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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

JANUARY AND SEPTEMBER TERMS, 1917.

VOLUME CI.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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By Harry C. Lindsay, Reporter of the Supreme Court,
For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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IN MEMORIAM

MANOAH B. REESE

At the session of the Supreme Court of the State of Nebraska, January 10, 1918, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable Charles B. Letton, Honorable William B. Rose, Honorable Samuel H. Sedgwick, Honorable Francis G. Hamer, Honorable Albert J. Cornish, and Honorable James R. Dean, Associate Justices, the following proceedings were had:

To the Honorable, the Supreme Court of Nebraska:

Your committee, appointed to prepare and submit a testimonial to the life and character of our late Chief Justice Reese, respectfully present the following:

Manoah Bostic Reese was born September 5, 1839. He was admitted to the bar in the state of Iowa. He removed to Nebraska and settled at Plattsmouth in the spring of 1871. In the early part of the following year he removed to Ashland, and early in the next year removed to Wahoo, where he practiced law for ten years, when he was elected judge of this court, taking his seat in January, 1884. Upon retiring from the bench in January, 1890, he removed to Lincoln, where he resided continuously until the day of his death, September 28, 1917. In 1907 he was again elected as one of the judges of this court, taking his seat in January, 1908. By the amendment of the Constitution, in 1908, he became Chief Justice of the Court, which position he held until the expiration of his term in January, 1915. Judge Reese was no ordinary man. All his life he was a close and analytical student of the law. His reputation as a lawyer at the time he retired from this court, in January, 1890, was such that he was very soon appointed Dean of the College of Law of the State University, which

office he held for a number of years. He brought to his position as an instructor in the Law the same ability and industry which had characterized him in the practice of the profession. We feel safe in saying that no man ever held the office of dean in any college of law in the land who so thoroughly impressed his personality upon the students and who so endeared them to their dean as did Judge Reese. He not only imbued the students with an ambition to become real lawyers, but he impressed them with the idea that in becoming lawyers they were becoming members of a great profession, in which honesty and frankness in their dealings with court and client and probity in private life were the main stepping stones to greatness in that profession. As a judge he was absolutely fearless. No outside consideration ever influenced him. He hewed to the line without thought as to where the chips would fall. He was honored and respected by the profession at large and most highly appreciated by his associates on the bench. His life was one well worth living. He left the world the better for his having lived in it. He was courteous to his associates on the bench and to the lawyer who appeared at the bar, regardless of whether such lawyer had won his way to the highest point in his profession or was arguing his first case before the court. He was twice greatly honored by the people of Nebraska by election to the most important office in the state. He repaid the debt with a public life that reflected great honor upon the people who had elected him. He was distinctly a people's man. He abhorred fraud, oppression, and vice of all kinds. If he had any weakness as a judge it was in standing for the weak against the strong, morality against wickedness. Such weakness in any judge is not, after all, a weakness, it is a tower of strength for justice. Add to all this the fact that he was at all times a courteous and Christian gentleman and you have before you a high type of a true American; an honest lawyer, and a conscientious judge.

His death was a great bereavement to his family and a distinct loss to the state which had so signally honored him and which he so greatly loved.

We recommend that this testimonial to our departed Chief Justice be ordered spread upon the journal of this court, and that a copy, duly certified under the seal of the court, be sent to his son and daughter who survive him.

JACOB FAWCETT,
JOHN B. BARNES,
E. E. GOOD,
A. W. JEFFERIS,
JOHN M. TUCKER.

PERSONAL TRIBUTE OF JACOB FAWCETT.

My estimate of the life and character of our departed brother is so fully reflected in the committee's report that I have little to add thereto. One point, not covered, comes to me. The judge was a diligent and painstaking worker. He did not believe in following the line of least resistance in his work. He never did so. During the years that I was associated with him as a member of this court, I learned that he carefully and painstakingly read the record and every brief in every case in which he wrote the opinion. The work of the court is so constant and exacting as to be little short of slavish. The people, and even many lawyers, have little conception, and less care, of the fact that the judges of our supreme court are the hardest worked officials in the state; that they actually work more hours in the day than any other state officers. Other state officers may spend more hours in their offices, but each judge, in the isolation of his private office, is following his daily, nerve-racking grind of examining dry and ofttimes unresponsive records, in an attempt to protect the rights of litigants, and to uphold the law. This court has ever had that class of judges; and I know whereof I speak, and I speak without

any thought of flattery, when I say, it has them now. In the front rank of that line of splendid men and judges, for thirteen years, stood Judge Manoah Bostic Reese. In life I loved and respected him. In death I cherish his memory.

JUDGE JOHN B. BARNES:

May It Please The Court: Having been closely associated with Judge Reese for many years as a member of this court, it is proper for me to speak a few words on this occasion. I first became acquainted with the late Chief Justice in the early part of the year of 1876. At that time he was the district attorney of the Fourth judicial district of this state, and I occupied a like position in the Sixth judicial district. By correspondence and in consultation in regard to the criminal procedure and certain prosecutions in which we were engaged, we became well acquainted, and I soon learned to know his worth and his zeal as a public prosecutor. The acquaintance, thus begun, soon ripened into a firm friendship which lasted without a break until the day of his death. In all the years of our association together I always found him to be a loving companion and a just and upright judge. Judge Reese was a man of high ideals and a friendly disposition. He was an untiring worker, and he brought to his labors great legal learning and an unswerving sense of justice.

It would not be true to say that we were always in accord on legal propositions, but whenever we differed our differences were friendly ones. Judge Reese always accorded to his associates the right of their individual opinions on questions of law or facts, and his remarks in the consultation room left no sting of bitterness. Take him all in all, he was a man who was loved by all who knew him, and one whose like we shall not soon again behold.

It was always greatly to his credit that his judgments, while just, were always tempered with mercy. Judge Reese was of great service to the state, first as a member of the convention that framed our present state Constitution; afterwards as district attorney of his district; as dean of the

university law school; and finally as judge and chief justice of this court. In all of that service he left a clean and honorable record, to which the state and its citizens may point with pride. The people will always remember his achievements in behalf of good government; and his personal friends will forever hold his name in loving memory. We can only say of him:

"Our friend is gone from the sight of men,
His faults, if any, were written in the sand.
His virtues will live forever in the hearts of his friends,
May he rest in peace."

JUDGE EDWARD E. GOOD:

May It Please The Court: He, whose passing has caused this Honorable Court to pause in its usual and regular proceedings that the court and members of the bar may honor his memory, pay tribute to his sterling worth and his praiseworthy achievements, and make a record of the esteem and affection they entertained for him and of their high appreciation of his noble character, was for more than thirty years my close personal friend.

I frequently met him in the practice of his profession. Sometimes we were associated together on the same side of the counsel table, and other times we were on opposing sides. I knew him as Dean of the Law School of the State University and as Justice of this Honorable Court. I knew him as a neighbor, a companion, and a friend. We have spent together several summer vacations in the Rocky mountains of Colorado and toured the Yellowstone National Park as companions and chums. These intimate associations and friendly relations for almost a third of a century gave me an opportunity to know and appreciate one of God's noblemen.

Physically he was robust and vigorous, of more than ordinary stature. He was well proportioned and was a commanding figure in any assemblage of men. Mentally he was well equipped for his profession. While he was keen and shrewd, a clear thinker, a logical reasoner, and gifted with a power of lucid statement, his was not a

scintillating intellect. He reached correct conclusions almost unerringly, but did it by patient mental effort, rather than by intuition.

Morally his standard was of the highest. He never, to my knowledge, countenanced an immoral act, much less was he guilty of one.

Few, if any, are the individuals who have made a deeper, more lasting, or a more favorable impress upon the jurisprudence and history of the state than he. Upon the legal history and structure of the state his thought and influence is everywhere manifest.

He was one of the framers of the state Constitution by which we are now governed. While that instrument may not be adequate to present day needs, by reason of the great changes that lapse of years has brought about, it was considered a model of excellence at the time it was drafted, and met the approval of the people when submitted to them. His industry, keen foresight and unswerving integrity were potent factors in the framing of that historic document.

For many years during the early history of this commonwealth, when crime was much more prevalent than now, he was district attorney for the Fourth judicial district. It was his duty to prosecute many important criminal cases. This duty he performed with strict fidelity and great zeal, and used his talents to make the reign of law supreme. The published reports of the opinions of this court show that he was an able and fearless prosecutor, and that he met with signal success in the performance of his duties.

He was twice elected a justice of this Honorable Court, and gave thirteen years of his life to the performance of the duties incident to that position, and for more than half those years he was Chief Justice. He presided with dignity and fairness. In his relations with counsel and his associates around the counsel table he was uniformly genial, patient, courteous. He was industrious and painstaking in seeking out and applying the principles of law. His opinions, as a rule, are clean, clear cut and vigorous, based on reason and the correct application of

sound legal principles. He was imbued with a belief that justice in the instant case was the great end to be attained, regardless of whether established precedents were followed. Many of his opinions are now recognized as landmarks in the jurisprudence of this state.

During the many years he was Dean of the College of Law he wielded a wide influence in moulding and shaping the professional career of many of the young lawyers of the state. He was not only an instructor of the law, but he instilled sound morals, and a high standard of legal ethics. His life and example were an inspiration to right living, right thinking. He possessed in an unusual degree the faculty of drawing to himself and retaining the ardent admiration and fervent friendship of young men. I have never known a lawyer who graduated while he was dean who did not have a sincere regard and genuine affection for our departed friend.

In all his years of public service I have never known of any of his official acts that have been seriously criticised. No one, so far as I know, has ever questioned the motive which has prompted any of his official acts. He believed in and rigidly lived up to the doctrine that public office is a public trust, and those holding public positions should act with no thought save of the public good.

In his business and personal relations with his fellows he was courteous and obliging, kindly considerate, and always honorable and upright. It was his delight to aid and assist the young and inexperienced. On many occasions, in the trial of cases when he has been pitted against a young lawyer with little experience, he has aided his opponent in developing his case or making a proper record by a kindly hint or suggestion, acting on the theory that justice was the end to be attained, and not an unmerited success. Many, many times, with a clear vision of the difficulties under which the young lawyer was laboring, has he aided him in the solution of difficult problems by stating the controlling principles involved and where a discussion of them could be found. With a friendly spirit and a noble generosity he has frequently shed light on the dark places and pointed the way to the proper course to pursue.

He was ever thoughtful and careful of his acts and words, and considerate of the feelings of others, and rarely, if ever, made an unkind or cutting remark. He was tender and sympathetic of those in sorrow or trouble, and ever ready to assist an erring friend or brother with good counsel and advice.

He was candid, truthful and upright in all his dealings with his fellow men. If he found that by inadvertence or through misinformation he had been led to do an act of injustice to another, none was more ready than he to make amends by correcting the error, and making the fullest possible reparation.

He lived a clean and blameless life, and always counseled clean and upright living by others. By precept and example he wielded a powerful influence for good in the wide circle of his acquaintance. In the fullest and truest sense of the term he was a good man. The world is better for his having lived in it, and those who knew and associated with him are better for that association. His good deeds will live after him. His life was a benediction. The ties that bound us so closely have been severed. We shall miss the kindly smile, the gentle greeting, the warm hand-clasp, but his life will be an inspiration and his memory cherished by us while life doth last.

HONORABLE A. W. JEFFERIS:

May It Please The Court: The death of Judge Reese terminated his personal activities, but not his influence, nor that of his works. If it were not for the lives of good and able men and their efforts in guiding and directing the efforts of their fellow men, the human family could make but little, if any, real progress.

The life of the departed was long, useful, and helpful. It was one of service. As a young man and member of the constitutional convention, he helped to construct the fundamental law for the commonwealth of Nebraska, his adopted state. As its district attorney in the early days, he performed faithful service to the people in an earnest effort to protect the lives and liberty of an increasing people and to make sure their property rights.

In the full maturity of his manhood, he directed his great intellectual attainments, his wise judgment and sterling insight to the performance of the delicate and trying duties of a judge of the highest court in his state.

He likewise gave his time and talent as Dean of the Law Department of the University in educating students of the law with high ideals and adequate legal training, to the end that the people of the various localities of the state might be counseled and advised in their efforts by lawyers of ability and honor.

A life of service such as was his is proof conclusive that the promptings of his heart led him to seek and help in the establishment of justice and right among his fellowmen, rather than to the accumulation of the world's riches for himself. His works will remain as guiding precedents. His character and standing is an honorable heritage for the members of his family. The bar and its members have the inspiration of his achievements to guide them in efforts to obtain the respect and encomium of those people who desire and wish that right and justice may be established and maintained for the well-being of mankind.

HONORABLE JOHN M. TUCKER:

May It Please The Court: The mark that the life of Manoah Bostic Reese made was as Judge of the Supreme Court, a lawyer in active practice, lecturer and dean of the law school, and as a leading citizen of his country.

His career as Judge of the Supreme Court was noted for sound and learned opinions that thoroughly digested the subject to a point where discussion was at an end. The opinions that he wrote in cases go far beyond a statement of the nature of the action, the evidence adduced, the contentions of the parties, and the holding of the court. When his opinions are before the student of the law who reads in preparation for the bar, or the lawyer who is examining authorities to cite, there will always be found a line of sound legal reasoning that is helpful in arriving at a conclusion of what the law is. His opinions always contained an argument in explanation of the reason for the holding of the court. Without this, an opinion is of very

little value to the student of the law or to the profession. He was possessed of broad sympathies, and these were at all times cultivated so that in applying legal principles to cases under consideration the weak were protected against the unjust attacks of the strong. In a decision of a case he never looked for a friend to reward nor any enemy to punish.

As a lawyer his ability was the result of a growth and development that was brought about by hard continuous work and labor in a study of the entire field of the law. He possessed a keen faculty to apply the knowledge obtained to the facts in the cases that came to his practice. In ability to raise points from facts in cases and to weave about his contentions a line of legal reasoning beyond successful attack he stood among the first. He was never swept off his feet by the forceful opposition of contending counsel. He was not afflicted with an irritating and tactless spirit of contention that excited antagonism in all with whom he came in contact, whether they were opposing counsel, judge, or jury. He was never rash or impetuous, or lacking in sound judgment and poise. He gave all of his best efforts to the practice of his profession, and was never disposed to postpone tasks of any sort. He never looked upon the practice of law as a matter of business. He did not regard the profession from the standpoint of money making, and therefore he never permitted himself to indulge in unethical practices. He always observed scrupulously his duty to the public, the courts, and his clients. Professional ideals were always first in his mind. Due to this high professional conduct, he always had the highest respect of the members of the bar.

HONORABLE CHARLES A. ROBBINS:

May It Please The Court: Others here today will speak of Judge Reese as lawyer, district attorney, member of the constitutional convention, Justice and Chief Justice of the Supreme Court, and citizen. I have thought that my close association with him for ten years in the work of the State University Law School entitled me to speak of him as a teacher of the law and of the influence of his teaching.

The State University Law School was established in 1891. Judge Reese was a member of the faculty from the beginning and delivered lectures on real property. For the most part instruction in the school was by lectures. There was little, if any, sequence in the courses of instruction. In the judgment of the board of regents the results were unsatisfactory. In 1893 it was ordered that text-books should be made the basis of instruction in the principal subjects, and Judge Reese was appointed Dean of the school. He held the office until 1903, a term of ten years. Nearly every advancement made in Nebraska in courses of law study, methods of instruction in law, requirements for graduation from the law school, and for admission to the bar of the state were made during that ten years. And very much of that advancement was due to his understanding, sympathy, and influence.

During the ten years of his office Dean Reese grew. His original opinions on some subjects were changed by experience and observation. He was not, in the academic sense, a product of the schools; but he acquired much of real finish by open-eyed and open-minded observation and study of results in the law school. That Abraham Lincoln had studied to advantage by tallow dip or open hearth such books as he was able to procure did not convince Dean Reese that the present day student should not read sytematically under an electric light. And, then, the supply of Abraham Lincolns seemed so very limited. And so Dean Reese favored the advancing requirements for admission to the law school, the change from the vague preliminary education sufficient to enable the student to understand the principles of the common law to the specific requirement of three years of high school work, and the change from three years of high school work to four years of high school work. The present standard of one year of college work was not effective until 1909.

It is now the settled conviction of most American law teachers that the ability to apply legal principles to concrete cases is best acquired by the study of the reported decisions of the courts. Such was not the opinion of most law teachers in 1893. And it was not the opinion of Dean

Reese at that time. When the case method of instruction was first used in the State University Law School, it was camouflaged under the term "text-book and cases," later changed to "cases and text-book." Dean Reese approved of the results. He had strong faith in good results. In 1902 every teacher in the law school (Dean Reese included) was using cases in class instruction, and some were using an out and out case method. What student of Dean Reese's day will fail to recall that his own instruction was illuminated from an inexhaustible collection of unforgetable special instances?

The three-year course of instruction in the law school was adopted while Judge Reese was Dean. And there have been very few important changes in the course of study in the intervening years.

I cannot but believe that what advancements have been made in the requirements for admission to the bar in this state have been made largely through the influence of the law schools. In 1893 there was no general educational requirement for admission to the bar in this state. The applicant for admission was required to pass a satisfactory examination in the principles of the common law under the direction of the court to which application was made. It was said that ability to distinguish between the Compiled Statutes and Maxwell's Justice Practice was satisfactory in some districts. Certainly no real tests were applied in most districts. The influence of Dean Reese was exerted strongly in securing the enactment, in 1895, of the statute placing the matter of admission to the bar in the exclusive jurisdiction of this court. It need hardly be said that he exercised an influence in the state legislature that no mere pedagogue could exercise. Dean Reese approved of the statute of 1905 requiring a three-year course of law study and general preliminary educational requirements, though at one time he came to doubt whether the legislature could be induced to pass the act.

Real liberty is equality before the law. To Dean Reese the courts of justice were the very flower of civilization. To him the calling of the lawyer was a high calling. Useful and right as are the rules of legal ethics, a mere peda-

gogue may recite them. But Dean Reese possessed those splendid qualities of uprightness, manliness, and bigness which made his daily presence and conversation in the class-room a telling influence for right living and conduct. He was himself a concrete case. At the bar of this state, and other states, his influence for good will long survive him.

HONORABLE JOHN LEE WEBSTER:

May It Please The Court: Manoah Bostic Reese, to whom we are this day paying memorial tribute, was one of Nebraska's most worthy and esteemed citizens.

He was a child of nature, a rustic youth, who developed strength, character and efficiency with the experience of years. In his long public service in various capacities, he proved himself to be an extremely useful man to the people whom he served.

As the elected representative from a farming community to the convention of 1876, Mr. Reese did effective and valuable work in helping to frame the Constitution under which the state has prospered during a period of forty-two years.

For six years he was prosecuting attorney in a judicial district which then included a dozen sparsely-settled counties which were not much more than open prairies dotted over with pioneer settlements and widely-separated villages.

In the early fifties, J. Sterling Morton, standing on a sloping hillside near where the village of Ashland now is, with a sweep of his hand, pointed to the valley of the Platte as the eastern boundary line of a vast desert region which extended westward to the far-setting sun.

Mr. Reese lived to see those counties become peopled with a numerous, thrifty, and industrious citizenship; the growing up of many and varied productive industries; the accumulation of millions of wealth, and the springing up of many cities therein which are like clustered gems evidencing the development and maturity of Nebraska's statehood.

From the vocation of a country lawyer in a little village, Mr. Reese was elevated to the honored position of one of the judges of the Supreme Court. Afterward, for a period of six years, he was a lecturer in the College of Law, and for ten years following was Dean of that department in the State University. At the end of that time, he again became a member of this court and was serving the people as Chief Justice at the time of his retirement.

From this brief summary, we see that Mr. Reese for nearly thirty-eight consecutive years served the people of Nebraska in some public or semi-public capacity. They respected him. They loved him. They honored him.

For a better appreciation of the life and character of Manoah Bostic Reese, permit me to make a hasty survey of his life, from the time and place of his birth to the end of his honorable career, that we may get into the atmosphere in which he lived, and observe the conditions surrounding him. Out of these conditions, like unto the lives of many other distinguished men, we can discover from whence came the innocent and sweetest thoughts of childhood which in time were succeeded by the vigorous energy and reflective qualities of strongest manhood.

Mr. Reese was born of pioneer parents in the prairie state of Illinois in 1839. That was long before the inventions and discoveries in the sciences which have subsequently produced the economical changes which have furnished the luxuries of modern day life. That was fifteen years before the Nebraska territory was created, and fifteen years before there were any permanent white settlements in this region west of the Missouri river.

Back in Illinois as a farmer boy, he lived close to nature; cultivated the soil; watched the fruit and the grain grow; and in the winter season occasionally attended a district school. His pleasures and opportunities were limited to those of the plain people who then inhabited that sparsely-settled country.

Out of the simplicity of those times, we can trace the beginning of the simple habits of life which remained with Mr. Reese as an ornament in future years. Again looking back to the peaceful times when Mr. Reese was but

a child playing on the prairie plains of Illinois, the United States had less than eighteen millions of people, yet Mr. Reese, broadening with time and influenced by his environment, lived long enough to be a part of the government when its population had grown to be more than one hundred millions of people, and to see the nation engaged in preparing an army of millions of soldiers to carry on its warfare with the central powers of Europe, in this the greatest cataclysm in history to make the world safe for republican forms of government.

The very extended panorama of interesting historic events which passed before his vision made lasting impressions upon his memory, and were stimulating influences in developing his strong and useful personal character, and caused him to become a close student of modern history.

In 1856 Mr. Reese removed from the prairies of Illinois to the prairies of the newer state of Iowa. It was after this pioneer farmer boy had reached the age of full manhood when his ambitions induced him to enter the doors of a seminary, and, later on, to engage in the reading of books in a law office; and in 1865 he received a license to practice law in the state of Iowa. We know but little more of him until we afterward find him in the village of Ashland in 1873, and in the town of Wahoo in 1874. The vast expanse of plains and rolling prairies had lured him westward. Longings for higher attainable things began to stir within him. Hazy glimpses of hitherto undreamed of possibilities began to shape themselves in his mind.

It might well be said of him that he was an example of the saying that nature is more perfect than all the artificialities of civilization, and a most efficient environment for the moral development of man. Thus only it is believed was it made possible for him to quicken and vitalize his powers to the fullest.

He came among us at a time when the chaos of a mighty world "was rounding into form the raw material of a state." The new country, with its new ideas and new questions, gave exhilarating energy to his body and mind. It may be well said of him that "he heard the tread of the

pioneers" moving westward over the prairie lands where soon would "roll a human sea."

In 1875 we find him among that group of sixty-nine men who framed the Nebraska State Constitution. This was an assemblage which, in proportion to the number of its members, contained in the growing more strong influential men who afterward arose to increased distinction and held more high offices of honor than any other single group of men of like number of which I have knowledge. Mr. Reese, in conscientious work, in careful investigation, and in faithfulness to duty, compared most favorably with his colleagues, and was recognized by all as one of the most valuable and useful members of that convention. He enjoyed the fiery, impulsive, combative debates of General Van Wyck. He listened with intense interest to the enthusiastic and inspiring eloquence of James Laird. He attended closely to the scholarly, dignified and cultured General Manderson.

From his experience in the constitutional convention, he recognized that governments are created by the union of fundamental elements of law woven into constitutional fabrics to control the body politic, and to preserve the mutual safety through the combined strength of the people. The proceedings of that convention were to Mr. Reese like a post-graduate course in constitutional law and in the science of government.

After all that may be said of Judge Reese, his chief reputation was made as a member of the Supreme Court. He was a patient and attentive listener. He had a retentive memory and was desirous of understanding all the intricate applications of the law. But the law is an immense subject. It is limited only by the boundary lines of human knowledge. It is a shield of protection for the richest and the lowliest, and holds the universe of men in one common embrace. As a judge of this court, he recognized that there are principles that are universal in the field of law, and that their application can be made to the countless conditions of life which are to be affected by them.

He had a vivid conception of the growth and development of the law. He had an appreciation of the aptness of the illustration, as expressed by another: "We may stand by the river and admire the great body of water flowing by, yet when we trace it back to its source we find a mere rivulet meandering on, joined by other streams, fed by secret springs and the rains and dews of heaven, but gathering strength and deepening its channels as it flows through the provinces until it attains its present majesty.

"Thus we can trace the principles of the law from small beginnings through gradual and countless contributions, until they finally take their places in use. * * * No such system can be born in a day; it is not as when nature in the full proportion of her strength suddenly lifted land into mountain ranges, but rather as by small accretions during countless ages, she places her islands in the seas."

Now and then we meet with instances of inharmonious joining of its principles which produce unsatisfactory results. These are not the faults of the law, but mistakes arising from an unfortunate application of its principles, or an erroneous judgment pronounced by those who administered it. It is the duty of the lawyer and the judge to ascend to that elevation of greatness from which he can comprehend the law as a science, and administer it as a philosopher. This Judge Reese always endeavored to do to the best of his ability.

Judge Reese was a man big enough to look at the facts in the record impartially, and to remember and apply the principles of the law uninfluenced by any heresy that might be popular for the hour. He was a judge ever ready to stand faithful to the fundamental truths of government and the sound philosophy of the law as he understood them. He realized that the "principles battled for at the bar in the passion of debate are merely re-echoed from the bench in unimpassioned utterance."

A person whom I do not know gave the following graphic and picturesque description of the Chief Justice at a time when he was sixty-nine years of age:

"The Chief Justice entered his private office in the state house one evening last week. He had spent the day

in the consultation room, communing with his colleagues. With a sprightly step he advanced to a table and laid down a calf-bound law book. His snow-white hair fell in cascades over his broad, high forehead. Keen, piercing eyes looked out from under bushy eyebrows. The forehead, eyes, nose and mouth suggested the recluse, the scholar, and the thinker, but the square aggressive jaw denoted the innate energy of an industrial field marshal." Judge Reese had something of the Quaker element in his composition, which was manifested by his silence, by his sincerity and his plainness; in his self-respect and respect for others; in his unconventionality and in his benevolence, his friendships and his deep religious nature.

In closing, I know no better phrase in which to express the whole life of Chief Justice Reese than to say of him that he was a child of nature. The effect of the environment of prairie land can be seen in the formation of his character and, in its extensive sweep of region, the expansion of his mental vision.

For his many friends, he always had a pleasant smile and a kindly greeting. At last he said to all of us "Farewell," and to the world "Good night."

CHIEF JUSTICE ANDREW M. MORRISSEY:

Realizing the important part that Judge Reese played in shaping the destiny of the state, and appreciating the high character and lovable disposition of the man, the court named this committee to draft resolutions expressive of the sentiments of its members. So well has the committee discharged its duties that I shall not undertake to add anything to what has been said.

The court adopts these expressions as its own. And, in order that they may be preserved as a lasting tribute to the memory of our departed friend, it is ordered that the resolutions presented and the speeches delivered be spread at length upon the journal of the court, and that they be published in our reports.

JUDGE CHARLES B. LETTON:

I fully concur with all that has been said with respect to the virtues of our departed friend. In addition, I wish

to say that there were two strongly marked traits of character of Judge Reese which deeply impressed me from my first acquaintance with him many years ago.

His pole star was right and justice. He would not knowingly wrong any man by word or deed. In every case brought to this court for review, he painstakingly sought to inform himself as to the facts and diligently sought to ascertain and apply the proper legal principles so as to reach a conclusion most in accordance with right.

Another trait of his character was his uniform kindness of disposition and amiability of manner. His courtesy was not a mere veneer. It came from his essential kindliness of heart and his good will to all mankind, and was but the outward expression of that inward condition. In this respect, as in others, he was "a gentleman of the old school," and yet he felt a stern devotion to duty. To paraphrase: "He was a man, take him for all in all, we may not look upon his like again."

JUDGE FRANCIS G. HAMER:

He was my friend. If he had faults they were but few, and I wrote them in the dust; when the wind blew they were gone. To us he is only a memory, although his work is all around us. As a lawyer, his inclination and experience made him an advocate. As a judge, he was careful, painstaking, and industrious; zealous to discover the correct rule of law, and fearless in declaring it.

I knew him from the time of his vigorous manhood until his tottering steps were nearing the boundary where eternity begins. I especially liked him because of his interest in young men. He was a teacher of young lawyers. He made them feel that he was their friend. He encouraged the best that was in them. The evidences of his work are with us, and they will continue down the ages, ceaseless as the centuries. He had the capacity and the art to make the young man understand that he was filled with the possibilities of useful citizenship. He made the future attractive by the promise of the bright things and the good things in store for the young man of enterprise and industry. He was much the friend of the student, and every student

knew it. He made no great pretense of learning, but he was strong. He had read much and had digested it.

The students who attended the law college at the State University are many of them in our state, many of them have gone to other states, and some of them are in the trenches across the water. Wherever these young men are, whether fighting the battles of their clients in the courts or fighting the battles of their country and of the democracy of the world, they are the better because they met Judge Reese, who widened their views of the law, of civilization, and of good government, and strengthened their patriotism and love of country.

Judge Reese stood for the betterment of mankind. He believed in rescuing and building up the unfortunate whom some mistake, perhaps some weakness, caused to wander from the path of honesty and to slip and fall. He did not believe that a man should be condemned and ostracised for the reason that he had once fallen and once violated the law. He believed that when the prisoner was liberated from the penitentiary he should be welcomed by those willing to throw a good environment about him, and to furnish him with honest employment, and to encourage him to live the life of good citizenship. He believed that most persons possessed good qualities, and that the misfortune of a mistake and a term in the penitentiary should not deny the man convicted from access to the opportunities of life. For many years he was president of the Nebraska State Prison Association. During that time he was the leader of that body in its attempts to rescue those who in their youth had slipped from the path of rectitude and had been adjudged to receive the punishment which properly comes to those who commit crime.

As a judge he was tender to those who had been tried and adjudged to be guilty and who had not received a fair trial. His vote was always in favor of a new trial for the prisoner who had been unjustly convicted and sentenced. He was in all such cases fair and full of courage.

I have never met a young man who was a student of the law school of which Judge Reese was the dean without feeling, when I talked with him, that the influence of Judge

Reese upon him had been for the best. I liked Judge Reese because be was full of manhood and tenderness. He was always useful, and the world will be the better because he did what he could to educate and to instruct the young of our profession and to lead them so that they went with unfaltering foot-steps toward the right. In his life he stood for morality, sobriety, and the best citizenship.

When the waves of time that beat forever on the mystic shore that lies beyond the range of human ken have borne and beaten all the boats and barks that sail their voyage on the sea of life beyond the fogs that hem our vision in, beyond the voiceless breakers of that silent shore to the harbor of the Great Beyond, then know the rising sun that lights and warms eternity both glints and cheers with all its golden beams the man who left us, carrying in his soul a flood of love and tenderness, of sorrow, of balm and charity for bruised and wounded hearts; for he stood for the poor, the weak, the fallen and distressed, and loved them all.

Safe in the care of Him who holds the sea within the hollow of his hand, who guards the navies of the world, its crowns and kingdoms and its marshalled hosts, the lonely home on desert, plain or forest solitude, the sleeping village, and the cities' teeming millions from storm and earthquake, pestilence and death, yet feels the pain of wounded bird and notes the sparrow in its fall, we leave our friend, himself so gentle, kind and true.

During the period covered by these reports, in addition to the cases reported in this volume, there were 43 cases affirmed by the court without opinion, and 144 cases disposed of by the supreme court commission.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1917.

HOLT COUNTY FAIR ASSOCIATION, APPELLEE, V. HOLT COUNTY, APPELLEE: WILLIAM LELL ET AL., APPELLANTS.

FILED MARCH 16, 1917. No. 19058.

Agricultural Societies: ORGANIZATION: COUNTY AID. Where six persons only join in the organization of an agricultural society, such society is not entitled to an appropriation from the county general fund under the provisions of section 6, Rev. St. 1913.

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

Brome & Brome, W. G. Stewart and *C. H. Stowell,* for appellants.

A. J. Donohoe, J. J. Harrington and *W. K. Hodgkin, contra.*

MORRISSEY, C. J.

This is an appeal from the district court for Holt county. In 1913, 50 citizens of that county organized a county agricultural society in conformity with the statutes. In 1914 they held a three days' fair at O'Neill, the county seat. Application for county aid, under section 6, Rev. St. 1913, was made to the board of supervisors. The board made the allowance and ordered the issuance of a warrant for the proper amount. When this was done, William Lell and Charles Conarro gave notice of intention to appeal from the issuance of the county warrant, and filed an appeal bond. This action was then

brought by the Holt County Fair Association to compel the delivery of the warrant. The county of Holt is a nominal party, and stands ready to deliver the warrant. Lell and Conarro appear as taxpayers, but it develops that the real contention is that, years before the organization of the Holt County Fair Association, there was organized, at Chambers, an association called the South Fork Fair Association. From year to year this association held a fair at Chambers, and for a number of years the board of supervisors of the county gave it donations; or contributed aid, but not in the amount fixed by the statute. The South Fork Fair Association did not intervene, and is not a party. However, it is evident that this litigation is conducted in its interests, and its purpose is to secure the fund for the South Fork Fair Association. The section under which each party is claiming the right to the money provides that when 20 or more persons, residents of any county, shall organize themselves into a society for the improvement of agriculture and adopt a constitution and by-laws, and hold a fair of at least three days' duration, the county board shall order a warrant drawn in its favor, on the general fund, for an amount equal to five cents for each inhabitant of the county, based on the vote cast for member of congress. There is no question that the Holt County Fair Association organized strictly according to the statute, and held the three days' fair.

Six persons, in the year 1899, adopted what they call articles of incorporation of the South Fork Fair Association, and filed them with the county clerk and the secretary of state. When the board of supervisors was making its donations, or paying its bounty, from year to year to the South Fork Fair Association, it is evident that the board did not regard the association as entitled to the full five cents for each inhabitant, because the amounts paid varied all the way from $100 to $500 per annum. Chambers is located six miles from the south line of the county, and its nearest railroad station is O'Neill, 21 miles away. O'Neill is the county seat, has two railroads,

several hundred inhabitants, and is located close to the center of the county. Of course, it is the logical place for the county fair, but the matter of location is not controlling. If the South Fork Fair Association had complied with the statutes and perfected its organization first and held a county fair from year to year, it would be entitled to the fund provided by the statute. But its articles of incorporation show that but six persons joined in its organization. This was not such a compliance with the statute as entitles it to receive money from the county treasury.

The district court found that the Holt County Fair Association was regularly and duly organized, and conducted such a fair as entitled it to the money, and found specifically that the South Fork Fair Association had not been formed and organized in conformity with the statute, and that the money which had been paid to it from year to year by the board of supervisors was paid without authority of law. These findings are sustained by the evidence, and the judgment is

AFFIRMED.

CORNISH and DEAN, JJ., not sitting.

ALFRED PETERSON, APPELLEE, V. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, APPELLANT.

FILED MARCH 16, 1917. No. 19172.

Appeal: CONFLICTING INSTRUCTIONS. It is erroneous to state to the jury by instructions that certain allegations of negligence set forth in the petition are to be considered by it in making up its verdict, and also to tell the jury that such allegations should be disregarded by them. Unless from the whole record it is apparent the jury were not misled thereby, the error must be considered prejudicial, since it is impossible to know which of the directions it followed.

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

Crofoot, Scott & Fraser, for appellant.

Jefferis & Tunison and *Hollister & Cunningham, contra.*

LETTON, J.

Action for personal injuries occurring by the plaintiff being knocked down and run over by an engine upon a railroad bridge. Plaintiff recovered a verdict and judgment for $10,000. Defendant appeals.

The plaintiff is a common laborer. Shortly before the accident he had been working on a farm in Nebraska. He went to an employment agent in Omaha, who directed him to go to Neola, Iowa, where he could procure employment on a stock farm belonging to one Hubbard. He arrived at Neola at about half past 5 o'clock in the evening of December 2, 1912. The accident occurred about 6: 25 P. M. He testifies that he inquired of the lady in charge of the station, and she directed him to Hubbard's residence. The evidence shows that for a short distance west of the station the railroad track and the railroad bridge crossing a small stream were very generally used by pedestrians. The bridge was floored and a hand-rail erected on both sides. The substance of plaintiff's testimony is as follows: He walked westward after he crossed the bridge until he met a passenger train coming in. Thinking he was mistaken in the direction, he turned and walked back toward the station. A little before he reached the bridge he heard a whistle; at the switch stand, which is east of the bridge about 35 feet, a man, whom he took to be a brakeman, was standing; that he told him he was looking for Mr. Hubbard, and that this man told him that Hubbard was in the stock-yards (which were north and west of this point), and said for him to go over the bridge to the yards. He then looked eastward, saw a train or car standing in front of the depot on the passing or switch track, but it had no lights. As he went to the stock-yards he stopped within one or two feet of the bridge and

looked back to see if the train was coming, but it was not moving, and he saw no headlight; when he reached about the middle of the bridge he was struck in the back and knocked down by an engine. It was dark at the time. He heard no noise and had no knowledge that the train was coming, or he would have jumped off the bridge. It is shown that his left leg was cut off, and that the heel and part of his right foot were crushed and afterwards removed. He remained in one hospital for about seven months, and about a year afterwards he was taken to another hospital, remaining there many months and suffering great pain. The bridge had been used as a pathway for many years to the knowledge of defendant's employees, a beaten track leading to and from it. There were no signs or notices forbidding persons to use the same. The bridge at that time was 13.2 feet in width, and there was a space of 16¼ inches between the engine and the hand-rail on the side of the bridge. The west end of the station building is 298 feet east of the east end of the bridge. The main line is the first track south of the station platform, and the passing track on which the engine and freight train stood is the next one south.

Plaintiff testifies he could see the station when he turned and looked back before going onto the bridge, and also saw a car on the south passing track. The switch point is 35 feet east of the bridge. It is shown that the engine was uncoupled from the train and moved forward on the side-track at the rate of two or three miles an hour until the switch stand was reached. After the switch was opened it moved forward on the bridge at about the same rate for the purpose of clearing the switch, so as to back onto the main line to be used in moving cars at the rear end of the train. There is a slight curve in the track, so that the beam from the headlight would be directed north and west of the bridge until after the engine emerged from the side-track. Neither the engineer nor fireman saw the plaintiff, and they did not know he was on the track until they heard him scream. The engine was stopped immediately, and

he was found lying on the bridge toward the south end of the track between the tank and engine. At the rate the train was moving, according to the testimony, about eight or ten seconds elapsed between the time the headlight shone on the track on the bridge and the time the plaintiff was struck. There is a direct conflict between the testimony of plaintiff and that of a number of witnesses for defendant as to whether there was a headlight burning upon the engine and as to whether any signals were given. Although he says he heard no whistle, we think it is established that two short whistles were blown before the engine moved, as a signal to a towerman stationed about 600 feet east of the bridge, who answered by a signal light, allowing the train to go upon the main line. The only direct testimony that no headlight was burning is that of the plaintiff, though two other witnesses say they did not notice it. The positive testimony of the engineer, fireman, conductor, two brakemen, the towerman, and that of two farmers, who were at the stock-yards at the time, is that the headlight, which was an oil burner, was burning before the accident occurred, and at the time plaintiff was struck. In such a state of the evidence, where there is so much doubt as to the existence of negligence on the part of defendant, it is especially needful that the instructions be clear and unequivocal.

Since the evidence is clear and undisputed that the defendant company had permitted the bridge to be used as a passageway for pedestrians for many years, and this use was well known to its agent and employees, the plaintiff was not a trespasser, but occupied the status of a licensee. This being the case, defendant was bound to use ordinary and reasonable care to see that a traveler crossing the bridge was not injured by its negligence.

The petition alleges, in substance, that the defendant invited the plaintiff and the public generally to use the bridge as a public way, and that the accident to plaintiff was, among other things, due to "negligence of said defendant in keeping and maintaining said bridge as a

passageway for the use of pedestrians without sufficient space between the tracks and railings thereof," and its negligence in failing "to provide any signal or watchman at said bridge to give people warning that were using the same."

Instruction No. 2 given by the court is as follows: "You are instructed that the burden of proof is upon the plaintiff herein to establish, by a preponderance of the evidence, all of the material allegations of his petition, which are not admitted by the defendant's answer, before he will be entitled to recover in this action. That is to say, it is for him to establish:

"(1) That defendant was negligent in one or more of the particulars with which it is charged in said petition, namely, that defendant was negligent in maintaining the bridge in question as a public passageway for the use of pedestrians without sufficient space between the tracks thereon and the railings thereof to afford reasonable safety for pedestrians to pass over said bridge at the same time the defendant's engine and tender were passing over the same, and, under such circumstances, in the defendant running its engine and tender over and upon said bridge while plaintiff was thereon; or that defendant was negligent in operating its engine and tender over or upon said bridge while plaintiff was thereon, without giving any signal or warning of its approach, and striking and injuring plaintiff at a time when plaintiff was unable to protect himself, and when defendant's servants in charge of said engine and tender saw, or by the exercise of reasonable care should have seen, the plaintiff in time to avoid injuring him; or that the defendant was negligent in failing to provide some signal or watchman stationed at said bridge to warn persons of the danger incurred in crossing said bridge.

"(2) That such negligence of the defendant was the proximate cause of the plaintiff's injuries, while the plaintiff himself was in the exercise of ordinary care for his own safety; but, on the question of ordinary care on the part of the plaintiff, it is sufficient, in the first in-

stance, if the evidence adduced on behalf of the plaintiff does not disclose negligence on his part directly contributing to the happening of the accident complained of; and,

"(3) That plaintiff has sustained some damages by reason of said injuries and the amount thereof.

"Should you find that plaintiff has established each and all of the foregoing propositions by a preponderence of the evidence, and should you further find from the evidence that plaintiff was not guilty of contributory negligence, as hereinafter defined, then plaintiff would be entitled to recover such damages as the evidence shows he has sustained as the natural and direct result of the defendant's said negligence, and your verdict should be for the plaintiff accordingly.

"Should you find, however, that plaintiff has failed to so establish any one or more of the foregoing propositions, or should you find that the evidence upon any one or more thereof be evenly balanced, or that it preponderates in favor of the defendant, or should you find from the evidence that plaintiff himself was guilty of contributory negligence, then plaintiff will not be entitled to recover herein, and your verdict should be for the defendant."

The court in instruction No. 1 restated all the allegations of negligence in the petition. Instruction No. 2 states that it is for plaintiff to establish that the "defendant was negligent in *one or more* of the particulars with which it is charged in said petition." The first charge made is that defendant was negligent in maintaining the bridge without sufficient space between the tracks and the railings to allow pedestrians to pass over the bridge at the same time while the engine and tender was passing. Another charge is that the defendant "was negligent in failing to provide some signal or watchman stationed at said bridge to warn persons of the danger incurred in crossing said bridge." By the third instruction the jury were told that they must be satisfied "that the defendant was guilty of negligence in *one or more* of the particulars with which it is charged in the petition,

and which are more specifically set forth in the first subdivision of instruction number 2 herein."

These instructions permit a verdict to be rendered against the defendant merely for the reason that the bridge as constructed was not wide enough to permit foot passengers and engines or trains to pass over it at the same time with safety. This is not a correct statement of the law. The fact that the defendant suffered or permitted the use of this bridge for foot passengers for so long a time implies a license to use the same, but it did not impose upon it any duty to change the construction of the bridge. The bridge was apparently absolutely safe for the purposes of the railroad company, and with due regard to the fact that a narrow railroad bridge, even though planked over, is always a place of danger, the bridge was apparently perfectly safe for foot passengers except when a train or engine was crossing. The license to the public was a license to use the bridge in the condition as it then stood, and no duty was imposed upon the defendant to make the bridge sufficiently wide so that foot passengers and railroad trains could pass over it at the same time. And so with the allegation that it was negligence to fail to keep a watchman at the bridge, the evidence did not establish such a constant use of the bridge by pedestrians as to impose such a duty upon defendant.

After reciting these and the other allegations of negligence in the petition, the court says: "Should you find that the plaintiff has established each and all of the foregoing propositions by a preponderance of the evidence, and should you further find from the evidence that plaintiff was not guilty of contributory negligence, as hereinafter defined, then plaintiff would be entitled to recover such damages as the evidence shows he has sustained as the natural and direct result of the defendant's said negligence, and your verdict should be for the plaintiff accordingly." It is true that by the eleventh and twelfth instructions the jury were told that the railroad company would not be liable for injuries

occurring to a licensee merely and solely because of the narrowness of the space between the track, or the engine or cars upon the track, and the railings on the bridge, and that there was no duty upon it to maintain a watchman at the bridge, but it is impossible to tell whether the jury followed these or the first, second and third instructions. It was error to give such conflicting instructions, which tend to confuse the jury. *Wasson v. Palmer,* 13 Neb. 376; *School District of Chadron v. Foster,* 31 Neb. 501; *Chicago, B. & Q. R. Co. v. Oyster,* 58 Neb. 1; *Williams v. McConaughey,* 58 Neb. 656; *Reed v. State,* 75 Neb. 509, 521; *Bryant v. Modern Woodmen of America,* 86 Neb. 372.

In the state of the pleadings and evidence in this case, it is especially important that the instructions be clear and unequivocal. In a number of cases we have held that the giving of conflicting instructions, although erroneous, is not always prejudicial, and we adhere to these views. Whether prejudicial depends upon the circumstances in each particular case. The main thing is that the reviewing court be satisfied that the defeated party has had a fair trial of the real issues. Unless it is so convinced, the error must be deemed to be prejudicial. We are of opinion that the rule announced in the cases above cited should be applied and the giving of these conflicting instructions be held to be prejudicial. Upon a retrial only such allegations in the petition and such issues as are supported by evidence should be submitted to the jury.

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

REVERSED.

SEDGWICK, J., not sitting.

IN RE ESTATE OF JANE A. DOVEY. GEORGE OLIVER DOVEY ET AL., APPELLEES, V. GEORGE E. DOVEY, APPELLANT.

FILED MARCH 16, 1917. No. 19223.

1. **Wills**: SETTING ASIDE: UNDUE INFLUENCE: BURDEN OF PROOF. When it is shown that a will has been signed and attested by the statutory number of witnesses, and it is conceded that the testator was of sound mind, the will is presumed to be valid. In order to set it aside on the ground that it has been procured by undue influence, competent proof is required, and the burden of proof is ordinarily upon the contestant.
2. ———: PROBATE. If the facts in evidence justify the belief that the instrument was the result of the volition and expressed intentions of the testatrix, that the disposition of her property is not opposed to natural justice or contrary to or opposed to the usual considerations which move reasonable minds in such matters, and that it may as well have been the result of love and affection as of influence, solicitation or coercion, a finding is justified that the will expresses the true intention of its maker.
3. ———: EXECUTION: PROOF. The due and proper execution of a will may be proved by the testimony of the attesting witnesses, even though the attesting clause is excluded from the consideration of the jury.
4. ———: PROBATE: TRIAL: WITHDRAWAL OF EVIDENCE. It is within the discretion of the district court to admit or reject evidence of declarations made by the testatrix some four or five years before the execution of the will to the effect that she did not intend to make a will, and under the evidence in this case it was not prejudicial to withdraw such testimony from the jury.
5. ———: ———: VERDICT: SUFFICIENCY OF EVIDENCE. Where the evidence in behalf of the contestants tending to establish the existence of undue influence is specifically denied by the witnesses for the proponents, a verdict that the will was valid will not be disturbed for lack of evidence.

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

John L. Webster, for appellant.

C. A. Rawls, contra.

LETTON, J.

This is a contest over the probate of the will of Jane A. Dovey. The contestants allege that the testatrix, by reason of old age and weakness caused by continued illness, was not possessed of sufficient mental capacity to make a will, and that at the time it was made she did not understand its contents. It is also alleged that it was executed by reason of improper and undue influence exerted upon her by E. G. and G. O. Dovey, her grandsons, who are the sole devisees in the will, and by their parents and other members of the family of H. N. Dovey; that, by reason of her great age, weakness and mental condition, she was easily influenced and her mind was poisoned against the objectors, her sons, George E. Dovey and Oliver C. Dovey, without cause or provocation, and she was thereby deprived of her free will and agency. The will was executed on April 24, 1913. At that time Mrs. Dovey was 86 years of age, was suffering to some extent from enlargement of the arteries and from severe pains in the back of her head, and, while able to walk about the house, she was so infirm that she had to be carried up and down stairs. She died November 20 of the same year. She was totally blind for several weeks before her death and her eyesight had been failing for some months, but there is no evidence to show that at the time the will was executed she was not fully competent to make a will. For some months after the date of the execution of the proposed will she read the daily papers, conversed intelligently, was interested in current events and in local happenings, and showed no signs of mental incompetency. Mrs. Dovey had three sons, George E., Horatio N., and Oliver C. Dovey. Prior to 1909 these brothers had carried on a mercantile business in Plattsmouth, which was started by the father E. G. Dovey, and after his death was still continued under the name of E. G. Dovey & Son. In 1909 dissension arose among them and litigation ensued, but the evidence is undisputed that each of the sons and

their families maintained pleasant relations with the grandmother until her death. For 25 years after the death of her husband she lived in the family of her son Horatio and continued to live there until the time of her death. Testimony was introduced to show that several years before, on at least two occasions on being spoken to with reference to disposing of her property by will, she said she would not make a will, that her deceased husband was opposed to wills, and that she would not make one. This evidence was taken from the consideration of the jury by oral and written instructions of the court as being too remote. The will contains a provision charging the legatees with the maintenance and support of their mother "of the character to maintain the station in life which she has always occupied." The proponent E. G. Dovey testified that his grandmother requested him to go to Omaha to have the will prepared for her, telling him what disposition she wanted to make of her property; that he went to Omaha and had the proposed will prepared by a lawyer of that city, and that when he returned he gave the will to his grandmother. This was on April 19, 1913. On April 24 Mr. Walling, a friend of the family, was called to the home at the request of Mrs. H. N. Dovey, proponent's mother. He testifies that he went upstairs to the room where Mrs. Jane E. Dovey was sitting. She handed him the paper, and at his suggestion she named two friends whom she desired to act with him as witnesses to the will. These ladies were then called by telephone. When they arrived Mrs. Dovey told them that the paper she had was her will, signed it in their presence, and asked them to sign as witnesses, which they did. They each testified that she appeared to be of sound mind and competent to act. A short time before this George E. Dovey, the oldest son of Mrs. Dovey, had procured a will to be prepared by which his mother devised all her property to Mr. Horatio N. Dovey, the father of the proponents, or to Horatio and himself, as to which the record is not

quite clear. He gave this proposed instrument to Horatio Dovey and asked him to have it executed by his mother, but this was never done. In May, 1913, he also procured a bill of sale of his mother's property to be made conveying it to Horatio and himself, and asked Horatio to have his mother sign this. Soon afterwards it was returned to him by Horatio, who testifies he never presented it to Mrs. Dovey. George E. Dovey testifies that he then took the bill of sale and went to Horatio's home to see his mother. That Mrs. H. N. Dovey accompanied him upstairs to Mrs. Dovey's room. When he presented the bill of sale Mrs. Dovey refused to sign it, saying she would sign no more papers, and Mrs. H. N. Dovey said that "mother has signed about all the papers she had ought to sign." Mrs. Dovey denies making this statement.

The testimony is undisputed that the writing of the proposed will and its execution was not communicated by E. G. Dovey or his mother, Mrs. H. N. Dovey, to any other member of the family until after Mrs. Dovey's death, when Mr. Walling was called by Mrs. H. N. Dovey, given the key to Mrs. Jane E. Dovey's bureau, and asked to get the papers. He found the will in an envelope, as he had sealed it and indorsed it on the day he had executed it. It was filed for probate that day.

The testimony of Mrs. Patterson, a daughter of George E. Dovey, that every time she went to visit grandmother Dovey she was never left alone with her, but some member of the family of H. N. Dovey was present, is directly contradicted by Mrs. H. N. Dovey. Testimony that Mrs. H. N. Dovey some time before told Mrs. Oliver C. Dovey, "I tell you I have got grandma now where she does just what I say," is also contradicted by Mrs. H. N. Dovey. At the hearing the contestants offered no evidence as to Mrs. Dovey's soundness or unsoundness of mind, and did not bring her sanity into question, so that the only matter in issue between the

parties is as to whether the execution of the will was brought about by undue influence.

The first assignment of error is that the court erred in permitting several witnesses for the proponents to testify as to the mental capacity of Mrs. Dovey to make the will. At the trial the contestants admitted that Mrs. Dovey was mentally competent to make a will at the time the instrument was executed, hence this complaint was waived. Moreover, there is ample testimony on this point to support the will.

The second assignment of error is that the court erred in refusing to permit the contestants to prove by Mr. Walling that the will was not read to Jane A. Dovey. This exclusion was on cross-examination. The witness had just testified twice on direct examination that the will was not read over to her before she signed it, and that all he knew about it was that she made the statement that she had read it.

The third assignment of error is that the court erred in admitting the will without the attesting clause. Since the proof of execution was sufficient otherwise, this was not essential. *Monroe v. Huddart*, 79 Neb. 569. The fourth and sixth have reference to the exclusion of evidence. The same facts were established by other testimony, and there was no prejudicial error in the rulings complained of.

It is complained that the court erred in refusing an instruction to the point that undue influence may be exercised by one not a beneficiary under the will. Instruction No. 9 expressly told the jury: "Proof of undue influence may be circumstantial and inferential, and the influence may be that of a third person as well as that of a direct beneficiary under the proposed will, or by both in conjunction." There is no ground, therefore, for this complaint.

It is insisted in assignment No. 10 that the court erred in its instructions Nos. 7 and 8, relating to what constitutes undue influence and the degrees of evidence necessary to sustain the charge of undue influence.

The seventh and eighth assignments of error are that the court erred in withdrawing from the jury by oral and written instructions statements and declarations of Mrs. Jane A. Dovey that she had not made and did not intend to make a will. That George E. Dovey himself placed little weight upon these declarations is evidenced by the fact that before this will was executed he endeavored to procure a will drawn by his own attorney to exclude his brother Oliver from a share in the estate, to be executed by his mother. This will was given to Horatio to be presented to her. This he never did. While we are satisfied the evidence might properly have been received, it was so remote in point of time that its admission or rejection lay within the discretion of the district court, and it was not prejudicial error to withdraw its consideration from the jury.

Counsel for appellant are in error with respect to the scope of the instructions. The court did not withdraw from the jury the declaration, which George testified was made in May after the will was signed, to the effect that she had signed her name to all the papers she was going to sign. In cases of this nature declarations made by the testatrix within a reasonable time prior or subsequent to the making of the will, material to the inquiry, may be considered upon the question of undue influence. We are satisfied that no error would have occurred if this testimony had been admitted in the discretion of the district court, but we are also satisfied that no prejudicial error occurred by its exclusion. The proof shows that these remarks were made more than four years before the will was executed, and before controversy and litigation arose between the three sons arising out of their relations as partners in the business of E. G. Dovey & Son. It was after this time that the relations between Oliver and his brothers George and Horatio became strained and dissension arose. Under the circumstances it is not strange that Mrs. Dovey changed her mind. The fact alone that she

devised her property to her two grandsons, for whom she had love and affection, was not an unnatural or unusual disposition of her property, or enough to convince an unprejudiced mind that the will was the result of undue influence.

After stating that the contestants alleged that there was undue influence used upon Mrs. Dovey, which resulted in her signing the proposed will, against her intention and against her real wish and will, and that it devolved upon the contestants to so prove by a preponderance of the evidence, before the jury would be warranted in finding the proposed will invalid for that reason, the court said in instruction No. 7: "In this connection you are instructed that the term 'undue influence' means such influence as compels or induces a person to do that which is against her real wish and desire, either from fear, desire for peace, or from some feeling which at the time she is not able to control. What would amount to undue influence in one case and vitiate a will of a testatrix would not necessarily be so considered in another case. In that regard every case stands or falls upon the peculiar facts and circumstances surrounding it, as the same may be established by the evidence. In any case, however, the undue influence necessary to vitiate a will must be such as to amount to moral force destroying the free agency of the testatrix and substituting another person's will for her own. There must be proof that the purported will was obtained by such undue influence and that the circumstances of its execution are inconsistent with any other hypothesis but undue influence."

Instruction No. 8 is as follows: "You are instructed that not all influence exerted upon a testatrix on the making of her will is undue or unlawful. Lawful influence arising from legitimate family and social relations may produce irregularities in the disposition of property which may work an apparent hardship, but neither advice, argument or persuasion so bestowed will avoid a will made freely and from convictions held

by the testatrix, although such convictions be the result of such advice, argument or persuasion. To render influence undue it must subvert the free agency of the testatrix."

It is strenuously insisted that instruction No. 7, in so far as it states that "undue influence necessary to vitiate a will must be such as to amount to moral force destroying the free agency of the testatrix and substituting another person's will for her own," and that "there must be proof that the purported will was obtained by such undue influence and that the circumstances of its execution are inconsistent with any other hypothesis but undue influence," is an erroneous statement of the law. It is conceded that these ideas are first found in the jurisprudence of this state in *Latham v. Schaal,* 25 Neb. 535. It is said that the language is found in the syllabus and not in the body of the opinion, and was, therefore, prepared by a reporter and not by the court. But the reporter's note at the beginning of the volume states that the syllabi in this volume were prepared by the judge writing the opinion, in accordance with rule 18, and the practice of this court for very many years has been to make the syllabus as much the decision of the court as the opinion itself. Like statements of the law in instructions were approved in *Seebrock v. Fedawa,* 30 Neb. 424, 437, opinion by Norval, J., and cases from Wisconsin, Ohio, New York and Michigan are cited in the opinion to sustain the proposition; in *Boggs v. Boggs,* 62 Neb. 274, opinion by Pound, C.; in *Stull v. Stull,* 1 Neb. (Unof.) 389, opinion by Oldham, C., and in concurring opinion by Pound, C., p. 399; and in *Spier v. Spier,* 99 Neb. 853. Practically the same theory is stated in *Knox v. Knox,* 95 Ala. 495. And in *Schieffelin v. Schieffelin,* 127 Ala. 14, an instruction that, in order "to set aside a will of a person of sound mind for having been obtained by undue influence, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue in-

fluence," but "it must be shown that they are inconsistent with a contrary hypothesis, and the undue influence exercised in relation to the will itself," was held proper.

There can be no doubt that, where there is testamentary capacity, a finding that undue influence has been exerted will not be supported merely by evidence that some person had an opportunity to exert or was possessed of influence over the testator. It must be made to appear, where there is no express evidence, by a justifiable and fair inference from the facts proved that such influence was exerted so as to dominate and control the will of the testator, and caused a testamentary disposition to be made of his property other than that which he would have made if uninfluenced. An inference of undue influence which induced the testator to do that which he would not otherwise have done must be established by a preponderance of the evidence and must exclude any reasonable inference. *Schuchhardt v. Schuchhardt,* 62 N. J. Eq. 710. Almost the exact language of the instruction complained of was used by the Lord Chancellor in *Boyse v. Rossborough,* 6 H. L. (Eng.) *2, *50.

In *Latham v. Schaal, supra,* the language is credited to the case of *Maynard v. Vinton,* 59 Mich. 139. In a later case, *Bush v. Delano,* 113 Mich. 321, it is said that this language stated an incorrect rule, that the proof to establish undue influence need only amount to a preponderance of the evidence. A Missouri case is to the same effect. *Gay v. Gillilan,* 92 Mo. 250.

We are content to abide with the law as formerly announced, and hold that the instruction is not erroneous as applied to the facts in this case.

It is contended that the fact that the execution of this will was kept a secret from the sons of Mrs. Dovey until after her death is a strong indication of the exercise of undue influence. E. G. Dovey testifies that he saw the will prepared by an attorney at the instance of George E. Dovey and delivered to his father,

in the bank, and thinks he read it. It would be human nature, knowing the desire of his uncle George to have Mrs. Dovey, the testatrix, execute a will making a different disposition of her property, to keep the knowledge of the actual will from him in order to avoid any attempt on his part to change the disposition of the property. The close business relations existing between his father and George E. Dovey probably kept E. G. Dovey and his mother from telling his father, Horatio N. Dovey, of the will. The other legatee was not aware a will had been executed until after the death of his grandmother.

Taking the evidence as a whole, we are convinced that it supports the verdict of the jury. At the time Mrs. Dovey made the will the three sons were apparently each possessed of a competency. The two young men to whom she left her property had been born and grew up in the home where she resided. A strong bond of love and affection existed between them. It is a well-known fact that grandparents are more indulgent and more apt to overlook the faults of their grandchildren than their own parents are. Mrs. Dovey was a woman of strong mind. Her intellectual capacity was unimpaired at the time the will was made. There is no evidence of any restraint or compulsion being brought to bear upon her or that she was deceived in any way. She lived in full possession of her mental faculties for months after the will was made, and never at any time manifested a wish or desire to change it; on the contrary, she stated to her son George in response to his request to sign a conveyance of her personal property that she would sign no more papers. Knowing the relations between her three sons as she did, we think there was nothing unnatural or suspicious in the fact that Mrs. Dovey gave to her grandsons her estate, imposing upon them the duty of caring for their mother in whose home she had lived so many

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

AFFIRMED.

SEDGWICK and HAMER, JJ., dissent.

WILLIAM A. COLE, RECEIVER, APPELLEE, V. C. E. ADAMS, APPELLANT.

FILED MARCH 16, 1917. No. 19183.

Banks and Banking: ASSESSMENT OF STOCK: SET-OFF. The value of property owned by a stockholder of an insolvent national bank and delivered by him to the receiver under an agreement that it should be credited on any assessment subsequently levied upon his stock may be pleaded as a set-off in an action to collect a stock-assessment, where the receiver refused to return the property and used the proceeds to increase the assets for the benefit of creditors.

APPEAL from the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed.*

Stubbs & Stubbs, for appellant.

Dexter T. Barrett, H. H. Mauck and *Bernard McNeny, contra.*

ROSE, J.

This is an action by the receiver of the insolvent First National Bank of Superior against a stockholder to recover a stock-assessment of $16,862.50, defendant having owned 168.62½ shares and the comptroller of the currency having ordered an assessment of $100 a share. The answer of defendant contained detailed statements, alleging in substance that he owned promissory notes of the value of $8,799; that he turned them over to a temporary receiver under an agreement that they should be used, if necessary, in liquidating the bank's indebtedness, in such an event their value to be credited on any stock-assessment subsequently levied upon defendant's stock; that the receiver has re-

fused to credit defendant with the proceeds of the notes, but has converted them to the use and benefit of the bank's creditors; that the assets of the bank were sufficient to pay all of its indebtedness; that in any event an assessment of $50 a share would be sufficient, and that therefore the order of the comptroller for an assessment of $100 a share was invalid. For the value of the notes defendant sought credit on the assessment, if valid; if invalid, his prayer was for the return of his property or the proceeds. A demurrer to the plea of set-off was sustained. From a judgment in favor of plaintiff for $17,652, defendant has appealed.

The ruling on the demurrer is presented for review. Defendant contends that the comptroller's order for the assessment does not conclude a stockholder, but may be reviewed in equity, and that, since an equitable defense is available in an action at law, the set-off was a proper plea.

The decision of the comptroller, as a general rule, conclusively determines the necessity for, and the amount of, a stock-assessment. *Kennedy v. Gibson,* 8 Wall. (U. S.) 498; *Rankin v. Barton,* 199 U. S. 228. The comptroller's order does not, however, conclusively determine the liability of a stockholder in a suit against him to collect the assessment. *Moss v. Whitzel,* 108 Fed. 579; *Welles v. Stout,* 38 Fed. 807.

In the case last cited it was held that, in an action to recover an assessment from a stockholder, a set-off for a claim of defendant was properly pleaded, where he "would be entitled to receive the full amount before distribution by the receiver to general creditors." The defendant therein was allowed to set off against the assessment a fund created for a specific purpose amounting to a trust.

According to the answer in the present case, the notes pleaded as a set-off were the individual property of defendant. They were not assets of the bank at the time the receiver took charge of it. They were not available for the payment of general creditors of the bank. The notes were delivered to the temporary receiver for a specific purpose. The proceeds of the notes have been used by the receiver for

the benefit of creditors of the bank. These are circumstances under which a stockholder is entitled to protection by means of a set-off. Plaintiff contends that the power of the receiver is limited, and that defendant was bound to take notice of the limits of his authority. *Ellis v. Little,* 27 Kan. 707. The receiver, however, has retained the notes and the proceeds have been used for the benefit of the bank's creditors.

Plaintiff relies upon *Witters v. Sowles,* 32 Fed. 130. In an action to collect an assessment it was alleged in the answer that, while the bank was in a failing condition, property was delivered to it under an agreement with its officers and the bank examiner that, in case of a failure, the property should be applied upon a stock-assessment. A set-off was denied, the court saying:

"This assessment is for the purpose of paying those who were creditors of the bank at the time of its failure. That property went to pay others not creditors at the time of the failure, so far as it did pay them. The delivery of the property may have created a liability of the bank; if so, the assessment upon this and the rest of the stock would go ratably upon that and the other liabilities if proved and established. A set-off cannot be made without depriving others of their ratable proportion. Besides this, the claims are not in any sense mutual. The claim of the executor, if he has any, is against the bank. The assessment never was due to the bank, and does not belong to it. The assessment belongs to the creditors of the bank, and is recoverable by the receiver, only for the purpose of ratable distribution among them. * * * This claim is therefore no answer to the claim for the assessment, whether this understanding was had or not, or with the bank examiner or only with others. There was no receiver, and the examiner did not, and probably did not assume to, represent the creditors."

The case may be distinguished. In the present case the agreement was made with the receiver after the bank failed. Defendant's claim is against the receiver and does not deprive the bank's creditors of assets to which they are en-

titled. The proceeds of defendant's property have increased the assets available for the payment of creditors of the bank at the time of its failure.

The district court erred in sustaining the demurrer to the plea of set-off. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

SANDHILL LAND & CATTLE COMPANY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 16, 1917. No. 19321.

Judgment: REVERSAL: INVALID STATUTE. A judgment based on a void act of the legislature will be reversed, if properly assailed, on appeal.

APPEAL from the district court for Grant county: JAMES N. PAUL, JUDGE. *Reversed.*

Byron Clark, Jesse L. Root, J. W. Weingarten, F. A. Wright and *D. F. Osgood,* for appellant.

E. H. Boyd, contra.

ROSE, J.

This is an action to recover damages prescribed by statute for delay in the transportation of live stock. Rev. St. 1913, secs. 6018, 6019. From a judgment in favor of plaintiff for $400, defendant has appealed.

The invalidity of the statute under which the action was brought is pleaded as a defense. Since the appeal was taken the statute has been declared unconstitutional. *Davison v. Chicago & N. W. R. Co.,* 100 Neb. 462. On authority of that decision, the judgment of the district court is reversed and the cause remanded.

REVERSED.

SEDGWICK, J., not sitting.

IN RE ESTATE OF LOGAN ENYART.
KATHERINE ENYART, APPELLEE, V. ALBERT F. ENYART, APPELLANT.

FILED MARCH 16, 1917. No. 19168.

1. **Executors and Administrators:** SPECIAL ADMINISTRATOR: APPOINTMENT: APPEAL. The special administrator provided for by section 1381, Rev. St. 1913, has entirely different duties from those imposed upon a special administrator appointed under section 1341, Rev. St. 1913. The latter section provides that "no appeal shall be allowed from the appointment of such special administration." This provision does not apply to the administrator appointed under section 1381. From the appointment under section 1381 an appeal is allowed by the general provision for appeals from orders of the county court.
2. **Partnership:** DEATH OF PARTNER: SPECIAL ADMINISTRATOR: APPOINTMENT. A special administrator to settle with the surviving partner of the decedent is authorized by section 1381, Rev. St. 1913, only when such surviving partner is also the executor or administrator of the decendent's estate; that is, the general executor or administrator having charge of the property of the decedent, including the residuary estate.
3. ———: ———: ———: ———. In such case, if the surviving partner is executor of a will disposing of only a part of the estate, and there is also a general administrator for the whole property including the residuary estate, such general administrator must settle with the surviving partner, and no special administrator is allowed for that purpose.

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

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

Paul Jessen and *W. H. Pitzer, contra.*

SEDGWICK, J.

Logan Enyart died in Otoe county in November, 1912. He left two separate, distinct wills. Each disposed of certain property specified therein. He also left a considerable estate not disposed of by either of these wills. He and his

brother, Albert F. Enyart, were partners in business and as such in their partnership business had a considerable amount of property. By one of the wills he devised his interest in this partnership property to his brother, Albert F. Enyart, with the provision that his brother should pay to Katherine Enyart $5,000. Katherine Enyart was the widow of Logan Enyart, and after the death of the decedent it was contended that there was an antenuptial contract between Logan and Katherine Enyart, by which she barred herself from any right or interest in the property of the decedent. It was afterwards determined that this alleged contract was invalid, and that Katherine Enyart was entitled to participate in the property of her deceased husband as his widow. *In re Estate of Enyart*, 100 Neb. 337. She renounced all claims under the wills, and elected to take as the widow of her deceased husband. By the will which gave the decedent's interest in the partnership property to his brother, his brother, Albert F. Enyart, was nominated as executor, and was afterwards duly appointed as such by the county court of Otoe county, and H. D. Wilson was duly appointed general administrator of the estate not disposed of by these two wills. An application was made to the county court of Otoe county for appointment of a special administrator under section 1381, Rev. St. 1913. That court entertained the application and appointed a special administrator. From this order an appeal was taken to the district court for Otoe county. A motion was made to dismiss the appeal on the ground that no appeal was allowed. The appeal was dismissed by the district court, and from that order dismissing the appeal, an appeal has been taken to this court.

1. The first question then presented is whether an order appointing a special administrator under sections 1380 and 1381 is appealable. Those sections are as follows:

Section 1380. "The executor or administrator of a deceased partner shall settle with the surviving partner all the dealings and transactions of the partnership, as well as those remaining unsettled before the death of the deceased

partner, as of the said parties thereafter, and shall present to the county court appointing such executor or administrator a full statement of the matter and manner of such settlement, and upon due notice to all parties interested, the said court shall examine, review, correct, approve, or disallow such settlement. But if the said legal representatives of such deceased partner and the surviving partner cannot agree upon such settlement, the accounts of the dealings and transactions of the partnership shall be settled as heretofore."

Section 1381. "In case the executor or administrator of a deceased partner be also his surviving partner, the county court appointing him shall appoint a special administrator to discharge the duties herein provided, and his powers shall be limited thereto. Such appointment shall be made upon the same proceedings as are provided by law for the appointment of special administrators, when there is delay in the granting general letters testamentary or of administration."

These sections were enacted by the legislature of 1883. Laws 1883, ch. 39. The title of the act is: "An act providing for selling the interests of a deceased partner and settling the accounts between him and his surviving partners." The administrator provided for in section 1381 is called a special administrator, and his duties are limited to settling with the surviving partner all the dealings and transactions of the partnership, and his powers are limited to those duties. It is in that sense that he is a special administrator. His duties continue during the entire time of the settlement with the surviving partner. The special administrator contemplated in section 1341 is only appointed temporarily while there is a delay in granting general letters, occasioned by an appeal or from some other cause. If an appeal could be taken from his appointment, there would in the meantime be no one to preserve or care for the estate. Hence the provision that in such case no appeal shall be allowed, but this consideration does not apply to the appointment of an administrator to settle with a partner of the de-

ceased, who is also general administrator of the estate. Section 1341, Rev. St. 1913, after reciting that a special administrator may be appointed when there is a delay in granting letters, occasioned by an appeal or from any other cause, provides: "No appeal shall be allowed from the appointment of such special administration." This provision forbidding the appeal applies only to "such special administration" as is provided for in that section. The district court was, we think, in error in dismissing this appeal.

2. The appellant contends that the conditions existing in this case did not authorize the appointment of a special administrator. It is perhaps unusual that a man makes two distinct wills, and still leaves a large portion of his property intestate. If a surviving partner is also "executor or administrator of a deceased partner," ordinarily he has full control of his deceased partner's estate. Section 1380 requires the executor to settle with the surviving partner of the decedent. If the same man is both a surviving partner and executor or administrator of the decedent's estate, it would be impossible that he should, as executor, settle with himself as surviving partner. But this is true only when he is general executor or administrator, and as such has custody and control of the residuary estate. This is the condition provided for in section 1381. The section uses the definite pronoun *the*, "In case *the* executor or administrator," and in the light of the other statutes this section should not be construed as though it read "In case any executor or administrator." These two wills, being special and not covering the whole estate, the executor of each of these wills is in a sense himself a special executor, and not *the* executor of the deceased partner's estate. The general administrator of this estate is H. D. Wilson, and he is not the surviving partner of the deceased. It is clear that the legislature did not intend that section 1381 should apply in such a case. The administrator, that is, the general administrator, who administers the residuary estate, is fully authorized, under these statutes, to settle with the partner of the decedent,

and it follows that no special administrator for that purpose was necessary or authorized by the statute. This general administrator will protect the interests of the widow, Katherine Enyart, and will "settle with the surviving partner all the dealings and transactions of the partnership." It is the duty of the surviving partner to see that the debts of the partnership are paid, and that the widow obtains such interest in the partnership property as the law gives her, and it is the duty of the general administrator to see that he does this, and to settle with him, representing those who are interested adversely to the surviving partner in the partnership property, if any.

The judgment of the district court is reversed and the cause remanded, with instructions to enter an order reversing the order of the county court.

REVERSED.

STATE OF NEBRASKA, PLAINTIFF, V. SUPREME FOREST, WOODMEN CIRCLE, ET AL., DEFENDANTS.

FILED MARCH 16, 1917. No. 19761.

1. Insurance: FRATERNAL ASSOCIATION: DECREE: ENFORCEMENT. When this court has taken jurisdiction of the affairs of a mutual beneficiary society at the suit of the state by the state insurance board, and has entered a judgment and restraining order, then it is the duty of this court to see that its judgment is effective and is not violated by the parties.

2. ———: ———: ———. In the judgment heretofore entered in this case it was intended to preserve the affairs of the defendant society *in statu quo* as far as practicable until the governing body, the supreme forest, can interpret and, if necessary, amend its laws and regulations. In the meantime the general administration of the affairs of the society is committed to Mrs. Manchester, as supreme guardian, and those who are associated with her.

3. ———: ———: INJUNCTION: VIOLATION. Until such action by the supreme forest, complaints of violations of the orders of this court, or complaints of misdemeanors of officers in connection with the affairs of the order, must be addressed to this court.

PROCEEDING for contempt and injunction. *Injunction allowed.*

Willis E. Reed, Attorney General, for plaintiff.

John J. Sullivan, Arthur F. Mullen, Stout, Rose & Wells, and *John B. Barnes,* of counsel, for Emma B. Manchester.

Jefferis & Tunison, Brogan & Raymond and *Frank H. Gaines,* for Dora Alexander *et al.*

SEDGWICK, J.

After the decision was entered in this case on the 19th of December, 1916, 100 Neb. 632, it appears that the parties continued the controversy, and some of the defendants who were enjoined by that decision afterwards complained against Mrs. Manchester to the executive council. This executive council, it will be remembered, consists of 13 members, of which a majority of 7 are disputing with Mrs. Manchester as to the authority to conduct the affairs of the society. The executive council then, by these 7 members, appointed a committee "to investigate the actions and transactions of the supreme guardian and make report." That committee, on the 16th day of February, 1917, reported articles of impeachment against Mrs. Manchester. This report is quite voluminous, covering about 18 sheets of typewritten matter, and embraces 11 or 12 specifications of alleged ground for removal. Thereupon Mrs. Manchester filed in this case a complaint against the 7 members of the supreme executive council charging them with contempt of court in attempting to remove her from the office of supreme guardian in violation of the orders and judgment of this court, and charging that they have conspired "to circumvent, defeat, and make a nullity the judgment entered by this court." She asked that they be enjoined from further proceeding in that matter until her complaint could be heard and a final order entered therein. Upon this complaint the defendants complained of were cited to show cause why they should not be punished for contempt, and a temporary order of injunction was issued. Affidavits were

filed by the contending parties and oral arguments were heard.

In our former decision it was determined: "The authorities of the state, under our statute, are given such control of fraternal beneficiary associations as to require the state to see that the interests of the members of the association are not sacrificed by unauthorized usurpations of authority on the part of officers of the association. Under the circumstances in this case, this court has original jurisdiction of an action in the name of the state brought by the attorney general, in behalf of the insurance board, to determine the jurisdiction and powers of the contending officers of the association." And in the opinion it was said: "There is more or less ambiguity and uncertainty in the articles of association and the by-laws, and, even if we assume that all parties have acted in good faith, it is apparent that these uncertainties have led to this destructive conflict of authority." It appeared that there was "an irrepressible conflict" between rival factions in this society that endangered the usefulness of the society, if not its very existence. The intention was to determine that it was the duty of this court on the complaint of the state authorities to take jurisdiction of this controversy and of the affairs of the association, and take such measures as the law provides to determine the controversy and protect the endangered interests of the membership. It was said that the law required such societies to have a representative form of government, and to this end they must have a governing body with supreme authority to control and regulate all of its affairs, and that this governing body must be freely selected directly or indirectly by the members of the society. It was found that in the main the differences between the contending factions arose from irreconcilable interpretations of the constitution and laws of the society, and that further radical and definite action was necessary on the part of the governing power, the supreme forest. It was intended to maintain the *status quo* as it existed when this action was begun as far as practicable until the governing body could act and

adjust the differences. The contention between the factions was so radical and in some respects so unreasonable that it was at one time thought that it would be necessary to place the affairs of the association in the hands of a receiver; but, as Mrs. Manchester and those associated with her had for so many years managed the affairs of the society and apparently with some considerable degree of credit, it was thought best, if possible, to continue that management until the supreme forest should act. In this view of the matter there is no doubt that in the meantime it was the duty of this court to see to it that its judgment should be effective, and that neither faction should be allowed to take such action as might endanger the existence of the society or seriously embarrass its work. When, during the pendency of the action in this court, a majority of the executive council attempted to remove Mrs. Manchester from the office of supreme guardian, it was determined, and we suppose so understood by all parties, that the rival and contending faction should not be allowed to determine the whole controversy by assuming the exclusive control of the affairs of the association. If Mrs. Manchester, as supreme guardian, should be found to be violating the orders of this court while the court has jurisdiction of the affairs of the association, or if she should be guilty of mismanagement of the affairs of the society so that it would become necessary to remove her from its management, application should be made to this court for that purpose. There is a general provision in the laws of the society that the executive council shall, when the supreme forest is not in session, have power to remove defaulting officers; but they are to report their proceedings to the supreme guardian, and some action in the premises by that officer seems to be required, so that there was perhaps some question as to whether it was intended by their laws that such power of removal should include the supreme guardian. At all events, such comprehensive powers could not be entrusted to the rival faction in this controversy while the disagreement between these factions was being adjudicated by the

courts. It is intimated in the proofs offered by the defendants in answer to the citation for contempt that the supreme guardian and some of her influential appointees are sacrificing the interests of the society in an attempt to control or influence the election of members to the supreme forest. Such practices, it is said, sometimes obtain in politics; but it is unfortunate indeed if such methods are used in these beneficiary societies. The supreme forest has a large membership. Its members are selected from all parts of the country, and this court cannot presume that it will, when convened, be under the control of selfish and corrupt influences. The thousands of interested members of the society in all parts of the country must be aware that it is in their interest as well as their duty to be informed in regard to the affairs of the society and to choose intelligent and honorable and disinterested members of this controlling body of their organization. Political differences must be submitted to the electorate, even though there may be danger that the individual voters will be imposed upon and misinformed, and there seems to be no other remedy in this case than to submit these differences to the membership of the association through their supreme forest in the hope and expectation that the voting membership will intelligently perform their duties.

The so-called articles of impeachment against Mrs. Manchester as supreme guardian, upon which the executive council was about to act when this citation was issued, contained 12 specifications. The first is as to the appointment of an attorney for the society. It is alleged in this specification that Mr. Burnett was supreme attorney prior to July, 1915, and that after the executive council had adjourned in July, 1915, the supreme guardian requested Mr. Burnett to resign and appointed Mr. Price, and the executive council in February, 1916, "concluded not to continue Mr. Price as attorney for the order, and selected Mr. Gaines for a period of five months," and that notwithstanding Mrs. Manchester had taken counsel with her attorney and had been advised that she did not have the power to

appoint the attorney, and had upon that advice recognized Mr. Gaines as attorney, and had presided at the meeting of the executive council at which Mr. Gaines was appointed and had participated in that appointment, still the supreme guardian in December, 1916, entered into a contract with Mr. Price as supreme attorney and attempted to dismiss Mr. Gaines as such attorney "that she may have her own appointee who will be subservient to her will as supreme attorney," with other details as to the controversy in regard to the attorneyship. The specification ends with the charge: "We accordingly charge the supreme guardian with violating the laws of the order and the rules, regulations and directions of the supreme executive council in her attempt to oust the supreme attorney from his office and to employ W. B. Price as attorney for the order contrary to its laws and the rules, regulations and directions of the supreme executive council." Mr. Gaines' communication to the council, which inaugurated the removal proceedings, contains the statement: "It is necessary that the four officers, namely, the supreme guardian, the supreme clerk, the supreme physician, and the supreme attorney, must work in harmony, because each has independent duties to perform which are absolutely necessary to the continuance and preservation of this order." In our former opinion we said that the matters in controversy between these rival factions appear "to include the appointment of financial and other agents and attorneys, and other important matters." It is manifestly necessary that these four officers named in Mr. Gaines' statement should be able to act together in harmony, and as Mrs. Manchester and those who were acting with her appeared to have generally been in control of the affairs of the society when the rival faction began their attempts to take over that control, which condition continued substantially to the commencement of this action, it seemed to be absolutely necessary in the interests of the society that that condition should continue until the supreme forest would take final action making the powers and duties of the respective parties plain

and adjusting the whole controversy. This specification in regard to the attorneyship is the leading and perhaps the most important in the whole charge.

Another specification is that the supreme guardian without authority waived the payment of the $1 certificate fee required upon each application for beneficiary membership. This $1 fee goes to the general fund of the order, and it seems that the regulations make no provision for waiving it. This waiving of this fee caused, as is alleged, a loss to the order of "many hundreds of dollars." It seems that the regulations provided for another fee of $5 to be paid upon each application, and that the supreme guardian is authorized to waive the payment of this fee, but should not have made her order so general as to cover the $1 fee also. If Mrs. Manchester had personally profited by the waiving of this $1 fee, it would be an indication of corrupt practice; but, as there was no profit to her apparently in the transaction, it might possibly be considered as a mistake on her part. In view of our general conclusion as to the right of these respective factions to remove each other from all connection with the society while the matter is pending before this court, we will not regard it necessary to analyze these extensive charges. In the main they appear to relate to transactions prior to the commencement of these proceedings, or at least prior to the judgment heretofore entered herein; and, without determining whether any of the matters charged against Mrs. Manchester are of so serious a nature as to require this court to take action thereon, it is sufficient to say that they have not been brought to the attention of this court in such a manner as to require investigation. We are not determining which of these factions has the greater (or perhaps we should say the lesser) merit. The affairs of the society must be administered while we are awaiting the action of the governing body, and we are committing the administration to those authorities that have so long managed the business, believing that it is better to do so, unless and until it is made to appear that a receiver is necessary.

It appears that the rules of the order provide that the supreme guardian shall call a special meeting of the supreme forest upon request of the executive council. Since this citation was issued, such request has been made to Mrs. Manchester. The request specified the time and place of holding the meeting. An application was made to this court for an order requiring the supreme guardian to call the meeting for the time and place specified by the executive council, and proof was tendered which it was claimed showed that fair dealing and the ends of justice required that the supreme forest should convene at the time and place fixed by the council. But as the laws of the order were indefinite on that point, except as they required the supreme guardian to call the meeting, and so might be understood to place the responsibility upon her, and as there was such a radical difference between the factions upon this as upon all other questions, it was thought best to refer this contention also to the supreme forest itself. If the supreme guardian should name an unsuitable or improper time and place for the supreme forest to meet, that body will have ample power to correct the error.

Until the meeting of the supreme forest, matters must continue as nearly as practicable as they now are. If the supreme guardian, or members of the executive council, should in the meantime violate the orders of this court, or should wilfully convert or unlawfully dissipate the funds of the society, or be guilty of any other wilful misdemeanor in connection with the affairs of the order, complaint should be made to this court. Upon such complaint the court will take measures to determine the facts in relation thereto, and also whether such complaint is made without probable cause, and will make such order in the matter as the circumstances require. We find that the proceeding and attempt to remove Mrs. Manchester from the office of supreme guardian is in violation of the former judgment of this court; but as these defendants were acting under the advice of eminent counsel, members of the bar of this court in whom we have great confidence, and as our find-

ings and judgment heretofore entered were not as formal and comprehensive as they might have been, we cannot find that the defendants have been guilty of an intentional and wilful disobedience of the injunction heretofore allowed, and no other penalty wll be imposed than to require the individual defendants in this citation to pay the costs of this hearing.

The preliminary injunction upon this citation is made permanent, and the costs upon this citation will be taxed against the defendants therein.

INJUNCTION ALLOWED.

ROSE, J., not sitting.

STATE, EX REL. ALBERT S. WHITE ET AL., APPELLEES, V. JOHN H. MOREHEAD ET AL., APPELLANTS.

FILED MARCH 16, 1917. No. 19911.

Mandamus: REMEDY AT LAW. The action of the state banking board in granting or refusing a bank charter is reviewable by petition in error in the district court. This affords a complete and adequate remedy for any error of that board in such matters, and mandamus to compel a different action cannot be maintained.

APPEAL from the district court for Lancaster county: WILLIAM H. WESTOVER, JUDGE. *Reversed and dismissed.*

Willis E. Reed, Attorney General, Dexter T. Barrett and *Charles S. Roe,* for appellants.

Lambert, Shotwell & Shotwell and *Morning & Ledwith, contra.*

SEDGWICK, J.

The first question presented in this case is whether mandamus is the proper remedy, and that depends upon whether the relator had a complete and adequate remedy by petition in error to review the order of the state banking board in refusing to grant the charter. Under the opinion of this

court in *Mathews v. Hedlund,* 82 Neb. 825, and *Munk v. Frink,* 75 Neb. 172, and various other decisions of this court, some of which are cited in the two cases above referred to, there can be no doubt that the action of the state banking board can be reviewed by petition in error filed in the district court.

The question then is whether the review by petition in error in such case is an adequate and complete remedy. Section 7880, Rev. St. 1913, provides: "Any person or officer, or the presiding officer of any board or tribunal before whom any proceeding may be had, shall, on request of any party thereto, settle, sign, and allow a bill of exceptions of all the evidence offered or given on the hearing of such proceeding." Section 8177 provides the procedure. This would seem to give the applicants for a banking charter the right to have the evidence taken down and a bill of exceptions settled by the state banking board. If that was done and the evidence with the petition in error filed in the district court, the district court would proceed exactly as it would upon a writ of mandamus, if that was the proper remedy; that is, it would determine whether the board had committed any substantial and reversible error. If the record showed that the board had exceeded its jurisdiction or power, or if it showed that in the exercise of its discretion the board had abused its discretion to the prejudice of the plaintiff in error, the order of the board would be reversed. The statute provides that the order, if found erroneous, "may be reversed, vacated or modified by the district court." Under this power the district court would affirm or reverse the order of the banking board, and, if the order was reversed, would determine what order should have been made, if that could be determined upon the record presented, and certify to the banking board with instructions to enter the order that should have been entered. If the record was insufficient for that purpose, the matter would be remanded for further proceedings. This remedy would be complete.

In this case the proper practice is discussed in the briefs, and it is insisted that mandamus is not the proper remedy. It is the general rule in all courts that mandamus cannot be used when there is a complete and adequate remedy provided by statute. The important question of the construction of the statute, and the power of the banking board to refuse a charter solely because it may find that the banking facilities in the locality where it is proposed to use the charter applied for are already adequate, is determined in *State v. Morehead,* 100 Neb. 864, and it is not necessary to discuss that question here.

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

REVERSED AND DISMISSED.

HAMER, J., concurring in part and in the conclusion of dismissal.

According to the syllabus in the majority opinion, the action of the state banking board in denying an application for a charter is reviewable by petition in error in the district court, and if denied in that court an appeal may be taken to this court, and mandamus to compel the board to issue the charter is held not to be the proper remedy.

In *Munk v. Frink,* 75 Neb. 172, it was held: "By section 580 of the Code the district court is given jurisdiction to review, by proceedings in error, an order of the state board of health revoking the license of a physician."

In *State v. Hay,* 45 Neb. 321, it was held: "The power conferred upon the governor to remove certain public officers for cause is an administrative and not a judicial function, and orders made in the exercise of that power are not reviewable by the courts." It was held in that case that the office of governor was an administrative and political office, and that it was not judicial, and that a hearing had before the governor to remove the incumbent of the office of state superintendent of the asylum for the insane at Lincoln could not be reviewed in the courts. Governor Holcomb heard charges against Dr. Hay and removed Dr. Hay

from the office which he held as superintendent of the asylum. Dr. Hay tried to review the proceeding before Governor Holcomb, but he was unable to bring about any result. He came to this court to review the proceedings against him. Judge Post, delivering the opinion of this court, said: "The conclusion reached, although not expressed in the case cited (*State v. Smith*, 35 Neb. 13) was, that such power is in its proper sense an administrative rather than a judicial function, and that orders made in the exercise thereof are not reviewable by the courts; and a re-examination of the subject at this time has confirmed that conclusion. * * * It is sufficient that the conclusion above stated is in accord with the decided weight of authority and supported by the more satisfactory reasoning"—citing a large number of cases. If that doctrine is to be applied, there is in this case no remedy except mandamus. There can be no review by petition in error except where the proceeding sought to be reviewed is a judicial proceeding.

Section 580 of the Code reads: "A judgment rendered, or final order made, by a probate court, justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated, or modified by the district court." Notwithstanding what is said touching the case where Dr. Hay was removed from the office of superintendent of the asylum, there are plenty of decisions to the effect that the action of the officer attempting to exercise the functions of a court or quasi-judicial functions are subject to review by petition in error based upon a statement of the issues involved and the evidence preserved in a bill of exceptions.

Does a review of the merits of the case justify the conclusion that it ought to be dismissed?

Sections 280-345, Rev. St. 1913, contain the act concerning banking. Section 295 provides that, after the examination and approval by the banking board of the statement provided for in section 294, the corporation shall file with the state banking board the oath of the president or cash-

ier that the capital stock has been paid in as provided by section 292, and then that the state banking board shall issue the certificate provided for in section 293 and the charter, and this is to be done if the state banking board is satisfied that the parties are parties of integrity and responsibility. It would seem clear that that question is for the determination of the board. In the instant case the banking board does not seem to have been satisfied with the leading promoter in the scheme of organizing the new bank. Governor Morehead, a member of the board, seems to have testified that he was opposed to the promotion of banks. He thought that the creation of banks should come about through voluntary action. As to himself he was inclined to adopt the view that he might be prejudiced against White, who was active in the promotion of the proposed new bank. It seems that the board engaged one Van Horn to investigate Mr. White, the leading promoter in the organization of the proposed bank. Van Horn reported that White had been a justice of the peace in South Omaha; that he had worked at the real estate business in Kansas City; that he was instrumental in the organization of a bank at Chadwick, Missouri, and that he later organized the Night and Day Bank of St. Louis, capitalized at $200,000, and that White went in as president of the bank, and was president for something more than a year. Mr. Van Horn reported that White was well educated, exceptionally bright, and a good promoter, and not dishonest, but that he had been unfortunate in some of the enterprises which he had organized; that he had been in debt and unable to pay, but had subsequently paid what he owed.

Van Horn's report is complimentary to Mr. White, but it at the same time showed that Mr. White had charged large promotion expenses and had been successful in collecting them. There was enough in the report of Mr. Van Horn, and also in the testimony of Governor Morehead and Mr. Royse, to make it a matter of uncertainty as to whether it was advisable to issue a charter to Mr. White and those associated with him. It is for the banking board to

determine the question as best it may concerning whether the parties who apply have "integrity and responsibility." It is not a question for us to determine whether the board rightly decided upon the question which it had before it. If it had a question to decide, and there is evidence enough in the record to show that it had, then that question can only be reviewed by bringing the evidence before us in such a manner that we may properly consider it. There was no proceeding in error from the action of the banking board to the district court for Lancaster county. It was an application for mandamus, and it is well settled that in an application for mandamus there cannot be a review of the testimony for the purpose of correcting errors in the proceedings of the original tribunal. It will be seen that the case does not regularly come to us after being reviewed in the district court on a petition in error from the proceedings of the banking board.

Where one of these various boards, of which there are still many in this state, has heard a case and has made a finding of fact permitting only one conclusion, which it hesitates to declare, there should be no delay upon the part of the courts to use the remedy which mandamus alone provides by compelling it to announce a decision which it is clearly its duty to make and about which it is no longer permitted to exercise discretion. A familiar illustration of the use of mandamus is furnished in cases where officers refuse to declare the result of an election. *Strong, Petitioner,* 20 Pick. (Mass.) 484; *Kisler v. Cameron,* 39 Ind. 488; *Munk v. Frink,* 75 Neb. 172; *State v. City of Lincoln,* 68 Neb. 597.

While, if there was nothing to decide, there would be a clear right to compel action of the board by mandamus, yet in the instant case there was something to decide. It is still undecided. We could not review the decision of the banking board until it was first properly reviewed in the district court upon appeal or error. This court will not by mandamus, attempt to control the discretionary powers of

another tribunal so that they shall be exercised in a particular way. *State v. District Court,* 2 Neb. (Unof.) 385.

"The writ of mandamus will not issue merely to correct errors; it must further appear that the remedy prayed for by the application for the writ can be obtained by that means only and as a last resort, and that the relator has no adequate remedy in the due and ordinary course of the law." *State v. Jessen,* 66 Neb. 515.

The action of the state board of equalization may be reviewed in the district court by a petition in error. *State v. State Board of Equalization and Assessment,* 81 Neb. 139.

Where mandamus is sought to compel the performance of a plain and unqualified duty concerning which the officer is vested with no discretion, the writ will command the doing of the very act itself. *Humboldt County v. County Commissioners of Churchill County,* 6 Nev. 30.

The fact that the party aggrieved by the nonperformance of official duty has a remedy by an action against the officer upon his official bond will not prevent the courts from lending their aid by mandamus to enforce the duty; the remedy upon the bond being inadequate. *State v. Dougherty,* 45 Mo. 294.

In *State v. Francis,* 95 Mo. 44, it was held that mandamus would issue to vacate an order of a police board directing the chief of police not to interfere with the sale of wine and beer on Sunday.

"In contested proceedings for the revocation of a physician's license to practice medicine, * * * if it appears that the state board of health has acted within its jurisdiction, and that all of the jurisdictional facts essential to uphold its final order are sustained by some evidence competent for that board to consider, its orders will be upheld in error proceedings in the district court, and on appeal to this court." *Mathews v. Hedlund,* 82 Neb. 825.

I agree to the conclusion that the case should be dismissed, but upon the merits, and not because of a mistake in the procedure.

OTTO BEINDORFF, APPELLANT, V. PAUL ANTHES, ADMINISTRATOR, APPELLEE.

FILED MARCH 16, 1917. No. 19205.

Wills: CONTEST: QUESTION FOR JURY. In this, a contest over the probate of a will, the evidence is examined, and, there being no testimony supporting the allegation of undue influence, the court properly withdrew that question from consideration by the jury.

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

W. J. Connell and *Herbert J. Connell,* for appellant.

Weaver & Giller, contra.

CORNISH, J.

The trial in the lower court resulted in a verdict for the proponent of the will in question. This appeal is taken to vacate the judgment rendered on the verdict.

The error assigned is the instruction of the trial court that the evidence did not support the allegation of the plaintiff that the will was made under duress and through the undue influence of Mrs. Burnett, the daughter of the deceased, Charles Beindorff, with whom she lived for some months previous to the making of the will and for over 7½ years afterwards, when he died at the age of 85 years. He left an estate variously estimated at from $20,000 to $70,000. He bequeathed the bulk of his estate to Mrs. Burnett; $1,000 each to her two children; $500 each to the children of his deceased son, Charles F.; the same amount to the two eldest children of his son Otto, the contestant; nothing to his grandson Charles; and $1 to Otto. So far as the evidence shows, he was on good terms with his grandchildren and had always helped the families financially. The testimony is somewhat conflicting as to his relations with his son Otto. Otto was given to strong drink and was frequently in financial distress. The will recites that Otto has "re-

ceived advances from my estate in excess of his distributive share." The evidence shows that the father supported Otto and his wife for four years while they were in Europe, the former studying music, and that he also helped his son Charles in business enterprises, and lost money advanced. According to testimony of certain witnesses, the deceased had said that Charles had received advancements equal to his distributive share. There is evidence showing that when Otto could not get money from his father he would sometimes become very abusive. This testimony is denied. In a letter to his sister, Otto solicits her aid in securing $50 "to avoid a cussing from Pa and excitement to you."

As bearing upon undue influence, Adolph Holz, who worked in the family in 1907, a year after the will was made, testifies that when Otto wanted to borrow a dollar to buy coal Mrs. Burnett objected, but her father permitted Otto to have a sack of coal. According to this witness, she would prevent her father from giving Otto money. The witness Ish testifies that Mrs. Burnett told him that she had to manage the business, and that when she asked or required her father to do anything he would do it. When asked if he had ever known deceased to comply with any order or direction his daughter gave him, the witness replies: "He would do what she said, and did do it." He also testifies that after the will was made, in a conversation he had with her, she anticipated litigation over the will. When these conversations occurred, the evidence does not disclose. The witness also testifies that, from 1900 on, the deceased failed mentally and physically, so as not to be mentally competent to transact business. This issue of fact was submitted to the jury, which found against the contestant.

It is unnecessary to go further into the details of the evidence. While the jury might believe from the evidence that the will was unfair, there appears to be an entire absence of evidence of the exercise of undue influence on the part of Mrs. Burnett, connected with the execution of the will and operating at the time it was made; that at the time the testator's mind was so overmastered that her will was sub-

stituted for his. While the intentional exercise of undue influence, destroying the free agency of the testator, may be shown by circumstantial evidence, it is not sufficient to show merely that the person may have power to unduly overbear the will of the testator. The evidence must go further and show that by the exercise of that power the will was, in fact, procured. Mere suspicion, conjecture or guess that undue influence has been exercised is not sufficient. In *Boggs v. Boggs,* 62 Neb. 274, this court used language as follows: "The burden is upon the contestants to establish undue influence, and in so doing it is not enough to show that the circumstances attending execution of the will are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis."

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

AFFIRMED.

HAMER, J., dissents.

MAY TANNER, APPELLANT, V. FLORENCE M. DEVINNEY, APPELLEE.

FILED MARCH 16, 1917. No. 19776.

1. **Appearance:** SPECIAL APPEARANCE. The appearance of the defendant in an attachment case to challenge the jurisdiction of the court over his person or property, because the plaintiff has not been a resident of the state for six months preceding the attachment, is a special and not a general appearance, and does not, of itself, give the court jurisdiction to proceed with the trial on the merits.
2. **Constitutional Law:** RIGHT OF ACTION. The provision in section 7732, Rev. St. 1913, as amended in 1915 (Laws 1915, ch. 145), requiring plaintiff to have been a *bona fide* resident of the state for not less than six months preceding the filing of the petition, is not unconstitutional as violative of section 2, art. IV, of the federal Constitution, which provides that citizens of each state shall be entitled to all of the privileges and immunities of citizens of the several states.

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

Lee O. Carter and *Edwin Falloon,* for appellant.

Jean B. Cain and *Alvin E. Evans, contra.*

CORNISH, J.

This is an action sounding in tort, the plaintiff attaching the defendant's property on the ground of nonresidency. When notice for service by publication was complete, the defendant appeared specially as follows:

"The defendant, appearing specially and for the purpose of this motion only, and for no other purpose, moves the court to quash and set aside the service of the writ on said defendant, and the return thereof, for the reason that the attachment herein was not properly granted, it not being shown to the court that the plaintiff has been a resident of this state for at least six months preceding filing the petition, and is not in compliance with the statutes of this state relative thereto, and for the further reason that this court has no jurisdiction over the person of said defendant."

This motion was sustained and the action dismissed.

Error is claimed on two grounds: First, that the statute, which permits attachment in case of tort only when the plaintiff has been a resident of this state for six months, is inimical to section 2, art. IV of the federal Constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states; and, second, that the special appearance, above quoted, amounts in fact to a general appearance.

Giving the motion its broadest scope, it does not seem that the defendant appeared, or intended to appear, for any other purpose than to challenge the jurisdiction of the court over her person or property. Such a motion well taken entitles the mover to a quashing of the writ. The statute requires six months' residence in the state by the plaintiff as a jurisdictional fact. It is very possible that

where the particular condition or status of the plaintiff is made a jurisdictional fact in the law, it could not be dispensed with by the litigants. However that may be, we hold that the motion invoked no power of the court beyond those which were proper to the motion.

We are of opinion that the provision for six months' residence does not make the law unconstitutional. It touches residency, not citizenship. It would apply as well to a citizen of this state who is not a resident at the time as it would to a citizen of another state residing here. It is like the law which requires nonresidents to give security for costs. Such discrimination between resident and nonresident plaintiffs may be based upon reasons of public policy. Our courts should not be vexed with litigation between nonresident parties over causes of action which may arise outside of our territorial limits. The federal provision refers only to those privileges and immunities which grow out of citizenship, those which are in their nature fundamental rights belonging to the individual as a citizen of the state. Its object is to secure to the citizens of every state an equal administration of justice as it regards their essential right either of property or person by the courts of every state, and is not intended to interfere with the mode of prosecuting those rights.

For cases bearing upon this question, see *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315; *Central Railroad & Banking Co. v. Georgia Construction & Investment Co.*, 32 S. Car. 319; *Cummings v. Wingo*, 31 S. Car. 427; *Kincaid v. Francis*, 3 Tenn. 49; *Chemung Canal Bank v. Lowery*, 93 U. S. 72; *McCready v. Virginia*, 94 U. S. 391; *Frost & Dickinson v. Brisbin*, 19 Wend. (N. Y.) 11; *Davis v. Cleveland, C., C. & St. L. R. Co.*, 217 U. S. 157, 18 Am. & Eng. Ann. Cas. 907; *Coffman v. Brandhoeffer*, 33 Neb. 279, 284; *Harkness v. Hyde*, 98 U. S. 476.

AFFIRMED.

SEDGWICK, J., not sitting.

RUTH MCHENRY MORRISON, APPELLEE, V. ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT.

FILED MARCH 16, 1917. No. 19145.

1. **Garnishment: JURISDICTION.** The plaintiff, a citizen of Iowa, brought an action by attachment and garnishment in this state, alleging personal injuries sustained in Iowa against the defendant, an Illinois corporation; the garnishees both being Illinois corporations. The testimony examined, discussed in the opinion, and *held*, that the trial court in the exercise of sound judicial discretion had jurisdiction to hear and to determine the action.

2. ———: ———. Section 7746, Rev. St. 1913, construed, and *held*, that a debt owing by the defendant, an Illinois corporation, and in pursuance of a contractual obligation payable in that state to an Illinois corporation, may, in a proper case, by attachment and garnishment commenced in this state, be subjected to the payment of a debt owing to a resident of Iowa.

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

Helsell & Helsell and *William Baird & Sons*, for appellant.

M. F. Harrington, contra.

DEAN, J.

This action was begun on October 3, 1914, in the district court for Holt county by plaintiff against defendant, the Illinois Central Railroad Company, by attachment and garnishment. Plaintiff and defendant are both nonresidents of Nebraska, the former being a citizen of Crawford county, Iowa. The defendant is an Illinois corporation with its home office and principal place of business at Chicago. The suit is for personal injuries sustained by plaintiff on alighting from one of defendant's coaches at Denison, Iowa, on July 19, 1914, in the course of a trip made by her and her husband and minor child on that date from Dow City to Denison, distant ten miles. Plaintiff sued to recover $15,100. The jury awarded her a ver-

dict of $7.500. The Chicago, Burlington & Quincy Railroad Company and the Chicago & Northwestern Railroad Company were made garnishees. Both of the garnishees answered, disclosing that they each were severally indebted to defendant in sums respectively in excess of the amount sued for, but they each contend the indebtedness grew out of interstate shipments, and that by the terms of their respective contracts with defendant the debts arising therefrom are severally payable only at Chicago. The court overruled the objections and ordered the garnishees to pay to plaintiff a sufficient amount of money to discharge such sum as plaintiff might recover in the action with attendant costs. The defendant appealed.

Plaintiff in her petition alleged, in substance, that her injuries were brought about because defendant's employees kept the steps of the coach in which she was transported, "with the metallic parts, nails and wood thereof in a negligent, unsafe and dangerous condition. And by reason of this said condition the plaintiff, while attempting to get off said car and while unaided by the defendant or its servants, tripped, fell and was thrown first backward and then downward to the platform owned and maintained by defendant at said Denison." She also charges that defendant's negligence in the premises is intensified from the fact that she had lost her left hand, which was well known to defendant's employees, and that upon alighting from the coach she was entitled to more than ordinary care for that reason.

The petition goes on to charge: "By reason of the carelessness and negligence of defendant and its servants in failing to assist her from said car, she fell and was thrown, and the heel of one of her shoes broken off, and she was first thrown backward and then thrown forward and down and upon a platform of said defendant at said Denison, whereby she sustained the following injuries to wit: Her left foot between the toes and ankle, and in the ankle, were strained and all parts thereof were crushed, bruised, torn and injured, and she was rendered lame in her left foot and leg.

Plaintiff's right hip was crushed, bruised, blackened, torn, and injured, and plaintiff's right side and her back were crushed, torn, lacerated, bruised, blackened, and injured, and her neck was bruised, injured, made lame, and sore. * * * That by reason of said injuries the plaintiff has ever since sustained and ever will sustain great nervousness, and her nervous system has been permanently injured. * * * That plaintiff sustained all of said injuries without fault or negligence on her part."

The defendant answered, generally, reserving and not waiving its special appearance, objecting to the jurisdiction of the court, and pleading: "That the plaintiff is a resident and citizen of Crawford county, Iowa. That the alleged injury complained of * * * is alleged to have occurred at * * * Denison in said Crawford county, Iowa. That the Illinois Central Railroad Company, * * * is a legal corporation * * * of Illinois, having its home office and principal place of business in * * * Chicago." The answer then alleges that the Chicago, Burlington & Quincy Railroad Company and the Chicago & Northwestern Railroad Company, both garnished in this action, are both of them Illinois corporations with their respective home offices and places of business in Chicago, and that the alleged indebtedness owing by both of the companies respectively to defendant consists of liabilities which accrued outside of Holt county and which are payable in Chicago; that defendant never had any railroad line in Holt county, nor agent, nor representative, nor any property in Holt county subject to attachment, and never at any time material to the issues had any debts owing to it in Holt county. "That the attempted attachment and garnishment * * * is an unjust and unlawful abuse of the process of this court. That by reason of the fact that the plaintiff and defendant are both nonresidents of * * * Nebraska and there is no cause or legal or just reason shown why this court should take or assume jurisdiction of this case, it is an unjust abuse of the process and powers of this court in assuming to take and retain jurisdiction of this case and in

requiring this defendant to answer herein, and this court is not required under the rules of comity to take or retain jurisdiction of this case. That assuming and retaining jurisdiction of this case, and compelling this defendant to answer herein, would, if the same should be retained and prosecuted to judgment, deprive this defendant of its property without due process of law and deny to it the equal protection of the law contrary to the provisions of the Constitution of the United States in such cases made and provided." As to the injuries complained of in the petition, defendant pleads a general denial, and prays that the action be dismissed with its costs. The reply is in the usual form denying every allegation of new matter in the answer.

Section 7746, Rev. St. 1913, as amended in 1911 (Laws 1911, ch. 168) is as follows: "PROPERTY AND GARNISHEE BOUND BY ORDER. An order of attachment binds the property attached from the time of service, and the garnishee shall stand liable to the plaintiff in attachment for all property, moneys, and credits in his hands, or due from him to defendant, from the time he is served with the written notice mentioned in section one hundred and eighty-two, notwithstanding the money or debt owing by such garnishee, and which is sought to be attached, may be payable at the place of residence of a nonresident defendant; but where the property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment."

The 1911 amendment of section 7746 incorporated this language in the body of the act: "Notwithstanding the money or debt owing by such garnishee, and which is sought to be attached, may be payable at the place of residence of a nonresident defendant."

Our attention has not been called to any construction of this statute made since the amendment. There are many citations not applicable to the present case, but to actions arising thereunder before the amendment.

Each of the garnishees has a line of railroad in Holt county, and an office and agent there, so that service can be made upon them in that county. The record shows that

they are indebted to the principal defendant, the Illinois Central Railroad Company. Under section 7746, Rev. St. 1913, such garnishees are "liable to the plaintiff in attachment" for credits in their hands, "notwithstanding the money or debt owing by such garnishee, and which is sought to be attached, may be payable at the place of residence of a nonresident defendant." This gave the court jurisdiction of the garnishees and of their indebtedness to the principal defendant. The defendant insists that the court could not obtain jurisdiction over it, because it had no line of road or other property in Holt county, and made special appearance to insist upon this objection. The defendant, however, appeared so far as to contest the attachment and garnishment, and the court had jurisdiction to apply the credits so garnished in satisfaction of the plaintiff's claim against the defendant. The judgment is not personal against the defendant and affects only the attached liability of the garnishees.

On the merits, both parties introduced considerable testimony, and much of it is in sharp conflict; but the jury as triers of disputed questions of fact having passed upon this feature of the case, we are not disposed to disturb the verdict, there being sufficient testimony to support it. Defendant did not file a motion for a new trial, but filed a "motion in arrest of judgment and to dismiss the action." It is fundamental that a motion in arrest of judgment and to dismiss cannot be made to take the place of a motion for a new trial. Nevertheless, we have considered every point raised by defendant in the motion in arrest of judgment that has been presented in the oral arguments of counsel and in the briefs.

That plaintiff sustained injuries and that there was an accident on the occasion complained of by plaintiff is shown by the testimony that relates to plaintiff's alighting from the train at Denison. She testifies that she was injured because of defects in the steps of the coach, and that in leaving the coach her left foot was caught in one of the steps in such a manner as to throw her down with such

violence as to impart to her the injuries complained of. The left shoe that plaintiff wore at the time of the accident was introduced in evidence and is attached to the record. The lower layer of the heel is detached, and the one immediately above shows that it too, while not detached, was subjected to some strain. The heel is high and so narrow at its lowest point that it would readily protrude through a small opening, such as plaintiff's husband testified he saw in one of the car steps. The plaintiff testified that, when the lower layer of the heel was torn off at the time of the accident, she saw it under the car step and within a foot of the rail, and that it was picked up by one of the trainmen. In this she is corroborated by witness McCarthy, flagman on the train, who was called by defendant, and he testified that he picked up the layer of the heel from the ground under the lower step. Referring to plaintiff, he also testified that he did not "know how she slipped, but she slid down the steps in a sitting position to the platform," and that he assisted her to rise.

The record is voluminous. Approximately 35 witnesses testified, and among them several physicians. It is impracticable to reproduce much of the testimony within the space that should be allotted to an opinion. We deem it sufficient to say that in the state in which we find the record we conclude there is sufficient testimony to sustain the verdict of the jury.

Defendant invokes the rule of comity as a defense, and argues that the case may properly be tried in Iowa, but that it is not triable in this jurisdiction. Counsel argue at length and with much earnestness that the trial court had no jurisdiction of the subject-matter because neither of the parties to the suit are citizens or residents of this state, and because defendant had "no property in Holt county and no debts owing to the defendant in Holt county, and the defendant could not be found in Holt county. * * * The jurisdictional proposition in this case involved the right of attachment and garnishment. And if the court reached nothing by the garnishee process, it is evident that,

as regards the *rem* which represented the subject-matter on that phase of the case, it acquired no jurisdiction."

Section 2, art. IV of the federal Constitution, viz.: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"—has been construed by the supreme court of the United States in the following cases, among many others: In *Paul v. Virginia,* 8 Wall. (U. S.) 168, Mr. Justice Field, in construing the privileges and immunities provision of the federal Constitution says: "It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

In *Mason v. The Blaireau,* 6 Cranch (U. S.) *240, *264, Marshall, C. J., in discussing the rights of aliens to bring an action in a court of the United States, says: "On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it."

Chambers v. Baltimore & O. R. Co., 207 U. S. 142, holds: "The right to sue and defend in the courts of the states is one of the privileges and immunities comprehended by section 2, art. IV of the Constitution of the United States, and equality of treatment in regard thereto does not depend upon comity between the states, but is granted and protected by that provision in the Constitution; subject, however, to the restrictions of that instrument that the limitations imposed by a state must operate in the same way on its own citizens and on those of other states. The state's own policy may determine the jurisdiction of its courts and the character of the controversies which shall be heard therein."

See *Corfield v. Coryell,* 4 Wash. C. C. 371; *Ward v. Maryland,* 12 *Wall.* (U. S.) 418; *Conner v. Elliott,* 18 How. (U. S.) 591; 11 Cyc. 663, 667; *Eingartner v. Illinois Steel Co.,* 94 Wis. 70; *State v. District Court of Waseca County,* 126

Minn. 501; *Davis v. Minneapolis, St. P. & S. S. M. R. Co.*, 134 Minn. 455.

It seems from an examination of the authorities bearing on the question last discussed herein that the rules pertaining thereto are not immutably fixed. The apparent conflict in the cases arises mainly from the application of local statutes that in terms affect the citizens of all states alike. From the facts appearing in the present case, it was not an abuse of sound judicial discretion for the court to hear and to determine the action, notwithstanding all of the parties and their witnesses were nonresidents of this state. Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

HAMER, J., concurring separately in part.

I would put in the opinion that it should be the duty of the trial court, before entertaining jurisdiction and preliminary to the trial, that there might be a showing touching the extreme hardship of meeting an action brought in another state than that in which the defendant has its residence. I would do this for the protection of the defendant company because of the fact that a common carrier of passengers and freight works for the public, and if it can be put to great expense in defending itself at a long distance from its residence the business might be impoverished. Witnesses must be gathered up where they can be found, and to take witnesses away 500 to 1,000 miles to testify in a case of this sort is to put a great burden upon the parties, and especially upon the defendant if it should be necessary to render judgment against it. I would not permit the exercise of jurisdiction, except that the court first inquire where the place of trial shall be convenient to the parties, and I would make it ground to reverse the judgment, if there was abuse of discretion upon the part of the trial court in determining the place of trial. By way of illustration, I would say that the little business I have had

as a lawyer could be utterly ruined if I might be sued 1,000 miles away from home, because some one there may be indebted to me.

STATE, EX REL. WILLIAM P. MARROW, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED MARCH 16, 1917. No. 19901.

1. **Statutes:** CONSTRUCTION. "In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will." *Hagenbuck v. Reed*, 3 Neb. 17.
2. ———: ———: TITLE. In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act.
3. ———: ———. It is the duty of the court to discover, if possible, the legislative intent from the language of the act. It is not the court's duty, nor is it within its province, to read a meaning into a statute that is not warranted by the legislative language. In the legislative domain, and within constitutional bounds which it is bound to follow, the legislature is supreme.
4. ———: ———: JUDICIAL NOTICE. In the construction of a statute, courts take judicial notice of events and conditions generally known within their jurisdiction.
5. **Municipal Corporations:** COMMISSION FORM OF GOVERNMENT: OFFICERS: ELECTION. Section 5300, Rev. St. 1913, construed, and *held* to apply to Lincoln, a city of approximately 60,000 inhabitants.

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

Fawcett & Mockett, L. C. Burr and *J. A. De Bardeleben*, for appellant.

C. Petrus Peterson, George W. Berge and *Charles R. Wilke, contra.*

DEAN, J.

In April, 1912, the city of Lincoln adopted and it is now governed by the commission form of government in pursuance of the provisions of the Banning law (Laws 1911, ch. 24) being sections 5288-5311, Rev. St. 1913. This is an application for a writ of mandamus brought in the district court for Lancaster county by William P. Marrow, relator and appellant, against the city of Lincoln, defendant and appellee, to compel the city to reinstate him in the fire department of the city as assistant fire chief, from which position he was peremptorily discharged by the mayor and city council. The writ was denied, and relator has brought the case here for review.

Relator's employment in the city's fire department commenced on July 2, 1911, at a monthly salary of $75, and at subsequent periods he was promoted to the positions of lieutenant and captain and assistant fire chief, in the latter position his monthly salary being $100. It was while in this position that he was discharged by order of the commission, a body consisting of five members, in pursuance of a resolution passed on December 31, 1915, by four members of the city council. The order of discharge briefly recites that the services of relator, as a "member of the fire department, be and the same are hereby dispensed with." The resolution by its terms became effective immediately on its passage. No charges were filed by the council nor by any person against relator, and it follows that he had no hearing before the council. The testimony introduced by relator in the district court disclosed that he was a capable and efficient officer in the several capacities in which he had served in the city's fire department. The city did not offer any testimony.

Relator argues that in view of the premises the city council was without lawful authority to dismiss him. Defendant contends that it was justified in discharging relator peremptorily and that in the premises its acts are within the law. To determine the controversy between the parties it becomes necessary to construe so much of the Banning

law and the firemen's pension act as apply to the facts in the case before us. The title to the Banning act and section 13 thereof follow:

"An act for the government of all cities having, according to the last preceding state or national census, five thousand or more population, and to enable such cities to adopt the provisions of this act called the 'commission plan of city government.'"

Section 13 (Rev. St. 1913, sec. 5300): "The council shall at its first meeting, or just as soon as possible thereafter, elect as many of the city officers provided for by the then existing laws or ordinances governing any such city as may, in the judgment of the council, be essential and necessary to the economical but efficient and proper conducting of the government of the city, and shall at the same time fix the salaries of the officers so elected either by providing that such salaries shall remain the same as fixed by the then existing laws or ordinances for such officers or may then raise or lower the existing salaries of any such officers, and the council may modify the powers or duties of any such officers, as provided by then existing laws or ordinances, or may completely define and fix such powers or duties anew. Any such officers or any assistant or employee elected or appointed by the council may be removed by the council at any time: Provided, however, in cities of the metropolitan class no member or officer of the police department, or department of police, sanitation and public safety or of the fire department or department of fire protection and water supply, shall be discharged for political reasons, nor shall a person be employed or taken into either of such departments for political reasons. Before any such officer or employee can be discharged charges must be filed against him before the council and a hearing had thereon, and an opportunity given such officer or employee to defend against such charges, but this provision shall not be construed to prevent peremptory suspension of such member by the council in case of misconduct or neglect of duty or disobedience of orders. Whenever any such

suspension is made, charges shall be at once filed by the council with the officer having charge of the records of the council and a trial had thereon at a second meeting of the council after such charges are filed. For the purpose of hearing such charges the council shall have power to enforce attendance of witnesses, the production of books and papers, and to administer oaths to witnesses in the same manner and with like effect and under the same penalty, as in the case of magistrates exercising civil and criminal jurisdiction under the statutes of the state of Nebraska."

The modern writers and authorities generally hold that, in case of doubt as to the meaning of a statute, resort may be had to the title of the act as an aid to discover the legislative intent, but of course by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act. And this is particularly the case in a state where the Constitution requires the subject of the act to be expressed in the title. Black, Interpretation of Laws (2d ed.) sec. 83; 2 Sutherland (Lewis') Statutory Construction (2d ed.) sec. 339. In the present case it will be noted that the title refers to "all cities having * * * five thousand or more population."

Defendant contends both in the oral argument and in its brief that cities of the class of Lincoln have an unrestricted right to remove at any time any employee without the formality of preferring or filing charges and without such employee being given an opportunity to be heard in his defense. In its brief it prints in full section 5300 above referred to, and in italics these words, "Any such officers or any assistant or employee elected or appointed by the council may be removed by the council at any time," and argues that "the power of removal is by that section (5300) given to the city of Lincoln unrestricted, to be exercised in their discretion and at their pleasure, and any officer or employee so appointed holds his office in their discretion and at their pleasure."

To consistently maintain its argument the city must also contend that the words "such officer or employee" in

that part of the section following the word "provided" relate only to the officers named in the proviso. If "in cities of the metropolitan class no member or officer of the * * * fire department * * * shall be discharged for political reasons," why the necessity of having such "member or officer" of a city of the metropolitan class safeguarded against a discharge "for political reasons" when he cannot at all be discharged for those reasons? We hold that the proviso clause of the section under consideration begins with the words, "Provided, however," and ends with the words, "departments for political reasons." So read, the proviso is complete in itself, and construed in the light of the other parts of the act and other statutes it was so intended by the legislature. Any other construction of that statute is too refined for practical use. We cannot give our assent to the defendant's argument, nor to the judgment pronounced by the learned trial court.

Mr. Justice Story in *Minis v. United States,* 15 Pet. (U. S.) *423, speaking for the supreme court of the United States, says: "The office of the proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extending to cases not intended by the legislature to be brought within its purview."

A rule of statutory construction is admirably stated in the early case of *Hagenbuck v. Reed,* 3 Neb. 17, cited in syllabus 1 herein: "In the construction of a statute, * * * no sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will."

Applying the foregoing rule to the present case, we find the proviso is so plain that it is not susceptible of strained construction. It provides on the point involved that "no member or officer of" the several departments of a metropolitan city that are embraced within its terms "shall be

discharged for political reasons." The proviso does not use the word "employee." That word is first used in section 5300, immediately preceding the proviso in this connection: "Any such officers or any assistant or employee elected or appointed by the council may be removed by the council at any time." The next use of the word "employee" is found in the language immediately following the proviso, where it is used twice: "Before any such officer or employee can be discharged charges must be filed against him before the council and a hearing had thereon, and an opportunity given such officer or employee to defend against such charges." Clearly the designation "officer" and "employee," as used in the language following the proviso, relates back to the subject embraced in the language that precedes the proviso. In view of the universal rule that the proviso is to be strictly construed, it would certainly be a strained construction to hold that all of section 5300 that follows the word "provided" is a part of the proviso, as the city seems to contend. To hold that all the remainder of the chapter is a part of the proviso would be a construction only a little less liberal.

That it is the duty of the court to discover, if possible, the legislative intent from the language of the act is elementary. It is not the court's duty, nor is it within its province, to read a meaning into a statute that is not warranted by the legislative language. In the legislative domain, and within constitutional bounds which it is bound to follow, the legislature is supreme.

In the construction of a statute, courts take judicial notice of events generally known within their jurisdiction. In the present case the court may properly take judicial notice of the comparative size of the cities within its jurisdiction, and the reasons urged for and against the enactment of laws relating to cities generally. With this in mind, we can discover no reason why the legislature should have intended to grant to a member of a fire department in a city of 100,000 inhabitants and upwards, a right to be faced by his accusers and to be heard in his own defense,

and in the same act deny the right to a member of the fire department in a city of approximately 60,000 inhabitants. In the construction of the statute before us, the court will not impute to the legislature an intent to be unreasonable, nor to commit itself to anything that is so manifestly un-American. It is always presumed the legislature intends to do the reasonable thing.

In the interpretation of a legislative enactment, it is the duty of the court to apply to the act generally accepted rules of statutory construction, to the end that effect may be given to the will of the legislature. The law-making body too is bound by such rules. But, in any event, if a law is objectionable application should be made to the legislature for its repeal or modification. The right to be heard, the right of any citizen in any walk of life to have his day in court, should not be denied him by placing a strained and technical construction upon a statute, and if there is any doubt about the meaning of the legislative language in this respect it should be resolved in favor of a hearing, rather than against a hearing. Such interpretation is more in harmony with the genius of our institutions.

In addition to the foregoing defense, the relator argues at some length that, by virtue of his employment in the fire department, he thereby had a vested right in the fireman's pension fund in pursuance of sections 2516-2519, Rev. St. 1913, which, in brief, provide that, after a service of 21 years, such employees shall be entitled to the pension named in the act. It is conceivable that an arbitrary discharge of a fireman might be brought about without a hearing, for the sole purpose of enabling the city by indirect means to evade the payment of a pension. But, in view of our holding that the relator is entitled to a hearing in pursuance of section 5300, it does not appear to be necessary to discuss the pension feature at greater length.

Both of the parties too gave considerable attention in their respective briefs to questions of procedure. But on the final hearing technical rules relating to practice were for the most part abandoned, for which both parties are to

be commended, thus avoiding the necessity on the part of the court of discussing anything save the merits.

The judgment of the district court is reversed, and the cause remanded, with instructions to enter a judgment in accordance with the views expressed in this opinion.

REVERSED.

CORNISH, J., not sitting.

SEDGWICK, J., concurring.

When this case was being heard before the district court, the judge suggested to the attorney for the city that he supposed "that you would introduce testimony as to the reason or motive for the discharge of plaintiff by the city," and the city attorney answered: "We do not intend to introduce any testimony. It is our desire to have a square decision of the law in this case of the right and power of the city to discharge the plaintiff without notice or opportunity to be heard, and without hearing or charges being filed." Whereupon counsel for the relator said: "With that statement the plaintiff rests." No formal return was made to the alternative writ, but the city filed an answer to the application for the writ, which I think the court may properly consider in the nature of a general demurrer and determine the precise and only question so presented.

The question is whether section 13 of the so-called Banning act confers upon the city council of Lincoln the power to discharge a member of the fire department arbitrarily without stating any cause therefor, and without a hearing. Of course section 13 is to be construed in the light of the other sections of the act and in the light of other provisions of the statute which are still in force. The precise question is whether the whole of section 13 after the word "provided" is to be construed to apply only to cities of the metropolitan class, or whether that part of the proviso which provides that charges must be filed against such officer before he can be discharged, and regulates the procedure thereon, applies to all cities that may become governed by the act. The legislation from which this question is to be

determined is not as specific and clear as might be desired. The clause that "no member or officer of the police or fire department shall be discharged for political reasons, nor shall a person be employed or taken into either of such departments for political reasons," is taken from the act of 1905 (Rev. St. 1913, sec. 4200) which applies only to cities of the metropolitan class, and in that act those words were followed with the provision that, "before a policeman or fireman can be discharged, charges must be filed against him," etc. In section 13, which we are considering, the expression is "before *any such officer or employee can be discharged.*" The fact that the provision for filing charges and having a hearing before removal is borrowed from the statute covering metropolitan cities, and is not found in any of the statutes covering cities of other classes, indicates that the legislative intent was that this provision should apply only to cities of the metropolitan class as contended by the city. In cities of the first class, having over 40,000 and less than 100,000 inhabitants, there is a provision that "any such officers so appointed may be removed at any time by a vote of three-fourths of all the members of the council." Rev. St. 1913, sec. 4483. And in cities from 25,000 to 40,000 inhabitants it is provided that the mayor "shall have power in like manner to remove from office, by and with the consent of a like majority of the council, any person or persons by him appointed thereto." Section 4654. These facts furnish some indication that in these two classes of cities it was not intended by section 13 of the Banning act to require that charges should be filed and a hearing had before appointed officers were removed. If, however, we examine the provisions of the statutes governing the cities of the respective classes, we find also indications that the legislature intended that this provision in regard to formal charges and hearing should also apply to other cities than of the metropolitan class. In cities of over 5,000 and less than 25,000 inhabitants it is provided that police officers "may be removed by the mayor at pleasure;" that other appointive officers may be removed *for cause.* Section 4874. This

would of course require a statement of the cause and a hearing thereon. We see therefore that the internal evidence of the act itself, in the light of existing statutes upon the same general subject now in force, is conflicting and somewhat uncertain. To determine the intention of the legislature it is therefore very important to consider the nature of the office from which the relator was discharged, and the fact that by his discharge he is deprived of the benefit of the firemen's pension law. If the city can discharge him without cause and without stating or having any reason therefor, it can be done of course at one time as well as another; and, when he has served for nearly the length of time to entitle him to a pension upon withdrawing from the service, he may be arbitrarily discharged and be deprived of his expected pension. It is argued that a fireman has no vested right in a pension under the statute, but whether or not he has a vested right, that is, a contract right, of which he cannot be deprived without compensation, it must be conceded that a competent and efficient fireman who has conscientiously and strictly performed his duties for a term of years has an interest in his prospective pension by which he may support his family and himself in his declining years. "The pension forms an inducement to the individual to enter and remain in the service of the fire department, and the pension in a sense is part of the compensation paid for those services. * * * The state is under the same moral obligation to its injured firemen that it owes to the citizen who is injured while assisting in the capture of a criminal. The legislature may transform that duty into a legal obligation, and impose it upon the municipalities by statutes general in their application to the class of cities affected thereby, and, so long as the law is not repealed, that obligation will be enforced by the courts." *State v. Love,* 89 Neb. 149, 156. We cannot consider that the legislature would authorize the city authorities to deprive him of this right without cause, and without reason, and without a hearing, unless it has so declared plainly and in unequivocal language. A similar question was presented to the supreme court of Michigan

(*Pulford v. Fire Department,* 31 Mich. 458), and it was there decided: "There can be no power to impose forfeitures unless granted by clear legislative enactment. * * * It is abhorent to all reason to allow a forfeiture to be enforced on an alleged default without notice and a hearing, or an opportunity to be heard." And in the opinion it is said: "Summary means and methods unknown to the common law must be authorized by express authority." In *State v. Love,* 89 Neb. 149, the opinion says that in *Gillespie v. City of Lincoln,* 35 Neb. 34, it is said that firemen are all "public or state officers vested with such powers as the statute confers, and that the duties they perform do not relate to the corporate functions of the municipality." If we conclude that the law is that appointed officers may ordinarily be removed by the appointing power, still when such removal destroys a very valuable right of the officer removed, expressly given him by statute, if we should say that the legislature might authorize such removal, it will not be considered that the legislature has done so, unless it is by the most clear and explicit terms.

It may be true, as contended by the city, that if we look only to the language of the Banning act, under which the city was being administered, the city might have authority to act upon its arbitrary will in employing or discharging its employees. But this other provision of the statute applying to the city of Lincoln gives to firemen who have served the city for 21 years a right to a pension. In considering the rights of the relator, it seems that these two acts must be construed together. If the pension law is to be effectual for the purposes intended, it must be that an employee cannot be discharged on purpose to save the city from paying the pension provided for. Nor could the city adopt any method of employing or discharging such employees which would tend to defeat the purposes of the pension law. On the other hand, in legal contemplation, the employee has no vested or contractual right in the anticipated pension until its contingency has arisen. This, however, is an indisputable fact that employees will enter the service and remain in

it with such a promise held out to them, when otherwise they would not. This mere expectancy of theirs is intended by the pension law itself for better and longer-continued service. In regarding the pension law, we must regard that. The question we have to consider is what should be the rule as to discharging employees so as not to do violence to either of the laws above mentioned. If the city council can discharge such employees without giving a reason therefor, then it might do so arbitrarily and with the intention of defeating his pension, leaving him somewhat helpless as to the proof of the real nature of his discharge, and thereby creating a situation which would render the pension law inoperative for the purposes for which it was intended.

On the trial of this case, the respondent declined to offer any testimony or give any reasons for the discharge of the employee. The trial court placed the burden of proof upon the employee to show that he was discharged for the purpose of defeating him of a pension, or under a system of discharging employees which would render inoperative the purposes of the pension law. In this I think the trial court erred. I think the better rule would be, if the spirit and intention of the Banning act and the pension law are both to be carried out as near as may be, that, before such an employee can be discharged, the substantial reason therefor should be stated, and that, if the reason given therefor is untrue, or if the reason given is one which, if acted upon, would go contrary to the purposes of the pension law, as designed, then such a discharge should not be permitted. Mere arbitrary or capricious discharge would operate to defeat the pension law. The burden of showing the reason for the discharge should be upon the city council. By this I do not mean that the city is powerless to discharge such employee for any reason that appears good to it, acting as reasonable men. It has full power to do whatever, in the exercise of its discretion, is reasonably necessary for the betterment of the service. The trial court heard evidence of relator apparently upon the theory that it was proper and necessary that the relator should show that his discharge

was for the purpose of depriving him of his pension right. Of course upon the same theory the relator would sustain his case by proving that he was discharged for any unlawful or insufficient reason. This theory virtually concedes the relator's claim that he could only be discharged for cause. The most natural and regular way to prove that he was not discharged for any insufficient or improper cause would be to show that he was discharged for sufficient cause. And this burden should be placed upon the authorities who discharged him.

While the general question in this case is not free from serious doubt, I am inclined to agree with the opinion that the judgment of the district court should be reversed.

ROSE, J., dissenting.

The relator, assistant chief of the fire department of Lincoln, was discharged by the city council without notice or hearing. Later, in the district court for Lancaster county, he applied for a peremptory writ of mandamus to compel respondents, members of the city council, to reinstate him. The writ was denied, and he has appealed. In reviewing the proceedings of the trial court a majority of my associates hold that respondents had no authority to remove relator summarily. I dissent. In my opinion the power of the council to remove relator in the manner indicated is clearly conferred by the Lincoln charter, which provides that any "officers or any assistant or employee elected or appointed by the council may be removed by the council at any time." Rev. St. 1913, sec. 5300. Lincoln is under the commission form of government, and the members of the city council justify the dismissal of relator under that part of the charter declaring: "Any such officers or any assistant or employee elected or appointed by the council may be removed by the council at any time." Rev. St. 1913, sec. 5300.

In my judgment the opinion of the majority nullifies this plain expression of the legislative will by giving an unwarranted import to the language following the provision on

the subject of removals in Lincoln and other cities under the commission form of government. That language is:

"*Provided, however,* in cities of the metropolitan class no *member or officer* of the police department, or department of police, sanitation and public safety or of the fire department or department of fire protection and water supply, shall be discharged for political reasons, nor shall a person be employed or taken into either of such departments for political reasons. Before any *such officer or employee* can be discharged charges must be filed against him before the council and a hearing had thereon, and an opportunity given *such officer or employee* to defend against such charges, but this provision shall not be construed to prevent peremptory suspension of *such member* by the council in case of misconduct or neglect of duty or disobedience of orders. Whenever any such suspension is made, charges shall be at once filed by the council with the officer having charge of the records of the council and a trial had thereon at a second meeting of the council after such charges are filed. For the purpose of hearing such charges the council shall have power to enforce attendance of witnesses, the production of books and papers, and to administer oaths to witnesses in the same manner and with like effect and under the same penalty, as in the case of magistrates exercising civil and criminal jurisdiction under the statutes of the state of Nebraska." Rev. St. 1913, sec. 5300.

This is all proviso. It applies alone to Omaha, a city of the metropolitan class. The majority have fallen into grave errors by assuming that the proviso ends with its introductory sentence and by interpolating what follows into the preceding sentence authorizing the city council to remove officers and employees "at any time." Lincoln is not a city of the metropolitan class, and the sentence commencing with the word "provided" has no application to respondents. The second sentence in the proviso reads:

"Before any such officer or employee can be discharged charges must be filed against him before the council and a hearing had thereon, and an opportunity given such officer

or employee to defend against such charges, but this provision shall not be construed to prevent peremptory suspension of such member by the council in case of misconduct or neglect of duty or disobedience of orders."

In the majority opinion it is held that the words "any such officer or employee" refer to "officers or any assistant or employee" in the sentence preceding the word "provided," and not to "member or officer" in the provision relating to the fire and police departments of Omaha. The reason given by the majority for this construction is that, in the sentence commencing with "provided," the word "employee" was not used, and that therefore the words "any such officer or employee" refer to the sentence preceding the proviso. The second sentence in the proviso shows, however, that "employee" was used in the same sense as "member." After providing that an opportunity must be "given such officer or employee to defend," the statute declares that "this provision shall not be construed to prevent peremptory suspension of such member by the council in case of misconduct or neglect of duty or disobedience of orders." The provision that, "before any *such* officer or employee can be discharged," charges must be filed refers to a "member or officer" of the fire or police department of Omaha. "Such" is "descriptive, and is a relative word," and "must be referred to the last antecedent, unless the meaning of the sentence would thereby be impaired." *Summerman v. Knowles,* 33 N. J. Law, 202, 205. See, also, *Tuggle v. Enterprise Lumber Co.,* 123 Ga. 480; *Commonwealth v. Burrell,* 7 Barr. (Pa.) 34, 37; *Benoit v. New York C. & H. R. R. Co.,* 87 N. Y. Supp. 951.

In Lincoln and Omaha the difference in the power to remove firemen and policemen was not created by the act under consideration, but existed for a number of years under previous charters. The city council of Lincoln was authorized to remove such officers without notice or hearing. Rev. St. 1913, secs. 4483, 4489. In Omaha, however, their removal for political reasons was prohibited. No member of the fire or police department of Omaha could be dis-

charged without a hearing. Rev. St. 1913, sec. 4200. The intention to retain this feature in the charter of Omaha under the commission form of government is obvious from a reading of the act. Rev. St. 1913, sec. 5300.

The history of the act is of the same import. Section 5300 of the Revised Statutes is section 13 of the original act. Laws 1911, ch. 24. When the bill was introduced, section 13 ended with the provision that "any such officers or any assistant or employee elected or appointed by the council may be removed by the council at any time." Upon report of the committee of the whole, section 13 was amended by inserting after the word "time" all that part of the section as it now stands, commencing with "provided." Senate Journal, 1911, p. 644. The addition to the original section of the bill contains the substance, and in many respects the wording, of that part of the Omaha charter prohibiting the removal of firemen and policemen without a hearing. Rev. St. 1913, secs. 4200, 5300. It is clear that the legislature did not intend to restrict the power of the council of other cities to remove "at any time" officers, assistants and employees elected or appointed by it.

According to the majority opinion, as I understand it, the right to a hearing is not limited to firemen and policemen in Omaha as stated in the plain language of the lawmakers, but extends to every officer, assistant and employee selected by the council of a city under the commission form of government. The effect of the decision is to take from the council of Lincoln, after summary removal has been authorized in direct statutory terms, the power to remove such officers and employees without a hearing. As I view the opinion, it includes an exercise of power committed by the people to the legislature alone.

LETTON, J., joins in this dissent.

TIMOTHY MURPHY, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 31, 1917. No. 19083.

1. Waters: OBSTRUCTION OF STREAM: LIABILITY. Overflow waters of a stream which have spread over the adjoining country, whence they disappear only by evaporation or percolation, may be defended against as surface waters, but overflow waters which flow in an accustomed course through a depression into the same stream at a lower point in its course or into another stream or lake, though they do not flow in a channel with well-defined banks, do not become surface waters, and if their accustomed course is negligently obstructed by a railroad embankment, the railroad company is liable for damages to crops caused by the waters so retained.

2. ———: ———: DAMAGES. If, however, some damage would have occurred, even if the railroad embankment had not been built, the company would only be liable for such damages in addition thereto as were caused by the damming or obstruction of the waters to a greater height or for a longer time than would otherwise have occurred.

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

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

R. E. Evans, contra.

LETTON, J.

This is an action to recover damages for the destruction of and injury to hay, grain and growing crops by flooding, alleged to have been caused by the negligent construction of defendant's bridges and roadbed.

The petition, in substance, alleges that in the locality where the damage was done Omaha creek ran northerly, then easterly, then southeasterly into the Missouri river; that the creek is subject to heavy floods; that its banks close to the channel on the west are higher than at a distance from the same; that the railroad crosses Omaha

creek twice in the village of Homer, and that in the bridging of the creek the defendant negligently constructed the bridges by using piles so as to obstruct the flow of the water in the channel and catch and hold debris; that the water which would otherwise flow through the channels overflow on the west side of the railway, and flows down over and across land which is farmed by the plaintiff and his assignors, that the waters of Elk Creek, a stream flowing from the north, flow into Omaha creek about a mile and a half north of the bridges; that at the junction of these creeks in times of high water the banks of the stream are frequently overflowed. It is also alleged that there is a well-defined slough or channel or way through which the flood waters formerly rapidly flowed off to the east and southeast; that defendant negligently constructed a railroad embankment about four feet high across said flood-water channel and failed to provide sufficient means by which the flood waters could seek their natural outlet toward the Missouri river, into which the waters of Omaha creek naturally flow; that on August 16, 1912, there was a flood in said creeks, by reason of which and of said bridges so negligently constructed flood waters were thrown out of the channel and held upon the land of plaintiff by the railroad embankment to the damage of his crops, specifying the items. There are six other causes of action alleged for damage to crops upon other tracts of land either owned by the plaintiff or owned by others who have assigned their right of action to him.

The answer admits the construction of the railway, and that there was high water at the time stated, denies the facts alleged as to the crops, pleads that the overflow was the result of natural causes and of obstructions created by the construction of public highway bridges across Omaha creek. The case was tried without the intervention of a jury. The court found that the defendant was negligent in the construction of the embankment and bridges thereby causing the flood waters to flow across the lands described in the petition, retarding the flow therefrom, and destroy-

ing crops to plaintiff's damage in the sum of $3,026.80, for which sum judgment was rendered.

The flooded land lies upon what is known as the Missouri river bottoms. At this point Omaha creek, which drains a large territory, flows northward at a distance of about half a mile east from the line of the bluffs which form the western edge of the river valley. A short distance to the west of the stream there is a low ridge, so that a depression is formed between the bluffs and this ridge extending from near the railroad bridges about as far as the junction of Omaha and Elk creeks. The village of Homer lies near the south end of this depression. The line of railway crosses a loop or bend of Omaha creek in or a little south of the village of Homer by two bridges, both of which cross the creek somewhat diagonally. There is some evidence tending to prove that the northern of these two bridges obstructed the water of the stream, but, since the water passing through this bridge flowed from the east side of the embankment to the west side, this could not cause the flood on the west side of the railroad or cause the flood waters on the west side to flow northward through the depression mentioned to the land in section 2, described in the fifth cause of action.

The evidence is not disputed that before the railway was built the flood waters of Omaha creek, augmented by those of the tributary south of Homer known as Fiddler creek, in times of flood followed this depression. Plaintiff contends that the bridges by the obstruction they created on account of piling in the channel and insufficient openings caused the flood within this channel and over the other lands. We are convinced, however, from an examination of all the evidence that the waters were so high that, even if the bridge and railroad had not existed, they would still have followed the course through the streets of Homer and down the depression west of the stream, and we find the evidence insufficient to sustain the fifth cause of action.

The important question in the case seems to be whether defendant is liable for damages to crops on other lands un-

der the second ground of negligence alleged, to wit: the negligent construction of the railroad embankment across a natural depression to the east of Omaha creek, through which it is alleged overflow waters from both Omaha and Elk creeks had been accustomed to flow. At the time of the flood the water was three feet deep on the west side of the track and the land was dry on the east side. Testimony in behalf of plaintiff showed that before the construction of the railroad Omaha creek and Elk creek had overflowed at least four or five times in twenty-five years. Flood water coming from the stream some distance south of the junction flowed southeasterly for several miles to the old Blyburg lake bed; another overflow, farther north, ran northeasterly and again entered Omaha creek near the railroad bridge in section one. The water which ran to the lake did not flow in a channel with well defined banks, but followed a wide and shallow depression in the nearly level land. It varied in width from a few rods where it left the stream to a half mile, farther southeast, and in depth from a few inches at the edges to three feet. The evidence does not show how wide the depression is where the railroad obstructs it or how high the water was before it would flow into the lake, but it is shown that the water would run off the land of Mr. Ashford and others of plaintiff's assignors within about 24 hours, doing practically no damage to growing corn. In the flood of August, 1912, the railroad embankment prevented the water from passing off to the southeast, and it was held on the lands for three, four and five days, in some places three feet deep. It did not pass off until the water in the creek subsided, when a considerable part drained into the creek through a borrow pit near the lower railroad bridge in section one.

Defendant contends that this water is surface water that it has a right to defend itself against, and that it is not liable for damages under the doctrine of *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb. 406. It insists that, if it be held otherwise, in order to escape liability it will be compelled to build a trestle a half mile long to permit the free

flowage of water in times of such rather unusual floods, since it cannot construct openings in its embankment to permit these waters to pass through without becoming liable to owners of lower lands for collecting surface water and discharging it in a body upon their land.

Plaintiff's contention is that the waters are not surface water, but are flood waters of a stream. There is a conflict in the authorities upon this question, but as to flood waters which follow a well-defined course and return to the same stream at a lower point in its course the question has been settled for this state in the cases of *Chicago, B. & Q. R. Co. v. Emmert,* 53 Neb. 237, and *Brinegar v. Copass,* 77 Neb. 241. In the latter case it was said: "It is true that flood waters may become entirely separated from the stream and so have lost their identity with it. When it has spread over the adjoining country, settled in low places, and become stagnant, it can no longer be treated as a part of the stream, and the rules with respect to watercourses can then no longer be applied. But overflow waters from a natural stream in times of flood or freshet, flowing over or standing upon adjacent lowlands, do not cease to be part of the stream unless or until separated therefrom so as to prevent their return to its channel. 3 Farnham, Waters and Water Rights, sec. 879."

The evidence shows that the greater volume of the overflow waters would not return to Omaha creek at a lower point even had there been no embankment to obstruct their flow. These waters spread to some extent over the land east and southeast of their emergence from the creek, but did not remain there until lost by percolation or evaporation except in some small depressions. The testimony is not disputed that they found their outlet in the lake or lake bed about two miles to the southeast.

The question whether waters overflowing from a stream and following a slight natural depression, in a definite direction, and well-defined course, to an outlet in another stream or in a lake or lake bed, lose their character as flood waters and become, in contemplation of law, surface wa-

ters, which each landowner may dike against, is a new question in this state. In the *Morrissey* case the waters had never become part of a flowing stream. In the *Brinegar* case the waters were part of the stream, and after separation again returned to it. The basic principle which should determine the character of these waters seems to the writer to be the ancient maxim, *"Aqua currit et debet currere ut currere solebat."* Water runs and ought to run as it has used to run. Each owner of lands bordering upon either the normal or flood channels of a running stream is entitled to have its water, whether within its banks or in its flood channels, run as it has used to run, and no one has the right to interfere with its accustomed flow to the damage of another. The question has been considered in England. In *Rex v. Trafford,* 1 Barn. & Ad. (Eng.) *874, Lord Tenterden said: "Now, it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction." See, also, dictum of the Lord Chancellor in *Menzies v. Breadalbane,* 3 Bligh (Eng.) n. s. 414, 418; *Lawrence v. Great N. R. Co.,* 16 Ad. & E. (Eng.) 643, 654.

In a Wisconsin case the facts were that the flood waters of the Wisconsin river flowed in an accustomed course into the Baraboo river, and that the defendant city caused a street or causeway to be built so as to obstruct this natural waterway. The court said: "In the case before us it is obvious that the waters which were obstructed were not surface waters. They were the waters of the Wisconsin river, which, in its usual high stages, were accustomed to flow across this bottom into the Baraboo river. The effect of the road obviously would be to dam these waters, and

proper and sufficient culverts should have been provided for passing the waters through the embankment. But, because the road was negligently and unskilfully built, no such provision was made for the flow of the waters in their natural course. It seems to us the city was liable for damages accruing from the negligent and improper manner of constructing the highway." *Spelman v. City of Portage,* 41 Wis. 144.

In *Jefferson v. Hicks,* 23 Okla. 684, 24 L. R. A. n. s. 214, it was said: "The flood waters in the case at bar were accustomed, before the erection of the levee, to break out of the channel over the east bank of the stream at the place where the levee is being maintained and to flow down through the town site of Jefferson, and ultimately back into the main channel, or into another watercourse south of the levee. When the surface waters which fall upon the watershed of Pond creek ultimately gather and collect in the channel of that stream, they lose their character as surface water, and become the waters of a watercourse, and when they overflow the bank opposite the town site, and pursue a general course back into the same watercourse, or into another watercourse, although they do not follow a channel with well-defined banks, they continue flood waters of the watercourse, and do not become surface water." See, also, *Lampley v. Atlantic C. L. R. Co.,* 63 S. Car. 462; *Miller v. Eastern Railway & Lumber Co.,* 84 Wash. 31.

In *Conn v. Chicago, B. & Q. R. Co.,* 88 Neb. 732, it is said: "In the absence of a grant binding all persons affected and to be affected thereby, this court does not recognize the right of a railway company to obstruct the channel of a natural watercourse or drain, but has said that a continuing duty is imposed upon the carrier to permit the water to flow therein as it did in a state of nature, or to provide another adequate way therefor."

Mr. Gould says: "A stream does not cease to be a watercourse and become mere surface water because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks be-

fore flowing again in a definite channel." Gould, Waters (3d ed.) sec. 264.

In 3 Farnham, Waters and Water Rights, sec. 880, it is said: "Every stream flowing through a country subject to a changeable climate must have periods of high and low water. And it must have, not only its ordinary channel which carries the water in ordinary times, but it must have, also, its flood channel to accommodate the water when additional quantities find their way into the stream. The flood channel of the stream is as much a natural part of it as is the ordinary channel. It is provided by nature, and it is necessary to the safe discharge of the volume of water. With this flood channel no one is permitted to interfere to the injury of other riparian owners. When the water rises until it reaches the margin of this flood channel, and begins to flow over it, it may do so in natural vents or outlets which are a part of the stream, and with which there can be no individual interference to the injury of other persons, or it may spread out uniformly over a large section of country in small volume and with no definite course or ultimate destination, but which will gradually be lost by evaporation or percolation into the ground. The principles which prevent interference with the water when a part of the rushing torrent, or when finding its way by well-defined outlets from one stream to another, do not apply with equal force to the water when it is spread out over the face of the country in such a way as to have lost its power to maintain a continued flow. By keeping these forms distinct, and considering in every case to which of them a particular decision applies, most of the seeming conflict in the authorities disappears."

We conclude, therefore, that all damage caused to crops by the holding back of water which but for the embankment would have flowed in an accustomed course to the lake bed is a proper subject of recovery.

As to the fourth and sixth causes of action there is proof tending to show that the waters of Elk creek did not join the flood of Omaha creek until Sunday evening. In the

meantime the backwater caused by the railroad embankment had been flowing to the north of Omaha creek at and below the junction. Plaintiff contends that the damages claimed under the fourth and sixth causes of action were due to the bridge in Homer, and to the construction of the railroad embankment across the channel of the flood waters of Omaha creek. So far as the evidence shows, the same amount of water would flow north to the junction of the two creeks and flow off to the southeast, if there were no obstruction at Homer, and, if no embankment lay to the eastward, it would not cross over Elk creek into section 35 and the north part of section 2 in quantities sufficient to harm crops. If the water flowed north of Elk creek in sections 2 and 35, in any volume, it was due to the embankment, and not to any obstruction by the bridges at Homer.

The first group of assignments of error is concerned with the manner of proving the value of the crops damaged or destroyed. In several instances the witness, after having stated the value of the crop as it stood before the flood, was asked what in his opinion was the difference in the value of the crop just before the flood and after it had been injured. The latter question was objected to as being improper and invading the province of the court. The objection was overruled, and this and other like rulings are complained of. Having fixed the value before the flood, and the witness having given the difference in value after the flood, the court had exactly the same facts before it as it would have had had the usual formula in jury trials been observed of asking what was the value before and what was the value after the flood and leaving the court to compute the difference. We cannot see that the defendant has been prejudiced by these rulings. Other testimony as to the value was received. Taken together, the evidence is sufficient on this point. However, we deem it advisable to call attention to the rules for proving the amount of damages to crops laid down in the cases of *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657, and *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745, and cases cited in these opinions.

Complaint is also made that, since plaintiff had conveyed his land to his daughters prior to the flood, he had lost all title to the crops, and could not maintain such an action unless his right to crops was reserved in the deed. But both plaintiff and his grantees testified that the crops were his for that year. A judgment in plaintiff's favor based on such testimony would effectually estop his daughters from afterwards claiming as against defendant that they owned the crop, and no prejudice can result on this account.

The peculiar conditions of the locality with reference to the course of drainage, the combination in one suit of seven causes of action for damages occurring upon different tracts of land, the manner in which the testimony was given, the numerous maps and plats in evidence showing ground and high water levels, and the lack of findings of damages in each cause of action have made this a most difficult and perplexing case to determine. After repeated reading and consideration of the record, we have reached the conclusion that the injury to the crop upon part of the land was occasioned by the retention of water several days longer than would have occurred had the embankment not been built, but the evidence is unsatisfactory as to what its condition actually is, how many of the tracts were affected by this condition, and as to the specific damages to crops occurring upon each tract, and is insufficient to support the general finding. It is also unsatisfactory as to whether the "Blyburg lake bed" is a mere shallow and ordinarily dry depression in the surface of the land with no outlet, or what its condition actually is. Upon another trial plaintiff may be able to supply sufficient proof, more especially as to the land near the swamp north of the junction and embraced in the first, fourth and sixth causes of action. There seems to be no definite proof of the cause of damages occurring to crops upon the Murphy land in section 36, described in the second cause of action.

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

REVERSED.

SEDGWICK, J., concurring.

I think that the judgment of the trial court ought to be reversed, but I do not concur in the principal statements and definitions in the opinion.

The first paragraph of the syllabus says: "Overflow waters of a stream which have spread over the adjoining country, whence they disappear only by evaporation or percolation, may be defended against as surface waters." The opinion shows beyond question that the water complained of is overflow waters of the stream, that they have spread out over the adjoining country and they disappear only by evaporation or percolation. If the statement of the law in the syllabus is correct, then they are surface waters.

The principal question in the case seems to be whether the water complained of is surface water or is a stream of water as it was before it escaped from the principal watercourse. Surface water is a common enemy and may be defended against as such. A stream of water is a common friend and cannot be interfered with to the injury of others. To distinguish between these two the law calls one surface water, and has adopted a technical name for the other which is a little unfortunate. It is called "flood water." Now, surface water is generally a flood of water as the term flood is commonly used and understood. The word "flood" is defined in Webster's New International Dictionary as: "A great flow of water; a body of moving water; * * * especially, a body of water rising, swelling, and overflowing land not usually thus covered."

It seems that the court and also the plaintiff in the trial of the case used the word "flood" indiscriminately, sometimes in its technical sense of "flood water," that is, a stream of water, and sometimes as expressing a volume of water. This led to a considerable confusion which it seems to me is perpetuated in the opinion of the court. In the briefs the plaintiff concedes that this water complained of is surface water. The brief states two propositions relied upon to support the judgment: One is that the defendant improperly constructed its bridges and crowded

the water out of the banks of the creek. The other is: "Where a railroad company in the construction of its railroad crosses a natural channel or waterway through which storm or surface waters have been accustomed to flow, it is negligence upon the part of the company to construct its embankment in such manner as to obstruct or dam the natural waterway and thereby occasion damage upon the lands of others."

The opinion says that the water complained of "varied in width from a few rods where it left the stream to a half mile, farther southeast." It "followed a wide and shallow depression in the nearly level land." It varies in depth "from a few inches at the edges to three feet. The petition speaks about this water finally, after two miles overflowing this country, entering into a lake, but the opinion shows that the petition does not mention any lake, but alleges that the waters seek their outlet "toward the Missouri river, into which the waters of Omaha creek naturally flow," without alleging that it ever reaches any river. Some of the witnesses speak of the depression where this water, after flowing over the country for about two miles, is finally absorbed or evaporated, and one or two witnesses called it "the old Blyburg lake bed," but none of them testifies that there is anything like a lake there. Evidently some of this water gets as far as that depression (if the overflow is sufficiently large, which seldom happens) and is absorbed. The trial court found "that the defendant was negligent in its construction of its embankment and its bridges over and across Omaha creek as alleged and set forth in plaintiff's petition, thereby causing the flood waters of Omaha creek to flow back over and across the lands described in plaintiff's petition." The majority opinion finds that this is not true. The plaintiff's petition alleged that the defendant "negligently constructed their bridges, by using piles in such a manner that the piles, which support the bridge structure proper, obstruct the free flow of the water in the channel of said creek and catch and hold debris which further retards and obstructs the flow of wa-

ter, and that by reason thereof the water which would otherwise flow through said channel is crowding out of the channel above and flows over the land on the west side of the defendant's said line of railway, and that when said water is so crowded out of said creek channel by said bridges it flows down, through, over, and across and onto lands in said section 1 and the other lands in said township twenty-seven (27), range eight (8), and in township twenty-eight (28), in said range eight (8), which were farmed and cropped by this plaintiff."

It does not plainly appear from the evidence and the facts or the findings of the court that either the plaintiff or the judge considered this water as a stream or any part of a watercourse. The word "flood" is used sometimes, but apparently in the sense that there is a big body of water spreading over the land, in some places a half mile wide, and, as I said before, the plaintiff in his brief expressly predicates his case upon the proposition that this water is surface water, and the plaintiff insists that in the answer of the defendant "the existence of the flood was admitted." The majority opinion appears to hold that the water complained of is "flood water" in the technical sense. I do not think that the pleadings and evidence in the case will justify such a finding.

Plaintiff has failed to prove the damages allowed by the court, and for that reason the judgment is properly reversed.

WILLIAM W. CRYDERMAN V. STATE OF NEBRASKA.

FILED MARCH 31, 1917. No. 19749.

1. **Criminal Law:** HOMICIDE: CORPUS DELICTI: PROOF. The extrajudicial confession of the defendant is not of itself sufficient evidence of murder in the first degree to establish the *corpus delicti*. There must be also other evidence. But circumstantial evidence is competent for that purpose.

2. ———: ———: ———: ———. If the evidence other than the extrajudicial confession of the defendant establishes that the human being alleged has been killed by violence not self-inflicted, the *corpus delicti* is proved.

3. **Homicide:** SENTENCE: STATUTE. It has long been recognized that section 9179, Rev. St. 1913, is to be liberally construed in favor of justice, as a remedial statute, and that it is the duty of this court to determine, from a consideration of the evidence, whether the death penalty upon conviction of murder in the first degree is warranted by the evidence under the circumstances in the case being considered.

4. ———: REDUCTION OF SENTENCE. In such case, although the defendant is not insane, and he is capable of understanding the nature of his act, still if the evidence shows that his mind was not normal, and was not entirely reliable as a regulator of his conduct, and no rational motive for the crime appears, such evidence will not justify the infliction of the death penalty, and the punishment will be reduced to imprisonment for life.

ERROR to the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Affirmed. Sentence reduced.*

Sterling F. Mutz, for plaintiff in error.

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

SEDGWICK, J.

By information filed in the district court for Cherry county, Nebraska, the defendant, William W. Cryderman, was charged with the crime of murder in the first degree. It was alleged that he did kill and murder one Nellie Heelan in said county. The jury found the defendant guilty of murder in the first degree, and in their verdict added: "We further find and say that the defendant William W. Cryderman shall suffer death." The court thereupon sentenced the defendant to suffer death by electrocution, and the case has been brought to this court for review.

1. The first contention is that the *corpus delicti* is not proved. An alleged confession of the defendant was in evidence, and it is now insisted that there is no other evidence, proving or tending to prove the *corpus delicti.* The guilt of the defendant must be proved beyond a reasonable

doubt. The extrajudicial confession of the defendant alone is not sufficient evidence to justify conviction. There must be other substantial evidence of the *corpus delicti;* but in proving the *corpus delicti* circumstantial evidence is competent as in proof of other elements of the crime. It has sometimes happened that a defendant has been convicted of murder in the first degree upon a circumstantial and detailed confession of the murder on his part, when in fact no murder had been committed. In view of these circumstances, the rule became established that the death of the supposed victim must be established by other evidence than the confession of the defendant. Afterwards the rule was so extended as to require independent evidence that the death of the victim was by violence and not self-inflicted. Many details are suggested in the brief as elements of the *corpus delicti* which have never been so considered. If there is evidence, direct or circumstantial, other than the confession of the defendant, that the person alleged to have been murdered was killed by violence not self-inflicted, the *corpus delicti* is sufficiently proved.

Mr. Heelan and his wife and daughter resided on a ranch in Cherry county, and in the summer or fall of 1915 this defendant began working for Mr. Heelan on the ranch, and on the 13th of October it was necessary for Mr. Heelan to be away from home for a short time, and Mrs. Heelan procured a neighbor, Mrs. Layport, to stay with her over night in Mr. Heelan's absence. In the evening the dwelling house was burned, and the bodies of Mrs. Heelan and Mrs. Layport were found in the ruins. A search was immediately made for the defendant, and he was apprehended at Valentine the next morning. He freely confessed the murder, and answered, under oath, without hesitation, the questions that were put to him in regard to it, and finally, when his statement had been reduced to writing, he read it and signed it as a correct statement of the manner in which the crime was committed. In this statement he said that he had been hauling hay and coal the day prior to the murder, and he used four horses in hauling coal. While

so engaged he met the two women, Mrs. Heelan and Mrs. Layport, and told Mrs. Heelan that one of the horses had been sick, "and she told me I ought to have known better than to drive a sick horse. * * * Right after the women got home we had more talk about the horse, and I got very angry. The two women got some mail, and were sitting at the table in the kitchen reading the mail, along about nine o'clock. I was out on the back porch thinking things over. I was very angry about the way she had talked to me about the horse, and the more I thought about it the more angry I got. I had a feeling that I must have revenge. The gun, a double-barrel 12-gauge shot gun, was out in the barn. I decided while on the porch that I would go get the gun and kill both of the women. I went out to the barn and loaded the gun, and came back to the window at the southeast corner of the kitchen, and while Mrs. Heelan was reading a newspaper at the northeast corner of the table I shot her in the head. She was killed instantly. I then stepped inside the door and shot Mrs. Layport in the head; she was stooped over near the sink in the kitchen when I shot her. I then wrote the note which was found in the barn, and took it out and left it." He then set fire to the dwelling house in which these two women were, and took one of the horses and rode to Arabia, and stayed there about an hour, and then to Woodlake, and from there by freight train to Valentine. He intended to leave on the railroad the next day, but was arrested by the sheriff. The statement continued: "After killing the women I took some money, a little more than a dollar, out of Mrs. Layport's handbag, and also took Mrs. Layport's watch, from up-stairs, and took it along with me. I also took Mrs. Heelan's rosary. This was down-stairs on the sewing machine when I got it. I also took a comb and a prayer book from down-stairs. There was just the two women and myself present at the time I shot them." This statement was extrajudicial, and would be subject to the suggestion above that it could not of itself be sufficient to establish the *corpus delicti*. The defendant, however, offered himself as a witness upon the

trial, and testified in detail and at great length in corroboration of the statements in the writing that he signed, and also stated in express words under oath that the said writing which he signed was a true and correct statement of the facts. There were other circumstances tending to show that the crime was committed as detailed by the defendant, and sufficient of themselves without the assistance of the extrajudicial statement of the defendant, and probably even without his evidence in open court to establish the *corpus delicti*.

2. The question of the defendant's sanity is presented in the briefs. There is very much evidence in the record tending to show that he was not insane, and there was no witness called to prove the defendant's insanity except the defendant himself. Several expert witnesses testified that the defendant was not insane. There is no doubt from this evidence that the defendant fully understood the nature of his act, and knew the difference between right and wrong. There can be no doubt of his guilt. The question still remains whether the death penalty is too severe. Section 9179, Rev. St. 1913, has been several times applied in cases of this nature. In *Anderson v. State,* 26 Neb. 387, it is said that this statute "is a remedial one, and, like all statutes of that class, is to be liberally construed in favor of justice. The act of reducing the sentence and rendering a new one in accordance with the evidence, is in no sense a commutation of the former sentence. That can be granted only by the executive of the state, and is granted or refused as a matter of discretion. The reduction of a sentence, however, is a matter of right upon which the prisoner may insist when that imposed is in excess of what the evidence will justify. In other words, the statute makes it the duty of this court, when the proper proceedings are had, to review the evidence, and prevent the imposition of punishment which the evidence will not warrant."

In *O'Hearn v. State,* 79 Neb. 513, it was held that under the circumstances there shown punishment of death was excessive, and the sentence was reduced to imprisonment

for life. The court said: "The verdict in so far as it responded to the issues of guilty or not guilty of the crime of murder in the first degree was fully justified." But, because of the defendant's immature years and because of other circumstances shown in the evidence, the court concluded that the death sentence, "taking all the circumstances of the case into consideration, is excessive," and reduced it to imprisonment in the state penitentiary during life.

Hamblin v. State, 81 Neb. 148, was very similar to the facts in the case at bar, so far as the severity of the punishment was concerned. The court said that it was "persuaded that the killing of Rachael Engle was of a most unusual character. There seems to have been no reason for the act. It is insisted by the state that it was prompted by a spirit of wanton, jealous rage, induced by seeing Smith in her company, and that it was a most heartless, cruel, cold-blooded and deliberate murder of an innocent, inoffensive girl, against whom there was no possible cause for ill will or hatred. Viewed from the standpoint of his complete sanity and legal accountability at the time of the shooting, this would seem to be true. She had never given him any offense, had never mistreated him in any way. * * * A solution of the motive which prompted the act is, to the mind of the writer, an impossibility. Plaintiff in error appears to have been most unfortunate and a great sufferer during the greater part of his life. We are fully persuaded that he should never be given his liberty, for he would be a menace to those with whom he should associate. The evidence tends strongly to convince us that, owing to his physical and mental condition, there may be grave doubts as to his responsibility for his acts at the time of the tragedy, and yet he is neither an idiot, an imbecile, nor a maniac. We can find no justification for taking his life, nor should he ever be discharged from confinment."

In a somewhat similar case this language is referred to and approved, and the death sentence reduced to imprisonment for life. *Muzik v. State,* 99 Neb. 496. So that sec-

tion 9179, Rev. St. 1913, has been continually construed to require the reduction of the death penalty to imprisonment for life under circumstances that render that the proper penalty. This defendant at the time of the commission of this crime was a boy of 18 years of age. He had not had the benefits of home for several years, but had led a wandering life with varied experiences. He testified that he had been in a hospital for several weeks, and was "taken in charge for being crazy, * * * my folks and a couple of other parties in town" filed the complaint. The crime was not committed for profit or gain. No rational motive appears. He evidently at first contemplated committing suicide, and when he finally escaped from the scene of the crime he took the prayer book and rosary of his victims, a watch, and $1 in money, but very little of value. There was no evidence as to the value of the watch. He stayed around a small nearby station for several hours, and made no reasonable effort to get beyond the reach of the officers until well along into the succeeding day. As was said in the case last above cited, if his mind was not wholly deranged, it was not normal, and was not entirely reliable as a regulator of his conduct.

The judgment of conviction is affirmed, but the penalty is reduced to imprisonment for life.

SENTENCE REDUCED.

MORRISSEY, C. J., not sitting.

ROSE, J. I do not find in the record any reason for interfering with the verdict of the jury or with the sentence of the trial court.

IRVIN F. WILLMAN, APPELLEE, V. CHARLES H. SANDMAN ET AL., APPELLANTS.

FILED APRIL 14, 1917. No. 19266.

1. **Evidence:** MARKET VALUE. The knowledge on which a witness as to the market value of real estate bases his opinion must not have been acquired long before or after the rights of the parties became fixed, and, where his only knowledge of such value is acquired from one to two years subsequent to such time, it is too remote.
2. **Evidence** examined, and *held* insufficient to sustain the verdict.
3. **Trial:** INSTRUCTIONS: ASSUMPTION OF FACT. "It is error for the court to give an instruction which assumes as established a disputed question of fact. It is for the jury alone to pass upon conflicting evidence." *Terry v. Beatrice Starch Co.*, 43 Neb. 866.

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

B. F. Good, Charles H. Denney and *John C. Hartigan,* for appellants.

George W. Berge, contra.

MORRISSEY, C. J.

This is an action to recover damages for fraudulent representations in the exchange of property. In September, 1911, plaintiff was the owner of 320 acres of land in South Dakota, and some personal property in Lancaster county, Nebraska. Defendant Charles H. Sandman was the owner of 160 acres of land in Colorado, and defendant Elmer E. Bevard was a real estate agent residing in the City of Lincoln. Through negotiations conducted by Bevard, plaintiff exchanged his South Dakota land, an automobile, a few village lots, and some cash for the land owned by defendant Sandman in Colorado. Subsequently plaintiff brought this action, alleging that through the false and fraudulent representations of Sandman, made by his agent Bevard, plaintiff had been deceived as to the

value and character of the Colorado land. The petition is very long and sets out in detail the alleged fraudulent representations. Among other things, it alleges that the Colorado land was represented to be worth $12,000, and that plaintiff paid that sum therefor; that it was not worth to exceed $500, and plaintiff was thereby damaged $11,500. It is also alleged that plaintiff went upon the land, made improvements thereon, and attempted to farm the same, and prays for damages for the value of the improvements placed on the land, and the loss of seed, labor and time.

Defendant Sandman denied that there was any joint cause of action against him and the defendant Bevard; denied that Bevard was his agent; alleged that he dealt with Bevard believing him to be the agent of the plaintiff; denied all allegations of fraud on his part; and denied that he received anything in consideration for the Colorado land except a deed for the land in South Dakota; and he brought a deed to this into court and tendered it to plaintiff. He alleged that he purchased the Colorado land in 1909, and paid $45 an acre therefor, and had no knowledge or information that it was not worth the whole amount at which he valued it in the trade with the plaintiff, and denied generally the allegations of plaintiff's petition. Bevard admitted showing the real estate, but denied all other allegations of the petition.

The testimony in behalf of plaintiff was taken chiefly in the form of depositions. At the time the depositions were taken plaintiff evidently was proceeding on the theory that his measure of recovery was the difference between the alleged purchase price and the real value at the time the exchange was made. The trial court properly instructed the jury that the measure of recovery was the difference between the value of the land at the time of the exchange and what its value would have been if the land had been as represented, and properly withdrew from the jury consideration of the other causes of action, set out in the petition. Evidence was admitted showing

the value of the improvements plaintiff made on the land and the extent of his labor thereon. Later this was withdrawn from the consideration of the jury; but, in view of the verdict rendered, it is doubtful if the jury heeded the court's admonition to disregard it.

The petition does not expressly say what the value of the property would be if it had been as represented. But defendants neither demurred nor asked to have it made more definite and certain, and the cause was finally submitted on the theory that it contained the equivalent of such an allegation. The true measure of damages does not appear to have been in contemplation of the plaintiff until the trial of the cause was nearly completed; and the only testimony calculated to sustain the verdict is that of plaintiff, who testified to the effect that, from what he learned in the years 1912 and 1913, he was able to say that, if the land had been as represented, it would have been worth, at the time of the trade, September, 1911, $75 an acre; and he testified that the whole tract was worth not to exceed $500. This is not directly disputed, but there is evidence of exchanges of real estate in the same neighborhood, at that time, at a higher figure. There is also evidence as to the character of the soil, the action of water thereon, and the failure of crops, and some testimony as to the market value of land in the neighborhood. There is the testimony of one witness that he had traded the south half of the section wherein this land lies, about 3 months prior to the deal in controversy, at $100 an acre. This is in excess of the trading value placed on the land. Trading values are generally unsatisfactory. They seldom represent the true market value of property. In the instant case it is quite evident that both parties put trading values on their property far in excess of their true value.

Plaintiff had purchased the South Dakota land at $12 an acre. He traded it in at $18. A used automobile went in at its cost price. The town lots were situated in small villages and were of doubtful value. Defendant Sandman had paid $45 an acre for the Colorado property, and it was

put in at $75. We may well assume that each party knew the other was pricing his property at more than it would bring in cash on the market. These inflated values are entitled to scant consideration. The true measure of damages is that laid down in the court's instructions.

In 1911 plaintiff was living in Nebraska, and alleges that he was in total ignorance of the value of the Colorado land. His testimony as to what he subsequently learned is too remote, and is insufficient to sustain the verdict. The rule is: "The knowledge must not have been acquired long before or after the rights of the parties became fixed." 13 Ency. of Evi. p. 488. In *First Nat. Bank v. Coffin,* 162 Mass. 180, the court said of a witness who acquired his information of values 1½ years subsequent to the transaction: "The testimony might well have been excluded, on the ground that it was too remote in point of time."

The verdict finds so little support in the evidence as to suggest that the jury disregarded the instruction of the court as to the true measure of damages.

Instruction No. 3 is criticized. It reads:

"You are instructed that, to entitle the plaintiff to recover, the burden of proof in this action is upon him to prove by a preponderance of the evidence all the material allegations of his petition not admitted by defendants; that the defendants, or either of them, made representations alleged in the petition, or some of them; that, as against defendant Sandman, Bevard, in making representations, was acting for Sandman, the two having a common design, Bevard being his agent, as alleged in the petition, or that after learning the fraud alleged against him, Sandman ratified and adopted them, accepting the fruits thereof; also that said representations were untrue and were falsely and fraudulently made for the purpose of inducing the plaintiff to enter into the contract for the exchange of properties; that under the circumstances the plaintiff had a right to rely, and did rely, upon the representations so made; that the representations were material representations touching the value and character of the land; that

plaintiff was thereby induced to enter into the contract; that he was thereby damaged, and the amount of such damages. The burden of proof is upon Sandman to prove that any tender back of property was made within a reasonable time after discovery of fraud."

This permits a recovery if the jury should find any of the allegations in the petition to be true, notwithstanding that the court had withdrawn certain of these allegations from their consideration. The concluding clause may also be open to criticism because it omits reference to the proof of fraud.

Instruction No. 7, which we shall not set out at length, also seems to assume matters that are clearly for the jury to determine. It is unnecessary to discuss or determine the other questions raised, as they are not likely to occur on a retrial.

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

REVERSED.

LETTON and CORNISH, JJ., not sitting.

NATIONAL BANK OF COMMERCE, APPELLANT, V. ERNEST BOSSEMEYER ET AL., APPELLEES.

FILED APRIL 14, 1917. No. 19061.

1. **Bills and Notes:** INDORSEMENT. Under the provisions of section 5354, Rev. St. 1913, an indorsement "Pay to any bank or banker. All previous indorsements guaranteed"—is not a retrictive indorsement.

2. ———: ———: HOLDER FOR VALUE. In the usual course of business a grain dealer deposited in a bank a sight draft with bill of lading attached, in which the depository bank was payee. It forwarded the draft to plaintiff, its correspondent bank, indorsed generally as above. Plaintiff bank gave credit to the remitting bank for the amount in its general checking account. The custom between the banks was that, if such drafts were protested and returned to plaintiff, they should be charged back to the account of the

remitting bank, and that interest should be charged from the time the credit was given until the proceeds of the draft were received. Plaintiff had no knowledge or notice of any custom between the depositor and the remitting bank, and there is no other evidence as to the intention of the parties. *Held*, that the indorsement and credit passed title to the draft to the receiving bank and made it a holder for value in due course.

3. ———: LIABILITY OF DRAWER. The draft was protested for nonpayment and returned. *Held*, that the receiving bank was entitled to enforce payment of the draft and protest fees against the drawer. Section 5379, Rev. St. 1913.

APPEAL from the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed, with directions.*

Morning & Ledwith, E. J. Hainer and *A. W. Lane,* for appellant.

Buck, Brubaker & Buck, contra.

LETTON, J.

On January 3, 1911, defendants, who are grain dealers at Superior, Nebraska, drew a sight draft upon a firm in New Mexico for $729 and attached a bill of lading for a car of grain consigned to the order of the drawer. They deposited the draft in the First National Bank of Superior (hereafter termed "the Superior bank"), which gave them credit for the amount upon their checking account. This was done in accordance with a custom whereby defendants deposited such drafts with bills of lading attached and were given credit, with the understanding that, if the draft was not paid, it should be protested, and its amount, with protest fees, should be charged back; that, if interest was charged to the bank by the correspondent, the interest should be charged to the account of drawer. Before the draft was deposited, by mutual agreement the custom was changed and such dishonored drafts were not charged back, but defendants, upon being notified of their return, would give a check to the bank to cover the amount of the draft and protest fees. This was the custom in Superior between banks and grain dealers generally.

The Superior bank sent the draft and bill of lading to plaintiff, its correspondent bank in Lincoln, which credited it with the amount and forwarded the draft and bill of lading to New Mexico through its regular correspondents. The draft bore upon its face the following: "Protest and return immediately with all papers attached if not paid upon presentation." The indorsement by the Superior bank is as follows: "Pay any bank or banker. All previous indorsements guaranteed." Before the draft reached New Mexico the Superior bank had suspended payments and been taken in charge by the comptroller of currency. Defendants notified the drawee not to pay the draft, caused the car to be delivered, and collected the amount due from him. The draft was protested and returned to plaintiff. This action was brought against the drawers by plaintiff as a holder for value, as defined in section 5344, Rev. St. 1913. Five similar transactions are alleged as causes of action in the petition.

Several defenses are set up: (1) That the drafts were deposited with the Superior bank for collection only, to the knowledge of plaintiff, and were received by plaintiff from that bank for collection. (2) That, since the Superior bank charged interest until the collection was made and charged the drafts back if not paid, it was not an owner or holder in due course, and the same relation as to the drafts being deposited for collection existed between the Superior bank and plaintiff. (3) That at the time the drafts were received the Superior bank was insolvent, which was known to plaintiff and to the officers of the Superior bank, but unknown to defendants, and that when these conditions became known defendants rescinded the transaction. The action was tried to the court without a jury, which found generally for the defendants and rendered judgment of dismissal. Plaintiff appeals.

The evidence is undisputed that the Superior bank had only one account with plaintiff; that as soon as such drafts were received by plaintiff it gave credit to the Superior bank for the amount of the same and usually charged

interest from that time until it received the proceeds from its correspondent bank; that if any draft was protested and returned it charged back the amount of the draft and protest fees to the Superior bank, and that this is the usual custom among bankers. Plaintiff had no notice of the insolvency of the Superior bank until January 9, 1914, and had no knowledge of the dealing between the drawer and the Superior bank, but received these drafts in the usual course of business, relying upon the indorsements. The assistant cashier of the plaintiff bank testifies that the drafts were sent to plaintiff, together with checks on Lincoln and other banks, foreign bills of exchange, and other items, with deposit slip "Enclosed for credit and advice," and were acknowledged in the following form:

NATIONAL BANK OF COMMERCE.

As per your letter of 3:

We credit subject to payment	We transfer to	We enter for collection
634 2 43 36 3 28	New York Chicago	

Items merely sent for collection were entered under the column "We enter for collection." When plaintiff received notice of the failure there was a credit of $3,608.36 on its books to the credit of the Superior bank. This amount fluctuated until March 28, when there was $4,102.52 on hand, which was the amount at the time of the trial. The plaintiff bank had also loaned to the Superior bank $10,000 upon its note, which was secured by collateral to the amount of $14,000; $1,000 of which has been collected and the remainder is of questionable value. The drawer testified that the drafts were deposited with the Superior bank for collection only. The question for determination is whether the draft was received by the plaintiff for collection, the title and ownership remaining in the Superior bank, or, did plaintiff become a holder in due course by the indorsement and receipt of the draft and the crediting of

the Superior bank with the amount thereof? Defendants contend that the indorsement is restrictive and shows that the title did not pass; that, since the custom was that interest should be charged between the date of the receipt of the paper and the receipt of the money in payment thereof, and because if not paid it was the custom to charge the amount and protest fees back to the account of the Superior bank, the draft was taken for collection only.

Is the indorsement restrictive? Whatever may have been held before the enactment of the negotiable instruments act, it is clear that this question must be determined by the provisions of that statute. Section 5354, Rev. St. 1913, is as follows: "An indorsement is restrictive which either: First—prohibits the further negotiation of the instrument; or, second—constitutes the indorsee the agent of the indorser; or, third—vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive."

There is nothing on the face of this indorsement which prohibits the further negotiation of the instrument or constitutes the indorsee the agent of the indorser, or vests title in the indorsee in trust for the use of some other person, and hence, by the most elementary principles of statutory construction, the plain meaning of the language must be observed, and it must be held that the indorsement was not restrictive.

In *Bank of Indian Territory v. First Nat. Bank,* 109 Mo. App. 665, a case which was decided before the negotiable instruments act went into effect in that state, it was held, without any discussion of the reasons, that an indorsement such as this was a restrictive indorsement. In three cases decided in that state after the act was in force (*National Bank of Rolla v. First Nat. Bank,* 141 Mo. App. 719; *National Bank of Commerce v. Mechanics American Nat Bank,* 148 Mo. App. 1; *Citizens Trust Co. v. Ward,* 195 Mo. App. 223) the same ruling was made; but in none of these cases was the language of the statute con-

sidered, and the holding is placed upon the authority of the first case, which, as we have seen, was decided before the act took effect. These cases are not authority upon the proposition as to whether such an indorsement is restrictive under the provisions of the act. Furthermore, any bank receiving a draft with such an indorsement has the right to again indorse it in blank or payable to any particular bank or person. This, of course, it would have no power to do if the indorsement was restrictive. If, however, the words "for credit," "for account," "for collection and return," had been added, the character of the indorsement would have been changed entirely, and it would have been restrictive, showing upon its face that the indorsee bank took it only as a collecting agent, and not as a holder for value. *White v. Miners Nat. Bank,* 102 U. S. 658; *Commercial Bank of Pennsylvania v. Armstrong,* 148 U. S. 50; *Ditch & Bros. v. Western Nat. Bank,* 79 Md. 192, 23 L. R. A. 164; *Murchison Nat. Bank v. Dunn Oil Mills Co.,* 150 N. Car. 718; *Fayette Nat. Bank v. Summers,* 105 Va. 689, 7 L. R. A. n. s. 694; *United States Nat. Bank v. Geer,* 55 Neb. 462.

In *First Nat. Bank of Belmont v. First Nat. Bank of Barnesville,* 58 Ohio St. 207, 41 L. R. A. 584, it is pointed out that the practice of indorsing checks "for collection," "for account,"had become almost universal, but when it was decided by the supreme courts of New York and Missouri that the drawee bank could not recover back money paid upon a forged draft in the one case from a collecting bank, or in the other from the bank owning the draft, "it startled the banks located in large cities, and awakened them to the dangers attending the payment of such drafts or bills, and the result was that in the year 1896 the clearing house in the city of New York adopted a rule to the effect that its members should not send through the exchanges any paper having any qualified or restrictive indorsements, such as 'for collection,' or 'for account of,' unless all indorsements were guaranteed by the bank sending such paper. This action was soon followed by the clearing houses in other

cities, and in some of them all indorsements are required to be either in blank, or 'pay to.....or order.' By this action of the clearing houses, indorsements 'for collection,' or 'for account of,' have fallen into disuse, and the banking business of the country is now done, almost universally, upon unrestricted indorsements." We conclude, then, that the indorsement by the Superior bank was general, and not restrictive.

Does the fact that, if protested, the Lincoln bank was entitled to charge back the amount of the draft and protest fees constitute it merely an agent for collection and not a holder in due course? While there is some conflict in the authorities, the better view is that the deposit of a check or draft in a bank with a general indorsement and the giving of credit for its amount by the bank to the depositor, in the absence of other evidence as to the intention of the parties, passes the title to the bank and makes it a holder for value, entitled to recourse on prior indorsers upon the protest of the paper. In other words, when such a state of facts is proved there is a *prima facie* case made that the title has passed, and the fact that it, the receiving bank, may charge back a protested draft does not affect the relation. In *Higgins v. Hayden,* 53 Neb. 61, before the enactment of the negotiable instruments act, it was held that a bill of exchange drawn to the order of a bank by its customer, the amount of which was placed to his credit, and on which he drew and the bank paid checks, became the property of the bank; such conduct being inconsistent with the theory of a bailment for collection. 2 Michie, Banks, sec. 127; 1 Morse, Banks and Banking, sec. 187; 2 Morse, Banks and Banking, secs. 573, 575; *National Bank v. Everett,* 136 Ga. 372; *Dymock v. Midland Nat. Bank,* 67 Mo. App. 97; *Brusegaard v. Ueland,* 72 Minn. 283; *Jefferson Bank v. Merchants Refrigerator Co.,* 236 Mo. 407, 415; *Ditch & Bros. v. Western Nat. Bank,* 79 Md. 192, 23 L. R. A. 164; *Burton v. United States,* 196 U. S. 283; 25 Sup. Ct. Rep. 243, and cases cited; *Noble v. Doughten,* 72 Kan. 336, 3 L. R. A. n. s. 1167; *Bank of the Metropolis v. New*

England Bank, 1 How. (U. S.) 234; *Fayette Nat. Bank v. Summers,* 105 Va. 689, 7 L. R. A. n. s. 694; also cases cited in 7 C. J. p. 635, note 27, p. 599, note 43.

That credit to the drawer was entered by the Superior bank in a passbook in which was printed, "This bank in receiving out of town checks and other collections acts only as your agent and does not assume any responsibility beyond due diligence on its part," cannot affect the right of the plaintiff to recover in this case. The fact that the drawers put the paper in circulation, and that the Superior bank was thus able to negotiate it as its owner and holder, received full credit for it, the plaintiff bank having no knowledge of any infirmity, makes it a holder for value as defined in section 5344, Rev. St. 1913.

The Minnesota case, *In re State Bank,* 56 Minn. 119, is not in conflict with these views, since in that case the controversy was between the original parties, and not between a holder for value without notice, and the drawer, and such was the relation between the parties in the other cases cited in which a printed notice was on the passbook. A similar case is *South Park Foundry & Machine Co. v. Chicago G. W. R. Co.,* 75 Minn. 186.

The fact that a custom between banks and grain dealers is that, when any draft bearing a general indorsement was unpaid, it was protested and either charged back or paid by the drawer is an argument in favor of the plaintiff's position, and not in favor of the defendants, because such a custom clearly recognizes the liability of the drawer to pay a dishonored draft to the indorsee who has failed to collect the same. Even though by the custom between the drawer and the Superior bank the drafts were taken only for collection, there is absolutely no proof in the record that the plaintiff had any knowledge whatever of this state of affairs. It received the draft with the general indorsement and credited the Superior bank with the amount in its deposit account which was drawn upon from day to day. Under section 5379, Rev. St. 1913: "The drawer by drawing the instrument admits the existence of the payee

and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder." The benefit of this liability in case of dishonor was transferred to plaintiff by the general indorsement. When the Superior bank closed its doors its assets became the property of the receiver for the purpose of liquidating its affairs. The rights of its receiver against the plaintiff or plaintiff's right to apply the fund in its hands to the payment of the debt of the Superior bank are not involved in this case, since the receiver is not a party to the suit, and the case must be determined without regard to this fund. That the bank was in fact insolvent at the time of the deposit, under the circumstances of this case, does not seem to be material: First, because plaintiff bank took the draft in good faith for value without notice or knowledge of any infirmity in the title; and, second, because the drawers between the time of the deposit of the first drafts and the closing of the bank drew out over $4,000 more than the credit given, and within a few hundred dollars of the total amount deposited within this period, leaving the account of the drawers substantially as it was before the drafts were deposited.

Under the provisions of the negotiable instruments act and the evidence in the case the defendants are liable as drawers for the full amount of the drafts and protest fees. The judgment of the district court is reversed and the cause remanded, with directions to enter judgment for the amount due.

REVERSED.

ROSE, J., took no part in the decision.

HAMER, J., dissenting.

I am unable to agree with the views expressed in the majority opinion. As I understand the facts in the case the defendants, the Bossemeyers, were dealers in grain at Superior. They were accustomed to draw sight drafts on the person to whom they shipped grain. The draft was expected to cover the full amount of the shipment, and it was expected that it would be paid out of the proceeds of the grain when it reached its destination. A draft would be drawn upon the person who was expected to receive the grain and for the price of the grain. There would be attached to that particular draft a bill of lading for the grain shipped. We will take one of the drafts and copy it with the indorsements upon it, and also the bill of lading attached to it, with its indorsements:

"Bossemeyer Bros., Grain Dealers. No. 1809.
"Superior, Neb., Jan. 3, 1914.

"At sight, pay to the order of First National Bank $729, seven hundred twenty-nine and 00/100 dollars.
"Bossemeyer Bros., By P. Bossemeyer.
"Young & Wheeler, Magdalena, N. Mex.
"Protest and return immediately with all papers attached if not paid upon presentation."

Indorsed on back: "Pay any bank or banker. All previous indorsements guaranteed. 76-137. Jan. 3, 1914. 76-137. First National Bank, Superior, Nebraska.

"Pay to the order of any bank or banker for collection and remittance. Jan. 5, 1914. National Bank of Commerce. 43-3 Lincoln, Nebrasaka. 43-3. James A. Cline, Cashier.

"Mechanics American National Bank, St. Louis, Mo. Pay to order of any bank or banker. Prior indorsements guaranteed. Jan. 6, 1914. J. S. Calfee, Cashier. (In red ink) Indorsement erased.

"Pay to the order of any bank or banker. Prior indorsements guaranteed. Jan. 7, 1914. Drovers National Bank. 18-22 Kansas City, Mo. 18-22."

As the bill of lading is very long we will copy only such parts of it as seem material:

"The Atchison, Topeka & Santa Fe Railway Company
"Order Bill of Lading—Original. Shipper's No. 1809.
"Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, at Superior, Neb., Jan. 3, 1914, from Bossemeyer Bros., the property described below, in apparent good order, except as noted. * * *

"The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper." Indorsed across above paragraph in red ink is the following: "A. T. & S. F. Ry. Co. Received Jan. 3, 1914. Freight Office. Superior, Nebr. * * *

"Consigned to order of Bossemeyer Bros. Destination, Magdalena, State of N. Mex., County of ———. Notify Young & Wheeler at Magdalena, State of N. Mex., County of ———. Route ———. Car Initial, A. T. & S. F. Car No. 27601.

No. Packages	Description of Articles and Special Marks.	Weight Subject to Correction	Class or Rate	Check Column.
400 100	Sax Corn Sax Cracked Corn 50 m car ordered	40000 10000 50000		

"Bossemeyer Bros., Shipper, Per H.
G. W. Hall, Agent,
By H. O. E.

"(This bill of lading is to be signed by the shipper and agent of the carrier issuing same.)"

The drafts appear to have been drawn and attached to bills of lading so as to enable the collection of certain amounts due for grain that had been shipped to customers

of the Bossemeyers. It was the custom of the First National Bank of Superior to send the draft and bill of lading to their correspondent. At the time the draft and bill of lading were received there would be a credit given to the Bossemeyer Brothers by the First National Bank of Superior, and, if there was a failure to collect, the amount would be charged back and the credit of Bossemeyer Brothers reduced accordingly. This sort of business had been conducted by the Bossemeyers with the First National Bank of Superior for perhaps 25 or 30 years. There were five of these drafts each with its bill of lading attached. The shipments were made to various places in other states than Nebraska. The places were of course mentioned in the bills of lading, as also the person expected to pay named in each.

The National Bank of Commerce of Lincoln, Nebraska, brought this action against the defendants, the Bossemeyers, as makers of five sight drafts aggregating about $3,200. The case was brought in the district court for Nuckolls county, and was tried before the judge of that court; a jury being waived. It was the contention of the defeated plaintiff that the sight drafts were negotiable, and that the defendants, the Bossemeyers, having made them, were liable thereon.

The defendants interposed defenses: (1) That the plaintiff was not the owner of the drafts; (2) that the drafts were deposited for collection only; (3) that the plaintiff did not intend to purchase the drafts; (4) that each draft and the bill of lading attached thereto were inseparable, and that the drafts represented perishable goods and could not be purchased by the bank, even if it wished to purchase the same; (5) that the plaintiff bank did not pay for the drafts; (6) that any credit given to the First National Bank of Superior was not drawn out; (7) that sight drafts with bills of lading attached are not covered by the negotiable instruments law, and that these drafts with the bills of lading attached showed that the defendants were not liable as drawers of commercial paper; (8)

that the drafts were taken by the First National Bank of Superior for collection and were not purchased by it, but were taken by it to be transmitted to the plaintiff bank for collection; (9) that drafts and bills of lading were received by the First National Bank of Superior at a time when it was insolvent.

An examination of the testimony convinces the writer that the contention made by the defendants is correct. It appears to me that the five sight drafts with their respective bills of lading attached are not in any sense negotiable instruments, and were not intended to circulate as commercial paper subject to the provisions of the negotiable instruments law, but that the scheme was devised for the collection of the amounts due on said shipments of grain shown by the bills of lading. The drafts and bills of lading were received from the 3d to the 7th of January, 1914, and on the next day, January 8, 1914, the bank failed and quit doing business. The reply of plaintiff admits that, "accompanying each of said several sight drafts, there was a bill of lading covering in each case one carload of grain shipped by the defendants to their own order, said several bills of lading being substantially the same as the said copies attached to said amended answer, excepting that each bore the indorsement of Bossemeyer Brothers upon the back thereof as follows: 'Bossemeyer Bros.'"

There is no statement in the reply that the deposit of the First National Bank of Superior with the plaintiff bank was exhausted, or that this money contained in the drafts, and for which in the first place the First National Bank of Superior was given credit by the plaintiff bank, was drawn out by the First National Bank of Superior; neither is there any allegation in the reply of the plaintiff bank or in its petition that it paid anything for the drafts and bills of lading, and an examination of the evidence shows that the plaintiff bank never paid anything for the drafts. The statement contained in the syllabus of the majority opinion that "all previous indorsements guaranteed" is not a "restrictive indorsement" is not sustained in the face of the

evidence which clearly shows that the indorsement was only to enable the collection of the price of the grain contained in the bill of lading.

Neither am I able to find any evidence which satisfactorily establishes to my mind that title to the drafts passed "to the receiving bank and made it a holder for value in due course." The evidence shows beyond all controversy that the receiving bank did not pay even one dollar for the drafts. I have never seen a case that seemed to me to have less to sustain it than this one. If the rule sought to be established and maintained in this case is finally declared and fixed, then no country bank can send a collection to a city bank in this state without running the greatest risk of having it appropriated by the city bank without any consideration therefor, and in the face of the evidence and the uncontroverted facts. Such appropriation would be regardless of all the rights of the customers of the country bank. In this case there was no controversy between the First National Bank of Superior and the Bossemeyer Brothers. The only controversy is with the National Bank of Commerce, which up to this date seems to have successfully appropriated the grain shipped by the Bossemeyers. While not the grain itself, the judgment amounts to the price thereof.

According to Bossemeyer's testimony Weil did not claim that his bank had suffered in any way. The jury in this case was waived and the case was tried to the district judge sitting as the district court. His finding is like the finding of a jury. I do not see what business we have to set it aside.

In *Whisker v. Vera Cruz Coffee Co.*, 95 Neb. 119, this court held: "The finding in an action at law, tried by the district court without the intervention of a jury, is entitled to the same consideration as the verdict of a jury, and will not be set aside unless it appears to be clearly wrong."

"The findings of the district court in a law action tried to the court without the intervention of a jury are entitled

to the same weight as the verdict of a jury, and will not be disturbed unless the evidence is clearly insufficient to support them." *Stanisics v. Hartford Fire Ins. Co.*, 83 Neb. 768.

"A finding of fact made by a court in the trial of an action at law is entitled to as much respect as the verdict of a jury, and, if there is competent evidence to support the finding, it will not be disturbed on appeal." *Dorsey v. Wellman*, 85 Neb. 262.

Where an action at law is tried in district court without a jury, findings of fact have the same force as a verdict. *National Engraving Co. v. Queen City Laundry*, 92 Neb. 402; *Darr & Spencer v. Kansas City Hay Co.*, 85 Neb. 665; *Providence Jewelry Co. v. Gray Mercantile Co.*, 92 Neb. 633.

On the first page of the Bossemeyers' pass book there was the following: "First National Bank, Superior, Nebraska. In account with Bossemeyer Bros., Superior, Nebraska. This bank in receiving out of town checks and other collections, acts only as your agent and does not assume any responsibility beyond due diligence on its part, the same as on its own paper." No one makes the contention that the First National Bank of Superior became the owner of these drafts and bills of lading. If it did not, then how did the plaintiff bank become the owner of the same? As the First National Bank of Superior never owned these drafts and the bills of lading it could not transfer to any one a good title. It had them for the purpose of making collection. It had no more authority to treat them as its own than a lawyer would have to appropriate the collections placed in his hands. The National Bank of Commerce acknowledged receipt of said sight drafts as follows: "With credit, subject to payment." This shows that there was no absolute and unconditional credit, but the credit was to be subject to payment only.

It is in the testimony that there was an understanding between the First National Bank of Superior and the defendants that the amount of the sight drafts should be

charged back to defendants and against their deposit account if collection should not be made from drawees of the sight drafts. At the same time, if the First National Bank of Superior was insolvent on the 9th of January, 1914, when it closed its doors, it must have been insolvent on the day before and for several days preceding that. It might have been insolvent, and if permitted to do so it might have honestly collected these drafts for the Bossemeyers. If it did not have any authority to collect the money and keep it, it is difficult to understand what right the plaintiff bank would have had to keep it if it had succeeded in collecting it. But it did not succeed, for the Bossemeyers collected the drafts themselves. We are not told in what way the Bossemeyers perpetrated a fraud upon the plaintiff bank. Unless they wronged the plaintiff bank in some way, it has no right to recover anything against the Bossemeyers.

The bank failed on the morning of the 9th of January, 1914. On the morning of the 10th of January, 1914, the First National Bank of Superior had on deposit in the plaintiff bank $8,588.08 according to the testimony of Carl Weil, the vice president. Therefore, there could have been no difficulty in charging back the amount of the uncollected drafts and bills of lading, as they only amounted to about $3,200. He also testified that the First National Bank of Superior had only one account with the plaintiff bank, "the checking account," and that all items forwarded to it were handled through that account, whether indorsed for collection and remittance, or for credit and advice. But he followed that up with a statement: "By agreement with the bank that we give them credit for all items in their checking account and permit them to check against it and have the use of the money, yes, sir." Also, that it was his understanding that items not collected should be charged back. "We were to be recompensed for anything that we could not collect." "Q. I see the dates are stamped on here with a rubber stamp in the collection column. What does that signify, if it signifies anything? A. It is merely, possibly, a careless manner of the clerk in dating."

When he was first asked about the matter he answered that the balance of the First National Bank of Superior on the morning of the 10th of January, 1914, was, "speaking from memory, I think about $1,000." An examination of the record showed $8,588.08. Subsequently he testified that the amount on the morning of the 13th was $4,091.82, "where it remained until the morning of the 28th, $4,096.08; on the morning of March 28th, $4,102.52, at which amount it now stands." The testimony of this witness suggests that he had designs on the grain of the Bossemeyers, or he desired to get a fund ahead to be used as collateral for certain other indebtedness of the First National Bank to his bank.

Ernest Bossemeyer testified that the First National Bank of Superior would charge them interest on the amount of the drafts made from the date they received them until they were collected. His testimony shows a slip of this sort where the Bossemeyer Brothers were charged in four days on this sort of a credit for interest, $14.29. This arrangement appears to have been extended also to the National Bank of Commerce, which charged the defendants in the same way, through their correspondent, the First National Bank of Superior, and also for protest fees.

The plaintiff bank at Lincoln received the drafts to collect them if it could out of the proceeds of the grain when the money should be paid on the drafts according to the bills of lading. The bank at Lincoln gave the bank at Superior a book credit subject to be charged back if the money was not collected from the drawees to whom the grain was sent. When the bank at Superior failed the Bossemeyers immediately countermanded payment of the drafts by wiring the persons to whom the grain was sent, who refused payment of the drafts. Of course the grain had all along been the property of the Bossemeyers because the bank at Superior had paid nothing for it; neither had the bank at Lincoln. The Bossemeyers had a credit with the bank at Superior which they might have checked against, but they did not. The bank at Lincoln was a cor-

respondent of the bank at Superior, and gave that bank a credit which it might have checked against, but it did not. The full amount of the credit in both banks was dependent upon the contingent fact whether the proceeds of the grain should be collected. If not collected, then the banks would lose nothing because they had paid nothing. Whatever is collected by the bank at Lincoln in its action against the Bossemeyers is taken out of their pockets without the Lincoln bank paying anything. Suppose the bank at Superior had kept the drafts until after Bossemeyers wired the purchasers of grain not to pay and then had refused payment, would the bank at Superior have had any sort of valid claim against the Bossemeyers? If so, why not? Of course it must be because it had paid nothing and it had lost nothing. The same is true of the bank at Lincoln. It paid nothing. Neither did it lose anything. It made an entry on its books, but that was not payment. That was a way of keeping an account of the transaction. If the bank at Superior had stayed in business the drafts would probably have been paid by the persons to whom the grain was sent, but because it went out of business the drafts were not paid. Should Bossemeyers lose their money because the bank at Superior failed? That appears to be the effect of the majority decision. The man who buys my horse from the man who has unlawfully appropriated the horse gets no title, and the horse is still mine. The rights of parties where a note has been discounted by a bank and the proceeds credited on the books of the bank to the person from whom it was purchased have been repeatedly stated by text-writers. I quote from 1 Daniel, Negotiable Instruments (6th ed.) sec. 779*b*, as follows: "The apparent purchase must have been a purchase in fact and not a mere bookkeeping entry. Mere discount and credit do not of themselves constitute a *bona fide* purchaser for value. To occupy that position the holder must actually have parted with something of value for the note. Thus, where a bank discounted a note for a company, and credited it with the amount, the credit, on account of other deposits, subse-

quently increasing, so that at the time of suit on the note the bank had actually paid nothing for it, it was held not a purchaser for value."

In Eaton and Gilbert, Commercial Paper, sec. 54, it is said: "A bank by merely discounting a bill or note and placing the proceeds to the credit of the payee does not become a holder for value; but where the bank, on the strength of such credit, has relinquished securities in its possession or made advances to or paid the checks of the payee, it becomes a holder for value."

In 7 Cyc. 929, it is said: "While the authorities are not entirely uniform upon the subject it is fairly well settled that a bank, by discounting negotiable paper, placing the same to the credit of the depositor, and honoring his checks or drafts, surrendering to him securities, or in some other manner making advances and extending its credit on the faith of such deposit, thereby becomes a holder for value. But the mere discounting and crediting of the amount on the depositor's account, without making payment or incurring any increased obligations or liabilities, is not sufficient."

In 4 Am. & Eng. Ency. of Law (2d ed.) 298, it is said: "Where a bank discounts paper for a depositor who is not in its debt, and gives him credit upon its books for the proceeds of such paper, it is not a *bona fide* holder for value, so as to be protected against infirmities in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues and the deposit is not drawn out, the bank is held subject to the equities of prior parties, even though the paper has been taken before maturity and without notice."

In *Thompson v. Sioux Falls Nat. Bank,* 150 U. S. 231, it is said: "The mere credit of a check upon the books of a bank, which may be canceled at any time, does not make the bank a *bona fide* purchaser for value. If after such

credit and before payment for value upon the faith thereof, the holder receives notice of the invalidity of the check, he cannot become a *bona fide* holder by subsequent payment."

In *Central Nat. Bank v. Valentine,* 18 Hun (N. Y.) 417, the court said: "The mere giving of credit by entering the amount on the books, and not actually parting with a dollar upon the strength of the indorsement, cannot be regarded parting with value in the sense which the law contemplates. The parties in whose favor the credit was given might never draw or appropriate any portion of the fund."

Other authorities along the same line are: *Dykman v. Northbridge,* 80 Hun (N. Y.) 258; *Clarke Nat. Bank v. Bank of Albion,* 52 Barb. (N. Y.) 592; *Thompson v. Sioux Falls Nat. Bank,* 150 U. S. 231; *Manufacturers Nat. Bank v. Newell,* 71 Wis. 309; *Citizens State Bank v. Cowles,* 180 N. Y. 346; *Davis v. Elmira Savings Bank,* 161 U. S. 275; *Ætna Nat. Bank v. Fourth Nat. Bank,* 46 N. Y. 82.

The legislation mentioned in the majority opinion is not aimed to take the property of any person without just compensation or without due process of law, and if that was its purpose such legislation would be void. Const. Neb. art. I, secs. 3, 21; also, Const. U. S., Amend. XIV, sec. 1.

IN RE ESTATE OF HENRY KELLER. LOUIS KELLER, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED APRIL 14, 1917. No. 19234.

1. **Parties:** INTERVENTION. Since the amendment of 1887, appearing now as sections 7609-7611, Rev. St. 1913, any person claiming an interest in the subject-matter of an action may intervene at any time before trial, as a matter of right.

2. **Pleading:** INTERVENTION: STRIKING ANSWER. Pending the administration of the estate of one H. K., who died intestate, a petition was presented to the county court by one L. K., claiming to be a brother of decedent, praying that he be found and decreed to be

the sole heir. The state of Nebraska by answer and cross-petition denied the relationship and heirship, alleged that the intestate was without kindred or wife, and asked that the court decree that the estate should escheat. The court found that L. K. was not a brother and heir. On appeal to the district court a like petition and answer were filed. On motion of L. K. this answer was stricken from the files. *Held*, that, although the pleading was irregular in form, it alleged an interest of the state in the subject-matter of the litigation adverse to the petitioner, and it was error to strike it from the files.

3. **Appeal:** TIME OF ENTRY. After a new trial was granted, leave to file such pleading was again requested and denied. The petitioner had the verdict and judgment. *Held*, that an appeal brought within six months of the final judgment is in time.

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

Wllis E. Reed, Attorney General, Dexter T. Barrett and *W. T. Thompson*, for appellant.

J. E. Willits and *J. W. James, contra.*

LETTON, J.

Henry Keller died intestate in 1904. An administrator of his estate was appointed and qualified. Pending the administration Louis Keller filed a petition in the county court, in which he alleged that he is a resident of Chicago; that he is the only brother of Henry Keller, deceased; that Henry Keller was never married, had no other brothers or sisters and no surviving father or mother. He prayed for a decree naming the petitioner as the sole heir at law.

The state of Nebraska filed an answer denying his heirship, and alleging that the property had escheated to the state. After a hearing the court found that Louis Keller was not the brother of the deceased. Louis Keller appealed to the district court and filed a like petition. Afterwards the state of Nebraska asked leave to file an answer, which was tendered, denying the petitioner's claim, and asking affirmative relief. Objections were filed by the petitioner, and leave was refused on June 24, 1914. Evidence was taken and the case argued and submitted. A verdict was re-

turned against the petitioner. He filed a motion for a new trial, which was sustained, the verdict set aside and a new trial granted. Afterwards the state, by the attorney general, moved the court to reinstate "the petition of intervention" and be allowed to defend against the claim of appellant. This request was denied. The record recites that on the second day of February, 1915, counsel for Louis Keller being present, "the court announces that John Snider, a reputable attorney and counselor at law of Hastings, Adams county, Nebraska, is present and will be permitted by the court to appear *amicus curiæ,* and to examine the jury on voir dire examination, and make statement of the case to the jury, and conduct cross-examination of the witnesses, and make argument and present his view of the evidence to the jury." Mr. Snider had previously appeared in the case for the state. The trial proceeded, evidence was taken, argument had, the jury were instructed and returned a verdict finding that Louis Keller is the brother and sole heir at law of Henry Keller, deceased. A motion for a new trial was filed by the state. Keller filed a motion to strike it from the files, which was sustained. The court found generally in favor of the petitioner, reversed the finding and judgment of the county court, directed the clerk to certify the proceedings and judgment to the county court, and ordered the county court to cause the estate to be finally settled and distributed in accordance with the judgment.

From this judgment the state appeals.

LETTON, J. (after stating the facts).

The state maintains that the court erred in striking its pleading from the files, that intervention is a statutory right in this state, and not a privilege to be granted or denied at the discretion of the trial court. Prior to 1887 no one not a party could take part in any pending action unless by leave of court. In 1887 an act was passed which now appears as sections 7609-7611, Rev. St. 1913. Under this statute we have held that persons claiming title to the

subject-matter may intervene at any time before trial (*McConniff v. VanDusen,* 57 Neb. 49; *State v. Holmes,* 60 Neb. 39), and that one may become a party to the suit without leave of court (*Spalding v. Murphy,* 63 Neb. 401). The first four paragraphs of the pleading sought to be filed by the state consist of an answer to the petition; the fifth paragraph, however, is an affirmative plea that Henry Keller died intestate without kindred or wife, and the prayer is that the court so find and should decree that the estate should escheat to the state of Nebraska. This pleading, although irregular in form and not strictly in conformity with the statute, alleged an interest of the state in the subject-matter of the proceeding adverse to the petitioner, raised a proper issue to be tried, and it was error to strike it from the files.

Appellee contends that since the state did not appeal from the order of June 24, 1914, denying it the right to file its pleading, the matter became *res judicata,* and since this appeal was not taken within six months from that time this court has no jurisdiction to consider this point. But the verdict in the first trial was against the petitioner and in line with the state's contention, and hence there was no reason for it to appeal. It was only after a retrial had been ordered and the subsequent application to file the answer had been denied that the state's interests were prejudicially affected and it had anything to appeal from. This appeal was taken within six months from the final judgment, and vests this court with jurisdiction.

The petition does not allege of what the estate of deceased consisted, nor that after the debts and expenses of administration are paid there will be anything left for distribution. In this respect it is probably subject to a demurrer, but since no attack was made upon it, and it was stated at the argument that the administrator has in his hands personal property, the distribution of which will be governed by the decision, we will assume it states a cause of action. It is essential to a due performance of the duties of the administrator that the court ascertain and de-

termine to whom such property belongs, since without a decree finding to whom it shall be distributed he will act at his peril. So far as now appears the property belongs either to the petitioner or to the state of Nebraska, and this issue should be determined upon proper pleadings and evidence in a proceeding to which each claimant is a party. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED.

HAMER, J., not sitting.

SUNDERLAND BROTHERS COMPANY, APPELLEE, v. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED APRIL 14, 1917. No. 19285.

1. **Commerce:** RECIPROCAL DEMURRAGE ACT: VALIDITY. The provisions of the reciprocal demurrage act (sections 6159-6167, Rev. St. 1913) relating to intrastate and interstate commerce are held to be separable, and the act, as applied to commerce within the state is held not to violate the Constitution of the United States or the Constitution of the state of Nebraska.

2. **Carriers:** RECIPROCAL DEMURRAGE ACT: CONSTRUCTION. Section 6162, Rev. St. 1913, construed, and *held*, that the duty of a railway company to make prompt delivery of cars is not ended when the cars are placed upon a "hold track" to await orders from the consignor or consignee, but the running of the time allowed by such section for delivery is only suspended while cars are so held.

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

B. P. Waggener, J. A. C. Kennedy and *Guy C. Kiddoo,* for appellant.

Baldrige, Keller & Keller, contra.

LETTON, J.

This action is brought to recover damages under certain provisions of sections 6159-6167, Rev. St. 1913 (known as

the reciprocal demurrage act), which require freight to be moved not less than 50 miles in 24 hours under liability for damages of $1 a car (unless prevented by a large number of contingencies, which are matters of defense) and which impose damages of $1 for each day cars are delayed in delivery.

Plaintiff is a dealer in building materials at Omaha. The defendant is a common carrier operating an interstate railroad. The petition alleges that at certain specified times from July, 1909, to December, 1912, building material in car-load lots was delivered at Louisville, Nebraska, with instructions to ship to points within the state over the defendant road; that bills of lading were issued for each shipment; that defendant failed to transport the shipment within the time provided by law. It is also alleged that the defendant failed to place loaded cars at a place accessible for unloading within the time required by law, and that the plaintiff had presented its claim for damages more than 60 days prior to the commencement of the suit.

In answer, defendant alleges that the statute prescribing a time limit for the movement of freight is in violation of the Constitution of the United States and the Constitution of the state of Nebraska; that, since congress has asserted its authority over interstate commerce, all regulations of the state of Nebraska affecting the carriage of goods by railroads and common carriers between states have been superseded; and that the trains and cars referred to in the petition were engaged in interstate commerce. As to the complaint of delay in placing the cars for unloading, the answer alleges that the plaintiff has three yards in Omaha in different sections of the city, and that at plaintiff's request the cars were not placed upon the public delivery track, but for the accommodation of plaintiff were placed upon a "hold track" of defendant to await plaintiff's order for delivery to its several yards.

A jury was waived and trial had to the court, which found that the statute was constitutional; that the defendant made 295 days' delay in the shipments and 345 days'

delay in the placing of cars after arrival. Judgment was rendered for $640 and an attorneys fee of $250.

The first complaint is that the statute violates both the Constitution of the state and of the United States, because it is an interference with and burden upon interstate commerce; that its provisons are so intermingled as to intrastate and interstate commerce that they are inseparable and the whole act must fall.

The superintendent of the western district of defendant and other operating officials testified that the average time of movement of freight cars on main lines in the United States generally is 2 hours and 24 minutes in each 24 hours; on defendant's road the average distance traveled by each freight car is slightly over 24 miles every 24 hours; which is slightly above the average of other roads throughout the United States; that traffic wholly within Nebraska might be moved at the statutory rate, but that to do so would retard interstate traffic to the extent that state business was advanced; that in practical operation interstate and intrastate traffic must move together; that freight of both characters is often loaded in the same car, and they can no more be separated than you can separate state and interstate passengers and operate separate passenger trains for them; that it is impracticable and perhaps impossible to move freight in Nebraska 50 miles a day of 24 hours. This testimony was largely matter of opinion, and upon cross-examination it was admitted that it is not impracticable to move cars from Louisville to Omaha in 24 hours.

Is the statute constitutional? It applies to "every railroad company operating a line of railroad wholly or in part within this state." In one section it requires "the conductor of every train bringing freight in car-load lots into this state from any other state to note on the original waybill of each and every car-load of such freight, destined to points within this state, the year, month, day of the month and hour of the day, on which such car-load of freight entered this state, and to authenticate the same by

his signature." It provides a time for the removal of freight in bond after permit to receive the freight is issued to the consignee by the United States collector of customs; and, considered as a whole, it evidences an intention to regulate all traffic. So far as the act attempts to regulate commerce between the states, it is of no force or effect, since congress has acted upon the subject, and when congress has acted the power of the state ceases. *Southern R. Co. v. Reid,* 222 U. S. 424; *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.,* 226 U. S. 426. The defendant insists that, since the act is invalid as respects interstate commerce, it is equally invalid as to commerce within the state. This is not a necessary conclusion. If the provisions of the act relating to interstate commerce can be disregarded and still leave a valid workable law, we see no reason why the act cannot be upheld so far as it applies to commerce within the state. It is true that some courts have held in somewhat similar circumstances that such a law will not permit a separation or division and the whole act must fall, but other courts take the view that, though a statute of this nature may be void and inoperative as a regulation of interstate commerce, it may be valid and enforceable with reference to transportation within the state. In *Commonwealth v. Gagne,* 153 Mass. 205, 10 L. R. A. 442, it is said: "A law which is unconstitutional within certain limitations, if in terms it exceeds or fails to notice those limitations, may yet be entirely operative within its legitimate sphere, and properly held to have the application which thus confines it. Indeed, where two governments, like those of the United States and the commonwealth, exercise their authority within the same territory and over the same citizens, the legislation of that which as to certain subjects is subordinate should be construed with reference to the powers and authority of the superior government, and not be deemed as invading them unless such construction is absolutely demanded. It should be held that such legislation was intended to apply, so far as it was within its sphere, and such construction should be given

it." Illustrative cases in point are *Oliver & Son v. Chicago, R. I. & P. R. Co.*, 89 Ark. 466; *Allen v. Texas & P. R. Co.*, 100 Tex. 525; *Southern R. Co. v. Melton*, 133 Ga. 277, 298; *Standard Oil Co. v. State*, 117 Tenn. 618, 641; *State v. Insurance Co.*, 71 Neb. 320; *McKee v. United States*, 164 U. S. 287; *Packet Co. v. Keokuk*, 95 U. S. 80; *People v. Butler Street Foundry & Iron Co.*, 201 Ill. 236, 249; *Attorney General v. Electric Storage Battery Co.*, 188 Mass. 239; *Murphy v. Wheatley*, 100 Md. 358; *State v. Western Union Telegraph Co.*, 75 Kan. 609, 629.

It is urged that the law places a burden on interstate commerce, and is therefore void because that which the legislature sought to regulate was the rate of movement of freight, and it is impossible to separate interstate and intrastate freight. There are several answers to this contention: First, the evidence is insufficient to show that the imposition of the duty upon the carrier of moving freight within the state a distance of 50 miles within 24 hours is unreasonable as applied to domestic freight, since the act allows a number of defenses to be made if traffic is obstructed or interfered with; second, the rate of movement of freight is not the only purpose of the act; third, the evidence does not establish that if freight within the state is moved at the rate required it will be necessary to unduly delay or hinder interstate transportation. The very fact that both classes of freight are sometimes carried in the same trains would tend to expedite and not to hinder shipments from without the state. Though the testimony is that the average movement of a freight car within the United States is only about 2½ miles a day and the average movement of freight cars upon the line of defendant is only about 24 miles for each 24 hour period, these computations are based upon the use of all freight cars, those standing upon side-tracks, in yards, in storage at division stations, being repaired, and in all other conditions, while the act applies only to freight cars which are in process of transportation, and the facts proved do not necessitate the conclusion urged. *Chicago, R. I. & P. R. Co. v.*

Beatty, 34 Okla. 321, 328, 42 L. R. A. n. s. 984, and on rehearing at page 988, in which many cases are cited on both points. We are satisfied that the statute does not operate as a hindrance or burden upon interstate commerce when confined in its operations to shipments from one point to another within the state.

The next assignment is that the court erred in granting a recovery for delay in switching cars which had been held awaiting orders from the consignees. It appears from the testimony that the plaintiff has three yards in different parts of the city; that the sand is usually billed to defendant at Omaha, but not to any particular yard or switch track. When the cars reach Omaha they are placed upon a "hold track" to await order, and reported by defendant to plaintiff's car clerk. As early as practicable after this is done, the clerk telephones the railroad company giving the disposition of each car. This is followed by a written order confirming the instructions. The time which it takes the plaintiff to direct defendant as to the setting of the car after notification that it has arrived in Omaha varies from a few minutes to a few hours, but almost without exception it is upon the same day, unless the car comes in at night. Section 6162, Rev. St. 1913, provides: "Cars for unloading shall be considered placed when they are held awaiting orders from consignors or consignees." Defendant's view of this statute is that as soon as the cars were placed upon the "hold track" to await orders, its liability for delay ceased. The district court took the view that the statute should be construed as if it read: "Provided all cars for unloading shall be considered placed *while* they are held waiting orders from consignors and consignees." The argument of plaintiff's counsel on this point is so apt and convincing that we copy from its brief: "If the duty of the railroad company would end with placing the cars on the 'hold track,' then there would be no delivery at all; and the statute would be meaningless. Cars might be placed on the 'hold tracks' for a day or a week or even a month, and the railroad company refuse to place them at

one of the plaintiff's yards, and the plaintiff would be remediless. The intent and purport of the statute was to give the plaintiff some remedy when the defendant neglected, delayed or refused to place the cars at their destination. If the railroad's construction of this statute is, as they contend, correct, then the whole statute fails in its purpose, for a train of sand is no more available to Sunderland Brothers on the 'hold tracks' of the defendant company than it would be at Louisville. The statute goes to the question of the prompt delivery of the cars at the point where the shipper wants them." We think the district court properly held that cars "held waiting orders" should be considered placed only while they were being so held, and that after orders were received from the consignee specifying the yard in which the cars should be placed the statutory time should again run. To hold otherwise would defeat the very object of the statute, to wit: the prompt delivery of cars after arrival at destination.

Plaintiff has filed a cross-appeal from the findings of the district court. In order to determine exactly the correctness of these findings, it would be necessary to examine the evidence as to the time of loading and of arrival in Omaha of each and every one of over 2,000 cars, and also to examine and determine how long a time each car was "held waiting orders" before delivery at the yards of the consignee. If the record and documentary evidence produced had been examined by disinterested and expert accountants and such experts had testified to the result of their examination, both the district court and this court would have been better able to determine the issues. The argument and briefs have not convinced us that the district court erred in its findings. The finding of the district court in such a case is of the same weight as the verdict of a jury and will not be set aside unless clearly wrong.

AFFIRMED.

ROSE, J., not sitting.

JOHN HENKE ET AL., APPELLANTS, V. GEORGE W. DEEMER, APPELLEE.

FILED APRIL 14, 1917. No. 19455.

1. **Justice of the Peace:** JURISDICTION. "In computing the 'amount in controversy' to ascertain whether a case is within the jurisdiction of a justice of the peace, interest accrued at the time of suit on an interest-bearing debt should be considered." *Adams v. Nebraska Savings & Exchange Bank*, 56 Neb. 121.
2. ———: ———. "It is not the amount which the bill of particulars shows the plaintiff might claim, but the actual amount of his demand, which ascertains the jurisdictional amount." *Adams v. Nebraska Savings & Exchange Bank*, 56 Neb. 121.
3. ———: ———. The bill of particulars and summons both disclosing that the amount of the debt with interest from the time it was claimed to the filing of the suit exceeded $200, a justice of the peace had no jurisdiction of the suit.

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

Allen G. Fisher and *William P. Rooney*, for appellants.

Lee Card, contra.

LETTON, J.

Plaintiff filed a bill of particulars, not verified, before the county judge exercising jurisdiction as a justice of the peace, and procured a summons, returnable in four days, to be issued and served. He sought to recover for medical services in the sum of $197, with interest from the 3d day of January, 1914. Defendants appeared especially and objected to the jurisdiction of the judge, because the amount sued for was in excess of $200, the limit of jurisdiction of a justice of the peace. The court had no power to issue a summons returnable in four days in such a case, and the summons was not returnable nor in form or substance such as required in term cases. This objection was overruled, and defendants made no further appearance. Judg-

ment was rendered by default against them for $197. Error proceedings were prosecuted to the district court, which affirmed the judgment. Defendants appeal.

In *Adams v. Nebraska Savings & Exchange Bank,* 56 Neb. 121, it is held that the "amount in controversy" which determines the jurisdiction includes interest accrued at the time of the suit, but that if the summons does not show on its face that the demand is in excess of jurisdiction upon default, the court could render judgment to the full jurisdictional amount.

In this case both the bill of particulars and the summons disclosed that the plaintiff claimed $197, with interest from January 3, 1914. The debt exceeded the jurisdiction of the county judge sitting as a justice of the peace, and the summons returnable in four days should have been quashed.

The judgment of the district court is reversed and the cause remanded, with instructions to reverse the judgment of the county court.

REVERSED.

CHAPIN E. MANNING, APPELLEE, V. LOUIS W. POMERENE, APPELLANT.

FILED APRIL 14, 1917. No. 20008.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: ACCIDENT. Plaintiff, who was employed to attend to and fire a steam-heating boiler, was compelled to use a narrow passageway when inspecting the steam gauges. Two iron beams lay on the boiler, and the ends projected over the passage. Plaintiff attempted to move them out of the way by pushing with his body, when he felt pain in his stomach, became faint and weak, was compelled to cease work and be assisted home. On the third day afterward he vomited blood, and afterwards had a slight paralytic stroke. *Held,* that his condition was the result of an accident as defined in section 3693, Rev. St. 1913, and that the injury arose out of and in the course of his employment.

2. ———: ———: APPEAL: CONFLICTING EVIDENCE. The evidence as to whether the present disability of the plaintiff was caused by the accident being conflicting, and there being sufficient testimony to that effect to support the finding of the district court, its judgment will not be disturbed.

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

Strode & Beghtol, for appellant.

Charles S. Roe and *G. P. Putnam, Jr., contra.*

LETTON, J.

Action under the workmen's compensation act. The plaintiff was a steam-fitter's helper employed by the defendant, who was engaged in the heating and plumbing business. While engaged in attending to a boiler for the defendant, the plaintiff attempted to move two steel "I" beams resting about three feet from the floor by pushing against the beams with his body. He did this once or twice, when he felt faint and sick, and was compelled to sit down. He was unable to work during the remainder of the day. He worked the next day at overseeing some other men. The next day was Sunday. He felt sick and faint during this time, but was able to take a walk that day. On Monday he felt worse, and that night he vomited blood, and has since been unable to work. He was paid compensation for part of the time, but afterwards defendant refused to make further payments, on the ground that the disability from which plaintiff now suffers is not due to the injury to which he ascribes it. The district court awarded him $678 as arrears, and $9.60 a week for 300 weeks, and $7.60 a week for the remainder of his life as compensation. From this award the defendant appeals, insisting (1) that the removal of the beams was not within the scope of plaintiff's employment; (2) that plaintiff did not suffer an "accident" as defined in the statute, and that his indisposition or disability was caused by senile arterio sclerosis; (3) that he has fully recovered from the effect of the injury, even if it had been caused by accident.

As to the first point we are satisfied that the injury or accident, if any there was, occurred in the course of plaintiff's employment. It seems there was a narrow passageway in which he was required to walk in order to reach the gauges showing the steam pressure in the boiler. The end of these beams projected over and obstructed the passageway, and, while there were steam-fitters near whom he might have called from their work to move the beams far enough to allow him to pass, it was perfectly natural and to be expected that in order to perform his duties he should move or attempt to move them himself. They were lying upon a projecting part of the boiler, and the testimony is that beams resting upon iron, as these were, usually slide easily when pushed. In our view he was acting within the scope of his employment.

As to the second point, defendant's argument is that under the definition of the word "accident" in section 3693 Rev. St. 1913, no accident happened. The statute provides: "The word 'accident' as used in this article shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury." It is insisted that no "unexpected or unforeseen event, happening suddenly and violently," occurred; that sickness arising from the placing of his body by plaintiff against the beams and surging back and forwards could not reasonably be said to be "an unforeseen event;" and that it did not happen suddenly and violently except as it was produced by the plaintiff himself. It is said that this language is "clearly meant to limit recoveries to accident such as the breaking of machinery, or the unexpected cutting or wounding of employee's person by some breaking or falling or exploding of apparatus, machinery, or tools." To hold this would unduly limit the meaning of this clause. The unforeseen event was the straining, weakening or lesion of the blood vessels of the brain or stomach, and this was an unforseen event happening suddenly. It

is also said that no "objective symptoms" of an injury appeared at the time, and that these elements are essential. We agree with this argument so far that the accident must produce "at the time objective symptoms of an injury," but the difficulty is as to what constitutes objective symptoms. Defendant's idea is that by objective symptoms are meant symptoms of an injury which can be seen, or ascertained by touch. We are of opinion that the expression has a wider meaning, and that symptoms of pain, and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.

Plaintiff testifies that when he pushed against the beams he felt something give way in his stomach; that it made him sick and faint, and he was compelled to sit down. His son was working there as foreman, and, when told he was hurt, he came and stayed with him for some time, and assisted him to go home. He was sick, nauseated and weak, and had soreness and pain across his stomach, which kept increasing. The next morning he went to work but felt badly. He did not attempt to do anything except oversee a few men who were covering piping. He ate no dinner that day. His son again assisted him home. That night he was still sore and lame. Sunday he was still weak, and was unable to work on Monday. That night while in bed he was nauseated and vomited blood; afterwards he had hiccoughs that lasted for about two weeks, and was very weak, and soon afterwards had a slight paralytic stroke that affected one arm and leg. In addition to the testimony of plaintiff himself on this point, his son testifies that when he saw him just after the event he was sitting with his head bowed in his hands, and his face was pale and drawn. A workman testified that he saw plaintiff lift, and then go and sit down, bent over, holding his stomach. He said that he had hurt himself. "He kind of fainted away and came to." Another witness says he saw

him about 10 or 15 minutes after he lifted the beam; that he was sitting doubled over apparently in great pain. These facts seem to establish the occurrence of an accident for which the statute allows compensation. *LaVeck v. Parke, Davis & Co.*, 190 Mich. 604; *Madden's Case*, 222 Mass. 487; *Duprey's Case*, 219 Mass. 189; *Forrest v. Roper Furniture Co.*, 187 Ill. App. 504.

A very material question in the case is whether the disability from which the plaintiff is now suffering resulted from the accident. As to this the medical expert testimony is in conflict. Plaintiff was 63 years old at the time of the accident. He weighed about 195 pounds. His weight fell to 135 pounds soon afterward, and is now about 140 or 145. In the summer of 1915 he was examined by a number of physicians while in New York state. The substance of their testimony is that the condition in which the plaintiff was at that time was or might be the result of the injury he suffered in February of that year. His attending physician in Lincoln testified to the same effect. Two physicians testify for the defendant that the plaintiff's condition is evidently the result of a progressive arterio sclerosis, and could not have been the result of the injury. The physicians all agree that plaintiff is permanently disabled. In this state of the medical testimony there is sufficient to sustain the findings of the district court that the disability is the result of the accident.

JUDGMENT AFFIRMED.

CORNISH, J., not sitting.

WILLIAM FREW ET AL., APPELLEES, v. GEORGE SCOULAR, APPELLANT.

FILED APRIL 14, 1917. No. 18734.

1. **Principal and Surety: CONTRIBUTION: LIMITATIONS.** A surety in whose favor the statute of limitations has not run, who has done nothing to suspend its operation, and who has been compelled to

pay the debt of his principal, may exact contribution from a cosurety in another state, though under the laws thereof the creditor's claim against the latter was barred when the principal's debt was paid.

2. **Parol Evidence:** SURETIES: CONTRIBUTION. In an action by a surety for contribution from an alleged cosurety, parol evidence may be admitted to show the actual relation of the parties to the obligation discharged by plaintiff.

APPEAL from the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed.*

W. G. Hastings and *Buck, Brubaker & Buck,* for appellant.

Charles Battelle and *Cole & Brown, contra.*

ROSE, J.

This is an action for contribution between sureties. It is alleged in the petition that, April 17, 1894, George Scoular, William Frew, Thomas Donald and Janet Scoular, as sureties, and Robert and William Scoular, as principals, executed a bond for the payment of a loan of £1,500. The bond matured May 15, 1894, and was secured by a mortgage on land in Scotland, where all the parties resided except defendant, a resident of Nebraska. It is also alleged that the principals in the bond became insolvent, that the incumbered land was sold in satisfaction of prior liens, and that, in 1912, William Frew and the trustees of the estate of Thomas Donald, plaintiffs herein, were compelled to pay the debt. It is alleged further that the laws of Scotland do not bar an action on the bond before 40 years. The suit is brought against George Scoular to compel contribution in the sum of $2,999, his alleged liability as one of three solvent sureties. Defendant pleaded that he signed the bond in Nebraska, that he was then, and has since been, a resident thereof, and that the action is barred here by the statute of limitations—a five-year period. Rev. St. 1913, sec. 7567. Defendant also pleaded that he was not a surety, but that he signed the bond under an agreement to merely release any inheritable interest he might have in

the mortgaged land. The trial court directed a verdict for plaintiffs, and from a judgment in their favor for $3,018.12, defendant has appealed.

Should defendant's plea of the statute of limitations be sustained? The question may be stated thus: May a surety in whose favor the statute of limitations has not run, who has done nothing to suspend its operation, and who has been compelled to pay the debt of his principal, exact contribution from a cosurety in another state, though under the laws thereof the creditor's claim against the latter was barred when the principal's debt was paid? While the decisions appear to be in conflict, the better reason and the weight of authority seem to support the rule requiring contribution. *Camp v. Bostwick,* 20 Ohio St. 337; *Wood v. Leland,* 1 Met. (Mass.) 387; *May v. Vann,* 15 Fla. 553; *Crosby v. Wyatt,* 23 Me. 156; *Crosby v. Wyatt,* 10 N. H. 319; *Martin v. Frantz,* 127 Pa. St. 389; *Aldrich v. Aldrich,* 56 Vt. 324; *Wolmershausen v. Gullick,* 2 L. R. (1893) Ch. Div. (Eng.) 514.

In *Camp v. Bostwick,* 20 Ohio St. 337, it was contended, as in the present case, that, since the statute of limitations had barred an action by the creditor against the defendant before the plaintiff paid the debt, defendant received no benefit from such payment and was not liable for contribution. In answer to this argument the court said:

"If the right of a cosurety to claim contribution rested upon the doctrine of subrogation to the rights of the creditor, the proposition might be true. The doctrine of subrogation has its origin in the relation of principal and surety, whereby a surety who pays the debt of his principal is, in equity, substituted in the place of the creditor and is entitled to all the rights which the creditor may have against his principal. But the doctrine of contribution has its origin in the relation of cosureties or other joint promisors in the same degree of obligation. It is not founded upon the contract of suretyship. 1 Ohio St. 327, and 1 Cox, 318. It is an equity which springs up at the time the relation of cosureties is entered into, and ripens into a cause

of action when one surety pays more than his proportion of the debt. 4 Grat. (Va.) 268. From this relation the common law implies a promise to contribute in case of unequal payments by cosureties. But equity resorts to no such fiction. It equalizes burdens and recognizes and enforces the reasonable expectations of cosureties because it is just and right in good morals, and not because of any supposed promise between them. This equity, having once arisen between cosureties, this reasonable expectation that each will bear his share of the burden is, as it were, a vested right in each, and remains for his protection until he is released from all his liability in excess of his ratable share of the burden. Neither the creditor, the principal, the statute of limitations, nor the death of a party, can take it away."

Defendant argues that the Ohio case is based upon *Wood v. Leland,* 1 Met. (Mass.) 387, a suit in equity which must be distinguished, contribution now being a legal remedy to which the statute of limitations should be applied. The argument is not conclusive. The question is not whether the statute of limitations runs against a surety's claim for contribution, but when does the cause of action for contribution accrue? Ordinarily the statute of limitations does not commence to run until the cause of action accrues. The right of a surety to contribution does not arise until he has paid more than his proportion of the debt or until his liability has been determined by judgment. *May v. Vann,* 15 Fla. 553; *Wolmershausen v. Gullick,* 2 L. R. (1893) Ch. Div. (Eng.) 514; *Ex parte Snowdon,* 17 L. R. Ch. Div. (Eng.) 44. Upon this point most of the cases cited by defendant appear to be distinguishable. *Cochran v. Walker's Ex'rs,* 82 Ky. 220, and *Shelton v. Farmer,* 9 Bush (Ky.) 314, are decisions under local statutes modifying the general rule. *Lovell v. Nelson,* 11 Allen (Mass.) 101, and *Spelman v. Talbot,* 123 Mass. 489, rest upon special statutes relating to claims against the estates of deceased persons, but recognize the general rule announced in *Wood v. Leland,* 1 Met. (Mass.) 387. *Stockmeyer v.*

Oertling, 35 La. Ann. 467, without discussion, follows *Ledoux v. Durrive,* 10 La. Ann. 7, and neither case involves the statute of limitations. *Turner's Adm'r v. Thom,* 89 Va. 745, appears to be a case where payment by the plaintiff was voluntary; the statute of limitations having run in favor of both sureties. *Stone v. Hammell,* 83 Cal. 547, is a case where the plaintiff by absence from the state had suspended the operation of the statute. *McLin v. Harvey,* 8 Ga. App. 360, without any discussion of the principles underlying contribution, and *Screven v. Joyner,* 1 Hill Ch. (S. Car.) *252, announce the rule urged by defendant herein, but the reasoning is not convincing. The action for contribution was not barred by the statute of limitations.

The trial court excluded testimony tending to show that defendant signed the bond at the request of his brother, one of the principals therein, and that it was agreed between them and the obligee that defendant was merely releasing whatever inheritable interest he might have in the incumbered land, and that plaintiffs knew defendant was not to be held as a surety. This is not an action on the bond, but a suit between sureties to enforce contribution. Evidence was therefore admissible to show the actual relation of the parties to the bond. 4 Wigmore, Evidence, secs. 2444, 2445; *Chapman v. Garber,* 46 Neb. 16; *Cox v. Ellsworth,* 97 Neb. 392; *Oldham v. Broom,* 28 Ohio St. 41; *Chapeze v. Young,* 87 Ky. 476; *Leeper v. Paschal,* 70 Mo. App. 117; *Shea v. Vahey,* 215 Mass. 80; *Enterprise Brewing Co. v. Canning,* 210 Mass. 285; *Bulkeley v. House,* 62 Conn. 459, 21 L. R. A. 247. In the case last cited it was said:

"In considering the questions involved it should be borne in mind that this is an action for contribution. Contribution does not rest upon contract, but on the broad equitable principle that equality is equity. Justice and fair dealing demand that where one or more parties sign the same obligation, and become equally obligated in precisely the same degree thereby, and stand upon the same

footing as to their liabilities thereunder, one of the number shall not be compelled to assume the whole burden for his associates, but may compel them to share equally with him any loss that may occur as the result of their joint liability. In actions for contribution, therefore, the principle seems now to be well established that parol evidence is admissible to show the true relations existing between the several parties bound by a written obligation. * * * Such evidence is not offered to contradict or vary the contract contained in the writing, but simply to show the actual relations subsisting between the joint makers of the note and the real nature of the contract between them. Such facts are not a part of the contract and do not affect its terms, but are wholly collateral to it. To support his claim for contribution therefore, the plaintiff clearly had the right to show his true relation to the note, and this without regard to the knowledge of the defendant."

If defendant was not one of the sureties, he is not liable for contribution. The trial court therefore erred in excluding evidence on this issue. It follows that the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

CORNISH and DEAN, JJ., not sitting.

HAMER, J., concurring in part, and dissenting as to that part of the majority opinion which refuses to dismiss the case.

I concur in so much of the opinion as holds that the judgment of the district court shall not stand and reverses the same. But I would go further and dismiss the case. To the mind of the writer the majority opinion would import the Scotch statute of limitations into Nebraska and determine the liability of the defendant by that statute, and without consulting our own statute of limitations. It denies to the resident in Nebraska the protection which the Nebraska statute of limitations confers upon him. I would ask my brethren who are responsible for the majority opin-

ion if the statute of limitations of this state does not run in favor of a man who was a resident of Nebraska at the time he signed the contract and has never since changed that residence?

It is said in *Bell v. Morrison,* 1 Pet. (U. S.) *351, opinion by Justice Story: "It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that instead of being viewed in an unfavorable light, as an unjust and discreditable defense, it had received such support as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts, and to suppress those perjuries which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them."

The majority opinion concedes that "the decisions appear to be in conflict," but then says that the better reason is that there shall be a rule allowing contribution. This decision in effect imports, in a way, the Scotch statute of limitations to Nebraska.

It should be remembered that this is not an action on the instrument which the defendant signed. This is an action to enforce contribution. It is based on the claim of the plaintiffs that the defendant was liable with them as a cosurety, and that they paid the debt, and therefore, that he should pay them his share. Before the defendant can be liable he should stand upon the same footing and be under the same burden with the other sureties when they paid the debt. The right to enforce contribution is based upon the fact that one or more of several, having a common liability, has paid the debt. If the basic fact upon which the right

rests, the common liability, is lacking, payment by the cosurety gives no right to contribution.

The majority opinion does not answer the questions: (1) Does the Nebraska statute run in Nebraska? (2) If it does run, could the holders of the instrument showing the indebtedness sue the defendant in Nebraska upon it after the expiration of five years from the time it came due, and maintain an action upon it? (3) If they could not, then was the defendant liable upon the said bond and mortgage at the time the plaintiffs paid and satisfied it, between 17 and 18 years after it became due? (4) And if the defendant was not liable upon it, what sort of favor did the plaintiffs confer upon the defendant when they paid it? (5) And if the Scotch statute of limitations is 40 years, and the plaintiffs were still liable under it for the debt up to the time they paid it, and the defendant, who lived in Nebraska, and not in Scotland, had been released from the payment of it by the Nebraska statute of limitations, five years, can you explain how the sureties in Scotland and the alleged surety in Nebraska actually stood upon the same footing and carried the same burden when the Scotch sureties paid the debt in Scotland, and, if you cannot explain it, why should the rule that there can be no contributon enforced between sureties unless at the time of payment the sureties who pay and the surety against whom contribution is sought stand upon the same footing and carry the same burden be disregarded in this case?

I have looked and listened in vain for answers to these questions.

When the Scotch sureties paid the original debt due on the mortgage the defendant had already been released from the payment of that debt if the statute of limitations runs in Nebraska. But the Scotch sureties were still liable on the original mortgage when they paid the debt, because they were living in Scotland under a statute of limitations by which the debt would be continued 40 years. But at this time the defendant was not liable, if he had ever been liable, because the Nebraska statute of limitations had re-

leased him from the payment of that original debt. If the defendant had been released from the payment of the original debt by the statute of limitations of the state of Nebraska, then he did not stand on the same footing as the Scotch sureties in Scotland, and there could be no way to make the defendant liable unless he made a new promise, and this he is not shown to have done.

We have only to inquire whether Clark, the creditor in Scotland, or the trustee in charge of his estate, could come to Nebraska and maintain an action against the defendant on the instrument which it is alleged he signed. Of course, no such action might be maintained in Nebraska, because the Nebraska statute of limitations rendered the maintenance of such an action impossible, but it is claimed that the cosureties paid the debt, and therefore that they acquired the right to compel the defendant to pay what they allege was his proportion. And now as the Nebraska statute of limitations does run in Nebraska, and the defendant had been released from the payment of the original debt by such statute, he must have been already discharged. Of course, if the sureties in Scotland had chosen to pay the debt before the statute of limitations in Nebraska outlawed it, they might have done so, and then they could have come to Nebraska and could have successfully sued the defendant for contribution and maintained their suit against him. But they did not come, and when the Nebraska statute released him it became impossible that they should acquire any right unless he made a new promise, and that he did not do.

It is contended by the plaintiffs that the statute of limitations in Nebraska did not run for the reason that the sureties in Scotland made payments on the debt. But it is proper to remember that the theory upon which a payment prevents the statute of limitations from running is that the payment is a new promise by the debtor. In this case there was no new promise for the reason that the surety in Nebraska, if he was a surety, knew nothing about these payments being made and, therefore they could not be his

promise. To illustrate: Suppose that A sues B for contribution as a cosurety with him on the bond of A, B, and C to D, which bond A has paid, and suppose B's execution of the bond was obtained by duress, a good defense to an action by D in whose favor the bond was given, and equally and surely a good defense in an action for contribution by A; for if B had no liability on the bond, being compelled to execute it by duress, his defense to an action for contribution could not be defeated by A's act in paying the debt. So, likewise, if B's liability is terminated by the statute of limitations, A cannot by payment of C's obligation, on which A and B are sureties, compel contribution from B. B's obligation is terminated. A remedy against him cannot be revived otherwise than by his own act.

Did the statute of limitations run in Nebraska? In Pingrey, Suretyship and Guaranty (2d ed.) sec. 90, it is said: "The American doctrine is that a part payment by one of several joint debtors is inoperative to prevent the running of the statute of limitations as to the others. In order to prevent the running of the statute, payment must be made by the debtor in person, or for him by authority, or for him and in his name without authority, but subsequently ratified by him. The mere fact that he has knowledge of payment being made by his codebtor is not sufficient. Hence, a partial payment of a promissory note or debt by the principal debtor will not suspend the statute of limitations as to the surety." Of course, the same thing must be true as to a surety where the payment is by one or more of his cosureties.

In *Cocke v. Hoffman*, 5 Lea (Tenn.) 105, 40 Am. Rep. 23, it was held: "A surety who pays the debt after the bar of the statute of limitations has attached in his favor, is not entitled to recover contribution from a cosurety equally protected by the statute." That was an action for contribution. Jesse M. Lyons, the intestate of the plaintiff in error, commenced said action January 20, 1867, against James Hoffman, before a justice of the peace, to recover contribution from him as a cosurety for money paid in discharge

of the common debt. Lyons and Hoffman were sureties for James Richards on a note dated December 14, 1862, and payable one day after date to William Lyons, for $100. Jesse M. Lyons paid this note on the 20th of January, 1875, after the bar of the statute of limitations had become fixed. In the body of the opinion it was said that "it has never been held that if one of such parties (a cosurety) pays the debt after it has ceased to be legal, subsisting and compulsory, as where he is himself protected by the statute of limitations, or by a discharge in bankruptcy, he could recover against a cosurety."

In *Cochran v. Walker's Ex'rs,* 82 Ky. 220, it was held: "A surety who has paid a judgment cannot enforce contribution against his cosurety, if, when the debt was paid, the statute of limitations ran as between the original obligee and the cosurety or his executor." In the body of the opinion it is said: "It is conceded that, if one surety pays the debt to his principal after the running of the statute, he has no right of contribution against his cosurety, so as to defeat the plea of limitation."

In note c, 98 Am. St. Rep. 44 (*Stockwell v. Mutual Life Ins. Co.,* 140 Cal. 198), it is said: "The general rule is that where one joint debtor pays a debt which is barred by limitation, without the consent of his codebtor, he is not entitled to contribution from him"—citing many authorities.

In *Spelman v. Talbot,* 123 Mass. 489, it is said in the statement of the case: "The prayer of the bill was for judgment for the amount of the defendants' intestate's contributory share in the sums paid by the plaintiffs, and for general relief. The answer contained a demurrer for want of equity." The court held that there could be no recovery, "inasmuch as it (the claim in the case) did not come into existence until after the period had arrived at which the administrators of the deceased were relieved by law of all liability." While this is not the usual case for contribution, the nature of it is the same.

In *Turner's Adm'r v. Thom,* 89 Va. 745, it is held: "To entitle one joint obligor to recover from his co-obligor mon-

ey paid by him in excess of his proportion, the payment must have been made upon a debt for which the latter was legally liable at time of the payment, and which the obligor paying was compellable to pay, and not upon a debt that was barred as to the obligor sought to be charged."

It was a suit for contribution. The court said in the body of the opinion: "For, whether the doctrine of contribution 'is the result of a general equity which equalizes burdens and benefits,' or originates in a contract which the law implies, that the joint promisors, at the time of the giving of the joint obligation, mutually promise each other that, if one is compelled to pay more than his proportion of the joint debt, the other will indemnify the one so paying to the extent of the excess over his just proportion, it is equally clear that the payment must have been made upon a debt for which the defendant was legally liable at the time of the payment, and which the obligor who pays was compellable to pay, and not upon a debt which was barred as to the obligor sought to be charged"—citing Wood, Limitations, 321, 322; *Bell v. Morrison,* 1 Pet. (U. S.) *351; 1 Story, Equity Jurisprudence (13th ed.) sec. 325, and note; *Fordham v. Wallis,* 10 Hare (Eng.) *217.

In *Stockmeyer v. Oertling,* 35 La. Ann. 467, it was held: "The party from whom contribution is demanded must have been under a legal obligation to pay at the time payment was made by him who demands the contribution." In the body of the opinion it was said: "The party from whom contribution is demanded must have been himself under a legal obligation to pay at the time payment was made by him who demands the contribution."

In *McLin v. Harvey,* 8 Ga. App. 360, it was held: "As a general rule, one surety cannot recover contribution from another when the debt paid by the surety seeking contribution was not binding either on the principal or on the other surety. * * * The right of contribution does not rest on the original contract, but arises out of the relation, created thereby, of a common obligation, and the contract implied therefrom of discharging the common obligation equally,

and when one surety or indorser on a promissory note is, by operation of law, discharged from the obligation of payment, the obligation thus discharged cannot, without his consent, be revived against him by the voluntary act of a cosurety."

In *Ellicott v. Nichols,* 7 Gill. (Md.) 85, it was held: "A plaintiff who seeks to extricate a case from the act of limitations must show a new promise, within three years prior to the institution of the suit, either express or implied." It was also said: "One copromisor who pays a debt barred by the act, against the consent of his co-debtor, cannot maintain an action for contribution against such co-debtor."

In *Wheatfield Township v. Brush Valley Township,* 25 Pa. St. 112, it is held: "Where a debt is due from several parties, and one of them pays it after it is barred by the statute of limitations, he cannot maintain an action for contribution against the other debtors." In the body of the opinion it is said: "The action for contribution is founded upon the equity arising from the payment by the plaintiff of more than his share of a liability existing at the time against both. Where the plaintiff is not liable for the debt, he has no right to volunteer a payment for the purpose of making the defendant his debtor. And where the defendant is not bound for it, the payment confers no benefit upon him."

In *Williamson's Adm'r v. Administrator of Rees,* 15 Ohio, 572, it is held: "The cosigners of a note, joint and several in its terms, which fell due in 1807, and on which a suit was severally instituted in 1814 against another co-obligor, and judgment recovered, and afterwards suffered to lie dormant 16 years, and then revived, and finally paid, 38 years after it became payable, cannot be compelled to contribute."

In *Hunter v. Robertson & Robertson,* 30 Ga. 479, it was held: "A payment by the principal or maker of a promissory note, before barred by the statute, does not constitute a new point for the running of the statute of limitations as

against the indorser or surety, unless such indorser or surety be a party to such payment."

In *McBride, Adm'r, v. Hunter,* 64 Ga. 655, it was held: "A payment and entry thereof on a note by the principal does not prevent the bar of the statute of limitations from attaching in favor of his security. Nor can the administrator of one who signed a note only as security relieve it from the bar of the statute so far as primary creditors may be affected thereby. Especially is this the case where the note was barred before the death of the security."

In *Rogers v. Burr,* 105 Ga. 432, 447, the decision of Lord Mansfield in *Whitcomb v. Whiting,* 2 Doug. (Eng.) 652 (the beginning of the trouble) is cited, and the court say: " 'The foundation on which it rests was found to be altogether unsatisfactory. In Pennsylvania and some of the other states it has been utterly exploded'—citing *Levy v. Cadet,* 7 Serg. & Rawle (Pa.) 126; 4 Greenleaf, 140; also cases collected in 2 Pick. (Mass.) 581, 583, note 1."

In *Ledoux v. Durrive,* 10 La. Ann. 7, it was held that when one of several sureties has paid the debt he cannot, in an action for contribution against his cosurety, recover when "at the time of such payment the cosurety himself was under no legal obligation to pay."

This court long ago settled that payment by one surety is no bar to the running of the statute of limitations as to another. I would say that the great weight of authority is so strong that it would seem there should be no serious contention about the matter, but for the fact of the existence of this majority opinion. As early as 1877 this court in *Mayberry v. Willoughby,* 5 Neb. 368, held: "To take a debt out of the statute, there must be an unqualified acknowledgment of the debt as originally due, and a promise to pay it; and if the promise is conditional, the condition must be performed before an action can be maintained on the promise." It was also said: "A promise by one joint debtor will not take a debt out of the statute of limitations as to his cocontractors, unless he is specially and severally authorized by them for that purpose." The moral right of

the statute and the wisdom of its policy were commented upon by Justice Gantt, who said: "Hence, the law must be regarded as designed to protect persons from ancient claims, whether well or ill founded; and its tendency is to produce speedy settlements, and if such settlements are not made within the time limited by the law, its effects are such as to extinguish the legal liability upon the debt, unless it be revived by a new promise; and therefore if the creditor by his own fault and laches permits the statute to attach, whatever may be the nature or character of his claim, he cannot complain of the operation of the law, since it is by his own negligence that it can be brought to bear against him."

There was nothing to prevent the sureties in Scotland from paying the debt there within five years after it fell due, and then they could have come to Nebraska and could have sued the defendant here within that time. By so doing they could have recovered a judgment for contribution money from the defendant to the extent of his share of the debt. But they wait 17 years until the principals have failed and until they have gone through bankruptcy. They wait until the property mortgaged in Scotland, in which this defendant had an interest, has been sold, probably for very much less than its value. They seem to have had possession of this property, and after the defendant has nothing left in Scotland of his inheritance they try to get judgment against him in Nebraska and to absorb the results of his 25 years of labor here.

It is contended that the Scotch sureties by the payment of the debt of Scotland kept alive some sort of living principle in it.

In *Dwire v. Gentry,* 95 Neb. 150, it is said: "The payment of interest on a note by a principal without the authority, knowledge or consent of the surety will not stop the running of the statute of limitations as to the surety." In the body of the opinion it is held: "That the statute of limitations is one of repose, and that when the time limited by it has expired then in legal contemplation the debt is

extinguished, and can only be revived by a new promise by the person sought to be charged or by some person lawfully authorized by him for that purpose." If we apply the principle stated in that case to the instant case it is apparent that the debt in Scotland had been outlawed in Nebraska, and that no suit could be maintained upon it here. It follows, therefore, that the Nebraska surety did not stand upon the same footing and did not bear the same burden borne by the Scotch sureties under their very long winded statute of limitations.

In *Dwire v. Gentry, supra,* the case of *Omaha Savings Bank v. Simmeral,* 61 Neb. 741, was relied upon. Mr. Justice Letton, referring to the last-named case, quotes from it: "No payments were made on the note by Redick. Simmeral, the principal on the note, made several payments, which were without the knowledge or consent of Redick, the surety. The payments so made did not toll the statute as to Redick."

In *Mizer v. Emigh,* 63 Neb. 245, it is said: "A payment made on an account by a person other than the debtor, without his authority, knowledge and consent, will not toll the running of the statute of limitations." In that case the statute of limitations was interposed as a defense and was sustained by the court below, which rendered a judgment for the defendant. This court affirmed the judgment.

Along the same line as the cases above cited and quoted from are *Bell v. Morrison,* 1 Pet. (U. S.) *351; *Coleman v. Fobes,* 22 Pa. St. 156; *Screven v. Joyner,* 1 Hill Ch. (S. Car.) *252; *Willoughby v. Irish,* 35 Minn. 63; *Waughop v. Bartlett,* 165 Ill. 124; *Bulkeley v. House,* 62 Conn. 459; *Oldham v. Broom,* 28 Ohio St. 41; *Smith v. Coon,* 22 La. Ann. 445; *Pfenninger v. Kokesch,* 68 Minn. 81; *Harper v. Fairley,* 53 N. Y. 442; *Hance v. Hair,* 25 Ohio St. 349; *Mozingo v. Ross,* 150 Ind. 688; *Bottles v. Miller,* 112 Ind. 584; *Littlefield v. Littlefield,* 91 N. Y. 203; *Kallenbach v. Dickinson,* 100 Ill. 427; *Myatts & Moore v. Bell,* 41 Ala. 222; *Steele v. Souder,* 20 Kan. 39; *Tate v. Clements,* 16 Fla. 339; *Van Keuren v. Parmelee,* 2 N. Y. 528; Angell,

Limitations (6th ed.) sec. 259; 2 Wood, Limitations (4th ed.) sec. 285. In that section it is said that the doctrine of *Whitcomb v. Whiting,* 2 Doug. (Eng.) 652, is repudiated; that "the courts, without any express legislation, have repudiated the doctrine as unsound, predicated upon erroneous reasoning, and opposed to the spirit of these statutes. Especially is this the case in New Hampshire, Pennsylvania, Tennessee, Kansas, Florida, Maryland, Illinois, and by the United States supreme court;" also, that the doctrine in *Whitcomb v. Whiting* "has been nearly obliterated by legislative and judicial action."

I think that I have examined all the cases cited in the majority opinion. Some appear to be overruled. Only one seems to justify the views expressed in the majority opinion. It is *Aldrich v. Aldrich,* 56 Vt. 324, where the plaintiff and defendant were cosureties on a promissory note, and the principal and sureties were residents of Vermont, and after the statute of limitations became a bar in Vermont the plaintiff went to New Hampshire where the statute of limitations is no defense, and was there sued and judgment rendered against him when he paid the debt. It was held that he had an action for contribution against his cosurety. In *Waughop v. Bartlett,* 165 Ill. 124, 133, it is said: "One joint maker of a note cannot, by payment thereon or any other act, stop the running of the statute of limitations against another joint maker, except when duly authorized for that purpose." In the body of the opinion it is said: "The note in this case shows indorsements of interest thereon, at regular semiannual periods, from its date up to January 1, 1890. These indorsements of interest were all made by the holder of the note or his representative in the state of Massachusetts. Of themselves they would not constitute a new promise."

Justice Story in delivering the opinion of the court in *Bell v. Morrison,* 1 Pet. (U. S.) *351, *367, quoted Lord Mansfield's opinion in *Whitcomb v. Whiting,* 2 Doug. (Eng.) 652, where he said: "Payment by one is payment for all, the one acting virtually as agent for the rest;

and, in the same manner, an admission by one is an admission by all; and the law raises the promise to pay when the debt is admitted to be due." Justice Story said of this very brief exposition of a legal principle: "This is the whole reasoning reported in the case, and is certainly not very satisfactory. It assumes that one party, who has authority to discharge has, necessarily, also authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists, by analogy, to charge the whole. Now, this very often constitutes the matter in controversy. It is true that a payment by one does inure for the benefit of the whole; but this arises not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt. If such payment were made, after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor would no longer sue them. In truth, he who pays a joint debt pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them, in contribution, without such payment has been rightfully made, and ought to charge them. When the statute has run against a joint debt, the reasonable presumption is that it is no longer a subsisting debt; and therefore there is no ground on which to raise a virtual agency to pay that which is not admitted to exist."

Eighteen of the courts of last resort in the United States, which I have examined, together with the United States supreme court, have declared for the doctrine which I have endeavored to express in this dissent. If I am right, there is against them only the highest tribunal of the state of Vermont. The majority opinion seems to disregard the decisions of the supreme court of our own state.

In note 17, sec. 287, 2 Woods, Limitations (4th ed.) it is said: "The earlier decisions in New York following *Whitcomb v. Whiting* (see *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3; *Patterson v. Choate*, 7 Wend. (N. Y.) 441) were

overruled in 1849, in *Van Keuren v. Parmelee,* 2 N. Y. 523, 51 Am. Dec. 322."

In the body of the text (section 285) it is said: "The doctrine of *Whitcomb v. Whiting,* 2 Doug. (Eng.) 652 that an acknowledgment, new promise, or payment, made by one of two or more joint contractors, will remove the statute bar as to all, has practically but little force at the present day, as in many of the states the legislature has expressly overridden it by providing that no acknowledgment, promise, or part payment made by one joint debtor shall deprive the others of the benefit of the statute; * * * especially is this the case in New Hampshire, Pennsylvania, Tennessee, Kansas, Florida, Maryland, Illinois and by the United States supreme court; while in Connecticut, New Jersey, Rhode Island, and Delaware, the doctrine of *Whitcomb v. Whiting* is still adhered to." Many authorities are cited against the doctrine. It is also said in the text that the doctrine of *Whitcomb v. Whiting* "has been nearly obliterated by legislative and judicial action." In addition to the authorities above cited, which are against the doctrine of *Whitcomb v. Whiting,* are the following states mentioned in note 3, under section 285: Alabama, Iowa, Minnesota, Kansas, South Carolina, Ohio, California, Oregon, Nevada, Nebraska, Texas, Arizona, Dakota, Idaho, Montana, Utah, and Wyoming.

If I have correctly counted the decisions as they are cited, the courts of last resort in 22 states have repudiated the doctrine of *Whitcomb v. Whiting* as it was laid down by Lord Mansfield.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. VILLAGE OF EDDYVILLE ET AL. APPELLEES.

FILED APRIL 14, 1917. No. 19298.

Waters: DIVERSION: INJUNCTION. An injunction at the suit of a railroad company to prevent a village from diverting waters along

a highway boundary to plaintiff's railroad embankment between the village and a river constituting the natural drainage basin *held* properly denied, where plaintiff disregarded a statutory duty to construct a culvert at the highway crossing and failed to prove that injury from such diversion would nevertheless have occurred.

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

Edson Rich, B. W. Scandrett, E. F. Dougherty and *I. J. Nisley,* for appellant.

Niles E. Olsen, contra.

ROSE, J.

This is a suit for an injunction to prevent the village of Eddyville, defendant, from diverting water from the natural course of drainage to the roadbed of the Union Pacific Railroad Company, plaintiff. From a judgment of dismissal, plaintiff has appealed.

Running northwest and southeast parallel with the general direction of Wood river, the railroad, with a grade two feet or more above the surface of the ground, is located between that stream and the western boundary of Eddyville. The general slope of the land around the village is west or southwest toward Wood river, which is the natural drainage basin. On this part of the watershed there are only two openings in the railroad embankment, each being a 24-inch tile culvert. The northern boundary of Eddyville is a Dawson county road running east and west across the railroad and Wood river a short distance west of the village. In draining an 80-acre lagoon with its center in the county highway east of Eddyville, Dawson county constructed an 8-inch tile drain, 1,200 feet long on the north side of the public road, the east or lower end of the drain being north of the village, near the mouth of a drainage basin heading in hills to the north. Later, in 1911, the village enlarged a ditch or natural depression extending from the west end of the tile along the north side of the county road to the railroad right of way. At times water followed this drain to the railroad embankment, flowed north 600

feet, and passed through a 24-inch tile culvert under the railroad track. In June, 1914, there was an unusual flood which washed out the culvert and 15 feet of railroad track.

The position taken by plaintiff is that defendant, by means of its ditch, wrongfully contributed to the diversion of water from the natural course of drainage to plaintiff's right of way, thus causing irreparable injury. Stated differently, plaintiff insists that water which, in the natural course of drainage, would have run southward through the village was diverted westward along the highway to the railroad. The trial court refused to grant an injunction. The decision is without error for the following reasons: The drainage of the highway is authorized by statute. Rev. St. 1913, sec. 2944; *McLaughlin v. Sandusky,* 17 Neb. 110. The 8-inch tile drain was constructed by the county, and the latter does not complain of any act of defendant. There was a natural depression or ditch where the drain was widened and deepened by defendant. Both before and after defendant improved the ditch part of the water followed it to plaintiff's right of way and part flowed through the village. The construction of a drain along a highway is not an improper use thereof. *Wachter v. Lange,* 94 Neb. 290; *Churchill v. Beethe,* 48 Neb. 87. Such a drain is not necessarily limited to waters on the highway, but may inure to the benefit of an adjoining proprietor. *Thom v. Dodge County,* 64 Neb. 845. A properly constructed culvert through the railroad embankment at the highway crossing would have drained water from the village ditch along the highway to Wood river. It is the statutory duty of a railroad company to make such a culvert when necessary. Rev. St. 1913, sec. 3016. The necessity therefor may fairly be inferred from the proofs. That duty has not been performed. There is a failure to prove that the injury of which plaintiff complains would nevertheless have occurred. In addition, the capacity of the culvert 600 feet north of the crossing is inadequate when the quantity of water which naturally collected there is taken into con-

sideration. These are circumstances under which a court of equity may refuse an injunction.

AFFIRMED.

SEDGWICK, J., not sitting.

WESTERN LIFE & ACCIDENT COMPANY OF COLORADO, APPELLANT, V. STATE INSURANCE BOARD, APPELLEE.

FILED APRIL 14, 1917. No. 19380.

1. Insurance: "ASSESSMENT ASSOCIATION." An insurance company which requires the payment of a fixed premium in advance and provides benefits not in any degree dependent upon the collection of assessments from other members, and which does not provide for the levying of extra assessments, if necessary, is not an assessment association as defined by the Nebraska insurance laws. Rev. St. 1913, sec. 3138.
2. ———: RESERVE FUND. A mutual insurance company which guarantees dividends in the form of paid-up insurance for one year to policy-holders who have been members continuously for five years may be required by the insurance board to provide a reserve fund to meet the liability thus created. Rev. St. 1913, secs. 3138, 3139, 3233, 3235.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

R. C. Roper and *Leo E. Pryor,* for appellant.

Willis E. Reed, Attorney General, and *George W. Ayres, contra.*

ROSE, J.

The Western Life & Accident Company of Colorado, a corporation engaged in the business of accident and sickness insurance, applied to the insurance board for a certificate of authority to transact business in Nebraska. Its policy contains the following provision: "Each fifth year period continuous membership from the date of this contract shall entitle the insured to a dividend to be applied

on the premiums of this policy, but said dividend shall not be less than twenty per cent. of the premiums paid hereon during said five-year period."

An insured entitled to the benefit of this provision is described in the record as a "persistent policy-holder," and is entitled to paid-up insurance for the sixth year. The insurance board declined to issue a certificate on the ground that plaintiff refused to make any provision for the establishment of a reserve fund to meet the claims of persistent policy-holders, thus disregarding a regulation of the insurance board. Plaintiff appealed to the district court, where the decision of the insurance board was affirmed. From the affirmance, plaintiff has appealed to this court.

Has the state insurance board power to require plaintiff, a mutual insurance company of Colorado, to provide a reserve fund for deferred dividends guaranteed to persistent policy-holders in the form of paid-up insurance for the sixth year of continuous membership, as a condition of procuring a certificate to transact business in Nebraska? Plaintiff contends that only 7 per cent. of its members become persistent policy-holders, that it is an assessment company, and that it is without power to create a reserve fund for the protection of a part of its policy-holders. Plaintiff purports to be organized under Colorado laws providing for the incorporation of insurance companies "upon the assessment plan." The Nebraska statute defines an "assessment association" to be "one that meets its losses and expenses from assessments levied upon its members," and a "mutual company" to be "one without capital stock that charges a fixed premium and is required to maintain the same reserve as a stock company." Rev. St. 1913, sec. 3138. The contract of insurance issued by plaintiff provides for the payment of a membership fee and a fixed premium in advance, the insurance being for a term of one month, renewable upon the payment of the premium in advance for the succeeding month. The policy also provides that the liability of the insured "shall not exceed twelve monthly premiums in one year and shall not be less than

eleven." It does not appear that the indemnity to be paid to the insured is dependent upon the collection of assessments from other policy-holders, nor that additional assessments may be levied, if necessary. Within the meaning of the insurance laws plaintiff does not transact business on the assessment plan and is not an assessment association. Rev. St. 1913, secs. 3138, 3262-3264, 3268; *State v. Matthews,* 58 Ohio St. 1; *Knott v. Security Mutual Life Ins. Co.,* 161 Mo. App. 579. The insurance board may properly hold that plaintiff, not being an assessment association, is not entitled to a certificate to transact business without complying with the conditions imposed upon similar mutual companies.

Mutual companies are required to maintain the same reserve as stock companies. Rev. St. 1913, sec. 3138. The insurance board requires domestic companies, guaranteeing deferred dividends in the form of paid-up insurance to persistent policy-holders, to provide a reserve fund, and applied the same rule to plaintiff. This regulation appears to be authorized by law. Rev. St. 1913, secs. 3139, 3235, 3275.

The statute provides that the insurance board "shall have general supervision, control and regulation of insurance companies, associations, and societies, and the business of insurance in Nebraska;" that "it shall have power to make all needful rules and regulations for the purpose of carrying out the true spirit and meaning of this chapter and all laws relating to the business of insurance;" and that "no insurance policy or certificate of any kind shall be issued or delivered in this state unless and until a copy of the form thereof has been filed with the insurance board and approved by it." These powers may be exercised to compel a foreign insurer to provide a reserve fund required of a similar domestic insurer.

The judgment of the district court is therefore

AFFIRMED.

KILPATRICK BROTHERS COMPANY, APPELLANT, V. FRENCHMAN VALLEY IRRIGATION DISTRICT, APPELLEE.

FILED APRIL 14, 1917. No. 19397.

Waters: IRRIGATION: ADVERSE USER. During the time a prior appropriator carrying water for hire to landowners is properly engaged in developing its right, the use of water by an upper proprietor under a subsequent appropriation is not adverse, where it does not deprive the prior appropriator of the use of water when actually needed.

APPEAL from the district court for Chase county: ERNEST B. PERRY, JUDGE. *Affirmed.*

Charles W. Meeker and *Hazlett & Jack,* for appellant.

C. E. Eldred and *John F. Cordeal, contra.*

ROSE, J.

Plaintiff brought this suit in equity in the district court for Chase county to determine priority of rights to the use of waters of the Frenchman river for irrigation. According to an adjudication by the state board of irrigation, defendant's predecessor, the Culbertson Irrigating & Water Power Company acquired, May 16, 1890, an appropriation of 215 cubic feet of water a second. Plaintiff is an upper proprietor, and its adjudicated appropriation, 64.86 cubic feet of water a second, dates from December 23, 1890. These appropriations as thus originally established are not in dispute, but it is asserted that, by prescription or adverse user for the statutory period of ten years, defendant lost and plaintiff acquired all of the prior appropriation in excess of 50 cubic feet of water a second. On the contrary, it is insisted that plaintiff's use of water to which defendant was entitled under its adjudication was not adverse and that the proofs are insufficient to entitle plaintiff to relief in equity. The trial court found the issue in favor of defendant and dismissed the suit. Plaintiff has appealed.

On appeal a careful examination of the evidence leads to the conclusion reached by the trial court. The elements essential to prescription or adverse user for the statutory period of ten years are not established by the proofs. In many respects defendant's irrigating enterprise was a growth in a new country. Its irrigating system was established principally for the purpose of carrying water for hire to the lands of others. The benefits of irrigation were not fully understood by all owners of lands along defendant's canals. It required time to procure irrigating contracts for all available water. The right to the appropriation continued as a developing right. *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121. Under such circumstances plaintiff's diversion of water which could not be beneficially used by defendant was not adverse. When the conditions and circumstances outlined are considered, the proofs do not show that plaintiff's use was adverse as distinguished from permissive. *Maranville Ditch Co. v. Kilpatrick Bros. Co.*, 100 Neb. 371; *Ison v. Sturgill*, 57 Or. 109. Relief on the ground of adverse user was therefore properly denied.

AFFIRMED.

CORNISH, J., not sitting.

GEORGE HOLMES, ADMINISTRATOR, APPELLEE, V. CHARLES F. DOLL, APPELLANT.

FILED APRIL 14, 1917. No. 19401.

1. **Appeal: MISTAKEN REMEDY: AFFIRMANCE.** In an action against a trustee for the value of notes and mortgages which he has wrongfully refused to transfer to the administrator of the estate of the beneficiary, where the petition shows that plaintiff is entitled to relief in some form, a judgment in his favor on a verdict sustained by evidence which in a court of equity would require findings in his favor will not be reversed on appeal merely because he mistook his remedy and prayed for a money judgment.

2. **Limitation of Actions:** SUIT AGAINST TRUSTEE. The statute of limitations does not commence to run against an action by the administrator of the estate of a beneficiary, to recover from the trustee the value of notes and mortgages which he has refused to transfer to plaintiff, until the trustee has repudiated his trust and refused to transfer the property.

3. **Appeal:** AMENDMENT OF ANSWER: DISCRETION OF COURT. The refusal of the trial court to permit defendant to file an amended answer adding a counterclaim or set-off will not be disturbed unless an abuse of discretion has been shown.

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

G. W. Shields & Sons, for appellant.

Howard H. Baldridge and *Piatti & Wear, contra.*

ROSE, J.

This is an action by the administrator of the estate of August Doll, deceased, to recover from Charles F. Doll the value of seven notes and mortgages held by the latter in his own name in trust for his uncle, the decedent, and which defendant has refused to transfer to plaintiff. Defendant admitted his refusal to transfer to plaintiff the notes and mortgages, asserted ownership thereof, and pleaded the statute of limitations as a bar to the action. The jury returned a verdict in favor of plaintiff for $28,770.30, the value of the notes and mortgages with interest. From a judgment thereon, defendant has appealed.

Defendant contends that plaintiff's remedy is a suit in equity, and that an objection to the introduction of evidence on that ground should have been sustained. In this connection it is also argued that the trial court erred in refusing to strike out that part of the reply tending to state an equitable action, on the ground that allegations of that nature should have been inserted in the petition. Of this ruling defendant is not in position to complain. Upon his motion similar allegations had previously been stricken from the petition. The petition and reply state facts en-

titling plaintiff to relief in some form. That the prayer of the petition is for a money judgment only does not prevent plaintiff from obtaining relief. *Seely v. Seely,* 150 N. Y. Supp. 66; *Schulsinger v. Blau,* 82 N. Y. Supp. 686; *Murtha v. Curley,* 90 N. Y. 372. The proof supports the finding of the jury. The parties understood the nature of the controversy between them. The identity of the notes and mortgages described in the petition and the character of plaintiff's claim were not left in doubt. On both sides proofs applicable to the case, considered either as an action at law or a suit in equity, were adduced at great length. Defendant did not object to the impaneling of a jury. If plaintiff had drawn his petition in conformity to defendant's understanding of equity pleading, the submission of issues of fact to a jury would have been in harmony with correct rules of practice. Defendant was not deprived of any opportunity to make a defense. The trial in fact lasted nearly a month. On the same evidence another trial of equal length in a court of equity would result in findings for plaintiff. On appeal, the objections to the form of the action, to the nature of the pleadings, and to the submission of issues of fact to a jury will be overruled. *Lashmett v. Prall,* 93 Neb. 184.

Defendant contends that the action is barred by the statute of limitations, the notes and mortgages having been held in his name for more than four years before the action was commenced. The proof tends to show that August Doll, for more than ten years before his death, bought and sold realty and personalty in the name of defendant, retaining absolute control over the property, defendant transferring title whenever requested by his uncle. During the latter's illness in 1909 defendant collected the interest on the notes and mortgages, and after his uncle's death in 1910 asserted absolute ownership of the property. The statute of limitations did not commence to run until defendant repudiated his trust and refused to transfer the notes and mortgages to plaintiff. *Davis v. Coburn,* 128 Mass. 377; *Schmidt v. Schmidt,* 216 Mass. 572.

The overruling of a motion to amend the answer is also assigned as error. The application was not made until the trial had been in progress eleven days. No satisfactory reason for the delay is given. It is not shown that the trial court abused its discretion in refusing permission to amend the answer.

Rulings of the trial court upon the admission of evidence and in the giving and refusing of instructions are also assailed, but prejudicial error in these respects has not been shown. The judgment is therefore

AFFIRMED.

HAMER and CORNISH, JJ., not sitting.

OMAHA ELECTRIC LIGHT & POWER COMPANY, APPELLANT, V. ROBERT BUTKE ET AL., APPELLEES.

FILED APRIL 14, 1917. No. 19456.

Pleading: PETITION: CONSTRUCTION. A petition should be construed with reference to the general theory upon which it proceeds, and where it thus states a cause of action for negligence, it is not error to refuse to construe it as also stating a cause of action for a trespass based on an allegation amounting to a legal conclusion.

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

Crofoot, Scott and *Fraser,* for appellant.

Brogan & Raymond and *Fitzgerald & Lynch, contra.*

ROSE, J.

This is an action to recover damages in the sum of $467.29. The claim, according to the petition, arose in the following manner: Plaintiff had an underground conduit running lengthwise in a public alley in Omaha. In making an excavation for a building to be erected on a lot abutting on the alley, defendants removed the support from

the conduit, thus causing the injury of which complaint is made. From a verdict for defendants, plaintiff has appealed.

The controlling question for review is assigned error in the trial court's refusal to give the following instruction requested by plaintiff:

"You are instructed that a landowner does not have any right to go upon a public street or alley and make excavations for the purpose of erecting a building upon his own property, and one so doing or other persons doing so by reason of contract with the landowner are responsible in damages, if by reason of excavating in a public street or alley damage is caused to property which is lawfully located and placed in said alley upon the surface or beneath the surface of the land."

Defendants argue that this instruction was properly refused, because it would have permitted a recovery for a trespass in the alley under a petition narrowed to a charge of negligence in making the excavation. Plaintiff contends that the petition states a cause of action for both negligence and trespass. The decision hinges on the following allegations of the petition:

"That during the month of May, 1914, the defendants herein were engaged in the erection of a building for the Skinner Manufacturing Company on property extending from Jackson street south to the alley, and extending from the east side of Fourteenth street toward Thirteenth street for some distance, which the plaintiff is not able to state exactly, and that in the construction of said building the defendants herein caused an excavation to be made and dirt to be removed therefrom on the property owned by the Skinner Manufacturing Company, and also caused an excavation to be made and dirt to be removed in the alley south of the line of the property owned by said Skinner Manufacturing Company and in close proximity to the conduit maintained by the plaintiff herein, as heretofore described.

"That the defendants wrongfully and negligently caused the paving and the dirt under said paving to be excavated in the alley beyond the conduit of the plaintiff herein without taking proper precautions to prevent said dirt and paving materials from caving in and causing damage to said conduit, and the removal of said paving and the excavating of the dirt therein did cause a large portion of said dirt and paving material to cave in and to damage and destroy the conduit of the plaintiff herein and to damage the cable carried therein for a distance of forty-four feet. * * *

"That the plaintiff herein was obliged to expend said sum of $467.29 wholly through the negligence of the defendants herein."

The allegation that defendants "wrongfully and negligently caused the paving and dirt under said paving to be excavated in the alley" is pointed out by plaintiff as a charge of trespass, when considered with other averments. In this connection it is argued that "wrongfully," not being synonymous with "negligently," characterizes the commission of the acts as without legal right or excuse. To sustain this position reference is made to *Howard's Adm'r v. Hunter,* 126 Ky. 685. There the court was construing a statute creating a right of action for death by "negligent" and "wrongful" acts. In a pleading, however, the ultimate facts showing that an act is wrongful should be stated, the word "wrongfully," in absence of such a statement, being a conclusion. *Scofield v. Whitelegge,* 49 N. Y. 259; *Wallace v. Columbia & G. R. Co.,* 34 S. Car. 62; *Spahr v. Tartt,* 23 Ill. App. 420; *Schiffman v. Schmidt,* 154 Mo. 204. The language copied from the petition imports the theory of negligence. The mere use of the word "wrongfully," in absence of alleged facts constituting trespass, does not imply a cause of action based on that theory. If plaintiff intended to require defendants to answer for excavating in the alley in violation of law, the facts constituting trespass, as distinguished from negligence, should

have been pleaded in the petition. The trial court adopted this view, and thus followed the law. The rule is:

"A pleading should be construed with reference to the general theory upon which it proceeds; and a pleading should not be uncertain as to which of two or more theories is relied upon." Phillips, Code Pleading, sec. 354; *Spargur v. Romine,* 38 Neb. 736.

While some testimony tending to prove a trepass was adduced by plaintiff, it was applicable also to negligence —an issue properly raised by the pleadings and submitted to the jury under correct instructions. There was no error in refusing the instruction requested by plaintiff.

AFFIRMED.

BANK OF BENSON, APPELLANT, V. W. A. GORDON ET AL., APPELLEES.

FILED APRIL 14, 1917. No. 19738.

1. **Appeal: CASE STATED.** A "case stated," as contemplated by the rule for the advancement of cases, must include an agreed statement of the facts upon which the questions of law arise. Rule 14.
2. ———: ———. A "case stated" must be allowed and certified by the trial judge, must be filed with the clerk of the district court, and must be printed and bound with appellant's brief. Rule 14.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Motion to advance overruled.*

Daniel L. Johnson, for appellant.

Byron G. Burbank and *William Baird & Sons, contra.*

ROSE, J.

This is a motion to advance the case under rule 14 (Supreme Court Rules, 94 Neb. XIII), which provides:

"The parties may by agreement state the case to be presented to this court on appeal. The case stated shall in

plain language briefly recite the facts upon which the questions of law arise, and also any substantial conflict in the evidence as to any fact involved, and separately state and number the rulings of the court complained of, with so much of the record as will fully show the law question involved in such ruling and the exceptions and contentions of the parties thereon. The case stated will in such case constitute the bill of exceptions, and must be allowed and certified by the judge who tried the case, and filed with the clerk pursuant to section 7880 and 8194, Revised Statutes 1913. The case stated must be printed and bound with appellant's brief. A case so submitted will be advanced for hearing, if both parties desire."

The parties have agreed upon an abstract of the record which seems to be intended as a "case stated." It does not "in plain language briefly recite the facts upon which the questions of law arise." The rule contemplates a statement of the facts. An agreed abstract of the evidence from which the reviewing court is required to find the facts does not meet the requirment. A case stated is intended as a substitute for a bill of exceptions, and it must make findings of fact in the appellate court unnecessary. The document submitted with the motion to advance is wanting in the following particulars: It has not been "allowed and certified by the judge who tried the case." It has not been "filed with the clerk." It is not "printed and bound with appellant's brief."

The motion to advance is therefore

OVERRULED.

THOMAS SINCLAIR, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED APRIL 14, 1917. No. 19405.

1. **Municipal Corporations: TAXATION: CONSTITUTIONAL PROVISIONS.** By section 6, art. IX of the state Constitution, the corporate

authorities of cities may be authorized by statute to assess and collect taxes for all "corporate purposes." The levy of a tax by the city of Lincoln for campus extension to induce the location of the state university favorably to the interests of the city is for a corporate purpose, and the provision of section 4546, Rev. St. 1913, authorizing such levy, does not violate that section of the Constitution.

2. ———: ———: LEGISLATIVE POWERS. The advisability of conferring this power upon the city is a question of public policy for the legislature, and not for the courts. Whether such location would have such effect was a question for the exercise of the reasonable discretion of the city authorities.

3. ———: ———: DISCRETIONARY AUTHORITY. The question for the city authorities to consider was the benefit of the city at large, and the fact that some parts of the city were or might be benefited more than other parts would not render the tax invalid. Individuals may be called upon to sacrifice some rights to the greatest good for the greatest number.

4. **Statutes:** AMENDMENT. The amendment of the statute giving the cities the authority to levy taxes for university campus extension is germane to the general provision of the statute specifying for what purposes such taxes may be levied.

5. **Constitutional Law:** MUNICIPAL CORPORATIONS: TAXATION. This tax being levied for a corporate purpose of the city of Lincoln, sections 1 and 4 of article IX of the state Constitution and the Fourteenth amendment to the federal Constitution have no application.

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

F. B. Baylor and *D. J. Flaherty,* for appellant.

C. Petrus Peterson, George W. Berge, Charles R. Wilke and *Sterling F. Mutz, contra.*

SEDGWICK, J.,

The authorities of the city of Lincoln levied a tax upon the property of the city to raise money to purchase real estate adjoining the university campus for the purpose of the extension of that campus. The plaintiff brought this action in the district court for Lancaster county in behalf of himself and other taxpayers of the city similarly situated to enjoin the collection of the tax. The district court

found no equity in the petition and dismissed the case at plaintiff's costs. The plaintiff has appealed.

In 1913 the legislature amended the statute which confers power upon the city to levy taxes, and added the following as additional purposes for which such taxes might be levied by the city: "The council shall have the power to levy and collect a tax not to exceed five mills in addition to the tax hereinbefore authorized for the purpose of purchasing, holding and improving public grounds and parks, park extensions and improvements, and university campus extension." Laws 1913, ch. 5, sec. 3 (Rev. St. 1913, sec. 4546). The Constitution of the state provides: "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessments, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." Article IX, sec. 6. Section 4 of the same article provides: "The legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

It is contended that the legislative act attempting to give the city power to levy taxes for "university campus extension" is violative of these provisions of the Constitution. The argument is that the university is a state institution, and that it must be supported by the state at large, and that to place a larger part of this burden upon the city of Lincoln in effect releases other portions of the state from their "proportionate share of taxes to be levied for state purposes," and therefore violates section 4, above quoted. By section 6, above quoted, the corporate authorities of cities may be authorized by statute to assess and col-

lect taxes for all "corporate purposes," so that the question is whether this tax so levied by the city was for corporate purposes. The petition in this case alleged that when this action was begun a general election was about to be held in the state of Nebraska to determine whether the university, except the college of medicine, should be removed to the state farm, or the colleges of the university generally should be located "on the present city campus and on land contiguous thereto," and "that all of the buildings of the university of Nebraska, except the college of agriculture, are now located" upon the present city campus, and that the levy in question "is for the purpose of purchasing ground to the east of said location and extending said grounds." It appears that the object of levying this tax was to, in effect, donate this money to the state for the university for the purpose of inducing the state to continue the location of the university at its present site in the city of Lincoln, rather than to remove it to the state agricultural farm, which is about two and one-half miles east of the present location and is just without the limits of the city of Lincoln. Is this a corporate purpose? Can the legislature authorize the city to donate money for the purpose of retaining the university within the city and at such point therein as shall be found to be most advantageous to the city and its inhabitants? If such donation is for a corporate purpose, then the legislature may authorize the city to do so under section 6 of the Constitution, above quoted. Some of the authorities cited in plaintiff's brief seem to hold that such tax is not for a corporate purpose and is invalid. Under a somewhat different constitutional limitation, it was held that the state might authorize such a tax. *Merrick v. Inhabitants of Amherst,* 94 Mass. 500. The court said: "It may at first sight seem as if the establishment of a college and its endowment and support by the the commonwealth for the education of all persons within the state who might wish to receive instruction in certain branches of science or art would stand on the same footing as the public schools, and that money raised for such an

object ought to be apportioned and distributed in such manner as to bear on all persons and property equally, without a resort to local taxation, which would operate partially, and in a certain sense disproportionately. * * * If the establishment of a public institution of general utility or necessity in a particular locality would be productive of direct and appreciable benefit to persons or estates in the vicinity, either by increasing the value of property there situated, or by the opportunities which it would afford to those residing in the neighborhood to enjoy certain common advantages and privileges with greater facility and at a less cost than others having an equal right to participate in them, but who reside or own estates more remotely situated or in distant parts of the state, we can see no reason why these special advantages or benefits should not be taken into consideration in determining the mode in which the public burden of defraying the cost of the institution should be apportioned and distributed. * * * In this view, it seems to us that the statute by which the legislature empowered the town of Amherst to assess on its inhabitants a tax of fifty thousand dollars, to raise money to be paid to the Massachusetts agricultural college, was legal and valid, and within the scope of constitutional authority conferred on the legislative department of the government."

In *Marks v. Trustees of Purdue University,* 37 Ind. 155, the court said: "While the university is a state institution, and every citizen will have an equal right, under the same circumstances, to avail himself of its privileges, still the location of it in a given county will, doubtless, confer upon that county many local benefits of pecuniary value. The parents of the county can send their sons and perhaps their daughters to the college to be educated, at a less expenditure of time and money than would be incurred if it were situated at a more remote point in the state. The college, with its professors, tutors, attendants, and students, will probably diffuse much more money throughout the community than would otherwise circulate. It may also

add to the educated and intelligent population of the place, and be the means of stimulating the industry and increasing the wealth and moral worth of the community, thereby enhancing the attractions of society and the value of property. There may be other and greater local benefits than those above glanced at. Now, it seems to us that taxes collected to discharge an obligation entered into by the county, solely for the purpose of securing the location of the college in that county, cannot be said, in any just sense, to be collected for any state purpose. On the contrary, they are solely for a county purpose."

The tax complained of was levied for the purpose of directly or indirectly influencing the electors of the state to locate the main university buildings at the point thought to be beneficial to the city at large. Whether such location would have such effect was a question for the exercise of the reasonable discretion of the city authorities. The advisability of conferring this power upon the city is a question of public policy for the legislature, and not for the courts.

The plaintiff has property and resides near the grounds of the agricultural college, one of the locations then being considered for the main university buildings. He contends that it would be more advantageous to him and render his property more valuable if these buildings were located near his property than if they were located on the campus or an extension thereof in the main part of the city, and that therefore this tax as it affects his property is compelling him to pay for that which does not benefit but rather injures him. But the question for the authorities to consider was the benefit of the city at large, and the fact that some parts of the city were or might be benefited more than other parts would not render the tax invalid. Individuals may be called upon to sacrifice some rights to the greatest good for the greatest number. This tax being levied for a corporate purpose of the city of Lincoln, sections 1 and 4 of article IX of the state Constitution and the Fourteenth

amendment to the federal Constitution have no application.

There is no ground for the contention that the amendment of the statute giving the cities the authority to levy taxes for university campus extension is not germane to the general provision of the statute specifying for what purposes such taxes may be levied.

The judgment of the district court is

AFFIRMED.

HENRY MILLER, APPELLEE, V. MORRIS & COMPANY, APPELLANT.

FILED APRIL 14, 1917. No. 19880.

Appeal: CONFLICTING EVIDENCE. Under the employers' liability act (Laws 1913, ch. 198), where the case is heard in court before a judge of the district court upon conflicting evidence, and where there is competent evidence sufficient to sustain the finding, the judgment rendered by the district court will not be set aside on appeal unless it is clearly wrong.

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

James C. Kinsler, for appellant.

Stout, Rose & Wells, contra.

HAMER, J.

The plaintiff and appellee brought this action in the district court for Douglas county under the employers' liability act (Laws 1913, ch. 198) to recover compensation from the defendant and appellant for the alleged total loss of the use of his left arm in an accident arising out of the course of his employment. It seems to be conceded by the defendant that the accident happened at the time and place and in the manner alleged by the plaintiff, but the defendant denied that the plaintiff had lost the use of his

left arm as alleged by him, and further denied that he had been disabled more than a few weeks. It is shown that at the time of the injury the plaintiff was working for the defendant, and that the defendant was operating under the said statute, and it seems to be admitted that the rights of the parties are to be determined under and by virtue of such statute. The plaintiff's injury was sustained in the course of his employment and he is damaged. The average weekly wage earned by the plaintiff during his employment by the defendant was $13.52, and the plaintiff claims that the rate of compensation to which he is entitled is $6.76 a week for 215 weeks. It is admitted that plaintiff received a cut across his left wrist April 19, 1916, which severed the tendons connecting the muscles of his forearm with the four fingers of his left hand, and also severed the ulnar nerve and partially severed the median nerve. The plaintiff claimed that he had permanently lost the use of his left arm and hand. The defendant claimed that some infection developed which resulted in adhesions forming between the injured tendons and the sheaths by which they are covered. There was a contention on the part of the defendant to the effect that there had been no injury to the plaintiff's left thumb, and that, while the tendons in the wrist had been cut and the fingers had become stiff, yet since the 15th of June, 1916, the plaintiff's hand had been in good condition, and that he will regain the use of his second, third and little fingers of the left hand, and that the first finger had so improved by June 15, 1916, that he had been able to use it in connection with the thumb on his left hand; and that as his hand now is he can make use of it in performing his work in the hog gang of the defendant; that he could have returned to his work in the hog gang at least a month before the trial, but did not do so; that he was a butcher in the packing trade, but could do almost anything in the cutting and dressing of hogs; that until the day he was injured he shaved them sometimes, and that he gutted hogs sometimes; that he would also sometimes cut the heads off hogs, and at other times he would trim

shoulders and bacon; that after the hogs are killed they are carried along on an endless chain, and the butcher can steady the hog with his left hand and take his knife in his right hand and reach up and start through and open the hog up all the way down to the neck. The defendant contends that, notwithstanding the condition of the plaintiff's stiff fingers, he could still work in the hog gang and use his left hand to steady the hog while he held the knife in his right hand and did the cutting with it, or, if he was shaving hogs, that he could take hold of the hog with his left hand as it came along and turn it around while he shaved it with his right hand; and in sticking hogs it is claimed that all he would have to do as the hog came along on the chain was to put his left hand on the hog to steady it, while he used his knife in his right hand to do the sticking. One of the witnesses testified that the hogs came along at about the rate of seven a minute, and sometimes it only took a slight pressure to turn the hog around, and at other times "they turned mighty hard." It is claimed that the plaintiff's left hand and arm are strong enough to do this kind of work in which he was engaged at the time he was injured. It is also claimed that the defendant's foreman tried to get the plaintiff to go back to work, and that the defendant was then, and still is, ready to give him work.

The defendant seriously objects to the judgment of the district court, and seems to be in earnest that the plaintiff should receive nothing, or at least very little.

There appears to be no dispute that there was a deep cut in the wrist which severed the tendons connecting the muscles of the forearm with all four of the fingers of the left hand, and which also severed the ulnar nerve and partly severed the median nerve; and there was also an infection which prevented the healing; and there is evidence that at the time of the trial, four months after the accident, the lower part of the left hand was without a sense of feeling, and also the last two fingers of that hand, and that a needle could be stuck in that part of the hand without being felt; and there was also only a partial sense

of feeling in the middle finger of that hand; also that the forefinger of the left hand was so stiff that it could not be brought in contact with the thumb, and that the thumb could not be laid over so as to touch the palm of that hand. In any event the hand was badly crippled. Dr. Betz testified he did not expect the plaintiff to be able to use his hand for any ordinary purpose of manual labor.

There are perhaps some minor questions which we do not deem it necessary to discuss.

Subdivision 3, sec. 3662, Rev. St. 1913, provides: "For all disability resulting from permanent injury of the following classes, the compensation shall be exclusively as follows: For the loss of a hand, fifty per centum of the wages during 175 weeks; for the loss of an arm, fifty per centum of wages during 215 weeks."

In this case the hand was injured, and also the arm was injured, and the trial court had before it the consideration under the facts of both these subdivisions.

It should be remembered that the judge who heard this case saw the witnesses and heard them testify. He had a better opportunity to determine the facts than we have. He also must have seen the injured wrist and the stiffened fingers and perhaps the arm, and he could therefore tell whether they corroborated the testimony of the witnesses. The district court found that the plaintiff had permanently lost the use of his left hand, and allowed him compensation for 175 weeks. Of course, it might be contended with some show of right that something of the hand is yet left, and that it may still be useful to the plaintiff; but, if he did not lose all of his hand, he probably did lose the use of his arm to some extent, because the deep cut severed the tendons in the wrist and severed the ulnar nerve, and partly severed the median nerve. His wrist and arm will probably never be as good as they were before the injury.

The judgment contains an elaborate finding, and closes with: "It is therefore considered, ordered, and adjudged by the court that the plaintiff have and recover of the defendant, Morris & Company, judgment in the sum of

$143.96, with 7 per cent. interest from this date, and that execution issue therefor; that the defendant pay the plaintiff further compensation weekly at the rate of $6.76 per week, beginning with the date of this judgment and ending at the end of a period of 175 weeks after the 19th day of April, 1916, and that the costs of this proceeding be taxed to the defendant." The judgment is dated on the 24th of August, 1916.

This case was tried before a judge of the district court and without a jury. In *National Bank of Ashland v. Cooper,* 86 Neb. 792, it is said in the body of the opinion: "The rule is settled beyond question, in this jurisdiction, that when an action at law is tried without the intervention of a jury the findings of the trial court are entitled to the same consideration by the appellate court as is the verdict of a jury." *Evans v. De Roe,* 15 Neb. 630. It is also well settled that a verdict based on conflicting evidence will not be set aside unless it is clearly wrong. *Woods v. Hart,* 50 Neb. 497. In *Hare v. Winterer,* 64 Neb. 551, it is held, as stated in the syllabus: "The finding of a trial court upon an issue of fact is conclusive in this court, unless clearly wrong."

The case was heard in the district court upon conflicting evidence, and it appears to have been competent and quite sufficient to sustain the finding and judgment of the district court. We do not feel at liberty to set aside the judgment, and cannot do so under the rule established, unless it is clearly wrong.

The judgment of the district court is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

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

FILED APRIL 14, 1917. No. 18846.

Landlord and Tenant: DEFECTIVE PREMISES: LIABILITY OF LANDLORD. "The rule of *caveat emptor* applies to leases of real estate, and, in the absence of warranty, deceit, or fraud on the part of the lessor, the lessee cannot recover for personal injuries received through latent defects therein, of which the lessor had no knowledge at the time of making the lease, and which were as patent to the lessee as to the lessor." *Davis v. Manning*, 98 Neb. 707.

Rehearing of case reported in 100 Neb. 69. *Former judgment of affirmance vacated, and judgment of district court reversed, and action dismissed.*

DEAN, J.

This case is here on rehearing. The former opinion is reported in 100 Neb. 69, and in which a lengthy statement is made. There are a number of points discussed in the briefs upon which the evidence is conflicting. The verdict of the jury settled these questions of fact. Among them are whether the plaintiff's foot was injured, as she contended, by a puncture from a concealed nail in a threshold, or whether, as the testimony for defendant tended to prove, it was injured by a nail in the heel of her shoe. At all events, the immediate cause of her injury was blood poisoning caused by an infection. The verdict settled the question whether the injury by the nail was the proximate cause of the infection or whether the wound was infected afterward from another source. Two questions remain to be considered, whether, conceding the facts established as the plaintiff claims, the landlord is liable as a matter of law for injuries resulting from a hidden defect in a threshold of which he has no knowledge, and whether the evidence supports a verdict based upon a promise, made before the plaintiff took possession, to put the premises in repair and keep them in repair.

The evidence as to the condition of the threshold is about as follows: The plaintiff's brother, a street car conductor, who lived with her, says that they finished moving upstairs late in the afternoon, that about 9 o'clock at night his sister told him she had stepped on something; that he first looked in the hall, but found nothing, he then looked at the threshold. He testifies: "I could see nothing by observation on the top of it. I examined it. From the appearance on the top you could not tell that there was anything wrong, but on bearing my weight on it I found there was a spring in the threshold, and on moving my hand along over there to see whether there was anything on the threshold, thinking there might be something wrong in a case like that, I found that there was a nail protruding from the threshold, which was a piece of board nailed over the threshold. Q. How did you discover that would show above the board? A. By weighting down with my knee and feeling with my hand. The weight of my hand by bearing down with the hand would not spring down enough. Q. And the weight of your knee? A. With the weight of my body on the knee, and that on the threshold, would make the nail protrude through. Q. How far would it protrude through? A. With my left it was possibly a quarter of an inch." The next morning he examined the threshold again. He was unable to pull the nail with a hammer, but, by raising the piece of wood that had been nailed down, he pulled the nail by the use of pliers. He was then asked: "Q. Could you see anything wrong with it by looking at it from a distance in the room. A. No, sir. Q. You could not see the concave under it? A. No. sir."

The plaintiff testified that she first knew the board would spring down when she stepped upon it, and, on being asked when she first discovered the nail, answered: "We noticed it that evening first, and then we examined it more thoroughly the next day. Q. Before or after the injury? A. After the injury. Q. Before that, did you notice anything wrong with that threshold? A. No." Mrs. Mc-

Elhinney testified: "Q. And stepping on the board or threshold there, state what you could see, if anything, concerning the nail you mention. A. Nothing at all except the threshold." Another witness for plaintiff who lived across the hall testified that he noticed the board about two weeks before the plaintiff moved in, and that the board had a tendency to spring when it was stepped on. On cross-examination he testified: "Q. When you stepped on it was your attention attracted to any loose nails in the board? A. No, sir."

Norlen, the man with whom the plaintiff changed apartments, testified that he nailed the board on the threshold in October, 1909, that he moved out of the apartment the same day that Mrs. Rankin moved in. He then testified: "Q. Was there anything to call your attention to the nail in any way? A. No. Q. Did you and your children use that doorway? A. Yes, we did. Q. Had you or your family heard of any nail in that threshold? A. No. Q. I will ask you Mr. Norlen whether at or about the time you left there that threshold was in a condition so as to move up and down if anybody stepped on it? A. I could not say. I never noticed it. I did not pay any attention to it. Q. Was there anything about the appearance of the threshold or its condition to challenge your attention or call your attention to the fact that it was movable and moving up and down? A. No."

This is the substance of the testimony in favor of the plaintiff with respect to the condition of the threshold. For defense, those in charge of the building testified they never heard of any defect in the threshold until this suit was begun, two years after the alleged accident, and that Norlen had no authority to make repairs. It is undisputed that the defect in the threshold was not obvious and open to observation, and that it had not been seen by any one until after Mrs. Rankin was hurt. Plaintiff conclusively established the fact that the defect was latent and hidden. She produced no evidence that the lessor or his agents had any knowledge or notice of the defect, and their testimony

is undisputed that they neither knew nor had any reason to suspect such a condition.

Can a landlord be held liable as a matter of law for an injury resulting from such a latent defect of which neither he nor his agents had any knowledge? This question is settled in this state by the case of *Davis v. Manning,* 98 Neb. 707, wherein the opinion examines the authorities and lays down the rule: "The rule of *caveat emptor* applies to leases of real estate, and, in the absence of warranty, deceit, or fraud on the part of the lessor, the lessee cannot recover for personal injuries received through latent defects therein, of which the lessor had no knowledge at the time of making the lease, and which were as patent to the lessee as to the lessor." The condition of the case brings it clearly within the rule in *Davis v. Manning,* and there can be no recovery on this theory.

Upon re-argument and re-examination of the case, we are satisfied that the agreement to make repairs, even if it was as the plaintiff states it, would not include such defect, if it existed as described by plaintiff and her witnesses. The testimony, not only of the witnesses called by defendant, but as well those called by plaintiff, establish the hidden nature of the defect. The testimony discloses that it comes within the generally accepted and recognized definition of the expression "latent defect" as used by law-writers. On this point the law seems to be well settled. *Bennett v. Sullivan,* 100 Me. 118, announces a rule that is generally accepted: "The owner of private property owes to a prospective lessee no duty to exercise ordinary care to ascertain and apprise him of unknown defects in the property to be leased where such prospective lessee has equal opportunity to ascertain the defects." *Walsh v. Schmidt,* 34 L. R. A. n. s. 798 (206 Mass. 405) holds: "A statement by a property owner to a prospective tenant that he has fixed the house all right, that it is fit for anybody to live in, does not constitute an express warranty that there are no latent defects which may cause injury to the tenant." See, also, *Cate v. Blodgett,* 70 N. H. 316; *Morgan v. Shep-*

pard, 156 Ala. 403; *Howell v. Schneider*, 24 App. D. C. 532; *Shinkle, Wilson & Kreis Co. v. Birney & Seymour*, 68 Ohio St. 328.

Our former judgment is vacated, and the judgment of the district court is reversed, and the action is dismissed.

REVERSED.

HAMER, J., dissenting.

This case is to recover damages for an injury done to the plaintiff through the negligence of the defendant by its servant, one Norlen.

The case of *Davis v. Manning*, 98 Neb. 707, was wholly unlike it. There the plaintiff had lived for several months in the house which she had rented, and she had been an occupant of the house before the time of her occupancy when injured. She knew that the floor was rotten. She knew that because there were holes that had rotted through it and which were patched up with tin. These pieces of tin were scattered over the floor of the kitchen. Each piece covered a hole. This fact is undisputed. There was no attempted denial of it. An examination of the original petition filed in that case shows that the plaintiff claimed that she "did not know of the rotten and defective and dangerous condition of the floor;" that she was preparing her breakfast and was standing near the front of her stove and was about to step from the stove to the pantry, and that "a part of one of the floor boards broke through, causing a hole about 7 by 2½ inches in size, into which the heel and a portion of plaintiff's left foot passed, thereby throwing plaintiff, * * * and crushing and bruising her left side, and fracturing and breaking her left thigh bone."

In the answer the injury does not appear to have been denied, but it was claimed that the plaintiff "had occupied and lived in said house since about the 1st day of May, 1905," and prior thereto, and that the condition of said premises was fully known to plaintiff, and was open

and obvious to her. It was said further that she assumed the risk.

Judge Sedgwick wrote the first opinion (*Davis v. Manning*, 97 Neb. 658), in which he says: "There is, however, substantial evidence, as we have said, by at least three witnesses that there had been openings in other parts of the kitchen floor which had been covered with tin," that "plaintiff's original petition was in evidence, and it contained the allegation that in other parts of the floor there were cracks and openings, and that she had requested the defendant's agents to repair the same. The defendant contended that this proved that the plaintiff had notice of the condition of the floor, and was therefore guilty of contributory negligence. The plaintiff in her evidence at the trial testified that she knew that these cracks existed in other parts of the floor and that they had been repaired." It was also all the time contended: "That plaintiff knew of the condition of the floor." On the rehearing of *Davis v. Manning*, 98 Neb. 707, it is said: "It was plainly to be seen that there were no ventilators under the kitchen, and the tenant must be held to have equal knowledge of the law of decay as the landlord."

In the instant case Norlen testified: "Q. You paid nothing for your rent for that reason? A. No. sir. Q. With whom did you make this arrangement? A. Payne & Slater. Q. They were the agents of that building? A. Yes, sir." Norlen was asked: "Q. Was one of your duties to look after the other tenants in the building? A. My duty was to shut off and turn on—shut off and turn on the water in the winter when the cold weather was on, and look after the plumbing." Payne & Slater were the agents for the building, but a man named Porter also helped with the rents.

Edwin M. Slater testified that the repairs were made through Mr. Porter; that Mr. Porter represented the firm of Payne & Slater in looking after the property of the Elizabeth Kountze Real Estate Company; that he had charge of the building and collected the rents. Slater also

testified that they had a man down there who occupied one of the apartments. "Q. And do you know as to who was janitor down there, and who had matters in charge in any way? Do you know anything about that? 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 the name. Q. Norlen? A. Yes, sir. I think that was the name."

He then testified that Norlen received his rent free. Janitors are found in apartment houses all about, and they do not pay rent because they are servants and are therefore kept in the houses for the benefit of the property and its occupants. "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 (empty apartments), and to collect the keys and take care of the keys down there."

Appleby testified that Norlen made repairs. "Q. Do you know whether Mr. Norlen made some repairs in and about the building? A. Well, he done some repairing." Mr. Grimmel testified that his company was to, and did, make some repairs on the building.

It will be seen that he was discharging all the duties of a janitor, and, in addition, he was assisting the company's agents by taking care of the keys and notifying the office when tenants had gone out. He was assisting in keeping the premises occupied. In addition to that, as he himself says, he turned the water on and turned it off and looked after the plumbing. The witness further testified on cross-examination that he (Norlen) may have made some repairs. I think that he looked after the yard and mowed the grass, if there was any there, and mowed weeds and

something like that. Mr. Slater was candid enough to testify: "Q. And what he did was for your firm? A. Yes, sir. Q. And Mr. Porter was representing the firm? A. Yes, sir."

Norlen was the servant of the defendant real estate company. He stayed at the building to watch it and to perform the duties of a servant. He stayed at the building to turn the water on as it was needed, and to turn if off when it threatened danger by freezing up and bursting the pipes. He cut the grass on the lawn. He gathered up the keys when the tenants left, and he was their custodian. He notified Payne & Slater when the rooms were vacant. He did what any servant entrusted with such duties would have done. He was occupying the room in which the plaintiff was hurt just previous to the time when she received her injury. The plaintiff and Mr. Norlen talked over the question of exchanging rooms. It was then agreed that Norlen should go out of the room where Mrs. Rankin was injured, and that he should go down into the basement formerly occupied by Mrs. Rankin, and she was to go up-stairs into the room which had been occupied by Norlen up to that time. Payne & Slater agreed to it, and thereupon the removal was made. On the evening of the day when the removal was made, late in the afternoon, Mrs. Rankin started to go to the toilet. She had probably been in her new apartment not more than two hours, and she knew nothing about the danger that threatened her. She was in her stocking feet. She stepped on the board which Norlen had placed over the threshold. Immediately the nail that was still in this board came up through it. It ran into Mrs. Rankin's heel. No one denies what happened there. What Norlen did was alleged to be done "for his own convenience." Counsel for the defendant sought to excuse his client. Norlen was not there on his own account, but as the servant of the defendant real estate company. Slater says so. Norlen was to take care of the property. Regardless of that duty he placed a dangerous trap in the threshold. Mrs. Rankin had not seen it. The nail was in-

visible. Of course, if the board extended over the threshold, which was of soft wood, it would bend down when Mrs. Rankin stepped upon it and the nail would then run up into the heel. It was that nail which made an injury that resulted in all the bones being removed from Mrs. Rankin's heel.

Caveat emptor applies where there is no fraud and no injury that is the result of negligence upon the part of the landlord and his servants. The job which Norlen did should have been done in a workmanlike manner by a carpenter. The company did this work with a bungling servant instead of doing it with its carpenter. The carpenter would have known how to fix that threshold. He might have charged more than the janitor cost the landlord, but he would have left a proper threshold there. The duties of a janitor are probably becoming greater as more apartment houses are constructed. The landlord is engaged in an effort to extend the service of the janitor. It is like a railroad company attempting to use a brakeman as an engineer. The janitor not only makes fires and takes away the ashes and garbage, but he may put the screens in the windows and take them out, and he may turn the water on and off, and look after the plumbing and try to make a plumber of himself. He does all this with his landlord's consent. He may also cut the grass and weeds and get new tenants and new keys for the apartments, and he may occasionally put in a new electric lamp with its wire and its necessary connections. He is the servant of all work in an apartment house by the direction of his landlord. The room which he occupies is always rent free. That is one of the badges that marks him as a servant.

Nothing was said in the original opinion which was in anyway entitled to be called a criticism upon the private character of any member of the defendant company.

If Mrs. Rankin's case should be submitted to a man sitting as a judge or a juror and having many farms or houses in the city, he might shut his eyes and ears to the evidence in spite of an upright and honest desire to be fair.

If the judgment in this case in favor of Mrs. Rankin shall finally be set aside, I shall never feel sure of anything that my friends may write, however it may be justified by the evidence.

On rehearing of *Davis v. Manning,* 98 Neb. 707, cited on behalf of the appellant, the syllabus reads: "The rule of *caveat emptor* applies to leases of real estate, and, in the absence of warranty, deceit, or fraud on the part of the lessor, the lessee cannot recover for personal injuries received through latent defects therein, of which the lessor had no knowledge at the time of making the lease, and which were as patent to the lessee as to the lessor."

It was all right in *that* case to apply the rule of *caveat emptor,* because the plaintiff then had an opportunity to know the condition of the floor where she was standing, and she did know it if she had thought of the facts within her knowledge. She had all the opportunity to know it that the landlord had. She knew of the repairs. She saw the pieces of tin covering the holes that had rotted through the floor. But the rule of *caveat emptor* is all wrong in the instant case, because here the plaintiff had no opportunity to know the condition of the threshold on which she stepped, and she did not know it until the nail pierced her heel and she fell down screaming and her brother ran to help her. Judge Sedgwick in his dissent said: "We should probably follow the rule of *caveat emptor,* which is so well established in this country. It has been a little difficult to apply this rule with exact justice in some cases, and some of the opinions seem a little extravagant in protecting reckless landlords. The rule should not be strained in favor of shrewd landlords, who are familiar with the construction of buildings and the general condition of the same, against an elderly lady who has no such knowledge and experience, and who must necessarily rely upon the good faith of the landlord." Judge Fawcett appears to have believed the same way, because he joined in Judge Sedgwick's dissent. Of course, if Mrs. Davis did not know the condition of the floor and

had no good reason to know it, then it is difficult to understand why Judges Sedgwick and Fawcett were not right in their dissent. The way to beat Mrs. Davis in her case was to exact of her the same high standard of knowledge of cause and effect that might naturally be expected of a man of wide education, broad experience, and accurate judgment. When she saw the repairs made on the kitchen floor she might have had reason to suppose that a greater or less number of the boards in the floor were rotten on the under side. That knowledge, if she had been able to reach a right conclusion concerning it, would have shown her that she was in danger if she continued to use the floor. But the *Davis v. Manning* case falls very far short of the instant case, for Mrs. Rankin had no visible thing to tell her what was wrong, and that a horrible danger was beneath her feet.

Judge Sedgwick cites *Hines v. Willcox,* 34 L. R. A. 824 (96 Tenn. 148), where it is said in the third paragraph of the syllabus: "A landlord is liable to his tenant for damages that may result from the unsafe and dangerous condition of the premises leased when that was known to, or with reasonable care and diligence might have been known to, the landlord, but not to the tenant, although the latter examined the premises and did not discover the defect."

In *Lindsey v. Leighton,* 150 Mass. 285, it was held that it was not necessary to show that the owner had actual knowledge of the defects; that his duty was that of due care, and ignorance of the defect was no defense in the absence of such care.

In 1 Pingrey, Real Property, sec. 592, it is said: "Of course, if there is a concealed defect which renders the premises dangerous which the tenant cannot discover by the exercise of reasonable diligence, of which the landlord has or ought to have knowledge, it is the landlord's duty to disclose it, and he is liable for an injury which results from his concealment of it."

If we apply the above doctrine to the instant case, the fact that the servant who fixed the threshold knew the condition that it was in, or ought to have known it because he did it, was knowledge of the landlord. If the servant knew it, the landlord knew it. The officers of a railroad company do not generally know of the negilgent acts of their employees at the time they are committed, but the railroad company is nevertheless held liable for the wrongs and injuries which their employees commit through negligence.

That Norlen notified Payne & Slater when the tenants went out, and that he took care of the keys, shows that he was assisting somewhat in the conduct of the business. He was undoubtedly helping to get tenants. He helped to get Mrs. Rankin as a tenant. She would never have moved up into his room but for the fact that he was willing that she might. If she had not found a better room than the one she occupied in the basement she might have left the premises. Norlen was an active man or he would not have been there. The man who lives in a part of my house without paying rent, and who helps take care of the house and the lawn, is my servant.

In Webster's New International Dictionary, servant is defined: "(2. Law) any person employed by another and subject in his employment to his employer's directions and control; an agent who is subject to the direction and control of his principal. *Servant* is defined in the codes of some states of the United States as 'one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master.' (3) One who serves, or does services, voluntarily or on compulsion; a person who is employed by another for menial offices, or for other labor, and is subject to his command; a person who labors or exerts himself for the benefit of another, his master or employer; a subordinate helper."

Norlen was clearly a subordinate helper. Payne & Slater could not stay out there in the building and turn the water on and off, nor could they remain there to gather up the keys when the rooms were vacated. Norlen was quite an efficient helper so far as they were concerned. Neither of them fixed the plumbing or cut the grass and weeds. They were running a great real estate renting agency and were all the time agents of the defendant company. What the servant did in this case was towards the maintenance of the apartment in a habitable condition. That was clearly within the line of his employment. He put the threshold in to keep the cold out and to make the room habitable.

In *Younkin v. Rocheford,* 76 Neb. 531, the act done was to pick up a bucket containing oil and throw it on the fire in a brick-kiln. The man who did it had nothing to do with burning the brick-kiln. He was not there for that purpose. He was engaged solely to press brick on a table, and the oil which he used was to be used on the roller to oil the tables. He was a brick-maker, but he was not a brick-burner. He used the oil for another and different purpose than that for which he was employed, and therefore he was clearly outside of the scope of his authority. He caused a man to be dangerously burned.

In *Neff v. Brandeis,* 91 Neb. 11, it was held that, to sustain a recovery for injuries caused by being run down by an automobile owned by the defendant, the plaintiff must show by a preponderance of the evidence that the person in charge of the machine was the defendant's servant, and was at the time of the accident engaged in the master's business, or there with the master's knowledge and direction. The defendant in that case had loaned his cars to a third party, and he took it to a garage, and it was sent out by the garage in charge of their man and for the use of the borrower. The chauffeur was returning the car to the garage when he ran into a vehicle that was driven by the plaintiff, and then and there committed the injury. The garage had loaned the car without the consent of its owner.

The nail protruded. It had been driven through an elastic springy board. The nail caught and was fast down in the lower part of the board of the threshold and the floor. Because the board was springy and would work up and down over the sharp end of the nail there was danger to any one who might step upon it. When the head of the nail broke off, of course the board would come up because no longer retained in its place. When Mrs. Rankin stepped upon the board it went down because it was springy and because there was a concave space in the threshold that was directly beneath the board and which was unoccupied. This board was of soft material. It was less than an inch in thickness. It is uncontroverted that it was springy. It was probably not quite as thick as Norlen's testimony would make it. If the board was of elmwood or soft pine or basswood or any other soft wood it was not likely to be firm under the feet of any one who stepped upon it.

We are used to the idea that the railroad company must pay damages for the negligence of its servant. We are hardly accustomed to the other idea as yet that a real estate company must also pay.

Norlen was there at the request of the renting agency, Payne & Slater. The renting agency acted for the owner, but was obliged to do so through its assistants. Norlen was one of its assistants. He was the servant on the ground and in the immediate possession of the premises. Norlen could do what he did because whatever he did was done directly by permission of the renting agency which acted for the owner and which assisted the owner in taking care of the property and in renting it. In *Young v. Rohrbough*, 84 Neb. 448, it is held that where the landlord leased premises which were defective in construction, and an injury occurred because of such defect, then the landlord is liable if he knew, or under all of the circumstances ought to have known, of such defective condition. The plastering in that case fell off the walls of a room and killed a lady member of a fraternal society occupying it. The principle declared in that case has never been denied by this court.

Nor has it been changed, although the former judgment was vacated, but for another reason than that given in the first opinion. *Young v. Rohrbough,* 86 Neb. 279. The former judgment was vacated because, "Where all of the defendants are by the court's instructions placed in the same relation with respect to 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"—citing *Gerner v. Yates,* 61 Neb. 100. The original opinion should be allowed to stand, or one reaching the same conclusion. Norlen did a bad job. He was the servant of the defendant. What the real estate company did it did through him. He should have taken out the remnant of the threshold and should have built it up from the bottom. If he had done this, even though he was a poor workman, Mrs. Rankin would not have been hurt. But a carpenter should have been employed. I am not forgetful that a majority of this court voted to adopt the opinion which we published to the world as our opinion, and, in addition, one other member of the court said the conclusion was right, and all this was done after a full consideration by the whole court and after several of us had contributed our share to the opinion as it finally stood when it was voted upon. I think that the verdict of the jury settles the question in favor of the plaintiff as to how the injury was received. It also settles the question that Norlen was the servant of the defendant real estate company. There is abundant evidence to sustain the finding of the jury as to both matters. No one interfered with Norlen's duties. They were exclusively his. He lived in the room rent free. He turned the water on and off. He cut the weeds. He kept the keys and looked for tenants. He was in direct communication with the real estate agency that had charge of the renting of the house. The contention of the defendant that Norlen was not a servant would not now be made by defendant's counsel were it not with the hope of getting rid of the judgment.

KATZ-CRAIG CONTRACTING COMPANY, APPELLANT, V. CITY OF COZAD, APPELLEE.

FILED APRIL 14, 1917. No. 19212.

1. **Municipal Corporations:** CONTRACTS: ESTIMATES: CONCLUSIVENESS. Where a contract for the installation of a municipal water-works system provides that final payment shall be made when the work has been approved and accepted by the city council or by the engineer, and where after installation the city council took possession of the plant and used it continuously for more than three years without complaint, a final estimate issued by the engineer, immediately before such appropriation of the plant by the city, which designates a given sum as the "balance due contractor," in the absence of fraud or of such gross mistake as to imply bad faith or a failure to exercise an honest judgment, is conclusive as between the parties.
2. ———: ———: ———: ———. The evidence examined, discussed in the opinion, and *held* that the supervising engineer employed by defendant to inspect and approve the construction of the water-works system in suit is the sole arbiter as between the contractor and the city, and that in the absence of fraud a final estimate issued by him certifying the amount due the contractor is binding upon the parties.
3. **Contracts:** CONSTRUCTION BY PARTIES. Where a contract is ambiguous in any of its terms, the interpretation mutually placed thereon by the parties thereto is conclusive as to their respective rights arising thereunder.

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

Isidor Ziegler and *E. A. Cook,* for appellant.

Wilcox & Halligan, contra.

DEAN, J.

The city of Cozad entered into a contract to pay the Katz-Craig Contracting Company of Omaha $34,400 for the installation of a water-works system. The plant was duly installed by the company, and partial payments were made from time to time by the city to apply on the contract price on estimates furnished by Hershey S. Welch a con-

structing engineer who was employed by the city. The contract is dated September 14, 1910. This suit was begun on October 6, 1914, by the Katz-Craig Contracting Company, plaintiff and appellant, in the district court for Dawson county to recover $7,291.65 from the city of Cozad, defendant and appellee, that being the amount alleged to be remaining unpaid on the contract for completion of the plant. Plaintiff obtained a verdict and judgment thereon for $3,689.70, but, being dissatisfied with the amount of recovery, brought the case here for review.

The petition, in substance, alleges that Hershey S. Welch, a constructing engineer, was employed by the city to supervise the work; that the constructing engineer made a report and a final estimate showing the amount due from defendant. The answer denies generally the unadmitted allegations of the petition; admits that Hershey S. Welch was the engineer employed by defendant to prepare the plans and specifications, but denies that he was the supervising engineer in charge of the work, or that he had control thereof; admits that Welch was employed by the city to make estimates of amounts due plaintiff as the work progressed; alleges that the ditches for the water mains were not dug the depth required by the contract, and alleges defective covering thereof.

Plaintiff's reply denied generally all of the new matter in the answer, and denied specifically any obligation to reimburse defendant for its counterclaims.

The issues are simplified from the fact that defendant in its brief concedes that "the city is not claiming damages for defective construction of the plant. The city concedes that the plant was constructed in all respects as required by the contract, and there is not now any question between the city and the contractor on that point; and, while the plaintiff herein continually mentions damages in his brief, a critical examination of the answer in this case will not show any amount claimed as damages, but the only amounts claimed are reductions for work not done and performed by the plaintiff."

It is pointed out by plaintiff that the contract does not provide for the deductions from the contract price for which the city contends. The contract makes no reference whatever to such deductions. The contract is not ambiguous. Its terms are clearly expressed. It does not contain an obscure sentence. In such case it is the duty of the court to discover the intention of the parties from the language of the contract. It is no part of the province of the court to put a strained construction on the instrument in suit, nor to impose upon the parties a different contract than that entered into by them. In any event the interpretation placed on the contract by the parties should govern.

To support its contention the defendant argues that Hershey S. Welch was not the duly authorized supervising engineer to oversee and to pass upon the work performed by the plaintiff company. Plaintiff offered in evidence, without objection, the contract of employment between the defendant city and Hershey S. Welch that had to do with his services as engineer. It is therein shown that Engineer Welch not only prepared the "plans and specifications and detail drawings" for the plant, but that he was employed by the city to supervise and to oversee the "work and the inspection of the material used therein during the time said water-works system is being constructed by the contractor." This employment contract may properly be considered in connection with the record, and, all taken together, it is fairly disclosed that Hershey S. Welch was employed by the city and was actively engaged as its supervising engineer. The defendant city paid to the plaintiff many thousands of dollars upon estimates furnished by Engineer Welch. Not a payment was made that did not have his approval. The contract between the plaintiff company and the defendant city provides that payment for material and work "is to be made on estimates furnished by the engineer under the plans and specifications which are made a part of this contract." In view of the contract and of the record generally, the city can scarcely be heard to deny the employment and active service of Mr. Welch as

supervising engineer with full authority to bind the city in the premises. A proper construction of the contract makes the certificates of the engineer conclusive of the quality, the material furnished, and of the work performed. *Malone v. City of Philadelphia,* 12 Phila. (Pa.) 270. It also appears from the record that on October 14, 1910, Councilmen Hart, Fochtman, Hess and Wallace were appointed a committee to look after details of the plant, and of these members Councilman Hart was the chairman. It was his duty, as the record shows, "to look after the work of the water-works system," and the record elsewhere discloses that he was fairly active in the performance of the civic duty that was committed to his charge.

On July 26, 1911, engineer Welch prepared and presented to the mayor and city council his "report" wherein he recommended an acceptance of the water-works system, and his "final estimate" wherein he certified $6,956.11 as the "balance due contractor." Below his signature appeared some credits claimed by the city, which cannot be considered because he testified that they were placed there at the instance of some person connected with the city government, and that it was done without his approval. It was therefore no part of the estimate of the engineer. It may be noted that the deductions so appearing below his signature aggregate $1,860, and of this sum $1,650 is a claim for damages, contemplated in the contract, for 165 days' delay at $10 a day beyond the time agreed upon for the completion of the plant. The trial court properly withdrew this claim from the consideration of the jury because no testimony was offered to prove any damages for such delay. It will not be considered by us because defendant's brief contends only for deductions for work not done and performed. The remaining items aggregated only $210, but they cannot properly be considered as a part of the engineer's final estimate, for the reasons already given.

Sheffield & Birmingham Coal, Iron & R. Co. v. Gordon, 151 U. S. 285, holds: "When a contract provides that work done under it shall be examined by a superintendent every two weeks, and if done to his satisfaction it shall be a final acceptance by the other party, so far as done, the acceptance by the superintendent forecloses that party from thereafter claiming that the contract had not been performed according to its terms."

Omaha v. Hammond, 94 U. S. 98, holds: "Where a contract, entered into by a city for the construction of certain public works, provides that they shall be completed under the supervision and to the satisfaction of an officer of the city, his action, in finally accepting them, is an announcement of his decision that the terms of the contract have been complied with, and is binding upon the city."

The record before us utterly fails to sustain the defendant's argument in support of its claim "for reductions for work not done and performed." The specifications, which it is agreed are a part of the contract, provide that "the decision of the engineer will be final relative to the materials furnished;" and that the engine and the machinery and the pump fixtures "will be subject to the inspection and approval of the engineer in charge." It is also specified that "all pipes, specials, valves, and hydrants will be located as directed by the engineer," and that "the trenches shall be dug and pipes laid according to the grades and lines given by the engineer." And the contract finally provides that "the final estimate, including the 20 per cent retained from monthly estimates, will be paid in cash upon the completion of the work according to contract, providing it has been approved and accepted by the city council or their engineer." *National Water-Works Co. v. Kansas City,* 62 Fed. 853, 866, 27 L. R. A. 827, 838; *Mercer v. Harris,* 4 Neb. 77; *School District v. Randall,* 5 Neb. 408; Wait, Engineering & Architectural Jurisprudence, secs. 429, 430, 446, 485.

Fraud has not been alleged nor proved. There is no charge nor proof of collusion between plaintiff and any officer or employee of the defendant. The city chose and employed the engineer. The plaintiff acquiesced in its choice. The engineer was thereby constituted sole arbiter as between the parties. The work was approved by the engineer as the contract provided. He recommended an acceptance of the plant in his report, and in pursuance thereof and of his final estimate a warrant should have been drawn in payment of plaintiff's claim. Defendant contends that it was the province of the city authorities, and not that of the engineer, to inspect and approve the work before acceptance and final payment. It is sufficient answer to point out: First, that the contract expressly provides that the plant may be "approved and accepted by the city council or the engineer;" and, second, that the duly authorized authorities of the city took possession of the water-works plant and used it continuously without complaint for more than three years before this suit was commenced. Defendant thereby acted upon and ratified the acceptance of the engineer. It may properly be added that without proof it will not be presumed that the city officials failed to respond to the full measure of the official duty that was imposed upon them, and that before they took possession of the water-works system it was duly approved by them as well as by the engineer. The record before us bears convincing proof that the plant had the approval both of the council and of the engineer. In the absence of fraud or of mistake, such complete appropriation by defendant's officers of the water-works system in suit and its continuous and uninterrupted use for so many years estop defendant from denying its liability under the contract.

The court is unable to discover any reason anywhere in the voluminous record why the defendant city should not, after the lapse of so many years, pay the plaintiff for the water-works system that "was constructed in all respects as required by the contract," as the defendant's brief com-

mendably concedes. The present case falls far short of the rule that in a proper case permits the impeachment of an estimate, report or certificate on the ground of fraud, or of such gross mistake as that bad faith would be implied. *Martinsburg & Potomac R. Co. v. March,* 114 U. S. 549.

In view of the record before us and of the authorities applicable thereto, the motion of plaintiff for a directed verdict should have been sustained and judgment entered for plaintiff in the sum of $6,956.11.

The judgment of the district court is reversed, with directions to enter judgment for plaintiff in conformity with the views expressed in this opinion.

REVERSED.

SEDGWICK, J., concurs in the conclusion.

HAMER, J., dissents.

O. IHNEN, JR., APPELLANT, V. SOUTH OMAHA LIVE STOCK EXCHANGE ET AL., APPELLEES.

FILED APRIL 14, 1917. No. 19357.

Voluntary Associations: MEMBERSHIP: DISCIPLINE. One who assumes membership in an unincorporated voluntary association or exchange, organized not for pecuniary gain or profit, but to provide convenient facilities for the orderly conduct of business at the common expense, such association having adopted for its government reasonable and uniform rules that do not contravene the law of the land nor offend against public policy, thereby consents to such rules, and, in event of violation thereof, is subject to such reasonable discipline as they may provide.

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

Lambert, Shotwell & Shotwell, for appellant.

Brown, Baxter & Van Dusen, contra.

DEAN, J.

The plaintiff is a member of the South Omaha Live Stock Exchange. He is a dealer in live stock, and does business in the name of the "Farmer's Live Stock Commission Company," of which he is the sole owner. The defendant exchange is a voluntary association of persons not incorporated, organized to establish and maintain a commercial exchange, but not for pecuniary gain or profit.

For its government the defendant has a code consisting of many rules, regulations and by-laws. The control of the defendant association is committed by its rules to a board of nine directors, a president and a vice-president. Defendant filed a complaint with the board of directors against plaintiff charging him with the violation of rule No. 2 and rule No. 27 of the exchange.

Rule No. 2 follows: "The objects of this association are: To establish and maintain a commercial exchange, not for pecuniary gain or profit, but to promote and protect all interests concerned in the purchase and sale of live stock at the South Omaha stock-yards; to promote uniformity in the customs and usages at said market; to inculcate and enforce correct and high moral principles in the transaction of business; to inspire confidence in the methods and integrity of its members; to provide facilities for the orderly and prompt conduct of business; to facilitate the speedy and equitable adjustment of disputes, and, generally, to promote the welfare of the South Omaha market."

The complaint contained two counts. It will not be necessary to consider the first count, for the reason that it involves rule 27, and that rule is not before us. The second count, charging a violation of rule 2, follows: "(2) Said O. Ihnen, Jr., is guilty of violating rule No. 2 of said exchange in the following particular: That he, the said O. Ihnen, Jr., knew at the time he employed said * * * on or about the 28th day of August, 1914, that the said * * * was guilty of the several offenses charged against him in violating section 16 of rule No. 13 and section 7 of

rule 11 of said exchange, and knew of his trial on said charges, and knew of his plea of guilty thereto, and knew of his expulsion from said membership in said exchange and that in the face of said knowledge, and notwithstanding the expulsion of said * * * for the numerous offenses charged against him, the said O. Ihnen, Jr., in violation of rule No. 2 and in violation of his obligation as a member of said exchange to protect its good name and to promote the purpose for which said exchange was formed namely, to promote and protect all interests concerned in the purchase and sale of live stock in South Omaha, Nebraska, and to inculcate and enforce correct high moral principles in the transaction of business, and to inspire confidence in the methods and integrity of its members and, generally, to promote the welfare of the South Omaha market, employed and still employs said * * * to assist him, the said Ihnen, in carrying on his live stock commission business in South Omaha, Nebraska."

Section 7 of rule No. 11 that is referred to in the foregoing complaint against plaintiff follows: "When any member of the association shall violate any of the rules, regulations or by-laws of the association, be guilty of any act of bad faith, or dishonest conduct, he shall be censured, fined, suspended, or expelled by the board of directors, as they may determine from the nature and gravity of the offense committed. A majority of a quorum sitting at a regular or adjourned meeting of the board of directors shall be necessary to censure, fine, or suspend, and an affirmative vote of at least six members of the board of directors shall be necessary to expel."

A notice was served on plaintiff to appear for hearing on a day therein named at the office of A. F. Stryker, secretary traffic manager of the exhange. Shortly thereafter, and before the day fixed in the notice, this action was begun by plaintiff in the district court for Douglas county to enjoin the defendant exchange and its officers from proceeding with the hearing.

The petition alleges generally that the membership of plaintiff, now of eight years' duration, is of great pecuniary value; that he is under a contractual obligation for one year to pay $150 a month to the former member of the exchange who is now in his employ, and who "was expelled from membership in defendant association, and * * * has never been reinstated to membership in said association; that the said * * * expelled member is an experienced cattle salesman, with a large and broad acquaintance with the various shippers and cattlemen shipping to the South Omaha live stock market, and that by reason thereof his services are now, and have been, and will in the future be, of peculiar and great value to plaintiff, and that a breach of said contract by plaintiff will subject him to great and irreparable damage and injury." The petition charges that rule 2 is merely "a recital of the alleged objects and purposes" of the association, and that "no penalty is provided by the rules and by-laws" for its violation. The plaintiff further alleges "that, unless enjoined, the defendants will proceed to try and convict" him, and that he will be heavily fined or expelled from membership. Defendant demurred to plaintiff's petition, alleging that it "fails to state facts sufficient to constitute a cause of action against them, or either of them." The court allowed a temporary order of injunction, and enjoined the defendant exchange, until its further order, from "trying, or attempting to try, * * * or taking any action against the plaintiff * * * for the alleged violation of rules 2 and 27." Defendant moved a dissolution of the temporary injunction, for the reason stated in the demurrer, and because the "petition is without equity," and because "the court is without jurisdiction to enjoin the defendant as prayed in the petition." On submission to the court on the foregoing pleadings and motion of defendant and the rules and by-laws of the defendant exchange, the temporary injunction as to the alleged violation by the plaintiff of rules 14 and 27 was made perpetual. The in-

junction was dissolved as to rule 2, and to this ruling plaintiff excepted.

Plaintiff in his brief charges that "the whole controversy started over the employment" by plaintiff of a cattle salesman, who "had been expelled from membership in the exchange." He concedes that defendant demanded of him the discharge of the ex-member, who was in his employ before the charges were filed. Plaintiff argues that, inasmuch as his sole business and livelihood is derived from his connection with the exchange, in which he "has a membership which is of the value of $3,000," he "would suffer irreparable injury from expulsion." It is argued that no member of the defendant association can be expelled for a violation of rule 2, because that rule is merely a preamble and statement of the objects and purposes of the organization, and does not state any penalty for its violation.

A member of an unincorporated association may be expelled "for such conduct as clearly violates the fundamental objects of the association." *Otto v. Journeymen Tailors Protective & Benevolent Union,* 75 Cal. 308, 7 Am. St. Rep. 156. Under this rule plaintiff's employee, the former member, was expelled for 27 specified violations of the fundamental objects of the association, to which he pleaded guilty. Thereupon the plaintiff, who was a member of the defendant association, employed the expelled member, and thereby placed him in the same position with reference to opportunities to violate the fundamental objects of the association. This conduct of the plaintiff might have a tendency to overrule and reverse the decision of the association in its action that resulted in expelling from membership the plaintiff's employee, and the result might be that one who was expelled would thus be allowed in the name of the plaintiff to do those acts for which he had been expelled.

The authorities do not support plaintiff's contention that he cannot properly be subjected to a trial in the premises. Plaintiff voluntarily assumed his membership in the association, and he thereby consented to its rules and sub-

jected himself to its tribunal. No rule is better settled than this. The case of *Green v. Board of Trade,* 174 Ill. 585, holds: "Courts will not interfere to control the enforcement of reasonable by-laws which infringe no rule of law or public policy, but will leave such enforcement to the corporation in the manner they have adopted for their own government and discipline."

The rule is well stated in *Leech v. Harris,* 2 Brewst. (Pa.) 571, wherein it is held: "If a complaint made against a member of a board is within and according to the regulations of the association, the person charged must submit to the forum and tribunal to whose jurisdiction he assented when he became a member of the board, and this court can give him no relief, except in case of irregularity of the proceedings against him." *Ryan v. Lamson,* 44 Ill. App. 204; *Board of Trade v. Weare,* 105 Ill. App. 289; *Jackson v. South Omaha Live Stock Exchange,* 49 Neb. 687; 26 Am. & Eng. Ency. of Law, 796; 17 Cyc. 860; 10 R. C. L. 1192.

The question of the guilt or the innocence of the plaintiff of the charges preferred against him by the exchange is not presented to us in the record. The question before us is with respect to the right of defendant to prefer charges against plaintiff and to put him on trial in pursuance of the provisions of valid rules that are in all respects reasonable, and that are not against public policy, and that do not contravene the law of the land. We hold that the exchange is clothed with the right so to do, and we will not assume without proof that a fair and impartial hearing will not be accorded plaintiff.

The judgment of the district court is right, and is in all things

AFFIRMED.

ROSE, J., not sitting.

HOMER G. STAPLETON, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MAY 5, 1917. No. 19280.

1. **Witnesses:** PRIVILEGED COMMUNICATIONS: PHYSCIANS. When a party submits to an examination, or inspection, by a physician, for the purpose of learning the state of his health or the physical condition of any part of his anatomy, the knowledge thus acquired by the physician is privileged, and, under section 7898, Rev. St. 1913, the physician is not permitted to testify to the condition he found, over objection based upon the statute.
2. ———: ———: ———. When plaintiff has permitted a physician to make a radiograph of his injured foot for the purpose of ascertaining the extent and character of his injuries, the radiograph so made is not admissible in evidence over objection of plaintiff based upon the statute.
3. **Master and Servant:** INJURY TO SERVANT: INTERSTATE COMMERCE. The evidence, set out in the opinion, *held* insufficient to show that the locomotives being moved when plaintiff received his injuries were instruments of interstate commerce.
4. **Damages:** REMITTITUR. The evidence of plaintiff's life expectancy and earning capacity and the extent of his injuries, set out in the opinion, and a verdict of $17,500 *held* so excessive as to require a remittitur of $5,500.

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

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

Benjamin S. Baker and *E. A. Conaway, contra.*

MORRISSEY, C. J.

Plaintiff recovered judgment for personal injuries received while in the employ of defendant. Defendant has made an unusual number of assignments of error, but they all fall within three or four general groups. The injury was received May 9, 1914, while plaintiff was engaged in switching 2 dead engines and 2 shop cars in the yards at Havelock, Nebraska, and is alleged to have been received

in the following manner: The switch engine was moving in an easterly direction, and plaintiff was riding on an iron step on the south side of one of the dead engines, the step being attached to the pilot beam of the engine, and being about a foot in length and eight inches in width. He was standing on this step and holding on to the handrail with both hands, when the step struck a cross-tie which had been left in too close proximity to the track. This tie, together with a great many others, had been thrown off along the right of way by a different crew and was intended for use in repairing the track. It is claimed that the impact of the step against the tie knocked plaintiff's feet from the step; that his right ankle was struck and injured in such a manner as to destroy the normal use of his foot and leg, and that he is permanently disabled.

Defendant admitted the allegation as to employment, and that while in such employment plaintiff's ankle came in contact with the tie or some other substance, denied all other allegations of the petition, and alleged that plaintiff was an experienced switchman, knew the condition of the track and premises, and that whatever injury he received arose out of the hazard which he assumed by virtue of his employment, and that his injuries were caused by his own negligence and carelessness. During the trial a shoe which plaintiff wore on his right foot at the time of the injury was offered in evidence. This shoe showed an abrasion of the leather, and on cross-examination defendant's counsel asked the witness several questions in regard to the shoe, and as to the time when he concluded to preserve it as evidence. On redirect examination plaintiff testified that he concluded to preserve the shoe about the time defendant offered to pay him $750 in settlement. Timely objection to this testimony was made, but overruled. Subsequently the court struck out this testimony, and instructed the jury that the testimony was withdrawn from the record, and that they should not consider it or give it any consideration. Defendant says the action of the court in withdrawing the testimony and giving this instruction to the

jury did not correct the error in admitting the testimony, and also that by striking it out he denied defendant the opportunity to cross-examine in relation thereto. The testimony was improperly admitted, but, in view of the admissions in defendant's answer that plaintiff received injuries while in its employment, we cannot see that a mere offer of settlement would seriously prejudice defendant before the jury, even though the evidence had not been stricken out. The court having withdrawn the evidence and instructed the jury to disregard it, the error is not so prejudicial as to require a reversal.

Dr. Wilson, a witness for plaintiff, testified that in examining plaintiff's limb he found an area of anesthesia; "he has no feeling on the inner side extending up to within about four inches below the knee; and he has no feeling in the back part of his leg extending up to about the half of the calf of the leg; that the reflexes, the knee jerk, is absolutely minus in that leg; * * * it indicated the absence of the proper condition of the nerve of the right leg. It also showed that the Babinski reflex was minus. * * * By scratching the bottom of the foot the great toe is in dorsal flexion. This is minus also. * * * I made a test of his pupillary reaction, of his eyes, and of the Romberg's sign, showing a condition that we always try to find out in case there is any nerve trouble, and in measuring the foot I find the measurements of the leg on that side are three-quarters of an inch smaller than on the other. Q. At what point? A. At the calf is three-quarters and at the ankle is three-eights. Q. What does that indicate, Doctor? A. It indicates an atrophy of the muscle or a malnutrition."

Presumably to contradict this testimony, defendant called as witnesses several doctors, all but one or two of whom were in its regular employ, to whom plaintiff had submitted his leg for inspection and examination. This testimony was objected to on the ground that it falls within the prohibition contained in section 7898, Rev. St. 1913, providing: "No practicing * * * physician * * *

or surgeon * * * shall be allowed in giving testimony to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office." The objections were sustained, and the greater part of defendant's brief is given up to an effort to show that this evidence was admissible. In this connection several propositions are laid down: First, it is said that when a party asks to exclude evidence under this section of the statute he must make it appear that the physician acquired his knowledge while attending the patient in his professional capacity. This meaning may be fairly inferred from the section itself. Immediately after the injury plaintiff consulted defendant's local physician, Dr. Ballard. Later he called on other physicians of the company, Drs. Hollenbeck and Wenger, and he had testified as to measurements they had made of the leg, and the court permitted these physicians to testify as to the measurements because testimony on that subject had been offered by plaintiff, but their testimony on all other branches of the case was excluded, although defendant offered to prove by these physicians that their examination was not for the purpose of treatment. Two of the physicians made X-ray examinations, but none of the physicians whose testimony was excluded prescribed for the plaintiff. Dr. Buchanan testified that plaintiff called at his office in the summer of 1914, and he made a radiograph of plaintiff's foot and ankle. Defendant offered these plates in evidence, but they were excluded. Dr. Hollenbeck testified that plaintiff called at his office August 27, 1914, and once or twice afterwards; that he was not there for treatment, but was there for the purpose of having an examination made to ascertain the condition of his foot. Dr. Wenger testified that plaintiff called at his office in September, 1914; that he was not there for the purpose of treatment. "He was there for examination, * * * for a physical examination." Dr. Young met plaintiff in Dr. Hull's office in August, and made an examination of him "to ascer-

tain the state of his health at that time, his physical condition, * * * with particular reference to his right ankle and limb." Dr. Hull testified as to the examination at which Dr. Young was present, and said the purpose was to determine his physical condition. Dr. Tyler, another X-ray specialist, said plaintiff called on him "for an X-ray examination of the foot, * * * to find out the condition of the bones in the foot." He further testified that he was sent to him by Dr. Hull, and later stated that he was employed by the defendant. We cannot escape the conclusion that as to each of these witnesses the relation of physician and patient existed. It was because of their professional training that plaintiff submitted his leg for inspection and examination. The statute cannot be given a strained construction, but must be taken in its plain and ordinary sense. When it says that a physician shall not be allowed to give testimony or to disclose confidential communications properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office, it means to exclude the disclosure of any information that comes to such physician by reason of the professional capacity in which he acts. It does not matter whether the patient seeks a prescription for a disordered stomach or a radiograph of an injured foot. Nor does the statute make any distinction between a regularly retained physician of a railroad company, who is paid for his services by the railroad company, and a physician paid by the patient.

In *Battis v. Chicago, R. I. & P. R. Co.*, 124 Ia., 623, the court had under consideration a question somewhat analagous to that which we are discussing. The statute of Iowa is very similar to ours. The station agent called the local surgeon for the railroad company to attend plaintiff who had received an injury. It was claimed by the railroad company that the physician was its employee, was acting for it, and that the physician was in no sense the physician of plaintiff. The court said: "The allegiance of the physician must be wholly upon one side or the other.

It matters not, in this connection, who calls him in the first instance, or who pays him."

The same rule which would exclude the oral testimony of the doctor would exclude the radiographs of plaintiff's foot. Its introduction in evidence would be a disclosure of a confidential communication.

In *Sovereign Camp, W. O. W., v. Grandon,* 64 Neb. 39, in discussing the statute at page 46, this court said: "The rule in this state, as well as in other states having a like statute, is that the above sections protect a party against any disclosure by a physician made to him in the course of his professional employment, and necessary and proper to enable him to discharge his duty to his patient. Not only are such communications privileged, but whatever knowledge the physician may gain from observing his condition and symptoms is likewise privileged. There can be no doubt as to the rights of the patient in this respect, and the courts, in a proper case, are vigilant to see that these rights are fully protected."

"Information acquired by the physician by looking at the patient or by examination is as much within the statutes as are the verbal communications which take place between them." *Smart v. Kansas City,* 208 Mo. 162, 197.

Defendant complains because on cross-examination it was not permitted to inquire whether plaintiff had submitted himself for examination to specialists for the purpose of qualifying them as witnesses, and that he did not intend to produce these witnesses upon the trial. This line of examination was not pertinent to anything developed in the examination of the witness in chief. He had the right to select his own physicians and his own witnesses. If counsel for defendant disbelieved the testimony of Dr. Wilson, who testified as to the character and extent of plaintiff's injuries, he might have procured the testimony of men eminent as physicians and surgeons by application to the court for the appointment of a commission to make an examination of the person of the plaintiff. *State v. Troup,* 98 Neb. 333.

One paragraph of instruction No. 3, defining negligence, is singled out and criticized. It is a familiar rule that the instructions must be construed together. This rule must be applied to instruction No. 3, and when so applied the instruction correctly states the law.

Defendant further complains because the court refused to submit the defense of assumption of risk, which it contends is applicable to this case under the federal employers' liability act. Was there sufficient proof to warrant the court in submitting this defense? Plaintiff alleges in his petition that defendant operates a line of railroad "in and through the states of Iowa, Nebraska, Kansas, Colorado, and Wyoming, over which is carried passengers and freight for hire as a common carrier to and over points on its said railroad." This allegation is admitted in the answer of defendant, but the answer makes no reference whatever to interstate traffic. The accident occurred in defendant's yards at Havelock, Nebraska. The only testimony cited by defendant to sustain its contention that the engines being moved were engaged in interstate commerce was elicited on the cross-examination of the plaintiff: "Q. Were the cars next to the switch engine? A. They were. Q. And then came the two dead engines? A. Yes, sir. Q. They were both of the same class, were they not? A. Yes, sir. Q. What were they, 0-2? A. 0-2, or 0-1, I don't remember now. Q. That is the largest class of freight engines used on the Burlington? A. I think so, at that time. Q. Since then they have put out the M-1? A. I think so. Q. But before your accident they were the largest class of locomotives in use by the Burlington on the lines west of the river? A. No. Q. Unless it would be the Mallet? A. The Mallets were larger; yes, sir. * * * Q. And they are used exclusively for hauling through freight trains? A. Yes, sir. Q. Had these dead engines, before the accident, been in use by the Burlington? A. Yes, sir. Q. On the lines west? A. The lines east. Q. And had been brought to Havelock for repair? A. Yes, sir. Q. After they were overhauled and

repaired, then do they go back in the same service? A. I think so."

This testimony shows that the engines had been used for hauling through freight trains, but we are not informed as to what is meant by the term "through freight train." There is no suggestion that these engines crossed a state line or that they hauled freight that crossed a state line. If we are left to speculate as to the character of a through freight train, we might suppose that it is a train running from one division point to another division point without stopping to pick up or to unload local freight. There are a number of division points on defendant's lines within the state of Nebraska. To say they are in use on "the lines east of the river" or "the lines west of the river" is equally indefinite. The Burlington railroad crosses the Platte river at Ashland, a few miles east of Havelock, and this statement might as well apply to engines in use east of the Platte river or west of the Platte river as to apply to some river flowing between two states. If these engines had, in fact, been used in interstate commerce, defendant might easily have so shown, and it was its duty to do so. There being a failure of such proof, the court properly withdrew the defense of assumption of risk from the jury. But he not only withdrew that defense, but told the jury that, "by an express provision of the statutes of the state of Nebraska, the plaintiff in such case cannot be held to have assumed any of the risks of his employment; and, therefore, should you find from the evidence, as heretofore stated, that the defendant or its servants was guilty of negligence as charged, and that the same was the proximate cause of plaintiff's injury, then you should find that plaintiff did not assume the risk of his employment arising from such negligence."

It is said in defendant's brief that this instruction not only deprived defendant of that defense, but that "its plain purport is that defendant had interposed a defense declared unlawful by the legislature of Nebraska," and that the effect of this is to prejudice defendant's cause in

the minds of the jury. Perhaps a discussion was unnecessary, but we cannot see that it would have any prejudicial effect, and, if error it is, it is error without prejudice. *Carlon v. City Savings Bank,* 85 Neb. 659.

It is not possible within the limits of this opinion to discuss separately all of the assignments made, but those not discussed have been considered. The verdict and judgment was for $17,500. Neither counsel has seen fit to favor us with any suggestion as to what would be a fair recovery under the circumstances, although counsel for defendant refers to this verdict as "monstrous and out of proportion to any possible injury inflicted." At the time of the injury plaintiff was 37 years of age. He had a life expectancy of 29 years, and was earning from $100 to $125 a month as a switchman. He is not educated in any of the professions, but has throughout his life been engaged in hard manual labor. The nature of plaintiff's injury is such as will necessarily prevent him from continuing in his usual occupation and will greatly lessen his capacity for earning money. What he may earn in his crippled condition is hard to estimate, still it is clear that he is not wholly incapacitated. There is but meager proof of pain and suffering, compensation for which is always difficult to measure. Though his foot is crippled, plaintiff is not entirely deprived of its use. Serious as his injuries are, they are not such as to sustain the verdict for the full amount, and we are constrained to hold that the verdict is excessive, and that plaintiff should be required to remit all in excess of $12,000. If plaintiff files such remittitur within 20 days, the judgment as thus reduced is affirmed; otherwise it will stand reversed, and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

SEDGWICK, J., not sitting.

CENTRAL STATE BANK ET AL., APPELLEES, V. FARMERS STATE BANK ET AL., APPELLANTS.

FILED MAY 5, 1917. No. 19984.

Banks and Banking: "DEPOSIT:" FAILURE TO PAY: GUARANTY FUND. When a party, in good faith, and in the usual course of business, places money in a state bank under an agreement that the account shall be subject to check and shall draw interest at a rate not exceeding that fixed by statute, it becomes a deposit under the provisions of sections 280-356, Rev. St. 1913, and, in case the bank fails to pay on demand, it may be made a charge against the depositors' guaranty fund.

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

Willis E. Reed, Attorney General, and *Dexter T. Barrett,* for appellants.

Lambert, Shotwell & Shotwell, contra.

MORRISSEY, C. J.

This is an appeal from an order of the district court for Burt county allowing the claim of plaintiff against the defendant, who is the receiver of the Farmers State Bank of Decatur. Albert S. White, who was in active charge of the organization work of a proposed banking corporation, called the Central State Bank, made three deposits in the Decatur bank, aggregating $8,000. May 2, 1916, after the completion of the organization of the proposed Central State Bank, White drew his check against the deposits for the full amount thereof, less the accrued interest, and it was redeposited in the name of the real owner of the account, the Central State Bank. This deposit was made on the same terms as the original deposit. Four days thereafter the state banking board took possession of all of the assets of the Farmers State Bank of Decatur, and subsequently a receiver was duly appointed.

The plaintiff herein filed its petition for the allowance of its claim in the principal sum of $8,000. White, as secretary, filed a claim in the sum of $45.77 for the interest accrued while the deposit stood in his name as secretary. The attorney general filed objections to the allowance of the claims, alleging that the money was not deposited in the usual course of business, nor entitled to the protection of the depositors' guaranty fund. The evidence shows that the deposit was made for an indefinite period, with the agreement between White and the bank that it should draw interest at the rate of 5 per cent. White was receiving subscriptions from numerous parties to the capital stock of the Central State Bank. He testified that he made similar deposits in other banks, intending to withdraw the money when the new bank should be chartered and be ready for business. He admits that he learned from the cashier of the failed bank that the bank was in need of money, as its deposits were decreasing, and he did not want it to become embarrassed, but that that was a minor reason, that he would not have made the deposit if he had not known it was protected by the depositors' guaranty fund. There is no contradiction of this. The account was subject to check; it might have been drawn out any day without notice; and the interest agreed upon was within the limit fixed by statute. Neither White nor any other person acting for plaintiff was a stockholder of, or officer in, the Decatur bank. The transaction appears to be free from fraud, and the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

EDWARD L. SIMON, APPELLANT, V. H. J. CATHROE COMPANY ET AL., APPLLEES.

FILED MAY 5, 1917. No. 20016.

1. **Master and Servant: EMPLOYERS' LIABILITY ACT: LIMITATIONS.** Sections 3674, 3679, Rev. St. 1913 (Employers' Liability Act) should

be construed together, and the limit of six months for making a claim for compensation and of one year for agreeing upon the compensation, or for filing of the petition, does not begin to run until six months after the removal of physical or mental incapacity.

2. ———: ———: FILING PETITION. Evidence examined, and *held* to sustain the finding of the district court that the plaintiff was physically incapacitated from the time of the accident until the time of the trial.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed as modified.*

R. J. Greene, for appellant.

Mahoney & Kennedy, Strode & Beghtol and *Guy C. Kiddoo, contra.*

LETTON, J.

Action under employers' liability act, sections 3642-3696, Rev. St. 1913. H. J. Cathroe Company was the employer and the London Guaranty & Accident Company are insurers of its liability.

On January 15, 1915, plaintiff was a bricklayer engaged in laying brick in the lower portion of a stormwater sewer. A workman whose duty it was to lower brick in an iron basket managed the same so negligently that a brick or the corner of the basket struck the plaintiff on the head, causing a wound from which he bled quite freely, and was obliged to stop working. The wound healed in a week or two, but plaintiff was not able to return to the job, although he afterwards worked for about a week for other parties. A few months afterwards he began to act peculiarly, complained of severe pains in his head, was unable to sleep, assaulted a married son with whom he he had previously been upon good terms, threatened to kill himself and his children, and in other manners manifested a deranged intellect. He consulted a physician and surgeon in April or May of the year following the accident, who told him that he might have a clot of blood upon the brain. He was afterwards, on the complaint of his

son, found to be insane by an insanity commission, and confined in the state hospital for the insane at Lincoln. About September 1, 1916, his skull was trephined and a portion of the cranium about three inches square removed, when a blood clot was found on the brain about the size of an olive. This was removed by the surgeon. Plaintiff recovered from the operation, except for a slight paralysis from which he had not fully recovered at the time of the trial, and which the surgeon testified might continue for a year thereafter or more. It seems clear that the injury caused an effusion of blood which affected to a greater or less extent the plaintiff's mental faculties, and, while he only displayed a tendency to violence occasionally, he suffered from nervousness and sleeplessness and lack of co-ordination of ideas to a greater or less extent until the removal of the blood clot. The cause was tried to the court, which found generally in favor of the plaintiff against the defendant Cathroe Company, that plaintiff was mentally incompetent after the accident until about the 12th day of September, 1916, when he was discharged from the state hospital for the insane at Lincoln; that up to the present time his disability has been total, but that he is recovering, and that it is impossible to determine beyond six months the length of time during which he will be partially disabled; that the occupation of such petitioner was seasonal; and that the plaintiff ought to recover from the defendant Cathroe Company for a total disability for a period of 72 weeks at $10 a week in the gross sum of $720, and for partial disability at $5 a week for six months in the future. No allowance was made for medical or hospital services. The case against the London Guaranty & Accident Company was dismissed.

Plaintiff complains of the refusal to allow reasonable medical and hospital expenses, and of the findings that the occupation of plaintiff was seasonal, and that the disability of plaintiff would continue only for six months following the trial. As to the first point: The allowance was evidently refused because no medical expenses were incurred

"during the first twenty-one days after disability begins." Section 3661. Even if we should consider that the disability for which medical aid was needed did not begin until the trouble was diagnosed as a blood clot, it was about six months afterwards before the aid of the surgeon was again sought and the operation performed. The disability, except for two weeks that he was able to work, extended to the time of the trial, which took place 102 weeks after the injury, and hence the recovery should have been for 100 weeks at $10 a week, or $1,000. Even if the occupation is seasonal, as the court held, the statute would not reduce the allowance to less than $10 a week at the wages plaintiff was earning. As to the allowance for future partial disability: The surgeon testified that immediately after the operation the plaintiff suffered a slight paralysis, and that it has not entirely disappeared, but it would probably last no longer than one year after the time of the operation. Since either party has the right at any time after six months from the award to have the question re-examined under sections 3682, 3683, Rev. St. 1913, on the ground of increase or decrease of incapacity, we will not interfere with the finding of the district court as to partial disability. The judgment of the district court will be modified in accordance with these findings.

As to the cross-appeal: In addition to denials, the answers plead that the parties had not agreed upon compensation within one year after the accident, and that the plaintiff did not file his petition to recover compensation within said time; that his claim for compensation was not made within six months after the occurrence of the injury, and he was not suffering from any physical or mental incapacity during such time which would excuse his failure; that no medical and hospital services were needed during the first 21 days of his alleged disability, and no claim was made for the same upon the Cathroe Company. Section 3679, Rev. St. 1913, provides: "That all claims for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the

compensation payable under this article, or unless, within one year after the accident one of the parties shall have filed a petition as provided in the next following section hereof." Section 3680 provides and regulates the procedure in actions under the statute. Section 3674 provides: "No proceedings for compensation for an injury under this article shall be maintained, unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same, or in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity." It is also provided that "want of such written notice shall not be a bar to proceedings under this article, if it be shown that the employer had notice or knowledge of the injury."

We are of opinion that section 3674 and section 3679 should be construed together, and that as to the limit in section 3679 of one year the period must be construed as in section 3674, so that the time begins to run after the removal of such physical or mental incapacity.

The accident occurred on January 15, 1915. The petition was filed November 1, 1916. The first claim for compensation was made September 26, 1916, which was a few days after the plaintiff was discharged from the insane hospital, but it was shown that both defendants had notice and knowledge of the accident a few days after it occurred. If plaintiff was physically and mentally incapacitated until discharged, as found by the district court, the claim was filed in ample time.

The cross-appellant contends that this finding is not supported by the evidence. It is shown that in 1913 plaintiff had been confined in the hospital as a dipsomaniac, but that he had not indulged in liquor again until after the accident and there is no proof of excessive use of intoxicants since that time. The attending physician at the

hospital gave the result of his physical and mental examination of plaintiff and testified that in his opinion he was not insane, but he was not informed of the existence of the blood clot, nor did he testify that plaintiff had not been mentally incapacitated after the accident. We are unable to determine from the evidence at just what period before the six months after the accident expired the mental incapacity of the plaintiff developed, but when the whole testimony on this point is considered the finding that his mind was affected before the expiration of the time and that not until after the operation did his faculties clear is supported by the evidence. The injury seemed slight at the time and the existence of the blood clot was not suspected or known until he had visited the surgeon. The rule announced in *Johansen v. Union Stock Yards Co.*, 99 Neb. 328, is that in a case of an injury which at first seems slight but afterwards develops graver symptoms, the injury occurs when the diseased condition culminates. The finding of the district court that the claim was filed in time is supported by sufficient evidence.

The judgment of the district court is modified so that plaintiff shall recover the sum of $1,000 for total disability to time of trial and $5 per week for partial disability for six months thereafter, and as so modified the judgment is

AFFIRMED.

CORNISH, J., not sitting.

FRANK RYBA, APPELLEE, V. SWIFT & COMPANY ET AL., APPELLANTS.

FILED MAY 5, 1917. Nos. 19247, 19937.

1. **Appeal: CONFLICTING EVIDENCE.** A finding of the jury upon conflicting testimony will not be set aside, if there is competent evidence to support it, unless clearly wrong.

2. Damages: REMITTITUR. A verdict in plaintiff's favor for $9,625, in a suit by a carpenter earning $2.50 a day at the age of 53 to recover damages for negligence resulting in a fracture of the femur of his left leg, *held* excessive, requiring a remittitur in the sum of $3,625 as a condition of affirmance.

APPEAL from the district court for Douglas county: CHARLES LESLIE, Judge. *Affirmed on condition.*

Gurley & Fitch, for appellants.

Weaver & Giller, contra.

ROSE, J.

This an action to recover damages in the sum of $25,000 for personal injuries sustained by plaintiff, January 12, 1914, while employed by defendant Swift & Company in the construction of an eight-story concrete building of which defendant Henry Perkins was superintendent. The building was situated in South Omaha, and was intended for packing purposes. On the seventh floor there was a long room without windows. It was lighted with kerosene lanterns. Running lengthwise in the floor there was a vent or opening two feet or more in width. On platforms over part of the vent, plaintiff had been engaged with other workmen in chipping concrete from girders. He had been directed by the foreman to get a timber, and in carrying it across the room he fell through the vent to a concrete floor below. In connection with the facts thus outlined, the conditions and conduct imputing negligence, if the petition is understood, may be summarized as follows: Under the platforms where the employees had been at work the vent was entirely covered with planks. Elsewhere over the vent boards arranged to leave interstices had been covered with a layer of paper. Plaintiff fell through the vent where there was nothing over it but paper. The room was not properly lighted. Defendants did not provide a safe place to work. Plaintiff did not know of the conditions and had not been warned of the danger. Defendants denied the negligence charged, and pleaded negligence on the part of plaintiff. From judgment on a ver-

dict in plaintiff's favor for $9,625, defendants have appealed.

It is contended that the trial court erred in refusing to direct a verdict for defendants on the ground there was no proof of actionable negligence on their part. They argue that plaintiff, a carpenter who had been at work on the building, knew the risks and dangers incident to such employment; that defendants had a right to assume he would realize existing conditions and use common sense to avoid injury; that the accident was the result of his own negligence. This argument is refuted by testimony tending to prove the appearance of safety and the concealment of danger. On the issue of notice or warning to plaintiff the evidence is conflicting. The proofs in support of the allegations of the petition seem to sustain the verdict. In this view of the evidence, there does not appear to be any prejudicial error in the ruling of the trial court.

It is also contended that the verdict is excessive. There seems to be merit in this assignment. Plaintiff was a carpenter 53 years of age, and was earning $2.50 a day when injured. His expectancy of life was about 19 years. Figuring the present worth of his earnings for the full period, the award of the jury, including suffering and other elements of damage, would be a substantial recovery for total and permanent disability. The femur of his left leg was broken just below the hip joint and he was otherwise temporarily injured. While the injured leg has been shortened, the evidence will not justify a finding that plaintiff's earning capacity as a carpenter has been permanently destroyed.

Upon the filing of a remittitur in the sum of $3,625 within 20 days, the judgment to the extent of $6,000 will be affirmed. Otherwise it will be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

LETTON, J., not sitting.

EARL A. RAWITZER ET AL., APPELLEES, V. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, APPELLANT.

FILED MAY 5, 1917. No. 19484.

1. **Insurance: ACTION: SUICIDE: QUESTION FOR JURY.** Where suicide is properly presented as a defense in a suit on a certificate of accident insurance to recover indemnity for the death of insured, it is error to direct a verdict for plaintiffs, if different minds may reasonably draw different conclusions from the evidence on that issue. *Walden v. Bankers Life Ass'n*, 89 Neb. 546, explained.

2. **Pleading: DEFENSES.** "A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false." *Home Fire Ins. Co. v. Decker*, 55 Neb. 346.

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

Thomas Lynch, for appellant.

Byron G. Burbank, contra.

ROSE, J.

This is an action to recover $5,000 and interest on a certificate of accident insurance issued by defendant January 8, 1910, to Albert H. Rawitzer, father of plaintiffs. The certificate provided for an indemnity of $5,000 in the event that the death of insured resulted from external, violent and accidental means. While the insurance was in force insured died from carbolic acid poisoning, June 13, 1914. In the petition plaintiffs, among other things, alleged: "The said Albert H. Rawitzer was killed by carbolic acid poisoning, through external, violent and accidental means; that he swallowed enough to cause his death, and, when he took it, he did not know it was a deadly poison, as it was, but believed it to be some harmless liquid, and he took the same without any intention to injure himself, and the taking thereof was accidental." Defendant denied that insured swallowed the carbolic acid without knowing it was a deadly poison, believing it to be a harmless liquid, and

denied that he drank it without intention to injure himself. Defendant also pleaded a by-law limiting to $500 the insurance for injuries resulting from "the accidental taking of poison." The reply of plaintiffs contained a plea of estoppel based on the ground that a synopsis of the by-laws printed by defendant on the certificate of insurance made no reference to a by-law limiting to $500 the indemnity for injuries resulting from "the accidental taking of poison." Plaintiffs adduced no proof, and at the close of the testimony on behalf of defendant the trial court sustained a motion for a peremptory instruction in favor of plaintiffs. From judgment on a verdict for $5,473.45, defendant has appealed.

The first question presented here is assigned error in the order directing a verdict for plaintiffs. The reasons urged in support of the peremptory instruction may be summarized as follows: There is a presumption that insured did not intentionally take his own life. There is no evidence of a motive for self-destruction. The evidence would not sustain a finding that insured committed suicide. In this connection plaintiffs invoke the following language quoted from the syllabus in *Walden v. Bankers Life Ass'n*, 89 Neb. 546:

"The burden is upon an insurance company to prove by a preponderance of the evidence a controverted defense that the deceased came to his death from poison self-administered.

"In such a case, the defense is not established unless the evidence so clearly and unmistakably points to the conclusion of suicide as to exclude all reasonable probability of death by accident or from natural causes."

The rule announced in the latter paragraph should not be included in a charge to a jury on the issue of suicide, but it is applicable in the appellate court on review of a jury's finding that insured did not intentionally take his own life. On appeal it may properly be held that such a finding should not be overturned "unless the evidence so clearly and unmistakably points to the conclusion of

suicide as to exclude all reasonable probability of death by accident or from natural causes." This is another way of saying that the finding of a jury on an issue of fact will not be set aside on appeal as unsupported by the evidence unless clearly wrong.

In the present case a direction to the jury to return a verdict for plaintiffs is challenged as erroneous. The trial court, in ruling on the motion for a peremptory instruction, was required to consider whether the evidence would support a finding by the jury that insured committed suicide. The following rules of law are applicable to the inquiry: On an issue in a civil action a finding in favor of the insurer does not require more than a preponderance of the evidence. *Walden v. Bankers Life Ass'n,* 89 Neb. 546. The presumption that insured did not intentionally take his own life is rebuttable. *Hardinger v. Modern Brotherhood of America,* 72 Neb. 869. Where different minds may reasonably draw different conclusions from the testimony on an issue of fact in a civil case, it is error to direct a verdict. *Suiter v. Park Nat. Bank,* 35 Neb. 372; *Gillis v. Paddock,* 77 Neb. 504; *Tarnoski v. Cudahy Packing Co.,* 85 Neb. 147. In the present case, may different minds reasonably draw different conclusions from the proofs on the issue of suicide? Would the evidence sustain a finding by a jury that insured intentionally took his own life? No testimony was offered on behalf of plaintiffs. They rely on the admitted fact that insured died from carbolic acid poisoning and on the presumption of accidental death. The home of insured, at the time of his death, was a summer cottage near Carter lake. Early in the morning he was found dead in a garage in the rear of his cottage. His clothing consisted of a shirt and pantaloons. His feet were bare. He had swallowed three ounces of carbolic acid. Death resulted from the taking of the poison. Evidence of these facts is uncontradicted. The circumstances outlined tend to rebut the presumption that insured was prompted by the instinct of self-preservation. The incidents narrated by defend-

ant's witnesses might reasonably lead jurors to conclude that insured committed suicide. From all of the testimony on that issue different minds might reasonably draw different conclusions. The question of fact, therefore, should not have been withdrawn from the jury, and the trial court erred in directing a verdict in favor of plaintiffs.

Plaintiffs contend further that the judgment in their favor should be affirmed on the ground that defendant admitted in its answer that insured's death was accidental. This contention is based on defendant's allegation that a by-law limited to $500 the insurance for injuries resulting from the "accidental taking of poison." It is argued that this defense is available only where death results from the accidental taking of poison, and that the plea amounts to an admission that insured's death was accidental. If the position of plaintiffs is tenable, defendant cannot plead in its answer both the defense of suicide by the taking of poison and the by-law limiting the liability in such event to $500. The refinement is too subtle for the practical purposes of pleading under the Code. The demands of justice call for a more liberal rule. The defenses are not inconsistent. Proof of one does not disprove the other. The rule in harmony with Code pleading has been correctly stated as follows:

"A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false." *Home Fire Ins. Co. v. Decker,* 55 Neb. 346; *Hilmer v. Western Travelers Accident Ass'n,* 86 Neb. 285; *Havlik v. St. Paul Fire & Marine Ins. Co.,* 87 Neb. 427; *Ford & Isbell Lumber Co. v. Cady Lumber Co.,* 94 Neb. 87.

For the error in directing a verdict in favor of plaintiffs, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

CELIA G. CHANDLER, APPELLEE, V. ROYAL HIGHLANDERS, APPELLANT.

FILED MAY 5, 1917. No. 18772.

1. **Insurance:** BENEFICIAL ASSOCIATION: AGENCY: PRESUMPTION. The secretary of a local lodge or circle who collects dues from the members of a fraternal beneficiary association and remits to the association is the agent of the association, and the law presumes that he informs his principal of what he does in its service.
2. ———: ———: PAYMENT OF DUES: WAIVER. If such association adopts a custom of receiving payment of dues after the day named in the contract for such payments, and thereby leads the assured to believe that his policy will not be forfeited if he pays in accordance with such custom, the association thereby waives the right to forfeit the policy for delay of payment which is tendered in accordance with such custom.
3. ———: ———: ———: CUSTOM. But if payments are duly made for the insured by the local lodge or its secretary as a loan to the insured, at his request, the fact that the insured does not return such loan to the lodge or its secretary as agreed by him will not establish a custom to extend time of payment on the part of the association.
4. ———: ———: ———: PRESUMPTION. If the lodge or its secretary advances the payments when due for the insured, and afterwards receives payments thereof from him, the presumption, in the absence of evidence, is that it was at the request of the insured, and as a loan to him to enable him to comply with his contract.
5. ———: ———: FORFEITURE: WAIVER. Under such circumstances. the association cannot be held to have waived the right to declare a forfeiture when so provided in the contract, if payments are not forwarded to the association within the time specified therein.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

Hainer & Craft and *A. W. Lane,* for appellant.

B. F. Good, C. Petrus Peterson and *R. W. Devoe, contra.*

SEDGWICK, J.

This is an action by the beneficiary to recover $2,000 on a certificate of life insurance issued December 8, 1905, by

defendant, a fraternal beneficiary society, to plaintiff's husband, Charles D. Chandler. The certificate provided for the payment of an assessment of $2.40 on the first day of each month, and that, for failure to pay it on or before the first day of the succeeding month, the member should stand suspended from all benefits of the society. Chandler, at the time of his death, which occurred May 28, 1908, had not paid the assessment due April 1, 1908, and delinquent May 2, 1908. Plaintiff pleaded that defendant had repeatedly accepted and retained assessments long after they had become delinquent; that it had induced Chandler to believe assessments need not be paid promptly; and that defendant had thereby waived the right to insist that Chandler was suspended for failure to pay the April assessment on or before May 1, 1908, Chandler having died within the time usually allowed him in which to pay his past-due assessments. The defense was that Chandler's assessments, with the exception of the one due April 1, 1908, had been promptly received at the head office of the society, but under an arrangement with the secretary of the local lodge the latter, out of his own funds, had in some instances advanced Chandler's assessment when due and was subsequently reimbursed by him; that the local secretary by express terms of the society's edicts, which are parts of the insurance contract, had no authority to waive the provision requiring prompt payment of assessments; and that the chief officers of the society had no knowledge that assessments were not paid by Chandler when due. At the close of the testimony each party requested a peremptory instruction. From a judgment on a directed verdict in favor of plaintiff, defendant has appealed.

Did defendant, by its course of dealings with Chandler, waive prompt payment of the April assessment? It is a fraternal beneficiary society, and has at Hartington a subordinate lodge or castle of which Chandler was a member. Members were required to pay assessments monthly to the secretary of the local castle, and it was his duty to report and remit all assessments to the chief secretary

of the society by the fourth day of the succeeding month. At least six times within a year, Chandler had failed to pay his assessment before it became delinquent. The assessement due February 1, 1908, was not paid by Chandler until April 1, 1908, 31 days after it had become delinquent. Chandler died May 28, 1908, the April assessment, which became delinquent May 2, 1908, not having been paid.

Testimony tending to prove the facts narrated would sustain a finding that defendant waived prompt payment, unless the defense already outlined was established. On behalf of defendant the local secretary testified, in substance: That at least six times within a year the witness had advanced out of his personal funds the money to pay Chandler's assessment, and had remitted it to the head office with his regular monthly report and remittance. He had remitted Chandler's February assessment with the report of March 3, 1908, and had been repaid by Chandler April 1, 1908. He did not deliver the receipt to Chandler until the latter paid the sum due. Chandler gave the witness a check April 1, 1908, to pay the February and March assessments. The April assessment was not paid, and in his report the local secretary marked Chandler suspended.

A waiver must be pleaded and proved by the plaintiff, and the defendant's answer to it is either a general denial or a specific denial showing what the facts were. This needs to be borne in mind, because, though certain presumptions might arise in favor of the plaintiff touching waiver, the burden of proof is always upon her. The waiver pleaded is that the defendant is estopped to claim a forfeiture according to the terms of the policy by its course of dealing with the deceased; that defendant, by continuously accepting payments after due, without declaring a forfeiture, would naturally lead the insured to believe that a strict compliance with the terms of the policy was not required. This calls upon plaintiff to plead and prove the course of dealing which would lead the deceased, as a

reasonable man, to believe that payments need not be made when due; that he relied thereon; and that he was thereby misled. To prove the waiver the plaintiff must prove the custom of receiving the payments after due; that the payments so made were received and retained by the defendant company with knowledge that they were past-due payments. These propositions of law will not be disputed.

In the case at bar, unlike the cases cited, money due for assessments always came to the company when due. If, when Dr. Eby sent money to the defendant, he had informed them that the Chandler assessment was paid by him out of his own funds, he having loaned it to Chandler, it would not create, or tend to create, an estoppel or waiver. You cannot assume belated payments when, as to the company, there were none, and an essential fact to create the waiver must be the retaining of assessments paid after due. This is illustrated in defendant's brief by stating that oftentimes it happens that local lodges will raise a fund to help out members unable to pay their assessments on time. The local lodge sees that the company gets its payment for such member when due, just as Dr. Eby did. It must frequently happen in such cases that the local lodge will itself refuse further aid. It is stated that the courts in no instance have allowed this to create a waiver by the company itself; it always having received the assessments when due. When the company received its money the first of the month, no matter by whom paid, its business with Chandler was ended for that month. If, when Eby advanced the money, he told the company the facts, it would have had a right to suppose it was a loan. When afterwards he collected the money from Chandler he would be acting only in his private capacity and in no sense as the agent of the company. If Eby loaned the money to Chandler, then he acted as Chandler's agent in applying the money as payment of Chandler's dues. If their agreement was that Eby should make these payments for Chandler when due, and that Chandler should afterwards reimburse

him, the transaction was a loan by which Chandler caused the payments to be made when due.

It may be said that, considering the testimony, a jury could reasonably find that Chandler had no knowledge that his assessments were paid by the secretary when due. But what his knowledge was must be a presumption arising from admitted facts, there being no direct evidence as to his knowledge. A jury will not be permitted to find contrary to the legal presumption. If there were no decisive presumption either way, then, the burden being upon the plaintiff, upon that point the finding must be against her. The law will presume that Chandler knew the rules of the society, and when he must make his payments or forfeit his rights, and that he would follow self-interest. The law will presume that he knew that Eby could not make a waiver for the society for his benefit. Knowing that, the law will presume that he knew or believed either that Eby had remitted for him, or that he was himself guilty of laches. The law will presume, also, where it is a pure question of fact, that all persons will endeavor to do their duty, will meet their obligations and observe their contract; that one man will not pay the debts or the obligations of another, except at the other's instance or request. To say that Dr. Eby did so is to do violence to common experience, from which all presumptions arise. Not once in a thousand times would a man in Dr. Eby's place make advancements out of his own pocket for the accommodation of another without informing him. Such being the presumption, it follows that Eby, having made the advancement, did it at the instance of Chandler. The alternative presumption that Chandler believed that the society, knowing that he had not paid, was waiving time of payment, cannot be indulged, because of the other presumptions above named, and especially the one that Eby would not make personal advancements without either being requested or at least informing Chandler that he did so. The presumption must prevail that Chandler knew that Eby was making these payments for him when

due. It is said that Dr. Eby retained the receipt until he received the money. That does not alter the fact of payment, and does not affect the presumptions just alluded to, because common experience is that any man, paying the obligations of another, and procuring a receipt, would always, as a matter of prudence, retain the receipt until he should be repaid his advancement. The evidence shows that when Dr. Chandler repaid Dr. Eby he did it in a personal check to him, not one running to him as an official. If Dr. Chandler had believed that Dr. Eby had power to waive payments when due, the case might be different; but we are not permitted to indulge the presumption that he believed that. He was bound to know the contrary.

The plaintiff objects that certain evidence of Dr. Eby was incompetent; but the evidence conceded to be competent, with the presumptions of law that arose therefrom, establishes that Dr. Eby advanced the money for Dr. Chandler upon the latter's request and as a loan. The company knew this if it was bound to know what its agent knew. With this loan Chandler caused his payments to be made when due. This loan was the private business of Chandler and Eby, and was not the company's business. It received its money when due, and by so doing waived none of the terms of its contract.

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

REVERSED.

MORRISSEY, C. J., and LETTON, J., concur in the conclusion.

ROSE, J., dissents.

ARTHUR J. KOENIGSTEIN V. STATE OF NEBRASKA.

FILED MAY 5, 1917. No. 19418.

1. **Jury:** SPECIAL VENIRE. Section 9106 Rev. St. 1913, applies only when two or more persons are charged in the same indictment or information, and one of them so charged has had a separate trial. Under that section to obtain a new jury the clerk must procure a list of 60 electors of the county, and the jury is selected from this list.

2. ———: ADDITIONAL JURORS. Under section 8143 Rev. St. 1913, the court orders the sheriff to "summon without delay good and lawful men, having the qualifications of jurors." These are summoned from the body of the county, and the sheriff is not required to apportion them equally to all parts of the county. Such a method of selecting jurors to try a particular case is exceptional, and should not be lightly resorted to.

3. **Criminal Law:** FORMER JEOPARDY. *Res adjudicata* is a fundamental principle in civil cases, and the corresponding principle in criminal cases is that no one shall be twice put in jeopardy for the same offense. It is only when the same matter is in issue in both cases that the defendant can be said to be put in jeopardy for the same offense in both cases. A trial jury is not expected to base its opinion of the weight of the evidence upon the opinion of other men, and is not to be influenced by the consideration of what any other jury has or might have done upon the same state of facts.

4. ———: EVIDENCE: RECEIVING BRIBES. But under the general allegation of an indictment that the defendant received a bribe from a specified keeper of a disorderly house, it is competent to prove that the defendant adopted a plan or system requiring each and all of the disorderly houses in the vicinity to pay him a specified sum to prevent prosecutions; and that pursuant to that plan not only the person alleged, but also other persons similarly situated, paid defendant such bribes.

5. ———: ———: ———: FORMER ACQUITTAL. Under such circumstances the former acquittal of the defendant upon an indictment charging him with receiving a bribe from the keeper of one of such disorderly houses will not exclude evidence of that offense upon a subsequent trial of an indictment for receiving a bribe from the keeper of another such house. Such evidence is allowed only for the purpose of strengthening the evidence of the offense charged in the subsequent trial by showing the general

plan or system under which the bribe was received. The two crimes are distinct, and neither is an element of the other. But when such evidence is introduced the defendant should be allowed to prove his acquittal on the former trial.

6. ———: INSTRUCTIONS: DUTY OF COURT. In instructions intended to guard against mistakes or oversight by the jury, if the interest of the court or of the state at large in the conviction of the guilty is suggested, care should be taken to avoid the impression that this is of more importance than is the acquittal of the innocent. It is erroneous to impress upon the jury the importance of the conviction of the guilty without also as effectively guarding against the conviction of the innocent.

7. ———: MISCONDUCT OF JUROR. The jury must determine the issues submitted solely upon the evidence admitted in open court upon the trial. If any juror assumes to state facts that may be known to him, which might influence the verdict, and which were not admitted by the court with opportunity for cross-examination, such misconduct will vitiate the verdict and require a new trial.

ERROR to the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed.*

Reese, Reese & Stout, H. F. Barnhart and *Jack Koenigstein,* for plaintiff in error.

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

SEDGWICK, J.

The defendant was found guilty of accepting a bribe while acting as county attorney of Madison county, and was sentenced to imprisonment in the penitentiary from one to five years. He has brought the case to this court for review.

The first questions presented are as to the impaneling of the jury. It appears that there were two indictments pending against the defendant at the same time; both charging him with accepting bribes from respective keepers of disorderly houses in or near the town of Norfolk. The defendant was tried upon one of these indictments and found not guilty, and at the same term the case at bar was about to be tried, and the prosecuting attorney filed a motion "to discharge the regular panel of jurors summoned

for the special September, 1915, term of said court, and to enter an order causing a special venire of jurors to be called to try the above entitled cause." It appears that upon the former trial of the defendant at the same term of court it was contended, and there was some evidence indicating, that while he was county attorney he had required each one of the disorderly houses in the town to pay him a regular monthly bonus, and in consideration of such payment had refrained from prosecuting them. The indictment indicated that the same contention would be made in the case at bar. The jurors of the regular panel had all heard the evidence in the case that had been tried, eleven of them were upon the jury that tried the case, and the remainder of the members of the panel were in the courtroom more or less at the time of the trial and heard the evidence and argument of counsel. Upon these facts the court discharged this regular panel, and directed the sheriff to "summon without delay twenty-four (24) good and lawful men, having the qualifications of jurors, to fill and complete the panel." This was done immediately, and the defendant filed a motion and affidavit objecting to the jurors summoned by the sheriff. In an affidavit filed by him he stated "that the regular panel and bystanders are incompetent, because of having heard the evidence, or a part thereof, in the former trial, to sit as jurors in this cause." This proceeding of the court in quashing the panel was not authorized by section 9106, Rev. St. 1913. That section applies when two or more persons are charged in the same indictment or information, and one of them so charged has had a separate trial. If then the court is "satisfied, by reason of the same evidence being required in the further trial of parties to the same indictment or information, that the regular panel and bystanders are incompetent, because of having heard the evidence, to sit in further causes in the same indictment or information," then the court may require the clerk to prepare a list of 60 electors of the county, and the jury is to be selected from this list. This method of proceeding was not followed, the court un-

derstanding that the section did not apply in this case, but the motion of the prosecuting attorney to quash the panel was sustained apparently because the court found that each and every juror upon the panel was disqualified to sit, having already heard the evidence in the case, and of course having heard the public discussion that would follow after the first trial. Under these circumstances, if the jurors of the regular panel had been severally examined on their *voir dire,* none of them would have been allowed to sit in this case, and therefore excluding them under this general order was not erroneous.

The order of the court directing the sheriff to summon 24 jurors was authorized by section 8143, Rev. St. 1913: "Whenever at any general or special term, or at any period of a term for any cause there is no panel of grand jurors or petit jurors, or the panel is not complete, said court may order the sheriff, deputy sheriff, or coroner to summon without delay good and lawful men, having the qualifications of jurors." Under this order of the court the sheriff called 24 jurors, and the defendant then filed an objection "to the panel of petit jurors summoned for the trial of this cause by the sheriff of Madison county." The grounds of this objection alleged by the defendant were because a list of persons from which this jury was drawn was composed of persons residing in one particular locality of the county, and none of the jurors were selected "from residents of Norfolk precinct which contains at least one-third of the population of the county," or from six other specified precincts of the county. "The prisoner has the right to insist that the list of persons from which the panel is drawn be filled in due proportion from all of the precincts within the trial district, and not from a part only." *State v. Page,* 12 Neb. 386. In the same case it is said that, if the county commissioners in preparing the regular jury list overlooked a precinct containing one-third of the whole number of persons in the trial district qualified to serve, the panel would be illegal, but in such case "the court has ample authority to provide a lawful jury under section

664 (Rev. St. 1913, sec. 8143)." *Barney v. State,* 49 Neb. 515. Under section 664 the sheriff summons "good and lawful men, having the qualifications of jurors." These are to be called from the body of the county, and the sheriff is not required to apportion them equally to all parts of the county. This point was determined in *Welsh v. State,* 60 Neb. 101, in which case the court said: "In cases where a jury is drawn in the manner prescribed by said section 658 *et seq.* of the Code of Civil Procedure the provisions thereof must be observed. That they are mandatory we do not doubt, particularly those provisions which require that the panel must consist of persons drawn, as nearly as may be, from all portions of the county, in proportion to their population, and this we understand to be the rule laid down in most of the cases of this court cited by counsel for defendant in support of the proposition that the panel in this case was illegal. But no such requirement is prescribed by section 664, hence it was unnecessary that the jury in this case be so selected." Such a method of selecting jurors to try a particular case is exceptional and should not be lightly resorted to. It was said in the case last cited: "The authority conferred by this section should be sparingly exercised and exigencies should not be purposely created by the courts for its exercise. This defendant suffered no injustice through such proceeding, and the lower court must be sustained in its action."

The next objection presented in the brief is: "The court permitted the introduction of evidence of the identical acts complained of in the former charge (trial), which had been found not true, and refused to permit the introduction of evidence of such acquittal." The theory of the prosecution was that the defendant as county attorney adopted a plan or system of requiring each and all of the disorderly houses in the town to pay him a specified sum to prevent prosecutions. The first witness introduced by the state testified that he was a driver of a taxicab, engaged in carrying passengers from place to place in the town for hire, and that he, at the defendant's request, took him to each

of the disorderly houses in the town, and that afterwards the witness received money from each of the keepers of these houses at or about the first of each month and delivered the money to this defendant. It appears to be seriously contended that the indictment is not sufficient to admit this class of testimony, but there seems to be no ground for this contention. In *Guthrie v. State,* 16 Neb. 667, several questions were considered. The indictment in that case alleged the receipt of $300 as a bribe, and alleged that the $300 was paid by one Branch "and other persons whose names are to the jurors unknown." The proof showed that it was paid by Branch alone, and it was held that there was no fatal variance between the allegation and the proof. In the case at bar the allegation is that $75 was paid by Nannie Meyers and Riley McLimans and there was proof that the $75 was so paid. The indictment continued, stating how and for what purpose the $75 was paid, and in that regard alleges that it was paid for the purpose of permitting Nannie Meyers "and other persons to the grand jurors unknown" to carry on unlawful business. The proof tends to establish that the $75 charged in the first count of the indictment as paid by Nannie Meyers and McLimans was paid in pursuance to a general plan and system whereby similar amounts were to be paid by other persons and all persons so paying were to be protected from prosecution. Under the opinion in *Guthrie v. State, supra,* this proof would have been admissible under the general allegation of payment by Nannie Meyers and Riley McLimans. The court said: "It is clearly shown that the agreement was a continuing one, and contemplated a system of payments to be made in the future, and for which the same course was to be pursued by plaintiff in error as for the $300. It was known by plaintiff in error when Branch received money, and no gambling house was molested after its share of the money had been paid. He was fully advised of what occurred in the workings of the plans and designs, not only at the time of the receipt of the $300, but at all times, so long as the system under

which they were working continued. This system was fully developed and exposed by Branch in his testimony. It was properly admitted as a part of the transaction in which the $300 was paid by Branch to plaintiff in error. The fact of the carrying out of this system was proper evidence for the purpose of corroborating the testimony of Branch, and showing the purpose, understanding, and intent with which the money was received as alleged in the indictment, and for the purpose of showing the system under which these several transactions were had."

And, so in the case at bar, under the allegation that $75 was paid for such purpose by Meyers and McLimans, it was competent to prove that it was paid under a system by which all violators of the laws similarly situated were to make similar payments and were to be protected. This seems to be well supported by authority. Judge Wharton says: "When the object is to show system, subsequent as well as prior collateral offenses can be put in evidence, and from such system identity or intent can often be shown. The question is one of induction, and the larger the number of consistent facts, the more complete the induction is." Wharton, Criminal Evidence (10th ed.) sec. 146.

In *Frazier v. State,* 135 Ind. 38, the court adopted the following language quoted from text-writers: "A series of mutually dependent crimes may be shown where they tend to prove that they were committed under a system which becomes relevant to the inquiry."

In *Wallace v. State,* 41 Fla. 547, the law is declared to be: "Where the crime in question is one of a system of criminal acts occurring so near together in point of time and so nearly similar in means as to lead to the logical inference that they are all mutually dependent and committed in pursuance of the same deliberate criminal purpose and by means planned beforehand, evidence of such other acts is admissible, even though those acts amount to another criminal offense." This seems to be the general rule.

The evidence admitted to show this plan and system of the defendant included evidence of money received from one Fern McDonald, which was the substance of the charge upon which the defendant had been formerly tried and acquitted. In rebuttal the defendant offered in evidence the indictment in the former case identifying the payments so received as the same payments upon which the defendant was formerly tried. The defendant then offered in evidence the verdict of acquittal in the former case. Upon objection of the state this was excluded. The general rule is that the verdict of the jury in another case between different parties is not competent evidence of the fact so found by the jury. The reason of that rule is that the verdict of one jury is not evidence to be considered by another jury in determining the same question. But in this case the former trial was between the same parties as the present trial. The defendant relies upon *Mitchell v. State,* 103 Am St Rep. 17 (140 Ala. 118), which holds: "If, on the trial of an accused for the commission of one crime, evidence is permissible and is introduced of the commission of another similar crime for the purpose of showing the intent with which the crime charged was committed and the identity of the accused as the person who committed it, he is entitled to introduce in evidence the record of a court showing his trial and acquittal for such other crime. Such evidence is admissible under the doctrine of *res adjudicata.*" And it is said in the opinion: "Whether the production in evidence of a record such as defendant offered to produce would have rendered the state's evidence of the burning of Murphey's house subject to exclusion is not a question here raised or determined." It would seem that if his acquittal in the former trial for a distinct offense would be *res adjudicata* of the principal fact therein charged, so as to determine that question for the subsequent trial for another offense, it would be the duty of the court in the subsequent trial to instruct the jury that it was established that this defendant did not receive the bribe so charged as the substance of the former offense. The receiving of a bribe

from Fern McDonald was the substance of the offense charged in the former trial, and undoubtedly the state could not rely upon such allegation as the substance of any subsequent charge, or as an essential element of any criminal charge against the defendant. The Constitution prevents putting a person in jeopardy the second time for the same offense, and when the essential element of any crime has been determined the defendant cannot be again required to defend against it. The receipt of bribes from Fern McDonald is not in issue in this case. It is only when the same matter is in issue in both cases that the defendant can be said to be put in jeopardy for the same offense in both cases. Parker, C. J., in *King v. Chase,* 15 N. H. 9, 41 Am. Dec. 675, speaking of *res adjudicata* in civil cases, said: "Any fact attempted to be established by evidence, and controverted by the adverse party, may be said to be in issue, in one sense. As, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties. But this is not the matter in issue, within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. * * * But facts offered in evidence to establish the matters in issue are not themselves in issue, within the meaning of the rule, although they may be controverted on the trial." This doctrine has been repudiated by some text-writers, and also by some courts, but appears to us to be sound.

Res adjudicata is a fundamental principle in civil cases, and the corresponding principle in criminal cases is that no one shall be twice put in jeopardy for the same offense. This distinction is stated by Judge Wells: "The principle —which is parallel to the principle prevalent as the fundamental rule in civil cases—is that no one shall be twice

put in jeopardy for the same offense. And, accordingly, the primary inquiry under it is, when does jeopardy attach, so as to be a bar to any subsequent prosecution?" Wells, Res Adjudicata and Stare Decisis, 318, 319.

But in the present trial the defendant is not put in jeopardy of conviction of receiving bribes from Fern McDonald. The payment by her is not an element of the crime for which he is now tried. That evidence could not be omitted in proving the general plan and design under which the money was received from Nannie Meyers, and so far as such evidence is allowed it is only for the purpose of strengthening the evidence of the substantial charge now being tried. The trial jury is not to be controlled by the consideration of what any other jury has or might have done upon the same state of facts. They are not expected to base their opinion of the weight of evidence upon the opinions of other men. Under the holding of Parker, C. J., above quoted, this evidence would not be excluded in the application of *res adjudicata* in civil cases. At all events it seems that receipt of such evidence cannot be said to put the defendant in jeopardy the second time for the same offense. We think the evidence of the receipt of bribes from Fern McDonald, tending as it does to prove the general system or plan of defendant, was competent. The fact that defendant was acquitted of that crime in the former trial is not to be considered as *res adjudicata* in this trial. While the forming of the plan and purpose of exacting money in the nature of bribes from all of the disorderly houses of the town and vicinity would not of itself constitute a crime defined in our law and subject to punishment, the act of accepting a bribe being the substance of the crime so defined, yet the fact of forming and attempting to execute such a general plan would, if proved, strongly support the evidence of the definite crime charged. The state attempted to prove more payments of that nature by the witness Fern McDonald than by any other person. It appears also that in the former trial the state attempted to prove the same corrupt plan and purpose as was made

so prominent a feature in the trial of the case at bar. While this general plan was not an element of the crime charged, and the result of the trial did not necessarily depend upon the existence or nonexistence of such plan and purpose, still it was a question of fact in evidence in both trials, and a very important one. Without this evidence it may well be doubted whether the defendant would have been convicted in the case at bar. While the verdict of acquittal in the former trial is not to be considered as determining that collateral question for the purpose of the subsequent trial for a distinct offense, we think that, when so much of the the evidence of the former trial was before the jury in the case at bar, justice required that the former verdict should also have been allowed in evidence.

The statute authorizing the court to require the sheriff to call jurors from the bystanders or from the body of the county for the trial of a particular case should be made use of only when it is reasonably certain that the case to be tried will not be prejudiced by such method of selecting a jury. Under the circumstances in this case it would not in general be expected that a jury would be so selected. If the defendant is to be successively tried upon charges which in the law are regarded as distinct from each other, and yet which admit of the introduction of much of the same evidence to support the respective charges, great care should be taken to protect the interest of the state and the rights of the defendant against any prejudice that might have arisen from the former trial, and ordinarily both cases would not be tried at the same session of the court. Under our former decisions there has been no technical violation of the law in that regard, and yet it may well be doubted whether the results of the second trial may not have been in some degree influenced by the transactions in the former trial. Under such circumstances, if there were a sufficient number of trials in succession at the same session of court, the acquittal of an innocent defendant in all of the trials might not be as certain as the public interest requires.

Evidence that the various houses of prostitution were open and being operated during the time named in the indictment was competent, but apparently the cross-examination of the witness McLimans who testified to these facts was somewhat too restricted. This perhaps was owtions were propounded to this witness upon this cross-exing to the fact that so many apparently unnecessary quesamination.

There seems to have been some attempt made to show that there was a conspiracy among the keepers of these houses and their patrons to prosecute this defendant unjustly. So many of the witnesses were connected with these houses that this would have been an important matter if it had been established by the defendant. Many questions were asked by defendant's attorney in the cross-examination of the plaintiff's witnesses with this object in view, and there are many assignments of error in the brief predicated upon sustaining objections to these questions. Many questions and answers were allowed that might have been excluded, and it seems probable that in some instances evidence was excluded that might have been allowed. This was almost unavoidable under the circumstances. In many cases the purpose of the question was not as plain to the court as it may have been to counsel. As the case may be tried again we have gone somewhat into detail, but we cannot attempt an analysis of this evidence, covering as it does more than 600 sheets of closely typewritten matter.

The witness Nannie Meyers testified to a conversation with the defendant at the defendant's office in which the defendant said she could have no police protection in running her house, the only protection she could have was what he, the defendant, could give, and asked her what that would be worth to her. She was then asked whether she heard from him after that, and testified that the witness Riley McLimans called at her house, and, representing that he was sent there by the defendant, asked her if she was going to send that money to the defendant. She was

then asked, "What did you say?" This was objected to as incompetent and hearsay. The court overruled the objection, and she answered, "I said, 'Yes,' but I didn't have it, and I asked him if it would be all right in a few days, and he said he didn't know, but he would see. Q. Was anything said about whether the other women had paid? A. I asked him if the other women had paid, and he said, 'Yes.'" It is insisted that this evidence was incompetent and prejudicial. There was, however, evidence that the defendant himself had represented to this witness and others that McLimans would receive this money for him, and although this was denied by the defendant, still if the jury believed that McLimans was authorized to receive the money for the defendant this evidence would not be prejudicially erroneous so as to require a reversal.

There are many assignments of error upon the rulings of the trial court in admitting and excluding evidence. In some instances the trial court might properly have been more liberal in the cross-examination of the state's witnesses, and also in the defendant's offer of evidence.

Instruction No. 3, given by the court, appears to be rather more particular to guard the interests of the state than those of the defendant against mistakes or oversight by the jury. Great care should be taken in such instructions to avoid the impression that the state is more interested in conviction than in acquittal. "It is essential to the peace and welfare of society and good government that every guilty man be punished, when his guilt is established by a measure of proof required to convict of crime in a court of justice. * * * You should not allow your minds to be influenced by consideration of sympathy for the defendant, or for his family or friends." This instruction presents pretty strongly the interest of the state in conviction. The corresponding statement, "You will readily appreciate its importance to the defendant, because it involves his liberty," perhaps infers that the state is equally interested in the acquittal of an innocent man, but does not present that idea as emphatically. Under the circum-

stances in this case this instruction was prejudicial to de-defendant.

One of the grounds for the motion for new trial was that there was misconduct of one of the jurors in the jury room while the jury was considering their verdict. Three several jurors testified that the juror Yeazel stated in the jury room to the jurors, in substance, that he had known the defendant since boyhood, and that he knew his reputation, and that it was bad, and stated some things as facts to the jury which, if true, would indicate that the defendant's character and reputation was bad, and that the said Yeazel continued in this sort of recital to the jury until he was stopped by the foreman of the jury. This evidence of these three witnesses was denied by the juror Yeazel, and also denied by one other juror, who testified that the juror Yeazel did state that he knew the defendant when he was a boy, but that he did not state the other matters attributed to him. This witness stated that cots were put up for them, and that during the night he went to sleep and slept until 7 o'clock the next morning. He was asked if it was possible that Yeazel might have made the remarks attributed to him by the other jurors, and answered, "It is possible, I presume, but not probable. * * * I couldn't say I heard every word because we were all talking a good deal. Q. And at times some were talking in one part of the room and others in the other part? A. Yes, they was talking to some extent." The foreman of the jury was not called as a witness. Such a recital of alleged facts as it is charged this juror made would be misconduct and would vitiate the verdict. The preponderance of the evidence is that the juror Yeazel was hostile to the defendant, and that he stated as facts within his knowledge substantially the matters testified to by the three jurors referred to.

For the reasons indicated, we cannot affirm the judgment, and it is therefore reversed and the cause remanded for further proceedings.

REVERSED.

LETTON and ROSE, JJ., dissent.

STATE OF NEBRASKA, PLAINTIFF, V. GEORGE CORDING, DEFENDANT.

FILED MAY 5, 1917. No. 19540.

1. **Public Lands: CONVEYANCE: CONSTRUCTION.** The state is not bound by the unauthorized acts of its agents, and public policy requires that such acts be restrained, and, when contrary to public interest, annulled. When, however, the state by its authorized agents executes a conveyance that is ambiguous or susceptible of different constructions as to the intention or purpose of the state, and a definite construction of its meaning and of the intention and purpose of the state in executing the same has been understood and acted upon by the public generally, and knowingly acquiesced in by the state, the original right of the state to assert a different construction of the conveyance may, by great lapse of time, be considered as abandoned, if the assertion of such right will manifestly work an injustice.

2. ———: ———: ———. Under the circumstances in this case, indicated in the opinion, it is considered that, the public generally having acted upon the understanding that the deed of the state was intended to convey the land in question, and the state having knowingly acquiesced in that construction of the intention of the state for more than 40 years, the state ought now to be held to have abandoned any other construction of its deed.

Original action in ejectment. *Judgment for defendant, and action dismissed.*

Willis E. Reed, Attorney General, Dexter T. Barrett and *George W. Ayres,* for plaintiff.

Hainer, Craft & Edgerton and *Heasty & Barnes, contra.*

SEDGWICK, J.

The state brings this original action in this court to recover 80 acres of land. In 1872 the state conveyed a large tract of land "for works of general improvement" to the Omaha & Southwestern Railroad Company, pursuant to and in harmony with the act of congress under which the lands were granted to the state. The deed from the state to the railroad company conveyed lands adjoining section 7,

and described seven-eighths of the section by particular descriptions, omitting one-half of one quarter of the section, being about 80 acres, and the land here in controversy. The deed stated that the land conveyed by the state was 626.18 acres, the number of acres shown by the government survey to be included in the entire section.

The question might well have been raised whether this 80 acres of land that is now in question was intended to be conveyed and was omitted by mistake. The state for about 40 years construed this deed as conveying the entire section. During that time this defendant purchased this 80 acres of land, and took a conveyance purporting to convey the title, and had held it under this color of title for about 20 years. This 80 acres of land was assessed for taxation prior to 1889 and in that year, and continuously from the year 1889 until the present time. The state has received the benefit of these taxes, and all of the officers of the state from the time of the conveyance by the state in 1872 knew that in construing its deed as a conveyance of the entire section the state would be able to collect taxes thereon, and has continued in various ways to construe its deed as conveying this 80 acres of land in question, and has acquiesced in the construction which this defendant and his grantors placed upon the deed and upon the intention of the state in executing the same. In *State of Michigan v. Jackson, L. & S. R. Co.*, 69 Fed. 116, the court of appeals of the sixth federal circuit said: "While it is necessary and right to restrain or annul the unauthorized acts of its agents by which its interests might be impaired, yet there must come a time, after long-continued acquiescence in public action with knowledge of it, when, in the interest of its citizens, the state itself shall be precluded from despoiling others by the assertion of its original rights." Relying upon this construction of the intention of the state in making this conveyance, this defendant has improved the land in question, and the state ought not now to deny that it was the intention of the state to convey the whole section by its deed.

Upon these facts we find in favor of the defendant, and the action is DISMISSED.

ROSE, J., dissenting.

I understand the majority opinion to create a species of estoppel having the virtue of a warranty deed, whereby a private individual may, in the absence of legislative grant or gift, procure from the state of Nebraska, in violation of a public trust, title to public land without buying it or paying for it. The decree of the majority transfers from the state of Nebraska to defendant for private use title to 80 acres of land held for public purposes. The state of Nebraska acquired the land from the United States for internal improvements, and never sold it or parted with the title. One of the purposes of the federal grant was to furnish aid in the construction of railroads. All of the land included in the grant was held by the state of Nebraska in trust. As to the 80-acre tract in controversy the trust has never been executed. The land can only be used by the state of Nebraska for internal improvements. *Koenig v. Omaha & N. W. R. Co.*, 3 Neb. 373. Aiding in the construction of railroads was a far-reaching governmental purpose of the nation and the state. These railroads were by the Constitution made public highways. Const., art. XI, sec. 4. They are now connecting links between a granary of the world and the highways of the nations. Lands held by the state of Nebraska in trust for such improvements should not be frittered away for the benefit of private individuals either by fiction of the law or by unauthorized acts of public officers.

The state is bound only by officers acting pursuant to legislative authority. The board of public lands and buildings did not transfer the title, and other officers were without power to do so. An officer can perform no official act not authorized by written law. His powers are defined by the legislature, and his official acts are disclosed by public records, accessible alike to the state and private individuals. Neglect, unauthorized acts, and violation of duty are wrongs of private individuals, and not official acts binding on the state. What an officer may do on behalf of, or for, the public depends on the law, which private individuals

must know. Authorized acts alone bind the public. Those who deal with public officers must do so on statutory terms, without the prospect of procuring an advantage through violation of law, laches, or neglect of official duty. If the state of Nebraska is under a moral obligation to defendant, the legislature will discharge it upon a proper request.

State property is not subject to taxation. Const., art. IX, sec. 2. No officer can assess or collect a tax on state property. Attempts of this kind are mere wrongful acts of individuals. Estoppel does not grow out of such conduct. In these respects neither the lapse of the time nor the wrongs of individuals assuming to perform official acts grow into estoppel or title to land.

I take issue with the assertion that the state knew the facts on which the estoppel announced by the majority is based. The officers who could be charged with knowledge are not mentioned. There is no attempt to name an officer who could bind the state by knowledge of what was done by defendant or others.

The doctrines of estoppel and laches, unless adopted by statute, are not applicable to the federal or state government. *United States v. Williams,* 5 McLean (U. S.) 133; *United States v. Thompson,* 98 U. S. 486; *State v. School District,* 34 Kan. 237; *Des Moines v. Harker,* 34 Ia. 84; *United States v. Hoar,* 2 Mason (U. S.) 311.

CORNISH, J., dissenting.

I concur in the dissenting opinion of Judge Rose. Conceding that a case might arise where a conveyance by the state is ambiguous or susceptible of different constructions as to its meaning and intent, and where a definite construction has been given and acquiesced in generally by the public and the agents of the state for a long period of time, and that in such a case there might arise a conclusive presumption of fact that the construction given was in accordance with the actual intent and purposes of the state, this is not a case where such rule should be applied. Such

a rule would be one of evidence, not of estoppel, denying to the state the right to show what the facts were.

The maxim, "The king can do no wrong," as legally applied, worked for justice and in truth represented a high ideal of the state. It operated, not only for the benefit of the state, but for the benefit of those dealing with the state. It did not mean that the king was above the laws. It did mean that the state is not amenable to other earthly power, and that, being created for the benefit of the people, its powers cannot be exerted to their prejudice. It meant that the state is incapable, not only of doing wrong, but even of thinking wrong. It was under that rule that it was held that the crown cannot dispense with anything in which a subject has an interest, or make a grant in violation of the common law, or injurious to vested rights. The rule applies with even more force to the modern democratic state, in which not only is the state incapable of doing wrong, but, as a matter of fact, is not disposed to do wrong.

A law, making the state responsible for its conduct like private citizens or corporations, answerable to others, permitting it to be estopped by the wrongful acts of its agent, would not only degrade the state, but would be a law not responding to the situation as it exists. In transactions and controversies between private individuals, self-interest causes the rights of each to be protected. My 25 years of observation and experience in public office convinces me that the interests of the state are not, as a rule, as faithfully safeguarded through its agents as are the interests of private individuals. If the state buys or sells anything, or has work done, we are not surprised to learn that it has at least dealt liberally with others. The eye of the master is always upon his agent to see that he is faithful. Sometimes this is true of the state's agent, sometimes not. It seems to me, if we are to avoid what would in time amount to great losses to the state, we must hold to the rule that the state's agents are our agents, and in dealing with the state through its agents the state is bound only as the agent keeps faithfully within the law. No doubt cases will arise,

possibly the instant case, where it can be said that the state's conduct has done a citizen a wrong. If so, he should present his claim to the state. I served in the legislature two terms, when many claims against the state were presented to it for adjustment. I never knew a member who, from his expressions, appeared to act selfishly or fraudulently in behalf of the state, in consideration of a claim, and I believe there was none.

EDWARD A. SMITH, APPELLEE, V. ELIAS HOLOVTCHINER ET AL., APPELLANTS.

FILED MAY 5, 1917. No. 19452.

Schools and School Districts: EXPENSES OF OFFICERS: INJUNCTION. Expenses incurred by the president of the board of education and the superintendent of schools, at Omaha, Nebraska, in attending a congress of school hygiene, under the authority of the board, for the purpose of securing general information on the subject of school hygiene, are not necessary expenses incurred in the performance of official duties, and the treasurer of the board may be enjoined from the payment of such expenses.

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

Carl E. Herring, for appellants.

T. E. Brady, contra.

CORNISH, J.

On August 18, 1913, the board of education of Omaha, by resolution, directed Elias Holovtchiner, president of the board, and Ellis U. Graff, superintendent, to attend as delegates the Fourth International Congress on School Hygiene, to be held at Buffalo, New York, and also to visit several technical schools at the board's expense. This action was brought to enjoin the payment of $250, traveling expenses, incurred in carrying out the order of the board. From the court's order, granting the injunction, this appeal is taken.

Section 7027, Rev. St. 1913, provides for the levy and collection of taxes deemed necessary, as shown by the report of the board, for school purposes named, including the support of schools, purchase of school sites, and erection and furnishing of school buildings. Statutes granting power to tax are construed strictly. The purpose for which the tax is levied must come within the statute from which the power is derived. The corporation possesses only such powers as are specifically granted, and such others as are necessary for the purpose of carrying into effect those expressly given.

Cases, challenging the right to expend the public funds for expenses of public officers in attending conventions, have been before the courts, and the courts appear to have uniformly held that these are not within the scope of proper public expenditures. In the case in hand, the real object in attending the convention was educational. Strictly speaking, it had nothing directly to do with either the support of the schools, or the erection and furnishing of school buildings. Counsel for appellants believes that modern conditions require a more liberal rule. While it cannot be disputed that the municipality might derive great benefit from what its delegates might learn at the convention, yet experience has shown that, when the control of a fund and the use of it may be lodged in the same person, a situation arises which is subject to such flagrant abuses that courts have thought that this was an additional reason for that rule of strict construction made to protect the rights of taxpayers.

Expenditures of this sort, necessary to ascertain a particular fact upon which the action of the board in the management of schools is to depend, stand upon a different footing. In the instant case, the expenses of visiting the technical high schools are commingled in the claim with the expenses incurred in attending the convention. Whether such expenses would be lawful or not, since unlawful items are included that cannot be paid from money obtained by taxation, the claim should not have been allowed. For

cases bearing upon the question above discussed, see *Waters v. Bonvouloir,* 172 Mass. 286; *James v. City of Seattle,* 22 Wash. 654; *Minot v. Inhabitants of West Roxbury,* 112 Mass. 1; *Gregory v. City of Bridgeport,* 41 Conn. 76; *Austin v. Coggeshall,* 12 R. I. 329.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

F. M. HALLOWELL, APPELLANT, V. BUFFALO COUNTY, APPELLEE.

FILED MAY 5, 1917. No. 19479.

1. **Judges:** DE FACTO OFFICERS. A county judge was removed from office by a judgment of the district court declaring the office vacant. After three days the county board duly appointed another person to fill the vacancy. He qualified, took possession of the office, performed its duties, received its fees, and was generally recognized as the one in authority. Afterwards, on appeal, the judgment of ouster was held void, and the duly elected official was reinstated in office. *Held,* that the appointee of the county board performed the duties of the office with color of title and was officer *de facto.*
2. ———: ———: SALARY. "Where a county has once made payment of the salary of a county office, to one actually in possession of the office, performing its duties with color of title, before his right to the office has been determined against him by a competent tribunal, it cannot afterwards be compelled to pay the same salary to the *de jure* officer." *State v. Milne,* 36 Neb. 301.
3. **Appeal:** REVERSAL: MANDATE. "When the judgment of a district court is reversed, a mandate is the proper and legal mode of communicating the judgment and directions of the supreme court to such district court." *Horton v. State,* 63 Neb. 34.

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

H. M. Sinclair and *T. F. Hamer,* for appellant.

Albert B. Tollefsen, contra.

CORNISH, J.

Plaintiff was removed from the office of county judge June 15, 1913, by a judgment of the district court declaring the office vacant. After three days, no one in the meantime performing the duties of the office, the county board appointed one Morrison to fill the vacancy. He duly qualified, took possession of the office, performed its duties, received its fees, and was generally recognized as *de facto* officer until February 5, 1914, when, by mandate from the supreme court, he was removed, and plaintiff reinstated in the office. In the supreme court's decision it was held that the district court was without jurisdiction of the subject-matter, and its judgment would therefore be void. *Conroy v. Hallowell*, 94 Neb. 794. Plaintiff brings this action to recover from the county his salary, $1,053.85, being the amount paid by the county to Morrison during the time he was removed from office.

In *State v. Milne*, 36 Neb. 301, we held: "Where a county has once made payment of the salary of a county office, to one actually in possession of the office, performing its duties with color of title, before his right to the office has been determined against him by a competent tribunal, it cannot afterwards be compelled to pay the same salary to the *de jure* officer."

The acts of such an officer are valid, and are sustained upon the ground that it would be intolerable that the general public, having business to do with the office, should be required to determine at their peril who is the rightful incumbent. The county board, in allowing such an officer his fees and salary, has a right to rely upon his apparent title and to treat him as an officer *de facto*. The board being justified in allowing him the emoluments of the office, the county cannot afterwards be compelled to pay them again.

Because the judgment of the district court, removing him from office, was finally found to be void, and because Morrison was an appointee of the county board, plaintiff disputes the proposition that Morrison was a *de facto* officer, or

held under color of title, and contends that he should be treated as an intruder or usurper of the office, and that the county should be required to pay plaintiff what would have been due him as salary. While we must agree with the plaintiff that the judgment of the district court was void and a nullity in so far that probably no rights could be predicated upon it, yet it was a fact and circumstance in the case upon which persons could and did act. Was not the plaintiff himself justified in not attempting to resume the office, or to continue to exercise its functions, until the case had been finally decided? And, likewise, was not the board justified in believing that the judgment had created a vacancy, and in acting upon that belief at a time when there was no one assuming the responsibilities of the office?

We agree that mere possession of an office is not sufficient to make the incumbent a *de facto* officer. To constitute one a *de facto* officer he must have color of title, or his possession must be acquiesced in by the public generally. In this case, we are of opinion, these conditions existed. Morrison acquired color of title by reason of the district court's decision purporting to create a vacancy and by reason of his appointment by the board, a body authorized by law to fill vacancies. He was recognized as the incumbent by the public and the authorities generally. As above stated, if plaintiff recognized such a situation as existing, others are not to be blamed for doing so. Whether a legal vacancy existed or not, all the colors that the view presented to the eye at that time indicated that it did; everybody acted accordingly, and we are of opinion that Morrison became a *de facto* officer.

A void judgment is analogous to a constitutional act. It is held in *State Bank of Pender v. Frey*, 3 Neb. (Unof.) 83: "An unconstitutional act attaching territory to a county, accepted and acquiesced in, will suffice to render the acts of the register of deeds of such county, as to such territory, done before the law was declared unconstitutional, acts of a *de facto* officer."

Does the fact that the county board appointed Morrison make any difference as to the liability of the county to the plaintiff for his fees? We think not. It is argued that the basis of the rule touching what constitutes a *de facto* officer is protection of the innocent. That may be true. Ordinarily, and here, the taxpaying public are among the innocent. The public needs required that the office should be filled. The county board would be derelict in its duty if it failed to see that it was properly filled. When the trial judge had declared the office vacant, the board could not wait for the judgment on appeal before acting. In *Berryman v. Schalander,* 85 Neb. 281, we held: "A county board or board of county commissioners are clothed, not only with the powers expressly conferred upon them by statute, but they also possess such powers as are requisite to enable them to discharge the official duties devolved upon them by law."

If the board, acting as the agents of the county, had in bad faith used its official powers fraudulently to put one in office who was a mere intruder or usurper, and paid him the salary, the case would be different. In this respect the instant case is distinguished from *Warden v. Bayfield County,* 87 Wis. 181, relied upon by the plaintiff. No fraudulent act of the officials, acting as such, removed plaintiff from his office. That was done by the judgment of the court.

Forty-three days elapsed between the time of the decision of the supreme court and the time when the mandate, issued February 3, 1914, reached the district court of Buffalo county, when plaintiff was reinstated in his office. Under the decisions in *State v. Sheldon,* 26 Neb. 151, and *Horton v. State,* 63 Neb. 34, it appears that the judgment of the supreme court would not be final or officially known to the proper officers in Buffalo county, so that they would be required to execute the judgment, until the mandate was filed on February 5, 1914.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

WESTERN BRICK & SUPPLY COMPANY, APPELLEE, V. MID-WEST CONSTRUCTION COMPANY, APPELLEE; AMERICAN SURETY COMPANY, APPELLANT.

FILED MAY 5, 1917. No. 19459.

1. **Contracts:** CONSIDERATION. An agreement entered into without consideration is unenforceable.
2. **Appeal:** CROSS-APPEAL. "Parties to an action desiring to effect a cross-appeal in this court are required to file a brief of assignments in error within the time limited by statute for appealing." *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693.

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

Montgomery, Hall & Young, for appellant.

J. A. Gardiner, contra.

DEAN, J.

The Western Brick & Supply Company, hereinafter called plaintiff, began an action in the district court for Adams county against the Mid-West Construction Company, defendant, hereinafter called the Construction Company and the American Surety Company of New York, its codefendant, hereinafter called the Surety Company, to recover $916.93, that being the unpaid balance due from the Construction Company for building material sold and delivered by plaintiff to the Construction Company and used by it in the erection in Aurora of a building for Cass Brothers, a building for Mrs. A. V. Thomas, and for an addition to the Aurora Electric Light Company building. Plaintiff obtained judgment against both defendants for $916.93 and $90 that was allowed as attorney fees in addition to the amount of the judgment, to be taxed as a part of the costs in pursuance of section 3212, Rev. St. 1913. The Surety Company appealed from the judgment and

from the allowance of attorney fees. The three several building contracts between the Construction Company and its Aurora patrons were executed by the parties thereto in September, 1913. Shortly thereafter the Construction Company procured from its co-defendant, the Surety Company, three separate indemnifying bonds, wherein the Surety Company agreed to "indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal to faithfully perform said contract." The only obligees named in the three respective bonds executed by the Surety Company are Cass Brothers, Mrs. Thomas, and the Electric Light Company.

The Thomas building was completed on November 1, 1913, the Cass building on December 1, 1913, and the addition to the Electric Company building sometime in February or March, 1914. The statutory time for filing subcontractors' liens against the Thomas building expired some time in January, 1914, and on the Cass building some time in February, 1914. The time for filing such lien against the Electric Light building would not have expired until April 12, 1914, but that is not material, because it is shown by the direct examination of A. H. Ferrens, secretary and treasurer of plaintiff company, and by the testimony of E. D. Bruce, its shipping clerk and bookkeeper, that $421.35 was paid to plaintiff on April 7, 1914, in full settlement of the unpaid balance due for all material furnished by plaintiff that was used in the Electric building at Aurora. There is no dispute in the record with respect to the fact of this payment. To the same effect is the statement of S. H. Griffen, assistant manager of the Surety Company in Nebraska, who testified that he made the payment of $421.35 on April 7, for and on behalf of the Construction Company, from money furnished him for that purpose by the Electric Company. Philip Potter, resident manager of the Surety Company, also testified that his company did not to his knowledge contribute anything to this payment. Mr. Griffen testified, in substance, that shortly before the payment was made, per-

haps the same day, he called at the office of the Aurora Electric Company with Joseph Neptune, superintendent of the Construction Company, and while there Charles P. Craft, president of the Electric Company, gave to them a check for $1,000, with directions to pay certain accounts from the proceeds of the check, among them being the $421.35 which was the balance due plaintiff for material used in the Electric Company building.

From the record it is evident that counsel is mistaken in its contention that "plaintiff could have filed a valid lien on the building and ground of the Aurora Electric Light Company for the sum of $427.33 in addition to the $421.35 paid by Mr. Griffen on April 7, 1914." Obviously so, because two of plaintiff's witnesses and one witness for defendant testified that the latter sum constituted a payment in full of the balance due for material furnished by plaintiff that was used in the Electric building.

Plaintiff contends that when S. H. Griffen, the agent of the Surety Company, called at its office at Hastings on April 7, besides paying them $421.35, he promised plaintiff that if it would forbear the filing of liens against any of the Aurora property erected by the Construction Company the Surety Company would pay the balance of the indebtedness owing by the Construction Company to plaintiff for material furnished by it that was used in the Aurora buildings.

It appears to us that plaintiff must be mistaken with respect to such promise having been made. It is scarcely reasonable that it should have been made. When the balance due for the material that was used in the Aurora Electric building was paid, no lien could have been filed on that building, and the record clearly shows that the time in which a valid lien might have been filed by plaintiff on the Cass and Thomas buildings expired long before April 7; and the promise, even if made, which the agent denies, was without consideration. Doubtless there was considerable talk between the parties at the time, and some remark made by the agent was perhaps construed

to be a promise. It remains that it was no fault of the agent nor of the Surety Company that plaintiff allowed the time to pass in which it might have protected itself from loss by filing liens against the Cass Brothers and the Thomas buildings.

Plaintiff relied for recovery, not only on the alleged promise of the agent of the Surety Company to pay the balance due for material furnished by it to the Construction Company, but also pleaded and argued that the Surety Company was liable generally on the surety bonds.

The trial court eliminated from the consideration of the jury any liability of the Surety Company to plaintiff on the indemnity bonds, and gave to the jury this instruction: "The court instructs you, gentlemen of the jury, that, under the pleadings and the evidence, the sole question for your determination in this case is: Did the defendant, the American Surety Company, agree with the plaintiff that if plaintiff would not file any liens against the buildings constructed by the Mid-West Construction Company, and the lots upon which they were located belonging to the Cass Brothers, the Thomases, and the Aurora Electric Light Company, the American Surety Company would pay what was due to the plaintiff for the materials so furnished the Mid-West Construction Company?" After reading the court's instruction with respect to the "sole question" for its determination, there could remain no doubt in the mind of the jury as to the meaning of the court in the premises.

The Surety Company argues that the claim to recover on the surety bonds is eliminated by the judgment of the trial court, and that, plaintiff having failed to take a cross-appeal on that feature, the adjudication of the trial court is final on the question of its liability on the bonds generally. The contention of the Surety Company must be sustained. Rule 18b (Supreme Court Rules, 94 Neb. XV) provides: "On Cross-Appeal.—Coparties of appellants may join in the appeal or take cross-appeal, or any appellee may take cross-appeal, by filing with the clerk of

this court, within thirty days before the time fixed as rule day, a præcipe, which shall designate the name of such party as cross-appellant, and the names of all adverse parties as cross-appellees." *Anderson v. Griswold,* 87 Neb. 578. It is said in *Nebraska Hardware Co. v. Humphrey Hardware Co.,* 81 Neb. 693: "Parties to an action desiring to effect a cross-appeal in this court are required to file a brief of assignments of error within the time limited by statute for appealing." Plaintiff having failed to comply with the rule that has been invoked by the Surety Company, which requires that a cross-appeal be perfected in this court, we are compelled, in obedience to an orderly observance and enforcement of a salutary rule of long standing, to treat the allegation of plaintiff with respect to the alleged liability of the Surety Company generally on the indemnity bonds as an incident that has been finally closed in the trial court. The sole question tried and submitted to the jury in that court is plainly stated in the instruction now complained of by plaintiff, and hence in the present state of the record it is the only question that can properly be reviewed here.

The judgment of the district court is reversed, with directions to dismiss the action with costs as to the defendant American Surety Company.

REVERSED.

SEDGWICK, J., not sitting.

MINNIE MARTINS, APPELLEE, V. SCHOOL DISTRICT ET AL., APPELLANTS.

FILED MAY 5, 1917. No. 19470.

Schools and School Districts: TUITION: INJUNCTION. Minnie Martins, plaintiff, a minor child, by her next friend, enjoined the defendant school district from refusing to permit her to attend its public school without paying tuition. The testimony examined, discussed in

the opinion, and *held*, that plaintiff was qualified to attend the public school in the defendant school district without the payment of tuition on the ground of residence and on the ground that a married sister, resident in the district and with whom plaintiff lived, stood *in loco parentis* to her.

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

A. M. Emley and *A. R. Oleson,* for appellants.

Hugo M. Nicholson, contra.

DEAN, J.

On October 8, 1914, Minnie Martins, who was then 17 years of age, began an action in the district court for Cuming county by her next friend, John Richmond, plaintiff and appellee, to enjoin the officers of School District No. 30 of Wisner, defendants and appellants, from denying to her the privilege of attending the public school without payment of tuition. On final hearing a perpetual injunction was granted, and plaintiff's application for permission to attend the school without the payment of tuition was granted. The defendants have appealed.

Plaintiff is a sister of John Richmond's wife, and for nearly two years before the action was begun had made her home with the Richmonds at Wisner. She argues that her sister stands in the place of a parent to her, and besides maintains that she is a resident of Wisner, and is therefore entitled to attend the public school without charge on either ground. She attended the school of the defendant district throughout the 1913-1914 school year. No tuition was demanded until September, 1914, when a demand was made that $18 tuition be paid for the school year that was past. The demand was not complied with, because it was contended that her permanent home was at her sister's, and also because of plaintiff's claim of residence in the school district. On October 5, 1914, the district by resolution prevented her further attendance until the $18 tuition for the 1913-1914 school year was paid. Then, or at about that time, the board by resolution fixed

the fee for nonresident pupils at 50 cents a week, and required all nonresident pupils to comply therewith. To this demand plaintiff also refused a compliance for the same reason that she refused to pay the charge of $18.

Defendants argue that plaintiff's sister nor any other person stands *in loco parentis* to her at Wisner, and they contend that she is a nonresident of the district. They point out that John Richmond, in pursuance of notice, appeared before the board and promised that all tuition payments that were demanded would be paid, but that he later repudiated his agreement. Mr. Richmond in explanation frankly admits the most of defendants' contention on this point, but he testified that at the time of his talk with the board he had not then been informed about an arrangement that had long theretofore been made between his wife and plaintiff's father, at or very soon after the death of plaintiff's mother, which provided in effect that the father, in part owing to his bereavement, had placed her in charge of Mrs. Richmond to care for and to educate. When asked if, on discovery, he ratified his wife's act in the premises, he promptly answered that he did.

Defendants argue that Mr. Richmond should not, after litigation is begun, be permitted to change his ground and mend his hold. The answer to this contention is that the board was notified by him of his change of ground before any action was taken by it, and besides, in the absence of authority or of ratification by plaintiff, he could not bind her by any promise or agreement he might make, and the record shows he was without such authority, and it is not shown that she ratified his unauthorized act. Plaintiff was emphatic in her testimony that she never authorized John Richmond to make any statement to the board in her behalf about the payment of tuition, and that she never knew of his talk with the board on this subject until about the time suit was begun. The real issue in the case is whether Minnie had a right to go to defendants' school

without the payment of tuition. To this all else is subordinate. If Mrs. Richmond stood in the place of a parent to her she had that right or if plaintiff was a resident in good faith of the district she had a right to attend its public school. In either event, in view of the surrounding circumstances, John Richmond's promise or attitude or change of ground has nothing to do with a proper determination of the case.

The case was tried on June 8, 1915. Her mother had been dead eleven years. Her father and stepmother, to whom at that time he had been married about eight years, lived at Scribner, which had then been their residence for many years. During all of the time that plaintiff lived with her sister she had not been at her father's home, distant about 30 miles, to exceed perhaps three times, and then for only a few hours between trains, and never remaining there over night. It is in evidence that her sister furnished plaintiff with practically all of her clothing and with a little spending money ever since her mother died, and for all of the time that plaintiff was in her home at Wisner she furnished her with food, lodging and clothing free of expense to her father. Besides attending school, plaintiff worked in the telephone office at Wisner, where Mrs. Richmond's husband was manager. For this she received wages, which she testified she was saving to be used by her in obtaining an education. It does not appear that she went to Wisner mainly to go to school, but that her school attendance there was merely an incident in the life of a motherless child.

That plaintiff's father had given to Mrs. Richmond the entire control of plaintiff nearly two years before this action was begun is established by the testimony of Mrs. Richmond, of Minnie, and of her father. Plaintiff testified, too, that her father told her at Scribner, shortly before she went to her sister's to live, that she must make her own living or leave home. Her father never gave her any money or clothing after she left his home, and he tes-

tified that his daughter furnished Minnie with nearly, if not quite, all her clothing ever since her mother died. Mr. Martins testified that on one occasion he went to Wisner for the purpose of having Minnie return with him to Scribner to assist in the care of her stepmother, who was ill, but that Mrs. Richmond would not let his daughter go. He said her refusal was based in part on the ground that he had formerly relinquished control of Minnie to Mrs. Richmond, and that he acquiesced in her refusal to let her return with him for that reason, and that he returned to Scribner alone. Defendants point out that the testimony of Mr. Martins at the final hearing differed from an affidavit and other of his testimony at an earlier period of the controversy. When it is remembered he speaks a foreign tongue and that a part of the former testimony was taken through the medium of an interpreter, the apparent discrepancy loses much of its force as a challenge of its probative value.

Section 6800, Rev. St. 1913, among other things, provides that the school board may "make such rules and regulations as they may think needful for the government of the schools and for the preservation of the property of the district, and also to determine the rates of tuition to be paid for nonresident pupils attending any school in the district except nonresident pupils attending the high school without charge." Statutes pertaining to our public schools should be liberally construed to the end that all persons of school age may enjoy their privileges. A rule of a board of education that would prevent plaintiff or any person similarly situated from attending its public schools cannot be enforced. From the record it clearly appears that plaintiff is qualified to attend the public school at Wisner. *State v. School District,* 55 Neb. 317; *State v. Selleck,* 76 Neb. 747. Solicitude for the education of its youth has always been characteristic of Nebraska. It is a settled policy of the state that every person of school age shall have an opportunity to attend its free schools. Section 6, art VIII of the Constitution, follows:

"The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." The district court rightly interpreted the constitutional provision pertaining to this subject and the intent of the laws enacted in pursuance thereof.

The judgment of the district court is right, and is in all things AFFIRMED.

SEDGWICK, J., not sitting.

STATE, EX REL. JAMES GROVES ET AL., APPELLANTS, V. SCHOOL DISTRICT OF OMAHA ET AL., APPELLEES.

FILED MAY 5, 1917. No. 19983.

Schools and School Districts: NONRESIDENT PUPILS: STATUTE. In a proceeding to compel the Omaha school district to admit qualified nonresident pupils to its high school upon payment of the fee provided by statute, *held*, that the school district was not justified in refusing to admit relators where it was not shown that the district was unable to furnish such instruction at the statutory tuition fee, excluding the cost of "constructing or renting additional buildings, hiring extra teachers, or" showing some "other reasonable cause" for such refusal. Rev. St. 1913, sec. 6813, subd. 6.

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

E. R. Leigh, for appellants.

Carl E. Herring, contra.

DEAN, J.

In this action the relators, appellants, pray a peremptory writ of mandamus against respondents, to compel the admittance of certain applicants to free high school privileges in the high schools of the Omaha school district, by

virtue of the provisions of the free high school law. The school district refused admittance except on payment of $57 a year tuition. The relators were ready to pay $1 a week tuition, the amount provided by the statute, or $38 a year. The case involves the constitutionality of the high school law as amended in 1915 (Laws 1915, ch. 119), which provides for attendance of nonresident pupils in the high schools of the state on payment of $1 a week tuition.

Under the provisions of our Constitution relating to equality in taxation, any law imposing an unfair or unequal burden of taxation upon one school district for the benefit of another would be unconstitutional. This was held in *High School District v. Lancaster County,* 60 Neb. 147. Afterwards, in *Wilkinson v. Lord,* 85 Neb. 136, we held that the court would not assume without proof that a fee fixed by law was not compensatory.

The law under consideration provides that such school district as may be "unable to furnish accommodations to nonresident pupils, without constructing or renting additional buildings, hiring extra teachers, or other reasonable cause, may refuse admission to any or all such nonresident pupils." Rev. St. 1913, sec. 6813, subd. 6. It was evidently the view of the legislature that, since such expenses would be incurred in any event, if no additional expense was imposed upon the receiving district for teacher's wages or for buildings and their upkeep, the sum of $1 a week would cover all additional cost. The school district is abundantly fortified against imposition by reason of the statutory right that is given to it to deny admittance when its school accommodations and facilities are insufficient to give proper care and attention to its own resident pupils as well as to those seeking admittance from another school district.

The respondent school district admits that it has at present facilities for additional pupils, and the evidence shows that the statutory fee of $1 is fully compensatory for the additional expense which would be incurred by reason of the proposed attendance of nonresident pupils.

The respondent, therefore, should be required to admit the relators to the privileges of its high schools.

The judgment of the trial court is reversed and the cause remanded for further proceedings in harmony with the views expressed in this opinion.

REVERSED.

SEDGWICK, J., not sitting.

CORNISH, J., dissenting.

Under democratic institutions, it ought never to happen that one community should be required to bear the burdens of another. Especially is that true where the burden involves taxation, and under a Constitution like ours where its framers undertook to provide every possible safeguard which they thought necessary to secure equality. This question is discussed at length in *High School District v. Lancaster County,* 60 Neb. 147, where Judge Norval came to the conclusion that any attempt at fixing an arbitrary sum which one school district must pay another for educational privileges must fail, because, in the nature of the case, the sum arbitrarily fixed would be either too great or too little, putting an unfair burden on one district or the other, to be raised by taxation. I cannot help but think that this is true. I agree that the opinion is in accordance with the rule laid down in *Wilkinson v. Lord,* 85 Neb. 136, and that the fee is compensatory in the sense urged. The trouble is, its reasoning proves too much. If it is lawful to eliminate overhead expenses, as is done in this case, then the amount which the outlying district might be required to pay might become merely nominal; $5 a year might cover it. Then a situation could arise wherein the community supporting the school would pay by taxation $100 a year per pupil for its own resident pupils and be forced to give to nonresident pupils the same privileges for $5 a year, which, while it would meet the additional expense for the nonresident pupil, would be far less than the actual cost, and less than what I think can be fairly considered as compensatory.

An arbitrary charge should not be forced upon the district. I doubt if there is a high school district in the state not ready and willing to accept additional pupils, when it has room, at a reasonable charge. In the instant case, the evidence shows that the cost per pupil in one school is $77.31 a year; in the other, $119.39. The district offered to take the additional pupils at $57 a year, which was reasonable. Section 6944, Rev. St. 1913, provides a way by which the school districts can agree upon what is fair compensation. This the district in which appellant resides would not consent to, although all of the other districts surrounding Omaha were willing to pay the $57.

Educational privileges are no doubt important to the future welfare of the state, but not more so than the preservation of those principles of equality embodied in the Constitution, or the necessity of abiding by them until the Constitution is changed.

SAMUEL ASKEY, ADMINISTRATOR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED MAY 9, 1917. No. 19055.

1. **Railroads:** CROSSINGS: DUTY OF TRAVELER. It is the duty of a 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 he is guilty of negligence.
2. ———: ———: NEGLIGENCE. It is the duty of one approaching in an automobile a railroad crossing with which he is familiar, where his view is obstructed until he gets within a short distance of the railroad track, to keep his car under control and drive at a speed which will enable him to stop in time to avoid a collision after discovering a train. A speed which prevents such control under the circumstances is negligence as a matter of law.
3. ———: ———: CONTRIBUTORY NEGLIGENCE. Failure of the railroad company to ring the bell or blow the whistle as the train

approached the crossing, even though it may have been negligent, would not make the railroad company liable for the death of the automobile driver in a collision at the crossing, if he recklessly failed and neglected to have his car under control and by looking and listening at the proper time and place could have seen the approaching train in time to stop before reaching the track, but recklessly failed and neglected to do so, whereby there was a collision.

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

Byron Clark, E. E. Whitted and *J. L. Rice,* for appellants.

John Everson and *J. G. Thompson, contra.*

HAMER, J.

This case comes here on appeal from a judgment rendered against the defendants in the district court for Harlan county. The plaintiff, as administrator of the estate of Thomas Askey, deceased, brought this action against the Chicago, Burlington & Quincy Railroad Company and Robert Cole, for the alleged negligent killing of Thomas Askey, plaintiff's decedent. A trial resulted in a verdict in favor of plaintiff for $5,000, and judgment thereon.

The only allegation of negligence contained in the petition in the instant case reads: "Plaintiff alleges that the defendants were guilty of gross carelessness and negligence in causing the death of said Thomas Askey, in this: Said train was running at a high speed, and no warning was given of its approach to said crossing of the highway, either by sounding the whistle or ringing the bell. And the track of said company, from a point about 300 feet to the west of said crossing to a point east of said crossing, curves to the south; and trees have been permitted to grow upon and over the north side of the right of way of said company between the curve and the crossing, so that deceased and other persons going south on said highway and crossing the track of said company from the north cannot see the track of said company except to the curve,

and said trees and undergrowth upon said right of way wholly obscure the trains approaching from the west until within about 20 or 30 feet of the rails of the track of said company."

The appellant contends that the evidence is insufficient to sustain the verdict. It shows that the accident occurred on June 18, 1913, at a wagon road crossing over the track of the railroad company west of Oxford, in Furnas county, Nebraska; that the wagon road in question passes over the track from the north to the south, and that the railroad at the crossing follows a practically east and west course. On the day in question the automobile being driven on this road from the north by the plaintiff's decedent was struck by an east-bound passenger train shortly after 6 o'clock in the evening, and the deceased was killed. At about 1 o'clock in the afternoon of the day when the accident occurred the deceased, together with his brother, Roy Askey, Frank and Ed Morris, and Charles Morris, went to Arapahoe, a town about 14 to 16 miles west of the home of the deceased. Arriving at Arapahoe, they went directly to a saloon, and were in and about the two saloons of the town the greater share of the time that they were there, probably about four hours. It is agreed that they had been drinking, but whether the deceased was intoxicated at the time of the accident is disputed.

It is contended that the bell was not rung nor the whistle sounded as the train approached the crossing. Upon the allegations of negligence on the part of the defendant, the evidence seems to be conflicting, and, the jury having found for the plaintiff, we must, for the purpose of this opinion, consider that the defendant was guilty of negligence which would have justified a recovery, unless the plaintiff's intestate was guilty of contributory negligence. We will therefore confine ourselves to that question.

The party left Arapahoe about 5 o'clock in the afternoon. They took with them three cases of beer and some lunch. They drove east upon a public road which runs

along the south side of the railroad, crossed the railroad at the crossing in question, drove north to the place occupied by Ed and Charles Morris, and left them there and a case of beer, turned around, and then, with decedent driving, with Frank Morris sitting beside him, and Roy Askey in the rear seat, they started south to cross the railroad, and thence to go west to Thomas Askey's home. In attempting to cross the track at this time, the automobile was struck by the locomotive, and Thomas Askey and Roy Askey were instantly killed. Frank Morris survived. Whether Thomas Askey was drunk or sober, he was required to exercise ordinary prudence at the crossing in either case.

West of the crossing, but not upon the right of way, is a large tree which overhangs the right of way. South and west of this had been a tree growing in the bottom of the creek's bed and distant from the track about 20 feet. This tree had been cut off, and is referred to in the testimony as the "stumped off" tree. Sprouts were growing from this tree and reached a little above the banks of the creek. West of this point the railroad curves to the south and goes in a southwesterly direction, and a train coming from the southwest could be seen from the crossing, or a point north of it not exceeding 48 feet, for a long distance, perhaps two or three miles. There was a dry creek that made a bend upon the right of way. There was a deep "hole" in the dry creek, and shrubbery and brush were growing out of it. It seems that the "hole" was only the bed of the creek. This dry creek came down in a southeasterly direction toward the railroad until it came in contact with the right of way, when it turned and went northeast. The brush which grew out of this dry creek was about two feet above the level of the rail. There was a stump of a tree in the bottom of the creek from which some sprouts had grown up. The railroad, following it west from the crossing, seems to have curved southwesterly at a distance of a little more than 300 feet west of the crossing. A train coming on the track from the west toward the crossing

might have been obscured by the tree and by the brush as to a person on the line of the crossing and more than 48 feet north of the crossing, but after the automobile, which was going south, got within 47 or 48 feet of the railroad track a person could see along the track in a westerly direction for a distance of from 300 to 350 feet, and by looking southwesterly along the track a train might be seen two miles away or further. The automobile was within 28 feet of the track when it seems to have slid and to have changed its direction so that it ran a little more westerly. This suggests with great force that the automobile was running so fast that it ran onto the track in spite of the driver. All the witnesses agree that the track was open to view toward the west for a distance of 300 feet or more when entered by the roadway at the north side, and from a point not to exceed 48 feet north of the crossing; also that the country is level and the track slightly higher than the surrounding country. Frank Morris, the surviving member of the party, testified on his direct examination: "A. Well, you can stand inside of the right of way, I think about three feet, and you can see a train when it is about 300 feet west of the crossing." The automobile was struck squarely in the center. The speed of the train was shown by the speed recorder to be 37 miles an hour. The deceased lived in the neighborhood. He had been over the crossing itself four times on the morning of the day that he was killed. Approaching the crossing approximately the same rate of speed was maintained that had been maintained elsewhere on the road. There was no slowing down. The evidence showed that 28 feet north from the north rail there were marks in the road showing that the automobile had skidded, and that from that point on toward the track it had not followed the usual traveled course, but had turned westerly and had gone on to the crossing planks near the west side. If the curved track of the automobile in the road indicates that at this point the brakes were applied to the automobile and that deceased endeavored to stop, then the accident occurred

because the deceased approached the crossing at a rate of speed too high to permit him to stop after he saw the train. He ought to have been able to stop in less than 28 feet. These curved automobile tracks are significant that he tried to stop, but if he did not attempt to stop then he must have driven about 47 or 48 feet from the point where the train might first have become visible to him clear up to the track without making an effort to stop. The train would, at the rate of 40 miles an hour, cover 300 feet in a little more than five seconds, consequently, it was in plain view at a point on the highway within 47 or 48 feet of the place of collision for fully five seconds, and perhaps six, before reaching the crossing, which offered deceased ample time to discover the danger and to stop if he had endeavored to do so, and had had his car under control. The speed of his car must have prevented him from stopping.

The witness, Frank Morris, in his testimony on behalf of the plaintiff, described the accident as follows: "A. Well, as we started to come up (to) the right of way, first, I looked down the track east. We had some crackers there, and I reached down and picked up the crackers, and I was looking right west like this (indicating), and just as I raised up, Tom says, 'My God, there is a train!' and just then I seen it; just as he said that I seen the train. The last I seen of Tom he was reached over like this (indicating attitude), and I was jumping out of the car."

"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." *Rickert v. Union P. R. Co.*, 100 Neb. 304. The evidence wholly fails to show the performance of this duty. During all the time the train was moving eastward from a point 350 feet west of the crossing, or thereabouts, it was in full view of the occupants of the automobile if they had looked.

It is the duty of one operating an automobile and approaching a crossing with which he is familiar, and where

the view is obstructed until near the track, to drive his car at such speed that he can stop it after discovering a train in time to avoid a collision. The high speed which prevents such control at a railroad crossing is negligence as a matter of law. *Gage v. Atchison, T. & S. F. R. Co.*, 91 Kan. 253; *Corley v. Atchison, T. & S. F. R. Co.*, 90 Kan. 70; *Earle v. Philadelphia & R. R. Co.*, 248 Pa. St. 193. This rule springs from the rule which recognizes a railroad crossing as a place of danger and requires one, knowing he is approaching it, to look and listen before attempting to cross. Control of the vehicle is essential. The decedent either did not look for a train at a time when he could have saved himself as he was approaching the crossing, or he was driving at a rate of speed which made his discovery of the train unavailing. The failure to do these things is more than a slight negligence as a matter of law. *O'Toole v. Duluth, S. S. & A. R. Co.*, 153 Wis. 461; *Dohr v. Wisconsin C. R. Co.*, 144 Wis. 545.

In *Gage v. Atchison, T. & S. F. R. Co.*, 91 Kan. 253, the court said: "Ordinary prudence requires him to control his car so that he could use his faculty of sight near the track where it would be of most benefit to him, and so that he could stop before going on the track if a train should appear within the distance he was able to see."

In *Avery v. New York, O. & W. R. Co.*, 205 N. Y. 502, the trial court was requested by the defendant to charge the jury: "It is the duty of the person riding a bicycle upon a highway, in approaching a railway crossing, to keep the bicycle under complete control and be prepared to stop." This request was refused, and the court of appeals said: "I think the ruling was grave error. * * * The rider of a bicycle should have it under full control." The opinion cites *Cullen v. Delaware & Hudson Canal Co.*, 113 N. Y. 667, *Wallace v. Central V. R. Co.*, 138 N. Y. 302, and other cases.

Applying the rule here laid down to the instant case, the decedent should have looked and listened, and should have had his automobile under control, and this he should

have done if neither the bell was rung nor the whistle sounded. Also along the same line are the following: *Glick v. Cumberland & W. E. R. Co.*, 124 Md. 308; *Northern P. R. Co. v. Tripp*, 220 Fed. 286; *Turck v. New York C. & H. R. R. Co.*, 95 N. Y. Supp. 1100.

In the sixth instruction the court said: "If from the evidence in this case you find that Thomas Askey on approaching the crossing did not look and listen for the train, or exercise such precaution as a person of ordinary prudence and judgment, under similar circumstances and conditions as are shown by the evidence existed at the crossing in question, would use, such facts would be evidence of contributory negligence, and if from the evidence you find that Thomas Askey was guilty of contributory negligence, and that such contributory negligence was the approximate and efficient cause of his death, then and in that event the plaintiff could not recover, and your verdict should be for the defendants."

In the above instruction the jury are, in effect, told that one approaching a railroad crossing is not necessarily required to look and listen. The instruction as it was given was clearly wrong. It told the jury that Thomas Askey might look and listen for the train, or that he might exercise such precaution as a person of ordinary prudence and judgment would exercise under similar circumstances. It was the duty of Thomas Askey on approaching the crossing to look and listen for the train, and exercise such precaution as a person of ordinary prudence and judgment under similar circumstances and conditions would exercise.

In *Hunt v. Chicago, B. & Q. R. Co.*, 95 Neb. 746, it is held: "The rule that, if negligence on the part of a person injured contributed to the injury, he is not entitled to recover therefor applies as well where the injury is to plaintiff's property as to where it is to his person, and in cases of contract as well as those of tort."

The court refused to give instruction No. 12, requested by the defendants, as follows: "The omission of a rail-

road company to sound the whistle or ring the bell of its engine when approaching a public crossing does not of itself make out a case of negligence against the railroad company or those operating the engine; and, even if the whistle is not sounded and the bell not rung, yet if the traveler on the highway by exercising ordinary care in looking and listening for the train, or by traveling at a prudent and proper rate of speed, could prevent a collision, but does not do so, he cannot recover for injuries received in the collision, notwithstanding the whistle was not sounded or the bell not rung."

The district court failed to properly submit to the jury the question of decedent's contributory negligence.

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

REVERSED.

MORRISSEY, C. J., dissents.

MT. MORIAH LODGE NO. 57, A. F. & A. M., APPELLEE, V. OTOE COUNTY, APPELLANT.

FILED MAY 9, 1917. No. 19291.

1. **Taxation:** EXEMPTION: PROOF. Facts which render property exempt from taxation under section 6301, Rev. St. 1913, must be affirmatively established. *Watson v. Cowles*, 61 Neb. 216.

2. ———: ———: EVIDENCE. Evidence examined, and *held* insufficient to show that the property of plaintiff lodge is exempt from taxation. *Plattsmouth Lodge v. Cass County*, 79 Neb. 463, distinguished.

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

W. F. Moran, for appellant.

E. F. Warren and *S. P. Davidson, contra.*

MARTIN, C.

Mt. Moriah Lodge No. 57, Ancient Free and Accepted Masons in Nebraska, was the owner of a second story of a building located in the village of Syracuse, Nebraska, and was also possessed of a limited supply of furniture and paraphernalia used in its lodge work. The authorities taxed this property for the year 1913. The plaintiff paid the tax under protest, and thereafter brought suit against the county of Otoe to recover said taxes. A jury was waived, and the court rendered judgment for the plaintiff for the full amount of the tax on the ground that said property is exempt under section 6301, Rev. St. 1913. The defendant county appeals to this court, and asks a reversal, contending that this property is not used exclusively for charitable purposes, and that the decision is wrong for that reason. Cases are cited wherein it is held that "a Masonic lodge is not a charitable benevolent institution." *City of Bangor v. Rising Virtue Lodge,* 73 Me. 428; *Morning Star Lodge v. Hayslip,* 23 Ohio St. 144. In the case of *Watson v. Cowles,* 61 Neb. 216, this court held that the taxes would have to be paid on the evidence that a part of the building was used for residental purposes and a part for school purposes, and that the plaintiff must show affirmatively the facts that render his property exempt from taxation. In the case of *Y. M. C. A. of Omaha v. Douglas County,* 60 Neb. 642, that portion of the building used for business purposes was held not exempt from taxation. This court also held in *Royal Highlanders v. State,* 77 Neb. 18, that the mere fact that an organization is carried on not for profit does not of itself exempt it from taxation. The trial court in the decision of the case at bar no doubt was governed by the decision of this court in *Plattsmouth Lodge v. Cass County,* 79 Neb. 463. The defendant insists that this case cannot be controlling for the reason that it was decided upon a stipulation of facts from which the Plattsmouth Lodge was declared to be an organization conducted exclusively for charitable and benevolent purposes. In that case the syllabus is: "Under the agreed

statement of facts in this case the property of Plattsmouth Lodge No. 6, A. F. & A. M., is not subject to taxation for the year 1905." Judge Letton concurred in the conclusion, saying: "Of course, if all the property of the lodge is used exclusively for charitable purposes, as the stipulation recites, it is also exempt, but it would have been much more satisfactory if the case had been submitted upon testimony." A Masonic lodge may have property which is devoted exclusively to charitable purposes, and under the stipulation between the parties agreeing to that proposition as stated in the syllabus, the property was held to be exempt.

In order to determine whether the case at bar is controlled by the *Plattsmouth Lodge* case, it is necessary to ascertain the character, object and purpose of the plaintiff lodge as shown by the evidence. The property assessed is a hall, being the second story of a brick building located upon a part of lot 6, block 15, in the village of Syracuse, Otoe Couty, Nebraska, the lower story of said building being used and owned by the First National Bank of that village. The lodge also owns the furniture and paraphernalia used in its lodge ceremonies. The second floor of said building consists of one large room, two anterooms, and two medium sized rooms which are used by plaintiff lodge. The lodge is supported by annual dues of $5 from each member and the fees for doing degree work which are charged the candidates and placed in the treasury of the lodge, a portion of which goes to the support of the Grand Lodge and the Masonic Home located at Plattsmouth, Nebraska, and a portion is used for charitable purposes, being distributed by three officers who constitute a standing committee on charity. The expenses of the local lodge are for fuel, light, cleaning of the hall, and work of that kind. These funds are confined largely to helping needy members of the order, not necessarily those who are members of the local organization, but those who have been such. The Eastern Star also uses the lodge hall for its meetings. It is an organization composed exclusively of the wives,

mothers and sisters of Master Masons, but the evidence shows that they had the use of the hall without any expense whatever to them, and that the lodge proper received no compensation whatever therefor. The plaintiff lodge has no way to get any revenue and obtains no income from any source except donations, the annual fees paid by each member, and the initiation and degree fees paid by candidates. The evidence of one witness also shows that the object of the lodge's charity is not limited to brother Masons and their families in distress, but that assistance, if necessary, may be rendered to any one with the approval of the lodge. This witness also swore that very little assistance had been necessary in the last two or three years, but that the lodge had helped the Masons who were caught in the cyclone at Berlin, Nebraska. This record also shows that the lodge inculcates in its members principles of morality, temperance and charity. It is thus made plainly to appear that the plaintiff lodge devotes a portion of all the funds which are derived from its members to charity, to helping the needy members and families of the same, and also to maintaining the Masonic Home at Plattsmouth. All the rest of its revenue it uses in its local work and in helping the Grand Lodge to maintain the machinery which accomplishes these purposes. Several witnesses testified that the money of this lodge was received in annual dues of the members, $5 each, and in membership dues when they were admitted. Two dollars of the $5 annual dues was sent to the Grand Lodge of the state, $1.50 for the benefit of the Grand Lodge, and a half dollar to go to the Masonic Home. The only direct and explicit testimony as to what part of the money of the lodge was spent for charitable use is this 50 cents of the $5. What was done with the other $3 is explained by the simple statement of the witnesses that it is "used for lodge purposes exclusively." One of plaintiff's witnesses says: "A dollar and a half of that goes to the Grand Lodge, and the other three and a half is retained by the local treasurer for local lodge purposes. Q. Now, how much, if you know, if any, of that dollar and a half which

you send to the Grand Lodge is appropriated or used for the Masonic Home? A. Fifty cents of that goes to the support of the Masonic Home." The local lodge uses some other money for charitable purposes, but there is no direct evidence as to what proportion is so used. Another witness was asked: "Q. For what purposes are the fees used? A. Well, to pay the expenses of the lodge—whatever expenses are incurred. Q. Anything else? A. Well, if there is anybody needs any help we help them; give them money." So that the amount they devote to charity is very indefinite; the most of it, according to the evidence, is used for purposes other than charitable purposes. Therefore it seems to us that the *Plattsmouth Lodge* case is distinguishable from, and is not decisive of, this case. The rule of course is that all property is to be assessed, and so, unless it can be clearly shown that a certain property is specifically exempted from taxation, it must be held to be liable.

Inasmuch as the plaintiff failed to show that its property is used exclusively for charitable purposes so as to come within the constitutional and statutory exemptions, the case should be reversed and judgment directed against the plaintiff.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, and the trial court is directed to enter judgment against the plaintiff, and this opinion is adopted by and made the opinion of the court.

REVERSED.

HOWARD MCMASTERS, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

FILED MAY 19, 1917. No. 19341.

1. **Municipal Corporations:** DEFECTS IN STREETS: NOTICE. Section 4583, Rev. St. 1913, requiring written notice of defective public

streets to be filed with the city clerk five days before the occurrence of the injury complained of, has no application when the defects complained of were open and obvious and existed at the time the city opened the street to public travel, without guarding or warning against them.

2. ———: ———: NEGLIGENCE: QUESTION FOR JURY. Where plaintiff was injured by his horse becoming frightened and plunging down a declivity into a creek bed in the street, which the city left unguarded when it opened the street to the public, the question of negligence is for the jury.

3. Evidence examined, and *held* to support the verdict.

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

C. Petrus Peterson, Charles R. Wilke and *George W. Berge,* for appellant.

E. P. Holmes and *Guy C. Chambers, contra.*

MORRISSEY, C. J.

While plaintiff was driving a horse and buggy along Twenty-third street in the city of Lincoln, the horse became frightened and plunged down a declivity into a creek bed in the street, and plaintiff suffered injuries. On the trial he was awarded a judgment for $2,000, and defendant has appealed.

Twenty-third street was 100 feet wide at the point where the injury was received. Antelope creek made a sharp curve and swung out to about the center of the street and ran for some distance parallel with the street. The city had failed to erect any guards or barriers to protect travelers from driving into the channel.

Defendant invokes the provisions of section 4583, Rev. St. 1913, which provides that cities of the first class shall be exempt from liability for damages or injuries suffered or sustained by reason of defective public streets unless actual notice in writing of the defect shall have been filed with the city clerk at least five days before the receipt of the injury. No notice of this kind had been given, and the trial court instructed the jury: "That such notice would

be unnecessary, if you believe from the evidence that any dangerous condition of said street was the result of the action of said city in establishing said street in the manner and under the conditions as shown by the evidence." If section 4583, Rev. St. 1913, applies, no recovery can be had; but appellee contends that it does not apply where the city causes the defect in the street, or leaves the street in a defective condition when laying it out.

In *Updike v. City of Omaha*, 87 Neb. 228, 237, it was held that this provision of the statute has no application to defects caused by the city itself in negligently constructing a sewer in one of the streets of the city. In the body of the opinion the section is discussed: " 'What was the purpose of requiring this notice? Clearly, to direct the attention of the proper officers of the city to the fact that at a particular point on one of the public highways of the city there exists at the time a condition in the public highway which renders the street unsafe and dangerous for public travel, a condition likely to result in injury to some traveler on the highway. The purpose of this notice was to enable the city to prevent accidents by repairing or guarding the defect.' This is undoubtedly the real purpose of the legislation. The city had been held liable in some cases in which it was uncertain whether the officers of the city had notice of the defect complained of. It was regarded as a question of fact for the jury to determine whether they knew, or the circumstances were such that with reasonable diligence they must and ought to have known, of the dangerous condition of the streets. And having apparently more regard for the financial interests of the city than for the rights of strangers or danger to the citizens, the legislature purposed to change this. There should no longer be any liability on the part of the city unless its officers actually knew of the defect. It was not presumed that the officers of the city would themselves create the defect. The statute was not necessary nor intended for such a contingency. To so construe the statute would be to hold that the intention of the legislature was to bar a proportion of the claims against the

city without regard to the justice of the claims or the conditions under which they arose." (p. 239) "If the act causing the dangerous condition is done by the officers of the city themselves, the knowledge of its existence is inherent in the act. To suppose that the legislature intended that they must be notified of their own act is to question the judgment and motives of the lawmakers."

The only essential difference between the facts in *Updike v. City of Omaha* and the instant case is that in the former case the city itself negligently constructed the sewer. In the instant case it did not make the excavation into which plaintiff fell. But it did lay out and maintain the street, and in doing this, through its officers and agents, it had notice and knowledge of the topography of the earth. It knew the dangerous condition that existed. It opened the street for travel and impliedly invited the public to use it as a thoroughfare. There can be no difference in principle between the act of the city in negligently laying a sewer and in negligently leaving open and unguarded a pitfall which nature made, when that pitfall existed at the time the street was laid out, and had existed, as said in defendant's brief, "from time immemorial."

Defendant further insists that no negligence has been shown. The distance between the lot line on the east side of the street and the bank of the creek on the west side of the street was 41 feet, and the traveled roadway was about 15 feet in width. The plaintiff was traveling on the right-hand side of this roadway, the side next to the creek, when his horse suddenly shied and plunged down the declivity. He testifies that the wind was blowing, that he does not know what caused the horse to shy, but gives it as his opinion that he might have been frightened by blowing paper. It must be admitted that the roadway was sufficient in width, and that had the horse remained on the grade the road would have carried him safely. Was the city chargeable with negligence in failing to fill the pit or to erect suitable barriers?

The court instructed the jury: "It was the duty of the city to use reasonable care to make the highway safe for travelers, and if you believe from the evidence that in the exercise of such reasonable care to make said highway safe, at the point where it is alleged that plaintiff fell into said ditch, or creek bed, some guard or protection was necessary to prevent travelers from falling into the ditch, and if you find that the city failed to do this, and was negligent because thereof, then you are instructed that if you find from the evidence that because of such negligence, if such you find there was, the plaintiff, while in the exercise of due care, fell into said ditch, and was damaged thereby, then you will find for the plaintiff." No complaint is made of this instruction, and the verdict of the jury must be taken as a finding that the city did not exercise due care to make the highway safe.

In *Gould v. Schermer,* 101 Ia. 582, a case wherein plaintiff's horse became frightened on a bridge which had no guard rails, it was held that the question of negligence was for the jury, although guards or rails were not required by law.

A case very closely in point is cited with approval in *Dailey v. Swift & Co.,* 86 Vt. 189, wherein the court say:

"What is known as the 'Partridge Case,' *Hilas Grow v. Town of Corinth,* heard and decided by this court, in Orange county, in March, 1881, though never reported, seems to have involved much the same principle, in this respect, as the case now before us. There, when the plaintiff, a traveler, was passing over a public highway in the defendant town, driving a pair of horses, his horses took fright at the noise made by the flying up of a partridge in the bushes on the upper side of the traveled road, but within the limits of the highway, became unmanageable, and without fault on his part ran off the bank on the lower side of the road, whereby the plaintiff was injured. There was no guard or railing on that side of the road where the team went off. On the facts found by a referee, the town contended that the proximate cause of the in-

jury was the flying up of the partridge, and not the want of a guard or railing on the side of the road, and therefore it was not liable.

"It was held, Chief Judge Pierpont orally delivering the opinion of the court, that a suitable guard or railing on the side of the road at the place in question would have prevented the accident, and consequently the want of such guard or railing was the proximate cause of the injury, and the town was responsible." For other cases in point, see *Walrod v. Webster County,* 110 Ia. 349; *Harvey v. City of Clarinda,* 111 Ia. 528.

It is further said that the verdict is excessive. There is a conflict in the evidence as to the extent and character of the injuries received. Plaintiff claims that his back was wrenched, that one ankle was so badly crushed that it was necessary to keep it in a cast for several weeks, and he was still wearing a brace at the time of the trial, about five months after the accident. He also claims to have suffered a hernia. There is evidence that his ankle has practically recovered, and there is a dispute as to whether hernia was produced as a result of his injury. But plaintiff was before the trial court and the jury. They were better able to judge of his injuries and his sufferings than we. The verdict does not seem to be so excessive as to require a remittitur.

As a final assignment, it is said that the court erred in overruling the motion for a new trial because of newly discovered evidence. Affidavits in support of the motion are found in the transcript, while we have uniformly held that in order to have such affidavits considered on appeal they must be incorporated in the bill of exceptions.

The judgment is

AFFIRMED.

ROSE, J., dissents.

LETTON, J., not sitting.

DANIEL J. POLLOCK, APPELLANT, V. PHILIP PEARSON ET AL., APPELLEES.

FILED MAY 19, 1917. No. 19454.

Trial: DIRECTION OF VERDICT. It is the duty of the trial court to instruct the jury to find for defendant when the evidence is not sufficient to sustain a verdict for the plaintiff.

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

L. L. Raymond, for appellant.

Wright & Mothersead, contra.

MORRISSEY, C. J.

Plaintiff agreed with defendant, a piano salesman, for the purchase of a piano of a specified make for $340, and executed his promissory note for that amount, the note being payable to defendant. Defendant agreed to have the piano shipped from the factory to plaintiff's home at Scott's Bluff, where plaintiff should have the right to inspect the instrument, and, if it was found to be satisfactory, the note, which by agreement between the parties had been deposited in the hands of a third party, was to be delivered to defendant. Defendant ordered the piano shipped to plaintiff, but had the bill of lading sent to himself. Before the piano reached Scott's Bluff, defendant concluded that the note might be uncollectible, and notified the railroad company that the piano should not be delivered to plaintiff. Plaintiff then brought this action in replevin against defendant Pearson, the railroad company, and its agent, alleging ownership and right to immediate possession. On the trial it was stipulated that neither the railroad company nor its agent had any interest in the litigation, and the trial proceeded against defendant Pearson. At the conclusion of the testimony the court instructed a verdict for the defendant, and plaintiff appeals.

There is little, if any, dispute in the evidence so far as the material issues are concerned. If the verdict returned is the only one which the evidence would sustain, there can be no error in the direction of the court. And in this respect it is necessary to consider only the testimony of plaintiff. His statement of the agreement is substantially as heretofore detailed. He says it was agreed that the note should be held by a third party, one Telander, until such time as plaintiff inspected the piano and notified Telander to turn the note over to defendant. This shows that the parties had merely entered into an executory contract, which defendant might rescind before delivery, and thus prevent the title passing. Whatever plaintiff's right might be to recover for breach of the contract, the title to the property had not passed.

The verdict returned is the only one that could be sustained by the evidence, and the court did not err in directing a verdict.

AFFIRMED.

J. S. FARRENS ET AL., APPELLEES, v. FARMERS STATE BANK OF DECATUR ET AL., APPELLANTS.

FILED MAY 19, 1917. No. 19985.

1. **Banks and Banking: "DEPOSITOR."** A "depositor" is one who delivers to or leaves with a bank money subject to his order, either upon time deposit or subject to check.
2. ———: DEPOSIT BY DIRECTOR. As the statute governing banks and banking stood prior to the enactment of House Roll No. 201, by the thirty-fifth session of the Nebraska legislature, a director of a state bank, as regards a deposit made by him in the bank of which he was a director, stood in the same position as any other depositor.

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

Willis E. Reed, Attorney General, and *Dexter T. Barrett,* for appellants.

Stout, Rose & Wells and *James A. Clark, contra.*

MORRISSEY, C. J.

In May, 1916, at the suit of the state banking board, the affairs of the Farmers State Bank of Decatur were placed in the hands of a receiver. Subsequently this plaintiff and three others each filed in due form his claim with the receiver for the sum of $7,500, and asked that the same be treated as a deposit and allowed as a preferred claim, and, when so allowed, that it be paid out of the assets of the bank or the depositors' guaranty fund. Each claim is evidenced by a certificate of deposit in the usual form, dated April 1, 1916, issued by the Farmers State Bank of Decatur. Each certificate was made payable three months after its date, drew interest at 5 per cent., and stated upon its face that it was protected by the depositors' guaranty fund of the state of Nebraska. To these claims the attorney general filed objections, alleging that claimants were directors of the Farmers State Bank at the time the certificates were issued; that the money was deposited with the Security State Bank of South Omaha to pay an indebtedness of the Farmers State Bank of Decatur, which was not secured by the depositors' guaranty fund, and that the total assets of the Farmers State Bank of Decatur, including the liability of the stockholders, were insufficient to pay the amount owed by the bank to its depositors.

After a full hearing, the district court overruled the objections and allowed the claims. The principal point now urged in the brief of the attorney general is: These certificates do not represent money placed with the bank as a deposit, but represent merely a loan to the bank. It is admitted that the bank got the benefit of the money. If it was placed in the bank as a deposit it is protected by the depositors' guaranty fund, while if it was merely a loan to the bank it is not so protected. We are asked by the appellees to affirm the judgment because the assignment of error differs from the issue tendered in the lower court,

but as this case was tried to the court without a jury, and is a matter of public importance, and all parties understood throughout the trial the main purpose of the protest and objection, and all of the facts necessary for a determination of the case on the issue tendered in the protest or in the assignment of error in the record, we prefer to dispose of the question on its merits rather than on the procedure.

The evidence shows that prior to the issuance of these certificates each claimant was a director of the Farmers State Bank of Decatur; that the bank was in need of money; that it borrowed from the Security State Bank of South Omaha $16,000, and pledged as collateral security notes of the face value of $22,000, and of the admitted value of $20,000. Claimants, who were not experienced bankers or business men, each borrowed from the Security State Bank $7,500, then deposited this amount with the Farmers State Bank of Decatur, and took as evidence thereof the certificates heretofore mentioned. The Decatur bank then paid off its indebtedness to the Security State Bank and redeemed the paper that had been put up as collateral security. The Decatur bank got the full value for each certificate. Had the money been deposited by some party not an officer or director of the bank, there would be no question as to his right to be listed as a depositor. The attorney general argues that these parties were merely making a loan to the bank, and that the relation of creditor and debtor exists. In a certain sense this is true. In *State v. Corning State Savings Bank,* 136 Ia. 79, a depositor was defined to be: "One who delivers to or leaves with a bank money subject to his order. These may be either time deposits or open ones subject to check." These certificates are in the usual form. The transaction was such on its face as occurs every day in the banking business. If claimants are to be denied the rights of a depositor, it must be solely because they were directors of the bank.

As the statute stood at the time of the transaction, an officer was not forbidden to become a depositor or denied

any privilege accorded to others doing business with the bank. The legislature not having denied this privilege, the court cannot. The legislature which has just adjourned has enacted a statute to meet such situations. House Roll No. 201, approved April 19, 1917. The fact that it took such action may be regarded as a legislative construction of the statute, and we may assume that when our bank act was originally passed it was not intended to exclude directors from the benefits of the act. If so, claimants fall within its protection. Again, it may be pointed out that the equities of the case are with the claimants. The bank got the benefit of their money; with their money it redeemed its collateral security, which was worth considerably more than the amount for which it was pledged. Not only the bank but the depositors' guaranty fund received the benefit of their money, and claimants are still liable for the penalty as stockholders. Indeed, the judgment of the district court directed the receiver to withhold the amount for which they are liable as stockholders. Thus all parties are amply protected and justice is done.

The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

FRANK H. CUNNINGHAM, APPELLANT, V. THOMAS LAMB ET AL., APPELLEES.

FILED MAY 19, 1917. No. 19225.

1. **Vendor and Purchaser:** BREACH OF CONTRACT: DAMAGES. In an action for damages for breach of a contract to convey land, the recovery of the amount paid upon the contract is a proper element of damages.
2. **Judgment:** BAR: BREACH OF CONTRACT: DAMAGES. Where, in an action for specific performance of a contract to sell lands, the plaintiff has pleaded that the defendant had conveyed the land for a valuable consideration before the beginning of the action to

a person not a party to the suit, and, under a prayer for general equitable relief, the district court has allowed the plaintiff credit for the money paid upon the contract, to be applied on a sum found due defendant on other contracts involved in the action, and plaintiff has availed himself of such credit, he cannot afterwards maintain an action to recover further damages for the loss of his bargain.

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

Burkett, Wilson & Brown, for appellant.

J. L. McIntosh, contra.

LETTON, J.

Action to recover damages for breach of a contract to sell real estate.

The petition alleges that the defendant, Thomas Lamb, in October, 1909, was the equitable owner of a section of land in Kimball county, under a contract of purchase with the Union Pacific Railroad Company; that he entered into a contract with the plaintiff to sell him the land and assign the railroad contract; that the land at that time was of the reasonable market value of $8,000; that the amount he was to pay defendant and Union Pacific Railroad Company for the land made the total purchase price $3,038; that plaintiff duly performed the terms of the contract, but defendant, in disregard of the same, sold the land and assigned the contract to one Weeces in April, 1911, to plaintiff's damages in the sum of $4,962, for which sum he asks judgment.

The answer consists of a general denial, a plea of forfeiture of the contract, and a plea that a former action had been brought by plaintiff in Kimball county against John D. Lamb and Thomas Lamb, the defendant, for the specific performance of contracts to sell section 3, the section in controversy, with two other sections of land; that the court awarded specific performance as to the other two sections, and found as to the section involved here that, inasmuch as an innocent person had acquired the owner-

ship of section 3 and had paid the defendants for the same, it would not be equitable to require specific performance as to that section, but that plaintiff should be entitled to credit for the amount of money he had paid defendant and had paid the Union Pacific Railroad Company on the contract, with interest, amounting in all to the sum of $602.-52; that this judgment is in full force and effect; and that, owing to plaintiff having accepted the credit of $602.-52, he is estopped from now claiming a greater amount as damages for the breach of contract. The cause was tried by the court without the intervention of a jury. The district court found that the judgment in the Kimball county case was *res judicata* of the rights of the parties; that plaintiff is estopped from now claiming further damages, and dismissed the action. Plaintiff appeals.

The only question presented by this appeal is whether the judgment in the former action is a bar to this suit. The plaintiff knew at the time of beginning the action for specific performance that the defendant had already assigned, transferred, and delivered the land contract and his interest in the land—presumably in good faith, since fraud or bad faith is not alleged—to Weeces, who had paid value for it. He so alleged in his petition. He thus asked for something at the hands of the court which he was not entitled to receive and which the court had no power to grant, since Weeces was not a party to the suit. The only object in making these allegations must have been to obtain damages, since no other relief could be granted as to this cause of action. He no doubt thought that the general prayer in his petition was broad enough to allow such a recovery. Whether, in such an action, under such allegations and such a prayer, the district court sitting as a court of equity should try the question of damages, it is unnecessary to decide. The question is not free from doubt. If a plaintiff knows when he begins his suit that he has no case for equitable relief, can he deprive his adversary of a jury trial by praying for such relief? An interesting discussion on this point may be

found in 36 Cyc. 747, 750. Since the same court now administers both law and equity, a jury might be called to ascertain damages.

The district court evidently considered that under the prayer for general equitable relief it had the power to award damages for the breach of contract. Unless it so considered, it could not have awarded any relief as to section three.

Courts differ as to the measure of damages in case of a failure to perform a contract for the sale of real estate. Some courts hold that the measure is the consideration money paid with interest; others, the value of the land at the time of the breach, or, what is the same thing, the return of the consideration money paid and the difference between its amount and the value of the land when the conveyance should have been made. 39 Cyc. 2106-2114; *Combs v. Scott,* 76 Wis. 662, and cases cited in the opinion; *Beck v. Staats,* 80 Neb. 482. The latter is the rule in this state. In an action for damages for breach of a contract to convey land, the plaintiff is entitled to recover all money paid by him on the contract as well as for his loss of his bargain. *Anderson v. Ohnoutka,* 84 Neb. 517; *Beetem v. Follmer,* 87 Neb. 514.

In granting relief under this prayer, the plaintiff probably did not receive all the damages to which he was entitled. He received nothing for the loss of his bargain. Even if the court had been mistaken in considering that the general prayer for equitable relief, in a case where the pleading showed no equitable relief could be had, warranted the ascertainment and award of damages in such an action, the plaintiff made no complaint, accepted the benefits of this holding, and took advantage of the damages allowed as a credit on the amount he was required to pay as a condition to the conveyance of the other contracts. He cannot split his cause of action by receiving a part of his damages in one case and then beginning a new action to recover those not then awarded him. He was concluded by the judgment as to the amount of such dam-

ages and cannot relitigate the question. The principles announced in the leading case of *Cromwell v. Sac County*, 94 U. S. 351, and the other cases cited by appellant, are sound and have been followed by this court, but the facts in this case are such that these principles are not applicable.

The judgment of the district court is therefore

AFFIRMED.

EDGAR P. WRIGHT, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED MAY 19, 1917. No. 19327.

1. **Master and Servant: INJURY TO SERVANT: NEGLIGENCE: QUESTION FOR JURY.** In this an action for damages for personal injuries sustained by a street railway conductor by coming in contact with a charged wire, the evidence is examined, and *held* to require the submission to the jury of the question whether the defendant was negligent in maintaining such wire at the height of 5½ feet above the top of the railway car at the point where the accident occured.
2. **Appeal: DEMONSTRATIVE EVIDENCE.** Where there was a sharp conflict in the testimony as to the existence of any permanent injury to or deformity of the plaintiff's spine, defendant was not prejudiced by the court permitting the plaintiff to bare his body so that the doctors testifying in his behalf could better describe the nature of the injuries claimed to have been sustained.
3. **Excessive Damages.** Under the facts proved, a verdict for $30,000 is excessive.

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

John L. Webster and *William Ross King*, for appellant.

Sutton, McKenzie, Cox & Harris, contra.

LETTON, J.

This is an action to recover damages for personal injuries. The plaintiff was a conductor in the employment

of defendant, and was in charge of an electric street car at the time of the accident. At one end of the run the car was turned by means of what is known as a "Y." In this operation the car is backed over a switch track forming one side of the "Y." In June, 1914, about midnight, on a dark and rainy night, the trolley pole left the wire while the car was being switched. It was the duty of plaintiff to replace the trolley upon the wire by means of a rope attached thereto, which was also fastened to the car. The rope broke close to the upper end of the trolley pole as the pole sprang up. There was no street light near. As soon as the trolley left the wire the lights in the car went out. Plaintiff testifies that, as was his duty, he went upon the top of the car to release the trolley pole and place it upon the wire; that he had never been upon the top of the car for this purpose at this point; that he had been instructed before he began to work and shown how to do this by an old conductor assigned for the purpose by the defendant; that he was told that the wires were not within striking distance of his head, and that, even if one did strike his head, there was no danger as long as he was standing on the top of the car; that he was told that, when the rope broke and he had to go on the top of the car, it was his duty to push the trolley pole against the wire so as to move the car forward far enough to pull the trolley pole from between the cross-wires; that he followed these instructions; that the motorman moved the car up a little; that he was about to stop him when his head struck, he received the shock, and knew nothing more until he was picked up from the ground. Other testimony is to the effect that the wires at the place where the plaintiff was injured were 5 feet 6 inches from the top of the car. The plaintiff was 5 feet 9 inches tall.

The negligence charged is that defendant was negligent in constructing and maintaining the wires in an unlawful, careless and dangerous manner about 5 feet above the top of the car; that defendant, while knowing the state of the wires, was negligent in not advising the plaintiff of the

dangerous construction, and in failing to warn him of the dangers incident to putting the trolley pole on the wire at this place, and was negligent in not providing insulation for the trolley pole, and in failing to provide sufficient tools or equipment for placing the pole upon the wire without exposing plaintiff to danger.

The answer denies negligence, alleges that the plaintiff was familiar with the manner of construction of the tracks, cars, trolley poles, and trolley wires, and knew the dangers incident to the operation of his work; that plaintiff had been a conductor for 3½ years prior to the accident, and was familiar with the construction and elevation of the trolley wires at that place for all of said time, and that, knowing the danger, he negligently took hold of the trolley pole; that the accident was brought about by his own carelessness and neglect of duty, and that the pole and wires were maintained and constructed in the usual and proper manner. The jury returned a verdict in favor of plaintiff for the sum of $30,000. Defendant appeals.

The court instructed the jury that the only acts of negligence charged against the defendant for them to consider were "that the defendant company was guilty of negligence in the method or manner of constructing or maintaining its overhead wires at the place of the accident in question," and "that the defendant company was guilty of negligence in failing to notify the plaintiff of the dangers incident to working on top of the car in close proximity to the wires," and that if they failed to find by a preponderance of the evidence that the defendant was guilty of negligence in either of these particulars their verdict should be for defendant.

A number of assignments of error are made with respect to the introduction of evidence, but we find no error so prejudicial to defendant as to require a reversal. The evidence is in conflict as to the proper height at which such wires should be maintained, as to the height above the top of a car at which wires were maintained at other

localities in the city, as to whether Wright had been fully instructed with respect to the dangers which might be incurred by coming in contact with charged wires, and upon almost every other material fact involved.

It is also assigned that the court erred in permitting the exhibition of plaintiff's body in the presence of the jury. The doctors called as witnesses by plaintiff testified that the injury had induced the disease of spondylitis deformans, and had caused a permanent deformed condition of the spine, pointing out on plaintiff's body the consequences of the injury as in their opinion they existed. For the defendant several witnesses, doctors and surgeons of long experience and high standing in the profession, testified that no degeneration of the vertebræ had taken place, and that the stooped and bent-over condition of plaintiff was caused by a neurasthenic condition; that the disease mentioned did not exist; that the X-ray pictures did not disclose a wasting away of the spinal processes; and that the bent condition of plaintiff was not permanent if he made an effort to overcome it and straighten up. There was no error in the exhibition of plaintiff's body to the jury under such circumstances. *Felsch v. Babb,* 72 Neb. 736; *Booth v. Andrus,* 91 Neb. 810. There were no scars of other wounds to confuse the jury as in the case of *McKennan v. Omaha & C. B. Street R. Co.,* 97 Neb. 281.

Aside from the claim that the damages are excessive, the principal contentions of the defendant are the lack of evidence of negligence in the construction and maintenance of the wire at that height, and that Wright had been in the service long enough to see and had ample opportunity to know the danger of short circuits, and that he did not come against the wire by reason of ignorance, but through inadvertence.

Considering the evidence as a whole, we are satisfied that it was sufficient to submit these questions to the jury. Wright had worked on this run for over 3 years. He must have been aware in a general way of the height of the wires, but to a man looking from the ground a difference

of about 3 inches in the height of a wire 17 or 18 feet from the ground would be almost imperceptible. There is no proof that he was ever upon the top of the car at a point nearer than 30 feet from where the accident occurred, or at any point where the wires were as low as here. A difference of 3½ inches in the height of the wire would have placed it beyond the reach of his head. The accident occurred at midnight on a dark and rainy night. The lights in the car were out by reason of the connection being broken. Ordinary care and prudence would seem to dictate that, where a conductor may be required under such circumstances as these to go upon the top of the car in the dark, the wire should be high enough so that no part of his body might come in contact with it, or other precautions be taken to prevent such an accident. There is no definite proof on behalf of defendant that such a dangerous construction was maintained at the height at which approved methods of street railway construction in the country generally are maintained, and the evidence is not so clear as to justify the removal of the question from the jury. We find no error in the instructions which are complained of covering these points.

The principal complaint is that the verdict is so excessive that it must have been the result of passion or prejudice. In his original petition plaintiff prayed for $25,000 damages. At the trial he was permitted to amend his petition to ask for $35,000. He was earning $93 a month at the time of the accident, or $1,116 per annum. His expectancy was shown to be 28.96 years. The verdict was for $30,000. If the opinions of the medical witnesses for the plaintiff are well founded, as the jury believed, plaintiff is entitled to substantial damages for the pain and anguish he has suffered, for the permanent disability, and for the humiliation occasioned by his deformity, in addition to the amount which he would be entitled to recover for the loss of his earning capacity. The medical testimony is in such sharp conflict as to the existence of the deforming disease that it is to be regretted that the law does

not permit a re-examination as in cases under the workmen's compensation act. We must accept the finding of the jury on this point. There is ample evidence to support it, if the contrary opinions are rejected, as the jury had a right to do. Considering the present worth of his earnings for the period of his expectancy and the other elements of damage, it would seem that a recovery of $30,000 is excessive, and that the evidence does not justify a recovery of more than $20,000. The judgment of the district court is affirmed upon plaintiff entering a remititur of $10,000; otherwise it is set aside and a new trial allowed.

JUDGMENT ACCORDINGLY.

ANTON DWORAK, APPELLANT, V. SUPREME LODGE, WESTERN BOHEMIAN FRATERNAL ASSOCIATION; MARIE DWORAK ET AL., APPELLANTS; WILLIAM DWORAK ET AL., APPELLEES.

FILED MAY 19, 1917, No. 19502.

1. Insurance: FOREIGN BENEFICIAL ASSOCIATIONS: LIMITATIONS. A benefit society incorporated in another state which comes into this state in order to do business under the permission granted by the laws of Nebraska is subject to the same limitations and restrictions as such an association organized in Nebraska.

2. ———: ———: BENEFICIARIES: LAW GOVERNING. The statute of Nebraska which specifically prescribes the persons to whom payment of benefits by a fraternal beneficiary association can be made (Rev. St. 1913, sec. 3298), governs in all Nebraska contracts. The law of the domicile of a foreign association has no application to such contract.

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

Weaver & Giller, Louis Berka and *Nelson C. Pratt,* for appellants.

Stout, Rose & Wells, contra.

LETTON, J.

Joseph Dworak, a resident of Nebraska, became a member of the defendant, which is a fraternal beneficiary association, organized in the state of Iowa. The certificate provided that upon his death the sum of $1,000 would be paid to his wife, Marie Dworak, and his stepchildren, Milton Dworak and Stanley Dworak. He died and left surviving him William Dworak, Joseph Dworak, Carrie Dworak, now Carrie Johndeit, and Arthur Dworak, his children by a former marriage. He had no children by the second marriage. He became divorced from his wife and ceased to reside with her and her children, so that thereafter none of the beneficiaries were members of his family or household. Shortly before his death he designated the plaintiff, Anton Dworak, his brother, as beneficiary, instead of his former wife and her children, but the former beneficiaries allege that this was not done in accordance with the by-laws of the association and is therefore of no effect. This action was brought by Anton Dworak to recover the proceeds of the certificate. The defendant association admitted the indebtedness, alleged that there were several claimants of the fund, and paid the money into court for the benefit of the persons whom the court might find entitled to it. The divorced wife, Marie Dworak, and her children claimed as beneficiaries under the certificate. The children of the insured in their answer plead the invalidity of the assignment to plaintiff, set forth the facts as to the divorce of Marie Dworak, alleged that neither she nor the other beneficiaries were members of the family of Joseph Dworak at the time of his death, or for a long time prior thereto, and were not blood relatives or dependent upon him, that they are the children and the only heirs of the insured, and that under the constitution and by-laws of the association and the laws of the state of Nebraska they were entitled to the amount due upon the certificate.

At the oral argument it was stated by counsel for Anton Dworak that his client was willing that the fund be paid

to the children and next of kin as was adjudged by the district court. This relieves the court of the necessity of considering the validity of the attempted change of beneficiaries. The only question necessary to determine is whether the statutes of Iowa and by-laws of the association govern the disposition of the fund, or whether this is controlled by the laws of the state of Nebraska. If the former apply, the beneficiaries named, the divorced wife and her children, are entitled to the money; if the latter, the children of Dworak are entitled to it.

The case was tried upon an agreed statement of facts. In addition to the facts hereinbefore stated, it appears that the application for membership was made in Omaha and forwarded by the officers of the local lodge to Cedar Rapids, Iowa, where the certificate was made out and signed by the supreme officers. It was then forwarded to the subordinate lodge in Omaha, was signed by the officers of the local lodge in Omaha, and delivered there to the insured. The application provided that the certificate would not be effective until the applicant was initiated in the local lodge and the certificate delivered to and signed by the applicant. After April, 1910, neither Marie Dworak nor her children lived with the insured, and none of them was a blood relative of or dependent upon the insured, nor an heir. The divorce was granted Marie Dworak in February, 1911. The Iowa statutes provide: "No fraternal association created or organized under the provisions of this chapter shall issue any certificate of membership to any person under the age of fifteen years, nor over the age of sixty-five years, nor unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such member." Iowa Code, sec. 1824. The supreme court of Iowa in *White v. Brotherhood of American Yeomen,* 99 N. W. 1071 (124 Ia. 293), construing section 1824 of the Iowa Code, where the facts were that a certificate was issued by a fraternal association "payable to a certain person by name, such person being the wife of the member when the certificate was is-

sued; subsequently she was divorced, and the member remarried, but made no change of beneficiary"—held that on the death of the member the first wife was entitled to the proceeds of the certificate. The business is conducted in the Bohemian language. The articles of incorporation recite as one of the objects of the organization: "To provide for the creation of a fund of assessments, contributions or otherwise, for the purpose of paying benefits to widows and children of deceased members, in accordance with the constitution, by-laws, rules and regulations that are now in force or that may from time to time be adopted by this supreme lodge." The by-laws provide that the benefit certificates "among other contents must contain also the name of the person or persons designated as heirs by the insured member, who have to be members of the family or related to him by birth." Another translation is: "This insurance, however, can be only in favor of the members of his family, or blood relatives, or mutually for husband or wife, or persons dependent on the member."

Section 94, ch. 43, Comp. St. 1911 (Rev. St. 1913, sec. 3298), which was in effect at the time the certificate of insurance was issued and at the time of the death of Dworak, provides: "Payment of death benefits shall only be made to families, heirs, blood relations, affianced husband, or affianced wife, or to persons dependent upon the member." It will be noted that in Iowa whether a person may become a beneficiary is determined by his status at the time the contract is entered into, but in this state the law controls to whom payment shall be made upon the matured obligation. We have held under a like state of facts with reference to the application for insurance, the conditions for membership, and the delivery of the certificate, that such a contract was entered into in Nebraska. *Pringle v. Modern Woodmen of America,* 87 Neb. 548; *Haas v. Mutual Life Ins. Co.,* 90 Neb. 808. A like view is taken in Illinois and Maryland: *Coverdale v. Royal Arcanum,* 193 Ill. 91; *Expressman's Mutual Benefit Ass'n v. Hurlock,* 91 Md. 585.

When the defendant association entered this state to do business, it came subject to the laws of this state regulating fraternal insurance. The statutory provision limiting and defining the classes of the persons to whom death benefits should be paid became as much a part of the contract of insurance as if it had been written therein, and it declared the policy of the state with respect to such contracts. *Leumann v. Grand Lodge, A. O. U. W.*, 85 Neb. 803. Every person concerned with the same, whether insurer, insured, or beneficiary, is bound to take notice of the law. It is pointed out in 29 Cyc. 108, that "where the classes of persons to whom benefits may be paid are prescribed by statute or by the society's charter of incorporation, neither the society, nor a member, nor the two combined, can divert the fund from the classes prescribed." It is also a settled rule that where a beneficiary becomes ineligible or disqualified, and therefore not entitled at the time of the death of the insured to receive the benefit, the fund goes to such other persons within the class as are eligible to take the benefits in the manner prescribed by statute. *Giffin v. Grand Lodge, A. O. U. W.*, 99 Neb. 589; *Johnson v. Grand Lodge, A. O. U. W.*, 91 Kan. 314, 50 L. R. A. n. s. 461; *Knights of Columbus v. Rowe*, 70 Conn. 545; *Lister v. Lister*, 73 Mo. App. 99; *Supreme Lodge, K. & L. of H., v. Menkhausen*, 209 Ill. 277.

Appellants rely upon *Supreme Council, Royal Arcanum, v. Green*, 237 U. S. 531, L. R. A. 1916A, 771. The question in this case is so different that the opinion in that case does not control its decision. The question there involved the relation existing between the corporation and its members and between the members themselves with respect to uniformity of assessments in different states. Here we are not concerned with such questions, since such relations have all been terminated by the maturity of the contract. The corporation itself is practically out of this case. It has paid the money in dispute into court for the benefit of the proper beneficiary. The contract was made with respect to

the Nebraska statute, and it must control the payment of the obligation.

JUDGMENT AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

HAMER, J., dissenting.

The case relied upon in the majority opininon is *Giffin v. Grand Lodge, A. O. U. W.*, 99 Neb. 589. That case was based upon a contract entered into in Nebraska by a resident of Nebraska. Thomas Coppinger was a member of the grand lodge of Ancient Order of United Workman, a fraternal insurance society, organized under the laws of Nebraska. The society, through its subordinate lodge at Gibbon, Nebraska, issued to Coppinger a certificate for $1,000 in which his wife was named as beneficiary. She obtained a divorce from Coppinger, and he died. No change was made in the benefit certificate by Coppinger after the plaintiff got her divorce. The plaintiff brought her action against the defendant society, and the sisters and brothers of Thomas Coppinger interpleaded. The district court decided in favor of the interpleading defendants, and gave them judgment for the amount of the benefit certificate, $1,000, less the sum of $130.40, which it was shown that the plaintiff had paid as dues upon the certificate, the plaintiff being allowed an equitable lien upon the benefit certificate in force. The plaintiff appealed, and the controversy was between the former wife of Coppinger and the heirs of the insured, who were his sisters and a brother. The plaintiff obtained her divorce August 25, 1912, and Coppinger died March 4, 1913. Perhaps the fact that the plaintiff took Coppinger to her home after he fell sick and took care of him until he died may have made a kindly feeling toward her upon the part of the members of the local society. He was sick and out of money. By the opinion it appears that section 96 of the by-laws of the society provided: "Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall in every instance be one or more mem-

bers of his family, or some one related to him by blood, or his affianced wife." The certificate issued designated Coppinger's wife as his beneficiary. Section 98 of the by-laws provided: "If one or more of the beneficiaries shall die during the lifetime of the member, the surviving beneficiaries or beneficiary shall be entitled to the benefit equally, unless otherwise provided in the beneficiary certificate, and if all the beneficiaries shall die during the lifetime of the member, and he shall make no other direction, the benefit shall be paid to his widow if living at the time of his death," or if there shall be no widow, no children, no grandchildren, no mother, no father, "then the brothers and sisters of such member, share and share alike," and the money shall go to the beneficiary fund of the grand lodge if no one living at the time of the death of the member is entitled to said benefit. It was alleged that the deceased left no widow nor children nor father nor mother, and that defendants were his sole heirs at law.

After Coppinger's wife obtained a divorce from him, he did nothing to change the beneficiary, but, so far as he was concerned, left the divorced wife to continue as his beneficiary, and he probably preferred that she should be, as she was always supposed to be kind to him and she took care of him in his fatal illness, and she paid the premiums on the policy alone. The district court found against her, and however equitable and just her claim may have been, and however willing the association may have been to pay her, the district court cut her off because of what he supposed to be his duty. The question for decision therefore was whether the plaintiff named in the beneficiary certificate was entitled to the proceeds of the certificate or the sisters and brother of the insured. He intended all for her.

The statute which it was claimed affected the question was sec. 94, ch. 43, Comp. St. 1911, which was in force at the time of the death of said Coppinger, and which has been embodied in similar form in sec. 3298, Rev. St. 1913. The section reads: "No fraternal society created or organized under the provisions of this act shall issue beneficiary cer-

tificate of membership to any person under the age of 18 years, nor over the age of 55 years. Payment of the death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of or to persons dependent upon the member." The statute quoted and the by-laws set out are limitations upon the power of the lodge to contract. If available to any one, these limitations are available to the lodge, and should not operate to confer a right upon any one not named in the certificate to participate in the fund due the beneficiary. By section 98 of the by-laws the amount due on the certificate is to be paid to the beneficiaries therein named unless said beneficiaries shall die, in which event, only, the benefit shall be paid to the widow, children, grandchildren, parents, brothers or sisters. Section 94, ch. 43, Comp. St. 1911, is, also, a limitation upon the power of such societies to contract, and is not sufficient to confer any title to the fund upon any one not named in the certificate. The fourth section of an act passed in 1897 (Laws 1897, ch. 47) entitled "An act defining fraternal beneficiary societies, orders or associations, and regulating the same, and to repeal an act entitled 'An act to exempt certain societies and associations from the requirements of chapter 16 of the Compiled Statutes,'" has no other purpose than to define the powers of such societies. The statute does not prescribe, nor do the by-laws define, to whom payment of the death benefit shall be made in the event that the beneficiary named in the certificate is an improper person, because of the by-laws or the statute. The certificate does not name any person entitled to become a beneficiary. The certificate remained unchanged, and with the name of the wife who procured the divorce in it. The brothers and sisters in that case should have had no standing. The people who came in and claimed the money as beneficiaries were strangers to the contract. The wife was a proper person at the time the certificate was issued to be named as beneficiary, and her rights ought not to have been affected by reason of the subsequent divorce. No one but the insurer could properly make the contention that she had no

insurable interest in the life of the deceased at the time of his death. Who had a right to put the name of the beneficiary out of the certificate? The decree of divorce did not do it. *Schmidt v. Hauer,* 139 Ia. 531. It ought to be the rule that life insurance valid in its inception remains so unless otherwise stipulated in the contract. *Courtois v. Grand Lodge, A. O. U. W.,* 135 Cal. 552; *Overhiser, Adm'x, v. Overhiser,* 63 Ohio St. 77; *Connecticut Mutual Life Ins. Co. v. Schaefer,* 94 U. S. 457; Bacon, Benefit Societies (3d ed.) sec. 253. The language used in section 96 of the by-laws cannot be said to be equal to an agreement that, in the event of a change in the status of the beneficiary named, the designation of such person shall be no longer of any force or validity. The interpleading defendants had no standing in the case, for the reason that only the society could properly object. The contract made was a contract between the insured and the society. The society was perfectly willing to pay the former wife. The decision rendered was a very severe sort of decision in view of the actual facts, and it was an unjustifiable decision apparently in view of the law. The arrangement made was an arrangement between the insurance company and the insured. When he wanted somebody else to be the beneficiary, rather than the old wife who provided for him up to the time of his death, it was time enough to change the beneficiary.

The principle invoked was decided by this court in *Baker v. Hardy,* 96 Neb. 377. Columbus Hardy, the deceased, had been a member of the National Union, a fraternal society, and had taken out a benefit certificate in favor of his wife, Mina I. Hardy. Shortly before his death, and without the knowledge or consent of his wife, he caused the certificate to be made payable to his son as trustee for his wife and his mother. The trustee was directed to pay to the mother an indebtedness which was owing to her and to pay the remainder to the wife. The certificate was paid to the son, and he disregarded the direction to pay to the mother, and the suit was prosecuted by the guardian of the mother.

Judgment was rendered against the guardian, and he appealed. This court said: "It is defendant's first contention that the plaintiff could not be named as a beneficiary, because she was not a member of the family of the deceased within the meaning of the laws of the order at the time of the change of the beneficiary, and was not a dependent. It appears that the laws of the society nominated blood relations, members of the family, and dependents as proper persons to be named as beneficiaries. * * * The testimony shows that during the life of the assured he changed the beneficiary by making his son, Noble Vaughn Hardy, a trustee to collect the money to become due under the beneficiary certificate for the benefit of his mother and his wife. This change was consented to by the National Union, and after the death of the assured the amount due on the benefit certificate was paid to the defendant, as trustee, by the society, without any objection whatsoever. The insurer having paid the amount of the certificate to the trustee, no other party can complain of the change, for that is a right which can only be taken advantage of by the insurer. 29 Cyc. 105-107; *Tepper v. Supreme Council, Royal Arcanum,* 59 N. J. Eq. 321; *Young Men's Mutual Life Ass'n v. Harrison,* 10 Ohio Dec. 786; *Alfsen v. Crouch,* 115 Tenn. 352, 89 S. W. 329; *Grand Lodge, A. O. U. W., v. Brown,* 160 Mich. 437; *Johnson v. Van Epps,* 110 Ill. 551."

In *Johnson v. Knights of Honor,* 53 Ark. 255, 8 L. R. A. 732, the statute was similar to ours. Comp. St. 1911, ch. 43, sec. 94. In that case it was said in the opinion that the word "heirs" is a technical word. "At law it was used to designate the persons on whom an inheritance in real estate was cast by the law on the death of the ancestor. Originally it could not be used to designate those on whom the goods or chattel property were cast, because the law cast them upon no one. No one 'was appointed by law to succeed to the deceased ancestor; on his death, they became *bona vacantia,* and were seized by the king on that account, and by him, as grand almoner, applied to pious uses, * * * for the good of the souls of their former owner.'" It is

then said the "weight of authority holds that the word 'heirs,' when used in any instrument to designate the persons to whom personal property is thereby transferred," means those who under the statute of distribution are mentioned as heirs in the event of death and intestacy, citing many cases in England and America, among others, *Houghton v. Kendall,* 7 Allen (Mass.) 72; *Croom v. Herring,* 4 Hawks (N. Car.) 393; *Eddings v. Long,* 10 Ala. 203; *Richards v. Miller,* 62 Ill. 417; *Hascall v. Cox,* 49 Mich. 435.

In the Arkansas case the court held that no one but the lodge could raise the question of ineligibility of the beneficiary, and that by paying the money into court it had waived the defect. *Johnson v. Van Epps,* 110 Ill. 551; *Peek's Ex'r v. Peek's Ex'r,* 101 Ky. 423; *Alfsen v. Crouch,* 115 Tenn. 352; *Stoelker v. Thornton,* 88 Ala. 241.

In *Cowin v. Hurst,* 124 Mich. 545, M. was a member of the Ancient Order of United Workmen. The beneficiary was entitled to receive $2,000. His first beneficiaries, his wife and daughter, having died, he wished to make his son-in-law his beneficiary. As this was prohibited by the articles of the association, he made his niece his beneficiary, with a written agreement receipt of the fund that she should pay it over to his son-in-law. The niece received the draft, but refused to transfer to the son-in-law or to pay him the money. It was held that the association was the only party in position to contest the legality of the transaction, and therefore that she was bound to carry out the trust.

In *Overhiser v. Overhiser,* 14 Colo. App. 1, the Ancient Order of United Workmen issued a benefit certificate to George Overhiser in which his wife was named as beneficiary. She obtained an absolute divorce from him, but he made no change in the beneficiary. The court held that obtaining a divorce by the wife was not the legal equivalent of the death of the beneficiary so as to give the heirs any right to the fund.

I am of the opinion that the decision of this court in *Giffin v. Grand Lodge, A. O. U. W.,* 99 Neb. 589, was

wrong, and that it should be overruled. The lodge waived all objections.

But whether the opinion was wrong in the foregoing case or not, that case was different from this one. In this case the fraternal beneficiary association was a corporation of the state of Iowa. The action was brought by Anton Dworak to recover the proceeds of the certificate. The defendant association admitted the indebtedness and paid the money into court for the benefit of the person or persons who might be entitled to it. That was a waiver of objections. In the majority opinion it is said: "The only question necessary to determine is whether the statutes of Iowa and by-laws of the association govern the disposition of the fund, or whether this is controlled by the laws of the state of Nebraska. If the former apply, the beneficiaries named, the divorced wife and her children, are entitled to the money; if the latter, the children of Dworak are entitled to it."

The certificate issued to Joseph Dworak provided that upon his death the sum of $1,000 would be paid to his wife, Marie Dworak, and his stepchildren, Milton Dworak and Stanley Dworak. He had children by a former marriage, but no children by his second marriage. When divorced from his wife, Marie Dworak, it is claimed that he ceased to reside with her and her children. There was a trial upon an agreed statement of facts by which it appeared that the application for membership was sent by the officers of the local lodge at Omaha to Cedar Rapids, Iowa, where the certificate was made out and signed by the supreme officers. They then sent the certificate to the subordinate lodge in Omaha, and it was then signed by the officers of the local lodge and delivered to the insured. The divorce appears to have been granted to Marie Dworak in February, 1911. The Iowa statute is shown by the majority opinion to provide: "No fraternal association created or organized under the provisions of this chapter shall issue any certificate of membership to any person under the age of fifteen years, nor over the age of sixty-five years, nor unless the

beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such member."

In *White v. Brotherhood of American Yeomen,* 124 Ia. 293, the supreme court of Iowa, in construing section 1824 of the Iowa Code, where a certificate was issued by a fraternal association payable to a certain person by name, such person being the wife of the member when the certificate was issued, and subsequently she was divorced, and the member remarried, but made no change of beneficiary, held, that on the death of the member the first wife was entitled to the proceeds of the certificate. Here is the business being transacted in an Iowa association where the supreme lodge issues the certificate to another state, but the courts of the state of Iowa have held that the person named in the certificate as beneficiary would be entitled to recover. That being the case, it would appear that there is but little jurisdiction left in our court to undo what has been done by the supreme lodge at Cedar Rapids, Iowa, and what has been decided by the supreme court of Iowa. It does not seem to me that we ought to be called upon to disregard the laws of Iowa or the certificate issued by the Iowa supreme lodge. It is maintained in the majority opinion that the Nebraska statute should apply, although the association is an Iowa association. The Iowa decisions are to the effect that the person who becomes a beneficiary has his status determined by the statute of Iowa at the time the certificate is issued. With this in force, it seems that the decision in this case is in utter disregard of the Iowa statute, and is also in disregard of the decisions of the Iowa supreme court. In this case the lodge waived any defect there might be in the claims of Marie Dworak, Milton Dworak, and Stanley Dworak, and their adversary claimants, and paid the money into court to be there disposed of as the court might order and adjudge. Marie Dworak, Milton Dworak and Stanley Dworak filed a joint answer and cross-petition to the petition of Anton Dworak. They admitted that they were beneficiaries named in the certificate

at the time it was issued, and that Joseph Dworak died on the 28th day of August, 1912. They denied that Joseph Dworak in his lifetime changed the beneficiaries under the policy in favor of the plaintiff. The trial court decided that any attempted change of beneficiaries by Joseph Dworak was not successful, and decided against Anton Dworak, and decided that Marie Dworak had been divorced from Joseph Dworak sometime before his death, and that she was ineligible to take as a beneficiary, and that her children, Milton and Stanley Dworak, were not members of Joseph Dworak's family at the time of his death, and therefore were ineligible to take as beneficiaries. The judgment was given in favor of the children of Joseph Dworak by his first wife. In the stipulation it is agreed that the supreme court of the state of Iowa in the case of *White v. Brotherhood of American Yeomen, supra,* announced the following rule: "Code, sec. 1824, provides that no fraternal association shall issue any certificate unless the beneficiary be the husband, wife, relation, legal representative, heir, or legatee of such member. An association which expressed its object to be the bestowal of financial benefits on the family, widow, heirs, relations, and such others as may be permitted by the laws of the state, and the constitution and by-laws of which permitted a change of beneficiary, issued a certificate payable to a certain person by name, such person being the wife of the member when the certificate was issued. Subsequently she was divorced, and the member remarried, but made no change of beneficiary. *Held,* that on the death of the member the first wife was entitled to the proceeds of the certificate." (99 N. W. 1071.) Under the foregoing ruling, it would seem that Marie Dworak and her children would be entitled to the judgment. A judgment against them would be in disregard of the certificate.

As I understand it, we are asked to disregard the statement of the certificate as to the beneficiaries therein named, to disregard the method of doing business adopted by the Iowa supreme lodge, and we are also called upon to dis-

regard the laws of Iowa and the decisions of its courts. That the objections that might be made are waived, see Bacon, Benefit Societies (3d ed.) sec. 308, and citations.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. WEBSTER COUNTY ET AL., APPELLEES.

FILED MAY 19, 1917. No. 19556.

Taxation: ASSESSMENT: RAILROAD ACCESSORIES. A pipe line connecting springs with a water system established and operated by a railroad company, owner, for general railroad purposes at a station and roundhouse, and the necessary land around the springs, should be assessed by the state board of equalization and assessment, and not by the county board of equalization, though the property described is not within the regular railroad right of way and station grounds. Rev. St. 1913, secs. 6375-6377.

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

Byron Clark, Jesse L. Root and *L. H. Blackledge,* for appellant.

Frank J. Munday, contra.

ROSE, J.

This is an appeal by the Chicago, Burlington & Quincy Railroad Company, plaintiff, from an order of the district court for Webster county sustaining an assessment made by the county board of equalization. The property assessed is owned by plaintiff and consists of three acres of land with springs thereon and 10,891 feet of water pipe connecting the springs with a water system established and operated by plaintiff for general railroad purposes at the station and roundhouse at Red Cloud. The springs are in Webster county outside of the regular right of way and outside of the city limits of Red Cloud. For the pipe line plaintiff acquired a right of way 25 feet wide. Water not needed for railroad purposes is at times diverted to the Red

Cloud water plant, but this seems to be a gratuitous service. The assessment was made for both 1914 and 1915, the property not having been taxed for the former year. Plaintiff contends that the county board of equalization had no authority to assess the property described, since the statute provides that it shall be assessed by the state board of equalization. In support of this contention plaintiff relies on the following provisions of statute:

"The state board of equalization and assessment is hereby empowered, and it is made its duty, to assess all property of the railroads and railroad corporations in the state of Nebraska; Provided, however, all machine repair shops, general office buildings, store houses, and also all real and and personal property outside of right of way and depot grounds as of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation by the principal officers or agents of such companies with the assessors of any precinct of the county where such real or personal property may be situated." Rev. St. 1913, sec. 6375.

"The board on the first Monday in May in each year shall proceed to ascertain all property of any railroad company owning, operating or controlling any railroad or railroad service in this state, which, for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, road-bed, right of way and depot grounds, and all water and fuel stations, buildings and superstructures thereon, and all machinery, rolling stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with the moneys, credits, franchises and all other property of such railroad company used or held for the purpose of operating its road, and appraise and assess the same as personal property as herein provided." Rev. St. 1913, sec. 6376.

The statute also requires each railroad company, on or before April 15, to report to the state board of equaliza-

tion and assessment: "A complete list giving size, location as to county, township and city and village, material and value of all depots * * * or other buildings situated wholly or in part on the right of way, together with all platforms, fuel and water stations, and the machinery and tanks connected therewith." Rev. St. 1913, sec. 6377, subd. 3.

On the other hand, the county contends that the property assessed does not come within the class described as "right of way and depot grounds, and all water and fuel stations * * * thereon."

The statute provides further: "The state board shall transmit to each county, as soon as practicable after receiving returns from the railroad company, a statement from such returns showing as to each county and railroad, all machine and repair shops, general office buildings, store houses, and also all real and personal property outside of such railroad right of way and depot grounds, not included in the property herein required to be assessed by the state board of equalization." Rev. St. 1913, sec. 6385.

In a literal sense the property in question is not right of way or depot grounds or water stations thereon. Within the intent of the statute, however, the property belongs to the class required to be assessed by the state board. The law makes it the duty of that body to assess "all property of the railroads" in this state. Rev. St. 1913, sec. 6375. There is an exception in the form of a proviso whereby "all machine repair shops, general office buildings, store houses, and also all real and personal property outside of right of way and depot grounds" shall be assessed by the local authorities. The statute adopts the following theory of taxation:

"A railroad, for the purpose of assessment and taxation, is considered as an entity, and includes all property that is held and used principally in the operation of the road and carrying on the business of transportation." *Chicago, B. & Q. R. Co. v. Box Butte County*, 99 Neb. 208.

A pumping station and a water tank constructed and used for railroad purposes on depot grounds are assessable by the state board. In the present instance plaintiff, for reasons of economy or efficiency, no doubt, adopted a different system to secure a water supply. The property is "used principally in the operation of the road and carrying on the business of transportation." Plants at different stations for the furnishing of water constitute a part of the railroad as an entity. The property in question should be assessed by the state board, and not by the county board.

The assessment in the present instance, however, should not be disturbed on appeal. The property in question was not reported to or assessed by the state board either in 1914 or in 1915. Having failed to report the property to, or to have it assessed by, the state board, plaintiff should not complain of the county board for placing it on the local tax list. The property was taxable, and plaintiff should not escape its proportion of the burden of taxation. *Chicago, B. & Q. R. Co. v. Merrick County*, 36 Neb. 176.

AFFIRMED.

GEORGE URBACH ET AL., APPELLANTS, V. CITY OF OMAHA, APPELLEE.

FILED MAY 19, 1917. No. 20015.

1. **Constitutional Law**: CITY ORDINANCE: REMOVAL OF GARBAGE. A city ordinance defining garbage to include "every refuse, accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking or the dealing in or storage of meats, fish, fowl, fruits or vegetables," and prohibiting its removal through the streets or alleys by any one not employed by the city for that purpose, is not unconstitutional as taking the property of a restaurant proprietor for public use without just compensation or as depriving him of his property without due process of law, though the regulation may prevent him from selling garbage as feed for swine.

2. ———: ———: RIGHT TO QUESTION. Parties whose constitutional rights are not affected will not ordinarily be permitted to challenge the constitutionality of a law on the ground that it may operate in other respects to deprive other persons of their constitutional rights.

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

H. Fischer, William Sternberg and *J. Gerald Mac Veigh,* for appellants.

John A. Rine and *W. C. Lambert, contra.*

ROSE, J.

This is an action to enjoin the city of Omaha from enforcing an ordinance prohibiting any one not employed by the city for that purpose from hauling garbage through the streets and alleys. Plaintiff King is the proprietor of a restaurant and sells the waste from his kitchen to plaintiff Urbach who hauls it beyond the city limits as feed for swine. It is alleged in the petition that the garbage is valuable feed for swine, and that the ordinance, in preventing King from selling it, violates the state and federal Constitutions, which prohibit the taking of private property without due process of law or for public use without just compensation. U. S. Const., Amend. XIV, sec. 1; Nebraska Const., art. I, sec. 21. Defendant demurred to the petition. The demurrer was sustained. From an order denying an injunction and dismissing the action, plaintiffs have appealed.

The ordinance makes it a misdemeanor for any one not employed by the city for that purpose to remove or haul any garbage through the streets or alleys; provides for the collection of garbage by city employees; requires every housekeeper, or occupant of any building, and the proprietor of any hotel, restaurant, café and boarding house to place all garbage in proper receptacles reasonably accessible to the garbage collector; and defines "garbage" to include "every refuse, accumulation of animal, fruit or vegetable matter

that attends the preparation, use, cooking or the dealing in or storage of meats, fish, fowl, fruits or vegetables."

The question presented is whether the enactment of the ordinance was a proper exercise of police power. Plaintiffs cite *Whelan v. Daniels,* 94 Neb. 642, in which it was held that an ordinance declaring that dead animals found within the city become the property of the contractor employed by the city to remove them was void as taking private property without just compensation. The decision was based on the propositions that a dead animal may be valuable property, that it is not a nuisance *per se,* and that its owner should be given a reasonable opportunity to remove it before it becomes a nuisance. In other cases it has been held that substances which are nuisances *per se* may "be removed by the city, in its exercise of lawful authority, for the protection and preservation of the health, comfort and welfare of the inhabitants." *Iler v. Ross,* 64 Neb. 710, 717; *Smiley v. MacDonald,* 42 Neb. 5. In the present case the ordinance deals with garbage, which it defines to include "every refuse, accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking or the dealing in or storage of meats, fish, fowl, fruits or vegetables." Under the police power of the city, garbage, thus defined, may be treated as a nuisance *per se. Smiley v. MacDonald,* 42 Neb. 5; *Iler v. Ross,* 64 Neb. 710; *City of Grand Rapids v. De Vries,* 123 Mich. 570; *State v. Robb,* 100 Me. 180; *O'Neal v. Harrison,* 96 Kan. 339; *California Reduction Co. v. Sanitary Reduction Works,* 199 U. S. 306; *Gardner v. Michigan,* 199 U. S. 325.

These cases are in harmony with the following statement of the law: "The removal and disposal of garbage, offal, and other refuse matter is recognized as a proper subject for the exercise of the power of a municipality to pass ordinances to promote the public health, comfort and safety. The natural scope of an ordinance on this subject is confined to discarded and rejected matter, i. e., to such as is no longer of value to the owner for ordinary purposes of domestic consumption. If the matter in question has not

been rejected or abandoned as worthless and is not offensive in any way to the public health, it does not come within the natural scope of such an ordinance. Garbage matter and refuse are regarded by the decisions as inherently of such a nature as to be either actual or potential nuisances. By reason of the inherent nature of the substance, it is therefore not a valid objection to an ordinance requiring disposal in a specified manner that garbage has some value for purposes of disposal, and that the effect of the ordinance is to deprive the owner or householder of such value. That the owner suffers some loss by destruction or removal without compensation is justified by the fact that the loss is occasioned through the exercise of the police power of the state, and the loss sustained by the individual is presumed to be compensated in the common benefit secured to the public." 2 Dillon, Municipal Corporations (5th ed.) sec. 678.

Plaintiffs further contend that the ordinance is void because it prohibits the owner of garbage from feeding it to fowls or animals on his own premises. Whether this is a proper construction of the ordinance and whether, thus construed, it is unconstitutional are questions not necessary to a decision. It is not shown that plaintiffs have been prevented from making such a use of the garbage. King complains because his right to sell garbage has been invaded, and the petition does not show that he does, or desires to, feed the garbage to fowls or animals on his own premises. Urbach complains because the ordinance denies him the right to purchase and remove garbage produced on the premises of others. The rule is that parties whose constitutional rights are not affected will not ordinarily be permitted to challenge the constitutionality of a law on the ground that it may operate in other respects to deprive other persons of their constitutional rights. *State v. Brandt,* 83 Neb. 656; *Cram v. Chicago, B. & Q. R. Co.,* 85 Neb. 586; *State v. Stevenson,* 18 Neb. 416; *Jeffrey Mfg. Co. v. Blagg,* 235 U. S. 571.

The ordinance is not unconstitutional for the reasons advanced by plaintiffs. The judgment of the district court is therefore

AFFIRMED.

HAMER, J., dissenting.

The plaintiff King is the proprietor and owner of a café situated in the city of Omaha, Nebraska, in which he serves meats, fish, fowl, fruits, vegetables and other food to his patrons. He claims the right to dispose of the unused left-over product as he sees fit. It is placed in a receptacle provided for that purpose. It is stipulated that the food not used is not decomposed, putrid, rotten or offensive when it is put in the receptacle, and also that it has a property value to the plaintiff King. It further appears that King sells the said material to the plaintiff Urbach who removes it from the King premises twice daily. The admitted value of the material sold by King raises an important state and federal question which I will hereafter attempt to discuss whether the property is taken by the city without due process of law.

The city of Omaha passed an ordinance by which it undertakes to take away from the restaurant keeper, the plaintiff King, and others similarly situated, including all the householders in the city, the right to dispose of their garbage to a customer purchasing the same and removing it from the premises. It is claimed on behalf of the defendant that under the ordinance the plaintiff King is prohibited from selling said garbage to the plaintiff Urbach, and that Urbach is prohibited from hauling the same through the streets of Omaha, even though the wagon used for that purpose is sufficient to remove said garbage in a sanitary way and without giving offense to the eye or nostril or in any way endangering the public. The ordinance provides that the city of Omaha shall remove the garbage, and that it shall haul the same in a good and substantial water-tight iron tank, or iron bed, securely inclosed with a sufficient covering so as to prevent the escape of the contents thereof,

or may haul the same in tight wooden boxes lined inside and out with iron or steel securely riveted and so as to be water tight. The ordinance provides that there shall be painted on the wagon used the words "City Garbarge Wagon," and that it shall be unlawful for any person to have or use upon the streets of Omaha any wagon so painted unless such person shall be an employee of the city engaged to remove or dispose of such garbage. There is also a provision that the housekeeper or occupant of any building in the city of Omaha and the proprietor of any hotel, restaurant, café, boarding house and eating house shall place their garbage in a suitable sheet iron or galvanized can with a tight cover provided at their own expense, and that such receptacles shall be placed near the alley in the rear of the premises. The ordinance defines garbage to mean "every refuse, accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking or the dealing in or storage of meats, fish, fowl, fruits or vegetables." There is a fine provided for the violation of any of the provisions of the ordinance of not less than $10 nor more than $50.

The plaintiff Urbach is stipulated to be engaged in the business of feeding hogs near the city of Omaha, and also it is stipulated that he purchases said garbage from the owners thereof, and that he takes the same to his feed yards and feeds it to his hogs; that this business is his sole means of a livelihood; that the city of Omaha interferes with the business of said Urbach and the plaintiff King by arresting and incarcerating Urbach and threatens so to continue.

The petition of plaintiffs prayed to enjoin the enforcement of the ordinance. There was a demurrer filed by the city of Omaha to the petition of the plaintiffs, which petition sets forth the foregoing facts. The court sustained the demurrer of the defendant city and rendered judgment in its favor and against King and Urbach.

It is contended by the plaintiffs that the city of Omaha did not possess the power to pass the ordinance; that it is

unreasonable and interferes with property rights and with the liberties of the plaintiffs; that it works confiscation of the plaintiffs' property without due process of law; that by the classification made by the ordinance certain matters which are not nuisances are made matters of nuisance; that the ordinance attempts a prohibition, and not a regulation, and regardless of any necessity for prohibition or for regulation of the subject-matter over which it assumes to act; that the ordinance creates a monopoly by which the plaintiffs are deprived of their property without compensation. It is claimed by the defendant that the ordinance is within the scope of the police power and is in every way valid. No evidence was taken, and therefore the case stands upon the demurrer to the petition and the stipulation admitting the truth of the facts stated.

It is contended by the plaintiffs that private property shall not be taken without compensation; that to deprive the plaintiffs of their garbage as long as it has a property value and is not a nuisance is an unreasonable exercise of the police power and is in violation of the principles of constitutional law. It is said that the ordinance is confiscatory. Omaha is supposed to be a city of 200,000 people. It covers a large area, sufficient to contain 1,000,000 inhabitants. Many of its residents are poor people depending in part for their livelihood upon the use of gardens and vacant lots. Some have a team of horses to plow them, also the use of a cow in some localites, and some raise chickens. Omaha is a city of many small home builders. It is claimed that this ordinance reaches the little homes of many people who need to use the scraps from the kitchen table for the benefit of their chickens; that in places of the city of Omaha where the family cow may be found the potato peelings may not be given to her without endangering the safety of the family by arrest; also that prosperous restaurant keepers may not suffer as much as the occupant of the small home, because the proprietor may receive enough from his patrons to sustain him, but the laborer with his possible family cow and his possible chickens is in

danger of doing without eggs and butter; and that he and his family may suffer in consequence of the enforcement of the ordinance. It is emphasized that the ordinance is in thoughtless disregard of the rights of the people of the city belonging to all classes, and especially the poor. The ordinance extends to "every housekeeper or occupant of any building in the city of Omaha." There are probably 40,000 homes in Omaha. If each of these homes should lose $10 in a year because of this ordinance, the sum lost would amount to $400,000. One of the peculiar things about this ordinance is that it makes it unlawful for any person to put in the garbage can, or receptacle, ashes, tin cans, broken glassware or crockery, or any refuse other than "garbage." The "garbage" is apparently to be left in such condition that it can be eaten by animals. Of course, it could not be eaten if it contained broken glass or crockery or ashes and tin cans. I do not suggest that the purpose is to give this garbage to some political favorite of the city management, or some one person who has a valuable perquisite not known generally to the public, or to the city officers. It will be readily seen that there could be a job of that kind, but in this case there was no evidence taken, and therefore we may not know "what is what" behind the scenes. Why is the broken glass and broken crockery to be kept out of the garbage can? If the stuff was merely to be hauled away and dumped in a safe place they could do no harm. Of course, we may not be able to shut our eyes to the possibilities of this plan. If the garbage is removed at the expense of the city, then there might be a little dot in this arrangement amounting to many thousands of dollars, and more than the salaries of all the state officers, including also the congressmen. Why should the laborer or the clerk with his little home and his possible cow and chickens be deprived of the waste which he can make very useful to himself and his family? Eggs and milk and butter will tend to make the children well and strong. It will put the rosy bloom of vigorous health in their

cheeks. The disposition of this case is something to the advantage or disadvantage of every householder in Omaha, including also all the hotel and restaurant keepers, and many of the dealers in fruits and vegetables.

In the brief of counsel for the appellants it is stated that there are in Omaha numerous wholesale food merchants handling great quantities of perishable foods, and that in the spring and summer immense shipments of fruit, melons, eggs and vegetables are handled, picked over, sorted and reshipped throughout the great Missouri valley, and that in handling this stuff a large amount of articles unsuitable for shipment are culled from original shipments with the result that many tons of culled fruit, melons, eggs and vegetables are left; that immediately the city of Omaha steps in and takes the salvage from the hands of the owner and bestows it upon the contractor who has agreed to pay the city the sum of $1,000 a year for the privilege of being able to demand and receive food which in one good day is said to be worth more than the sum he pays for the entire year, and that the commission merchant has no recourse but to deliver over; that no demand is necessary; that he is guilty of a misdemeanor if he fails to provide receptacles and put the culls in the cases; that he is not allowed to feed the culls to hogs of his own, nor to sell them to another, and that the purpose is to provide the contractor with a great amount of valuable material without expense to him; that one is not permitted to burn the garbage in an incinerator; that it must be turned over to the contractor.

It is also said in the brief that the ordinance does not say, "Place in a receptacle convenient for removal or otherwise dispose of the same in the manner provided by the board of health (or other proper officer)," but proclaims that the contractor has an indefeasible right to "every refuse, accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking or the dealing in or storage of meats, fish, fowl, fruits or vegetables." The ordinance is somewhat artfully drawn because the purpose perhaps is hidden under what appears to be an innocent

definition, but it includes the language quoted, and takes the articles mentioned from the owner. In the city there are many butcher shops in which fats, oils, tallow, scraps of meat and bones accumulate. These things may be collected and reduced to useful products, though not fit for food. They can be made into lubricants and soap, and perhaps other things. According to this ordinance, no hotel owner, no restaurant proprietor, may take these scraps through the streets of Omaha to his hogs or his chickens. This sort of thing is confiscation because in the stipulation it is said that the scraps and remnants "are not decomposed, putrid, rotten or offensive when put in said receptacle." It is proposed to take from the owners of the property things of substantial worth, and, under the claim that it is necessary, the ordinance hits everybody.

We seem to have disposed of the questions involved in this case in the following cases: *Smiley v. MacDonald,* 42 Neb. 5; *Iler v. Ross,* 64 Neb. 710; *Whelan v. Daniels,* 94 Neb. 642. They are all garbage cases.

In *Smiley v. MacDonald,* this court laid down a general rule which ought not to be lost sight of: "It may, however, with safety be asserted that the legislature cannot under the guise of police regulations arbitrarily invade personal rights and private property." If we apply the rule here laid down to the instant case, it probably requires a disposition of it in favor of the plaintiffs. At the same time it is proper to remark that the removal of noxious and unwholesome matter tends directly to promote the public health and the comfort and welfare of the people. The health of the people is above every other consideration, and all steps necessary to secure its maintenance should be taken. But this brings us to the question of whether the ordinance of the city goes further than is necessary. It raises the question whether the man who buys the garbage may not be regulated in his manner of removing it with the same strictness and efficiency required of the city contractor. Why should he not keep just as good and safe a

wagon as the city contractor and operate it just as well and with as much care?

In *Iler v. Ross, supra,* section 1 of the ordinance there under consideration provided that any person who shall collect or remove any dead animals, garbage, ashes, filth, offal, night soil or other refuse matter within the corporate limits of the city of Omaha, not having a contract with said city so to do, shall be deemed guilty of misdemeanor, and upon conviction thereof shall be fined not less than $5 nor more than $20. The relators in that case had been convicted of unlawfully collecting and removing garbage, ashes, filth and other refuse matter, without having a contract with the city, and contrary to the provisions of said section 1. They sought relief by *habeas corpus.* This court said, among other things: "If the city is empowered to enact an ordinance providing that a contract shall first be entered into with it before any person is authorized to do any of the things prohibited, it follows as a legal sequence that the city may grant an exclusive right to one individual with whom it may enter into a contract and refuse to contract with all others; that is, if it is authorized to contract at all, it may lawfully contract with one or more, as may best suit its own views as to the propriety, necessity and terms upon which it will enter into such contractual relation with another." In that case the word "garbage" was defined by the ordinance to mean "all refuse matter, animal or vegetable." It is there said that the right of a city under charter acts such as the one quoted to make all needful rules and regulations for the proper collection and removal of all forms of rubbish, waste and other refuse matter where the population is in a small territory and in order to protect the health of the inhabitants seems a proposition so plain as not to require discussion. Such regulation was clearly contemplated by the legislature. It is said: "In fact the preservation of the health and safety of the inhabitants is one of the chief purposes of local government, and reasonable by-laws in relation thereto have always been sustained

in England, as within the incidental authority of such corporations"—citing *Boehm & Loeber v. Mayor and City Council of Baltimore,* 61 Md. 259. The court also quotes *River Rendering Co. v. Behr,* 7 Mo. App. 345, where it was said: "The municipal legislature is especially charged with the preservation of the public health. That high duty lies in prevention rather than in cure. It would be poorly discharged, or not discharged at all, if the surest and most well-known precautionary measures were not thoroughly put in practice against the introduction of disease."

The court also cited *Alpers v. City and County of San Francisco,* 32 Fed. 503. After these citations and quotations, this court said: "Can an ordinance be upheld and justified as broad and of so sweeping a character as the one under consideration, which includes all accumulations of ashes, stable manure, rubbish, debris, etc., many different kinds of which may properly be regarded of some utility to the owner or others and which are not *per se* noxious and harmful? Is a city empowered to contract with one individual, and authorize him exclusively to go upon the private premises of the inhabitants, collect and remove at the owner's expense all such substances, and to make it a penal offense for another to engage in the performance of the same kind of labor? Can the city, merely by its fiat, declare all and every substance of the kind mentioned nuisances, and direct their abatement and removal through the agency of an exclusive contractor?" The court then quotes what is said in *Smiley v. MacDonald, supra,* concerning the limitation of the power of the legislature preventing it from arbitrarily invading private property or personal rights; also calls attention to the fact that stable manure has a value for the purpose of fertilizing lawns and gardens, and is highly prized by the thrifty husbandman in agricultural communities because it enriches the soil and increases the yield of crops, and that cinders and ashes are regarded as useful for many purposes. It is then said: "The ordinance not only grants a monopoly, always odious in the eye of the law, without

justification or necessity therefor as a sanitary measure for the protection and preservation of the public health, comfort and welfare, but is also (always) an unwarranted invasion of the natural rights of the inhabitants of the city. It is true the banker, the merchant and the lawyer may remove from their own premises, and with their own teams, stable manure, but nothing else. The man without a team and the one who desires to earn an honest living in removing for others these things which are not in themselves injurious to health are completely debarred. * * * Not only is the owner's property taken from him when he could perhaps dispose of it or make arrangements for its disposal to some advantage, but he is compelled to bear the expense of the taking. We cannot believe such an ordinance can be justified and upheld by the application of any sound principle of law."

In *Whelan v. Daniels,* 94 Neb 642, it was held: "The owner should be permitted to remove such animals or to cause the same to be removed within a reasonable time fixed by such municipality, and be allowed to receive the value thereof, or to put the same to a beneficial use." In the body of the opinion it is said: "The officers of the city must be allowed a large discretion in determining when and how such garbage must be disposed of, but the rights of property in the individual must not be unnecessarily violated." This court held, as stated in the syllabus: "The city of Omaha by an ordinance, in effect, declared that the carcasses of all dead animals found within the city, which were not slain for food, should at once become the property of the public contractor, whose name was contained in the ordinance; such ordinance is void, so far as it attempts to take private property without due process of law."

The ordinance under consideration is quite as sweeping as the ordinance in *Whelan v. Daniels.* In the instant case the language is not the same, but the effect is quite as drastic. In that case the law as declared by this court permitted the owner to remove the dead animal or to cause

the same to be removed within a reasonable time to be fixed by the municipality, and to be allowed to receive the value thereof, or to put the same to a beneficial use. The left-over part of a meal is perhaps quite as cleanly as the part that has just been eaten. If in the case of *Whelan v. Daniels* the owner of the dead animal was declared to have a reasonable time in which to remove it, or to apply it to a beneficial use, then the application of the same rule to the instant case does not in any way hinder the owner from removing what is of value to him, nor prevent him from selling it and realizing its value. The fallacy in the contention made on behalf of the defendant city is that only the contractor can safely be trusted with the removal of the matter to be taken away. I do not see why the man who purchases the refuse and undertakes to remove it may not be treated just as strictly as the city contractor. The power to pass by-laws gives authority to pass the same when they are reasonable in their character, within the scope of municipal authority, and not repugnant to the Constitution and general laws of the state. *State v. Ferguson,* 33 N. H. 424. It is no part of the franchise of municipal corporations to change the meaning of English words. *Mays v. City of Cincinnati,* 1 Ohio St. 268; *Henback v. State,* 53 Ala. 523. This being the case, left-over food of value cannot be discredited by calling it "garbage."

In England every by-law must be reasonable, and not inconsistent with the character of the corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property. *Feltmakers Co. v. Davis,* 1 Bos. & P. (Eng.) 98; *Sutton's Hospital,* 5 Coke (Eng.) pt. 10, p. 1; *City of London v. Vanacker,* 1 Ld. Raym. (Eng.) 497.

In the United States an ordinance passed in virtue of implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws of the state. *Davis v. Town of*

Anita, 73 Ia. 325; *Yick Wo v. Hopkins,* 118 U. S. 356; *Trustees of Schools v. People,* 87 Ill. 303; *In re Frazee,* 63 Mich. 396; *Clason v. City of Milwaukee,* 30 Wis. 316; *Ex parte Frank,* 52 Cal. 606; *State v. Higgs,* 126 N. Car. 1014; *Mayor of Memphis v. Winfield,* 27 Tenn. 707. The ordinance in the last case directed watchmen to arrest any free negro or slave that they might "find out after 10 o'clock (at night) and lodge them in the calaboose, there to remain until next morning." In addition, if the negro arrested was a slave, he or she was to receive ten lashes "on their naked backs." It is apparent that sometimes the ordinances of the past have been oppressive, while professing to be for the good of the community and the enforcement of proper conduct.

FOSTER M. SHICK, APPELLEE, V. FREDERICK H. JOHNSON, APPELLANT.

FILED MAY 19, 1917. No. 19176.

1. **Master and Servant:** ACTION FOR INJURY: DEFENSES: ASSUMPTION OF RISK: WAIVER. In an action by an employee for damages caused by an injury incurred in attempting an act of unusual danger, if the defense is that the danger was open and notorious, and that the plaintiff assumed the risk, and if the evidence shows that the plaintiff protested against performing the service on account of the apparent danger, and that the defendant peremptorily ordered him to perform it, the defendant will be held to have waived the defense of assumption of risk.

2. ———: ———: NEGLIGENCE: EVIDENCE. When the sole ground of negligence alleged and relied upon is that the danger was known to the defendant, and was unknown to the plaintiff, and could not have been observed by him in the exercise of ordinary care and diligence, it is not necessary to prove that the defendant peremptorily ordered him to perform the service over his protest. It is sufficient in that regard if the service rendered was in the line of plaintiff's employment and was consented to by defendant without notifying plaintiff of the hidden danger.

3. ———: ———: ISSUES: INSTRUCTIONS. When the petition in such case contains allegations that the defendant did many things negligently, without alleging any facts that would amount to actionable negligence except in one particular, it is erroneous to give the whole petition in charge to the jury, and instruct them that if they find defendant guilty of any act of negligence alleged in the petition they shall find for the plaintiff.

4. ———: ———: ———: ———. The court in its charge to the jury described an alleged act of the defendant that was not of itself counted upon as negligence justifying a recovery, from which the jury might infer that if that act was proved they should find for the plaintiff. This was erroneous.

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

James C. Kinsler, for appellant.

McLaughlin & Neely, contra.

SEDGWICK, J.

Foster M. Shick, an employee of Frederick H. Johnson, recovered a judgment against Mr. Johnson in the sum of $13,750 for damages caused by an injury while he was in Johnson's employment. Johnson was insured as an employer by the Casualty Company of America, and the suit against him was defended by the company. Afterwards an appeal was taken to this court, but no supersedeas bond was given. Proceedings were begun against Mr. Johnson to enforce collection of the judgment, and thereupon he settled with the plaintiff by giving him two promissory notes, one in the sum of $5,000, the amount for which the Casualty Company had insured him, and the other for the remainder of the judgment. Mr. Shick then dismissed the appeal. Upon motion and showing, the court found that, by the terms of the policy of insurance, it was agreed that the company should defend in the name of the insured any action against him in which the company would be liable under the terms of its policy, and that the company had so defended the action and in the name of the insured had taken the appeal. The motion of the company for rehearing of the order permitting the dismissal of the appeal was

sustained. The order dismissing the appeal was "set aside, case to be determined in its regular order." The case was argued and submitted upon its merits.

The defendant is a contractor and builder, and the plaintiff was in his employ. The action is to recover damages for an injury sustained by the falling of a beam and column that the plantiff and other employees were attempting to place. The plaintiff in his brief states the conditions surrounding the accident as follows:

"During the month of July, 1914, the appellee was at work with two other men in the basement of a building in the process of construction in the city of Omaha. The three men were employees of the appellant, and were engaged in the erection of iron I beams in the aforesaid building. The three men had set the first iron column in place on its foundation, and had just raised the first I beam and landed it in place so that one end rested on the brick wall at the west side of the building, and the other end rested on the west bracket of the first iron column. * * * After this first I beam had been hoisted into place, wooden braces were placed against it, one on each side, for the purpose of bracing it firmly in order to prevent it from toppling over. The upper end of each of the planks, which were used as braces, was put in the angle between the web and the upper flange of the I beam, and the lower end was driven or pushed into the ground. One of these wooden braces was placed opposite each other on each side of the I beam, a short distance west of the first column. After the work had reached this stage, the appellee or plaintiff injured his finger while he was endeavoring to move an I beam lying on the ground, and immediately left the excavation and went up onto the street in order to have his finger dressed. The foreman, Frank Painter, and the other workman, Ernest H. Peters, remained in the basement while the plaintiff went up onto the street. While the plaintiff was absent from the basement, the foreman and Peters moved the derrick, which had been used in hoisting the first I beam into position, from the place

where it had been when the plaintiff left the basement to have his finger dressed, to a position farther east, in order that the derrick would be in position to hoist the second I beam into its proper place. In moving the derrick, the plaintiff claimed that the wooden braces, which had been placed against the first I beam, as hereinbefore set out, had been taken down in order to get the derrick by, and were not put back into place. The plaintiff was absent from the excavation a few minutes (about ten), and when he returned to the basement he found that the derrick had been moved by the foreman and the other workman, as stated above. The second column was then put in place, and the raising of the second I beam was commenced. The foreman, Painter, stood a short distance east of Shick, taking the slack off from the drum forming a part of the derrick, and Peters was directed to turn the windlass, by which the I beam was raised. The plaintiff stood upon the ground and steadied the I beam by holding his hand on it, as it was hoisted, preventing it from striking against the columns as it ascended. After the I beam had been hoisted to the required height, it was necessary to land it on the brackets attached to the first and second iron columns. This was the work assigned to Shick, and, as soon as the I beam had reached the desired height and the hoisting process had stopped, the foreman nodded to Shick, indicating, as the plaintiff claimed, that it was time for him to commence his work of landing the beam on the column in its proper position. Immediately upon perceiving the foreman's nod, Shick turned around and started to climb up the first iron column in order to connect the beam to the column. While he had hold of the column, it swayed and toppled over on him before he could get out of its way. * * * When he returned to the basement, * * * the plaintiff testified that he did not observe or know that the master had removed the wooden braces which held the beam and column in a secure and steady position, and that no one called his attention to the fact that the braces had been removed. After the second I beam had been

raised to the required height, and the foreman indicated by a nod of the head that the time to connect the beam to the column had arrived, Shick promptly proceeded to perform his duty. He was crushed by the collapse of the beam and column, due to the absence of braces."

When the plaintiff was testifying as a witness in his own behalf, he was questioned, and answered, as follows: "Q. Then, * * * after the beam had been raised so you could hardly touch it any more, what did Painter do? A. Well, Peters stopped turning, and Painter kept hold of the line and nodded his head to me, and I turned around and started to climb the column. Q. Now, Mr. Shick, with the situation as it was there, with the beam up as high as you could reach, or a little higher, and Mr. Peters having stopped turning the crank, and Mr. Painter facing the work and giving you that nod, what did that nod mean to you? A. That was an order for me to connect the beam to the column." The defendant objected to all of this evidence as incompetent and immaterial, and now insists that "it was wholly immaterial what the condition of the plaintiff's mind may have been at the time as to whether the alleged nod of the foreman meant anything to him, or what it meant, or 'what he understood it meant to himself,' or 'how he interpreted it to himself.'" If the plaintiff knew the existing conditions and the danger involved in attempting to climb this column under the circumstances, and had protested to the foreman against performing such a service on account of the danger, and was now relying upon the order of the foreman to proceed and climb the column for the purpose indicated notwithstanding the apparent danger in doing so, to support such a cause of action it would be necessary to prove that the foreman intended to and did give such order. Such an order of the foreman under such circumstances would preclude the defendant from availing himself of the defense that the plaintiff assumed the risk of such apparent dangers. But the plaintiff did not bring his action, and does not now present it, on any such theory. He alleged in his

petition: "That solely and entirely by reason of the carelessness and negligence of the defendant and its duly authorized foreman, Frank K. Painter, in removing the above described props, and in carelessly and negligently failing to warn or advise the plaintiff of the unsafe and dangerous condition which had been created, and of the danger arising as a result of the removal of the said props or braces, and without any negligence or carelessness on the part of the plaintiff whatsoever, said plaintiff was injured as hereinafter set forth." And he says in his brief: "The statement that the plaintiff was ordered to climb up the iron column was a mere incident, and the plaintiff's case does not in any way depend upon the question of whether or not such order was given. The negligence complained of was that the defendant, acting through its foreman, failed to notify the plaintiff of the removal of the braces after he returned from the street, and the further fact that the foreman permitted and allowed the plaintiff to climb up the iron column without warning or advising him of the removal of the props, and of the dangerous and unsafe condition of the premises, which condition was a result of changes made during the plaintiff's absence." A nod of the foreman's head under the circumstances would be wholly inadequate as a peremptory order that the plaintiff should proceed to climb the column against his protest that it was dangerous to do so with the braces removed. And evidence that plaintiff so interpreted the nod would be incompetent upon such an issue, but as an indication that they were ready to have the column attached to the I beam, such evidence might be competent.

The issue of negligence stated in the petition and tried by the parties seems to be as the plaintiff states: "That the defendant, acting through its foreman, failed to notify the plaintiff of the removal of the braces after he returned from the street, and the further fact that the foreman permitted and allowed the plaintiff to climb up the iron column without warning or advising him of the removal of

the props, and of the dangerous and unsafe condition of the premises."

The petition was long, and contains several allegations that the defendant negligently did various things, without alleging any fact that would amount to actionable negligence except in the one particular before stated, and the court in its instructions recited to the jury substantially all of the allegations of the petition. The court gave a very suitable instruction for the plaintiff upon the issue of negligence presented by the petition, and then also gave numerous instructions tending to confuse the issues presented. In one instruction the jury were told: "The plaintiff claims that defendant's foreman ordered him to connect the second beam to the column which fell, and that such order was conveyed to the plaintiff by the defendant's foreman moving or nodding his head, and the movement of said foreman's eyes from the plaintiff to said column, and that thereupon plaintiff, understanding that he was ordered to ascend said column, proceeded to do so in compliance with such order from the foreman; this is denied by defendant; and it is for you to determine, taking into consideration all of the facts and circumstances of the case as shown by the evidence, whether or not such order was given. In this behalf you are instructed that, in giving an order or direction by a foreman to a servant working under his supervision, it is not absolutely necessary that such order or direction be given by word of mouth or word spoken, but the same may be conveyed by gesture, sign, or signal, such as a significant movement or nod of the head and movement of the eyes by the person wishing to convey to such workman such order or command. It is sufficient if the person so making such gesture of the head and eyes meant to convey to the workman the order to do the act in question, and the workman, so understanding it, undertook to comply with such order."

This instruction was clearly erroneous. In connection with the statement of the case as alleged in the petition, it conveyed to the jury the idea that they might find for the

plaintiff upon the negligence of this nod of the head alone. Whereas that evidence was of no importance, unless the defendant had, in the plaintiff's absence, made the conditions such that it was unusually dangerous to attempt to connect the I beam with the column, and the plaintiff was not aware of such change in conditions and could not have observed it by exercising reasonable care and caution. It is not clearly shown why the plaintiff did not observe that these braces had been removed. They are described as timbers or planks, and must have been very prominent, extending, as they did, from the I beam, eight feet or more from the floor, to a considerable distance on either side, where they were firmly planted in the ground. If he did observe, or might with reasonable care have observed, that these braces had been removed, and proceeded to connect the I beam without protest on account of the increased danger, he assumed the risk of so doing, and a nod of the forman's head would in any view of the matter amount to no more than consent that plaintiff might do so; it could not be considered as a peremptory order against plaintiff's protest which might result in his discharge if he failed to obey.

The court erred, also, in reciting the whole petition to the jury. If the evidence of the removal of the braces and of due care and caution on the part of the plaintiff had been sufficient, the court should have submitted to the jury the question of assumption of risk.

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

REVERSED.

HAMER, J., not sitting.

FRANK OPOCENSKY, APPELLEE, V. CITY OF SOUTH OMAHA, APPELLANT.

FILED MAY 19, 1917. No. 19403.

1. **Motor Vehicles:** REGULATION OF SPEED. Since the decision in *Gillespie v. City of Lincoln*, 35 Neb. 34, the legislature has modified the law as stated in that decision by the enactment of section 3049, Rev. St. 1913. By this statute no motor vehicle is allowed to be operated at a greater speed than 12 miles an hours in any city or village, or at any dangerous rate of speed when not "answering emergency calls."

2. **Municipal Corporations:** OPERATION OF MOTOR VEHICLES: LIABILITY. When a motor vehicle, the property of the city, is being operated under the directions of the city authorities for the benefit of the property itself, and not in the performance of any governmental duty, the city will be liable for damages caused by the unlawful operation thereof.

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

John A. Rine and *W. C. Lambert,* for appellant.

A. H. Murdock and *Ringer & Bednar, contra.*

SEDGWICK, J.

The plaintiff recovered a judgment in the district court for Douglas county against the city of South Omaha for damages caused by the collision of an automobile, owned by the defendant city and driven by one of its firemen, with the automobile in which the plaintiff was riding, and the defendant has appealed.

The defendant demurred to the amended petition, and, after verdict in the plaintiff's favor, defendant moved for judgment notwithstanding the verdict. The defendant makes five assignments of error, but they all are predicated upon the contention that the facts alleged in the amended petition are not sufficient to entitle the plaintiff to any verdict and judgment against the defendant city. The contention of the defendant is that, as the automobile

was for the exclusive use of the fire department of the city and was being driven by one of the members of the fire department, it must be held that the city was engaged in the exercise of a governmental function, and is therefore not liable.

Omitting the formal parts, the allegations of the petition that show the character of the question presented are: That the city of South Omaha at the time set forth in the petition was a municipal corporation, having less than 40,000 and more than 25,000 inhabitants; that Twentieth street between G street and Missouri avenue in said defendant city is a street within the corporate limits thereof which has for many years been opened, improved and placed in a condition for public use; that it is in the midst of a thickly settled part of the city and is a much traveled and used street; that at the time of the accident the plaintiff was traveling west on the north side of I street; that as they reached the intersection of said Twentieth and I streets, and "while they were traveling in an ordinarily careful, prudent and lawful manner, and the driver of said machine in which this plaintiff was riding having the same under full control, they were run into by the automobile herein described as belonging to the defendant city of South Omaha and then in use by the said city; that the said machine hereinbefore described was then being driven southwardly in the center of Twentieth street by one Kilker, an employee of said defendant city as an ordinary fireman in the fire department thereof, to whom the duty of driving said machine had been previously assigned by the chief of the fire department, and who was therein operating the said machine under the direction of and by the authority of the chief of the said fire department, said Kilker having been authorized and directed by the said chief to proceed with said machine to Twentieth street and thoroughly test it out;" that the defendant's automobile was then "being driven by the said Kilker at an exceedingly high and dangerous and unlawful rate of speed, to wit, fifty miles per hour, and that, at the time it was so

being driven by the said employee of the defendant city, it was not answering an emergency call made by any one to either the police, fire department, or city ambulance, but was so being unlawfully run in the manner aforesaid, under and by the direction of the said city official hereinbefore described; * * * and by reason of the further fact that the said machine was being driven on the wrong part of the street, to wit, the center of the street, the said Haney (the driver) was wholly unable to avoid being run into by the said approaching machine; that said machine in which plaintiff was riding was struck and overturned by the said automobile owned by the defendant city and being driven by the said Kilker, and by the force thereof this plaintiff was thrown out and under said machine as it struck the ground, and that by reason thereof he sustained great and lasting and permanent injuries."

The defendant relies largely upon *Gillespie v. City of Lincoln,* 35 Neb. 34, in which it was held: "A city is not liable at common law for the negligent acts of the members of its fire department." The court stated the question to be determined as follows: "Counsel says in his brief: 'The exercising of the team was a proper thing to do. It lies in the way of a proper discharge of the functions of the department. It was not *ultra vires.* The way in which it was performed is what we complain of.' Taking it for granted, then, that the driving of the team at the time in question was a proper exercise of the functions of the fire department of the city, and within the line of duty of the driver, we will proceed to examine some of the authorities bearing upon the question involved." The court then quoted from many of the earlier cases, mostly dealing with accidents happening while the firemen were engaged in controlling fires or preparing upon emergency to do so, and said that the city was not liable.

Conditions have greatly changed in the use of the streets of cities in Nebraska since the decision of *Gillespie v. City of Lincoln,* in 1892, particularly in the use of automobiles and other dangerous motor vehicles, and the legislature

has modified the law announced in that case, as found in section 3049, Rev. St. 1913: "Within any city or village no motor vehicle shall be operated at a speed greater than twelve miles an hour or at a rate of speed greater than is reasonable and proper, having regard of the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person. * * * Provided, the speed limits in this section shall not apply to physicians, or surgeons, or police, or fire vehicles, or ambulances when answering emergency calls demanding excessive speed."

The driver of this automobile was not "answering calls demanding excessive speed." He was therefore violating the law. He was not performing any service enjoined upon him by the state, but was acting under the authority of the city, testing an article of the city property. Under modern conditions, such conduct is dangerous, and, as it is wholly unnecessary, is forbidden by express statute.

The petition states a cause of action, and the judgment of the district court is

AFFIRMED.

ROSE and CORNISH, JJ., dissent.

CHARLOTTE HANSEN, APPELLANT, v. WILLIAM H. MALLETT, APPELLEE.

FILED MAY 19, 1917. No. 19121.

Trial: MISCONDUCT OF ATTORNEY. Aggravated misconduct of counsel in stating to the jury prejudicial facts outside of the record and in urging a disregard of the law applicable to the issues and proofs may require the reversal of a judgment on a verdict in his client's favor, though he was reprimanded by the trial court, and though the jury were directed to base their findings on the evidence and the instructions.

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

H. E. Burkett, for appellant.

R. J. Millard, contra.

HAMER, J.

This is a bastardy case. There was a verdict in favor of the defendant, and plaintiff has appealed.

The plaintiff was the servant girl working for the defendant at his home. She began to work for him on or about September 22, 1913. She appears to have worked continuously until about Christmas, except one week in the latter part of October or the early part of November. On July 14, 1914, she gave birth to a child. At the time of the trial it was still alive. The claim is made that the plaintiff got in the family way on Friday night, about the middle of October, 1913. At that time the defendant's wife was away. She came back the next day. In November the defendant's wife appears to have been absent at Sioux City for the period of two weeks. It is claimed by the plaintiff that the defendant had intercourse with her during that time.

We do not care to discuss the details of the evidence. The view that we take of the matter is that there will have to be a new trial because of misconduct of counsel during the trial. Immediately after the plaintiff's father learned of his daughter's condition, the defendant went to the home of the plaintiff's father and there had a conversation with the plaintiff's father and mother. In this conversation he appears to have said, according to the evidence, that he was awfully sorry, and wanted to know if he could do anything for the plaintiff's father. He talked to the girl, and according to the testimony said: "Don't cry, Charlotte." The girl made accusations against the defendant in the presence of her father and mother, and recited something of what she claimed the defendant had told her about laying the blame on some boy. The defendant claimed that he was not the father of the child. There was an effort to lay the blame on the plaintiff's cousin, a boy 15 years old. There was also an effort to show that

another boy 16 years old had had sexual intercourse with the girl. There was an objection, and the testimony was excluded. The defendant's counsel in his argument to the jury said: "And you gentlemen of the jury are not going to believe that this red-haired defendant is the father of Charlotte Hansen's black-haired, black-eyed babe; and you know that when she swore that this red-haired defendant was the father of her black-haired babe she swore to a lie." Plaintiff's counsel objected to this, and the objection was sustained; but defendant's counsel proceeded: "Your verdict in this case will be either 'guilty' or 'not guilty.' While, strictly speaking, this is not a criminal case, it is, however, a quasi-criminal case, and the plaintiff must have more and better evidence than is required in a civil case." There appears to have been an objection to this, and the trial judge said: "The court will instruct the jury as to the law." Counsel for the defendant also said to the jury: "If I were a juror in a case like this, it would require more than a preponderance of the evidence. The evidence would have to be convincing beyond a doubt." Here there was an objection upon the part of plaintiff's counsel, but the court does not appear to have censured counsel for the defendant, and we are unable to find any instructions of the court to the jury telling the jury to disregard these remarks. Counsel for the defendant also said: "It is true that we did not prove that the plaintiff had sexual intercourse with other men, as I said we would in my opening statement; but I am here to tell you that this defendant is not the father of her child, and that some other man is." There was an objection to this, and the court sustained the objection; but he does not appear to have admonished counsel concerning the vehemence of his language. Counsel for the defendant does not seem to have retracted anything that he said. The address of counsel contained inflammatory statements having no foundation in the evidence, and he advocated a course at variance with law. This misconduct is assigned as error.

In *Birmingham Railway, Light & Power Co. v. Drennen*, 175 Ala. 338, Ann. Cas. 1914C, p. 1037, the court held: "Where, in argument, the plaintiff's counsel makes statements that are prejudicially erroneous, and the court, although sustaining the defendant's objection to the statements, does not exclude them or reprimand the counsel for using them, and the counsel does not retract the statements after the objection is sustained the trial court should grant a new trial."

In that case the bill of exceptions contained the following recitals: "Mr. Harsh, in making the closing argument for the plaintiff in the case, said to the jury: 'I know Hugh Morrow, and I know what I am going to tell you about him is true. I know that if he was on the jury trying this case that he would render a verdict in favor of the plaintiff in a large amount.' The defendant, by its attorney, * * * objected to the foregoing argument of plaintiff's counsel, and the court sustained the objection. At the time of making the objection, defendant's attorney stated to the court, in the presence of the jury, that the facts stated by Mr. Harsh were not in evidence, and were not true in substance and in fact."

The supreme court said: "This was clearly and wholly illegitimate argument. It was matter stated as a fact to the jury, of which there was no evidence, and of which fact evidence would not have been admissible, if offered. Its only tendency and effect was to prejudice the jury against the defense of the defendant, and against the sincerity of its counsel in so defending. Its natural tendency was to persuade the jury to render a verdict for plaintiff, because it was practically confessed by the attorney for defendant. It would be difficult to conceive of argument more objectionable, unfair, and prejudicial than was this, coming, as it did, in the closing argument, to which the defendant's counsel has no opportunity to reply. Courts should not allow verdicts obtained by such argument to stand. * * * This court on appeal, can only review the actions and rulings of the trial courts, and not those of

counsel; hence on the main appeal we cannot review the action of the trial court as to this matter, for the reason that his ruling, as far as invoked on the main trial, was in favor of appellant, and appellant cannot therefore assign it as error"—citing *Cutcliff v. Birmingham Railway, Light & Power Co.,* 148 Ala. 108, and other cases. The court further said: "But the defendant could and did assign, as ground for new trial, this illegitimate argument of plaintiff's counsel, which argument counsel failed to withdraw, or to attempt to correct the erroneous impression it may have produced upon the minds of the jury, and the trial court declined to set aside the verdict on this account; so, as to the new trial, he may assign such action as error. This court has repeatedly and in strong language condemned remarks of counsel less offensive and less offending than those used in this case, and has awarded new trials where the trial court failed or refused to take prompt and decisive action to eradicate such erroneous impressions, and has done this in cases even where counsel making such argument had done all he could to cure his error; that is, by retracting the offensive remarks."

The court held that it was error to refuse to grant the motion for a new trial. Subsequently the rehearing was denied February 17, 1912. This, therefore, is a recent case.

In *Wolffe v. Minnis,* 74 Ala. 386, the court said: "It is one of the highest judicial functions to see the law impartially administered, and to prevent, as far as possible all improper, extraneous influences from finding their way into the jury box." In that case, when the objection was made, counsel said, "Oh, well, I'll take it back;" but the reviewing court said, "Such remark cannot efface the impression. The court should have instructed the jury, in clear terms, that such remarks were not legitimate argument, and that they should not consider anything, thus said, in their deliberations."

In *Chicago, B. & Q. R. Co. v. Kellogg,* 55 Neb. 748, this court said, on the rehearing, as stated in the syllabus:

"But where the misconduct of counsel is so flagrant and of such a character that neither a complete retraction nor any admonition or rebuke from the court can entirely destroy its sinister influence, a new trial should be awarded regardless of the want of an objection and exception." In that case Judge Sullivan, delivering the opinion of the court, cited *Florence Cotton & Iron Co. v. Field,* 104 Ala. 471; *Bullard v. Boston & M. R. Co.,* 64 N. H. 27; *Rudolph v. Landwerlen,* 92 Ind. 34; *Tucker v. Henniker,* 41 N. H. 317; and also two Nebraska cases.

In *Hughes v. City of Detroit,* 161 Mich. 283, the court said that the argument was inflammatory and prejudicial, and that it was cause for a reversal. In that case no allusion was made in the charge of the trial court to the improper argument of counsel. There had been an exception at the time the objectionable language was used. In that case counsel said: "Would you take all the money in the city of Detroit and have your sister go through with what this young woman has gone through with? * * * You have anybody crippled in the family, or where their usefulness is gone, and see how they stand the care, and wear away whatever affection there may be. * * * As my associate said, you would not take that injury for all the money that could be piled up in front of us." It was held that the language used was "inflammatory and prejudicial." The court said: "It was cause for reversal"—citing many Michigan cases.

In *Sullivan v. Chicago, R. I. & P. R. Co.,* 119 Ia. 464, it was held that, where it reasonably appears that the verdict may have been influenced by improper remarks made by an attorney, a new trial should be granted. In *Bjoraker v. Chicago, M. & St. P. R. Co.,* 103 Minn. 400, it was held that, where the language used by the attorney in his address to the jury is not a fair comment on the evidence or anything remotely deducible from the evidence, an order of the trial court denying a motion for a rehearing will be reversed and a new trial granted.

In *Hall v. Wolff*, 61 Ia. 559, the objectionable language was: "Hall was not the party really interested in said case; that the real animus of the case was the desire of T. H. Read, president of the First National Bank, of Shenandoah, Iowa, to cripple and injure the intervener; that Mr. Bogart, to the great relief of the citizens of Shenandoah, had started a second bank there, and that Read was managing this case in the hope of destroying or injuring said bank; that Hall 'was only a cat's paw to lend the cloak of respectability to the case,' and that he had not retained the counsel who appeared for him, but that was furnished by Read's and other banks; that this was a test case, upon which depended all the other cases pending against Wolff, in which creditors were seeking to subject property held by this intervener under the sale in controversy." It was held that a new trial should have been granted by the trial court, and the judgment was reversed.

In *State v. Duncan*, 86 S. Car. 370, Ann. Cas. 1912A, p. 1016, it was said: "Within the four corners of the evidence, great latitude in argument is allowed. But it is the duty of the court, of its own motion, to check any departure from the record. And when abuse of the privilege of argument is allowed, against objection, to such an extent that it appears probable that the verdict was thereby affected, a new trial will be granted. The law guarantees every litigant a fair and impartial trial, and this has not been secured, where the verdict has been influenced by considerations outside of the evidence."

The misconduct of which complaint is made was clearly prejudicial, and prevented plaintiff from having a fair trial. For this reason, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., not sitting.

SEDGWICK, J., dissents.

ROBERT S. KING, APPELLANT, V. W. W. DAY, APPELLEE.

FILED MAY 19, 1917. No. 19006.

Trial: VERDICT: CONFORMITY. Evidence examined, and *held* that the verdict does not respond to the evidence or the law as given in the court's instructions.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

Burkett, Wilson & Brown, for appellant.

Strode & Beghtol, contra.

CORNISH, J.

Under a contract entered into January 17, 1913, plaintiff purchased of defendant all the stock in the State Oil Company, agreeing to pay therefor $18,500, the business being transferred to plaintiff on the afternoon of January 29, 1913. By the terms of the sale defendant guaranteed that the value of the goods, wares and merchandise was $6,797.37; that the company owned 1,650 steel barrels; that the bills payable did not exceed $21,950.75, defendant agreeing to pay all bills in excess thereof; that the accounts receivable amounted to $12,288.24 and would be paid within three months. The value of the good will was fixed at $2,500. Alleging that defendant, "for the purpose of inducing the plaintiff to make said purchase and to enter into said contract, falsely and fraudulently and for the purpose of deceiving the plaintiff" misrepresented the net value of the assets, plaintiff brought this action to recover $17,943.60, it being alleged that the company was insolvent at the time plaintiff purchased the stock. There was a verdict for plaintiff for $1,941.90, and from the judgment thereon plaintiff appeals.

The controlling question on appeal is plaintiff's contention that his motion for a new trial should have been sustained, the proof conclusively showing that the verdict

should have been returned for a greater sum than $1,941.90, to wit, $15,486.28.

On appeal plaintiff classifies his elements of recovery as follows: for unpaid accounts receivable, $4,732.96; for excess accounts payable, not listed by defendant, $4,409.10; for shortage in inventory, $950.05; for goods on consignment, $1,194.44; for shortage in barrels, $1,698.73; and for good will $2,500.

Without considering these claims in detail, it is apparent that the verdict is not in harmony with the evidence. In the list of accounts receivable, items aggregating about $600 were listed twice by defendant. In the list of accounts payable, there was a mistake of $767.25, a debt of $775 being listed as $7.75. Taxes not listed by defendant amounted to $139.17. The largest claim under the classification of excess accounts payable relates to two cars of gasoline and one car of oil from the Chanute Refining Company, which, with freight charges and inspection fees, amounted to $2,544.86. There is considerable testimony about three cars on the switch track at the State Oil Company at the time the inventory was taken, January 29, 1913, and it seems to be proved that these cars were not inventoried. The three cars for which plaintiff is seeking to recover are cars unloaded while defendant was in charge of the company. The car of oil was shipped under an invoice dated January 10, 1913, for $324.16; one car of gas under an invoice dated January 3, 1913, for $910.13; the other car under an invoice dated January 13, 1913, for $100.83. The first two cars were paid for by plaintiff February 10, and the third car February 13. The records of the railroad company show that these cars were unloaded January 9, 18, and 20—some time before plaintiff and defendant took the inventory of the merchandise on hand. Defendant contends, however, that plaintiff has not shown that these cars were not included in the accounts payable, listed by defendant. The books kept by the State Oil Company while defendant was in charge show that the amounts due for these three

cars were not listed by him in the accounts payable. The first item which he listed under the account of the Chanute Refining Company was for oil and gas purchased December 16 and 18, $1,251.80. Other records of the company show that this was for a car of oil, $300.05, purchased December 16, and $951.75 for a car of gasoline purchased December 18. The second item listed by defendant was a note dated January 6, 1913, and due February 6, $2,748.32. It is shown by other records of the company that this note covered oil and gas purchased from December 2 to 10. The third item listed was a note due January 27, 1913, for $3,000, but other records show that this note was given for oil and gas purchased in November.

A consideration of the other items claimed by plaintiff is unnecessary to show that the verdict is not in harmony with the conceded facts or facts which are conclusively proved. Making proper allowance for additional credits to which defendant was entitled, the verdict is less than half the amount shown to be due plaintiff on the claims considered above.

The petition contains allegations pertinent to an action for breach of warranty and to an action for deceit. Defendant's motion to require plaintiff to separately state and number his causes of action was not sustained. At the close of plaintiff's testimony defendant's motion to require plaintiff to elect upon which cause of action he would rely was also overruled. The jury were given instructions applicable to both theories of recovery. The commingling of the two causes of action, together with the lack of order in presenting evidence on the different claims presented, no doubt was confusing to the jury, and has made it difficult to review the evidence on appeal. In any event, the verdict does not respond to the instructions and evidence. The trial court instructed: "If the jury shall find from the evidence that the plaintiff is entitled to recover against the defendant, you are instructed that the measure of damages on the amount the plaintiff is entitled to recover is the amount of loss that the plain-

tiff has suffered in the depreciation of the value of the stock he purchased by reason of the failure of any of the representations or guarantees of the defendant; and the jury are instructed that to determine this amount you will determine the diminution of the assets due to the defendant's failure to make his representations and warranties good."

On the second trial plaintiff should separately state and number his causes of action, and should be required to elect which cause of action he will present to the jury. In making the proof, and in the cross-examination as well, so far as possible a definite order of procedure should be adhered to, in order that the jury may not be unduly confused in considering the various items presented. With these suggestions in mind, a jury on a second trial will probably arrive at a verdict responding to the evidence and the law.

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

REVERSED.

HAMER, J., dissents.

LYDIA J. CRISWELL ET AL., APPELLEES, v. JOHN M. CRISWELL ET AL., APPELLANTS.

FILED MAY 19, 1917. No. 19142.

1. **Remainders:** ADVERSE POSSESSION. The possession of land by one who holds under a void administrator's deed, the land being sold to pay debts of the estate, will be construed to be hostile and adverse to a remainderman, so as to commence the running of the statute barring action for the recovery of the title or possession of the land, from the time that he knows that the possessor claims the entire estate in his own right, or from the time when, in the exercise of reasonable care for his own rights, he should have known that the land was so held by the one in possession.

2. **Life Estates:** LIFE TENANTS: ADVERSE POSSESSION. "The possession of land by a life tenant will not be construed to be hostile and adverse to a remainderman unless the knowledge is clearly brought home to the latter that the life tenant claims the entire estate in his own right, adverse and hostile to any claim or interest in the land by the remainderman or others claiming under him." *Maurer v. Reifschneider*, 89 Neb. 673.

3. **Overruled Cases.** *Hobson v. Huxtable*, 79 Neb. 334, *McFarland v. Flack*, 87 Neb. 452, *Helming v. Forrester*, 87 Neb. 438, and *Bohrer v. Davis*, 94 Neb. 367, in so far as they are in conflict with the rule as herein stated, are overruled.

4. **Evidence:** PRESUMPTIONS: ADMINISTRATOR'S SALE: CONSENT OF MINORS. On the trial of the case, a transcript of the proceedings in the district court, leading up to the administrator's sale and confirmation thereof, was introduced without objection, which showed written consent upon the part of certain of the remaindermen, then minors, to the sale. The original document was not introduced. *Held*, that this constituted presumptive evidence that the consent purporting to be signed by them was a genuine instrument.

5. **Infants:** ESTOPPEL: ADMINISTRATOR'S SALE. Upon becoming of age, it became the duty of such remainderman to affirm or disaffirm the sale. Failure to disaffirm such sale within a reasonable time after maturity would constitute an estoppel against them from disputing the title of the purchaser at the sale.

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

McGilton, Gaines & Smith and *W. A. Meserve*, for appellants.

M. F. Harrington, contra.

CORNISH, J.

Over 30 years ago, Andrew Hammond died, leaving a wife and 14 children.

In May, 1887, one Stolp, who succeeded Andrew P. Hammond as administrator, for the purpose of paying debts of the estate, obtained leave and sold the south half of the southeast quarter of section 34, of the estate, to one M. G. Owens, for the sum of $885, its fair value, giving his deed, purporting to convey the title, which was confirmed in the district court December 8, 1887. From that day to this

Owens and his successors, through mesne conveyances, have been in open, notorious, exclusive and adverse possession of the land, claiming to own the same in fee. It is agreed that M. G. Owens, purchaser, was a stranger to the title, did not enter by virtue of the widow's life tenancy, and that the deed to him, though color of title, was void because the land was part of the homestead. This is true unless certain heirs are estopped to claim title—a matter not necessary to the present discussion, but which will be considered later.

This action is brought by some of the heirs to recover possession of and by others to quiet title to the land, and for rents and profits. The widow, owner of the life estate, died February 25, 1901. This action was commenced February 14, 1911, lacking eleven days of being ten years after her death. The defendant's adverse possession, as above stated, goes back to December 8, 1887. Three of the children had not been of age ten years when the action was commenced. It is agreed as to them that the statute of limitations has not run. As to the other heirs, more than ten years having elapsed since they became of age, it is contended by defendant that their action is barred by the ten-year limitation of the statute. It is contended by the plaintiffs that their action to recover possession is not barred until ten years after the death of the life tenant, their mother. This constitutes the main controversy which we have to determine.

We must first consider the law as heretofore decided by this court. The general rule is that the remainderman has ten years in which to commence an action to recover possession after the death of the life tenant, and cannot commence the action before such death. In the meantime the remainderman is not without a complete remedy against one claiming adversely. It is expressly provided by statute that he may at any time avail himself of the action to quiet title, procuring a decree which will determine his right to possession at such time as he may be entitled to it.

Presumably, the person in possession is the life tenant, or one in privity with the life tenant, and generally such person's possession will not be adverse to the remainderman. Hence, no cause will arise in such cases until the death of the life tenant. Here, the rule supposes an uninterrupted continuation of the relation of life tenant and remainderman. When, as in this case, possession is in a stranger to the title, who has acquired an independent title, or color of title, adverse to the remainderman and life tenant, the question bears a different aspect.

It is important to consider some of our decisions.

Hall v. Hooper, 47 Neb. 111, was an action brought by the remainderman to quiet title, while the life tenant was yet living, against one in possession under a void deed like the one in controversy. The court said the action was the proper one, but held that, inasmuch as the defendant's possession had been adverse for more than 10 years since plaintiff arrived at maturity, the action was barred and title quieted forever in the defendant.

Lyons v. Carr, 77 Neb. 883, is like the case in hand—void administrator's sale and deed to pay debts of the estate. The widow, life tenant, and surviving children bring action to quiet title. Held, that the statute commenced to run from the time of the sale, and the court quiets title forever in the purchaser, as against the widow and remainderman. *Hall v. Hooper, supra,* is cited.

Hobson v. Huxtable, 79 Neb. 334, on rehearing 340, was an action to quiet title by two remaindermen against the adverse possessor under void deed. The life tenant died pending suit. Two other remaindermen filed cross-petitions in ejectment. The court sustained their action, although an action on their part to quiet title would have been barred by the running of the statute since their maturity.

In *Holmes v. Mason,* 80 Neb. 448, plaintiff was purchaser and adverse holder under a void deed at administrator's sale to pay debts. An action was brought to quiet title while the life tenant was still living. The court held

that the statute began to run when the remaindermen reached their majority, and, ten years having elapsed, title was quieted in the plaintiff.

In the case in hand, three of the plaintiffs, not of age ten years when the action was commenced, ask to have title quieted in them. The others, admitting that such action is barred as to them, ask a recovery of the land. As they say in their brief: "What we are after in this case is the right to raise oats, wheat, corn, alfalfa, and other products upon this land." They do not care where the title is.

This view, if correct, presents a surprising state of the law. Logically, it assumes that ownership may be in one and use forever in another. It lets the determination of the question, who shall have the shell and who the kernel of the nut, depend on accident. It makes out of remedial forms causes of action. It will lead to absurd and unjust results. In the case in hand, when the life tenant died, one-half of the remaindermen were more than ten years past maturity. If this view is sound, then we must say to the defendant: "Everything depends on the time and manner that the facts of a case happen to come before us. As it is, we must give to the plaintiffs the order in ejectment prayed. If you had been more alert and quick-witted and had commenced action to quiet title just before the life tenant died, your rights to the land would have been secure." We must say to all but three of the plaintiffs: "While we give you possession, we cannot quiet title in you. Your right is barred; but, after you get possession, then, according to our decisions, you may commence a new action against the defendants and have title quieted in you, doing indirectly what cannot be done directly." We must say to remainderman, as in *Hall v. Hooper, supra*: "If you bring your suit now, while the life tenant is living, we must defeat you because ten years have elapsed. If you will wait a year or two, until the life tenant has died, your possession will be sure." We must say to those who have had ten years' adverse pos-

session against adults: "If you bring your action now, your title is perfect. If you wait, even though you do not know that your title is questioned, until the life tenant dies, though 25 years hence, the judgment is equally certain against you." It is apparent that this ought not to be, and we think is not the law.

To make one's rights depend upon facts or events which have not the slightest connection with the merits of the controversy is both absurd and unjust. Litigants cannot be expected to know these quirks of the law. If one's right to land against the remainderman is complete today, it is absurd that the death of a third party tomorrow can defeat those rights and lose to him all the benefit of the situation which exists. The rights through court procedure of conflicting claimants to land should be mutual and equal so far as may be.

The rule is also unjust in this: Equitable conduct requires that one should make a timely assertion of his rights against another who he knows may be acting in innocence of his claim. The moral principle upon which estoppel is based applies. While, ordinarily, one has the undoubted right to bring his action within the statutory period, yet, as held in *Hawley v. Von Lanken*, 75 Neb. 597, and afterwards in *Foltz v. Maxwell*, 100 Neb. 713, courts of equity have inherent power to refuse relief, after undue and inexcusable delay, independent of the statute, when not to do so would work injustice in the particular case.

In so far as the view under discussion reflects the holding in *Hobson v. Huxtable, supra,* that case should be overruled. To quote from defendant's brief: "Either this court was wrong in *Hall v. Hooper* and *Holmes v. Mason* or in *Hobson v. Huxtable.* (Also *Lyons v. Carr, supra.*) It is to be remembered that the court decreed in *Holmes v. Mason* that the possession of Holmes, even pending the life estate outstanding, was sufficient on which to base a decree quieting the title of Holmes against the remaindermen not under disability. If we are going to adopt the proposition that there cannot be any adverse

possession as against the remainderman, pending a life estate, then *Hall v. Hooper* and *Holmes v. Mason* are both wrong. It is anomalous to assert that an adverse right of possession may run against remaindermen sufficient to enable the adverse holder to quiet his title against the claims of the remaindermen, and at the same time hold that the right of the remaindermen, so far as any possessory action is concerned, is not barred by the statute of limitations. Yet if it is true that there cannot be any adverse holding by one in possession during the life of the life tenant out of possession as against the remainderman, then certainly it should be held that the remainderman loses no rights whatsoever, either in law or in equity, by such possession. If the possession may be adverse to remainderman during the life of the life tenant as decided in *Hall v. Hooper* and in *Holmes v. Mason,* then correlatively the same adverse possession that would bar the remainderman's right to quiet his title should give the adverse holder the right to maintain and obtain a decree quieting title against him. It is unreasonable to assert that while the statute has run against the action to quiet title, by reason of adverse possession, yet the possessory right remains intact. Under the *Huxtable* case the court could put the barred remainderman into possession, and then, having put him there, could, under the doctrine laid down in *Batty v. City of Hastings,* 63 Neb. 26, and *Dringman v. Keith,* 86 Neb. 476, quiet the title, and so do by indirection what the court has in all cases asserted might not be done."

Section 6266, Rev. St. 1913, provides: "An action may be brought * * * by any person or persons, whether in actual possession or not, claiming title to real estate against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title."

Section 6268 provides: "Any person or persons having an interest in remainders or reversion in real estate shall be entitled to all the rights and benefits of this article."

As to half the remaindermen in this action, more than ten years had elapsed since their arriving at maturity and the death of their mother, the life tenant. If either they or the defendant had commenced action just before the mother died, this court, following its decisions (there is not one to the contrary), would have quieted title in the defendant. It seems that the above quoted statutes make such decisions necessary. Such decisions, too, would have been made upon the ground that, ten years having elapsed, the defendants' adverse possession had ripened into title. Statutes of limitations as to land bar rights, not remedies. This court has distinctly held that in substance. In *Postal v. Martin,* 4 Neb. (Unof.) 534, we held: "Adverse possession of lands for the period of limitations operates of itself as a grant of all adverse titles and interests to the occupant." The facts existing, title vests by statute. *Gatling v. Lane,* 17 Neb. 77. How can it be said that these plaintiffs still have their remedy in ejectment when their title had gone, and consequently their right to possession? To so hold is equivalent to reversing several of our decisions as to the nature of the bar of the statute as applied to land.

In *Foree v. Stubbs,* 41 Neb. 271, we held: "The purpose of the act of 1873, entitled 'An act to quiet title to real estate' (secs. 57, 58, 59, ch. 73, Comp. St.), was to abolish the fiction of constructive possession and prevent a multiplicity of suits, by a determination in one action of the rights of all persons asserting title to real estate." From the time of the passage of that remedial statute, with or without a statute of limitations, it became incumbent upon all persons claiming an interest or title in land to make a timely assertion of their claim. *Hawley v. Von Lanken,* and *Foltz v. Maxwell, supra.*

This seems to be the holding in other jurisdictions. In *Murray v. Quigley,* 119 Ia. 6, 14, 97 Am. St. Rep. 276, the court, in discussing this statute, says that there can be no hardship in such a rule, and adds: "And more especially

is this true where the possession is or may be held under a title entirely independent of and hostile to the life tenant." In *Crawford v. Meis,* 123 Ia. 610, 618, 101 Am. St. Rep. 337, the court, commenting upon this rule, states that it "involves no hardship, and the beneficent effect thereof must be to bring up for settlement disputed questions of title before becoming stale, and while yet the facts are within reach of the parties interested." See, also, 1 R. C. L. 743.

This court has held that, as between cotenants, where the acts of one unequivocally show adverse possession, or conduct amounting to an ouster, the statute of limitations commences to run as against the other cotenant.

As between life tenants and remaindermen, we have held that the statute commences to run in favor of the life tenant whenever knowledge is clearly brought home to the remainderman that the life tenant claims the entire estate. *Maurer v. Reifschneider,* 89 Neb. 673. When the statute should begin to run depends somewhat on the character of the possession. When, as in this case, the person in possession, purchased at administrator's sale, is a stranger to the title, and did not acquire any estate, possessory right or claim through the life tenant, the remaindermen are much more likely to know the situation than if it were adverse possession by a life tenant, and less likely to be deceived as to the character of the possession that is claimed. As against the remaindermen, it would seem equitable that the adverse holding should commence the running of the statute whenever they have actual knowledge of such possession, or whenever, in the exercise of reasonable care and prudence, they should have acquired such knowledge.

In the case before us, the heirs must have known of the adverse holding by defendant at all times. While the evidence is not clear and specific on this point, the fact remains that the remaindermen lived across the street from the land in controversy while the defendants lived thereon. It will also be recalled that in 1886 the widow petitioned for the sale of the land to pay the debts of the estate. Of

course, the statute would not commence to run until the children had arrived at their majority.

The argument has another phase which deserves our attention. The statute applicable (Rev. St. 1913, sec. 7564) reads as follows: "An action for the recovery of the title or possession of lands, tenements or hereditaments, * * * can only be brought within ten years after the *cause of action* shall have accrued." Sometimes statutes relate to remedy. This calls on us to determine what is the cause of action, for the reason that, if an action to quiet title and one to recover possession are two remedies for one cause of action, then the statute would be conclusive in this case.

Bliss, Code Pleading (3d ed.) sec. 1, defines a civil action, and then says: "As the action is a judicial proceeding for the redress or prevention of a wrong, the cause of action must necessarily be the *wrong which is committed or threatened,* and the object of a specific action is such redress or prevention by means of the relief which is sought." The cause of action must be some wrong committed or threatened touching one's rightful claim to the land. As to the remainderman, his cause of action in an action to quiet title against one in possession, claiming title adversely, and his action to recover possession are identical. In both cases his cause of action is the adverse claimant's possession, coupled with a wrongful claim of ownership. It is the wrongful refusal to recognize the plaintiff's rights in the land. On this principle that "the identity of the cause of action is preserved," this court has permitted actions to recover possession to be converted into actions in equity, and, conversely, actions to quiet title to be converted into ejectment actions, and has held that the commencement of either stops the running of the statute. The forms of action go to the remedy, not to the cause. *Gregory v. Lancaster County Bank,* 16 Neb. 411; *McKeighan v. Hopkins,* 19 Neb. 33; *Homan v. Hellman,* 35 Neb. 414; *Scroggin v. Johnston,* 45 Neb. 714; *Butler v. Smith,* 84 Neb. 78.

This view is consistent with this court's holdings, above mentioned, that statutes of limitations bar rights. *Postal v. Martin,* and *Gatling v. Lane, supra.* To hold, as we always have, that the *quia timet* action begins running with adverse possession, and also hold that afterwards, by reason of a death, a new statute allowing another remedy involving title commences running, is in defiance of those decisions and of logic.

We have found only four cases decided that are like the instant case, where the adverse holder was a stranger holding by independent title, not in privity with the life tenant. Three of these, including the latest, are in conformity with this opinion, the *Huxtable* case being the exception.

Other cases have been decided where the contest was between the remainderman and the life tenant or one in privity with the life tenant. The presumption of fact is that the possession of the life tenant, or one holding under or through the life tenant, is lawful and not adverse. Remaindermen have the right to act on that presumption, and not be charged with the duty of keeping their estate under constant observation. We held in *Maurer v. Reifschneider, supra,* that the statute would not begin to run in such cases until knowledge of the adverse holder's claim to the entire estate had been brought home to the remainderman. In these cases there is a conflict in the decisions. No one has denied the right of the adverse possessor to his *quia timet* action against remainderman or remainderman's right to the same action against the adverse possessor; but, where no such action has been brought during the life of the life tenant, it has been held that the remainderman should be permitted to commence action to recover possession within ten years of the death of the life tenant; this upon the ground that the remedy by ejectment is not available until then. These decisions, in so far as they stop the running of the statute once begun, or defeat the title already acquired by adverse possession, should be overruled.

In *First Nat. Bank v. Pilger,* 78 Neb. 168, the plaintiff, who held under deed from the widow who had been awarded the homestead under the Baker decedent law, brought *quia timet* action against the heirs some months after the widow, life tenant, died. Ten years had elapsed since the widow's deed. The court quieted title in the plaintiff on grounds of adverse possession for ten years.

In *Helming v. Forrester,* 87 Neb. 438, a case like the last above mentioned, the cause was tried in equity, but recovery of possession asked for was had. Although ten years had elapsed since the widow's deed, it was held that the suit having been commenced within ten years from the time of the death of the life tenant, the statute had not run. Whether the heirs had any notice of the adverse possession during the lifetime of the life tenant does not appear.

In *McFarland v. Flack,* 87 Neb. 452, the remainderman began action to recover possession against another holding under a deed by the life tenant. More than ten years had elapsed since the adverse possession had begun, but not ten years since the death of the life tenant. The case was decided in favor of the remainderman. The opinion shows that there was no notice to the remainderman of the adverse possession during the life estate, except recording of the deed. In so far as this case could be construed to hold that the death of the life tenant would stop the running of the statute, already commenced, in favor of the adverse possessor, it should be overruled.

In *Maurer v. Reifschneider,* 89 Neb. 673, the remainderman brought *quia timet* action against the husband of the ancestor's widow, who had conveyed to him. This is the action mentioned above, wherein it was held that the statute begins to run when knowledge is clearly brought home to the remainderman that the life tenant claims the estate. See, also, *Larson v. Anderson,* 74 Neb. 361, to the same effect.

In *Bohrer v. Davis,* 94 Neb. 367, action to recover possession was brought against one holding by deed from the

widow who had taken the homestead under the Baker decedent law. More than ten years had elapsed since the time of the deed. Held (one judge dissenting) that the remainderman could bring action to recover possession within ten years after the death of the life tenant. This decision should be overruled in so far as it holds that the death of the life tenant may stop the running of the statute barring claim of title and allow the remainderman ten years' additional time in which to assert his title and recover possession.

The defendant contends, as we have said, that some of the plaintiffs are estopped from bringing this action for the reason that, in the proceedings in the district court for license to sell the land to pay debts, they assented to and requested the sale. The defendant's position is that when these heirs became of age it was their duty, within a reasonable time, to affirm or disaffirm this action upon their part. In our view, the defendant's contention is right. The evidence touching this point consists of the transcript from the district court showing the proceedings leading up to the administrator's sale of the real estate. It shows that such a consent was filed, signed by five of the heirs, aged from 15 to 21 years. The application for the sale of the real estate was first made by Andrew P. Hammond and the consent filed at that time. In the same action the application for license to sell was renewed by Stolp, the successor to Hammond, as administrator. This evidence raises a presumption, without other proof, that the document showing consent of the heirs was a genuine instrument. If so, it follows that upon reaching their majority it was the duty of those heirs to affirm or disaffirm their act within a reasonable time, failing to do which they would be estopped to claim title as against the purchaser. The evidence does not show that they disaffirmed, and, as to such heirs, the rule should be applied. *Foltz v. Maxwell, supra; Ward v. Laverty*, 19 Neb. 429; *O'Brien v. Gaslin*, 20 Neb. 347; *En-*

glebert v. Troxell, 40 Neb. 195; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569.

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

REVERSED.

FREMONT MILLING COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MAY 19, 1917. No. 19526.

1. **Carriers**: TARIFF RATES: COMPLIANCE. Both the shipper and the carrier are bound to comply with the published tariff rates, rules and regulations. Erroneous statements of the carrier, or its agent, as to the same will not relieve either the shipper or the carrier from such obligation. A construction placed upon the tariff or transit rules and regulations by defendant's agent or what defendant may have done in the way of refunding unearned freight rates paid in other cases is immaterial.
2. ———: MILLING IN TRANSIT RATES. A milling in transit rate is an entirety, and must be accepted and carried out in its entirety or not at all.
3. ———: INTERSTATE SHIPMENTS: UNUSED TRANSIT CREDIT. A shipper cannot maintain an action in the courts of this state for unused transit credit on shipments of grain made from various points in Nebraska, destined to points outside of Nebraska and to one point in Nebraska, where parts of each car were forwarded indiscriminately to the points of destination, and where the rules and regulations provided for in the published tariff rates, rules and regulations giving milling in transit privileges have not been complied with.

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

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

Courtright, Sidner & Lee, contra.

CORNISH, J.

During the spring and summer of 1912, the plaintiff billed in car-load lots over defendant's lines, with milling in transit privileges at Fremont, grain from various points in this state to various points, all but one outside of the state, paying freight charges from point of shipment to point of destination. A part of each shipment, or its equivalent, in accordance with milling in transit rules, was afterwards forwarded to the points of destination. The remaining portion was not, leaving the plaintiff an unused portion of its milling in transit credits. Plaintiff's action is based on this unused credit for grain never forwarded. It sues to recover the difference between what would be the local rates on the unforwarded grain in car-load lots to Fremont and the rates originally paid on this grain, or its equivalent. The defendant points out that in each case the plaintiff in its claim has segregated the unforwarded tonnage from the remainder of the shipment both in and out of Fremont; that by virtue of the milling in transit privilege plaintiff was permitted to ship the grain to Fremont, resume possession, mill at that point, and forward the produce to destination upon the through rate, which was less than the two local rates would have been. Defendant admits that plaintiff was entitled to have the product, after milling of each car, forwarded within the time and according to the rate regulations and tariff provisions governing such shipments and milling in transit privileges.

It appears that, under the regulations for such shipments, there was a time limit within which grain held in transit could be forwarded, or what is called transit credit could be used. If the grain was not tendered for shipment within the time, the right to ship or use the transit credit terminated and the credit forfeited. No such tender was made in this case.

The tariff rules and regulations governing shipments with milling in transit privileges go into great detail, and permit only the various products of the grain to be for-

warded, so that the equivalent in weight of the shrinkage and portion lost in milling, what is called invisible loss, is not permitted to be forwarded. They provide that an account shall be kept and settlement had before the time limit for forwarding, which was not done in the instant case.

The defendant contends that, inasmuch as the plaintiff has not brought itself within these tariff rules and regulations, no settlement being had or forwarding shipments tendered within the time required, it has forfeited its right to the transit credit, and cannot be refunded any freight paid. While the plaintiff agrees that tariff rates must govern, it insists that the railroad can charge for carriage only what it has earned, that it cannot ask more than the tariff rate for service actually rendered, and that no tariff rules or regulations are involved where freight is not carried.

We are of opinion that whatever equities might exist in favor of the plaintiff (we do not say whether any would exist), if its claim were being considered before a railway board of transportation, this court cannot afford it any relief.

The policy of railway legislation in recent years has been, not alone to pass laws commanding what is right and prohibiting what is wrong in the management of railroads, but to give over to the public the management itself, in so far as may be necessary to prevent the wrongs complained of, touching rates, discriminations, facilities, etc. The purpose is to have the public hand in touch with everything so that the law cannot be violated, even though both parties to the transaction wish it. Courts of law, where parties are presumed to be adverse, are not suited to that sort of work. Collusion, resulting in discrimination, was one of the main evils to be remedied.

Where the tariff rates and regulations are published, these become the law governing every party to the shipment, only to be varied from by leave of that administrative body known as the railway commission, which has

power, by general rules, equally available to all other shippers, to do what is equitable. The railroad might resist a claim like this in court, but not do so in case of a favored shipper. All shippers must be treated alike.

It follows that every shipper is bound to know just what the tariff rates, rules and regulations are, and that the parties can make no express contract in any way modifying or superseding them. It follows, too, that the rights of parties cannot be altered by estoppel, as in case of private contracts. All special arrangements between shipper and carrier are prohibited.

The transit credit in the instant case cannot be treated as if it represented a single shipment of grain to Fremont. Being made up of parts of car-load shipments to Fremont, the remaining portion of which was forwarded to points of destination, it must be treated as a part of shipments made with milling in transit privileges, under the published tariff rates, rules and regulations for interstate shipments, and, the same not having been complied with, the plaintiff is not entitled to any relief in courts of law.

The judgment of the trial court should be reversed and the cause dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

BROWN CONSOLIDATED MILLING COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MAY 19, 1917. No. 19527.

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

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

Courtright, Sidner & Lee, contra.

CORNISH, J.

Except that in this case all of the points of final destination of grain shipments were outside of the state, the facts herein are substantially the same as in *Fremont Milling Co. v. Chicago & N. W. R. Co., ante,* p. 362, and this case is governed by the law as laid down in said case.

For the reasons therein given, the judgment of the trial court should be reversed and the cause dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

WILLIAM DIEDRICHS, APPELLANT, V. LAURA STEPHENSON, APPELLANT; WALTER V. HOAGLAND ET AL., APPELLEES.

FILED MAY 19, 1917. No. 19226.

1. **Attorney and Client:** GOOD FAITH. It is a familiar rule of law that an attorney is required to exercise the utmost good faith in all of his relations and dealings with his client.
2. ———: ———. The evidence examined, and *held* that defendants, who are attorneys, did not violate the forgoing rule in their relations with their client, and that their conduct in the premises was without fraud.

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

Burkett, Wilson & Brown and *R. H. Beatty,* for appellant.

Hoagland & Hoagland and *John J. Halligan, contra.*

DEAN, J.

The defendants Hoagland are members of the bar of this state. They reside and maintain a law office at North Platte. Plaintiff's wife employed defendants as counsel in a divorce action, and they rendered to her valuable legal services in that case, in which she prevailed in both district and supreme courts, and as well in subsequent litigation that grew out of the divorce case. In payment therefor

she conveyed to defendants a tract of land; defendants paying to her a sum of money that represented the difference in value between the land and the reasonable value of the services. Plaintiff now seeks to recover from defendants the tract of land conveyed to them by Mrs. Diedrichs on the ground of fraud, alleging ownership in the husband at the time of conveyance, a contention that is not sustained by the record. Plaintiff also demands a large sum of money claimed as damages. Mrs. Diedrichs appears in this action as Laura Stephenson.

In the divorce proceeding the plaintiff in this case was defendant. He has since remarried the wife who divorced him, and is now aided and abetted by her in his efforts to maintain this action. As soon as plaintiff and his wife were reconciled, their joint belligerence was directed against the wife's rescuer, a situation not altogether novel in human affairs. If plaintiff, who is appellant here, were to prevail, defendants would be deprived of any remuneration for services rendered, and besides would lose the sum of money paid to plaintiff's wife in part payment for the land when it was conveyed to them. In the trial court defendants prevailed, and in view of the record before us they must prevail here.

A lengthy statement of the facts is not deemed necessary, nor is it incumbent on us to write an opinion long drawn out. We believe it sufficient to say that we have carefully examined the record, and we are unable to find the defendants guilty of practicing any deceit or fraud or bad faith toward their client. We are not unmindful of the familiar rule that requires an attorney to exercise the utmost good faith in all his relations and dealings with his client. In this respect, as in all else, the record amply supports the judgment that was rendered in favor of defendants. The learned trial judge who heard the case was abundantly justified in finding on all points in favor of defendants.

The judgment is right, and is in all things

AFFIRMED.

SEDGWICK, J., concurring.

It appears to be conceded by all parties that the defendants Hoagland, as attorneys for Laura Diedrichs, acted in entirely good faith. Notwithstanding that fact, the law is so careful of the confidential relation between attorney and client that, if a client conveys property to her attorney while that relation exists, and is without information as to the value of the property at the time, the court in an action of this nature would be very careful to ascertain whether the value actually paid was the full value of the property. In this case, however, the attorneys were not attorneys for the plaintiff William Diedrichs. No relations of confidence existed between them, and Laura Diedrichs does not appear to have made any complaint in regard to the transactions with her attorneys for more than ten years after the transactions took place. It is desirable that questioned relations between attorneys and their clients should be adjusted at as early a date as is practicable, but the statute of limitations had run against all claims of Laura Diedrichs before the filing of her cross-petition in this case. The plaintiff, William Diedrichs, appears to have transferred this property to avoid the payment of his creditors. His original grantee did, at his request, convey the property to Laura Diedrichs, who was then Mr. Diedrich's wife. This does not seem to be equivalent to a reconveyance to Mr. Diedrichs himself in this case, because the motive which the law considers fraudulent that inspired Mr. Diedrichs to transfer this property still existed, and taking the title in the name of his wife might still defeat his creditors. Mr. Diedrichs, therefore, is not in a position to maintain such an action as this.

For these reasons, I consider that the judgment of the district court is correct.

LUVERNE A. WILLIAMS, APPELLEE, V. CHARLES E. WILLIAMS, APPELLANT.

FILED MAY 19, 1917. No. 19273.

1. **Divorce:** SERVICE OF PROCESS. Section 1571, Rev. St. 1913, is a special statute relating to a special subject. The act, as amended, construed, and *held* that under this section in an action properly brought in this state personal service of summons outside of the state is sufficient.
2. ———: SUFFICIENCY OF EVIDENCE. The testimony examined, discussed in the opinion, and *held* sufficient to sustain a decree of divorce.
3. ———: JURISDICTION. In pursuance of section 1571, Rev. St. 1913, the district court has jurisdiction to grant a divorce in a proper case in any county where the parties, or one of them, reside.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Strode & Beghtol, for appellant.

Lincoln Frost and *Guy T. Tou Velle, contra.*

DEAN, J.

This is a divorce action commenced on April 15, 1914, by Mrs. Luverne Williams, plaintiff, against her husband, Charles A. Williams, defendant, in the district court for Lancaster county. Plaintiff obtained a decree, and defendant appealed.

A summons, issued in pursuance of section 1571, Rev. St. 1913, was served on defendant in Colorado. He appeared specially, basing his objection to jurisdiction of the person "on the ground that the statute expressly requires the case in which such service is made be commenced in the county in which the cause of action arose." Defendant also contends that the manner of serving the notice in suit is found in section 7644, Rev. St. 1913, and argues that the two sections should be construed together. The special appearance was overruled to which defendant excepted.

An affidavit showing the nonresidence of defendant was filed preliminary to an effort made to obtain service by publication that was not perfected. The summons was dated April 15, 1914, and directed to the sheriff of Lancaster county, who on the same date by indorsement thereon appointed E. I. Cooke of Larimer county, Colorado, special deputy to make service and return of the writ on or before April 27, 1914. The return is under oath showing service on defendant April 17, 1914, by copy delivered to defendant in person in Larimer county, Colorado, requiring him to answer on or before May 18, 1914.

Section 1571, Rev. St. 1913, is a special statute relating only to divorce. The statute follows: "A petition or bill of divorce, alimony and maintenance may be exhibited by a wife in her own name, as well as by a husband, and in all cases the respondent may answer such petition or bill without oath. No person shall be entitled to a divorce unless the defendant shall have been personally served with process if within this state, or with personal notice duly proved and appearing of record, if out of this state, or unless the defendant shall have entered an appearance in the case; but if it shall appear to the satisfaction of the court by the affidavit of the petitioner or of his or her attorney that the petitioner does not know the address or residence of the defendant, and has not been able to ascertain either, after reasonable and due inquiry and search continued for three months after the filing of the petition, the court or judge in vacation shall authorize notice by publication of the pendency of the suit for divorce, to be given in a manner as provided in other cases under the Code of Civil Procedure."

All that part of section 1571 following the first sentence was added by amendment in 1909. The legislature seems to have divided the amendment with respect to personal service on defendants into two parts, namely: The first part relating to service on a defendant within the state; the second part to service on a defendant out of the state. The summons, its service and return were in all respects

regular, and it follows the trial court properly overruled the special appearance. The special divorce statute serves the good purpose of requiring a plaintiff to give a nonresident defendant in a divorce action whose address is known actual notice of the pendency of the suit. Rev. St. 1913, sec. 8574.

State v. Cornell, 53 Neb. 556: "It is a well-settled rule of construction that special provisions in a law relating to particular subject-matter will prevail over general provisions in other statutes so far as there is a conflict." To the same effect are the following: *Richardson County v. Miles,* 14 Neb. 311; *Albertson v. State,* 9 Neb. 429; *McCann v. McLennan,* 2 Neb. 286.

Defendant next contends that the court was without jurisdiction of the subject-matter, alleging that the cause arose out of the state, and that plaintiff did not reside within the state for two years next before bringing the suit. With respect to residence the following among other facts appear: The parties were married in 1898 in Springfield, Massachusetts, and soon after they came to Lincoln and resided until about 1905, when they removed to Colorado. Two children were born to them, a boy and a girl, now about 18 and 16, respectively. In 1909 plaintiff purchased a ten-acre tract of land within a convenient distance of Lincoln for a home, on which a substantial house was afterwards built by her as a residence for the family, being completed in 1912, and from thence being the family residence and home. After the Lincoln tract was bought, the Williams family continued their residence in Colorado until February 1, 1912, when Mrs. Williams came to Lincoln, bringing one of her minor children with her. On March 28, 1912, the remaining minor child and Alice Williams, a girl of 17, who made her home with the family, joined her at Lincoln, and plaintiff and her children resided continuously in Lincoln from that time until suit was begun, with the exception of a brief vacation period in the summer months of 1912. The testimony throughout discloses that it was plaintiff's *bona fide* intention to reside

permanently in this state, and that in pursuance of such intention she made Lancaster county her home continuously, except for a vacation period noted elsewhere, from the time of her arrival on February 1, 1912, until this suit was begun on April 15, 1914, and that she was then and for more than two years had been a resident of Lancaster county, Nebraska.

It is elementary and it is the universal rule that residence in a community is determined by the intention of the parties. *Swaney v. Hutchins,* 13 Neb. 266; *Chesney v. Francisco,* 12 Neb. 626; *People v. McClay,* 2 Neb. 7. Defendant's argument that a wife cannot have a residence separate and apart from that maintained by her husband is not supported by statute nor by the authorities. Section 1567, Rev. St. 1913, provides generally that a divorce may be decreed by the district court of the county "where the parties, or one of them, reside." *McConnell v. McConnell,* 37 Neb. 57. *Eager v. Eager,* 74 Neb. 827, holds that the district court has jurisdiction "to hear and determine an action for divorce in any county in the state where the parties, or one of them, reside." The rule is generally recognized. In *Vence v. Vence,* 15 How. Pr. (N. Y.) 497, it is held: "The common-law maxim, that the domicile of the wife follows that of the husband, has no application in actions for a divorce, where a separation has actually taken place, and where the very proceedings in the action are to show that the relation of husband and wife should be dissolved, or so far modified as to establish separate interests, and especially of bed and board, and of domicile and home." *Jones v. Jones,* 60 Tex. 451; *Johnson v. Johnson,* 12 Bush (Ky.) 485; *Cain v. Cain,* 5 Pa. Co. Ct. Rep. 669.

When plaintiff married defendant, or very soon thereafter, she became the owner by inheritance of property of the value of about $63,000. The defendant was almost destitute of means. While they lived together in Lincoln defendant attended the state university for about three years, plaintiff in the meantime supporting the family and

maintaining the household. Sometime after defendant completed his education at the state university the parties moved to Colorado, and their marital troubles seemed to increase, notwithstanding that plaintiff purchased and presented to defendant a valuable ranch in that state.

In 1913 plaintiff begun in Colorado and prosecuted to judgment a suit against defendant for divorce. Defendant made no appearance at the trial. Afterward he attacked the judgment, and on his application supported by affidavit, in which he alleged that his wife was then a resident of Lincoln, Nebraska, the judgment was vacated and the cause held for retrial, but before it was reached Mrs. Williams dismissed the action. Defendant now argues that plaintiff should not be permitted to maintain this action because of statements made by her in her petition in the Colorado case with respect to residence. Whatever may have been the fact in that case, it appears that the defendant not only in his affidavit alleged that plaintiff was at that time a resident of Nebraska, but procured a vacation of the judgment that was followed by a dismissal. Confronted as defendant is with his affidavit in the Colorado suit, he is not now in position to change his ground and contradict his own affidavit and his plea then made that plaintiff was a resident of Lincoln, Nebraska, in 1913.

The trial occupied four days. It was not shown that defendant at any time supported his wife or his two children, though of sufficient ability to do so. He was about 42 years of age at the time of the trial, strong and vigorous in mind and body, an athlete, highly educated, and no sufficient reason appears why he could not have earned a comfortable living for his family. The testimony fairly shows that the defendant, instead of aiding to conserve the estate of his wife and endeavoring to support and maintain her and his children, was a positive factor in its dissipation. The trial court found "generally for the plaintiff and against the defendant, upon the issue of nonsupport, and found that the defendant, though being of

sufficient ability to provide and to furnish fitting and suitable maintenance and support to the plaintiff, has grossly, wrongfully and cruelly failed and refused so to do."

From a review of the record we are of opinion the district court would have been justified in granting the divorce on grounds other and additional to those named in the decree and that were supported by competent testimony. But no good nor necessary purpose would be subserved by a discussion herein of that feature of the case.

The judgment of the district court is right, and is

AFFIRMED.

CORNISH, J., not sitting.

KATHERINE FERBER, APPELLANT, V. FRANK LEISE ET AL., APPELLEES.

FILED JUNE 2, 1917. No. 19373.

Appeal: PRESUMPTIONS. Upon appeal all presumptions are in favor of the correctness of the judgment of the district court. If the record does not show affirmatively that the judgment is wrong, it will ordinarily be affirmed.

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

John L. Webster, William R. King, R. J. Millard, C. A. Kingsbury, Oliver, Harding & Oliver and *Edward E. Baron,* for appellant.

Wilbur F. Bryant and *B. Ready, contra.*

MORRISSEY, C. J.

This is a proceeding in equity to obtain a new trial of a cause wherein judgment had been rendered against this plaintiff. The case was originally heard upon the petition of plaintiff and a demurrer thereto by defendant, and

upon appeal it was held that the petition stated a cause of action. *Ferber v. Leise,* 97 Neb. 795. On this appeal, counsel for appellant says:

"The gist of the action is that the attorneys for the plaintiff relied upon, and had a right to rely upon, their request to the court, and the court's acquiescence therein, that, if judgment should be rendered for the defendant, the usual and customary order would be entered allowing the plaintiff 40 days from the rising of the court to prepare and serve a bill of exceptions; that, by reason of inadvertence or mistake, this order extending time was omitted from the decree, and thereby the plaintiff, without any fault on her part, or that of her attorneys, was deprived of her constitutional right to an appeal from the judgment in the original action. It was to protect that right that the present bill in equity was filed to obtain a new trial."

On the trial the court found in favor of defendants. The case may properly be determined upon a consideration of the evidence without a review of the other questions raised. The only question of fact before the court on the trial of this case was: Had plaintiff been denied her right of appeal in the former case by reason of inadvertence or mistake on the part of the court in failing to extend the time for the preparation and service of the bill of exceptions after proper and timely request had been made therefor? On behalf of plaintiff, there is testimony to the effect that, after the taking of testimony was closed and the case had been argued to the court (but before the findings had been announced), the judge and others were visiting in the courtroom, when one of the plaintiff's attorneys said to the judge, "Well, Judge, if the case is decided against us, you will give the customary time for appeal?" and that the judge answered, "Yes." On cross-examination this witness, in referring to the request of the attorney, testified: "I rather think he did say bill of exceptions." The attorney who is said to have made the request testified that he said, "Save us, or give

us, the usual time for preparing bills of exceptions," and that he understood that the court assented thereto. This attorney also testified that the usual time allowed, when requested, was 40 days from the rendition of the judgment.

Another witness testified that, after the evidence was submitted and the case argued, the court indicated that he would not render a decision that evening, but would do so some time during the term, and that thereupon Judge Boyd, who was one of plaintiff's attorneys in that trial, stated that he was going away on an early morning train and would not be in court again during that term, and that, in the event judgment went against his client, "He would like the usual record for preparing the bill of exceptions."

Mr. Ready, one of the attorneys who represented defendants, testified that he was present in court when the case was submitted, and heard what was said by the attorneys representing plaintiff, and that there was nothing said about a bill of exceptions.

Mr. Bryant, another attorney for defendants, testified to substantially the same thing. He said: "There was a good deal of talk about a supersedeas bond, considerable discussion about that, and I heard Mr. Boyd say he was going away in the morning, but I didn't hear anything about a bill of exceptions." He says that conversations such as testified to by plaintiff's witnesses might have been had out of court.

The trial judge was a witness, and, when asked as to whether any request had been made for an extension of time, said: "I have no independent recollection other than appears on the trial docket and the custom that I have always followed." When asked what was his custom when asked for further time in which to prepare a bill of exceptions, he said: "I grant such time as is requested by counsel and note it on the trial docket. If they ask for 40 days from the rising of the court, that is granted. If they ask for 40 days from the rendition of judgment, that is the

order that is made. If no request is made, no order is entered." He further said that he remembered some little discussion with reference to fixing a supersedeas bond.

It is clear that every witness is honestly testifying according to his recollection of what occurred. But the record indicates that, if any request was made for an extension of time, it was informal and made while the court was in recess, and the court did not regard it of sufficient importance to enter it upon his docket. The same judge presided at each trial, and his recollection of what occurred appears to be just as clear as that of any other witness. The testimony offered on behalf of plaintiff is not so convincing that we can say the trial court erred in denying the prayer of plaintiff's petition.

The judgment is

AFFIRMED.

AMI L. GAUCHAT ET AL., APPELLANTS V. SCHOOL DISTRICT ET AL., APPELLEES.

FILED JUNE 2, 1917. No. 19863.

1. **Statutes:** CONSTITUTIONALITY. Chapter 121, Laws 1915, *held* not in violation of section 11, art. III of the Constitution.
2. **Schools and School Districts:** DETACHING TERRITORY. Evidence examined, and *held* to support the judgment of the trial court.

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

Fred G. Hawxby and *S. P. Davidson,* for appellants.

Kelligar & Ferneau and *E. F. Armstrong, contra.*

MORRISSEY, C. J.

Plaintiffs, who are residents and taxpayers of school district No. 11 of Nemaha county, brought this action against the defendants to have declared null and void an order made under the provisions of chapter 121, Laws

1915, detaching certain territory from district No. 11 and attaching the same to district No. 5.

The board, created under the provisions of chapter 121, in a proceeding had in accordance with the provisions of that chapter, detached 1,280 acres of land from district No. 11 and attached the same to district No. 5. The district court denied plaintiffs the relief prayed, and they have appealed, pressing two questions only: First, it is said that the act is void because in violation of section 11, art. III of the Constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." The title of the act is as follows: "An act to provide for the equitable adjustment of the boundaries of school districts in certain cases, to provide for the consolidation of certain districts and transportation therein, to provide for attendance at the nearer school, to amend section 6942, Revised Statutes of Nebraska for 1913, to repeal said original section and declaring an emergency."

It is said that the act contains four different subjects, namely: "(1) The equitable adjustment of the boundaries of school districts in certain cases. (2) The consolidation of certain contiguous school districts. (3) The transportation of children to school in certain cases, at public expense. (4) The amendment and repeal of section 6942 of the Revised Statutes of 1913, providing for the attendance of children to the nearer school."

It is true that each of these subjects is mentioned in the title and is dealt with in the body of the act, but an analysis of the title as well as the act will show that there was but one main and general subject for the consideration of the legislature, namely, rural schools and rural school districts. Its various subdivisions relate to this main subject.

In *Van Horn v. State*, 46 Neb. 62, 72, Commissioner Irvine has written an exhaustive opinion on this subject, wherein he aptly says:

"The constitutional inhibition is against the bill's containing more than one subject. The title must clearly express the subject, but provided the bill itself contains but one subject, and this subject is clearly expressed in the title, it matters not although the title, read independently of the bill, may seem double. We, therefore, look to the bill itself to ascertain whether or not it contains more than one subject, and having ascertained that it contains but one, then we look to the title to see if that subject is clearly expressed therein. If so, the constitutional provision we are here discussing is not violated. Tested by this rule, we have no hesitation in saying that the subject-matter of this act is single, and that while a more comprehensive and shorter title might have been sufficient to indicate the contents of the bill, still the title which the legislature adopted does clearly indicate every essential feature of the act. * * * We conceive the rule to be that the constitutional provision does not restrict the legislature in the scope of legislation. It does not prohibit comprehensive acts, and no matter how wide the field of legislation the subject is single so long as the act has but a single main purpose and object. * * * It has always been said that the legislature might choose for itself its manner of legislation, and that an act, no matter how comprehensive, would be valid provided a single main purpose was held in view, and nothing embraced in the act except what was naturally connected with and incidental to that purpose."

This language is applicable to the case before us. His discussion of this subject is thorough and his review of the authorities so complete that it is sufficient to refer the profession to that opinion without an extended discussion here. Following the rule therein announced, we must hold that the act does not fall within the inhibition of the Constitution.

The sole remaining question has to do with the reasonableness of the order made by the board. Before the change in territory, district No. 11 had a daily average

attendance of 22 pupils, and the valuation of the property of the territory was $105,685. The school was maintained by a levy of 7 mills for school purposes. After the change of territory was made, the property valuation was $84,425, and the school was supported by a levy of 11 mills. Before the change in territory, district No. 5 had a daily average attendance of 149 pupils, and the property valuation was $116,067, the levy for school purposes being 35 mills, the limit allowed under the statute. Without this additional territory, district No. 5 would not longer have been able to maintain the 11 grades which it had theretofore maintained. Even with the territory which was added, the district made a levy of 33 mills. These figures seem sufficient answer to the statement that the board acted arbitrarily and inequitably. On the contrary, the order seems to be fully warranted under the proof, and the judgment is

AFFIRMED.

IN RE ESTATE OF FRANK HOWE.

CHARLES HOWE, APPELLANT, V. NANCY HARDENBERGER ET AL., APPELLEES.

FILED JUNE 2, 1917. No. 19480.

Descent and Distribution: ESTATE OF SPENDTHRIFT: DEGREES OF KINSHIP. Certain real estate which was inherited by the intestate, a spendthrift ward, was sold under partition proceedings brought by his cotenant. The ward's share of the proceeds of the sale was paid to his guardian. Money received from another source was also paid to the guardian, who used part of the commingled fund for the benefit of the ward, reinvested part, and held part at the time of the death of the ward, which he paid to the administrator. At the final settlement of the estate of the ward the whole of the fund was claimed as ancestral property by his only full brother. Certain half brothers and sisters also claimed to participate in the distribution by virtue of section 1275, Rev. St. 1913. *Held*, that, under the facts, the fund was not of an ancestral character, and should be distributed as other personal property.

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

Kelligar & Ferneau, for appellant.

Lambert & Armstrong, contra.

LETTON, J.

Frank Howe died in 1913, intestate. He was unmarried, and his parents were both dead. He left surviving him the plaintiff, Charles Howe, who is his full brother, and the defendants, who are half sisters, and the children of a deceased half sister and of a deceased half brother. Frank Howe and Charles Howe inherited 160 acres of land from their father, Albert C. Howe. Mrs. Howe died in 1908. A guardian was appointed for Frank Howe in November, 1908, on account of his being a spendthrift. Afterwards Charles Howe brought partition proceedings to divide the land, which was found incapable of division, and was sold by order of court. Frank's share of the proceeds of the sale, $5,113.25, was paid to his guardian. There was also paid to the guardian from money due the ward from the estate of Mrs. Howe, $284.70. This commingled fund was part invested, part used for the benefit of the ward, the costs and expenses were paid from it, and at the time of Frank's death there was still on hand $4,165.50 of this money. This was paid to the administrator of the estate of Frank Howe. In the proceedings for the final settlement of the estate, plaintiff filed a cross-petition claiming all the residue of the estate, except $250 paid as damages for the death of the deceased, as being derived from the sale of the real estate, on the ground that, as the full brother of deceased, he inherits all the property received by Frank Howe from the estate of his father. Defendants insist they are entitled to share in the distribution. The issue to decide is whether the brother of the full blood should inherit the fund, or whether the children of the half blood are also entitled to share in it.

The decision of this case depends upon the construction to be given section 1275, Rev. St. 1913, which is as follows: "The degrees of kindred shall be computed according to the rule of civil law; and kindred of the half blood shall share equally with those of the whole blood, in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance."

An exhaustive note dealing with the whole subject of descent and distribution among kindred of the half blood may be found appended to *Anderson v. Bell,* 29 L. R. A. 541 (140 Ind. 575). So much labor and learning has been expended by the courts of other states on this subject that we believe it only necessary to call attention to the cases in which the subject is discussed.

The general tendency of this country is by statute to continue real estate in the blood of the ancestor. *Kelly's Heirs v. McGuire,* 15 Ark. 555. But it is also generally held that, when the real estate has been exchanged for other land or has been converted into money or other property, it loses its ancestral character. *Armstrong v. Miller,* 6 Ohio, 119; *Pence v. Pence's Adm'r,* 11 Ohio St. 290; *Kihlken v. Kihlken,* 59 Ohio St. 106; *Armington v. Armington,* 28 Ind. 74. It is also held that the rule which prevails in equity that a trust fund may be followed as long as it can be identified and segregated does not apply. *Patterson v. Lamson,* 45 Ohio St. 77; *Rountree v. Pursell,* 11 Ind. App. 522; *Stevenson v. Gray,* 46 Ind. App. 412. Where money has been received by an heir from the sale in partition or otherwise of lands descending to him without restriction or limitation, it does not retain its character as real estate, but he may use, invest, or dissipate it as if it came from any other source. *In re Simmons,* 55 Ark. 485; *Emerson v. Cutler,* 14 Pick. (Mass.) 108, 118; 9 R. C. L. 36-38. Nearly $300 of the fund claimed was not derived from the father's estate. The money coming from it was commingled. The specific property not being sep-

arated, distinguished, or kept apart, its ancestral character is lost. *Rountree v. Pursell,* 11 Ind. App. 522; *In re Simpson's Estate,* 144 N. Y. Supp. 1099.

In this state of facts, we are convinced that the property has lost its ancestral character. This was the conclusion reached by the county court and by the district court, and we believe that it is in harmony with the great weight of authority.

AFFIRMED.

SEDGWICK, J., not sitting.

FRANK SAMUELS V. STATE OF NEBRASKA.

FILED JUNE 2, 1917. No. 19888.

1. **Criminal Law:** REFUSAL OF INSTRUCTION. It is not error to refuse a requested instruction confined to a proposition of law correctly stated to the jury in another form.
2. **Information:** INDORSEMENT OF WITNESS. Under the Criminal Code as amended in 1915, it is within the discretion of the court to permit the county attorney to indorse on the information, after the trial has commenced, the name of an additional witness. Laws 1915, ch. 164.
3. **Criminal Law:** INSTRUCTIONS. Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed by the appellate court merely because a single instruction, when considered separately, is incomplete.

ERROR to the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

T. J. Doyle, for plaintiff in error.

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

ROSE, J.

In a prosecution by the state in the district court for Lancaster county, Frank Samuels, defendant, was convicted of stealing an automobile belonging to Ferdinand Rucklos, and for that offense was sentenced to serve in

the penitentiary a term of not less than one year nor more than seven years. As plaintiff in error he presents for review the record of his conviction.

During the evening of August 11, 1916, Rucklos drove his automobile to the pleasure resort at Capital Beach, where his family had gone in the afternoon for a picnic. When the car was unoccupied, defendant took possession of it and drove out of the grounds. Before noon of the following day, he appeared at Fairfield, Iowa, and there offered the car for sale. News that it had been taken from Capital Beach soon reached the sheriff at Fairfield. In the meantime the initials of Rucklos had been removed from the body of the car. Defendant left it at a garage. Within two hours he was arrested a few miles from Fairfield while attempting to escape on foot, and promptly confessed to the taking of the car.

One of the assignments of error is the refusal of the trial court to give a requested instruction that, if the owner of the automobile was within the jurisdiction of the court, it was incumbent upon the state to prove by him that he did not consent to defendant's taking of his automobile. In this respect the charge as a whole gave defendant the benefit of the law invoked by him. It is not error to refuse a requested instruction confined to a proposition of law correctly stated to the jury in another form. The trial court instructed that nonconsent of the owner is a material element of the crime, and must be proved beyond a reasonable doubt; that the owner's testimony is the best evidence on that issue; that where he is not called as a witness, if his absence is "satisfactorily accounted for," his "nonconsent may be proven by circumstantial evidence, that is, the facts and circumstances as proven must be such as to exclude every reasonable presumption that the owner consented to the taking." The proof seems to warrant these statements, and they contain the substance of the rule embodied in the rejected instruction requested by defendant. It may fairly be inferred from the testimony that Rucklos was not within the juris-

diction of the court at the time of the trial. The jury were justified in finding that his automobile was taken without his consent. The assignment is therefore overruled.

Another assignment of error relates to the indorsement of the name of a witness on the information after the trial had commenced. The statute relating to the filing of an information has been changed to provide that the county attorney shall "indorse thereon the names of the witnesses known to him at the time of filing the same," and that "at such time thereafter, as the court or a judge thereof in vacation, in its or his discretion, may prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him." Laws 1915, ch. 164. The statute formerly authorized the indorsement of additional names on the information "at such time before the trial of any case as the court may by rule or otherwise prescribe." Rev. St. 1913, sec. 9063. The purpose of the change is clear. The record shows that the court did not abuse its discretion in permitting the name of the witness to be indorsed on the information after the trial had commenced.

Defendant singles out one of the instructions, and argues that it permits the jury to find a larceny was committed without evidence establishing the crime beyond a reasonable doubt; that it assumes facts not proved; that it gives prominence to assumed facts; that it gives undue importance to the possession of the property; and that it withdraws from the jury evidence of defendant's good character. When the charge to the jury is considered as a whole, the law is correctly stated. An instruction preceding the one assailed enumerated the elements of the crime, and distinctly stated that each must be proved to the jury's satisfaction beyond a reasonable doubt. Another instruction correctly stated the law relating to evidence of defendant's good character. There was testimony relating to all of the matters mentioned in the instruction. The point is not well taken.

It is further argued that the court erred in refusing to give the following instruction requested by defendant:

"There must be evidence, aside from the statements of the defendant out of court, that the automobile was stolen, otherwise it is the duty of the jury to acquit the defendant."

Under the evidence the request was properly refused. The instruction is not limited to the rule that an extrajudicial confession is not of itself sufficient to establish the *corpus delicti*. There was other evidence tending to show that the automobile was stolen. In addition, statements of defendant not constituting a part of his confession were proper matters to be considered by the jury.

Error in the proceedings has not been shown. The judgment is therefore

AFFIRMED.

EDWARD E. MORAN, APPELLANT, V. ROBERT C. MORAN ET AL., APPELLEES: CAMDEN J. GARLOW ET AL., APPELLANTS.

FILED JUNE 2, 1917. No. 19458.

1. **Common Law:** LAW OF STATE. Any provision of the common law of England that is inconsistent "with any law passed or to be passed by the legislature of this state" is not made the law of this state by section 3697, Rev. St. 1913.
2. **Deeds:** CONSTRUCTION. Every instrument conveying real estate or interest therein must be construed so as "to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument," if the intent is not an unlawful one. Rev. St. 1913, sec. 6195. This applies to deeds as well as other instruments, and so far abrogates the rule in Shelley's case.
3. ———: ———: LIFE ESTATE. Applying these rules, the granting clause of the deed involved in this case is construed to convey to the grantee a life estate with remainder to his heirs.

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

Albert & Wagner and *Garlow & Long,* for appellants.

A. M. Post and *M. Whitmoyer, contra.*

J. J. Thomas and *Edwin Vail, amici curiæ,* on rehearing.

SEDGWICK, J.

On the trial of this case in the lower court the deeds involved were construed to convey life estates only. The plaintiff and cross-petitioner now contend that these deeds conveyed a title in fee to the grantees named therein. The cross-petitioner Garlow refers in his brief to some former decision of the district court as a bar to this action, but as no such decision is alleged in the pleadings, and no serious discussion is given it, and both the plaintiff and the cross-petitioner devote their discussion entirely to the construction of the deeds involved, we conclude, as stated by the defendants, that the decision of the district court rests entirely upon the proper construction of the deeds. The following is the granting clause of the deed to be construed:

"Grant, bargain, sell, convey, and confirm unto R. C. Moran, of Platte county, Nebraska, the following described real estate situated in the county of Platte, and state of Nebraska, to wit: (describing the land) Subject however to the following conditions: First, that the said R. C. Moran shall have, hold, use, occupy, and enjoy the aforesaid premises with all rents, issues, profits, and proceeds arising therefrom, for his own use and benefit, shall have authority to lease said premises, but shall not bargain, sell, or mortgage said premises during his natural lifetime, but upon his death said premises shall be the property of his lawful heirs. Second, that said R. C. Moran shall pay to the said Robert Moran from the proceeds of said premises $50 each and every year during the natural life of said Robert Moran. Together with all the tene-

ments, hereditaments, and appurtenances to the same belonging, and all the estate, right, title, interest, dower, claim or demand whatsoever of the said Robert Moran and Sarah Moran of, in, or to the same, or any part thereof."

There is some discussion in the briefs as to whether the rule in Shelley's case has any force in this state, but it is not necessary to determine what force, if any, that rule has with us. The cross-petitioner, as was done in *Albin v. Parmele,* 70 Neb. 740, quotes extensively from the courts of the different states as to the effect of the rule in Shelley's case in those states respectively. In Pennsylvania it was said: "The rule in Shelley's case is a rule of law, not a rule of construction, and where a case falls within it, it applies inexorably without reference to intent." *Shapley v. Diehl,* 203 Pa. St. 566. And in Tennessee: "The rule in Shelley's case was brought over by our ancestors, formed part of the colonial laws, and, until abrogated by statutory enactment, must continue to be law in Tennessee." *Polk v. Faris,* 30 Am. Dec. 400 (9 Yerg. (Tenn.) 209).

In so far as the decision of the case at bar is concerned, we might concede that the rule in Shelley's case would continue and be the law in Nebraska, "unless abrogated by statutory enactment." It is difficult to determine the origin of that rule. It probably arose out of some peculiarities of the law of feudal tenures in England a good many hundred years ago. Our statute provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law within the state of Nebraska." Rev. St. 1913, sec. 3697. By section 6195, Rev. St. 1913, it is provided: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice

to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." This latter statute has been construed by this court in *Rupert v. Penner,* 35 Neb. 587; *Albin v. Parmele, supra; Benedict v. Minton,* 83 Neb. 782, and in other cases. In *Albin v. Parmele, supra,* there is quite an exhaustive discussion of the subject in an opinion by Mr. Commissioner Ames, and, unless that is to be overruled, it must be decisive of this case. Two of those above cited cases of this court discussed the construction of granting clauses in deeds, and one construed such clause in a will, and it is suggested in the brief that a different rule might obtain in the construction of deeds, but section 6195, Rev. St. 1913, applies to every "creation or conveyance of any real estate, or interest therein," and, as pointed out in *Albin v. Parmele, supra,* wills in some instances are not as deliberately executed as are deeds in general, and therefore the effect of the use of technical terms in wills may not always have the same force as the use of similar terms in deeds might have in ascertaining the "true intent of the parties;" but, in any event, in both cases we are required to ascertain that intent from the whole instrument. It is said in one of the briefs that the rule in Shelley's case is the law, and any intent that is inconsistent with the law cannot be enforced by the very terms of the statute quoted. This suggestion is answered in *Albin v. Parmele, supra,* with the suggestion: "That which the statute expressly requires shall be consistent with the general rules of law is not the construction of the instrument, but the intent of the parties. * * * It cannot be pretended that an intent to limit a remainder in fee to the heirs at law of one to whom is given the precedent freehold is inconsistent with any general rule of law."

The language of the granting clause of this deed so plainly shows an intent of the grantor to convey to the grantee a life estate with the remainder to his heirs that it cannot be said that the language needs any construc-

tion. This language was correctly construed by the district court, and the judgment is

AFFIRMED.

The following opinion on motion for rehearing was filed October 13, 1917. *Remanded for further proceedings on question of partition of life estates.*

SEDGWICK, J.

The briefs upon the motion for rehearing by the appellants and by members of the bar who have appeared as friends of the court thoroughly present some of the questions involved in this case, from which it appears that our former decision, *ante,* p. 386, may be misunderstood or misleading, and some further explanation seems appropriate.

1. It is earnestly contended by appellants that "the conclusion reached by this court is in direct conflict with the doctrine announced in that case (*Loosing v. Loosing,* 85 Neb. 66), but that is not overruled, distinguished, or even referred to in the opinion." In the case referred to the court, in discussing 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," used the following language: "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." This expresses a familiar principle of construction, and we intended to apply it in the case at bar. In the *Loosing* case the will gave absolutely to each of several children certain described real estate, and then, after various other provisions, contained the following clause: "I want it distinctly understood that the property I have herein bequeathed to my two sons and one daughter that they shall not have the right to dispose or mortgage same,

but it shall be handed down to their children." In commenting upon this peculiar provision the court said: "If the testator intended that William, Fred and Louise (the children to whom the land had been devised in the will) should only take a life estate, a remainder could not descend or 'be handed down' from them, and their children could not receive an estate, except from the testator and through his will, and he nowhere in that instrument devises anything to the children of his children."

The language of the deeds construed in the case at bar is essentially different in two particulars: (1) It is quoted in our former opinion, and it will be observed that in connection with the granting clause and as a part thereof are the words "subject, however, to the following conditions." Then follows specifically the conditions of the grant, from which it plainly appears that the grant was not absolute. (2) The conveyance also contained the following words: "Upon his death (that is the grantee named) said premises shall be the property of his lawful heirs." These words passed the title in the remainder directly from the grantor to the lawful heirs by the force of the deed itself. The title in the remainder therefore does not pass through the grantee in the deed, but from the grantor himself, which is considered of vital importance in construing the conveyance in the *Loosing* case.

2. The appellants and the friends of the court strongly contend that our former opinion is wrong in not recognizing "the rule in Shelley's case as a part of the law in this state." It is insisted that the quotation in our former opinion from *Albin v. Parmele,* 70 Neb. 740, in regard to the rule in Shelley's case, should not be "invoked for the purpose of ascertaining the intention of the grantor," and therefore should not be considered as abrogated or affected by our "intent" statute. Judge J. J. Thomas and his partner, Edwin Vail, as friends of the court, have filed an exhaustive and interesting brief upon this question. The history of the rule in Shelley's case is given, and many authorities are cited which seem to support the view

contended for. Among them are Judge Cooley in his edition of Blackstone's Commentaries, 1 Blackstone's Commentaries (4th ed.) Book 2, *172, note 2; 1 Fearne, Contingent Remainders (4th Am. ed.) 85, 86; 4 Kent, Commentaries, *215; *Hamilton v. Sidwell,* 131 Ky. 428, 29 L. R. A. n. s. 961, and note; *Perrin v. Blake,* 10 Eng. Rul. Cas. 689; *Baker v. Scott,* 62 Ill. 86; *Starnes v. Hill,* 112 N. Car. 1; *Doyle v. Andis,* 127 Ia. 36. In our former opinion it was said: "We might concede that the rule in Shelley's case would continue and be the law in Nebraska, 'unless abrogated by statutory enactment.'" If the discussion in that opinion following this statement indicates that we consider that the rule in Shelley's case is abrogated in whole or in part by the "intent" statute (Rev. St. 1913, sec. 6195) we desire to modify that opinion in that respect, as it is not necessary in this case to determine that question.

3. It is now urged that in any case the parties are entitled to have a partition of their life estates, and that we should have reversed and remanded the case for that purpose. The original briefs of appellants and cross-appellants do not comply with rule 12 (94 Neb. XI), and we have not observed that they discuss or mention any right of partition of life estates. These estates were separate under the conveyances to them, and, if they have been united by the acts of the grantees, they might very well waive the question of their right to have the court adjudicate their rights as against each other. Ordinarily questions not discussed in the briefs are considered waived. We do not ordinarily reinvestigate the record upon motion for rehearing for the purpose of determining questions not presented in the briefs upon the hearing of the case. As we try equity cases *de novo,* we will not now determine the right of partition of the life estates, and this decision will not be a bar to further proceeding for that purpose, if it should be found necessary.

The motion for rehearing is overruled, reserving the question of partition of the life estates, and the cause is

remanded to the district court for further proceedings upon that question.

JUDGMENT ACCORDINGLY.

ANNA JANOUS, APPELLANT, V. COLUMBUS STATE BANK, APPELLEE.

FILED JUNE 2, 1917. No. 19506.

1. **Appeal.** The fact that the plaintiff has recovered a judgment in a foreign jurisdiction upon a judgment rendered in this state will not require this court to dismiss an appeal regularly taken from the original judgment, or from a judgment in an action in equity to vacate the former judgment.
2. **Judgment: VACATION: EFFECT ON FOREIGN RECOVERY ON DOMESTIC JUDGMENT.** In such case, if the original judgment is set aside and final judgment entered in favor of the defendant in the original action, the judgment in the foreign jurisdiction will be voidable.
3. **Process: SHERIFF'S RETURN: PRESUMPTION.** When a judgment is attacked collaterally, or when a long time after the judgment is entered the correctness of the sheriff's return is assailed, great faith and credit must be given to the formal return of the officer.
4. **Judgment: SUIT TO VACATE: SERVICE OF PROCESS: EVIDENCE.** In an action to set aside the service and the judgment entered therein, if the validity of the service depends upon the facts, and the officer and the persons present when the supposed service is made testify in detail as to the facts of service, and the preponderance of the evidence shows that no legal service was made, the service and judgment will be set aside and a new trial ordered.
5. **Process: SERVICE OF SUMMONS: EVIDENCE.** If the officer hands the copy of the summons to the defendant, and immediately retakes it and does not return it to defendant, the proof must show that the defendant knew, or had reason to suppose, that it was a summons for her, and that she had been sued, or such service will be invalid.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Reversed, with directions.*

Garlow & Long, for appellant.

A. M. Post and *Albert & Wagner, contra.*

SEDGWICK, J.

The defendant bank began an action against the plaintiff in the district court for Platte county and obtained a judgment. Afterwards the plaintiff began this action in the district court for Platte county, which is an action in equity to set aside the former judgment. It was decided against the plaintiff in the district court, and she has appealed to this court.

The bank began an action in Colorado against the plaintiff herein upon the first judgment obtained in the district court for Platte county, and obtained a judgment in Colorado upon a transcript of that judgment. Afterwards the defendant bank moved to dismiss this appeal. This motion was continued to the final hearing upon the appeal. The defendant contended: "If, pending an appeal, an event occurs which makes a determination of it unnecessary or renders it clearly impossible for the appellate court to grant effectual relief, the appeal or writ of error will be dismissed without prejudice." 4 C. J. 584. There is no doubt about the correctness of this rule, but the question in this case is whether obtaining the judgment in Colorado will prevent this court from granting effectual relief. The plaintiff cites several cases holding that it will not. In *Heckling, Ex'x, v. Allen,* 15 Fed. 196, the first paragraph of the syllabus is: "Suit was brought in Colorado on a judgment rendered by the superior court of Cook county, Illinois, and judgment was rendered here. Subsequently the Illinois judgment, the case being removed by writ of error to the appellate court of that state, was reversed. Defendant sets up these facts in a petition, and moves that the judgment be vacated. Held, that such proceeding is allowable." *Hawes v. Hathaway,* 14 Mass. *233, *Brennan v. Berlin Iron Bridge Co.,* 73 Conn. 412, and *Ætna Ins. Co. v. Aldrich,* 38 Wis. 107, seem to support the rule in the Federal Reporter. The action in Colorado was

strictly upon the former judgment in this case, and, if that judgment is vacated and judgment finally entered for defendant, the Colorado court will no doubt vacate its judgment also.

As this case is presented, there is but one question now to be considered, and that is as to the service of the summons in the original case. The defendant bank, plaintiff in the original suit, in its brief says: "The sheriff's return made under the solemnity of his official oath is presumptively true, and impeachable only upon the clearest and most unmistakable proof of its falsity." When a judgment is attacked collaterally, or when a long time after the judgment is entered the correctness of the sheriff's return is assailed, there is no doubt that great faith and credit must be given to the formal return of the officer. In this case, however, the evidence of the officer who made the service was taken soon after the service was made, and he tells in detail the facts connected with the service. Under these circumstances we think that the validity of this service depends upon the facts as testified to by the sheriff and the other witnesses present. From his evidence it appears that the plaintiff in this case, defendant in the original action, "was quite an elderly lady; she appeared to me to be about—oh, I don't know, at least 70 or 75; she was quite old." He says, "She spoke German." The original action was upon a promissory note which the plaintiff therein alleged was signed by this plaintiff and several of her sons-in-law and daughters. The plaintiff, who was a resident of Colorado, was at the home of one of her daughters to attend a funeral of the daughter's little child. The evidence shows without contradiction that the plaintiff was not familiar with the English language and could speak it very little. On the day of the funeral the sheriff says: "I went up to the residence, and some young lady, I don't know who she was, came to the door, and I asked for Mrs. Janous, I asked if Mrs. Janous was there, and she said, 'Yes.' So she called her to the door, and I told her that I had a summons for her. Q. Were you

speaking in German or English? A. No; I was speaking in English at the time, and she evidently didn't understand me, and so I asked the girl there, whoever she was, if the old lady could speak German, and she said, 'Yes,' and so I told her in German, *as near as I could,* that it was a summons, that she was sued by some party, and that it was necessary for me to deliver the paper to her. She accepted the paper, and spoke to the girl." This girl the sheriff speaks of was the plaintiff's daughter, and was one of the defendants in the case. The sheriff was not aware of that fact at the time. The sheriff testified: "The girl ask me what the old lady should do about the paper, and I said she could do as she pleased about it. Q. Were you speaking in German? A. No, to the girl I was speaking in English. She could do as she pleased with it, and I suggested that I would, if she wanted me to, that I would take the paper and give it to Joe, but I also had a summons for Joe anyway." The sheriff says that he handed the summons to the "old lady," and "then she returned it to me, and told me in German to give it to Joe." The plaintiff and her daughter deny that the summons was ever handed to her at all. However that may be, the sheriff immediately took it, according to his testimony, and delivered it to Joe. As Joe was one of the principal defendants in the case, it was, of course, necessary to deliver him a copy in order to make the proper service. The sheriff nowhere testifies that this plaintiff knew that the paper he was handing to her was a summons, or that she had been sued. He testifies that he told her that in German, "as near as I could." How well he could speak German and how plain he could make it to her is not indicated, but the statement that he told her as near as he could indicates that he could not speak German fluently. She testifies that she never knew that it was a summons or that she had been sued until after she had returned to Colorado and was notified that they had a judgment against her in this state. The supposed service was on Saturday, and on Monday the plaintiff returned to her

home in Colorado. The plaintiff testifies that she never signed the note sued upon. There is no proof that she was a principal on the note. If her sons-in-law had the entire consideration for the note, and if this plaintiff received nothing for the note, and believed that she never signed it, she would naturally not be very curious about papers connected with it. And if the sons-in-law had placed, or caused to be placed, the plaintiff's name on the note, it is not at all certain that they would take any great pains to inform her that she had been sued thereon. At all events, if the sheriff handed the summons to her and immediately retook it, as he says he did, it would not amount to service without clear proof that she received it with knowledge that it was service of a summons. Such proof is entirely lacking. The preponderance of the evidence is that this plaintiff knew nothing about the nature of the paper, but in good faith supposed it was some matter relating to local affairs that could be attended to by Joe, as he is called, one of the principal defendants in this case. This being an action in equity, we must determine it upon the evidence in the record without reference to the findings of the trial court. Of course, under our former decisions, if there was plainly a conflict in the testimony between the sheriff and this plaintiff, the fact that the court saw these witnesses and heard them testify would have influence with this court in determining that fact; but as we view this evidence, it does not appear clearly that there is a substantial conflict in this testimony upon the controlling facts in the case. These three witnesses appear to testify in good faith, and, as we have said, the preponderance of the evidence is that the summons was not delivered to and left with this plaintiff; it was immediately retaken by the sheriff, and the plaintiff had no actual knowledge of the nature of the paper that was shown to her.

The judgment of the district court is reversed and the cause remanded, with directions to set aside the original judgment and grant a new trial therein.

JUDGMENT ACCORDINGLY.

LETTON, J., not sitting.

The following opinion on motion to amend judgment was filed November 3, 1917. *Former judgment modified and cause remanded, with directions.*

SEDGWICK, J.

The defendant has filed a motion to amend the former judgment of this court by eliminating therefrom the direction for final judgment, and so as to remand the case for further proceedings in the district court. The defendant suggests that the Colorado court had jurisdiction in the action upon the transcript of the judgment to determine the question of the jurisdiction of the court of this state over the person of the defendant in that case, and that therefore the judgment of the Colorado court is binding upon this court. There is no doubt of the general proposition that in an action upon a foreign judgment the court may try the question whether the foreign court had jurisdiction of the action or of the person of the defendant therein. But that principle has no application in this case. In our former opinion, *ante,* p. 393, we quoted the statement from 4 C. J. 584, relied upon by the bank, but it was suggested in the opinion that, although the rule as stated was undoubtedly correct in general, it was not decisive of this case, because the question here presented is whether the Colorado court could prevent this court from granting effectual relief. The statement copied from 4 C. J. is, in the text, immediatedly followed by the statement: "If, however, the intervening event was due to the voluntary act of appellee the appeal will not be dismissed." If this was not so, that is, if the intervening event was due to the act of the appellee himself, and the appellee could then insist upon that act as grounds for dismissing the appeal, he might by proceeding upon his judgment in a foreign court prevent or at least very much limit the time allowed the judgment debtor for perfecting his appeal. As soon as he obtained his judgment he might proceed in another state, and if he could obtain a judgment there upon his transcript before the appeal could be heard in the courts of the state of the original judg-

ment he would then be entitled to have the appeal dismissed. He cannot in that manner oust this court of jurisdiction. The courts of one state must give full faith and credit to the final judgment of the courts of another state, but a judgment is not final in that sense as long as the courts of the state that render the judgment have jurisdiction under their practice to vacate or modify that judgment. In a note to *Dunstan v. Higgins,* 20 L. R. A. 668, 677 (138 N. Y. 70) it is said: "A foreign judgment will not be enforced unless it be final and conclusive. * * * If it is not conclusive in the same court which pronounced it, so that notwithstanding such a judgment the existence of the debt may, between the same parties, be afterwards contested in that court, and, upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then it cannot be regarded as finally and conclusively evidencing the debt." "If the first judgment is reversed after suit has been brought and judgment recovered on it in a foreign jurisdiction the defendant is entitled to have the second judgment reversed by *audita querela,* or a writ of error *coram nobis,* or other appropriate proceedings." 15 R. C. L. 942, sec. 419. This is in accordance with *Heckling, Ex'x, v. Allen,* 15 Fed. 196, and other cases cited in our former opinion.

The defendant suggests that it desires to present this question to the supreme court of the United States, and considers that in doing so it would be in a better position if a transcript of the Colorado judgment was in evidence in this case. The contention of the defendant is an interesting one, and it seems proper to permit the defendant to present it to that court without the embarrassment which it suggests. It is therefore ordered that our former judgment be modified, and that the judgment of the district court be reversed and the cause remanded, with instructions to allow the parties to put in further evidence, if so advised, and proceed further in the case in accordance with this opinion.

JUDGMENT ACCORDINGLY.

CONCRETE STEEL COMPANY, APPELLANT, v. ROWLES COMPANY; NATIONAL SURETY COMPANY, APPELLEE.

FILED JUNE 2, 1917. No. 19557.

1. **Counties: CONTRACTS: BONDS.** It is the duty of a county board, in letting a contract for the construction of a county building, to take a bond of the contractor conditioned as required by section 3840, Rev. St. 1913.
2. ———: CONTRACTOR'S BOND: LIABILITY FOR MATERIALS. A contractor for the construction of a public building who purchases material from a dealer who has no contract for the construction of any part of the building, and pays such dealer therefor in good faith, without notice of any liability of such dealer, will not be liable on his bond under section 3840, Rev. St. 1913, to the manufacturer or jobber from whom such dealer may have purchased such material.
3. ———: ———: ———. In such case the manufacturer or jobber who has notice that the contractor is purchasing the materials from the dealer and paying him therefor in good faith, and makes no objection to such payment, will not be allowed to recover on the contractor's bond for any balance of the selling price that may be due him from such dealer.

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

L. H. Blackledge, for appellant.

Bernard McNeny, contra.

SEDGWICK, J.

The defendant, Rowles Company, was a general contractor with the county of Webster for the construction of a court house, and gave the bond in suit, with the National Surety Company as surety. This plaintiff, at the request of Julian S. Nolan Company, furnished material used in the construction of the building. The plaintiff brought this action in the district court for Webster county against the Rowles Company, the original contractor, and the National Surety Company as surety for said contractor. There was no service upon the Rowles Company, and the

action proceeded against the surety company alone. Upon the trial the court instructed the jury to find a verdict for the defendant, upon which verdict judgment was rendered, and the plaintiff has appealed.

It appears that the bond given by the contractor contained the provisions: "(11) That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the obligee herein named; * * * (7) Nor shall this instrument or any rights thereunder be assignable, unless with the like consent of the defendant duly executed and attested * * * by its president or vice president and under its seal." The bond was given to the county as obligee. The defendant insisted upon the trial, under the provisions of the bond above quoted, that no action could be brought by any one except the county.

The statute (Rev. St. 1913, sec. 3840) provides: "It shall be the duty of * * * county boards * * * and all public boards now or hereafter empowered by law to enter into a contract for the erecting and finishing, or the repairing of any public building * * * to which the general provisions of the mechanics' lien laws do not apply, and where the mechanics and laborers have no lien to secure the payment of their wages and materialmen who furnish material for said work have no lien to secure payment for material furnished in said work, to take from the person, persons, firm or corporation to whom the contract is awarded a bond in a sum not less than the contract price with at least two good and sufficient sureties, or in lieu thereof, by one surety company, conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material which is actually used in the erecting, furnishing, or repairing of the building or in performing the contract. Such bond shall be to the board awarding the contract, and no contract shall be entered into by such board until the bond herein provided for has been filed with and approved by said board. Such bond shall be safely kept by the board

making the contract, and may be sued on by any person entitled to the benefit of this chapter."

It therefore appears that the bond given in this case is not upon its face a compliance with this statute, and is not in fact a bond under the statute. It is contended, however, that it must be construed as the statute provides, and that the defendant cannot be allowed to defend on the ground that it has incorporated in the bond the provisions not allowed by the statute. It would seem that, unless it can be so construed, the county board has not performed its duty under the statute, which duty is expressly made mandatory upon the board, and the question might arise whether the remedy would not be against the individual members of the board so failing to perform their duty. However, in the condition of this record, it does not seem to be necessary to determine either of these important questions.

It appears that the contractor, Rowles Company, purchased from the Julian S. Nolan Company of Chicago a quantity of reinforcing steel called for by their contract with the county. Their agreement expressly provided:

"Julian S. Nolan Company agree to accept the receipted freight bills at present car-load freight rates to Red Cloud, Nebraska, in partial payment of their steel and tile bills. Should default be made in prompt payment of any sum or sums due hereunder, according to the terms hereof, and at any time thereafter so long as the Rowles Company remain in default, Julian S. Nolan Company may at their option, without prejudice to any of their rights hereunder, stop shipments then and thereafter in transit, and either discontinue further shipments or make same upon any condition regarding payments due or to become due that Julian S. Nolan Company shall deem necessary for their protection. * * * It is agreed that Julian S. Nolan Company shall not be held accountable for delays caused by fires, accidents, strikes or other causes unavoidable or beyond their control. Whatever steel is desired from stock will be paid for by the Rowles

Company at the exact stock extra charged by the warehouse, but not to exceed $11 per ton above current mill steel prices."

From which it appears that it was understood that the Nolan Company was a dealer in this line of materials and kept such material in stock, but might find it necessary to replenish the stock or purchase materials from other dealers or manufacturers. The contention of the plaintiff is that under these circumstances the Rowles Company, contractor, was required to know whether the Nolan Company replenished its stock, and, if so, when and from whom it made the necessary purchases; that is, the plaintiff contends that under the statute the contractor, and his surety are liable to the manufacturer, or any person who may have been the owner, for any and all material that is actually furnished to the contractor and by him used in constructing the building. There is an interesting and somewhat exhaustive discussion in the briefs upon this question, and *United States v. American Surety Co.*, 200 U. S. 197, *Hardaway v. National Surety Co.*, 211 U. S. 552, *Mankin v. United States*, 215 U. S. 533, *Hegener Co. v. Frost*, 60 Ind. App. 108, *Forman v. St. Germain*, 81 Minn. 26, *Caulfield v. Polk*, 17 Ind. App. 429, Phillips, Mechanics' Liens (3d ed.) sec. 51, and *Monroe v. Clark*, 107 Me. 134, 30 L. R. A. (n. s.) 82, are cited as bearing upon this question. We do not find it necessary under the circumstances in this case to enter upon an exhaustive discussion of the questions involved in this contention. There must be some limit to such liability. A nail manufacturer sells to a jobber, who in turn sells to a hardware merchant, who subsequently fails, and his stock is sold at public sale by the referee in bankruptcy. A purchaser of a keg of nails at such sale exchanges it with another hardware merchant for other goods, and the latter sells it to the contractor, and the nails are finally used in the construction of the building, but the manufacturer has not been paid for them. The contention of the plaintiff seems to go so far as to hold the contractor's sureties liable to

the manufacturer for the selling price of the nails. A subcontractor, that is, one who undertakes to construct some definite part of the building, in some sense represents the contractor, and he represents the owner of the building. He is known by all parties interested in the construction of the building, and in contracting with him he can be held to guarantee, if necessary, that he will pay for the materials and labor he uses in constructing his part of the building. The cases cited seem to make a distinction between a subcontractor and a materialman, and hold the contractor and his sureties liable for materials and labor furnished to a subcontractor, and not liable to the manufacturer or dealer from whom a materialman may have purchased his stock. It appears, as already stated, that the contractor purchased this material of the Nolan Company, and understood that payment was to be made to that company. That company had no contract for the construction of any part of the building; it was not a subcontractor within the strict meaning of that term. The bills for the material were rendered by the Nolan Company to the contractor, and were paid to the Nolan Company without notice to the contractor that any other parties were interested therein. It is true that the Nolan Company ordered this material from the plaintiff company, and that it was shipped to the contractor directly by the plaintiff. While the material was being shipped, the Nolan Company wrote the plaintiff as follows:

"Gentlemen: Your mill order C 1041. We inclose herein freight receipt from the Burlington road for $403.20. Your freight allowance amounted to only $256.44, which leaves an overcharge of $146.76, and I will ask you to kindly credit our account with the amount of this overcharge, namely, $146.76. The contractor has taken credit for this overcharge collected from him in error by the Burlington, and, as you are the shipper, you should assume this overcharge and thrash the matter out with the railroad. We called the railroad's attention to the overcharge in our letter of June 29, and we have received a

reply from the auditor of freight accounts, dated July 7, giving their claim number as follows: 911852-57. Yours very truly."

This shows that the contractor was paying Nolan Company for the materials, and that plaintiff was relying upon the Nolan Company for payment, and that the contractor was not aware that the plaintiff was interested financially in the shipment. The contractor had reason to suppose, and did suppose, that the material actually used in the construction of the building was paid for. The plaintiff knew that it was so understood by the contractor. The plaintiff was satisfied to have payment for the material made through the Nolan Company, relying upon that company as authorized to receive such payment, recognizing such payment as payment to the plaintiff, and, by neglecting to notify the contractor, consented to such payment. If the plaintiff was not entirely satisfied to have these payments made to the Nolan Company, it should have at once notified the contractor. Failing to do so, it ought not now to be allowed to collect payment the second time from the contractor.

It follows that the judgment of the district court is right, and it is

AFFIRMED.

EMIL H. MILLER, APPELLANT, V. MARY ANN MILLER ET AL., APPELLEES.

FILED JUNE 2, 1917. No. 19954.

1. **Homestead: EXEMPTION: ALIMONY.** The liability for alimony in a divorce case is not a contract liability, and a government homestead of 640 acres, commonly called a "Kinkaid homestead," is not exempt from levy upon a judgment for alimony, under the United States statute which provides for exemption from "any debt contracted prior to the issuing of the patent therefor." Rev. St. U. S. 1878, sec. 2296.

2. ———: ———. The exemption of a homestead under our state statute is limited to 160 acres occupied as a family home.

3. **Execution: EXEMPTION.** Property of defendant, not exempt, acquired after judgment rendered against him, may be sold upon execution to satisfy the judgment.

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

E. D. Crites and *F. A. Crites,* for appellant.

Allen G. Fisher and *Roscoe L. Wilhite, contra.*

SEDGWICK, J.

The defendant, Mary Ann Miller, obtained a divorce from the plaintiff in November, 1909, in the district court for Sheridan county, and a judgment for $800 alimony. In August, 1908, the plaintiff made a homestead entry on a tract of land in said county under the homestead laws of the United States, and afterwards in May, 1910, made an additional homestead entry. The two entries covered a Kinkaid homestead. In June, 1910, an execution was issued on the defendant's judgment and was returned unsatisfied in August, 1910. In August, 1911, the plaintiff intermarried with Leta Miller, with whom he has since been living as his wife, and they established their home upon one of the quarters of land above mentioned. Afterwards in October, 1914, another execution was issued, which was returned in November of that year unsatisfied for want of property. In June, 1916, a third execution was issued and was levied upon all of the said land, except the quarter section thereof upon which the residence and other improvements of the plaintiff are situated. The plaintiff then began this action in the district court for Sheridan county to enjoin the sale upon execution of the land levied upon. A temporary injunction was allowed, and afterwards upon the trial the temporary injunction was dissolved, and there was a general finding in favor of the defendants, and the plaintiff's action dismissed. From this judgment the plaintiff has appealed.

The plantiff contends that, as the land so levied upon is a part of the government homestead, it is not liable in

satisfaction of this claim which originated prior to the issuing of the patent. The Revised Statutes of the United States (Rev. St. U. S. 1878, sec. 2296) provides: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." It appears that this statute has been construed by the federal courts. The circuit court of appeals of the district of Colorado decided in *Brun v. Mann,* 151 Fed. 145, 12 L. R. A. n. s. 154: "The exemption of lands acquired under the homestead laws and the timber culture laws (2 U. S. Comp. St. 1901, pp. 1534, 1535; Act March 4, 1896, c. 40, sec. 4, 20 Stat. 113, 114; 2 U. S. Comp. St. 1901, p. 1398, sec. 2296; Act May 20, 1862, c. 75, sec. 4, 12 Stat. 393) from any 'debt contracted' previous to their acquisition does not exempt them from liabilities for the torts of the entrymen previously perpetrated." In the opinion it is said:

"Congress exempted the lands which it practically donated to the entryman under the homestead and timber culture acts from any debt contracted previously by the patentees, but from no other liabilities. The terms 'liability incurred' and 'debt contracted' are equally familiar. When the subject of liabilities is brought to the attention, they occur to the mind with equal readiness, and when contrasted their significations are clear and definite. If an act provided that lands should be exempt from every liability incurred, there could be no doubt that they would be free from all liabilities. * * * These terms and their meanings could not have failed to occur to those who drafted, or to those who passed, the acts of congress under consideration, and their rejection of the familiar and broad term 'liability incurred' and their selection and adoption of the limited expression 'debt contracted' is a demonstration that they had no purpose to exempt the lands they gave from liability for the wrongs which the patentees might have perpetrated, and that they in-

tended to free it from the debts which sprang from their agreements only."

This construction of the law has been cited with approval by the supreme court of the United States in *Doran v. Kennedy,* 237 U. S. 362. In *Best v. Zutavern,* 53 Neb. 604, "A judgment for alimony in favor of a wife, rendered in an action for divorce, is a lien on the family homestead, the title whereof is in the husband." But that point is perhaps not important in this case, because the homestead under our state law does not exceed 160 acres of land, and the record in this case shows that the quarter section of land on which the plaintiff resides was not included in this levy. But the decision in that case and other decisions of this court are that the liability for alimony is not a contract liability. And it follows that a government homestead is not exempt from a judgment for alimony of a divorced wife. It is said in the brief that, as this judgment was rendered before the defendant therein acquired title to the land levied upon, the judgment could not then have been made a lien upon the land, but no reason is suggested why after acquired property not exempt may not become liable when acquired.

The defendant also relies upon a former judgment of the district court enjoining a levy to satisfy this claim as a bar in this case. It appears that an attempt was made to levy a former execution upon the improvements, consisting of a dwelling house and other improvements of this plaintiff upon that part of the land which was occupied as a home. An action was begun in the district court to enjoin the levy and sale of those improvements. The petition alleged that the improvements in question were so constructed and placed that they had become and were a part of the real estate, and that the defendant therein, the plaintiff in this case, had not yet made his final proof under the homestead laws of the United States, so that as real estate the improvements were not subject to levy. A temporary injunction was allowed, which was afterwards made permanent. The court found that the allegations

of the petition were true. It does not appear from the pleadings and proof in this case that the matter determined in the former action is essentially involved in this proceeding. The trial court was therefore right in not considering the former decree as a bar in this case.

It follows that the land levied upon herein is liable for the satisfaction of the judgment, and the judgment of the district court is

AFFIRMED.

HAMER, J., dissents as to the third paragraph of the syllabus, on the ground that the point therein determined is not involved in this case.

EDWARD IRWIN, APPELLEE, v. JETTER BREWING COMPANY, APPELLANT.

FILED JUNE 2, 1917. No. 19257.

1. **Judgment:** SATISFACTION. Where the plaintiff has recovered more than one judgment for the same injury against persons jointly and severally liable to him therefor, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause.
2. **Appeal:** PLEA IN ABATEMENT. This court has jurisdiction to entertain a plea in abatement by reason of matters happening after the appeal to this court has been perfected.

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

Mahoney & Kennedy and *Yale C. Holland,* for appellant.

William R. Patrick and *C. J. Southard, contra.*

CORNISH, J.

The plaintiff in this action recovered judgment against Gould & Son, contractors, for injuries received in an accident in the construction of a building for defendant. Afterwards he commenced this action against defendant, owner

of the real estate, for the same injury, on the statutory ground making the owner jointly and severally liable with the contractor for injuries received, and recovered the judgment appealed from. Pending this appeal, the plaintiff accepted payment of his judgment against Gould & Son, in full satisfaction thereof, as shown by the records in that case. Defendant made a showing of these facts and the further fact that it had commenced action in equity for the cancelation of the judgment in this action. It asked that the hearing be delayed until the hearing of the action in equity referred to, which it alleged would render further hearing of the action in this court unnecessary. This court entered the order that this action would be heard when reached, without prejudice, however, to the right of the defendant to a showing upon the final hearing that the damages had been paid.

Not disputing these facts, plaintiff contends that defendant's remedy is by injunction, and that this court has not jurisdiction to entertain this sort of a plea. He argues that judgment in this cause is subject only to reduction in the amount of the other judgment, and that in any event the defendant must pay the costs of this action.

We are of opinion that it is among the inherent powers of a court having jurisdiction of a cause on appeal to entertain a plea in abatement by reason of matters happening after the appeal has been perfected. *Shold v. Van Treeck,* 88 Neb. 80. Why should further hearings be had when indisputably the action itself is at an end and the controversy should cease?

The satisfaction by the plaintiff of the judgment obtained by him against Gould & Son operates as a satisfaction of the judgment obtained in this action, except costs up to the time that the judgment was satisfied. The rule is universal in this country that, where a party is injured by joint tort-feasors, or persons jointly and severally liable for the wrong, he may at his election sue separately one or both, and may recover judgment against each, but he is entitled to but one satisfaction for the injury done him.

Bryant v. Reed, 34 Neb. 720; *Fitzgerald v. Union Stock Yards Co.,* 89 Neb. 393; *Sessions v. Johnson,* 95 U. S. 347; 2 Black, Judgments (2d ed.) secs. 780, 782.

This cause is remanded to the district court, with directions that the same be dismissed on payment by defendant of the costs made up to April 29, 1916.

JUDGMENT ACCORDINGLY.

WILLIAM DUNN ET AL., APPELLEES, v. EVA ELLIOTT ET AL., APPELLANTS.

FILED JUNE 2, 1917. No. 19488.

1. **Wills: CONSTRUCTION: AMBIGUITY: EXTRINSIC EVIDENCE.** The bequeathing clause in the testator's will reads as follows: "I give and bequeath to my wife—Mary Etta Woodard all my personal property of whatever kind and nature, and our land, more particularly described as follows: (describing land) to be used by my said wife, Mary Etta Woodard during her natural life and under her complete control and at her death to be distributed between our heirs according to law." There were no children, the issue of the marriage of the testator and wife, to whom the words "our heirs" could refer. *Held,* that an ambiguity arises permitting parol or extrinsic evidence for the purpose of assisting the court in ascertaining its meaning.
2. ———: ———: **DISTRIBUTION.** Evidence examined, and *held* that, under the provisions of the will, the land should be divided one-half amongst the heirs of the testator and one-half amongst the heirs of his wife.

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

McGilton, Gaines & Smith and *A. L. Tidd,* for appellants.

Fawcett & Mockett, T. S. Allen and *H. L. Wilson, contra.*

CORNISH, J.

The questions presented in this case involve the construction of a will, and also the effect of the decree of the probate court in distributing the property of the estate.

The paragraph of the will in controversy reads as follows: "Second. I give and bequeath to my wife—Mary Etta Woodard all my personal property of whatever kind and nature, and our land, more particularly described as follows: (describing land) to be used by my said wife, Mary Etta Woodard during her natural life and under her complete control and at her death to be distributed between our heirs according to law."

Wills are to be construed according to the reasonable intent of the testator, as evidenced by the language of the will, giving to the words used their ordinary meaning. Where the language of the will is doubtful or ambiguous, parol or extrinsic evidence is admissible for the purpose of assisting the court in ascertaining the real meaning of the language used. Giving to the language above quoted its natural and ordinary import, the pronoun "our" would be taken to refer to the testator and his wife. The defendants contend that it means as if it read "my." The difficulty with this interpretation is that earlier in the paragraph the words "our land" are used, and in the preceding line the words "my personal property." It is unreasonable to suppose that in the same sentence one would use the words "my" and "our," except as distinguishing words.

It happens in this case that a latent ambiguity arises in this: There was no issue of the marriage of the testator and his wife to whom the words "our heirs" can refer. Both the testator and his wife, however, had children by former marriages; the husband two, the wife three.

It is contended by defendants that a distribution "according to law," as the will states, would be to give the land to the testator's children; that the courts will not, unless its language requires it, give a construction to a will which will have the effect of disinheriting or partly disinheriting the children of the blood of the testator, and they further argue, as above stated, that the pronoun "our" should be taken to mean "my." On the other hand, it is contended by plaintiffs that the plural pronoun "our"

means husband and wife; that the heirs referred to are two sets of heirs, those of the husband and those of the wife, as indicated by the use of the word "between," which usually refers to only two; that the signification of the words "according to law" is that the land shall be divided into two parts, one part going to his wife's, the other to the testator's heirs.

Neither of these constructions is without reason. A case is presented where it is proper to take evidence extrinsic to the will. Such evidence was taken. From this evidence it appears that the testator himself interpreted the will substantially in accordance with the view of the plaintiffs. At the time of its execution, when inquiry was made why one of his children, who was at the house, had not appeared, he remarked that "he guessed she didn't like it, but he couldn't help it; he wanted them all satisfied."

It appears that the land was the joint accumulation of husband and wife, and that they had lived together for 30 years.

From the language of the will, in the light of the evidence adduced, we are of opinion that the construction, contended for by the plaintiffs and given by the trial court, is right.

It appears that the probate court, in its decree distributing the property of the estate, decreed that the real estate in controversy upon the death of the testator's wife, Mary Etta Woodard, should descend to the children of the testator. While the county court has power to construe a will, in so far as it may be necessary to do so to give proper directions to the executor or administrator with will annexed, and for their protection, it is not empowered to finally decide controversies between adverse claimants under a will involving title to real estate. *Youngson v. Bond,* 69 Neb. 356; *St. James Orphan Asylum v. Shelby,* 75 Neb. 591. By the terms of the will the real estate was not to be distributed until the death of the testator's wife. At the time of the decree of distribution the wife had not

yet died. The decree of the county court was not *res adjudicata* as between the parties to this action.

For the reasons shown in this opinion, the judgment of the trial court is

AFFIRMED.

MARY HLAVATY, APPELLEE, v. RHODA M. BLAIR, APPELLANT.

FILED JUNE 2, 1917. No. 19565.

1. **Fraud:** MISLEADING REPRESENTATIONS. Representations made by one party to a contract in such terms as would naturally lead the other party to suppose the existence of a certain state of facts, or representations which he knows have led the other party to suppose the existence of a certain state of facts, if made designedly and fraudulently, are as much fraudulent misrepresentations as if statements of untrue facts were made in express terms.

2. **Witnesses:** COMPETENCY: TRANSACTION WITH DECEDENT. A transaction or conversation within the meaning of section 7894, Rev. St. 1913, is an action participated in by witness and decedent and to which, if alive, decedent could testify of his personal knowledge.

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

A. M. Post, for appellant.

C. Petrus Peterson and *R. W. De Voe, contra.*

CORNISH, J.

This is an action for rescission and reconveyance of lands exchanged, on the ground of false and fraudulent representations made by defendant's intestate as follows: That the land was free of all incumbrances; that the water rights appurtenant to the land had been paid in full, so that nothing was owing for water rights, or would be in the future; that the land was worth $150 an acre; and that he paid $9,000 for it. There was testimony of witnesses as to representations as follows: Mrs. R. W.

Holmes: "He (Mr. Blair) said he paid $150 an acre for it (the land), the water rights were paid, and she (Mrs. Hlavaty) wouldn't have to pay anything, (except) for what water she used during the year, and to pay the taxes." S. B. Iiams: "He insisted there was no bonded indebtedness and the water rights were paid for, I wanted to go out at that time, I wanted to start that evening, but he insisted his physical condition was such he could not and would not transact any business." Plaintiff, a native of Bohemia: "He did, he thought he did, I understood it was all paid for is what he told me, I don't need to pay nothing at all, just the water I used was all."

While defendant admits the land was represented as worth $150 an acre and free from liens, she denies the making of representations in the language sworn to. We are of opinion that the evidence shows that representations, substantially as above quoted, were made. The facts are that, within a month after the trade was made, plaintiff discovered that there were outstanding and unpaid bonds of the Otero Irrigation District, which included this 80 acres, in the sum of $777,500, with an assessed acreage of the district of 19,365 acres; that Blair had paid for the land $6,500, but had put improvements thereon, making the investment amount to about $9,000. The case turns upon the question whether, such being the representations and the facts, plaintiff was entitled to a rescission; the representations being made to induce the trade, and plaintiff having relied upon them to her injury.

It is defendant's contention that the water rights were, in fact, paid for by the bonds issued; that the bonds being municipal securities, like courthouse bonds, not a specific lien or incumbrance upon the land, the statements were in no event untrue or fraudulent. We are of opinion that this contention is erroneous. Even though we eliminate the statements sworn to by the witness Iiams, as to there being no bonded indebtedness, the natural import of the representations made would lead the plaintiff, or other ordinary person, to believe that she was getting the water

rights appurtenant to the land free of all expense, direct or indirect, to her, except what would be necessary for annual dues for maintenance, according to water used. In short the cost of water rights, though evidenced by bonds, and not a specific lien upon the land, was not, in fact, paid for. Each acre of the land had yet to pay its proportionate share as the money would be collected through taxation. The defendant's intestate could not have been ignorant of the fact that plaintiff wished to know how the value of the land she was getting was affected by the water rights appurtenant thereto, and that she was relying upon him for information. Plaintiff, under the circumstances shown by the evidence, was not bound to make an independent investigation. Even if the representations had been limited to a statement that there were no liens or incumbrances upon the land, as contended by defendant, yet, if at the time plaintiff was inquiring about the water rights appurtenant to the land she used language indicating to him that she understood that anything, still to be paid on account of the original cost of the water right, would be an incumbrance, then such a representation upon his part, tending as he would know, to mislead her, would amount to fraud and misrepresentation. 1 Bigelow, Law of Fraud, p. 5; 2 Pomeroy, Equity Jurisprudence (3d ed.) secs. 808, 873. But the representations went farther than a mere statement as to liens and incumbrances.

It is urged that there is no competent evidence of *reliance* upon any statement of deceased. It is said: "Reliance in this case upon the alleged false statement involved a mental process known to appellee alone." This comes near being true in any case, and by this argument it might follow that death of one, closing the mouth of both parties to the transaction, would prevent rescission for fraud in all cases. The general test is that such witnesses may testify to matters where the decedent, if alive, could not testify of his personal knowledge to the contrary. Certainly a state of mind, independent of the communication had between the witness and the deceased, is not open

to the objection. Such would be testimony that she made no inquiries of other persons touching the character of the land or water rights appurtenant thereto; that, outside of anything Mr. Blair may have said to her, she did not know there were any bonds against the irrigation district where the land was situated; and that she believed any statements made by Mr. Blair to be true.

We are of opinion that the evidence is ample to show that she traded for the land, relying upon her belief that there would be no charge, directly or indirectly, for water rights.

AFFIRMED.

STATE, EX REL. HELEN JENSEN, APPELLEE, V. ROY TURNQUIST, APPELLANT.

FILED JUNE 2, 1917. No. 19840.

Witnesses: IMPEACHMENT: EXCLUSION OF EVIDENCE. It is error to exclude evidence which has a tendency to impeach a witness on a material fact sworn to by him, the proper foundation having been laid therefor.

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

Ringer & Bednar, for appellant.

M. O. Cunningham, contra.

CORNISH, J.

This is an appeal from a judgment in a bastardy proceeding in which the defendant was found to be the father of the illegitimate child of relator, Helen Jensen. As stated in the brief of counsel for complainant, "the evidence is not as overwhelming in favor of the complainant" as one would like. He adds, however, that in cases of this kind it is often difficult to secure evidence which is altogether convincing and satisfactory.

The verdict rests upon the uncorroborated testimony of the complaining witness. Her mother testified that, while she knew her daughter went out with the defendant the first week in June, and that he brought her home in an automobile, she herself never met or saw him until August 21. Some of the testimony of the complaining witness is not consistent with ordinary experience in such cases. She testified to having had intercourse with the defendant the first evening they met; that she did not inform him of the situation until about four months afterwards. She testified to only the one act during the necessary period in which he might have become the father of the child. The defendant denied any acquaintance with her at the time.

Complainant testified that on September 27, 1915, when she told defendant of her condition, he procured a medicine, in the form of pills, which he gave to her for the purpose of producing a miscarriage. She testified that afterwards, early in January, she took the pills and they made her sick. In corroboration of this testimony, her mother testified that she discovered the medicine in November, when her daughter was sick from taking it. On cross-examination she was asked if in January she had not had a conversation with the parents of defendant in which she stated that she had purchased medicine for her daughter, which, when taken, had made her daughter sick. She denied making such statement. Afterwards, when the impeaching questions were put to defendant's parents, who were called as witnesses, the court sustained objections to the questions. This is complained of as error.

We are of opinion that the court did err in sustaining these objections. The evidence showing but one batch of medicine, secured and used, and but one sickness, this evidence would be proper for the jury to consider, in considering whether or not it was the defendant or the mother who had procured the medicine which made the complaining witness sick; and, if it was a circumstance bearing

upon that issue, it would be important testimony for purposes of impeachment.

We do not pass upon the other errors complained of by defendant. We are of opinion that the error above noted, under all the circumstances, was prejudicial to defendant, and that the judgment of the trial court should be reversed and the cause remanded.

REVERSED.

ALBRO L. HODGE v. STATE OF NEBRASKA.

FILED JUNE 2, 1917. No. 19943.

1. **Criminal Law:** TRIAL: INSTRUCTIONS: "REASONABLE DOUBT:" PREJUDICIAL ERROR. In a criminal prosecution an instruction contained the following language: "You are instructed that, concerning the term 'reasonable doubt' as the same has hereinbefore been used, you are instructed that as a matter of law the doubt which a juror is allowed to retain on his own mind, and under which he should frame his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt. And a juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of facts differing from that established by the evidence." This language has heretofore been disapproved by this court, and under the circumstances in the present case it is deemed prejudicially erroneous.

2. ———: RECEIVING PROPERTY WITH UNLAWFUL INTENT: SUFFICIENCY OF EVIDENCE. The evidence examined and discussed in the opinion, and *held* insufficient to support a judgment of conviction of the crime charged in the information.

ERROR to the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

J. E. Porter and *Earl McDowell,* for plaintiff in error.

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

DEAN, J.

Albro L. Hodge, plaintiff in error, hereinafter called defendant, a resident of Dawes county, was informed against by the state upon two counts, the first count charging him with the theft of a bull in Sioux county on August 12, 1916, the property of John E. Shaw, resident in that county. The second count charged him with unlawfully and feloniously receiving the bull with the unlawful and felonious intent of defrauding the owner of his property. On the first count defendant was acquitted. On the second count he was found guilty and was sentenced to serve an indeterminate period of penal servitude of from one to ten years. He brought the case here for review.

Defendant argues that his conviction is not supported by the evidence, and that for this reason, and for other errors as well that appear in the record, the judgment should be reversed.

The record shows that defendant is a farmer and ranchman, engaged in the occupation of buying and selling cattle on the local market, and in shipping stock to Omaha in connection with his stock ranch in Sioux county and his farm in Dawes county. On August 12, 1916, defendant shipped a car-load of cattle from Glen station, in Sioux county, to South Omaha. He directed his son and a hired man to round up a load of cattle from his ranch and take them to the railroad stock-yards at Glen, distant about two miles, for the purpose of loading for shipment. Defendant took no part in the selection of the cattle that were to be shipped, nor in loading them, but only in a general way directed his son and the employee as to the grade of cattle and the sort that he wanted to ship. The cattle so selected for shipment were not recently before the shipment seen by defendant until the morning of August 12, at about the time they were loaded. While the stock was being loaded by defendant's son and the hired man, defendant was engaged in the cattle car putting up a small partition for a blind cow that was included in the shipment that it might be protected from injury by the

other cattle. Defendant was not at home on the late afternoon and night of August 11, but was at the home of George Lakin, a neighbor, at whose place, Mr. Lakin and his wife testified, he arrived at about 6 or 7 o'clock in the evening, where he remained through the evening and until the next morning shortly after breakfast, when he left the Lakin residence. Defendant testified that he left his own ranch at about 4 o'clock in the afternoon of the 11th, going directly to the Lakin residence, and from there after breakfast the next morning to his ranch, where he gave general directions about the shipment. Defendant testified that while the boys were getting the cattle together he brought the blind cow to the stock-shipping yard at the station, and from there he went to the post office, where he got his grip, and returned to the way-car of the stock train. Shortly after 8 o'clock the shipment, accompanied by defendant, was on its way to the Omaha market, arriving there on August 14.

Four bulls were in the shipment that he sold in the open market at the South Omaha Exchange. When the cattle were inspected for brands, it was found that one bull in the consignment had the brand "VA" on its left side, that being the brand of John Howard, a resident of Sioux county, and also a brand "V" on its left hip. Defendant testified that he returned to his home without any knowledge that the branded bull was held up by the stock exchange for investigation as to ownership, and that when his attention was first called to the brands on the animal in question he believed it to be an animal he had purchased from Al Smith, a long-time resident of Sioux county, and a cattle dealer there. He testified positively that he did not know of the presence in his shipment of the animal in question until after his return home, when he received information to that effect from the stock exchange.

Al Smith, the cattle dealer, testified that he handled between 600 and 700 head of cattle in the 12 months immediately preceding the trial, and that in the summer of

1916 he sold to the defendant a mixed herd of cattle, in which there were four bulls, three red ones and a white faced one, and that the cattle were delivered at defendant's ranch in Sioux county. He said that he had no recollection about the brands on any of the cattle that he sold to defendant. The testimony conflicts in regard to the identity of the animal alleged to have been unlawfully received by defendant on August 12. The brand inspector testified that the animal that was held up out of defendant's shipment had a brand "VA" on the left side, and also a brand "V" on the left hip. When he was asked about the condition of the ears of the animal, he said he never noticed anything peculiar about them. John Howard, the former owner of the bull, testified that the animal he sold to Mr. Shaw had a white face, and that its ears were "either frozen off, or very small ears. I remember I intended to ear-mark him when I got him, and I didn't do it because his ears were very short or frozen off," and that he "figured part of them were gone," and that he was under the impression that the bull he sold to Mr. Shaw had a churn dasher on the jaw, and that he so testified at the preliminary. Mr. Howard, was then asked this question that referred to his testimony at the preliminary: "Q. And you said that was Sides' bull brand? A. I did, and I think yet it was on there. Q. Which jaw? A. The left jaw." It will be borne in mind that Mr. Shaw testified that there were no brands on the animal that he knew of except the "VA" brand on the left side. He also definitely fixed the morning of August 12 as the time when he missed his bull and it disappeared.

Defendant argues that the court erred in giving instruction No. 10, which follows: "You are instructed that, concerning the term 'reasonable doubt' as the same has hereinbefore been used, you are instructed that as a matter of law the doubt which a juror is allowed to retain on his mind, and under which he should frame his verdict of not guilty, must always be a reasonable one. A doubt pro-

duced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt. And a juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of facts differing from that established by the evidence. The jury are instructed that if, after a careful and impartial consideration of all of the evidence in the case, they can say that they feel an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charge made against him, then the jury are satisfied beyond a reasonable doubt." With respect to this instruction, the state in its brief makes this admission: "The first three sentences of the above instruction have been criticized by this court." But it argues that the instruction taken as a whole should not be held to be prejudicially erroneous. The objectionable portion of this instruction may be recognized as having been used in the noted anarchist trial. We again express our disapproval of its use. In the present case it was prejudicial to the defendant. It has been repeatedly held by this court so prejudicially erroneous as to require a reversal, and we so consider its use in the present case. *Brown v. State,* 88 Neb. 411; *Flege v. State,* 90 Neb. 390.

Defendant argues that the court erred in refusing to permit him to file a supplementary motion that was offered in apt time for a new trial "setting forth grounds of newly discovered evidence, and for time to procure the the necessary evidence." Defendant's offer was made to prove by reputable witnesses that John H. Howard after the trial told defendant in the presence of several witnesses that he, Mr. Howard, was "satisfied that the bull I (defendant) sold at South Omaha and for which I (defendant) had been convicted for receiving same knowing it to be stolen was not the bull he (Howard) sold to John E. Shaw." In view of the conflicting testimony on this material point, we believe the court erred in refusing to give defendant a reasonable time to permit the showing

to be made. The record shows that an application supported by affidavit was made to the court by defendant for time to make this showing immediately upon discovery of the fact.

Defendant insists that he was prejudiced by what he terms misconduct of the prosecuting attorney in his closing argument. But the record on this point shows, as the learned trial judge certified, that defendant's counsel promptly took exception to the remarks of the county attorney, and the court at the time directed that official to confine his argument to the testimony, and at the same time admonished the jury to disregard the statement of which the defendant complained. It sometimes happens that an attorney may, in the heat of argument, by use of statements that are not warranted by the record, inject into the mind of the jury a poison that cannot be neutralized by any admonition that the judge may give. And this court has held that such conduct may work a reversal in a case that is otherwise without prejudicial error. *Powers v. State,* 75 Neb. 226.

We do not reverse the present case on the ground of misconduct of the county attorney, but merely refer to it for the reason that the complaint is so often made that we have deemed it well to again express our disapproval of such conduct.

We have not discussed all of the testimony that we find in the voluminous record before us, but deem it sufficient to say that the testimony fails to connect the defendant with the crime with which he is charged.

For the errors appearing in the record, the case is

REVERSED.

SEDGWICK, J. not sitting.