and Koenig without Abbott joining in it in some way, then he was not liable in any event. Horn testified that he believed the statements of Jaeggi and Koenig. If he believed them, he had no occasion to rely upon Abbott.

Horn never talked to Abbott or made an independent inquiry. Jaeggi delivered the shares of stock to Horn. He was, and is, the owner. The stock appears to be Jaeggi's stock. Of course, Abbott was not in any way bound to make Jaeggi's stock pay. Nor was he responsible in any way for the exaggerated ideas or expressions of Mr. Jaeggi or Mr. Koenig. He did not compare with either of them in any way. He had been Mr. Koenig's lawyer. He was merely helping with the preparation of the articles of incorporation. He had no designs upon the pocketbook of Mr. Horn or upon the pocketbook of any other person.

The plaintiff does not seem to have talked with Mr. Abbott concerning the property, and Jaeggi seems to have been rather active. According to the plaintiff, Mr. Jaeggi showed him "a safe full of stocks and bonds, and told him that was just part of them, the rest of them was with the Peters Trust Company." Mr. Horn also testified: "Mr. Jaeggi told me that over $30,000 worth (of bonds) had been already sold and paid for at that time. * * * He told me that the company is immense. * * * He told me they had already sold over $30,000 worth of gold bonds; that he would float a couple of hundred thousand dollars worth of them in Europe, get foreign people in on the deal."

Horn seems to have placed a great deal of confidence in both Jaeggi and Koenig. He knew them both, and they

both talked to him, according to his testimony, in such a way as to inspire confidence, if he believed them. On Mr. Horn's cross-examination he was asked: "Did anybody lead you to believe, or did anybody say to you, that Abbott as an officer of the company would be in any way liable for its debts and obligations? Did anybody say that to you or lead you to believe that? A. There was never such conversation. Q. Did you think Mr. Abbott, even if he was a stockholder, or officer, was or would become liable for the debts or obligations of this company, or to make it good? A. It never entered my mind."

That Horn's testimony when he testified against Abbott is unworthy of belief is in a measure established by the fact that he never went to see Abbott or complained to him in any way. "Q. After you became suspicious that Jaeggi and Arnold Koenig hadn't told you the truth, did you go to see Abbott? A. No, sir. Q. Did you ever call him up? A. No, sir. Q. Did you ever consult him about your savings, or the deal you had made, after you became suspicious? A. No, sir."

Whether any false representations were made by Abbott to the plaintiff would be material if it was charged and proved. But it is not. The plaintiff is not shown to have relied upon any representation that Abbott made. He appears to have relied upon his own judgment and the representations of Koenig and Jaeggi.

Under section 8198, Rev. St. 1913, we are called upon to render our judgment in this case *de novo*. *Northwestern Mutual Life Ins. Co. v. Mallory*, 93 Neb. 579.

There is no proof that Horn relied upon anything that Abbott told him, if, as a matter of fact, Abbott told him anything, which is not shown.

In order to maintain an action for deceit, it is necessary to show that the plaintiff had a right to rely upon the representations made, if any, and did rely upon the same, and that they were false, and that he altered his condition in consequence thereof and suffered damages thereby. *Runge v. Brown*, 23 Neb. 817.

In the above case of *Runge v. Brown,* it was said in the body of the opinion: "But there is no proof that the representations alleged to have been made by plaintiff in error were relied upon by defendant in error, and induced him to make the sale referred to. Upon this point we think the authorities are substantially all one way. If defendant in error sold the sheep to Musheid, upon his own judgment, and wholly uninfluenced by the alleged statements of plaintiff in error, it is clear that such statements could not result in damages to him, however untrue they might have been, unless they were relied upon by defendant in error, and that, so relying, he sold the sheep, received the notes, and suffered damage thereby. It must appear that, relying upon the statements, he altered his condition, and was damaged thereby, that this change in his condition was in consequence of the representations, as well as that the representations were untrue."

In *Stetson v. Riggs,* 37 Neb. 797, this court held, as stated in the body of the opinion: "The defense of Riggs was, in effect, an action against Stetson for damages for false representation made by the latter. This answer, then, to be good, must allege with reasonable certainty: (a) That Stetson made some representation to Riggs, meaning he should act on it; (b) that the representation made was false; (c) that Riggs believed such representation to be true, relied and acted upon it, and was thereby damaged"—citing *Byard v. Holmes,* 34 N. J. Law, 296, and cases there cited.

"False representations as the basis of an action, whether for damages or for rescission of a contract, are such only as in some manner actually mislead the complaining party to his damage." *American Building & Loan Ass'n v. Bear,* 48 Neb. 455.

"Actionable fraud must relate to matters material to the transaction involved. Mere collateral inducement, although fraudulently made, of itself affords no ground for the rescission of a contract, or for the recovery of damage

against the offending party." *American Building & Loan Ass'n v. Bear,* 48 Neb. 455.

We also refer to *Jakway v. Proudfit,* 76 Neb. 62, where this court held, as stated in the body of the opinion, that an instruction was prejudicially erroneous which "submitted the case to the jury on the theory that, if the representation of the indebtedness of the corporation was false, and if such representation was relied upon by the plaintiff as an inducement to the contract, he was entitled to rescind, whether any actual damage accrued by reason of the representation or not."

Also, see *Lorenzen v. Kansas City Investment Co.,* 44 Neb. 99, where this court held, as stated in the syllabus: "In an action in the nature of an action of deceit, it is necessary not only to show the making of false representations justifiably relied upon, but in addition it must be made directly and not by conjecture to appear that, from such false representations and reliance upon them, there resulted a direct and actual loss to plaintiff."

In 1 Story, Equity Jurisprudence (13th ed.) sec. 203, it is said: "And in the next place the party must have been misled to his prejudice or injury; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked, that to support an action at law for a misrepresentation there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff."

In Bispham, Principles of Equity (8th ed.) sec. 217, it is said: "Fraud without damage is no ground for relief at law or in equity."

See, also, the following cases: *Taylor v. Guest,* 58 N. Y. 262; *White, Adm'x, v. Smith,* 39 Kan. 752; *Humphrey v. Merriam,* 32 Minn. 197; *Clark & French v. Tennant,* 5 Neb. 549.

The bonds purchased by the plaintiff seem to have been the property of Jaeggi, and a bargain with Jaeggi was not

a bargain with the Niobrara Investment Company, nor was it a bargain with Abbott.

Any fraudulent representations made by Jaeggi or by Jaeggi and Koenig were not the representations of Abbott.

1. The plaintiff, as to the defendant Abbott, is not shown by the evidence to have been misled or in any way deceived by the prospectus or by anything that was said or done by the defendant Lysle I. Abbott.

2. The defendant Abbott is not shown to have been in the management of the affairs of the company.

3. Horn seems to have known that Jaeggi and Koenig were the real parties in interest, and that they were in the actual control of the corporation, and that the defendant Abbott was only assisting them as counsel, and that what he did was done as a lawyer, and not otherwise.

4. Horn relied upon the facts within his own knowledge.

5. Under the relations existing between Horn, Jaeggi and Koenig, as shown by the evidence, Horn must have known that Jaeggi and Koenig were the real parties in interest and in control of the corporation.

6. The testimony of the defendant Lysle I. Abbott does not appear to be successfully controverted. He seems to be free from any fraudulent purpose or act. We are unable to hold that the plaintiff, Horn, has established the case set up by him in his petition.

The judgment of the district court appears to be sustained by the evidence, and it is

AFFIRMED.

SEDGWICK, J., not sitting.

ELBERN N. COONS v. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1916. No. 19431.

Burglary: SUFFICIENCY OF EVIDENCE. The evidence examined, and found to support the verdict of the jury declaring the defendant guilty.

ERROR to the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Robert G. Easley and *Walcott & Walcott,* for plaintiff in error.

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

HAMER, J.

The plaintiff in error, hereafter called the defendant, brings this case here so that we may review the judgment of the district court for Cherry county. He was arrested August 13, 1915, and was charged with the crime of burglary alleged to have been committed on or about the 29th day of July, 1915. On the 6th day of October, 1915, he was sentenced to serve an indeterminate sentence of from one to ten years in the penitentiary. The evidence against him is circumstantial. Ten instructions were given by the court upon its own motion. In the motion for a new trial error is alleged in the giving of these instructions, but there is no discussion of any of them in the defendant's brief. There was a motion by the defendant for a directed verdict, but this motion was overruled. The insufficiency of the evidence to sustain the verdict is apparently the main question upon which defendant's counsel rely.

Briefly stated, the facts are as follows: One George O'Kieffe was building a house on his farm. On the evening of July 28, 1915, O'Kieffe and the men working with him left the house, which was then nearly completed. The

windows and doors were all in, except that in one of the openings prepared for a window boards were nailed across the opening. The next morning when the men returned they found that the house had been entered during the night season and numerous articles, including log chains, carpenter tools, paint brush, and a pair of pincers, had been taken away. There were evidences that paper had been burned in the house to furnish light for the burglars. The country is sparsely settled. Rain had fallen in the night. A fresh wagon track was followed from the house by O'Kieffe and some of the men a distance of eight or ten miles to near the home of defendant. About a mile away from his home the wagon had been stopped, a hole dug in the ground, and certain articles buried. Among them were carpenter tools and the paint brush. The wagon track left the main road near the defendant's place, and after a circuitous route across the prairie was finally lost near the defendant's house. A wagon was standing in the yard of defendant, and there was a smear of moist white paint upon the bottom of the box. The paint brush taken was moist with white paint. The defendant's team looked fagged and weary, and showed signs of having been hard driven. The harness lay by the wagon tongue as it may have been thrown down when the team was unhitched. The stolen pair of pincers was found on the ground a short distance from defendant's house. When questioned regarding the paint on the wagon, the defendant stated that it had been there a long time, but other witnesses stated that the paint was still moist so that it came off when it was rubbed with the finger. Defendant's witnesses testified that the horses were fagged out from hauling a heavy water tank; that the trail on the prairie near the house was made by the team and wagon when used to pick up fuel—"cow chips"—and that defendant was at home all that night.

We are convinced that the jury were justified in disbelieving the testimony of defendant's witnesses, and that

they were equally justified from the circumstantial evidence in finding the defendant guilty.

It is possible that the conclusion reached by the jury upon the circumstantial evidence is wrong, but the jurors were inhabitants of the county, and much better qualified to determine the truth or falsity of the testimony than is this court. There is sufficient evidence in the record, if the jury disbelieved the defendant's witnesses, to uphold the conviction.

The value of the property taken was found by the jury to be $35.25, only a few cents more than an amount for which the defendant could have been convicted only of petit larceny. He had a wife and children. So far as the record shows, this is his first offense. It may be doubted whether further punishment than he has already suffered is advisable. It is to be hoped that the parole board will take these facts into consideration.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. JAMES J. PARKS COMPANY, APPELLEE, V. JAMES C. DAHLMAN ET AL., APPELLANTS.

FILED NOVEMBER 17, 1916. No. 19685.

1. **Municipal Corporations:** CONSOLIDATION: ASSUMPTION OF OBLIGATIONS. Where four proposed paving improvement districts had been created in South Omaha, and the property owners had indicated the kind of material they desired used, and the contracts had been let and bonds given for the performance of the same, and each of the foregoing steps had been taken under the direction of the city attorney and the city engineer of the city of South Omaha, and before the consolidation of the said city of South Omaha with the metropolitan city of Omaha, as contemplated by the statute, the contracts so entered into are valid, and they must be performed by the consolidated city of Omaha, although the statutory time allowed property owners in which to select material had not expired in any of the districts before the consolidation took place.

2. ———: STREET IMPROVEMENTS: CONTRACTS. The charter of the city of South Omaha provided that property owners might designate the material to be used in street paving by filing a petition within 20 days from the advertisement of bids. If such petition was filed within the 20 days, the council could at once contract for the improvement without waiting for the expiration of the 20 days' time.

3. **Mandamus**: MUNICIPAL CONTRACTS: ENFORCEMENT. The act providing for the consolidation requires the consolidated city to perform all valid, unperformed, subsisting contracts made by the city of South Omaha, and a writ of mandamus to compel such performance was properly issued by the district court.

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

John A. Rine, W. C. Lambert and *L. J. TePoel,* for appellants.

Murphy & Winters, contra.

HAMER, J.

This is a proceeding in mandamus to compel the city of Omaha to carry out certain paving contracts entered into by the city of South Omaha before the consolidation of the two cities. Four paving districts are involved, Nos. 128, 130, 133, and 134.

It appears that after the districts were created the city clerk of South Omaha, pursuant to the charter, gave to the property owners in the several districts notice by publication that the 20 days allowed the property owners in which to designate material, or to change any designation previously made, would not expire in any of the districts until after June 21, 1915, the date of the consolidation of the two cities; that in each of said districts petitions designating the materials were filed, after notice was given, prior to the consolidation and within the 20 days allowed for the selection of material or to change the designation thereof; that, before the consolidation, the city council of South Omaha adopted resolutions awarding to the James J. Parks Company a contract for the performance of the work, and the contract, together with the bond, was

duly approved. The respondents, the mayor and council of the city of Omaha, refused to recognize these contracts or to provide funds for carrying on the work, and this proceeding was brought to compel them to draft and pass the necessary ordinances providing for the issuance and sale of the district improvement bonds of the city of Omaha for the purpose of paying for the improvements in these districts, the same to be issued under the laws and charter of the city of South Omaha at the time of its consolidation with the city of Omaha. An alternative writ of mandamus was issued. The return to this writ sets forth that at the date of the consolidation, June 21, 1915, the relator did not have a completed, valid and subsisting contract with the said city of South Omaha for the work in any of said districts; that the proceedings had not progressed beyond the point where a valid contract could have been entered into, for that 20 days from the last date for publication for bids had not expired in any of said districts during which the property owners therein might have designated different material from that selected; that no contract in fact was made or attempted to be made prior to the expiration of the said 20 days; that the instruments signed as contracts were not dated and were not intended by those signing the same to be valid or subsisting contracts until after the expiration of the 20 days in which to designate said material; and that up to the time of the consolidation there had not been signed in said districts, or any of them, valid subsisting petitions designating material; and that, as to some of the pretended petitions designating material, names had been withdrawn in sufficient numbers to defeat the request of the petition; that the respondents are without power to issue and dispose of bonds of the city as a means of obtaining funds with which to pay for said work; that under the charter of the city of Omaha warrants or bonds may not issue for the payment for improvements such as paving prior to the time when such improvements have actually been made, and sufficient assessments have actually been levied, and a

fund created to meet such obligations; that, in the absence of a completed and valid contract, the respondents had no authority to issue bonds or to create a fund under the laws and charter of South Omaha as the same existed at the time of the consolidation; that the respondents were without authority to levy or assess charges against the property of the said districts for such improvements under either the laws and charter of the city of South Omaha, or the city of Omaha; that the said proceedings in the said districts terminated and became of no effect upon the consolidation of South Omaha with the city of Omaha; and that, as the proceedings had not progressed to a point where a complete and consummated contract or contracts had been made, the city of Omaha was not required to carry out and perform the said contracts.

Upon the trial a writ of mandamus was awarded as prayed. A motion for a rehearing was denied, and the respondents have appealed.

Section 3, ch. 212, Laws 1915, provides, among other things: "And the metropolitan city shall succeed to all the property and property rights of every kind, contracts, obligations and choses in action of every kind held by or belonging to the city or village consolidated with it, and the metropolitan city shall be liable for and recognize, assume and carry out all valid contracts, obligations, franchises and licenses of any such city or village so consolidated with it."

The foregoing language indicates very clearly that the consolidated city receives the property, property rights, and every kind of contract or obligation or chose in action held by the city or village consolidated with the metropolitan city. It also clearly shows that the metropolitan city, in addition to receiving the property of the village or city incorporated with it, assumes to carry out all valid contracts, obligations, franchises and licenses of the city or village consolidated with it. If the city of South Omaha had incurred an obligation by reason of what it did, then it is incumbent upon the city of Omaha to carry

out the contract or obligation, whatever it may have been. It is contended here that there was no contract because of the fact that there were 20 days from the last date of the advertisement of bidders within which the abutting property owners could designate the material that they desired to have used; that the 20 days had not expired when the cities were consolidated, and therefore that there was no pending contract. It was the view of the district court that the right to withdraw from the petitions existed only up to the time that the council acted upon the petitions, and that, when they acted upon such petitions, then the contracts became valid contracts, and that in the first place the city of South Omaha would be obligated to carry out the contracts, even though the full 20 days had not expired. It is said on page 20 of appellant's brief that, if the proceedings had by the city of South Omaha resulted in valid contracts, then "it may be that relator is entitled to the relief he claims." We are inclined to adopt the views of the district court.

Section 4719, Rev. St. 1913, provides: "The property owners of record within any district shall have twenty days from the last date of publication of the bids for any improvement, to designate by petition, to be filed with the city clerk, the specific material selected from those designated in the bids received, which they desire used in improving of the street or other public thoroughfare within said district, and, in case the record owners of the majority of the taxable foot frontage of property abutting upon said street or other public thoroughfare to be improved, file their petition within such twenty days, designating the specific material which they desire used in making such improvement, then in that event, the mayor and city council shall order said improvements made with the specific material so designated; but, in case there is no petition filed by the owners of a majority of the foot frontage of taxable property as aforesaid, within said twenty days, then the mayor and council shall by resolution, designate

the specific material they desire to be used, and award the contract to the lowest responsible bidder on said material."

The language of the section indicates that it was in the mind of the legislators when they passed the act that the abutting lot owners might not make any request with respect to the kind of material to be used, and then it would be for the council to determine what kind of material it would use. We have not been told that any objection has been made concerning the material to be used. It also appears that the council acted upon the petition. If no objection was made by the abutting lot owners at that time or since, then in any event the order of the council of South Omaha must stand.

Many authorities are cited in the brief of counsel for the appellees showing that the abutting lot owners have no right to withdraw after the action of the council. In this case the council did all that could be done prior to the expiration of the 20 days. If the city of South Omaha could make a contract, then it has been made, and it is the duty of the city of Omaha to carry it out. Apparently, this is a case where the abutting property owners desire that for which they petitioned. We are of the opinion that the contracts made were binding upon the city of South Omaha at the time of the consolidation, and, if so, they must be assumed by Omaha.

Section 6 of the act providing for the consolidation of South Omaha with the city of Omaha, being a part of chapter 212, Laws 1915, provides, in substance, that all taxes or special assessments which any city or village consolidated may have been authorized to levy or assess, but which are not "levied or assessed at the time of such consolidation, for any kind of public improvements" in process of construction or contracted for, may be levied or assessed by such metropolitan city as consolidated. The following cases seem to adopt the principle involved: *City of New Orleans v. Stewart,* 18 La. Ann. 710; *Irwin v. Mayor,* 57 Ala. 6; *Pavey v. Braddock,* 170 Ind. 178.

It may be true that, when Omaha acts for itself, it would have no power to issue bonds for the payment of indebtedness; but in this case it would seem that the city of Omaha undertook to carry out the contracts which had been made by the city of South Omaha. If so, it is for the city of Omaha to take such steps as may be necessary to pay the indebtedness incurred in the same manner that such indebtedness would have been paid by the city of South Omaha, provided it had not been incorporated into the city of Omaha. We see nothing in the way of issuing bonds after the manner the city of South Omaha might have issued them, and in levying assessments upon the particular property benefited, as South Omaha might have done if the consolidation had not been made.

The judgment of the district court is

AFFIRMED.

AMOS A. GALT ET AL., APPELLEES, V. CARSON HILDRETH, APPELLANT.

FILED DECEMBER 9, 1916. NO. 18938.

Opinion on motions for rehearing of case reported, *ante*, p. 15. *Former judgment modified.*

PER CURIAM.

This is a hearing upon questions presented in motions for rehearing. The issues and the evidence are stated in the first opinion. *Galt v. Hildreth, ante,* p. 15. At the time plaintiffs purchased from defendant Hildreth a controlling interest in the Franklin State Bank, he guaranteed that, if the net profits of the bank for the year 1912 should not be $8,000, he would pay plaintiffs three-fifths of the difference between that sum and the net profits.

He also agreed that plaintiffs might select notes in the bank of the face value of $3,000, and that he would pay the same to the bank.

The Galts brought this action against Hildreth to recover three-fifths of the difference between the actual profits and the guaranteed profit. The bank was made a party defendant, and filed a cross-petition in which it sought to enforce against Hildreth his liability upon the note clause of the contract, and also sought to collect from him the amounts due on notes alleged to have been made, indorsed and guaranteed by him. The trial court found that there was due from Hildreth to plaintiffs upon the profit clause of the contract $1,607.78. This was affirmed by this court, and is adhered to, except that plaintiffs should have interest thereon at the rate of 7 per cent. per annum from January 1, 1913.

The remaining questions relate to the causes of action pleaded in the bank's cross-petition against Hildreth. The contract between plaintiffs and Hildreth provided that plaintiffs should have the right to select notes of the face value of $3,000, and Hildreth agreed to pay to the bank "the face value with accrued interest from November 10, 1911, to January 1, 1913, on said notes." Hildreth contends that the recovery allowed upon this clause of the contract is excessive. The evidence shows that March 12, 1912, Hildreth paid a note of $500. This would leave notes of the face value of $2,500 to be selected. In the settlement of the matters relating to the Curtis land, Hildreth gave his check for $502.50, and it was agreed that this should apply upon his liability under the note clause of the contract. The cross-petition of the bank alleges that there was due under the note clause the sum of $2,301.17, and prayed judgment for such sum, "with interest thereon from January 1, 1913, at the rate of 7 per cent. per annum." The district court decreed that plaintiffs should select notes of the face value of $2,500, and that, in case Hildreth failed to pay the same within 40 days, the bank should have judgment against him for $2,500,

with interest thereon from November 10, 1911. This was error. The decree should have been for $2,301.17, with interest at 7 per cent. per annum from January 1, 1913.

It is also contended by the bank that the rule announced in the fifth paragraph of the syllabus in the former opinion is not applicable to the facts. It was held: "The defense successfully made by one of the signers and indorsers of a note, if not made on purely personal grounds, will bar a future action by the same plaintiff on the same obligation against another joint defendant." *Galt v. Hildreth, ante,* p. 15.

In its cross-petition the bank seeks to recover upon the so-called "brickyard" notes, known as the "Chaney" note and the "Gettle" note. Hildreth was one of three makers of the Chaney note and one of four indorsers of the Gettle note. In former actions brought by the bank against all the makers and indorsers, judgments for all the defendants, except Hildreth, who made no answer, were affirmed in this court. *Franklin State Bank v. Chaney,* 94 Neb. 1; *Franklin State Bank v. Gettle,* 96 Neb. 60. Hildreth filed no answer in those actions because he was representing the bank in the litigation and was to be its principal witness. His default was entered. After the judgments for the answering defendants were affirmed, the bank moved for judgment against Hildreth upon the default. Hildreth obtained leave of court to file an answer pleading the judgment in favor of his comakers and coindorsers as an adjudication in bar of the bank's claims. The second and third causes of action set forth in the bank's cross-petition in the present case are upon the notes involved in the two cases mentioned. Upon the trial of the present case it was stipulated that the original actions upon the brickyard notes should be consolidated with this case. The bank contends that the judgments in those actions are not conclusive of Hildreth's nonliability, because it does not appear that the judgments were founded upon a defense that was not personal to the prevailing defendants. One defense pleaded was that the notes were deliv-

ered to the bank merely to evidence its interest in the brickyard property, it having released its claim thereto, and that the notes were without consideration and were never intended to be enforced. The other defense was that, after the delivery of the notes, the makers and indorsers surrendered to the bank all claim to the brickyard property, and that the bank thereupon released them from any and all liability upon the notes. *Franklin State Bank v. Chaney,* 94 Neb. 1; *Franklin State Bank v. Gettle,* 96 Neb. 60.

Each of these defenses was a defense upon the merits, and was not a defense personal to the pleaders. If the first defense was established, there was never any liability upon the notes. If the notes were delivered merely to evidence the interest of the bank in the property and with the understanding that they were not to be enforced, there was no liability either on the part of Hildreth or the other makers and indorsers. If the plea of release was established, all the makers and indorsers were released. If the brickyard property was surrendered to the bank in consideration of the release of the defendants in the actions on the notes, it was a satisfaction and payment. The release of those makers and indorsers also released Hildreth. *Scofield v. Clark,* 48 Neb. 711; *Huber Mfg. Co. v. Silvers,* 85 Neb. 760.

It is also contended that Hildreth is estopped to plead his nonliability on the notes, because at the time the Galts purchased stock in the bank its records indicated that he was liable thereon, and that he so represented. The action upon the notes is brought by the bank. This is not an action by the Galts to recover for misrepresentation in the sale of the stock. Facts constituting an estoppel operating in favor of the bank were neither pleaded nor proved. It follows that the former adjudications released Hildreth from liability on the brickyard notes.

Except as herein modified, the judgment of affirmance is adhered to.

FORMER OPINION MODIFIED.

IN RE SUPREME COURT COMMISSIONERS.

FILED DECEMBER 9, 1916. No. 19964.

PER CURIAM.

In several cases that have been submitted to the supreme court commission and decided by the court, motions for rehearing have been filed. The contention is made that the act of 1915 creating the supreme court commission is unconstitutional and void, because the appellant has been deprived of his right to be heard in the court of last resort, as provided for in the Bill of Rights: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." Const., art. I, sec. 24. It is said, also, that the act deprives appellant of its property without due process of law, and denies it the equal protection of the laws, as guaranteed by the Fourteenth amendment to the Constitution of the United States. In one case it is urged that full findings of fact were not made by the commission as required by the statute; that permission "to be heard on printed briefs and by oral argument * * * before the commission" is insufficient, for the reason that the commission is not the court; that the provision that the unsuccessful party "shall have his motion for rehearing before the commission" is an attempt to take away its constitutional right to be heard before the court. It is said that the evident purpose of the act is to "clear the docket, regardless of judicial proceedings," and the only thing left for the supreme court is the perfunctory duty to approve and adopt the report of the commission and have it spread upon the records; there being no provision that the court may disapprove the report or order a rehearing of the case.

Much reliance is placed upon the opinion in the case of *State v. Noble,* 118 Ind. 350, 10 Am. St. Rep. 143, de-

cided in 1888, which holds that, though the commissioners provided for by the Indiana act were merely assistants of the court, it purported to confer judicial power upon them, and was therefore unconstitutional. In this state —mainly on account, no doubt, of the provision of the Bill of Rights referred to, which is unique, and is not found in the Constitution of any other state, and which has done much to delay justice and to enable the poor litigant to be worn out by unwarranted and vexatious appeals to an already overburdened court merely for delay—it became necessary, nearly a quarter of a century ago, to provide assistance to this court.

The first act providing for supreme court commissioners was passed in 1893. The purport of the act, in so far as it prescribed the duties of commissioners, is the same as in the present act. In *In re Supreme Court Commissioners,* 37 Neb. 655, its constitutionality was upheld on the ground that the commissioners were not judges and their opinions were of no force or validity until examined and approved by the court. In *Randall v. National Building, Loan & Protective Union,* 43 Neb. 876, the question was again considered and the same conclusion reached. A like result was arrived at in California. *People v. Hayne,* 83 Cal. 111, 7 L. R. A. 348. All these cases were decided after the decision in the *Noble* case was published.

Under the practice in this court, in all cases assigned to the commission for examination a written report of the facts disclosed by the record is made to each member of the court, and a proposed journal entry submitted; these reports are examined by each judge, sometimes they are approved, sometimes they are referred to the commission for further information. If the court has any doubt with respect to the facts stated or conclusions reached by the commission, it is not infrequent to set the case for reargument before the court proper. The court itself exercises its judgment upon each case, and not until the court is satisfied is the report of the commission approved, and a judgment rendered. In the case of motions for

rehearing, like reports are made. The case is then assigned specially for examination and report as in cases heard before the court proper, and not until the report made by a member of the court has been examined and passed on by the court is the motion for rehearing sustained or denied.

The objection, in one of the cases tried to a jury, that full findings of fact have not been made cannot be sustained. The law makes the jury the determining body with respect to the facts, and if there is evidence sufficient to support the verdict, and it is not clearly or manifestly wrong, it will not be interfered with by a reviewing court. If the statements of fact made by the commission to the court convince it that the evidence is sufficient to sustain the verdict, it is unnecessary to recite these facts at length in the journal. A detailed statement of the facts is not given in a large proportion of the opinions filed by the court. There is no more necessity for it in the one case than in the other.

Objection is made in some of the briefs because the act authorizes the judges of the supreme court to appoint three supreme court commissioners "who shall first be recommended for such appointment by the governor." The court is under no obligation to appoint commissioners at all. Unless the men whose names were suggested by the governor had commended themselves to the court as proper and fit persons in point of character and ability to fill such responsible positions they would never have been appointed.

Justice delayed is often justice denied. The serious condition in which the people of the state have been placed by the absence of restriction upon the right of appeal and the consequent delay convinced us that it was for the public welfare that the court be not unduly sensitive as to its clear and undoubted constitutional right to ignore or reject all recommendations for the appointment, by whomsoever made, and, when the names of fit and proper men were suggested, to make the appointment

from the list. The work of the commission has justified the selection made. That portion of the act which attempts to confine the right to appoint to nominees of the governor is clearly void. Neither the legislature nor the governor has the right to dictate whom the court shall appoint as its referees or assistants. The court might as well assume to appoint the chief clerk or sergeant-at-arms of each house of the legislature. The court, the legislature, and the executive are co-ordinate branches of the state government, and under the Constitution neither can exercise powers conferred by the people upon the other.

The act, if strictly and literally construed, is in part violative of some constitutional provisions, but the void portions may be and have been disregarded as unessential, and, as construed by the court, a valid act is left.

The report of the findings made by the commission is similar to the report of a referee, and is not in any sense a judgment. The reports are not approved *pro forma.* The commission renders no judgments, makes no orders, exercises no judicial functions.

The act is an authorization by the legislature that commissioners or referees may be appointed to aid in disposing of the accumulated work, and, no appropriation having been made, it imposes a moral obligation to compensate these authorized assistants. Such an act is valid.

CHARLES CROWELL, APPELLANT, v. WILLIAM SKILLICORN ET AL., APPELLEES.

FILED DECEMBER 9, 1916. No. 19028.

Contracts: RESCISSION: LACHES. When the grantee in a deed assumes and agrees to pay a mortgage indebtedness on real estate covered by the deed, but fails to keep this stipulation of his contract, and suffers the land to be sold under the mortgage, and sheriff's deeds to a third party to be issued, and he stands idly by for two years

thereafter, he will not then be permitted to rescind, nor be heard to assert in a court of equity that he was deceived as to the quality, quantity and character of the land, and that his grantor held no title thereto, and therefore conveyed no title to him, when his title to, and possession of, the land has never been called in question (except only by the enforcement of the mortgage liens which he had assumed and agreed to pay), without putting, or offering to put, the other party in *statu quo*.

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

Edwin J. Stason and *P. W. Cain,* for appellant.

M. F. Harrington and *C. E. Dean, contra.*

MORRISSEY, C. J.

This is an action by plaintiff to rescind a contract for the exchange of lands and to cancel a deed conveying to defendants 970 acres of land in Holt county and to quiet title thereto. From a judgment of dismissal, plaintiff has appealed.

April 23, 1907, plaintiff and defendants entered into a contract for the exchange of plaintiff's Holt county land for $1,250 and land owned by defendants seven miles northwest of Onawa, Iowa, referred to as: "The following described property situated in the county of Monona, state of Iowa, to wit: Lots 1, 2 and 3 in section 32, and lot 3, also southwest quarter of southwest quarter in section 33, all in township 84, range 46, and the northeast quarter of the northwest quarter and lot 1 in section 5, township 83, range 46, containing 407.87 acres, more or less, together with all lawful accretions thereto."

The land conveyed by defendants was subject to two mortgages for $7,000, which plaintiff assumed and agreed to pay. Plaintiff's land was subject to a mortgage for $4,860, which defendants assumed. Defendants paid plaintiff $1,250 in cash, and also allowed him the rent for the Holt county farm for 1908, estimated at $700. Plaintiff took possession of the land conveyed to him in 1908. In July of that year the greater part of the land was over-

flowed by high water of the Missouri river. April 24, 1908, the owner of one of the mortgages commenced an action of foreclosure, and October 16, 1908, the property was sold at sheriff's sale, and November 22, 1909, redemption not having been made, a deed was executed to the purchaser at such sale, March 6, 1911. Without previous notice of his intention to rescind the contract of exchange, plaintiff commenced this action. He alleged that defendants were guilty of fraud in representing the quantity, quality and value of the land, and in representing that the land was not subject to overflow. He also alleged that the land conveyed to him was the former bed of the Missouri river, a navigable stream, and that under the laws of Iowa the land belonged to the state. During the trial the petition was amended to allege that the land belonged to riparian owners on the Nebraska side of the river, and was not in Iowa, and did not belong to defendants.

Summarized, the undisputed facts show: Defendants acquired title to the Monona county land in 1904 in an exchange for an equity in an electric light plant. They listed the land for sale with Fred Lawson, a real estate agent at Glenwood, Iowa. The latter was informed that plaintiff desired to trade his Holt county land for Iowa land, and, after correspondence, plaintiff came to Glenwood. He accompanied Lawson to Onawa. From there, in company with Will Hawkins, a real estate agent at Onawa, they drove over the land. Upon returning to Onawa plaintiff made a written offer to exchange his land for defendant's land and $2,200. He also offered to pay Lawson $100 if he could induce defendants to make the trade. This offer was sent to defendants. William Skillicorn, one of the defendants, in company with Lawson, made a trip to Holt county and inspected plaintiff's land. Subsequently C. H. DeWitt, the other defendant, also made an inspection of plaintiff's land. Later the contract of exchange was executed. The consideration named in each deed was $30,000.

Plaintiff contends that defendants, and their agents, represented to him that there were 407 acres of surveyed lands, and enough accretion land to make 1,000 acres. The original government survey shows that there were 277 acres. The deed by which defendants acquired title described the land by the terms of the government survey, and as "containing 407.87 acres, more or less, together with all lawful accretions thereto." The testimony of defendants indicates that they told plaintiff there were 407 acres of "deeded" land, and produced the conveyance to themselves showing this: that they informed plaintiff they had not surveyed the land, but thought there was enough accretion land to make 1,000 acres. Plaintiff was a farmer and had inspected the land. Defendants were not guilty of misrepresenting to the plaintiff the quantity of land.

Plaintiff also contends that defendants deceived him as to the quality and value of the land. Testimony on behalf of defendants shows that the land was worth $25 or $30 an acre for "trading" purposes. Plaintiff's land was worth from $10 to $15 an acre. The consideration named in each deed was a "trading" value, and was far in excess of the actual value. Plaintiff lived in Iowa from 1873 to 1876, about three miles southwest of the land which defendants conveyed to him. He was familiar with the fact that the Missouri river was a shifting river. He testified that he asked defendants' agents whether the river overflowed the land, and was told that it did not do so. He also asked defendant DeWitt whether the river overflowed, and was told that it had not while defendants owned the land. The agents deny that they were asked whether the river overflowed the land. The evidence justifies the inference that plaintiff at the time knew that the land had formerly been overflowed. He testified that he knew that the river had run south and east of the land he was inspecting, and knew that the land was much lower than the land east of the old bed of the river. He has lived within a few miles of the Missouri river the

greater part of his life, part of the time on the Iowa side, a few miles southwest of the land in question. The record indicates that plaintiff and defendants held title to incumbered lands which could not readily be sold for cash, and that plaintiff believed, after a good inspection of the land, that he had made a good bargain. In view of plaintiff's familiarity with the actions of the Missouri river and his acquaintance with lands along the river, the evidence does not justify a finding that he was deceived either as to the quality or the value of the land.

Plaintiff contends that the evidence shows that the land was in Nebraska, and not in Iowa, and that defendants were guilty of fraud in representing that they owned the land and that it was in Iowa. It was stipulated that, when the government survey was made in 1853 and when the patent was issued, the land was riparian land on the east side of the Missouri river. Previous to 1876 the river had moved eastward and overflowed all but one acre of the patented land. From 1866 to 1876 the river gradually shifted its course westward again. A sandbar was thrown up in the river. In 1876, within two or three months, the river made a cut-off through the sandbar. The present channel is a mile and a half west of the government survey line of 1853. There is a "chute" between the land conveyed by defendants and the sandbar, west of which the river flows. In 1894 the land between the government survey and the chute, comprising 135 acres, was surveyed by the county, and has since been taxed by Monona county, Iowa. Plaintiff argues that the change in the course of the river was not gradual, but was sudden, amounting to an avulsion, and that the state boundary did not change, and that the land is within the Nebraska half of the bed of the stream. Plaintiff has not shown that there was a sudden avulsion of the stream to overcome the presumption that the land on the east side of the Missouri river is in Iowa. The land conveyed to plaintiff had been assessed by the state of Iowa since 1894. Plaintiff's title to the land has not been questioned either

by individuals or the state. There is nothing to indicate that it would have been questioned.

The real estate was mortgaged, and plaintiff took his deed subject to this mortgage incumbrance, which he assumed and agreed to pay. He broke this stipulation of his contract, and permitted the land to be sold under the mortgages. Plaintiff took possession of the land in 1908. The same year this mortgage foreclosure was commenced. A year later the sale was confirmed and deed issued. This suit was not commenced until 1911. He waited more than two years after the foreclosure of the mortgage without making any move to rescind. If the property had been misrepresented, he must have known it before the time for redemption from the mortgage foreclosure had expired. If he had any right to rescind the contract, and contemplated doing so, in good conscience, he ought to have made his intention known before the mortgage foreclosure was completed, and not wait until after whatever equity of redemption he, or his grantor, possessed had been extinguished. Having broken the stipulation in his contract to pay the mortgages, and having put it beyond his power to reconvey such title as he received, he cannot be heard to complain of what he alleges is a paramount title in somebody else who has never sought to assert title. The judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

JOHN STOICA, APPELLEE, v. SWIFT & COMPANY, APPELLANT.

FILED DECEMBER 9, 1916. No. 19524.

Master and Servant: EMPLOYERS' LIABILITY ACT: AWARD. In an action under the employers' liability act (Rev. St. 1913, ch. 35) the court may consider how far the injury will in all probability disable the plaintiff from engaging in those pursuits and occupations for which,

in the absence of the injury, he would have been qualified, and consider the health of the plaintiff and his general physical condition before the injury, as compared with his condition in these respects afterwards, and, when the proof shows a partial permanent disability, award damages for such injury in the sum of 50 *per centum* of the difference between the wages received at the time of the injury and his earning power thereafter, for the term fixed by the statute.

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

Gurley & Fitch, for appellant.

Fred W. Anheuser and *Cornelius F. Connolly, contra.*

MORRISSEY, C. J.

This is an appeal from a judgment rendered in the district court for Douglas county in an action brought under chapter 35, Rev. St. 1913, known as the "Employers' Liability Act." As is provided by the statute, the trial was had to the court without the intervention of a jury. The court found generally in favor of the plaintiff; that he was injured while in the employ of the defendant, and is entitled to compensation under the provisions of the act; that plaintiff had been permanently, partially injured in his earning capacity by reason of impaired hearing in his right ear; that the impairment is equivalent to one-fourth of his previous normal hearing; that the plaintiff had suffered total disability for a period beginning September 10, 1915, and ending November 13, 1915; that his earning capacity prior to the time of the injury was $10.50 a week; that he is entitled to compensation at this rate for the period of his total disability, in the aggregate of $48.75; found that plaintiff had his earning capacity reduced as a direct result of the accident $5.50 a week; and that he is entitled to be compensated for permanent, partial disability for the period covered by the statute, which it calculated to be 290 5/7 weeks, at the rate of $2.75 a week, being 50 per cent. of his reduced earning capacity; also that the sum of $10 be paid to

Dr. E. C. Abbott and $50 to Dr. T. R. Mullen, to be included in and taxed as costs.

Appellant complains that the judgment is not sustained by sufficient evidence. It is undisputed, however, that plaintiff was in the employ of defendant, and suffered an accident while so employed, and is one of those properly coming within the provisions of the employers' liability act. The complaint as to the sufficiency of the evidence is directed against the extent of the injury sustained, and lack of proof of plaintiff's decreased earning capacity.

As to the extent of the injury, the evidence is so convincing that we do not deem it necessary to set it out in this opinion. While there is some conflict, we think the clear preponderance of the evidence supports plaintiff's contention that his hearing was unimpaired until after he received this blow upon the head, and that it is now impaired to at least the extent found by the trial court. One of the points which is worthy of serious consideration, however, is the failure of the plaintiff to offer proof of the loss of earning capacity by reason of his impaired hearing, and it is said that, without such proof, the court could not enter a judgment for decreased earning capacity for the 290 5/7 weeks covered by the judgment. In support of this contention is cited *International Harvester Co. v. Industrial Commission of Wisconsin*, 157 Wis. 167. The Wisconsin statute differs from ours in that it provides compensation for such percentage of the average weekly earnings of the injured employee as represents the impairment of his earning capacity "in the employment in which he was working at the time of the accident," while the statute under consideration does not limit the right of recovery to the difference between earning capacity "in the employment in which he was working at the time of the accident," but allows generally for compensation, whether engaged in the same or a different employment, if that earning capacity be impaired or reduced. At the time of the accident plaintiff was employed in one of the

packing houses belonging to defendant. From that date until the trial he had not been employed. It is said in plaintiff's brief, and not controverted, that because of his impaired hearing he could not return to his former employment. It is a matter of common knowledge, of which we think we may take judicial notice, that, other things being equal, a man without physical defects will find employment more readily than a man who is physically unsound. If his ability to obtain employment in any of the great industrial enterprises of the country is impaired, it necessarily follows that he will be compelled to find employment in the less desirable occupations and at a less remunerative wage. It is well settled that prospective damages on account of diminution of earning capacity in the future is a proper element of damage, and proof of previous physical condition and ability to labor before the accident and ability to labor after the accident is deemed sufficient to enable a jury to fix the pecuniary damage. 8 R. C. L. p. 477.

The statute contemplates a trial and judgment soon after the injury, but provides for compensation covering a term of 300 weeks. By its very provisions future loss of earnings must be estimated. If the court cannot take notice of the disability at which plaintiff, who has suffered an impairment of one of his faculties, will be placed, the very end and purpose of the statute will be defeated.

We are dealing with a comparatively new statute designed to cover a field heretofore untouched by the legislature. Consequently there are few adjudicated cases by which we may be guided. In many of the states having acts somewhat similar to our own industrial boards or commissions have been created to administer the law. The purpose seems to be to give speedy and informal hearings, and to avoid, so far as possible, the more technical forms of court procedure. We have not created a board or commission, but this work has been given to the courts. We are constrained to believe, however, that from the terms of the act it may be reasonably inferred that the

more formal procedure must give way to a simpler and more direct administration of justice, and that to hold that no recovery can be had for impaired future earnings without positive proof of the diminution of earning capacity would, in effect, nullify the act.

In *Zelinko v. Peabody,* reported in Illinois Industrial Accident Board, No. 304, July 10, 1914, found in a footnote in 5 Negligence and Compensation Cases Annotated, p. 825, the claimant had suffered a broken leg and the fracture was successfully reduced, but in the reduction of the fracture there was a shortening of the limb. The proof shows that the claimant had again resumed manual labor, although in different employment from that in which he was engaged when he received the injury, but there was proof that he had been offered his former position and might have resumed work therein at his former wage. Nevertheless the commission made an award for permanent, partial disability. In a discussion of the subject the commission say: "We are prone to believe that, even though persons familiar with one's usual employment and with the character of an injury may testify that a person so injured is not impaired in his earning capacity, yet it is impossible to conceive how one who was healthy and strong, whose limbs were perfect, having suffered a broken limb and the same being shortened thereby, is not to some extent permanently injured or impaired in his earning capacity." The same reasoning may well apply to the partial loss of hearing, and where, as in this case, the amount awarded is small and well within the terms of the statute, the judgment will be upheld.

Complaint is made of an allowance to Dr. Mullen of $50 for professional services and witness fees, and of an allowance of $10 to Dr. Abbott for the same class of service. Under the statute, the employer is liable for reasonable medical and hospital services and medicines, not in excess of $200 in value, for the first 21 days after the disability begins. There is a dispute as to whether medical services were tendered the plaintiff. The record is indefi-

nite and unsatisfactory; but, in any view we take of it, the judgment as to these items cannot be upheld. The injury occurred September 10. The trial began December 1. Dr. Mullen testified that his charge for professional services included his services up to the date of the trial, and it is not shown what he did within the first 21 days, or what he did thereafter. Dr. Abbott made an examination merely that he might qualify himself to testify as to the extent of plaintiff's injury, but does not appear to have rendered any professional service. He is entitled to the fee fixed by statute for a witness, but not for professional service. The judgment as to these two items is set aside, but the clerk in taxing costs will make the proper allowance for witness fees; otherwise the judgment of the district court is

AFFIRMED.

FRANK ROBBINS, ADMINISTRATOR, APPELLANT, v. CITY OF OMAHA, APPELLEE.

FILED DECEMBER 9, 1916. No. 19632.

Municipal Corporations: ACTION FOR INJURIES: PETITION. The substance of the petition is set out in the opinion, and *held* that the demurrer of the defendant thereto was properly sustained.

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

John O. Yeiser, for appellant.

John A. Rine, W. C. Lambert and *L. J. TePoel, contra.*

MORRISSEY, C. J.

Plaintiff, as administrator of the estate of Francis D. Robbins, deceased, filed his petition in the district court for Douglas county, which, omitting the formal parts, alleged: That the city of Omaha is a metropolitan city having a population of more than 100,000; that it has no park commissioners, nor any special parks reserved by the state under any special acts of the legislature, but that

all streets, parks and public property are under the supervision of a paid body of men officially called "City Commissioners;" that it is the duty of these commissioners to administer the parks for the use of the city, with regard to the health, life and safety of the citizens of the city; "that said city of Omaha owns a large tract of land, a part of which is known as Elmwood Park, and is improved, and a part of said land is undeveloped for park purposes; that upon a part of the undeveloped portion is a pond artificially constructed, and maintained for profit, in that it operated an hydraulic ram to flush water for toilets and the private use of employees of the city in the park department, and maintained to save corporate expense of constructing water mains; that said pond was not maintained for bathing or for the use of the public in either health or enjoyment, but was withheld from use for bathing or fishing; that said pond was fed by springs of cold water, rendering it unfit for bathers and dangerously inducing cramps; that said pond was over six feet deep, and was negligently maintained at that depth and over by maintaining said dam * * * and by a failure to fill deeper portions; that said city negligently suffered and permitted a raft to be maintained upon said lake for over two weeks before the injury complained of, and negligently permitted and suffered many children to use said raft and pond, knowing of its danger, and never inclosed the said pond; that said deep, cold pond of artificial construction, with said raft, was maintained in an obscure part of said land, without any protection against accidents of children, and without any life-saving devices or means of calling for rescue, as an attractive nuisance, and for no public good, and, further, as a dangerous enticement to children; that said Francis D. Robbins came into said park and went upon said raft on the 20th day of July, 1915, and the caretaker of said city saw said child upon said raft and in a dangerous position, and negligently permitted him to remain in said place of danger, and, while so playing in the dangerous

place and situation, fell from said raft into the deep water of said pond at a place of five or six feet deep, causing said Francis D. Robbins to drown." It is further alleged that the deceased was a bright, healthy and intelligent boy, nine years of age, and there is the usual allegation that, by reason of his death, his parents have suffered damages; and there is a prayer for judgment.

To this petition the defendant city demurred, "for the reason that said petition does not state facts sufficient to constitute a cause of action against the defendant." The demurrer was sustained; plaintiff elected to stand on his petition; the cause of action was dismissed, and plaintiff has appealed.

The city claims that, in maintaining this park and pool, it was engaged in a purely governmental service, and that no liability could attach; but we do not deem it essential to a decision of this case to determine that point. The petition alleges that this artificial pond was in a remote part of the park, was out of the usual route of travel, and that it was maintained for profit. But it appears from subsequent allegations of the petition that it was used merely to operate a hydraulic ram to flush water for toilets for the convenience of the employees engaged in the park department. It is clear that it was not maintained for commercial purposes.

It is argued that, because the pond was 6 feet deep, was unguarded, had a raft thereon, and a child might fall therein and be drowned, it is a nuisance, while it is admitted that a shallow body of water which a child might wade across would not be a nuisance. We do not care to fix the depth at which water may be maintained in lakes formed and maintained in public parks. If this is to be done, it ought to be done by legislative enactment. It is a question that falls naturally to the legislative department of the government, and not to the judicial. A lake in a park, whether artificially formed or not, is not of itself a nuisance. Parks are maintained for the benefit of the public, and a pond or lake adds to the beauty of

the park and increases its attractiveness. Although this is an artificial body of water, it did not differ in its essential qualities from a natural body of water. The accident which occurred was one that might happen upon a lake formed by nature or upon a river front. This artificial lake, even with the raft thereon, was no more dangerous than the Missouri river front, where boys of all ages congregate. It is common knowledge that boys, even of tender years, indulge in athletic sports. They play upon rafts, boats and floating logs, climb trees, and expose themselves to innumerable dangers. It is part of a boy's nature to indulge in these venturesome sports, and a city can be no more held for negligence in maintaining this artificial pond, unfenced and unguarded, with the raft thereon, than it could for leaving the river front exposed. The possibility of a child being drowned in this pond was as patent to the parents as to the city. The path of the child is always beset with danger, and this pond is one of those dangers to which childhood has ever been exposed. From the facts stated in the petition, it does not appear that the pond and raft constituted an attractive nuisance. The demurrer was properly sustained, and the judgment is

AFFIRMED.

FAWCETT, J., not sitting.

ROSE, J., dissenting.

In my opinion the only ground on which the city can legally escape liability for damages under the facts stated by plaintiff is that it performed a governmental function in maintaining the park. I therefore dissent from the ruling that, without regard to the capacity in which the city exercised its powers, actionable negligence is not pleaded. The child was not a trespasser, but was in the park by invitation, express or implied. If the city is a property owner answerable for negligence, it is governed by the following rule of law:

"The owner or occupier of real property is under the duty of exercising reasonable or ordinary care and pru-

dence to the end of keeping his premises safe for the benefit of those who come upon them by his invitation, express or implied; and if, through a neglect of this duty, they are, without negligence or fault of their own, injured by reason of any negligent defect therein, he must pay damages." 1 Thompson, Negligence, sec. 968. *Tucker v. Draper,* 62 Neb. 66.

A child on the premises by invitation is not a trespasser, and it is unnecessary in such a case to show that the pond was an attractive nuisance. *City of Omaha v. Richards,* 49 Neb. 244.

If a city in establishing and maintaining parks does not act in a governmental capacity relieving it from liability for negligence, it is answerable according to the following doctrine:

"The maintenance of a public park in a populous city is not only an implied but an express invitation to the public to resort to it for amusement and recreation, and, where children of tender years and immature minds are invited to play and amuse themselves, the parents have a right to rely on the city to exercise reasonable or ordinary care to keep the park and water-works system safe for the benefit of those who come there by such express invitation."

"The city owed to adults and children alike the duty of exercising ordinary care to avoid injuring them anywhere within the boundaries of the public park, and it cannot escape liability for the death of this child by drawing a distinction between the duties the city owed to the invitees at different points or portions of the park. The view we take of the case is that the city owed to this child and its parents the duty to exercise ordinary care to avoid injuring him, no matter on which portion of the park the child might resort to for play." *City of Anadarko v. Swain,* 42 Okla. 741.

Unless the city was performing a governmental function in maintaining the park, the petition states a cause of action.