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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1917.
JANUARY AND SEPTEMBER TERMS, 1918.

VOLUME CII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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CHARLES B. LETTON, Associate Justice
WILLIAM B. ROSE, Associate Justice
SAMUEL H. SEDGWICK, Associate Justice
FRANCIS G. HAMER, Associate Justice[1]
ALBERT J. CORNISH, Associate Justice
JAMES R. DEAN, Associate Justice.
CHESTER H. ALDRICH, Associate Justice[2]

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[1]August 10, 1918, Associate Justice Hamer died.
[2]November 16, 1918, Chester H. Aldrich was appointed.
[3]Resigned June 30, 1918.
[4]Appointed July 1, 1918.
[5]Resigned March 12, 1918.
[6]Appointed March 13, 1918.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1917.

A. D. DUNN, APPELLEE, V. DIXON COUNTY ET AL., APPELLANTS.

FILED DECEMBER 15, 1917. No. 19690.

1. **Counties and County Officers:** COUNTY COMMISSIONERS: DELEGATION OF MINISTERIAL DUTIES. Duties which are purely ministerial and not involving the exercise of discretion may be delegated to an agent by a board of county commissioners.

2. ———: CONTRACT WITH COUNTY ATTORNEY: ORAL PROOF. Where a party has rendered services to a county in the prosecution of a felony, under an agreement entered into with the county attorney acting as the agent of the county board, the authority of the county attorney to make the agreement, and the agreement made, may be proved orally, although not entered upon the minutes of the county board.

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

J. J. McCarthy, Fred S. Berry and *C. A. Kingsbury,* for appellants.

C. H. Hendrickson, contra.

MORRISSEY, C. J.

Appeal by a taxpayer from a judgment of the district court for Dixon county wherein plaintiff recovered a judgment for services rendered the county as an expert witness in the prosecution of a felony. One Flege had been tried and convicted of the crime of murder. The

judgment of conviction had been set aside and the cause remanded. The county attorney believed it necessary to procure the services of men eminent in the sciences of medicine and chemistry to do research work and testify as witnesses in behalf of the state. He so informed the board of county commissioners, and the record seems to bear out the claim that the board authorized the county attorney to engage the plaintiff and another for such services. No record of such authorization, however, was made by the board. That plaintiff rendered the services is not disputed, nor is it claimed that the amount asked is unreasonable.

But the claim of the taxpayer is "that, in the absence of a special contract, an expert witness is entitled only to the statutory fee." This appears to be based upon the claim that the county board did not itself employ plaintiff; that it could not make such employment, binding upon the county, merely by authorizing the county attorney to act for the board in negotiating with plaintiff. Several members of the county board, as well as the county attorney, testified in the district court. We shall not undertake to set out their testimony; but it shows that the board, after being assured by the county attorney that the successful prosecution of this case required the services of experts such as plaintiff, and having been assured by the county attorney that he had investigated the qualifications of plaintiff and the other party whom he decided to employ, did authorize the county attorney to engage plaintiff. Subsequently the board ratified such employment by allowing his claim for services rendered under such employment.

It is said that the county board cannot delegate its power to make such contracts to the county attorney. "Duties which are purely ministerial and executive and not involving the exercise of discretion may be delegated by the board to a committee or to an agent, employee, or servant." 11 Cyc. 397.

In authorizing the county attorney to return to Omaha and notify plaintiff that the county board desired him to make the necessary research and to testify in this case, and that, if he did so, his fee would be paid, the board was delegating a mere ministerial duty to the county attorney to act as its agent.

The point is also made that whatever direction was given the county attorney was given at an informal meeting of the board, that no record thereof was made, and that it cannot be proved by parol.

The testimony of the county attorney and members of the board is uncontradicted to the effect that, on the day the county attorney claims to have been authorized to engage plaintiff, the county board was in session, with a majority of the members present; that the county attorney explained fully to the board the nature of the testimony it was necessary for the state to procure; that he had talked to plaintiff, who is an expert in the line which was required; they discussed the question of fees, and, although no formal motion was considered or vote taken, the authority to act was given. As one member of the board expressed it: "We authorized him to go ahead and get those two doctors." Another member of the board stated that the county attorney told the board he needed the expert witnesses, gave them the name of plaintiff and another doctor, and, while he admits no vote was taken, he says: "Well, I considered it a vote; every man present advised him to go ahead and hire these doctors."

It is urged that this authority must be shown by the record, and cannot be proved by parol evidence. In *Ragoss v. Cuming County,* 36 Neb. 375, it was held that, where the county board had appointed a deputy and fixed his salary and he had actually rendered the service, the fact might be proved, though there was no record of an order found in the minutes of the county board.

In *Green & Van Duyn v. Lancaster County,* 61 Neb. 473, 481, in discussing a contract made with the county

board, but not shown on its minutes, the court say: "The county board was authorized to make such agreement. They appear to have made it. The same has not only been entered into, but also fully executed. We know of no rule, or of any reason for a rule, that would not allow a contract thus made and executed to be established by parol testimony in the absence of any record of the same. So far as our observation has gone, the authorities are uniform to the effect that such may be done in the absence of a statutory requirement that a record shall be made of a contract in order to render it valid and binding."

The judgment of the district court is right, and is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

ROBERT RULE, APPELLEE, V. CLAAR TRANSFER & STORAGE COMPANY, APPELLANT.

FILED DECEMBER 15, 1917. No. 19614.

1. **Negligence:** CONTRIBUTORY NEGLIGENCE OF CHILD: QUESTION FOR JURY. As a general rule, whether a child 11 years of age is of sufficient knowledge, discretion and appreciation of danger that it may be held guilty of contributory negligence is a question for the jury to determine.

2. ———: QUESTION FOR JURY. Evidence set forth in the opinion examined, and *held* to justify the submission to the jury of the question as to the negligence of defendant's employees.

3. **Municipal Corporations:** COLLISION AT STREET INTERSECTION: NEGLIGENCE: QUESTION FOR JURY. The mere fact that a motor truck is driven by defendant's employees at a greater speed than that prescribed by statute, or that the plaintiff in turning into another street to the left did not turn around the center of the intersection of the two streets, does not establish either negligence or contributory negligence as a matter of law, but the violation of the statute and of the ordinance may be considered by the jury as evidence of negligence.

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

Sawtell & Blazer and *Kimball & Peterson,* for appellant.

Sugarman & Sugarman and *J. C. Kinsler, contra.*

LETTON, J.

This action is brought for personal injuries resulting from the collision of an automobile truck belonging to defendant with a bicycle ridden by the plaintiff, who was about 11 years of age at the time of the accident. The accident occurred at the intersection of Eleventh street in Omaha, which extends north and south, and Capitol avenue, which runs east and west.

While there is a sharp conflict in the evidence upon almost every point, the testimony in behalf of plaintiff tends to prove that the motor truck, on which were riding the driver and another man, was driven carelessly and negligently and at an excessive rate of speed southward on Eleventh street; that the men were laughing and frolicking and paying but little attention to the street as they aproached the intersection. There is a railroad track on the west side of Eleventh street, upon which a box car was standing near the intersection. The sidewalk on the north side of Capitol avenue is 24 feet wide from the curb to the wall of the corner building on the west side of Eleventh street. The box car was so far north of the curb as to permit the driver of the automobile a clear view of the roadway to the west for a space of 12 feet before the truck reached the line of the curb. In this connection it may be said that a witness for defendant testified that the south end of the box car was even with the south wall of the corner building on the west side, and that he had a clear view of the sidewalk both east and west on the north side of Capitol avenue after the truck passed the south end of the box car. For the plaintiff it is also in evidence that the driver of the truck failed to give any signal

of its approach as he approached the box car and intersection, and the plaintiff, who was riding about the middle of the street, and who was unaware of the approaching truck, was knocked down and injured; the truck running about 40 feet after the collision.

Plaintiff contends that the driver should have given a warning signal and checked his speed or swerved so as to avoid the accident, and that if he had been driving at a lawful rate of speed he could have done so. The statute provides that motor vehicles in cities and villages shall not be operated at a rate of speed exceeding 12 miles an hour, or greater than is reasonable and proper, and when crossing an intersection of streets shall not be driven at a rate of speed exceeding 6 miles an hour.

The testimony on behalf of defendant, in the main, is that the truck was proceeding at a moderate and lawful rate of speed, and that the bicycle and the truck were each hidden from the other by the box car. They also deny that the truck was carelessly and recklessly driven; deny that it was driven more than 5 or 6 miles an hour, and say that it stopped within a few feet. Defendant denies any negligence and further contends that the plaintiff was guilty of contributory negligence by riding on the wrong side of the street in violation of an ordinance of the city of Omaha, which provides: "In turning into another street to the left the vehicle shall turn around the center of the intersection of the two streets."

Complaint is made that the court erred in overruling certain objections of defendant to a hypothetical question and to testimony to the effect that the plaintiff complained of pain in the injured foot. We think no error was made in these rulings. The district court by proper instruction left it to the jury to say whether contributory negligence could be attributed to a boy of the tender years of plaintiff in view of all the circumstances of the case. Complaint is made of some

of the instructions given by the court, but we find no error prejudicial to defendant therein.

The principal complaint is that the evidence does not affirmatively establish circumstances from which defendant's negligence may be fairly inferred, and that it was therefore error to submit the case to the jury. There is a substantial conflict in the evidence; but, under the facts as testified to by the plaintiff's witnesses and by one of the witnesses for the defendant, it seems clear that if the driver of the truck had been alert on approaching the intersection, and if he had been operating his vehicle at such a rate of speed that it was under control after he passed the box car, he might have stopped it or swerved to the south and east in such a manner as to avoid the collision. At all events, the evidence of negligence was sufficient to take the case to the jury.

It is also argued that a party cannot complain of the negligence of another where his own negligence concurs in producing the injury, and that a child 11 years of age living in the city and of ordinary intelligence may be guilty of contributory negligence as a matter of law. Of the soundness of these propositions we have little doubt. The general rule is that whether contributory negligence may be attributed to a child of such tender years is a matter for the jury under all the circumstances of each case. *Breedlove v. Gates*, 91 Neb. 765. It is only in an extreme case where the facts show plainly knowledge and appreciation of the danger to be incurred if a certain act is performed, such as in the case of *Johnston v. New Omaha T. H. E. L. Co.*, 78 Neb. 27, that a court will declare as a matter of law that a child of that age may be guilty of contributory negligence. The writer has always been of the view that the *Johnston* case is an exception to the general rule, and its doctrine should not be further extended. Even if it were established that the plaintiff was of full age and discretion and "cut the corner" in violation of

the ordinance, yet this would not necessarily establish contributory negligence as a matter of law. *Chicago, B. & Q. R. Co. v. Metcalf,* 44 Neb. 848, 859; *Missouri P. R. Co. v. Geist,* 49 Neb. 489, 496.

It is a question for the jury whether the truck was driven with due and proper care, and whether the boy was, or could have been, guilty of contributory negligence which was a proximate cause of the accident. *Mahar v. Lochen,* 166 Wis. 152. Some of the questions involved in this case are considered in *Rogers v. Phillips,* 206 Mass. 308, 28 L. R. A. n. s. 944, and in cases cited in note thereto; also in note to *Coffin v. Laskau,* L. R. A. 1915E, 959 (89 Conn. 325). Similar questions were presented in *Cloherty v. Griffiths,* 82 Wash. 634, and a like counclusion reached. The principal issue in this case is one of fact, and the evidence is such that a verdict in favor of either the plaintiff or the defendant might be supported thereby.

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

AFFIRMED.

SEDGWICK, J., dissenting.

The opinion says: "Even if it were established that the plaintiff was of full age and discretion and 'cut the corner' in violation of the ordinance, yet this would not necessarily establish contributory negligence as a matter of law." To support this proposition, *Chicago, B. & Q. R. Co. v. Metcalf,* 44 Neb. 848, is cited, where the law is stated to be: "It was erroneous to instruct the jury that the railroad company was liable if it failed to give the signal required by statute, provided the injury was caused in consequence of such omission." I think this, if it is to be regarded and applied as a general proposition applicable to cases like the one now at bar, is fundamentally wrong, and that the case, instead of being approved by relying upon it as authority generally, should be overruled, if it is regarded as having that

meaning. As supporting this statement in the syllabus, the opinion in the *Metcalf* case cites ten opinions in which this court has considered the question of negligence or contributory negligence. In none of these is the question considered whether the failure to obey a law intended for the safety of the public is actionable when such failure directly causes an injury. Indeed, in the *Metcalf* opinion it is said: "It is everywhere agreed that a jury may infer negligence from the single fact of the violation of a statute, providing the injury was the direct result of such violation." And yet it seems in that opinion to be considered that, if the jury do find that the neglect to ring the bell or sound the whistle at a public crossing was the cause of the injury, they may still find that there was no negligence. The commissioner who wrote the opinion discusses at large the fact that the party injured was not attempting to cross the railroad, but his team was standing near the crossing at the time. It appears that this was a new question in this court, and the language used in paragraph 4 of the syllabus quoted above was used with reference to this new situation and ought not to be considered as applicable here. And yet, as I think, carelessly, the proposition to be discussed is thus broadly stated in the opinion, "if any duty is imposed in favor of others, does a violation of the statute as to such persons merely afford evidence of negligence, or does it constitute negligence as a matter of law, provided the injury be the proximate result of the violation of the statute?" which apparently leads the court in the case at bar to consider it as of general application. The statute under which that case was decided was quoted in *Missouri P. R. Co. v. Geist*, 49 Neb. 489, and expressly provided that if the statute is not observed the corporation shall "be liable for all damages which shall be sustained by any person by reason of such neglect." The court, while it cited *Chicago, B. & Q. R. Co. v. Metcalf, supra,* with approval, evidently did not regard that case as deciding as a general proposition

that the statute did not mean what it said or was invalid. There is nothing in the *Geist* case to commit the court to the holding that the corporation can neglect to obey the law and not "be liable for all damages which shall be sustained by any person by reason of such neglect." There is some confusion of language in the various opinions upon that question, but it seems to me that for the most part they can be harmonized. Some cases that are discussing the question whether the plaintiff's violation of law was a defense in that particular action, say that such violation is not in itself a defense, but would be a good defense if it appeared that it was the proximate cause of the injury complained of. And there are a few cases that say that such violation of law is not in itself negligence, but is evidence of negligence, meaning that it is not in itself contributory negligence that would preclude his recovery, but is evidence of such contributory negligence, and, if followed with evidence showing that it was the proximate cause of the injury complained of, would amount to a complete defense. The more careful opinions say that such violation of law on the part of the plaintiff will not of itself amount to a defense, but if it is the proximate cause of the injury complained of, the plaintiff cannot recover. It seems strange to say as an abstract proposition that to neglect to obey the law is not negligence. An act of negligence on the part of the plaintiff will not defeat his recovery, unless such act was the proximate cause of his injury, and if the plaintiff's negligence had nothing to do with his injury it is not necessary to say that it is not negligence in itself. It is enough to say that it was not contributory negligence preventing a recovery.

And, so, if we consider that this boy was of sufficient discretion to know that to violate this law of the road was dangerous and might be the cause of the very accident that he complains of, he must then be treated as a person of full age and discretion, and in such case we must inquire whether this violation of

the law on his part was the proximate cause of his injury, so that it would not have occurred if he had obeyed the law. If, therefore, he was of full age and discretion and "cut the corner" as the opinion says, and in doing so struck the defendant's truck, can we still say that there is a question remaining for the jury to determine? If there is a congestion of traffic in the street, or some unusual circumstances place the rider of a bicycle in danger, and in the emergency he acts as a reasonable person would, the fact that he rode on the wrong side of the street in such emergency will present a question for the jury whether he exercised the proper degree of care and acted as a man of ordinary prudence would act under such circumstances. This was held in *Cloherty v. Griffiths,* 82 Wash. 634, one of the cases formerly relied upon for the conclusion reached in the majority opinion. In *Reynolds v. Pacific Car Co.,* 75 Wash. 1, another case relied upon, it was claimed that because the plaintiff was driving his automobile to the left of the center of the street on which he was driving, and was struck by an automobile on a crossing street, his recovery for damages was not precluded as a matter of law because it did not conclusively appear that he was on the left of the center when the collision took place, and did not appear that the violation of the ordinance was a proximate cause of the collision. How different such a case is from a person driving on the left side of the street, and, turning suddenly around a corner to the left, colliding with another machine which was being driven on the right side of the street as the law requires. If the question was fairly presented to the jury, it seems to me that reasonable men could not differ in concluding that if this boy had been riding on the right hand side of the street and instead of turning abruptly around the corner to the left, had gone around the center of the street, the accident as detailed in this evidence could not have happened.

This regulation against turning abruptly around the corner to the left is one of the most essential regula-

tions for safety in our public streets in towns and cities. No one can violate this regulation if driving at an ordinary rate of speed without danger of an accident. And when this regulation is violated by one driving at ordinary speed, whether he will meet with an accident depends wholly upon whether some traveler on the right hand side of the intersecting street, as the law provides, happens to be at the point where this careless driver will necessarily collide.

The rule is for the safety of persons driving on the proper part of the street, and the authorities are practically unanimous that in such cases, if an observance of the rule by the plaintiff would have avoided the accident, he cannot recover.

JACOB MOHLER, APPELLANT, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLEE.

FILED DECEMBER 15, 1917. No. 19726.

1. **Eminent Domain:** MEASURE OF DAMAGES. The provisions of sections 7118, 7120, Rev. St. 1913, relating to condemnation proceedings for the purpose of extending the campus of the state university construed, and *held* that the provisions thereof are declaratory and the measure of damages heretofore applied in this state prevails and that loss of time and the cost of removal are not elements of damage.

2. ———: APPEAL: CONFLICTING EVIDENCE. There being a substantial conflict in the testimony with respect to the value of the property, the verdict of the jury will not be disturbed.

3. **Appeal:** ADMISSION OF EVIDENCE: HARMLESS ERROR. A judgment will not be reversed for error in the admission of testimony unless it is apparent that the substantial interests of the party complaining have been injuriously affected.

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

J. A. Brown and *George W. Berge,* for appellant.

F. M. Hall, H. W. Baird and *Fred C. Foster, contra.*

LETTON, J.

This is an appeal in certain condemnation proceedings. The property involved is a portion 50 by 50 feet of a city lot in Lincoln on which is situated a one-story seven-room cottage, modern except heat. The appraisers valued the property at $2,200. On appeal to the district court the jury found the value to be $2,250. The owner of the property being dissatisfied with the verdict has brought the case here for review. The court instructed the jury that the sole question it should determine was the value of the property at the time and place of its condemnation, saying further: "This would be the market value of the property at the time, what the appellant Jacob Mohler could have obtained for it in money on the market under conditions where it would be a voluntary sale on his part and a voluntary purchase on the part of the purchaser. The mere fact that it was his home at the time and that he would have to suffer the inconveniences of moving would in law make no difference."

Several assignments of error are made. The point is urged that the court erred in limiting recovery to the cash value of the property taken. The statute provides that the duty of the appraisers "shall be to carefully inspect and view the lands and hear all parties interested therein with reference to the amount of damages and the value of the lands, when they are so inspecting and reviewing the same, and for that purpose the appraisers shall give the parties interested reasonable notice of their proposed inspection and view of the lands, and thereafter they shall assess the value of such lands and the damages which the owners thereof shall sustain by the appropriation of such lands, and make report in writing to the district court of the county." Rev. St. 1913, sec. 7118. Section 7120, Rev. St. 1913, provides as to appeals: "Thereupon the appeal shall be set down for hearing at the next term of court, and shall be heard and determined in like manner

as appeals from awards in condemnations for railroad right of way."

Plaintiff insists that under the statute he was entitled to prove that he lost time from his employment as a railroad engineer, and that he had been compelled to procure another house and move his household goods, all to his damage in the sum of $250. The measure of recovery where property has been taken for a railroad right of way is the value of the land taken, and damages to the remainder of the tract not actually appropriated. This rule must have been in the mind of the legislature when this statute was enacted. It is merely declaratory of the former law. There is nothing in the text to indicate that it was the intention of the legislature to introduce a new element of damage.

It is complained that the damages are inadequate. The evidence is conflicting as to value, and the rule must be applied that where there is a substantial conflict in the testimony the verdict of a jury will not ordinarily be disturbed. The estimates of the value of the property run from $1,800 to $3,500, and on the rental value from $12.50 to $25 a month, but it would seem that the witnesses best qualified to know the actual value made the lower estimates. The undisputed evidence shows that the property faced upon an unpaved portion of the street; that the street was obstructed several blocks north by a railroad yard; that the growth of the city is mainly to the northeast and southeast and that property in the locality has been much decreased in value for more than ten years by reason of the movement of population in these directions. Some real estate dealers testified that it has been difficult to find buyers for property in this vicinity for a long time; that a large proportion of it has been for sale; and that before the campus extension agitation sales were made in this locality at a lower price proportionately than the value fixed by the appraisers.

It is urged that the court erred in permitting the witness Stephenson to relate incompetent and irrele-

vant evidence to the jury in an argumentative form. The first portion of his testimony of this nature might properly have been excluded, but no objection was made to its reception and no motion was made to strike the same. Later, objections were made which we think should have been sustained, but in view of all the evidence we are of opinion that the testimony did not influence the jury prejudicially to plaintiff. The judgment of the district court is

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

ELMER E. DODSON, APPELLEE, v. DAWSON COUNTY IRRIGATION COMPANY, APPELLANT.

FILED DECEMBER 15, 1917. No. 19824.

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

W. A. Stewart, E. A. Cook and *W. M. Cook,* for appellant.

George C. Gillan and *I. J. Nisley, contra.*

LETTON, J.

Action for damages caused by the damming of a natural drainage way and the consequent backing of water over a field of oats belonging to plaintiff. The defense is that the rain was unprecedented and amounted to an act of God which defendant was not required to anticipate. The evidence is somewhat conflicting, but the preponderance is with the plaintiff.

Complaint is made of one of the instructions, but there is nothing contained in it that is prejudicial to defendant. The damages are not excessive. The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

ALBERT A. BLAIR, APPELLANT, V. OMAHA ICE & COLD STORAGE COMPANY, APPELLEE.

FILED DECEMBER 15, 1917. No. 20386.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: COMPENSATION: ACCIDENT. Under the Nebraska statute, compensation can only be made for personal injuries or for the death of an employee "by accident arising out of and in the course of employment" and unless a disease is traceable to an "accident" as defined in section 3693, Rev. St. 1913, the law does not award compensation.

2. ———: ———: ———: DISEASE. A disease arising from the ordinary incidents of an occupation and which may reasonably be said to be the result of an occupation is expressly excepted by said section of the act and no recovery can be had for disability occasioned thereby.

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

Weaver & Giller, for appellant.

Gurley & Fitch, and *L. A. Hickman, contra.*

LETTON, J.

Action under the workmen's compensation law. Defendant operates an ice manufacturing establishment in Omaha. The ice is manufactured by immersing a can containing water in a tank holding a freezing mixture. When the contents are frozen the cans are raised by the use of a lever, dipped into a tank of hot water to loosen the contents, and the ice then "pulled" or emptied. Plaintiff began work as an "ice puller" in the summer of 1916. In the summer time the ice pulling took most of his time. When cold weather came he pulled ice part of each day and afterwards, under the directions of the foreman, did whatever work there was to do around the plant. In January, 1917, after pulling ice, he was set to cleaning the flues of one of the boilers. This was done by using a hose with an appliance at the end. His testimony is to the effect that,

when working at the end of the boiler next to the smokestack, this was very hot work, causing him to perspire freely; that, after working for about a week indoors at boiler cleaning, he was put to work, after the ice was pulled each day, to lower two pumps which were supported by brick pillars above the well outside of the building; that while engaged in this work water dripped upon him and he became very cold, the temperature being about 15 to 18 degrees below zero; and that, after having engaged in this work for about a week, he contracted sciatic rheumatism, became unable to work, suffered severe pain and was incapacitated from that time to the time of the trial. For this condition he claims compensation. There is testimony that the boilers are in a large room with high ceiling and that the temperature near the boilers is about 60 degrees, the same as in other parts of the room. Plaintiff was not required to work upon the pumps on the same days that he was cleaning the boiler, and while doing this the men would work until they were cold and then would go into the building and warm themselves.

For the defense it was testified that the plaintiff had complained of rheumatism in November, when he had been off duty for eight days and had used liniment at that time. Plaintiff says this was on account of a strain of the back which he got from lifting a heavy piece of ice. A physician testified for plaintiff that exposure to heat for a number of days whereby the pores became opened and the individual sweats profusely, followed by several days of exposure to severe cold and wet, would be apt to cause sciatic rheumatism; that while arthritic rheumatism is accepted as a germ disease, this is not the case with sciatic rheumatism, and that its causes are obscure. That in his judgment, from the history plaintiff gave him, the sciatica was the result of the chilling and of the extremes of temperature.

Plaintiff insists that the illness was an "accident" as defined in the compensation act, while defendant insists that the disease was contracted in the natural course of events, and was not the result of accident. The statute involved provides: "Compensation shall be made for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment." Rev. St. 1913, sec. 3651. "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. The terms 'injury' and 'personal injuries' shall mean only violence to the physicial structure of the body and such disease or infection as naturally results therefrom. The said terms shall in no case be construed to include occupational disease in any form," etc. Rev. St. 1913, sec. 3693.

Was the sickness of plaintiff an "accident?" There was no event which happened suddenly and violently which produced at the time objective symptoms of an injury. The statute provides that the terms "personal injuries" and "injury" "shall mean only violence to the physical structure of the body." There was no violence to the physical structure. The cases in this state cited by plaintiff are clearly distinguishable. In *Manning v. Pomerene,* 101 Neb. 127, upon which the plaintiff places great stress, there was an actual accident. The injured man was endeavoring to move a heavy iron beam when a strain or lesion occured in his physical structure which produced objective symptoms of an injury at the time. There was actual violence to the physical structure of the body in the cases of *Young v. Western Furniture & Mfg. Co.,* 101 Neb. 696, and *Kanscheit v. Garrett Laundry Co.,* 101 Neb. 702, in which it was held that a sunstroke or heat stroke came within the provisions of the statute. In each of

these cases the stroke happened suddenly and unexpectedly and produced at the time objective symptoms of an injury. Attention is called to cases cited in the notes to L. R. A. n. s. 1916A, 283, 290 (*Adams v. Acme White Lead & Color Works,* 182 Mich. 157) and L. R. A. n. s. 1917D, 103. There is a difference in the statutes of different states, and cases which in some states would be held to be within the law are in other states necessarily excluded. It is pointed out in the Bulletin of United States Bureau of Labor Statistics No. 203, issued in January, 1917, that the qualifying term "accidently" does not appear in the laws of California (as amended in 1915), Connecticut, Massachusetts, Ohio, West Virginia, and the federal statutes of 1908 and 1917, so that cases from those jurisdictions afford no light as to whether cases of this nature fall within the Nebraska statute. In practically every case in which the workman was held entitled to recover, which is at all similar, the facts disclosed a sudden event happening at a particular time to which the injury was directly traceable. Within this class of cases are sunstroke, heatstroke, hernia, and injuries from freezing. In a number of cases recovery has been allowed for death from a subsequent disease such as pneumonia, but in such cases there has always been some accident, such as a miner being compelled by accident to the machinery to stand in cold water for a long time, or a pilot jumping into a boat which partly upset and caused him to become wet and chilled resulting in sciatica, or some other accidental occurrence. The accident may not always have affected the individual directly, but it set a train of causative events in motion to which the disease was directly attributable. *Alloa Coal Co., Ltd., v. Drylie,* 6 B. W. C. C. 398; *Brown v. Watson, Ltd.,* 7 B. W. C. C. 259. Where a bill collector hurrying to finish his work became overheated, chilled by exposure, which developed into pleurisy, it was held no accident. *McMillan v. Singer Sewing Machine Co., Ltd.,* 6 B. W. C. C. 345.

In the case at bar no accident has been shown. The case is in no wise different than the ordinary case where a man who has been engaged in indoor work for a time does outdoor work in cold weather and contracts a severe cold. Indeed, it may be questioned whether the trouble according to the evidence of the doctor was not, to some extent, at least, occupational, and the statute expressly provides that the terms used therein shall in no case be construed to include occupational disease in any form. This court has already construed very liberally the provisions of the statute; but to hold that plaintiff's sickness was the result of an accident would be in our opinion to go beyond any reasonable construction. Even in Connecticut where "accident" is not a requisite it was held in a similar case there could be no recovery. *Linnane v. Ætna Brewing Co.*, 91 Conn. 158.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

BANK OF CORTLAND, APPELLEE, V. EDWIN MAXEY, APPELLANT.

FILED DECEMBER 15, 1917. No. 19096.

Trial: DIRECTED VERDICT. The trial court should not direct the verdict of the jury unless the evidence is so clear upon every point upon which the verdict must depend that reasonable minds could not come to any other conclusion.

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

J. B. Barnes, Edwin Maxey and *George A. Adams,* for appellant.

J. J. Ledwith and *Bruce Fullerton, contra.*

SEDGWICK, J.

In this case the trial court directed a verdict and entered a judgment for the plaintiff. The defendant appealed. The action was upon a promissory note given by the defendant to W. B. Sprague, who was the president and principal manager for the Lost Springs Coal Company. The alleged consideration for the note was the purchase of stock in that company. The note was assigned by Sprague to the plaintiff bank. This court upon the first presentation entered a judgment of affirmance without an opinion. Afterwards a re-argument was ordered, and, upon further consideration of the evidence in this record, we conclude that it is not so clear that the note sued upon was fairly obtained, upon a sufficient consideration, or that this plaintiff is the owner of the note in due course without notice of defendant's rights as against the original payee as to require the trial court to take the case from the consideration of the jury. As the case will be again tried, it is not deemed advisable to discuss or recite the evidence.

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

REVERSED.

ROSE and CORNISH, JJ., not sitting.

MARY MORAN ET AL., APPELLEES, V. WILLIAM CATLETT ET AL., APPELLANTS.

FILED DECEMBER 15, 1917. No. 19017.

1. **Process:** CONSTRUCTIVE SERVICE: AFFIDAVIT. "An affidavit for constructive service upon unknown heirs, under section 83 of the Code, must be made by the plaintiff himself, if an individual, and not by his attorney, and must be verified positively." *Moran v. Catlett*, 93 Neb. 158.

2. **Foreclosure of Tax Lien:** JURISDICTION: RECITAL IN DECREE. A recital in the decree rendered in an action to foreclose a tax lien

brought against a nonresident, that the court finds due and legal notice of the filing and pendency of the action was given to the defendants, will not supply the lack of facts necessary to confer jurisdiction. *Duval v. Johnson*, 90 Neb. 503; *McKenna v. Pleasant*, 96 Neb. 581.

3. **Evidence:** PRESUMPTION: JUDICIAL PROCEEDINGS. An alleged presumption in favor of the regularity of the proceedings of the court cannot be made to contradict the record itself.

4. **Appeal:** LAW OF THE CASE. A decision of this court on a former appeal of a question presented by the record becomes the law of the case, and such question will not ordinarily be re-examined on a subsequent appeal. *Mead v. Tzschuck*, 57 Neb. 615.

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

Hainer & Craft, A. W. Lane and *James I. Rhea*, for appellants.

Wilcox & Halligan and *R. H. Beatty, contra.*

HAMER, J.

This case is here for the second time. *Moran v. Catlett*, 93 Neb. 158. It comes on appeal from the judgment of the district court in favor of the plaintiffs. It involves title to the southeast quarter of section 13, township 10 north, range 39 west of the sixth P. M., in Perkins county, Nebraska. The action is brought by the plaintiffs to set aside certain conveyances founded upon alleged tax sale certificate foreclosure proceedings, and to be allowed to pay the taxes against said land and to redeem it. At the first trial a demurrer to the plaintiffs' petition was sustained and the cause dismissed. The plaintiffs appealed, and this court reversed the judgment of the district court. The judgment was rendered on a demurrer to the petition. We held the petition good. Whether our former judgment should be adhered to is one of the questions which we are called upon to determine.

On July 15, 1891, Patrick Fitzgerald died intestate and the owner of an executory contract to purchase from the Union Pacific Railroad Company the land in

controversy. He left surviving him his widow, Mary Fitzgerald, now Mary Moran, and one son, Patrick Thomas Fitzgerald, who was born on the 17th day of August, 1891, a month and two days after his death. The widow of Patrick Fitzgerald completed the payment of the purchase price of the land, and on the 24th day of January, 1894, the Union Pacific Railroad Company conveyed said land by deed to "the heirs at law of Patrick Fitzgerald, deceased." The deed was recorded in the office of the county clerk of Perkins county, August 10, 1894.

The 1894 taxes on said land and the subsequent taxes remained unpaid, and on March 12, 1896, the land was sold at a private sale to John W. Welpton. On September 19, 1900, said Welpton filed his petition to foreclose his alleged tax lien, naming as defendants: "Mrs. Patrick Fitzgerald, full name to plaintiff unknown, the heirs of Patrick Fitzgerald, further and full names to plaintiff unknown, defendants."

One of the issues in the instant case is whether the plaintiff in the tax foreclosure case, John W. Welpton, signed an affidavit to procure service by publication on the defendants in the tax foreclosure case. It appears to be conceded that such an affidavit was necessary and jurisdictional, and that without making and filing the same in the tax foreclosure proceedings the judgment of the district court in the instant case should be in any event affirmed. A careful examination of the files discloses no such affidavit. We will examine the petition and each affidavit filed in the tax foreclosure proceedings for the purpose of finding whether Welpton himself signed either of them. We will also examine the evidence concerning whether an affidavit to obtain service by publication was ever filed in the case by John W. Welpton. The petition in the tax foreclosure case is signed John W. Welpton by his attorney, and the verification to this petition is signed and sworn to by his attorney September 12, 1900,

before "J. B. Sherman, Clerk of Dist. Court." The petition is shown by the filing mark to have been filed September 19, 1900. On the 19th day of September, 1900, an affidavit was filed in said case entitled "John W. Welpton, plaintiff, v. Mrs. Fitzgerald, and the heirs of Patrick Fitzgerald." The affidavit is sworn to by the attorney for the plaintiff before "J. B. Sherman, Clerk of Dist. Court," September 19, 1900. This affidavit recites that on the 19th day of September, 1900, plaintiff filed his petition to foreclose "a tax sale certificate upon the S. E. ¼, sec. 13, twp. 10 north, range 39 west, which said real estate is in the name of the heirs of Patrick Fitzgerald, deceased, as appears from the numerical indexes in the office of the county clerk of Perkins county, Nebraska; that said premises were conveyed to said heirs by the Union Pacific Railroad Company; that affiant has written said company and been informed by it that said heirs were in Chicago, Illinois; that affiant has been unable to learn the names or address of any of the said heirs and plaintiff has been unable to do so, and their names and address are to plaintiff wholly unknown and he is unable to ascertain the same. Wherefore, affiant and plaintiff prays that service may be made upon said heirs as unknown and without naming them." The above affidavit is not called by any name and is written with a pen.

On the 19th day of September, 1900, there was filed in the office of the clerk of the district court for Perkins county an affidavit, entitled as follows: "John W. Welpton, Plaintiff, v. Mrs. Fitzgerald, wife of Patrick Fitzgerald, other and full name to plaintiff unknown, the unknown heirs of Patrick Fitzgerald, deceased, Defendants." It is called "Affidavit for Service." It is sworn to by the attorney for the plaintiff, and signed by such attorney and sworn to by him before "J. B. Sherman, Clerk of Dist. Court," Sept. 19, 1900. This affidavit recites that the attorney for the plaintiff, naming such attorney, deposes and says that he is the duly authoriz-

ed attorney for the plaintiff herein; "that on the 19th day of September, 1900, the plaintiff herein filed his petition in the district court of Perkins county, Nebraska, against the said defendants, Mrs. Fitzgerald, widow of Patrick Fitzgerald, other and full name to plaintiff unknown, the unknown heirs of Patrick Fitzgerald, deceased, the object and prayer of which are to foreclose a certain tax sale certificate issued by S. Wall, treasurer of Perkins county, Nebraska, on the 12th day of March, 1896, at private tax sale for taxes assessed against the southeast quarter, sec. 13, twp. 10, Range 39 west, in Perkins county, Nebraska; that the plaintiff has paid as subsequent taxes, duly and legally assessed against said premises, the following sums, to wit:" The plaintiff claims payment of taxes levied for 1895 to 1899, inclusive. It is then said that there "will be due the plaintiff thereon, the 12th day of November, 1900, the sum of $105.94. Plaintiff prays for a decree that the defendants be required to pay the same, and that said sum be decreed the first lien upon said premises, and that 10 per cent. thereof be taxed as attorneys' fees and made a part of the decree. * * * That service of summons cannot be made upon the said defendants or any of them within this state. Wherefore, plaintiff prays service upon said defendants by publication." The filing mark shows it was filed September 19, 1900. On the 12th day of November, 1900, according to the filing mark on the back of the original paper, the plaintiff in the tax foreclosure suit filed a paper in the office of the clerk of the district court, entitled: "John W. Welpton, Plaintiff v. Mrs. Fitzgerald, widow of Patrick Fitzgerald, full name to plaintiff unknown, and the unknown heirs of Patrick Fitzgerald, Defendants." This paper is signed "John W. Welpton, Plaintiff," by his attorney, giving the name of the attorney. It is verified by such attorney, and appears to have been sworn to by such attorney, naming him, before "J. B. Sherman, Clerk of District Court," on the 12th day of November,

1900. The body of the foregoing paper reads: "Comes now the plaintiff and alleges that he is the holder and owner of a tax sale certificate set forth in plaintiff's petition; that the property involved in this cause appears by the records to be owned by the heirs of Patrick Fitzgerald, having been deeded to said heirs by the Union Pacific Railroad Company; that plaintiff has made all possible inquiry to discover the address of said heirs and has been unable to find the same; that plaintiff is informed by the Union Pacific Railroad Company that deed was forwarded to the said heirs at Chicago, Illinois, but plaintiff has been unable to discover the names of said heirs or their address. Wherefore, plaintiff prays that said heirs may be served by publication as the unknown heirs of Patrick Fitzgerald, deceased." There is a verification to the above paper, which avoids calling it by any name, and which recites on information and belief that the person making it, calling him by name, "is the duly authorized attorney for the plaintiff in the above-entitled action; that the matters and facts herein set forth are true as he verily believes."

The certified copy of the appearance docket in the tax foreclosure case shows the filing of the petition September 19, 1900, and on the same day the filing of two affidavits, one designated as "Affidavit for Service," and one simply as "Affidavit;" also, that on November 12, 1900, an "Affidavit" was filed. This corroborates the proof offered in the shape of the original files and the oral testimony for the plaintiff. While the appearance docket entries do not show by whom the affidavits mentioned were made, the files show "Affidavit for Service" filed September 19, 1900, and another "Affidavit" filed on September 19, 1900, and thereafter the filing of an "Affidavit" November 12, 1900. There is an agreement as to the number of affidavits filed, the time of filing them, and where one of the affidavits is named "Affidavit for Service" the appearance docket

designates it in the same way. No other affidavit is shown to have been filed which might correspond to an affidavit made by the plaintiff himself. The complete record agrees with the appearance docket and with the original files.

The affidavit written with a pen, and which in its position in the files in the bill of exceptions here is next to the petition and immediately on top of it, recites that it was written on the 19th day of September, 1900, and is sworn to on that date and filed on the same day. It is naturally suggested to the mind that this affidavit written with a pen, and which was filed at the same time as the petition, was filed for the purpose of obtaining jurisdiction. The first affidavit must have been deemed insufficient, or a second affidavit would not have been filed. The "Affidavit for Service," which is in typewriting, and the next affidavit thereafter in the files, being next to the affidavit written with a pen and immediately above it, appears to have been sworn to on the 19th day of September, 1900, and the filing mark on it is on that day. The affidavit written with a pen and also the affidavit in typewriting immediately next thereto are both sworn to by counsel for the plaintiff in the tax foreclosure case and appear to have been filed on the 19th day of September, 1900. It may be asked what was the purpose of filing the third "Affidavit," the paper of the date of November 12, 1900. The two prior affidavits being the affidavits filed September 19, 1900, must have been deemed insufficient by counsel, or the paper referred to as the third "Affidavit" would not have been prepared and filed. And it is such a peculiar affidavit. The affiant himself, being the attorney of the plaintiff in that tax foreclosure case, states "that plaintiff is informed by the Union Pacific Railroad Company" that the deed had been forwarded "to said heirs at Chicago, Illinois." The attorney does not in this "Affidavit" allege what he himself is informed or knows, but he alleges the

plaintiff "is informed." Then he says that "plaintiff has been unable to discover the names of said heirs," etc. If counsel for plaintiff in the tax foreclosure case filed his own affidavits, three of them, besides the petition, and at the time himself thought they were sufficient to enable the court to acquire jurisdiction, was there any reason why he should have thought it necessary then to file the affidavit of the said plaintiff? In any event, this paper must have been intended by plaintiff's attorney to perform some service. It was a statement made under oath because verified by the attorney. It was made on behalf of the plaintiff in that case. It could not be a petition, because a petition had already been filed. It was probably filed just before the making of the order of November 12, 1900, directing that service be made by publication for four consecutive weeks. In the mind of the attorney it must have been intended to perform some function, or he would not have prepared, and filed it.

The journal entry of the order of November 12, 1900, directing that service be made by publication for four consecutive weeks, recites: "And it appearing to the court from the affidavit of the plaintiff annexed to his petition;" but we do not find any affidavit annexed to the petition, or any evidence that an affidavit was ever attached to the petition. The affidavit above referred to which was written with a pen and the affidavit called "Affidavit for Service" appear to have been both signed and sworn to by counsel for the plaintiff in the tax case and were filed on the 19th day of September, 1900, and they follow one above another beginning on top of the petition, the petition being on the bottom of the files as they are fastened together in the bill of exceptions, and the affidavit written with a pen is next to and immediately on top of the petition, and the typewritten affidavit of the same date, the one called "Affidavit for Service," being placed immediately on top of the affidavit written with a pen. It would seem to be

a natural conclusion that the two affidavits first named and first filed were prepared and filed at the same time that the petition in the tax foreclosure case was filed. The peculiar "Affidavit" was sworn to November 12, 1900, and was filed on that day, as shown by the filing mark on the back of the same. If counsel for the plaintiff thought it was necessary to make and file three affidavits of his own, he probably did not think it necessary to file one signed and sworn to by his client. His three affidavits were made to acquire jurisdiction. Presumably he did not think that he needed more. The attempt of defendants to show that an affidavit might have been made by the plaintiff in the tax foreclosure case and might have been abstracted is not of a satisfactory character and is not supported by any testimony. No one testifies that the plaintiff in the tax foreclosure proceeding filed any affidavit. If Welpton had signed an affidavit, the opinion of this court in the first case heard, *Moran v. Catlett, supra,* would probably have disclosed that fact, and attention would have been called to it in that case.

The attorney for Welpton testified in the instant case. He would not himself testify that Welpton made an affidavit. "Q. You may state whether or not any affidavit was filed with the petition in said case made by John W. Welpton to the effect that the names and residences of the heirs of Patrick Fitzgerald, deceased, were unknown to him." He answered: "I am unable to state in that matter. I cannot recall in my own memory the facts with reference to it."

The deposition of J. B. Sherman, formerly county clerk and clerk of the district court for Perkins county, Nebraska, was introduced in evidence. At the time it was taken he resided at Eugene, Lane county, Oregon. He testified that he remembered that Mr. Welpton brought some tax foreclosure suits while he was clerk. He did not appear to know whether the Welpton affidavit had been filed or not. He said: "I cannot say

that I have any distinct recollection of the filing of any particular paper in said case, but it runs in my mind that Welpton's affidavit was filed, and that this was one of the missing papers referred to in the memorandum made by my sister. I must say that my memory is weak as to this." His testimony was given 13 years after he ceased to be the clerk. If it appeared to be weak to himself, then it cannot be strong to us. This testimony might be due to the force of suggestion contained in the letter which counsel for the defendants in the instant case wrote to the witness and which appears in the evidence. There is the statement in the letter that the affidavit and a tax receipt are missing, and that his sister had testified in the case and had said that she must have made the memorandum "files missing." He is told in the letter that if he "can remember that there were two papers missing and that the Welpton affidavit was one of them" then his testimony will be of value. The letter states that Judge Grimes made an order on Nov. 12, 1900, directing that the heirs of Patrick Fitzgerald be served with notice by publication, and that the order recited that Welpton's affidavit was on file and annexed to the petition, yet "the law is such that we must furnish all the evidence that we can that it was actually made and filed." There is much in the letter calculated to stimulate the failing memory of the witness and suggesting that he may testify to certain things mentioned. Every trial judge of wide experience and every trial lawyer knows that the testimony of the witness is often colored at the suggestion of counsel.

Maggie Sexon testified that she had been deputy clerk during the years 1900 and 1901; that some one took the files out of the office during that time whose name she does not remember; that when the files were returned some of them were missing, but just how many or what was missing she could not say; and that she made a memorandum "files missing" and put it

with the papers in the case. Her testimony was taken at least 13 years after she left the office, and all that is true touching the weakness of her brother's testimony applies to her testimony.

It is proper also to consider that at the commencement of the tax foreclosure case there would likely not have been any one on the side of the defense in that case who would know that Welpton had filed an affidavit. The mother of the infant heir had gone to Chicago, where the child was with her. It might be natural for some one then connected with the foreclosure of the tax case to try to fix up a good title. No one undertakes to say who broke open the eyelets or who took out any paper, if a paper was taken out. The motive to break the eyelets and create deceptive appearances might exist on either side, but the plaintiffs in the tax foreclosure case who were then on the ground would be likely to have a knowledge concerning the record not possessed by the others, and this might stimulate them to action.

The order procured would seem to have been made on the affidavits of Welpton's lawyer. If so, was there any reason why Welpton's affidavit should have been made and filed?

The decree of foreclosure in the tax case appears to have been made March 19, 1901. It orders that in case the defendants fail for the period of 20 days from the date of this decree to pay into court the said sum of $108.94, and the further sum of $10.89 attorney's fee, and also the costs of this action, that then and in that case the said premises shall be sold by the sheriff of Perkins county, Nebraska, as upon execution to the highest bidder to satisfy the amount so found due.

There is no other affidavit filed in said case except the affidavit showing publication in the Elsie Leader. The complete record confirms the examination made of the files. Plaintiffs claim that the amended petition

was adjudicated by *Moran v. Catlett* to be sufficient and that the evidence in this case sustains it; that in the said case certain material points were decided by this court that have become a part of the law of the case, the most important being that an affidavit for service upon unknown heirs of a deceased person must be made by the plaintiff in the action, and that said affidavit was not so made. The case being remanded to the district court, the defendants answered said amended petition and a trial was had thereon, and from the judgment rendered for the plaintiff the defendants have appealed.

It is contended by the plaintiffs in the instant case that in the tax foreclosure proceeding the decree, and the deed issued thereunder, and all subsequent transfers are void for the reason that the district court was without jurisdiction in the said case of *Welpton v. Fitzgerald,* because no affidavit was made and filed by the plaintiff himself alleging that the names of the heirs of Patrick Fitzgerald and their residences were unknown to said plaintiff in the tax foreclosure proceeding. Defendants contend mainly that Welpton did execute and file such an affidavit.

If what was decided in *Moran v. Catlett,* 93 Neb. 158, has become the law of the case and is decisive, then we need go no further. We held in that case: "An affidavit for constructive service upon unknown heirs, under section 83 of the Code, must be made by the plaintiff himself, if an individual, and not by his attorney, and must be verified positively." In *Mead v. Tzschuck,* 57 Neb. 615, it was held: "A decision of this court on a former appeal of a question presented by the record is therefore the law of the case." It was also held: "When the evidence is substantially the same as on a former appeal, the weight and effect to be given such evidence must be considered as foreclosed by the former decision on that point." In the opinion it is said: "The determination of a question

presented in reviewing proceedings had in the cause in the district court becomes the law of the case and will not be re-examined." Along the same line we find the following cases which sustain the view taken: *Coburn v. Watson,* 48 Neb. 257; *Fuller v. Cunningham,* 48 Neb. 857; *Wittenberg v. Mollyneaux,* 59 Neb. 203; *Richardson Drug Co. v. Teasdall,* 59 Neb. 150; *Hall v. Baker Furniture Co.,* 86 Neb. 389; *Anheuser-Busch Brewing Ass'n v. Hier,* 61 Neb 582; *Hoosier Mfg. Co. v. Swenson,* 87 Neb. 182; *Piper v. Neylon,* 93 Neb. 51; *Cronin v. Cronin,* 94 Neb. 353.

It is contended by the plaintiffs that where a judgment recites that there was due service on defendant, but where the complete record fails to show a jurisdictional service, the record controls over the recitation in the judgment. The position is sustained in *McKenna v. Pleasant,* 96 Neb. 581; *Vandervort v. Finnell,* 96 Neb. 515; *Duval v. Johnson,* 90 Neb. 503. We think the principle established by our former decisions touching this point should be adhered to.

Out attention is called to *Suiter v. Turner,* 10 Ia. 517, where it is held: "Every presumption obtains in favor of the regularity of proceedings in a court of general jurisdiction; and a recital in a decree in a foreclosure proceeding showing the service of notice by publication is sufficient to sustain jurisdiction." To this it may be answered that the record shows that there was no foundation laid by the filing of a proper affidavit, and this destroys any presumption that might obtain in the direction of regularity in the proceedings.

There is not only a total failure of proof that Welpton made the affidavit, but all the circumstances surrounding the transaction point to the conclusion that no affidavit was made. It is sought to show that this affidavit by the plaintiff must have been taken out of the files, because it is possible that if an affidavit had been there it might have been taken out. It would first have to be there.

In *Joost v. Craig,* 131 Cal. 504, an action was brought against a notary public upon the ground that he had falsely certified that one Charles A. Anderson of Redwood City had acknowledged the deed. The deed appears to have been forged by one Keon. Keon wrote the name Charles A. Anderson. The notary who took the acknowledgment knew that Keon furnished the deed to Fisher and received the money. In the opinion it was said: "This was a fact peculiarly within the knowledge of the defendant notary, and which, in the nature of things, it would be difficult for plaintiff to prove. Under such circumstances slight evidence is sufficient to shift the burden of proof." Because of the foregoing slight proof, it was held that the burden was cast upon the defendant in that case.

In the instant case, counsel for the plaintiff in the tax foreclosure case testified on behalf of the defendants. He is shown to have prepared the papers that were filed in that case, and the knowledge that the plaintiff had filed the affidavit required therein was peculiarly his, if such fact had actually existed. He declined to testify to it. The burden of proof is put upon the plaintiff in the tax foreclosure case, because the knowledge was peculiarly within the range of the duties of his counsel, and he offered his counsel as a witness on his own behalf. He refused to testify to the necessary fact, and therefore the defendants failed to maintain their contention.

All the material questions in the instant case seem to have been heard and determined in favor of the plaintiff and appellee and against the defendants and appellants in the case of *Moran v. Catlett, supra,* The finding of facts made by the district court at the trial of this case fully sustains the allegations contained in the amended petition held to be sufficient on the former hearing in this court.

The land of no man or woman should be taken from its owner for failure to pay the taxes due upon it with-

out a strict compliance with the law. As the taxes become a lien upon the land, which they do under the statute, they must sooner or later be paid. Fitzgerald was born very soon after the father died. The mother went to Chicago and took the infant with her. Should anything be held against this infant because he failed to pay the taxes against the land?

It is contended by appellants that the amount of the tax lien on the land was fully equal to the value of the land itself at the time of the sale, and that the plaintiffs made no effort to redeem until the commencement of this lawsuit, at which time the land had increased in value. Whether it will be profitable to the plaintiffs to redeem the land from tax liens is not before us. We pass only upon their right to redeem.

The grantee of the purchaser at the tax sale took his deed based upon the tax foreclosure decree with that knowledge of the infirmity in the proceeding which the law presumes. He could not be an "innocent purchaser" in the sense that term is used in the law. We have not been shown a sufficient reason for reversing the judgment of the district court. It appears to be right, and it is

AFFIRMED.

ROSE, J. I concur in the affirmance.

SEDGWICK, J., dissenting.

The majority opinion makes this case depend upon one supposed defect in the record. An affidavit for publication of summons was made by the plaintiff's attorney—yes, two or three of them were made by the plaintiff's attorney. They stated the facts that would justify such service, and there is no question now but that the facts existed at that time as stated in those affidavits. The statutory ground for service by publication is shown beyond question to have existed at the time, and the question decided is whether the plaintiff also made an affidavit himself in the case. If he did,

the sale is regular in all respects. If he did not, we have the technical point that the facts that everybody now knows existed were established by the attorney's affidavit and not by that of the plaintiff himself. The case was before this court and was decided upon a demurrer to the petition, 93 Neb. 158. The petition was held to state a cause of action. This was because the petition showed that the affidavit for publication was defective. There is now no doubt but that several defective affidavits were filed. When the case went back it was alleged that there was a proper affidavit filed which had been lost from the files, and that appears to be the only question determined. It was not presented at the former hearing. The judgment of the trial court recites that there was an affidavit of the plaintiff filed and finds it sufficient and renders a judgment accordingly. When such a record is attacked, the burden is not upon the defendant to show that the judgment is regular, or that the court had jurisdiction, but the burden is upon the plaintiff who attacks the record to show clearly that there was a want of jurisdiction. And when this foreclosure title has stood for 10 or 15 years and the land has been bought and sold by innocent parties relying upon this title, the burden of showing that the court was without jurisdiction upon some technical matter is rightly placed by the law upon the party who attempts to set aside the judgment of the court and he must make a clear and complete proof. The majority opinion is entirely predicated upon the alleged weakness of the evidence tending to prove that the affidavit of Welpton, the plaintiff in that case, was in fact before the court when the court so found. The evidence of several witnesses is quoted, including the evidence of the deputy clerk who kept the record—that some one took the files out of the office during that time whose name she did not remember, and that when the files were returned some of them were missing, but just how many or what was missing she could not say, and

that she made a memorandum "files missing," and put it with the papers in the case. And some of the evidence of the clerk is quoted as follows: "I cannot say that I have any distinct recollection of the filing of any particular paper in said case, but it runs in my mind that Welpton's affidavit was filed, and that this was one of the missing papers referred to in the memorandum made by my sister. I must say that my memory is weak as to this." Similar evidence of other witnesses is quoted. In connection with the evidence of each, a suggestion like the following is made in the opinion: "His testimony was given 13 years after he ceased to be the clerk. If it appeared to be weak to himself, then it cannot be strong to us." So it is assumed through the whole opinion that, when a plaintiff attacks the finding and judgment of a court of general jurisdiction 10 or 15 years after it is entered, the burden is upon the defendant to prove that the finding and judgment assailed are true and valid. Not only is the burden placed upon the wrong party, but it is assumed that his evidence must be clear and positive and directly to the point considered. It seems to me that this cannot be the law. There is so much evidence that some of the papers were taken from the files before the time arrived for making a complete record under the statute (Rev. St. 1913, sec. 8013), and that the affidavit of the plaintiff himself was before the court when the finding to that effect was made, that, even if it devolved upon the defendant to make such proof when the findings and judgment were attacked by the plaintiff, this decision is wrong, especially when it is remembered that the plaintiff has offered no evidence in support of the allegations of his petition, except that the files have not been preserved complete for more than a dozen years, and that the complete record does not contain the affidavit in question. It is admitted that the fact existed that the affidavit of the plaintiff should have shown, and that the court found that the plaintiff's affidavit was upon file at the time of

the decision, and one who alleges that that is not true has no presumptions in his favor, but all presumptions are against him. The second paragraph of the syllabus might be considered as indicating that the court intends to hold that the burden of proof is upon the party who seeks to uphold the judgment of the court. Two decisions of this court are there cited as supporting the proposition of this paragraph of the syllabus. One of them, *Duval v. Johnson,* 90 Neb. 503, stated that "A recital in the judgment that 'the court finds that due and legal notice of the filing and pendency of this action was given the defendants' will not supply the lack of the facts necessary to confer jurisdiction," but does not in that connection state how "the lack of facts" should be made to appear. The case is not at all an authority for the proposition that the burden of proof is upon the party who seeks to uphold the judgment. The finding of the trial court that notice of the "pendency of this action was given the defendants" is not strictly a finding of fact alone, but is also a conclusion of law, and it is not a finding that any specific fact exists. It appears from the opinion in that case that there was no record that any notice whatever was published and that there was affirmative evidence that no such notice was published and no evidence whatever that it was. The case does not determine that the burden of proof was upon the party attempting to support the judgment. It simply determines that when there is no record furnishing any such proof, and there is proof to the contrary, the jurisdiction of the court is not sustained by the record. The opinion in the case cited says that this court has held that "the record must affirmatively show that the statute has been complied with," and that "this doctrine has been severely criticised by text-writers. * * * The weight of authority in other states seems to support a contrary view." Clearly this language that the record must affirmatively show that the statute has been complied with is not intended

in that decision as it is applied here in this case. In the case at bar the court specifically found that the affidavit of the plaintiff was filed, and this court has frequently held that the files of the newspaper in which the notice was published and other extrinsic evidence may be introduced to show that the notice was in fact published. The case is authority for the proposition that the party who attacks the judgment has the burden of showing that the court that rendered it was without jurisdiction. This burden he may sustain by introducing the record which fails to recite that any notice was actually published, or fails to recite some other jurisdictional fact, and this condition of the record *with affirmative oral testimony* tending to prove that no such notice was published may be sufficient to sustain that burden and defeat the judgment. In *McKenna v. Pleasant*, 96 Neb. 581, the other case cited in support of the second paragraph of the syllabus of the majority opinion, the rule is stated to be: "When the complete record of a forclosure of a real estate mortgage fails to show that an affidavit for publication of the summons was filed in the case, and no such affidavit appears in the files, it must be found that no such affidavit was filed, in the absence of any affirmative proof of that fact." That is, if there is no record that any such affidavit was filed and no "affirmative proof," this would be sufficient *prima facie* proof that no affidavit was filed. But when, as it appears in the case at bar, the absence of such affidavit from the complete record is explained and accounted for, and there is other evidence tending to show that such an affidavit was in fact filed, and there is an express finding of the court to that effect, clearly the attack upon the judgment has not been sustained. If we say that after many years the fact that the affidavit is not still in the files is so conclusive that the findings and judgment are wrong, we will, I think, render invalid a majority of the foreclosure titles in the western half of the state, if not a

larger proportion of them—a most unfortunate thing to do. It is suggested that when lands are sold for taxes there ought to be a liberal right of redemption. But there is also another side to be considered. If titles under foreclosure sales for taxes are rendered absolutely uncertain, the payment of real estate taxes cannot be enforced. Such titles are very common throughout Nebraska, and especially in the western part of the state. Twenty-odd years ago, when these taxes in this case became due, it was quite a common idea that the lands were not worth paying taxes upon, and so they became transferred to those that were willing to pay the taxes through foreclosure sales. One who buys land at a foreclosure sale takes his chances whether the value of the land goes up or down. If the value goes down or remains stationary, there is seldom any effort made to set aside the sale or to redeem the land. But if the land advances rapidly in value, then there will always be found some one to contest the proceedings if there is any possible hope of success in doing so. I suppose it very rarely happened that the clerk of the court was a lawyer or knew how to make up a record, and the judges themselves were not as particular to see that the clerk made up the record technically correct in all respects as perhaps the judges are now. I suppose that, among all of the foreclosures by tax sales in Nebraska, not more than one in ten can be found to stand the test of this decision.

DEAN, J., concurs in this dissent.

STEPHEN J. AMBLER ET AL., APPELLEES, V. JOHN C. JONES ET AL., APPELLANTS.

FILED DECEMBER 15, 1917. No. 19644.

1. **Homestead:** CONTRACT TO CONVEY: ENFORCEMENT. A contract in writing by the husband to convey the homestead occupied by himself and wife may not be enforced against the homestead.

2. ———: DEED IN ESCROW: DELIVERY. Under such contract there is no authority upon the part of one holding a deed for the premises in escrow to deliver the same to the purchaser.

3. ———: CONVEYANCE: EXECUTION: EVIDENCE. If the signing of the deed has been procured by the husband through the coercion of his wife, and the same is known to the purchaser, the facts pertaining to the execution of the deed may be inquired into regardless of the certificate of acknowledgment made by the notary public.

4. ———: ———: COERCION. The husband cannot coerce his wife so as to take from her the homestead which she is unwilling to abandon or exchange.

5. ———: ———: SPECIFIC PERFORMANCE: EVIDENCE. Where the husband and wife occupied a homestead in Nebraska, and the wife was unwilling that the homestead should be exchanged for land in Colorado, which her husband had agreed in writing to take in lieu of the homestead, but she wished to continue to occupy the same, and the husband undertook to coerce her so that she would sign the deed with him and consent to its delivery to the Colorado parties, and he succeeded in so far as to obtain her signature to the deed, and the notary who certified to the acknowledgment on the deed saw her sign the instrument, but failed to inquire of her whether the execution of the same was her voluntary act and deed, but assumed that she willingly executed the instrument because he saw her sign it, the determination of an action to compel specific performance of the contract made by the husband, and for delivery of the deed then in the hands of one holding it in escrow, will be determined on the evidence, without regard to the certificate of the notary, if the plaintiffs have knowledge of the coercion of the wife by the husband.

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

Samuel J. Tuttle, for appellants.

Clarence E. Tefft and *Matthew Gering, contra.*

HAMER, J.

This action was brought by Stephen J. Ambler and Helen C. Ambler, plaintiffs and appellees, against John C. Jones and Minnie Jones, defendants and appellants, and Thomas Murtey and The First National Bank of Weeping Water, defendants and appellees. The plaintiffs Ambler are husband and wife. So are the defend-

ants Jones. The action is for specific performance. The plaintiff Stephen J. Ambler owned 17¼ acres of land in Delta county, in the state of Colorado, and the defendant John C. Jones owned 15 acres of land in Cass county, Nebraska. On or about January 14, 1915, they made a written agreement to trade and exchange these tracts. The contract bears that date. With the Ambler land was to go certain stock in a ditch company and certain water rights. The wives of the parties did not sign the agreement; and the next day, according to its date, a deed of the Nebraska land was signed by the defendants Jones, by which it was to be conveyed to Helen C. Ambler. The certificate of acknowledgment appears to have been signed by the notary public, Thomas Murtey, three days later, January 18, 1915. The plaintiffs seek to compel an exchange of the properties.

The wife, Minnie Jones, makes a separate answer to the effect that she did not sign her name to the deed "voluntarily and of her own free will, but by the coercion, threats and duress of her said husband, said John C. Jones, by repeated urgings and persuasion, even to the extent of leaving her, and himself going to the state of Colorado. And that these urgings, persuasions and threats, operating upon her exceedingly nervous state and condition, caused her to sign said deed." She also alleged that she was violently opposed to the signing of the said deed and to the exchange of their homestead for lands in Colorado, and that she never executed the deed otherwise than to sign it, and never delivered it or in any manner sanctioned its delivery; that she never "knowingly appeared before any notary public or other officer legally authorized to take her acknowledgment to said deed, nor did she ever acknowledge the same to be her voluntary act or deed, or use or employ other words in substance and effect meaning the same." The land which the plaintiffs seek to have conveyed is the Jones homestead.

The defendant John C. Jones answered that the land was the homestead of his family, consisting of his wife, his daughter and himself, and that they had occupied the same for more than ten years continuously; also that the contract made between Stephen J. Ambler and himself was made under the general statutes of Nebraska respecting agreements for the conveyance of lands and respecting conveyances of the homestead, and unenforceable and incapable of ratification.

Thomas Murtey one of the defendants, is the notary public in the case, and is also cashier of the First National Bank of Weeping Water. He verified the answer made by himself and the bank. Both Murtey and the bank in their answer disclaim any interest in the deeds and contract, and say that the same are in the hands of the clerk of the district court for Cass county, Nebraska, or in the hands of the court reporter. They seek to have the action dismissed and to be relieved from liability for the payment of costs.

Murtey testified that he drew the contract signed by Jones and Ambler, and also that he drafted the deeds; that he put the contract and the deeds in the vault of the bank. There seems to have been some hurry in the execution of the deeds. January 18, 1915, Murtey had both deeds and the contract in his possession. Jones objected that Ambler's abstract did not have a plat, and Murtey testified that he was not sure whether he got it from the county surveyor of Delta county, Colorado, or not, but he believed that he did. The testimony is not very clear upon that point. It barely suggests that Murtey probably tried to help Ambler complete the trade.

The case presents, first, the question of whether the deed was legally executed and acknowledged; second, whether it has been delivered, or is still within the control of Minnie Jones, who claims the land as her homestead.

Minnie Jones testified that Mr. Jones tried to get her to sign the deed, and that she told him that she did not want to, and urged certain objections against the Ambler property, among which were that she "didn't want Mr. Ambler's orchard; it was too far away." She said that Mr. Murtey brought her the deed, and that she signed it. "Q. At any rate, when you got to the bank, at the request of either Mr. Murtey or your husband, you signed that deed, didn't you? A. I signed a deed, Yes, sir. Q. You did that voluntarily? A. No, sir. * * * Q. Was the signing by you of that deed your voluntary act? A. No, sir. No; it was not voluntary; no, indeed, it was not. * * * Q. While you were at Mr. Murtey's office, Mr. Murtey told you this was a deed, didn't he? A. No; Mr. Jones signed the deed, and Mr. Murtey took the pen from Mr. Jones and said, 'Now, your name Mrs. Jones,' and I signed my name."

Thomas Murtey testified that he did not recall asking Mrs. Jones when she signed the deed, if it was her voluntary act and deed; that he prepared the deed under Mr. Jones' direction, and that Mr. Jones and his wife signed the deed in his presence, and that it was acknowledged on the 18th day of January, 1915; that he saw Mrs. Jones sign the deed, and that she made no objection. "Q. But did she acknowledge that to be her voluntary act and deed? A. I can't remember as to the acknowledgment for her, whether she did or not. I can't remember. * * * Q. Well, did she acknowledge it to be her voluntary act and deed in substance? A. She did to my idea of things. Q. To your idea? A. Yes, sir. Q. What do you mean by that? A. She came in and voluntarily signed the deed before me, as a witness, as a notary."

John C. Jones testified: "Q. What, if anything, did Mr. Murtey say to you or your wife as to acknowledging the deed? A. He didn't say anything. Q. Did you hear him ask Mrs. Jones, or ask yourself, if this was your voluntary act and deed, or words to that effect? A. No, sir; I did not."

On the first point there is the testimony of Mr. and Mrs. Jones, and of the notary public, Murtey. This testimony appears to establish the fact that the usual formalities were not observed. It is not shown that Mrs. Jones was asked whether she acknowledged the instrument to be her voluntary act and deed. Because of the testimony of the notary public relating to the execution of the deed, and his refusal or failure to testify that Mrs. Jones acknowledged the instrument as her voluntary act and deed, we will examine all the evidence with a view to ascertaining whether she was coerced and unduly influenced. Women are generally home-builders and home-keepers. Mrs. Jones did not want to trade. She testified: "It was against my will from the beginning. * * * I didn't want to transfer it; I did not." She told Ambler and Mrs. Ambler that she did not want to trade. She said, referring to the Ambler property, "No; we don't want it; it is too far away. * * * Mr. Jones tried every effort he could to persuade me. I told him he couldn't persuade me; I didn't want to trade; I didn't want that orchard; I didn't want to trade."

Mrs. Jones testified that she did not go down to the bank where the deed was kept until after the expiration of about a week. When she finally did go and sign it, she says: "It was my hand, but not my will." She appears to have objected. "I made the remark in there (meaning the bank) they had all better keep their own land." She appears to have fought off the trade for two years. "Q. You said you fought it for two years? A. Ever since it commenced two years ago." She was unwilling to move to Colorado. She testified: "No; I never intended to go to Colorado. Q. Was that one of the reasons why you objected to this transaction? A. I objected to it because it was so far away. * * * I didn't want it;—that's the reason the trade didn't go through two years ago. I fought it down all the time, and talked it down for something near two years." She also

testified: "He told me, if I wouldn't go (to Colorado), he would go. Q. Did he threaten you in any other way? Did he say, if you didn't sign this deed, he would leave you? A. He said he would go out there, and I could stay here. I don't know what he meant. You can compute it. He said I came up against him too much in his transactions." Jones appears to have tried to coerce his wife. He said to her: "I will have to go West."

The daughter of the defendants testified that her mother "was always very much opposed to it. Q. What specific objections did you hear your mother make? A. Why, she didn't like to leave our home, because she liked the home. Further than that, she did not want Mr. Ambler's orchard." Mrs. McKay testified that Mrs. Jones came to see her before the signing of the deed. "And then Mrs. Jones came down, and I said to her, 'Why, Mrs. Jones, is this so, that Mr. Jones traded?' and she said 'Yes.' I said, 'I thought you weren't going to?' and she said, 'Well, you know it is sorely against my will.' "

Plaintiffs' petition alleges: "That in pursuance of said written agreement made between the plaintiff, S. J. Ambler, and J. C. Jones, defendant herein, the said parties, with their spouses, on or about the 15th day of January, 1915, made and executed deeds to the real estate herein described and so owned by each other, and deposited the same in escrow with the defendants Thomas Murtey and the First National Bank of Weeping Water." This statement is not supported by the evidence. In no event was the contract between S. J. Ambler and J. C. Jones binding upon the defendant Minnie Jones. *Thompson v. Foken,* 81 Neb. 261. It is said in the above case: "The homestead is a favorite of the law. It is intended as a home, not only for the husband and wife, but their children as well. It is the policy of the courts to frown upon all attempts to secure title thereto, except the vendee brings himself clearly within the letter of the law."

The first step was to get the husband to sign the contract. Immediately following that a deed was presented to the husband, which he signed, and then to the wife, and she signed it. In any event that contract was void. Rev. St. 1913, sec. 3079; *Keeline v. Clark*, 132 Ia. 360; *Wallace v. Travelers Ins. Co.*, 54 Kan. 442; *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316; *Gagliardo v. Dumont*, 54 Cal. 496; *Lichty v. Beale*, 75 Neb. 770.

The plaintiffs had notice that the contract was void as against any claim which Minnie Jones or her husband John C. Jones, might make to hold the land as a homestead. When the wife is the joint occupant of the homestead along with the husband, she cannot be made to give it up against her will, and the husband cannot by his act dispossess her or extinguish her legal rights.

Counsel for plaintiffs seem to have entertained the view that there must be a contract upon which to base the execution and delivery of the deeds. This court said in *Patrick v. McCormick*, 10 Neb. 1: "An escrow is a conditional delivery to a stranger to be kept by him until certain conditions are performed, and then to be delivered to the grantee." Of course, "conditions to be performed" implies a valid contract. In the instant case there was no contract, because the defendant John C. Jones could not make any that would bind the homestead. Section 3079, Rev. St. 1913, reads: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." *Weatherington v. Smith*, 77 Neb. 363, on rehearing, 77 Neb. 369; *Hedbloom v. Pierson*, 2 Neb. (Unof.) 799; *Lichty v. Beale*, 75 Neb. 770. In the case last above cited, this court held: "An executory contract for the sale of a homestead, made by either husband or wife without joinder by the other, is void as to the whole homestead tract, without regard to value, and not only will specific performance of

it not be decreed, but a breach of it will not afford a cause of action for damages."

If the case stood upon the certificate of the notary concerning the acknowledgment, contradicted only by the testimony of the defendant Minnie Jones, we might hesitate to inquire behind the certificate. But it stands upon the uncontroverted testimony of the defendants Minnie Jones and John C. Jones, and their daughter and Mrs. McKay, from which it appears that the plaintiffs Ambler knew that the tract sought to be conveyed was the homestead of the defendants Jones, and further knew that John C. Jones had coerced his wife, Minnie Jones, into signing the deed by threatening to go West, and by otherwise making it uncomfortable for her, and also knew that the defendant Minnie Jones was unwilling to give up her homestead.

The acknowledgment taken by the notary seems to have been irregular in the manner of its execution. He did not inquire of Mrs. Jones if she acknowledged the conveyance to be her voluntary act and deed, or that in substance, but seems to have assumed that she was willing to make the deed, inasmuch as she signed it. Under the decision of this court in *Council Bluffs Savings Bank v. Smith,* 59 Neb. 90, we feel constrained to hold that the taking of the acknowledgment, if it stood by itself, was at most only irregular; but the plaintiffs are in no sense innocent purchasers and they can obtain nothing by reason of the certificate of the notary. The evidence, taken as a whole, must determine the case. From this it is clear that the defendant Minnie Jones desired to continue to occupy the home in which she and her husband and daughter resided, and was unwilling to give up the same, claiming it as her homestead; that her husband, John C. Jones, attempted to coerce his wife into making the conveyance to Helen C. Ambler, and succeeded in so far as to procure her signature to the deed, but that she did not acknowledge the execution of the same to be her voluntary act and

deed; that the deed was not lawfully executed and acknowledged, and that it has not been delivered to the defendant Helen C. Ambler, and is still within the control of Minnie Jones, who claims her right of homestead and refuses to surrender such deed; that the plaintiffs have at all times been aware of the true facts concerning the proposed transaction and have acquired no rights thereby.

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

REVERSED and dismissed.

LETTON, J., concurring in conclusion only.

I agree to the conclusion only because I doubt the conclusion reached as to the existence of duress and that no acknowledgment was made by the wife; but specific performance is not a legal right, but rests in the discretion of the court. This is a trial *de novo*. There are facts in the case which warrant the refusal to award specific performance.

SEDGWICK, J., not sitting.

ROSA L. LORD, EXECUTRIX, APPELLEE, v. JASPER ROBERTS, APPELLANT.

FILED DECEMBER 15, 1917. No. 19658.

1. **Highways:** ACTION FOR DAMAGES: INSTRUCTIONS. In an action to recover damages alleged to have been sustained because of an automobile accident, it is not reversible error for the court to instruct the jury by quoting so much of the statute as relates to the evidence.

2. **Trial:** INSTRUCTIONS. A judgment of the district court should not be reversed because of the failure of that court to embody all of the disputed questions of law in a single instruction. It is sufficient if the instructions considered together fairly and properly submit all disputed questions to the jury.

3. **Trial:** CONTRIBUTORY NEGLIGENCE: INSTRUCTIONS. It is the duty of the court in a personal injury case where contributory negligence is pleaded to instruct the jury in such a manner as to eliminate that question where there is no evidence to sustain such a plea.

4. **Damages.** Evidence examined, and *held* sufficient to sustain the judgment and that the same is not excessive.

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

William H. Pitzer and *Edwin Zimmerer*, for appellant.

Paul Jessen, contra.

HAMER, J.

This action was brought in the district court for Otoe county to recover damages sustained by the plaintiff, which were alleged to have been caused by defendant's negligence in driving his automobile upon a highway in said county. There was a verdict for the plaintiff for $595 and judgment was rendered upon it for that sum. The defendant appeals. After the judgment was rendered the plaintiff died, and the case was revived in the name of his executrix, Rosa L. Lord.

It appears that on the 4th day of July, 1913, the plaintiff was riding in a spring wagon with his son and four other persons going west on the public road from Syracuse, Nebraska, to the home of his son. They had spent the day in Syracuse, and started for home at about 9 o'clock in the evening. When they had reached a point just east of what is known as Carper's place, they met an automobile coming from the west, and turned their team out on the right-hand side of the road and clear to the north side of the traveled portion of the highway, and there they stopped the team to allow the automobile to pass. Just after the automobile had passed the defendant came up from behind the carriage. He was driving his car at about 20 to 25 miles an hour, and in attempting to pass he struck the left hind wheel of the wagon which the plaintiff was riding in, and with such force as to wreck the

wheel, break the buggy tongue, and throw the driver of the team out over the dashboard of the wagon. The team ran away with the buggy in which the plaintiff and his daughter-in-law were riding. After the team had gone about half a mile the plaintiff was thrown to the ground, striking on his head, and thus received the injury of which he complains.

The record shows that the highway where the accident occurred was practically level and was in good condition. It appears that the driver of the wagon in which plaintiff was riding turned out to the north side of the road as far as he could, and that there was a space of 6 to 8 feet of clear way between the buggy and the middle of the traveled part of the highway, so that there was plenty of room for the passage of defendant's car if he had been looking and had been careful in attempting to avoid a collision with the buggy in which plaintiff was riding.

The evidence shows that there were weeds and also some brush consisting of ash sprouts on the side of the road where the team was standing, but we are unable to say that defendant's view was so obstructed that he could not have seen the team and wagon if he had been keeping the proper outlook. In fact defendant's wife saw the rig standing at the side of the road, and called attention to it when about 30 feet away. The foregoing is a brief statement of the facts leading to the injury.

Vincent Lord testified that the injury caused him to vomit and spit blood. Rosa L. Lord, the wife of Vincent Lord, testified that before the injury he had been able to do farm work, but that after the injury he sat in the rocking chair or was lying on the couch, and that he did no work in the field during the summers of 1914 and 1915. He appears to have coughed and spit blood whenever he tried to work, and was only able to feed the pigs and do chores. Other witnesses testified that after the injury Vincent Lord was unable

to eat breakfast and was spitting blood. He was weak and had to support himself by holding onto things.

It is contended by the defendant that the court erred in giving his third instruction to the jury. In that instruction the court defined the duties of the driver of an automobile on the streets or highways of this state by quoting such portions of the statute as he deemed applicable to the facts of the case. Without setting forth this instruction, it is sufficient to say that after a careful examination of it we fail to find any error therein.

Defendant next contends that the court erred in giving instruction No. 7 to the jury. The complaint made of this instruction is that the jury should have been told that defendant would not be liable for striking the wagon in which plaintiff was riding unless he knew or could have known by the exercise of reasonable care that the wagon was there in time to have avoided the collision. This assignment of error cannot be sustained, for in the second paragraph of the court's instructions defining negligence that question was completely covered.

Counsel for defendant contends that the court erred in the eighth instruction given because by that instruction the question of plaintiff's contributory negligence was withdrawn from the jury. As we view the record in this case the instruction was correct. It is difficult to see how the driver of the vehicle in which plaintiff was riding could have done anything other or more than he did in order to avoid the collision. He turned out on the proper side of the road for the purpose of allowing the automobile to pass him. He stopped his team at the extreme limit or north edge of the highway. In fact, he could have gone no farther than he did without getting into a deep ditch with his team, which would have resulted in disaster and subjected his family to injury thereby.

It is further contended that the fourteenth instruction is erroneous because it permitted the plaintiff to recover for future suffering. We think this instruction was a proper one considering the state of the evidence and in any event the amount of the verdict was so small that that matter could not have been considered by the jury.

Complaint is made of the refusal of the court to give certain instructions requested by the defendant. We have examined all of these instructions, and are satisfied that in view of those given by the court they were properly refused.

There seems to be no serious dispute about the speed at which the defendant was driving his car at the time of the accident. The defendant's wife, who was riding with him, testified on his behalf and stated that they were going so fast that she was uneasy about the speed. In *Blado v. Draper*, 89 Neb. 787, this court said: "The driver of an automobile upon a public street or highway, who, in attempting to pass a carriage from the rear, so carelessly and negligently handles his car as to strike the carriage and injure the occupant thereof, who is without fault, is liable for the injuries caused by such negligent act."

We have carefully examined the record and read the evidence, and it is our opinion that the case was fairly tried and properly submitted to the jury. We are unable to say that the verdict is excessive or that it is not sustained by the evidence. The judgment of the district court is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

JOHN M. MACFARLAND, APPELLEE, V. JAMES CALLAHAN, APPELLANT.

FILED DECEMBER 15, 1917. No. 19702.

1. **Statute of Frauds:** CONTRACT: CONSTRUCTION. An oral contract for services, the consideration to be paid when the promissor shall receive his anticipated share out of the estate of his father, not yet deceased, construed as intended merely to fix the time of payment, and not within the statute of frauds relating to contracts creating an interest in land.
2. **Contracts:** ESTATE NOT IN ESSE. Nor is such contract an attempt by an heir to contract with reference to an estate not *in esse.*
3. **Limitation of Actions.** Nor is action upon such contract barred by the statute of limitations when commenced within four years from the time the father died.
4. **Contracts:** ATTORNEY AND CLIENT: PUBLIC POLICY. The fact that part of the services rendered as an attorney for an amount agreed upon consisted in defending the promissor on a charge of perjury, alleged to have been committed in the trial of the main action for which the services were employed, will not render the agreement void as against public policy, such defense not being pleaded, and there being no evidence that either of the parties, at the time the contract was entered into, contemplated that perjury would be committed or charged.

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

E. A. Smith and *Murphy & Winters,* for appellant.

Lambert, Shotwell & Shotwell, contra.

CORNISH, J.

Plaintiff recovered judgment against the defendant for his fee and interest, upon an oral contract for services as attorney for the defendant's intestate, James Callahan, on certain charges preferred against him, arising out of the Cudahy kidnapping case. The defendant appeals.

Just what the contract was and its legal effect are among the questions in dispute. It appears that at

the time of the employment Callahan was in jail and desired the services of the plaintiff. He was without means to employ an attorney and did not know when he could pay him. It is contended by plaintiff that the agreement was to pay the fee when Callahan received his share of his father's estate, provided Callahan was freed from any charges brought against him connected with the kidnapping. It is further contended by plaintiff that the reference to the father's estate was only for the purpose of fixing the time when the payment should become due.

It is contended by defendant that the contract was that the plaintiff should be paid out of Callahan's share of the estate when he received it; that the agreement being oral was within the statute of frauds, as it related to real estate alone; that it was void in law as an attempt by an heir to contract with reference to something not *in esse,* that is, an interest in his father's estate, not yet determined by death; and that the action being of such character it was barred by the statute of limitations, suit upon the contract not having been commenced until more than ten years after the services were rendered, but within four years after the father died.

If the contract should be construed as an attempt to create an interest in Callahan's share of his father's estate, it is very possible that the objections, above stated, are well made. It is unnecessary to enter into a discussion of the evidence, showing the exact language used by the parties. It is the defendant's, not the plaintiff's, contention that the contract did or was intended to create in plaintiff any interest in or lien upon or assignment of Callahan's prospective share in his father's estate. If, when Callahan was making his promise, he had said: "I have no money to pay you now; I don't know when I will have; I anticipate that when my father dies I will be possessed of considerable property; I will then be able to pay you

and will pay you"—it could hardly be disputed that the language used would be intended merely to fix the time of payment. Yet, this was substantially the situation of the parties, and we are of opinion that the language used should not be construed as a contract with reference to the anticipated estate. The language used contained no words of transfer, or words amounting to a present appropriation, as distinguished from a promise to appropriate, sufficient to amount to an equitable assignment. 5 C. J. 909; 3 Pomeroy, Equity Jurisprudence (3d ed.) sec. 1283, and note.

The obligation, therefore, not being void as contracted, would not be barred by the statute of limitations until four years after the time of the father's death.

After the main trial in the prosecution had against Callahan, he was prosecuted for alleged perjury in testimony given by him at the trial. In this action the services rendered by plaintiff in defending him against that charge were pleaded and proved. In connection with this, error is assigned on two grounds: First, it is said that if the original contract contemplated that the plaintiff would represent him as attorney on a charge of perjury, not yet committed, the contract would be void as against public policy; and, second, if the contract did not contemplate such services, then evidence of such services was irrelevant and immaterial to the issues. The defendant did not plead that the contract was void as against public policy. There is no evidence that either of the parties, at the time the contract was entered into, contemplated that perjury would be committed or charged. There is nothing on the face of the contract evincing any such purpose.

The defendant was acquitted on the charge made. We are of opinion that there was no evidence adduced, calling for a submission of the question, whether or not the contract was void as against public policy. Under the contract as pleaded and proved, plaintiff was en-

titled to a judgment for the amount agreed upon, or none at all. Evidence of services rendered in the perjury case could not affect the amount of the verdict or prejudicially affect the finding of the jury.

Error is assigned that the court erred in rendering a general judgment against the defendant. When James Callahan died the action against him was "revived in the name of James A. O'Connor, administrator and heir of James Callahan, deceased." The judgment runs against "the defendant." The plaintiff has asked no personal judgment against defendant. We are of opinion that the judgment rendered should be considered as a judgment against defendant as administrator only, and that the form of the judgment is in no way prejudicial to the defendant's rights.

AFFIRMED.

SOUTH SIDE IRRIGATION COMPANY, APPELLANT, V. JOHN C. BROOKS, APPELLEE.

FILED DECEMBER 15, 1917. No. 19787.

1. **Waters: IRRIGATION: MAINTENANCE FEE.** Under the written contract granting a water right, described in the opinion, the defendant did not promise to pay a maintenance fee to the irrigation company before using the water and is not liable to the company on the contract for maintenance fees before he commences taking the water provided for.

2. **Irrigation Contract.** Whether such contract might be held to be discriminatory and void is not within the issues, and not decided.

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

E. A. Cook and *W. M. Cook,* for appellant.

I. J. Nisley, contra.

CORNISH, J.

The defendant, "for the consideration of a perpetual water right" to certain land, gave to the plaintiff the right to construct its irrigation canal over the land. Defendant has never exercised his right to the use of water provided for, and has refused to pay a maintenance fee of one dollar an acre, alleged to be the usual charge therefor. Plaintiff's action to recover the amount of the maintenance fee was dismissed by the trial court. Plaintiff appeals.

No water-right deed, providing for a maintenance fee, was made. It appears that before the contract was signed maintenance fee charges were talked about, but no agreement was reached. Under the written contract above described, we are of opinion that no liability arose against the defendant in favor of plaintiff for maintenance fees. Instead of taking cash for the right of way which the company got, he took by agreement the water right. It is said that if owners of water rights may, by nonuser, be relieved from maintenance fees, the public improvement itself might thereby be caused to go into decay. This is true, but we cannot assume such to be the fact under the issues in this case. The contract as written without provision for maintenance fees may have been a beneficial one for the private company operating the canal.

By statute in this state irrigation companies are made common carriers of water. They are not permitted to make excessive charges or discriminate between users. The defendant, as a user of water, must pay the same fees that others do. Whether the contract, as one permitting a water right without provision for use or maintenance fees, is or is likely to become an unfair burden upon other users of water, and is therefore discriminatory and void, is a question not involved in the issues presented.

AFFIRMED.

SEDGWICK, J., not sitting.

ELLA NATHAN, APPELLANT, v. FRANK NATHAN, APPELLEE.

FILED DECEMBER 15, 1917. No. 19772.

1. **Divorce:** ALIMONY. In a divorce action where alimony is prayed for by a wife, all of the issues that are properly presented by the pleadings and supported by the testimony are to be considered in arriving at the amount of the award.

2. ———: ———: TRUSTEE. Where a decree of divorce and alimony is granted to a wife on grounds other than adultery, the court is not warranted in placing such alimony in the hands of a trustee, in the absence of a proper showing of necessity therefor. In such case section 1581, Rev. St. 1913, does not apply.

3. ———: CUSTODY OF CHILDREN. In awarding the custody of a minor child the court will look to the best interests of the child.

4. ———: ———: ALIMONY. The record examined, and *held*, the decree of the trial court must be sustained in part and modified in part.

APPEAL from the district court for Cuming county: ANDREW R. OLESON, JUDGE. *Affirmed in part, and reversed in part, with directions.*

Courtright, Sidner & Lee, for appellant.

Barnes & Price, J. J. Sullivan and *Fred D. Hunker, contra.*

DEAN, J.

Mrs. Ella Nathan sued her husband for a divorce and for the custody of four minor children and for alimony. She was awarded a decree of divorce, the custody of the two younger children, $4 a week for their board and lodging while minors, "their clothing and other expenses to be borne by the defendant," a judgment for $35,000 alimony, $250 attorney's fees, and costs of the action. Plaintiff is dissatisfied with the award of the custody of the elder children to defendant and with the amount of the recovery, and has brought the case here for review.

The court found that four children were the issue of the marriage, namely, Harvey, 16, Leonard, 14, Eldred, 12, and Pearl, 10 years of age. The court also found the defendant guilty of extreme cruelty toward plaintiff, and awarded the custody of Eldred and Pearl to her, and of Harvey and Leonard to defendant. The decree directed that the judgment of $35,000 in favor of plaintiff should be paid over by defendant on or before October 1, 1916, to a trust company, located at Norfolk in a neighboring county, as trustee for plaintiff, subject to the further orders of the court.

The record is not voluminous, but it is sufficient to disclose that the decree of divorce is amply sustained by plaintiff's proof of repeated acts of cruelty. It is shown that defendant's cruelty toward his wife began within three weeks after the marriage vows were assumed and that its intensity increased with the passage of the years. In the presence and hearing of his children and of the hired help, and throughout their married life, he continuously and repeatedly charged that his wife violated her marriage vows by sustaining improper relations with one or more of the hired men, and that she had committed adultery with a man with whom she kept company before her marriage to defendant. His wife indignantly denied his every allegation of unchastity. But there was no need of denial. The defendant admitted at the trial that all of his aspersions against the good name of his wife were always known by him to be falsehoods and that he did not believe her to be unchaste or that she ever committed any of the improper acts of which he accused her. The record shows that in the privacy of their home he frequently told his wife, and at times told others, that his charges of infidelity were untrue. While such retraction is commendable, it does not recall the poisoned word of slander nor undo the grievous wrong of defendant in falsely parading his wife to his children and to the world as an adulteress. The record shows

that defendant was addicted to the daily habit of consuming considerable quantities of intoxicating liquors, though rarely to the extent of becoming perceptibly intoxicated. But the liquor habit does not extenuate it only aggravates the offense. His conduct became such that his wife was compelled to leave home. It is also disclosed that when the family and the hired help were seated about the dining table, and at other times, he was accustomed to make unseemly remarks to his children. Some of these were directed against his wife. The record shows that defendant should not have the custody of any of the children committed to him. In view of the record, we believe the custody of all the children should have been awarded to plaintiff.

Soon after their marriage defendant inherited from his father's estate 520 acres of the 1,000-acre tract which he now owns, and personal property valued at $3,000 or $4,000. About eight years after their marriage plaintiff acquired by inheritance $4,000 and at another time $1,000. This money she turned over to her husband. With the $4,000 he purchased 80 acres of farm land, taking title thereto in his own name. The remaining $1,000 was used in improvements on the place. Since their marriage, the parties out of the products of their land and earnings have purchased 400 additional acres of farm land. So that at the time of the trial defendant was the owner of 1,000 acres of farm land in Cuming county of the stipulated value of $150,000. It is admitted by him that his total financial worth approximates $155,000.

Plaintiff was a good house-wife and, though a delicate woman, attended well to the duties that pertained to her position in the home. She was a good mother and reared her children well. She seldom left the home place, but gave to her duties there her unremitting attention. With the help of her children she did practically all of the housework for many years for her

family of six persons and for the most of the time for two or more hired men. Owing to lack of conveniences about the home and that are detailed in the testimony, the housework she performed was apparently more than usually falls to the lot of a farmer's wife. In the domestic service of the home it seems that she received practically no assistance from defendant. Nearly all of these particulars are admitted by him. In view of the record and of defendant's admissions of cruel treatment and by reason of his cruel conduct toward his wife, that is amply supported by competent testimony with respect to the marital relation that he enforced and plaintiff's resultant suffering and ill health, the judgment that she recovered is inadequate. The trial court should have rendered a judgment in her favor for $50,000.

We have awarded the custody of all the children to plaintiff. This circumstance, entirely aside from the question of maintenance and education, will entail upon her additional burdens and care. In awarding the custody of a minor child the court will always look to its best interest. In the present case we have endeavored to apply this salutary rule. The situation before us is one that should not permit sentiment to prevail at the expense of the child's welfare.

But defendant cannot be permitted to escape the paternal obligation that he owes to his children of providing for their care, maintenance and education during minority. For this purpose defendant must pay to the clerk of the district court of Cuming county $1,500 annually, or by instalments, as the district court may direct, for the care, maintenance and education of his four children during their minority; such money to be by the clerk paid over to plaintiff on her request. Of this sum $500 a year is for the support of the daughter Pearl, and the remainder for the support of the three sons equally. For the purpose of determining the time and manner of payment for support of the

children, whether by instalment or otherwise, the trial court may in its discretion take testimony.

The court was not warranted by the pleadings nor the testimony in ordering plaintiff's alimony to be transported to a county other than that of her residence and there placed in the hands of a trustee. This may have been done in pursuance of section 1581, Rev. St. 1913, but clearly this statute has no application to the facts of the case before us.

The $250 that the court directed defendant to pay as an attorney fee for plaintiff's attorneys may stand as a charge against defendant, and when paid this sum may be applied as a payment on such fee as plaintiff and her counsel agree upon.

The judgment of the trial court is affirmed in part, and reversed in part, and the cause is remanded, with directions that it be modified to conform to the views herein expressed.

JUDGMENT ACCORDINGLY.

LETTON and SEDGWICK, JJ., not sitting.

THOMAS R. KIMBALL, APPELLEE, v. WILLIAM H. LANNING, APPELLANT.

FILED DECEMBER 15, 1917. No. 19790.

1. **Trial:** INSTRUCTIONS. It is reversible error for the trial court to fail to instruct the jury respecting the law that is applicable to the material issues that are raised by the pleadings and that are supported by the proof.
2. **Contracts:** ACTION FOR SERVICES: INSTRUCTION. Where, in an action brought to recover for professional services, defendant pleaded a total failure of consideration, and where there was proof that tended to support such plea, and where defendant sought to recover a payment made to plaintiff by him to apply on account of such services, the court should in such case have instructed the jury that, if they found from the testimony that there was a total failure of consideration, in such event their verdict should be in favor of defendant and the amount of his recovery should be the amount that he had paid to plaintiff, with interest.

3. ———: ———: ———. Where defendant made a payment to plaintiff to apply on account of professional services, a part of such services having been performed and a part to be thereafter performed, in an action by plaintiff to recover for such services it is error for the court to fail to instruct the jury that if they found for plaintiff they should deduct from their verdict the amount so paid by defendant.

4. **Trial**: INSTRUCTION: INTEREST. Where a prevailing party to an action is entitled to any interest, it is error for the court to fail to instruct the jury respecting the rate of interest that it may assess in its verdict.

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

J. W. James, Stiner & Boslaugh and *E. J. Clements*, for appellant.

Charles Battelle and *J. A. Gardiner, contra.*

DEAN, J.

Thomas R. Kimball is an architect residing at Omaha. He sued William H. Lanning, a resident of Hastings, to recover $6,727.31 with interest thereon at the rate of 7 per cent. per annum from August 8, 1912, as a first cause of action. On a second cause of action he seeks to recover $355.79 with interest thereon at the rate of 7 per cent. per annum from October 20, 1911. This action is to recover for professional services. Plaintiff recovered a verdict and judgment for $6,784.50 on both causes of action, from which defendant has appealed.

Some time before May 16, 1910, that being the date of the employment of plaintiff, Mr. Lanning planned to build a hospital at Hastings to the memory of a daughter then lately deceased. After the usual preliminary negotiations plaintiff was employed to prepare plans and specifications and to supervise the building of the proposed structure at an agreed fee of 7½ per cent. of the total cost of the building, and an additional sum to cover the added cost of the expense of supervision by reason of the fact that it would

necessitate plaintiff leaving his home and being for a part of the time at Hastings. It was at first provided that the memorial building should cost $60,000. By subsequent changes in the plans the cost was raised to $70,000 or $75,000. Up to this point there seems to have been no dispute between the parties. The record shows that some other changes in the plans were talked about and were the subject of correspondence. Soon after the 7th of January, 1911, plaintiff advertised for bids. The bids received showed offers to erect the building to completion for sums approximating from $107,000 to $110,000. When defendant discovered that the cost of the building would be so greatly in excess of the amount that he maintains was agreed on between the parties, he refused to accept the plans or to pay the architect for his services. Plaintiff then commenced this action.

It is regrettable that in the present state of the record we find that we cannot properly dispose of the case on its merits and thus end the litigation. We cannot do so for the reason that there are some charges raised by the pleadings and supported by proof for which the parties each respectively contend for a recovery but upon which the court gave no instructions to the jury. One of these is a payment of $1,000 by defendant to plaintiff and for which defendant demands judgment on a plea of failure of consideration. Another is a claim for interest approximating $1,500 made by plaintiff. Another is defendant's right in any event for credit for the $1,000 that he paid to plaintiff.

So far as the record shows it is unknown whether the jury deducted the $1,000 that was paid to plaintiff by defendant and reduced the amount of their verdict by that sum, or whether the jury in its deliberations considered plaintiff's charge for interest. Plaintiff seems to assume that the jury did not include interest in its verdict, because on February 21, 1916, three

days after it was returned, he filed a motion demanding the court "to allow him interest on the sum of $6,727.31, at the rate of 7 per cent. per annum, from the 8th day of August, 1912, as prayed in plaintiff's petition." This motion was overruled, and plaintiff excepted, but filed no cross-appeal.

Defendant contends that the case should be reversed because the court failed to properly instruct the jury respecting the measure of damages, and argues that instruction numbered 10, given by the court on its own motion, and the only instruction that refers to that subject, is erroneous because of its omissions in this particular. The instruction complained of follows:

"The court instructs you, gentlemen of the jury, that if you find from the evidence in this case that the plaintiff is entitled to recover on his first cause of action, then the measure of damages which he would be entitled to recover would be the contract price for his services, less whatever sum you find from the evidence it would have cost him to complete the performance of the contract according to its terms."

The instruction as given does not seem properly to cover the measure of damages that should be applied to the facts in the present case. The jury should have been instructed with respect to the rate of interest, if any, that plaintiff was entitled to recover. It should also have been informed that defendant was in any event entitled to credit for the $1,000 paid by him to plaintiff. The jury should also have been instructed as to their duty if they found there was a failure of consideration on the part of plaintiff. 2 R. C. L. 400; *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 42 L. R. A. n. s. 125.

Section 7858, Rev. St. 1913, provides: "When, by the verdict, either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of recovery."

There is nothing in the verdict from which it may be inferred that interest was included therein, nor that it was the intention of the jury that interest should be added to the amount of the recovery returned by their verdict. If the action had been on a promissory note, or on a contract that named a rate of interest, its intention in this respect might have been discovered from the verdict and the court could have computed the interest. But that is not the case before us. *Wiruth v. Lashmett*, 85 Neb. 286. We cannot gather from the record that the jury considered the payment made by defendant to plaintiff upon any theory presented by the record before us.

In view of the errors pointed out, the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON and SEDGWICK, JJ., not sitting.

STATE, EX REL. JAMES STREVER, APPELLEE, V. DAWSON COUNTY IRRIGATION COMPANY, APPELLANT.

FILED DECEMBER 15, 1917. No. 19823.

Mandamus: IRRIGATION COMPANY: BRIDGES. Section 3438, Rev. St. 1913, construed, and *held*, the owner or those in control of an irrigation ditch or canal that runs through any lands owned by a person "having no interest in said ditch or canal" may, upon refusal, be compelled by a writ of mandamus to erect a substantial bridge or bridges across the canal or ditch whenever such bridge or bridges may be necessary for the free and convenient use by the owner of the lands on both sides of the ditch or canal.

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

E. A. Cook and *W. M. Cook*, for appellant.

I. J. Nisley and *Niles E. Olsen*, *contra.*

DEAN, J.

This is a mandamus action wherein the relator seeks to compel the respondent to build a bridge over its irrigation ditch that runs through a square quarter-section of land, now and for 22 years owned by him. Relator prevailed, and respondent appealed.

The ditch, in which relator has no interest, was built through his farm about 30 years before this action was begun. It enters the land about 60 rods west of the southeast corner, and runs in a general northerly direction to a point a little north and west of the center of the quarter section, from whence it runs in a curved line north and east and leaves relator's land at a point about 20 rods south of the northeast corner. The ditch is about 20 feet wide at the bottom and about 4 feet deep, and without a bridge it cannot safely be crossed by horses and farm machinery. A creek enters relator's farm at or close to the northwest corner, and runs southeast to a point a little north of the center of the tract, where it intersects respondent's ditch, and runs thence, below a flume maintained by respondent, almost due east, and leaves relator's land at about the center of the east line.

Relator's residence, farmyards and buildings are located about 10 rods from his north line at about the center of his northwest 40 acres. South of these buildings he maintains a bridge over the creek that is otherwise impassable. His land is apparently all tillable, and he is actively engaged in farming. Hence, he contends, arises the necessity for bridges that the land may be conveniently farmed. Respondent has built one bridge for relator about 10 rods north of the point where the ditch intersects the creek, and from this fact counsel for the respondent company argue that there rests upon it no obligation to build the bridge south of the creek that is demanded by relator, and contends that the requirements of section 3438, Rev. St. 1913, under which this action was brought, have been fulfilled. The section follows:

"Any person, company, corporation, or association constructing a ditch or canal through the lands of any person, company, or corporation having no interest in said ditch or canal shall build such ditch or canal in a substantial manner so as to prevent damage to such land; in all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any inclosed field."

Respondent argues that "it does not seem reasonable that an irrigation company should be put to the expense of building bridges to enable a landowner to overcome natural obstacles." But it seems to us that his argument does not apply to the facts before us. If it were not for respondent's ditch the bridge that now spans the creek would make all of relator's farm conveniently accessible for tillage. But with the ditch as now located, not less than three bridges seem reasonably to be required for this purpose. In addition to the bridge built by respondent over its ditch north of the creek, and that is not involved in this suit, it appears to us that a fair and reasonable construction of the statute requires respondent to build an additional bridge over its ditch south of the creek, as the judgment of the trial court directed.

A glance at the plat in evidence, that is by stipulation shown to give an approximately correct location of the farm buildings, the creek, and the ditch, will suffice to show that something more than 40 acres in the southeast part of relator's farm would be inaccessible from any other part of the farm in the absence of the bridge that the trial court required respondent to construct, unless the landowner built another bridge across the creek. The legislature has not limited

the number of bridges that may be required to be built in such case on a given tract of land. It would seem, therefore, that the court should not do so unreasonably. It seems clear to us that the trial court was amply warranted in finding that the bridge demanded by relator was "necessary for the free and convenient use of lands on both sides of the ditch * * * by the owner."

Before the commencement of this action relator demanded that respondent erect a bridge over its ditch at the point in question, but his demand was refused. The right of relator to the relief that he sought having been clearly established, and having no adequate remedy at law, the writ was properly allowed. *State v. Chicago & N. W. R. Co.*, 83 Neb. 524. Other questions are raised by the parties, but we do not find it necessary to discuss them in arriving at the conclusion herein announced. The judgment of the trial court is right, and is in all things

AFFIRMED.

SEDGWICK, J., not sitting.

ANNA HOMAN, APPELLANT, V. FLORENCE W. HALL ET AL., APPELLEES.

FILED DECEMBER 22, 1917. No. 19777.

Torts: RIGHT OF ACTION: FIANCÉE. A fiancée cannot maintain an action for damages against a third party, not based on slander, but solely because her betrothed was induced by the defendant to break his engagement.

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

B. N. Robertson, for appellant.

Stout, Rose & Wells, contra.

MORRISSEY, C. J.

From an order sustaining a demurrer to the petition and dismissing the action, plaintiff appeals. The petition alleges: That the plaintiff and one Bangs, now deceased, had, during the lifetime of Bangs, entered into an agreement to marry; that they had agreed upon the date when the ceremony should be performed; and that each of the parties was capable of entering into the marriage relation.

"That the said defendants each jointly and severally maliciously, wrongfully, unlawfully, and without just cause and to advance their own pecuniary interests, interposed objections to the said Stephen D. Bangs carrying out his said contract with plaintiff, and through threats that they would place him in a sanitarium and have him removed out of the circle of society in which he was known and had lived, and through falsely representing that plaintiff was of an unchaste character, and by unlawful restraint and undue influence, caused the said Stephen D. Bangs not to fulfil his said contract of marriage with plaintiff, and caused the said Stephen D. Bangs to breach and break his said contract of marriage with plaintiff; that on the 4th day of November, 1914, said Stephen D. Bangs was ready and willing to marry the plaintiff, and, but for the wrongful interference of the said defendants as aforesaid, he was then and there able to do so.

"Plaintiff states: That, by reason of the said wrongful acts of the said defendants in causing the breach of the said contract of marriage, plaintiff sustained the loss of an advantageous matrimonial connection, the said Stephen D. Bangs being a man of wealth at the date set for the wedding and a man of social position; that plaintiff's affections have been disregarded and blighted, she has been disappointed in her affections, and her spirit and feelings wounded, resulting in great mental distress and humiliation, and she has been damaged in the sum of $200,000, no part of which has been paid."

The cause of action for slander was barred by the statute of limitations and is not relied upon by plaintiff, but her action seems to be for enticement or alienation of her fiancé. We are cited to no authority that sanctions a recovery under such circumstances. Where the marriage relation exists and third parties entice away the spouse or alienate the affections, a recovery is allowed, but the cause of action rests upon the right to the society, companionship, conjugal affections and fellowship of the estranged spouse. There is no such right in the fiancée. An alienation suit, therefore, is maintainable only for interference with the conjugal rights of the plaintiff.

"The prevention of a marriage by the interference of a third person cannot, in general, in itself, be a legal wrong. Thus, if one, by solicitations, or by the arts of ridicule or otherwise, shall induce one to break off an existing contract of marriage, no action will lie for it, however contemptible and blamable may be the conduct. But a loss of marriage may be such a special injury as will support an action of slander or libel, where the party was induced to break off the engagement by false and damaging charges not actionable *per se*. Here the action, it is perceived, is for the defamation, and the loss of the marriage only the damage flowing from the injury. A contemplated marriage might be prevented by the forcible separation of the parties, or by the imprisonment of one of them; but the wrong, in contemplation of law, would consist in the assault, or in the false imprisonment, and not in the loss of marriage. The suit might, therefore, lie in favor of one party, and not in favor of the other, if only one was subjected to the illegal force." Cooley, Torts (2d ed.) p. 277.

It is not claimed that she was imprisoned or in any way restrained of her liberty. Under no circumstances could she recover for the restraint or false imprisonment of Bangs. The right of engaged parties

to ask advice of their friends and the right of the friends to give advice has never been denied. To hold that a third party may be subject to answer in damages for advising or inducing an engaged person to break the engagement might result in a suit by every disappointed lover against his successful rival. The state has an interest in the marriage relation, and until the marriage is solemnized no domestic rights exist, and therefore cannot be violated.

The ruling of the trial court is without error, and the judgment is

AFFIRMED.

ROSE, J., not sitting.

CHAUNCEY E. BEADLE, APPELLEE, v. GEORGE W. BEADLE ET AL., APPELLEES: CHARLES ROHWER, APPELLANT.

FILED DECEMBER 22, 1917. No. 20372.

1. **Infants:** PROCESS: SERVICE OF SUMMONS. Where suit is brought by a father against his minor children, under 14 years of age, for the partition of lands in which they are tenants in common, service of summons on the minors, and on the plaintiff in the suit as their father and guardian and the person with whom they reside, is sufficient to confer jurisdiction on the court to appoint a guardian *ad litem*, and, if subsequent proceedings are regular, to decree the partition and sale of the land and divest the title of the minor defendants.

2. ———: GUARDIAN AD LITEM: APPOINTMENT. In the appointment of a guardian *ad litem* for a minor, there is imposed upon the court a special duty to guard the interests of the minor, and the guardian *ad litem* ought not to be selected at the suggestion of interested parties, but upon the independent judgment of the court.

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

Morsman, Maxwell & Crossman, for appellant.

George H. Simpson, John I. Negley, guardian ad litem, and *Wayne Sawtelle, contra.*

MORRISSEY, C. J.

This cause is brought here under Rule 14 (94 Neb. XIII) as a case stated.

We are called upon to answer the following question: Where suit is brought by a father against his minor children, under 14 years of age, for the partition of lands in which they are tenants in common, is service of summons on the minors, and on the plaintiff in the suit as their father and guardian and the person with whom they reside, such service as is contemplated by section 7637, Rev. St. 1913, so as to confer jurisdiction on the court to decree the partition and sale of the land and divest the title of the minor defendants?

Plaintiff filed his petition praying for the partition of a tract of real estate, alleging that he was the owner of an undivided one-third interest therein, and that each of his two minor children, each under 14 years of age, was the owner of a like interest. Summons was issued, and the return thereon shows service by delivering a certified copy to each defendant personally, and the sheriff certifies that he "served the same on Chauncey E. Beadle, by delivering to him personally a certified copy of this writ, together with all the indorsements thereon, for each of said above named minors, he being the duly appointed, qualified, and acting guardian of said minors, their father, and the person with whom they now reside." There was no other service on the defendants.

Subsequently the court duly appointed a guardian *ad litem* for the minor defendants, who filed a general denial in behalf of his wards. On hearing, a decree of partition was entered, a referee appointed, and the property sold to the appellant, Charles Rohwer. After bidding off the property and making a partial payment, Rohwer concluded that the service made on the minors was not good, refused to pay the remainder of the purchase money, and asked the return of the earnest money paid. His objections were overruled, the sale

confirmed, and he was directed to pay the remainder due under his bid.

Section 7637, Rev. St. 1913, reads: "When the defendant is a minor under the age of fourteen years, the service must be upon him, and upon his guardian or father, or, if neither of these can be found, then upon his mother, or the person having the care or control of the infant, or with whom he lives."

It is admitted that service was made strictly according to the letter of the statute, and that, if some person other than the one standing in the relation of parent or guardian to the minors was plaintiff, the service is sufficient. But it is argued that because the plaintiff is the father and guardian of the minors, and a copy of the summons was served on him as such, and his interests being presumptively adverse to theirs, the service did not vest the court with jurisdiction. We are cited to the case of *Borcher v. McGuire,* 85 Neb. 648, where there is some language in the opinion that may be taken as a criticism of this form of service but the discussion was mere *obiter dictum.* To hold that this service did not confer jurisdiction would require us to read into the statute a provision that the legislature did not see fit to write.

Sections 7590, 7591, Rev. St. 1913, provide for the appointment of guardians *ad litem* by the district court to protect the interests of minors in just such cases as this. We see no reason why a parent who is the natural guardian, and who has also been appointed the legal guardian for his minor child, desiring to partition real estate, should be required to surrender his appointment as legal guardian and procure the appointment of a stranger in order that he may maintain partition of the real estate. It may be that the real estate is of little consequence, while the personal estate is very great, and it may be disadvantageous to the minor to have its parent superseded by a stranger.

Perhaps no greater responsibility rests upon a district judge than that of guarding the interests of minors in the partition and sale of their real estate. But when due care is exercised in the selection of a guardian *ad litem*, the minors' interests will be safe, regardless of the relationship of the general guardian.

The service made meets the requirements of the statute, and the judgment of the district court is

AFFIRMED.

JAMES R. CARNAHAN, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 22, 1917. No. 19666.

1. **Master and Servant:** FEDERAL EMPLOYERS' LIABILITY ACT: DEFENSES: ASSUMPTION OF RISK. In cases brought under the federal employers' liability act, approved April 22, 1908, the assumption of risk as a defense is abolished only when the negligence of the carrier is in violation of some statute enacted for the safety of employees. *Jacobs v. Southern R. Co.*, 241 U. S. 229.

2. ———: ASSUMPTION OF RISK. If an employee having knowledge of a defect in machinery gives notice of the same to the employer or one who stands in his place and is promised that the defect shall be remedied, his subsequent use of the defective appliance for a reasonable time, relying on the promise, will not be held to cause him as a matter of law to assume the risk.

3. ———: FELLOW SERVANT. A section foreman who has charge of the tools and appliances used on the section, has power to hire and discharge men within certain limitations, and to direct the labor of a section laborer, is not a fellow servant of the laborer in matters regarding the condition and safety of the tools and appliances under his care and direction.

4. ———: DEFECTIVE APPLIANCES: NOTICE. As to such appliances, a complaint of defective or unsafe condition made to the foreman is a complaint to the employer, and a laborer is not required to seek out some higher official or agent of the master.

5. ———: INJURIES TO EMPLOYEES: NEGLIGENCE: INSTRUCTIONS. In an action under said statute, defendant is liable for "injury or death resulting in whole or in part from the negligence of any of

the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery," etc., and it is not erroneous to so instruct the jury.

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

Byron Clark, Jesse L. Root, J. W. Weingarten, L. C. Chapman and *F. S. Howell,* for appellant.

J. J. Harrington and *M. F. Harrington, contra.*

LETTON, J.

Plaintiff in December, 1914, was a section hand in the employment of the defendant, which is an interstate carrier, and this is an action under the federal employers' liability act. 35 U. S. St. at Large, ch 149, p. 65. He was under the immediate control of one Tegner, section foreman. He was injured while attempting to lift and pull a hand-car onto the rails. The allegations of negligence are: (1) That the hand-car was in an unsafe condition, that the wheels bound, that the hind axle was lower than the front one, and that the car was generally dilapidated, shaky, unsafe and unsound. (2) That the car weighed more than 1,000 pounds and reasonably required at least three men to handle and lift it; that defendant negligently failed to have at least three men, but attempted to operate it with only two men, the plaintiff and the foreman; that plaintiff had complained of the condition of the car, and that defendant, by its foreman, had promised that if he would continue to use the car for a few days defendant would procure an additional man and would furnish a new hand-car; that plaintiff relied on the promises and continued to work for a few days thereafter until he was injured. (3) That while plaintiff and the foreman were lifting and pulling the hand-car, trying to get it upon the track, Tegner, having hold of the hand-car at one corner, "carelessly, negligently and wrongfuly and suddenly and without notice or

warning to plaintiff gave a sudden, quick lift to said car," and suddenly cast upon the plaintiff a great and unusual weight, which he was unable to sustain or hold, which caused him to fall and injured his back and spine.

The answer admits that plaintiff was in its employment as a section hand, and that Tegner was his foreman; that in November, 1914, while the plaintiff was assisting in placing the hand-car upon the track, the plaintiff slipped, fell and sustained some slight injuries thereby; and avers that plaintiff assumed the risk, and that the injury was caused by his own carelessness.

Plaintiff recovered a verdict for $8,000. A remittitur of $2,000 was filed and judgment rendered for $6,000.

Defendant has assigned 57 errors, but these may be considered in groups.

Did plaintiff assume the risk of injury from the defective hand-car? In *Seaboard A. L. Co. v. Horton*, 233, U. S. 492, it is held that under the federal employers' liability act, 35 U. S. St. at Large, ch. 149, p. 65, when an appliance is not included in a federal statute enacted for the safety of employees, the common law with reference to the assumption of risk from injury from a defective appliance applies. In *Jacobs v. Southern R. Co.*, 241 U. S. 229, the common-law rules are restated, and it is said that an employee who, after having complained and obtained a promise of reparation, relying upon the promise, continues to work a reasonable time, does not assume the risk, unless it was so imminent that no ordinarily prudent man under the circumstances would rely upon such promise.

The evidence does not justify holding as a matter of law that the plaintiff assumed the risk, and the cases of *Malm v. Thelin*, 47 Neb. 686, and *Thompson v. Missouri P. R. Co.*, 51 Neb. 527, cited by defendant, are not in point. The evidence is not disputed that the hand-car was badly out of repair; that a short time

before the accident the axle of the rear wheels had broken, and it had become necessary to substitute a truck from a push-car, the wheels of which were lower than those of the hand-car. This prevented the perfect meshing of the cogs of the propelling or bull-wheel, caused the wheels to bind and not run true, and affected the running of the car both on the rails and when on the ground. The jury might well find from the evidence that this defect on the car concurred with the violent action of the foreman in producing the accident. It seems also clear that, while two men could lift one end of this car and pull it on and off the rails, it was only by the exercise of nearly all their strength, and that if a third man had been lifting at the other end, as the custom was when three men were employed, the accident would not have happened.

It is insisted that the court erred in permitting evidence to the effect that the plaintiff had complained of the unsafe condition of the hand-car before the injury, and that the foreman told him he had a hand-car ordered and was expecting the hand-car every day; that he also said he had the privilege of putting on another man and was expecting to get one every day; that plaintiff relied upon these promises, and would have quit work if they had not been made. The contention is that, the foreman's authority being limited no advantage could be taken by plaintiff of any promise made by him in excess of it, and that declarations of an agent are incompetent to prove his agency or the extent and scope of his power to bind his principal. The legal principle invoked is sound, but we think not applicable here. The foreman was the immediate superior of plaintiff and was the proper person to whom to make complaint. *Poli v. Numa Block Coal Co.*, 149 Ia. 104; *Collingwood v. Illinois & Iowa Fuel Co.*, 125 Ia. 537. So far as the plaintiff was concerned, the foreman represented the railroad company. He looked to him for orders, and not to the roadmaster, whom de-

fendant insists was the person to whom complaint should have been made. One can conjecture what would have happened if he had gone over the head of the foreman and attempted to complain to the roadmaster. The foreman was there all the time and the roadmaster only occasionally made visits. It was the master's duty to exercise reasonable care to furnish an appliance reasonably safe for its purpose. Its knowledge of the condition of the appliance was derived from the man to whom was committed its care and the duty of inspection. This was the foreman. In this respect he stood in the master's place; his knowledge was the master's knowledge; his negligence was the negligence of the master. The duty was nondelegable. The foreman and the plaintiff were fellow servants when they worked upon the roadbed or were doing the work that ordinary section hands perform, but when the foreman hired or discharged men, and when he furnished the tools or appliances to the plaintiff with which to work and directed the work to be done, he was a vice-principal. A promise made by Tegner with regard to a matter relating to the employment, which it would be reasonable and natural for the plaintiff to believe was within the scope of his authority, would justify plaintiff in relying upon the same and continuing work a reasonable time thereafter. *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Northern P. R. Co. v. Herbert*, 116 U. S. 642.

Defendant insists that plaintiff had no right to complain that there were not enough men employed, that the needed and customary number of men were supplied who could have handled the car if it had not been defective, and that consequently there was no negligence in failing to employ three men. If the evidence showed conclusively that two men are sufficient to handle a car of the size, weight and construction of the car in question when in proper and safe condition, this contention would be sound, but there was suffi-

cient evidence that three men were necessary in order to properly and safely handle a sound car of this class to warrant the jury in so finding.

It is next contended that the negligence, if any, with respect to the condition of the car was not the proximate cause of the injury, and that it was, therefore, error to submit the question of negligence in this respect to the jury. It is argued that the proximate cause of the injury was the sudden jerk by Tegner which resulted in throwing the car over and against the plaintiff, and it is urged that in so far as placing the car upon the rails is concerned plaintiff and Tegner were fellow servants. There might be good argument in this if the evidence was clear that the same result would have followed if the car had been in proper condition, but it seems to us that the shaky and dilapidated condition of the car caused its wheels to bind and stick, necessitating a tremendous effort and jerk on the part of Tegner in order to move it, and that the defects in the car, the shortage of man-power, and the sudden jerk combined were the proximate cause of the injury.

Complaint is made that the court erred in telling the jury it was the duty of the defendant railroad company to furnish reasonably safe instrumentalities with which its men may do their work for it, and if it negligently fails to furnish such reasonably safe instrumentalities it is liable in damages to an employee who is injured thereby, unless such employee has assumed the risk, since the law is that defendant was only bound to use ordinary and reasonable care to furnish such instrumentalities. This could not have been prejudicial, since the undisputed evidence shows that ordinary care was not used in providing a proper hand-car. The same reasoning applies as to the duty of inspection. Taking the charge as a whole the law was stated with fairness and impartiality and is applicable to the evidence.

A number of instructions were requested by defendant and refused, but many of those requested were practically embodied in and given in the charge of the court.

The principal doubt we have had has been with respect to the proof of damages and the amount of the verdict. Plaintiff was required to remit $2,000 as a condition to the overruling of a motion for a new trial. The trial court had plaintiff before it for several days and could better judge of his physical condition than can we, and he believed that the recovery of $6,000 was warranted by the evidence.

We find no prejudicial error, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

STATE, EX REL. DOUGLAS COUNTY, APPELLANT, V. ROBERT SMITH, CLERK OF THE DISTRICT COURT, APPELLEE.

FILED DECEMBER 22, 1917. No. 19765.

Officers: CLERKS OF DISTRICT COURTS: NATURALIZATION FEES. The Nebraska statute enumerating the fees chargeable by the clerk of the district court for his services, allowing him to retain a specified sum annually and requiring him to pay the excess into the county treasury, did not require him to account to the county for naturalization fees which he was authorized to collect and retain under the act of congress. Rev. St. 1913, sec. 2429.

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

George A. Magney, County Attorney, and *Ray J. Abbott,* for appellant.

John P. Breen, contra.

John J. Sullivan, amicus curiæ.

ROSE, J.

This is an application for a peremptory writ of mandamus requiring the clerk of the district court for Douglas county to pay into the county treasury one-half of the naturalization fees collected by him prior to 1917. Respondent resisted the allowance of the writ on the grounds that he had received the fees in controversy for services and expenses under the act of congress making provision for the naturalization of aliens, that the federal statute permitted him to retain such fees, and that he was not required by any law of Nebraska to turn any part of them over to Douglas county. From a dismissal of the proceeding, relator has appealed.

Relator invokes the Nebraska statute enumerating the fees which the clerk shall charge for his services, allowing him to retain $4,000 annually, and requiring him to pay the excess into the county treasury, after paying for the services of authorized assistants. Rev. St. 1913, sec. 2429. Relator's interpretation of the statute does not seem to be justified by the language of the act. The legislature enumerated duties and fixed a charge for each service. The fee bill is introduced thus: "The clerk of the district court shall charge for his services the following fees." In the same section, following the fee bill, the statute declares: "If the fees shall exceed four thousand dollars *per annum*, in counties having more than one hundred thousand inhabitants, said clerk shall pay such excess into the treasury of the county." Rev. St. 1913, sec. 2429. The fees for which the clerk must account are chargeable for his services as an officer of the judicial department of the state government, and these are the fees to which the act of the state legislature refers in requiring him to pay the excess into the county treasury. Naturalization fees are authorized by an act of congress, and no reference to them is made in the Nebraska statute. When collected by respondent, the state legis-

lature did not require him to turn them over to the county or to account for them in determining the "excess" which he is required to pay into the county treasury. The clerk performed services for two sovereigns—the United States and the state of Nebraska. The state law fixed and controlled the fees for one, and the act of congress for the other. The federal statute authorized respondent to retain one-half of the naturalization fees collected by him. 34 U. S. St. at Large, ch. 3592, sec. 13, p. 600. The Nebraska statute in force when the naturalization fees in controversy were collected did not require the clerk of the district court to account to the county for any part of them. The writ therefore was properly denied.

AFFIRMED.

LETTON, J., not sitting.

JOHN M. WELSH, APPELLEE, V. FRANK VALLA, APPELLANT.

FILED DECEMBER 22, 1917. No. 19701.

County Court: TIME FOR APPEAL. An appeal from the county court or justice of the peace to the district court must be taken within 30 days as provided in section 8453, Rev. St. 1913, unless prevented by some act or neglect of the court.

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

Hugh J. Boyle and *M. F. Harrington,* for appellant.

McGilton, Gaines & Smith and *A. B. Jaquith, contra.*

SEDGWICK, J.

This plaintiff recovered a judgment against the defendant in the county court of Douglas county on the 18th day of September, 1915. The defendant undertook to take an appeal, and filed his transcript upon

appeal in the district court for that county on November, 1, 1915. The plaintiff filed a motion to dismiss the appeal because it was not perfected within 30 days as provided by statute. The motion was sustained and the appeal dismissed, and, from that order dismissing the appeal, the defendant has appealed to this court.

The statute is in form mandatory. Rev. St. 1913, sec. 8453. It provides that the party taking the appeal "shall deliver the same (the transcript on appeal) to the clerk of the court to which such appeal may be taken within 30 days next following the rendition of such judgment." This court has several times decided that, when the delay is caused entirely by the fault of the court, the time may be extended, and in some of those decisions has taken occasion to say that "the appellant, unless unable to procure a transcript from the justice, must see that it is filed as required by statute," and "the appellant must be diligent and file his transcript within the time limited or the appeal will fail." *Lincoln Brick & Tile Works v. Hall,* 27 Neb. 874. And "the time within which an appeal may be taken is fixed by section 1007 of the Civil Code (Rev. St. 1913, sec. 8452), and we know of no law by which the time can be extended by the court, unless by the default of the officers, and without negligence on his part, the party seeking to appeal is prevented from doing so." *Miller v. Camp*, 28 Neb. 412. If we justify departing from the statute when the delay is caused by the court itself, we certainly cannot go further, and if, under such circumstances, the party has any remedy, he must find it in equity, as indicated in the decisions construing section 8207, Rev. St. 1913.

The facts in this case, as disclosed by the record, indicate the necessity of this rule of the statute. The defendant's attorney, who had the principal, if not the sole, charge of perfecting this appeal, became suddenly ill soon after the judgment was rendered, and was for

a few days confined to his house. He was then attending to business for about three days, and during that time procured the appeal bond and transcript, when he was again taken ill, and was confined to his house until after the 30 days had expired. He then, by telephone, caused the transcript which he had procured to be filed in the district court. It is contended that the defendant himself was not familiar with the English language, nor with the practices of the courts, nor in fact with business generally. The act of taking the transcript from the county court to the district court could be performed by any person; and whether the defendant's attorney could have procured it to be done during the three days that he attended to business, or in due time by telephone as he afterwards did, and other important questions of fact connected with the matter, cannot be satisfactorily tried upon affidavits, and, if the defendant can have that investigated at all, it should be upon full investigation in proceedings as above indicated. The order of the district court dismissing the appeal is right, and is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1918.

MARY F. KANEFT, APPELLEE, V. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, APPELLANT.

FILED JANUARY 5, 1918. No. 19705.

1. **Insurance:** CONSTRUCTION OF BY-LAW: RIGHT TO RECOVER. Under the quoted provisions of defendant's by-laws, when a certificate holder dies, within 26 weeks from the receipt of an injury from which blood poisoning develops and causes his death, the beneficiary is entitled to recover the full amount specified under section 9a of the by-laws.

2. ———: ACCIDENT: NOTICE. Under the provisions of defendant's by-laws, quoted in the opinion, the time within which a certificate holder must give notice of an accident does not begin to run until such time as he has reason to believe that the injury received will constitute a claim under his certificate.

3. ———: ———: ———. *Held*, that notice was given within the time required by the by-laws.

4. ———: COSTS: ATTORNEY'S FEES. When plaintiff recovers a judgment on a contract of insurance, he may have taxed, by the trial court, a reasonable attorney fee as part of his costs, but the amount allowed must be for services in the trial court only. The trial court is not authorized to allow plaintiff an attorney fee for services on appeal. Rev. St. 1913, sec. 3212.

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

Mahoney & Kennedy and *Guy C. Kiddoo*, for appellant.

Gurley & Fitch, contra.

MORRISSEY, C. J.

Plaintiff recovered a judgment for the death of her husband, Ollie J. Kaneft, who carried a certificate of membership in defendant company, and defendant has appealed.

May 5, 1915, Kaneft accidently struck his shin against the running board of an automobile. The blow caused a slight abrasion of the skin. He complained of the pain; but proceeded about his business. A few days later he developed chills and fever, and soon thereafter called a physician, who told him that he had la grippe, and treated him for that ailment. May 23 a different physician was called. This physician made an examination and told Kaneft that his sickness was due to the injury to his leg. He was then taken to a hospital, where he died four of five days later. Doctor Dunn, who was attending him at the time of his death, testified that there was a microscopic examination made of the blood, and "this blood culture contained a micro-organism that very frequently invades the blood in cases of so-called blood poisoning," and said that this organism entered through the wound. It is clear that Kaneft died of blood poisoning brought on from the injury to the leg.

At the close of the testimony the court directed a verdict in favor of plaintiff for the full amount of the certificate, and taxed as attorney's fees $500 for service in the district court and $200 for service in this court.

Defendant is a mutual beneficiary association. Section 15g of article XIII of its by-laws reads as follows:

"In event of disability or loss, due wholly or in part to, or resulting directly or indirectly from * * * septicæmia * * * blood poison in any form, * * * or in event of disability due partly to accidental injury and partly to sickness, then, in all such cases mentioned in this paragraph, the cause of disability shall be and is classed as sickness, and the

association shall only be liable therefor in accordance with the provisions made in the foregoing sections of this article for the payment of benefits for sickness, the original cause thereof notwithstanding."

Defendant offered this section of the by-laws in evidence, but it was excluded by the court. It insists that the word "loss" as used in this by-law means loss of life, and that the company is liable for sick benefits only. It requires no discussion to show that without the injury to the shin Kaneft would not have died. That injury was the proximate cause of his death. The organism mentioned by Dr. Dunn entered the blood through the abrasion caused by striking the leg against the automobile, and it, in turn, produced the disease from which he died.

Section 9a of article XIII of defendant's by-laws provides:

"Whenever a member of this association in good standing shall, through external, violent and accidental means, receive bodily injuries not hereinafter excepted which shall, independently of all other causes, result in death within twenty-six weeks of the date of the accident causing said injuries, the beneficiary designated by said member, if living, if not then the administrator or executor of the estate of said deceased member, shall be paid the amount collected from one assessment of $5 upon each member of the association holding certificate of membership form 25, in good standing on the date of the accident causing death, not to exceed five thousand dollars, subject only to the conditions, provisions and limitations of the by-laws in force at the time the accident occurred, out of which such claim arises."

Defendant would have us hold that under the quoted provisions of its by-laws it is liable only for the payment of benefits for sickness. Plaintiff denies that the by-laws were properly passed, or filed in the office of the auditor of public accounts, as required by

statute, but we do not deem it necessary to discuss these questions.

Article III of its articles of incorporation reads: "The nature of the business to be transacted by this association shall be to pay benefits to its members for loss of time by reason of accident or sickness, and to pay indemnities to members for loss of eyes or limbs effected solely by external, violent and accidental means, and to pay indemnities to the wives, relatives, dependents or legatees of members in case of accidental death, under such limitations only as may be provided in the by-laws adopted by the members of the association."

This declaration of the purposes of the company may be considered for the purpose of interpreting the provisions of its by-laws.

It will be noted that its purpose is to pay for loss of time by reason of accident or sickness, to pay "indemnities to members for loss of eyes or limbs * * * and to pay indemnities to the wives, relatives, dependents or legatees of members in case of accidental death."

The word "loss" occurs in each clause relating to payment where the claim arises because of sickness or disability other than death. But the word "loss" does not occur in the clause providing for the payment of indemnity where the accident proves fatal. It nowhere says "loss of life." Paragraph 15g of the by-laws uses the phrase "disability or loss," but does not say loss of life. It says "the cause of disability shall be classed as sickness," but it does not say the cause of death shall be so classed. Defendant is the author of this by-law, and under the well-settled rule of construction all ambiguities in its phraseology will be resolved in favor of plaintiff. It is not to be supposed that defendant intended to deny recovery for death under this policy except where the death follows immediately upon the accident.

A man buying accident insurance assumes that he is getting protection from cuts, blows and bruises and from their immediate consequences to his person. In stating the nature of its business, the defendant makes it clear that its business is to insure against such accidents. In paragraph d of section 15, it undertakes to define the word "loss" as applied to limbs and eyes, but our attention has not been directed to any place in the by-laws where it is made to apply to loss of life, and it cannot be held to control in case of death. As pointed out by the trial court in his ruling when excluding the by-law relied upon by defendant, by section 9a of its by-laws defendant specifically provides that in certain cases it shall pay an indemnity for death, when the death results within 26 weeks from the date of the injury. It is inconceivable that an injury will result in death 26 weeks after its receipt without complications arising. The conclusion seems irresistible that liability attaches where the injury is the proximate cause of death, although diseases may have set in or complications arisen, subsequent to the accident.

By section 17a of the by-laws it is provided:

"This association shall not pay or be liable for the payment of weekly benefits or other indemnity, either to a member of the association or to his beneficiary, or to any one, unless written notice of the occurrence of the accident or of the commencement of the sickness, giving full particulars in relation thereto, shall have been received at the office of the association within fifteen days after the date of said accident or commencement of said sickness."

The defendant denies liability because notice was not given within 15 days from the day Kaneft struck his leg against the automobile. The injury received, May 5, did not seem to be of consequence, nor did it prevent the insured from attending to his usual business, but May 9 he called a physican, who diagnosed

his trouble as la grippe, and continued to treat him for that ailment until May 23, when another physician was called. Then for the first time it was discovered that his condition was due to the injury to the leg. It will be noted from a reading of the paragraph of the by-law quoted above that notice is to be given of the "disability." In the instant case notice was given within 15 days from the time it was discovered that the injury to the leg was the cause of the disability.

In *Grant v. North American Casualty Co.*, 88 Minn. 397, where a policy required that notice be given to the company within 10 days of the beginning of the sickness, and the insured was sick 12 days before he gave the notice, but gave the notice on the day he became incapacitated to attend to his usual occupation, the beginning of the sickness within the terms of the policy was held to be when he became incapacitated, and the notice was held sufficient.

The time within which a certificate holder must give notice of accident does not begin to run until such time as he has reason to believe that the injury received will constitute a claim under his policy. He is required to give notice only when it appears that he has suffered, or is about to suffer, a disability as a result of an accident which has given rise to a claim.

Finally, we are asked to hold that the statute authorizing the court to tax attorney's fees upon a contract such as the one in suit is unconstitutional. We have held to the contrary. *Bierbach v. Mutual Benefit Health & Accident Ass'n*, 100 Neb. 675, and cases therein cited.

There is the further question: May the trial court upon entering judgment in favor of plaintiff tax an attorney fee for services to be rendered in this court on appeal? The right to tax attorney fees as part of the costs to be paid by the insurance company is purely statutory, and the statute must be strictly followed.

In construing statutes similar to the provision under consideration, we have, in effect, held that such allowance cannot be made. *Northcutt v. Missouri P. R. Co.*, 100 Neb. 1, and cases therein cited.

The judgment is modified by striking therefrom the item allowed for attorney fees on appeal. As thus modified, it is affirmed; the costs in this court to be equally divided between the parties.

AFFIRMED AS MODIFIED.

FRANK P. SHELDON ET AL., APPELLANTS, v. C. J. BILLS ET AL., APPELLEES.

FILED JANUARY 5, 1918. No. 19621.

1. **Appeal:** DISMISSAL. This court obtains jurisdiction upon appeal by the filing of the transcript duly certified. The appeal will not be dismissed for irregularities in the præcipe, if first brought to the attention of the court upon the final submission of the case, and there is no showing of prejudice.

2. **Corporations:** MISAPPLICATION OF ASSETS: LIABILITY. If the directors of a joint stock insurance company withdraw a large sum of money from the assets of the company and use it for a purpose beyond their powers as directors, they will be personally liable for the loss that the company actually suffers thereby. Their honest belief at the time that such action will result in benefit to the company will not relieve them from liability.

3. ———: ———: ———. If one of the directors of the company was absent from the state, and had no notice of the unlawful action of the directors, he will not be bound by such action, nor estopped to complain of the same.

4. ———: ———: RATIFICATION. The action of the stockholders in winding up the affairs of the company, after they had discovered this action of the defendants and the condition of the company, will not amount to a ratification of the former unauthorized action of the directors.

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

C. A. Rawls, for appellants.

T. J. Doyle, contra.

SEDGWICK, J.

In May, 1910, the Woodmen Fire Insurance Company was organized, under our statutes, as a joint stock company, having 1,000 shares of stock of the par value of $100 each. Each shareholder paid in $125 a share, giving the company a paid-up capital stock of $100,000 and a surplus of $25,000. The six defendants were duly elected directors of the corporation. In June, 1911, the defendants, as directors of the Woodmen Fire Insurance Company, attempted to purchase the Union Fire Insurance Company, Mutual, and paid to the directors of that company $26,000 as the purchase price. It was agreed between the directors of the two companies that the directors of the Union Fire Insurance Company, Mutual, should resign and the directors of the Woodmen Fire Insurance Company should be elected in their places, which was accordingly done. A stockholder of the Union Fire Insurance Company objected to this transaction and prevented it by injunction. Thereupon the $26,000 was returned by the Union Fire Insurance Company. On the 8th day of January, 1912, the defendants, as directors of the Woodmen Fire Insurance Company, entered into a contract with the Fidelity Phœnix Insurance Company of New York, by which they agreed to turn over the business of their company to the New York Company, and agreed that the Woodmen Fire Insurance Company should solicit no more loans and do no further business for a period of five years. They instructed the agents of their company to transact no further business, and the Woodmen Fire Insurance Company ceased to exist as a going concern. At the annual meeting of the stockholders of the Woodmen Fire Insurance Company on the 20th day of January, 1912, this contract with the Fidelity Phœnix Insurance

Company was submitted to the stockholders of the Woodmen Fire Insurance Company, and was ratified by the stockholders. At that meeting the stockholders voted to liquidate and wind up the affairs of the Woodmen Fire Insurance Company, and appointed a committee of five stockholders of that company to make investigations and report at an adjourned meeting of the stockholders to be held in February, 1912. At the meeting in February, 1912, the committee was continued and instructed to ascertain the assets of the Woodmen Fire Insurance Company and to obtain propositions for the purchase of the assets and report at a meeting to be held in March. At the adjourned meeting held in March, the defendants, as directors, were authorized by the stockholders to sell the assets of the company and pay to each stockholder his *pro rata* share of the proceeds. Thereupon the committee sold the real estate mortgages held by the company, of the face value of $75,800, to one of these defendants, and converted other assets into money, and distributed the proceeds of these assets, amounting to $398,303.94, among the stockholders of the company, each director of the company receiving $80 a share, and the other stockholders $95 a share. Afterwards the remaining assets were converted into cash and the proceeds distributed *pro rata*. Afterwards these plaintiffs brought this action in the district court for Lancaster county against these defendants, as directors of the company, alleging that the action of the defendants, as directors, was unauthorized and fraudulent, and that these plaintiffs, as stockholders, had been damaged thereby in the sum of $26.175 on each share of stock owned by them. The plaintiff, Andrew F. Sturm, was the owner of 40 shares, and the plaintiffs, Frank P. Sheldon and George L. Sheldon, were each the owner of 50 shares of the capital stock of the company, which shares, it was alleged, were worth $125 each, and because of the unlawful acts of the defendants these

shares were depreciated in value and the plaintiffs only received $98.825 a share. The trial court found the issues in favor of the defendants and dismissed the action. The plaintiffs have appealed.

The first question presented is as to the form of the action. It is contended that the corporation is a necessary party to this action, and that these plaintiffs, as stockholders, cannot maintain the action. The plaintiffs alleged in their petition that they brought this action in their own behalf and for all others similarly situated that might become parties to the action. The court tried the case as an action in equity and without the intervention of a jury, but made no special findings of fact. In the præcipe for appeal the parties are designated as Frank P. Sheldon et al. v. C. J. Bills et al., and the præcipe designates "the above-named plaintiffs as appellants, and the above named defendants as appellees." This, of course, is irregular. Rule 18, Supreme Court Rules (94 Neb. XV), requires that the præcipe shall state "the names of all parties and their relations to the case as they appeared in the court below. The præcipe shall also specify the party or parties appealing, and designate all others made parties to the appeal as appellees." There was no motion to dismiss the appeal, but the appellees in their brief object that the defendant Woodmen Fire Insurance Company is not made a party to the appeal, and asks that the appeal be now dismissed for that reason. The petition contained in the transcript contains the names of all of the defendants, and all of the defendants, including the Woodmen Fire Insurance Company, joined in the answer. It is not made to appear that these defendants were not duly notified of the appeal, and the objection now made to the appeal is too late.

It is next contended by the plaintiffs that the action of the defendants in their attempted purchase of the Union Fire Insurance Company was beyond their

powers as directors, and that the withdrawal of this $26,000 from the assets of the company ruined the business of the company, which was, before that, in a prosperous condition, and was a direct damage to all the stockholders of the company. The question so presented is quite similar to the question decided in *Gilbert v. Finch,* 173 N. Y. 455, 93 Am. St. Rep. 623. In that case it appears, as stated in the opinion, that "$35,000 were taken from the treasury of the Commercial Alliance Company and paid over to the incorporators of the Maine & New Brunswick Company," and the court said that this act was "*ultra vires* and constituted a waste of the funds of the Commercial Alliance Company, and that the defendants, who authorized such appropriation of the moneys, became liable to respond to the plaintiff in damages." And the law of the case was summarized by the authorities as follows:

"Directors of an insurance company, who use its funds to purchase the interest of the incorporators of another company, the latter having no interest that the purchasing company could buy, and the thing accomplished being the resignation of the officers of the second company and the substitution of the directors of the first, are joint tort-feasors, and liable for wasting the corporate funds." (93 Am. St. Rep. 623) The remarks of the court in that case as to the conduct of the defendants in entering into the contract are, we think, especially applicable in this case, and we quote them, as follows:

"It is not our purpose to question the character or the motive of the defendants in carrying out the transaction. We may readily concede that they thought they were acting for the best interests of the company which they represented. They doubtless thought that by getting control of the Maine company and getting themselves installed as officers they could get the policyholders in that company to transfer their in-

surance into the Commercial Alliance Company; but good motives and good intentions do not render the transaction valid or relieve them from liability for the wrong which they have committed."

The analogy between the two cases is apparent from the following language of the opinion:

"The Maine incorporation was not a stock company. Its officers had no stock in the company which they could sell or transfer, and consequently there was nothing that the Commercial Alliance Company could purchase. The thing accomplished by the transaction was the resignation of the officers of the Maine company and the substitution of the defendants or their representatives."

The greater part of the $26,000 so taken by these defendants from the assets of the company was returned within about eight months thereafter. The evidence shows that this transaction directly cost the company attorney fees and other items of expense. There is also evidence tending to show that the company received from the Union Fire Insurance Company some money in the settlement with that company, and also was put to some additional expense on account of their attempt to handle some of the business of the company. These defendants would be liable in this case for such part of the $26,000 as was lost to the company and such sums as the company expended in the transaction, and in adjusting their affairs with the Union Fire Insurance Company. Against these should be offset such sums of money, if any, as were received by this company from the Union Fire Insurance Company, or on account of their transaction with that company. The plaintiff George L. Sheldon was one of the seven directors of the company, but he was absent from the state during the transactions complained of, and did not participate in, or have any knowledge of, those transactions, so that the fact that he was one of the directors has no bearing upon the

mistake of these defendants, unless it is regarded as an aggravation of their conduct in acting without the unanimous voice of the board of directors. The action of the stockholders in winding up the affairs of the company, after they had discovered this action of the defendants and the condition of the company, although consented to by these plaintiffs, must not be considered as ratifying the former unauthorized action of these defendants. In this action the plaintiffs could recover only such damages as are definitely proved by a preponderance of the evidence. It is not clear from the evidence now before us that the company was in a prosperous condition when the attempt was made to purchase the Union Fire Insurance Company, nor that the attempted purchase of the Union Fire Insurance Company, caused the failure of this company. The plaintiffs may be able on another trial to introduce more definite evidence upon these matters, but it is clear that the unauthorized action of the defendants exhausted some of the assets of the company, and if it was already apparent, as the defendants contend, that the company could not continue in business as it was situated prior to this attempted purchase, this depletion of the assets of the company was a direct injury to the stockholders, and to that extent, at least, the plaintiffs should have recovered.

The judgment of the district court is reversed and the cause remanded, with instructions to allow the parties, if so advised, to amend their pleadings and furnish additional evidence.

REVERSED.

LETTON, ROSE and DEAN, JJ., not sitting.

LEAHLEA BROWN, APPELLEE, V. FLOYD HENDRICKS, APPELLANT.

FILED JANUARY 5, 1918. No. 19710.

1. **Bastardy:** ORDER FOR SUPPORT: IMPRISONMENT. When "neglect" to comply with an order is ground for imprisonment until the order is complied with, it is generally held to mean a careless omission of duty, and not an omission from necessity.

2. ———: ———: ———: "NEGLECT." The question of ability to comply with an order of court to make payments of money is committed to the sound discretion of the trial court. If the defendant in bastardy proceedings has been committed to jail, and upon proper application it is clearly proved that it is impossible to comply with the order, he cannot be longer imprisoned for neglect or refusal so to do.

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

Bernard McNeny, for appellant.

George Losey and *George J. Marshall, contra.*

SEDGWICK, J.

Upon trial in the district court for Franklin county the defendant was adjudged to be the father of the plaintiff's bastard child. In the trial of the case the defendant introduced evidence tending to show that he was unable to contribute to the support of the child. The trial court entered an order requiring him to pay $1,200 for the support of the child, in payments as indicated in the order. The defendant has appealed, and contends that the evidence shows that he could not comply with the order of the court, and that therefore the order of the court was erroneous.

The plaintiff contends that the defendant has no remedy other than acquiescence and compliance with the order, and that, even if the law were otherwise, the defendant has not made it appear in this case that the order of the district court was erroneous. The

language of the statute is: "In case the said reputed father shall neglect or refuse to give security as aforesaid and pay the costs of prosecution, he shall be committed to the jail of the county, to remain till he shall comply with the order of the court." Rev. St. 1913, sec. 362. He is committed to jail solely because he neglects or refuses "to comply with the order." What constitutes neglect or refusal? "To neglect and to omit are not synonymous terms. There may be an omission to perform an act or condition which is altogether involuntary and inevitable; but neglect to perform must be either voluntary or inadvertent. To neglect is 'to omit by carelessness or design' (Webster's Dictionary), not from necessity, and there can, therefore, be no possibility of neglecting to do that which cannot be done." *New York Guaranty & Indemnity Co. v. Gleason,* 53 How. Pr. (N. Y.) 122. That case has been many times cited with approval by the courts of New York. When it is made to conclusively appear that his failure to comply with the order of the court is involuntary and inevitable, he cannot be said to "neglect or refuse." The word "neglect," used as a verb, has been many times and variously construed by the courts. When neglect to comply with an order has been made the ground of imprisonment until the order is complied with, it has generally, if not universally, been construed to mean a careless omission of duty, and not an omission from necessity. 29 Cyc. 399, and notes. In *Ex parte Donahoe,* 24 Neb. 66, it is said that such order of the trial court "will not be reviewed on application for a writ of habeas corpus," and in the opinion: "Nor is there any remedy, other than acquiescence and compliance with the law, for his discharge." Perhaps the court, in holding that the proceedings "will not be reviewed on application for a writ of habeas corpus," took the view that the proper remedy was by petition in error (as the law then was), which would be by appeal under our present statute.

And in the statement that the remedy was by "acquiescence and compliance with the law, for his discharge," it may have been intended to refer to this rule of practice. In the later case of *Campion v. Gillan,* 79 Neb. 364, 11 L. R. A. n. s. 865, it was said:

"It is doubtful whether the question could be presented at all upon application for habeas corpus, and, even if it could, it would require a very strong showing, amounting substantially to absolute proof, so that the court would be without jurisdiction to continue the imprisonment. * * * Many states have statutes expressly providing for the discharge of the prisoner when absolutely unable to pay. It may be doubted whether any state in the Union, or any civilized country, unless it be Nebraska, has ever held that there was absolutely no remedy under such circumstances. It is frequently said that habeas corpus is not an effective remedy (citing cases). * * * Imprisonment as a punishment in such cases is not authorized. It is solely for the purpose of coercing the defendant to perform the duty which the judgment of the court requires of him. * * * But imprisonment under such order is never continued after it is made to appear that it is impossible for him to perform the thing required of him. * * * We do not regard the above cited cases, entitled *Ex parte Donahoe* (*supra*) and *Ex parte Cottrell* (13 Neb. 193), as decisive of this question."

No doubt the question of ability to comply with the order is committed to the sound discretion of the trial court. The mere fact that the defendant himself is without money or property would not necessarily be sufficient to control this discretion. In the case at bar, it does not appear that any evidence upon this question was taken, other than that of the defendant himself, and his evidence shows that his father was a man of ample means, and no reason is shown why he should not assist his son in furnishing the required

security for making these payments, which under the defendant's own evidence, the defendant would be able to pay if the undertaking was given, and he was at liberty to devote his energies to that purpose. We cannot presume that if the defendant had been committed to jail for failure to comply with the order of the court, and it had been made to conclusively appear to the court that he was unable to so comply, the court would have refused to have ordered his discharge.

It does not appear that the order of the court under the circumstances was erroneous, and the judgment is

AFFIRMED.

STATE, EX REL. SOPHIA RENGSTORF, APPELLEE, V. GEORGE R. WEBER, APPELLANT.

FILED JANUARY 5, 1918. No. 19155.

Bastardy: SETTLEMENT: EFFECT. The mother of an illegitimate child may, by a fair contract of settlement providing for the support of said child, executed before any complaint is filed in court, exclude herself from instituting bastardy proceedings against the putative father who performs the contract on his part.

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

Arthur F. Mullen and *Frank L. Dinsmore,* for appellant.

Bigelow & Schrempp and *Hugh LaMaster, contra.*

PARRIOTT, C.

The plaintiff filed her complaint in Douglas county charging the defendant with being the father of her bastard child. The case was tried to a jury, which found the defendant guilty. The court entered an order requiring the defendant to pay the sum of $100 a year for a period of 15 years for the support of the child. Defendant appeals.

The defendant, at the time of the trial in the district court, introduced a written contract entered into between himself and the plaintiff prior to the time of his arrest, which is as follows:

"Signed in Duplicate.

"This agreement made and entered into by and between Sophia Rengstorf and George Weber, to wit: Whereas the said Sophia Rengstorf believes she is now pregnant with a child, and when born will be a bastard and that George Weber, she believes, is the father of said child, in consideration of the alleged state of facts, the said George Weber hereby agrees to pay the said Sophia Rengstorf, in full of all claims or demands of whatsoever kind she may have, the following amounts to wit: Twenty-five dollars cash, twenty-five dollars in thirty days, one hundred dollars at the birth of the child and eight dollars per month for the period of three years, payable on the 1st day of each and every month during said time.

"In witness whereof, we have hereunto set our hands this —— day of June, A. D. 1914.

"GEORGE WEBER
"SOPHIA RENGSTORF."

The defendant relies for reversal upon several assignments of error, all of which depend upon the one question: Can the parents of an illegitimate child enter into a valid contract for the support of said child, and is such a contract a bar against bastardy proceedings under our statute by a party to such contract? The plaintiff cites the cases of *Peters v. Killian,* 63 Neb. 57, and *State v. McBride,* 64 Neb. 547, in support of the contention that the contract between the parties is illegal. In these cases this court did not pass upon the exact question presented in the case at bar. In the case of *Peters v. Killian, supra,* the court held:

"Proceedings in bastardy are purely statutory, and the courts can try such issues and make such orders

in them as the statute contemplates, and none other. A settlement between the parents of an illegitimate child, in order to be operative as a stay or termination of such proceedings, must be of such nature and made and attested in such manner as the act prescribes, and the district court can take judicial cognizance of none other. In that proceeding the court cannot try the issue whether the father or the mother of the child is the more suitable person to be entrusted with its custody."

The above case is distinguishable from the case at bar in the following particulars: In that case the defendant admitted the paternity of the child. The alleged agreement was only verbal, no part of which had been performed. The consideration alleged was so manifestly inadequate that it could not be considered a reasonable settlement, and in addition to these facts the issue as to the custody of the child was involved, all of which gave rise to the announcement of the rule of the case as above quoted.

The case of *State v. McBride, supra,* is not in point, for the reason that the parties therein attempted to make a settlement after the cause had been tried and a judgment rendered, which facts prompted the court to announce the following rule: "The complainant has no authority to compromise a judgment rendered in bastardy proceedings."

It seems to be a universal rule that the parties to a bastardy proceeding cannot compromise without the approval of the court after the court has once acquired jurisdiction in the matter. The reason for this rule is obvious. The court having acquired jurisdiction, and especially after judgment as in the above case, if the parties were permitted to compromise the judgment, the matter would stand adjudicated, and the defendant could never again be called upon to answer in court, however small the payment he might have made to perfect the settlement; but, in a case of settlement

out of court, defendant is not relieved of further liability unless the settlement is a fair and reasonable one.

In the case of *Griffin v. Chriswisser,* 84 Neb. 196, the court recognized a settlement in a bastardy case, and held that such a settlement was a sufficient consideration for a promissory note. It was said in the opinion: "The plaintiff had a right to make an agreement not to prosecute defendant's son under the bastardy act, and to accept in consideration for said promise a reasonable sum for the expenses of her lying-in, and for the maintenance, care and nurture of her illegitimate child."

So, it will be seen by the above decisions that this court is not committed to the rule contended for by the plaintiff and followed by the trial court.

The rule announced in 5 Cyc. 647, is as follows:

"A fair settlement by the mother with the alleged father, founded upon a sufficient consideration, precludes her from subsequently maintaining a proceeding against him." *Coleman v. Frum,* 3 Scam. (Ill.) 378; *Hendrix v. People,* 9 Ill. App. 42.

It is conceded that the parties in the case at bar were of full legal age and competent. The contract was not obtained by fraud. The defendant had complied therewith by making certain payments thereon.

In 7 C. J. 969, the following rule is laid down: "Except when forbidden by statute, the mother of an illegitimate child may, by a fair settlement with the putative father, on a reasonable consideration, preclude herself * * * from the right to maintain a bastardy proceeding."

Our statute cannot be construed as forbidding such settlements. On the contrary, it was evidently the intention of the legislature to encourage them. The primary object of the statute is to induce the father of the illegitimate child to make settlement which will insure the support of the child, and in section 357,

Rev. St. 1913, the mother of the child is designated as the one to be satisfied with the agreement.

It would be against public policy and a dangerous rule to announce that settlements made out of court are without merit and legal effect. Until the father of an illegitimate child is known, the mother is liable for its support. When the law makes the mother primarily responsible for its support, why should she be deprived of the right to contract with its father if an opportunity is given her to obtain a good settlement? While the statute provides for a settlement after the court has acquired jurisdiction and before judgment, it is silent as to settlements made between the parties before the arrest. As the proceedings are civil, no reason can be shown why a compromise of settlement should not be made therein the same as in all other civil cases, and such a contract, when made, is not in violation of public policy or against sound morals, as a bastardy proceeding is not a bar against criminal prosecution. *State v. Veres*, 75 Ohio St. 138. Where the parents of an illegitimate child are of full legal age and competent, it is their legal right to enter into a contract of settlement in which they provide for the support of said child. By such a contract the mother excludes herself from instituting bastardy proceedings against the putative father, unless such contract is set aside for good cause in an action brought for that purpose in the proper court.

It has been suggested that the county authorities have an interest that cannot be barred by contract. Section 358, Rev. St. 1913, provides that the county board may institute proceedings against the father of the bastard child if the mother fails or refuses to do so, but this is upon the theory that said child might become a public charge; but, where the support of the child has been provided for by contract, it would not be necessary for the county to enforce this section. No contract between the parents would exclude the

public authorities from instituting proceedings for the child's support if it became a public charge, but such action would not accrue if the child's support were otherwise provided for. For that reason, it is not necessary to discuss further this phase of the question in connection with this case.

For the above reasons, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings, and this opinion is adopted by and made the opinion of the court.

REVERSED.

JOHN M. NEFF ET AL., APPELLEES, V. JAMES G. KOLB ET AL., DEFENDANTS: H. BERGER, GARNISHEE, APPELLANT.

FILED JANUARY 21, 1918. No. 19843.

1. **Appeal:** GARNISHEE: MOTION TO DISCHARGE: AFFIDAVITS. Affidavits used on a motion to discharge a garnishee will not be considered in this court unless preserved by a bill of exceptions, and no issue can be raised here as to error in striking such affidavits from the files.

2. ———: FINDINGS BY COURT. The finding of the district court upon a question of fact in such a proceeding is entitled to the same weight as the verdict of a jury, and will not be set aside unless manifestly wrong.

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

D. H. Moulds and *H. D. Rhea,* for appellant.

E. A. Cook, W. M. Cook and *T. M. Hewitt, contra.*

LETTON, J.

This was a proceeding in garnishment after judgment. The garnishee's answer disclosed it had $373.79 belonging to defendant Berger. Defendant then filed an affidavit that he was married and the head of a family; that he had neither lands, town lots, nor houses subject to exemption under the laws of the state. He also filed an inventory that his personal property was of the total value of $458 and a motion to discharge the garnishee for the reason that the money in its hands was exempt. An affidavit was then filed by one of the plaintiffs to the effect that defendant and his wife resided in a dwelling-house in Lexington, which was owned by Mrs. Berger as their homestead. On December 27, 1915, seven affidavits were filed in behalf of defendant. A motion was filed to strike these affidavits from the files for the reason that each of them was sworn to before H. D. Rhea, attorney, who was then attorney for the defendant. The court took oral testimony on this point, found for plaintiff on this issue, and struck the affidavits from the files. The cause then coming on to be heard, oral testimony was taken. The court found that the homestead of plaintiff had not been abandoned, and that he was not entitled to the exemption of the personal property claimed. From this judgment defendant appeals.

The first proposition argued is that the court erred in sustaining the motion to strike the affidavits from the record which were sworn to before Mr. Rhea. The contents of only two of the affidavits are set forth in the bill of exceptions, and these only can be considered. *First Nat. Bank v. Carson,* 48 Neb. 763; *Morsch v. Besack,* 52 Neb. 502; *Carmichael v. McKay,* 81 Neb. 725; *Burrowes v. Chicago, B. & Q. R. Co.,* 85 Neb. 497.

As to whether the district court was justified in finding that Mr. Rhea was disqualified with reference to these, the evidence is not entirely clear. The same rule must be applied as in the case of a verdict by

the jury upon conflicting evidence, and the finding in such a proceeding will not be set aside unless it is manifestly wrong. We believe there is sufficient evidence to sustain the finding, and that it was not erroneous to strike the affidavits from the files.

The evidence shows that, when Berger and his wife removed from their home in May, it was for the purpose of having the same repaired and remodeled. They went temporarily to the home of Mrs. Berger's father in Lexington, and lived there most of the time while this work was being done. Most of their furniture was left in the house. Afterwards they went to Omaha for a time on account of Mrs. Berger's health, and while there a victrola was sent to Lexington by Mrs. Berger, and under her direction was taken from the railroad station and left at the home. There is also testimony that the contractor who raised the house was told by Berger that he was going to fix it up and rent it furnished, and that they were going to California; but the proof is not convincing that the home was ever actually abandoned. Even if the court had erred in deciding the collateral issue as to whether Mr. Rhea was qualified to administer an oath to these affiants, a consideration of all the testimony, including the evidence set forth in two of the affidavits stricken, which were excluded by the court at the trial, and are embodied in the bill of exceptions, has convinced us that the district court reached the proper conclusion.

AFFIRMED.

MIKE FEDA, APPELLEE, V. CUDAHY PACKING COMPANY, APPELLANT.

FILED JANUARY 21, 1918. No. 20392.

Master and Servant: WORKMEN'S COMPENSATION ACT: LIABILITY. Under the facts set forth in the opinion, *held* that the plaintiff's deceased did not come to his death by "accident arising out of and in the course of his employment."

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

C. W. Sears, for appellant.

Weaver & Giller, contra.

LETTON, J.

Action under workmen's compensation law. John Feda was employed by the defendant as a trucker. His duties were to take trucks loaded with meat from the fourth floor of the packing house to the trimmers' bench on the fifth floor, using an elevator between the floors. The trucks were there unloaded, and it was Feda's duty to return to the lower floor with the empty truck, where a loaded truck would be ready for him to take up.

On the day of the accident the elevator man, Verbeck, and Feda were playing with each other on the elevator, and Feda had taken hold of Verbeck between the legs. When Feda took the truck off at the fifth floor and set it at the bench, Verbeck chased him and took hold of him in the same manner. He ran back to the elevator with Feda immediately in pursuit. The elevator bell rang, and Verbeck ran upon and started it downward. Feda also ran upon it, but, finding it was going down, he turned and tried to jump back upon the fifth floor, when the top of the descending elevator caught him, inflicting fatal injuries. His father seeks compensation as a dependent. The court entered judgment against the defendant and it appeals, upon the grounds: First, that the death was not caused by an accident arising out of and in the course of the employment of Feda; second, that the injury was the direct result of decedent's wilful negligence in attempting to leave the moving elevator; and, third, that the court erred in finding that the plaintiff was partially dependent upon deceased at the time of his death.

Did the accident arise "out of and in the course of the employment?" Rev. St. 1913, sec. 3650. It was

no part of Feda's duties to return to the elevator without the truck or to run after Verbeck, and he abandoned his work in order to do so. It is argued that, though this may be conceded, the moment that Feda turned and attempted to get out of the elevator he became engaged in the course of his employment, and, the accident happening at this time, brought the case within the statute. If Feda had been attending to his regular duties, he would not have entered the elevator without the truck in the manner and at the time he did, and it would have been unnecessary for him to return. He ran upon it carelessly and attempted to leave it in a reckless and careless manner. The undisputed testimony shows that playing and scuffling in working hours was strictly forbidden, and that, if seen by the foreman, men engaged in it were discharged.

The right of recovery in such a case is purely statutory, and, unless the plaintiff has brought the case within the statute, he cannot succeed. The case is distinguishable from those where the person injured was the innocent victim of horseplay by another workman, since Feda was the original aggressor. The vital facts in the case are not in controversy, and it seems clear to us that there can be no liability, since the accident did not arise out of and in the course of the employment. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321. See, also, L. R. A. 1916A, 47, note 93, and p. 240, note 17*a*.

"Wilful" negligence is defined in the statute as "such conduct as evidences reckless indifference to safety." Rev. St. 1913, sec. 3693, subd. *d*. The elevator had descended a distance variously estimated at from two to four feet and was still moving before the deceased tried to leave it by jumping or climbing out upon the floor which it had left. Under section 3668, Rev. St. 1913, relating to wilful negligence, the right to recover may be seriously doubted, even if the accident had arisen out of or in the course of the

employment; but in the view we have taken of the other proposition it is unnecessary to so decide.

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

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

ABRAHAM L. REED, APPELLEE, V. AMERICAN BONDING COMPANY, APPELLANT.

FILED JANUARY 21, 1918. No. 19757.

1. **Insurance:** LARCENY: QUESTION FOR JURY. Under the contract sued upon, "the mere disappearance of an article" is not sufficient evidence of larceny; but, when other circumstances are in evidence indicating larceny, it may become a question for the jury.

2. ———: COSTS: ATTORNEY'S FEE. Our former decisions, that an attorney's fee may be allowed as costs in a judgment upon an insurance policy, although the contract was made before the act of 1913, are adhered to.

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

Stout, Rose & Wells, for appellant.

Morsman, Maxwell & Crossman, contra.

SEDGWICK, J.

The policy upon which this action was brought insured against the direct loss of the property described "by burglary, theft, or larceny." The plaintiff alleged that the diamond ring insured was stolen, and recovered a verdict and judgment in the district court for Douglas county for the value thereof.

1. The defendant contends that the evidence that the ring was stolen was not sufficient to justify the court in submitting that question to the jury. The evidence is not conflicting, and established that the plaintiff's wife wore the ring the evening of May 28, 1912,

and at night placed it in a jewel box with other jewelry in her room on the second floor of the residence. The box was provided with a lock, and she left the key in the lock. She had no occasion to wear the ring again for something over a month, and then discovered that it had been taken from the box. In the meantime a servant girl who had been in her employ for about two weeks had suddenly left her upon one day's notice, and, although she had mailed a postal card from Salt Lake City, Utah, to another girl in the plaintiff's employ, it gave no information as to her intentions for the future, and she has not been located since. This girl had had the care of the room in which the ring was left, and was in that room in the absence of the plaintiff or his wife. She had no money when she left, and borrowed a dollar to pay for taking her trunk to the station, and was paid the remainder of her wages, $13.60, by the plaintiff's check, which was cashed at a drug store. She had informed the plaintiff's wife that she intended to go to Los Angeles. The defendant company and the police were immediately notified when the loss of the ring was discovered, and, although search was made in the pawn shops of the city, the ring was not discovered. The policy contained the provision: "The mere disappearance of an article or money shall not be deemed sufficient evidence of its loss by burglary, theft, or larceny."

The defendant relies upon *Duschenes v. National Surety Co.*, 139 N. Y. Supp. 881, and other similar cases. In that case the provision of the policy relied upon was: "The assured shall also produce direct and affirmative evidence that the loss of the article or articles for which claim is made was due to the commission of a burglary, theft, or larceny; the disappearance of such article or articles not to be deemed such evidence." The evidence was not entirely identical with that in the case at bar, but it was quite similar, and the court said: "No direct or affirmative evidence

has been presented of any theft or larceny. * * * In order to protect itself from claims under the policy for loss of the articles covered by the policy by reason of some other cause than burglary, theft, or larceny, the company has provided that the insured must produce, not circumstantial, but direct and affirmative, evidence of the wrong"—and decided that the evidence was not sufficient to support a verdict.

Under a policy containing the same language, the supreme court of Pennsylvania held that quite similar evidence would support the finding that the article was stolen. The court said: "This contention gives to the words 'direct and affirmative evidence' a meaning so severely technical that, if this meaning alone can be given them, a policy containing the provision we have here would avail the assured only in the rarest and most exceptional cases, so exceptional that the average person would hardly think the contingency in which the policy could operate worth guarding against. * * * To limit the assured's right to recovery to cases where the *corpus delicti* can be proved by direct testimony, that is, by the testimony of witnesses who saw the actual taking, would make the policy next to valueless." The court refused to construe the words "direct and affirmative evidence" literally, as it could not be supposed that the parties to the contract so understood them. *Miller v. Massachusetts Bonding & Ins. Co.*, 247 Pa. St. 182.

These words are not in the contract under consideration. Indeed, the language we have to construe is much more liberal. It is true that if larceny, which is the gist of the action is sufficiently established by this evidence, the company's risk is a hazardous one. Such a contract would make it easy to manufacture a case against the company. The husband might remove the ring and secrete it until the litigation was over, and the wife could then in good faith make the same proof that she has made in this case. The ques-

tion is, therefore, a difficult one. The company may, if it desires, assume such risks as are here indicated, and, to hold that under this contract it has done so, presents to our minds the less difficulty than to hold otherwise. The husband was a witness in the case and submitted to cross-examination, and his evidence seems frank and fair, as does also the evidence of the wife. When, as in this case, the company selects for such insurance a family of high standing in the community, the insured being a man of well-known and unquestionable character, by so doing the risk is minimized. It seems more probable that both parties to this contract understood the difficulties in making proof of larceny in many cases, and that proof of the facts and circumstances from which larceny might justly be inferred, in the absence of any evidence to the contrary, would require the matter submitted to the jury.

2. The defendant also complains of the allowance of an attorney's fee and taxing the same as costs against the defendant. The contract of insurance was made before the enactment of the statute of 1913 (Laws 1913, ch. 234, Rev. St. 1913, sec. 3212), providing for such attorney's fee, and it is earnestly insisted that to apply that statute to litigation upon contracts made before its enactment impairs the obligation of the contract. The reasons advanced for this contention on the part of the defendant, and the manner in which they are presented in this brief, might well cause us to hesitate if the question was an open one. *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.*, 98 Neb. 863; *Ward v. Bankers Life Co.*, 99 Neb. 812. The decisions in these cases are based upon the proposition that the statute affects the remedy only, and to change the taxation of costs, even if it results in increasing the amount of costs, does not change the liability provided for in the contract, but only affects the method of enforcing that liability. If the contract is complied with, no costs are taxed against the company. If litigation becomes

necessary to determine the liability, the costs result from the litigation, and not from any construction of the contract. To suggest that the statute relates only to litigation upon contracts of a particular nature, and not litigation generally, presents a distinction of more or less difficulty; but that has already been determined in the cases above cited, a conclusion that we do not now feel at liberty to depart from.

The judgment of the district court is in harmony with these conclusions, and is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

LE ROY FUSSELL v. STATE OF NEBRASKA.

FILED JANUARY 21, 1918. No. 20194.

1. **Constitutional Law:** DIVORCE: EX POST FACTO LAW. Chapter 186, Laws 1915, making it a misdemeanor for "any husband, against whom a decree for divorce and alimony for the support of his children shall have been rendered," to neglect or refuse to comply with the decree, and declaring a penalty therefor, is not in conflict with either section 10, art. I of the federal Constitution, or section 16, art. I of the Constitution of the state, as an *ex post facto* law.

2. ———: ———: IMPRISONMENT FOR DEBT. The decree of the district court in a divorce suit providing that the husband shall pay to the wife certain instalments each month for the support of their minor child, is not a debt in the ordinary sense of the term, and the act of the legislature of 1915 providing for the imprisonment of the husband for refusal to make such payments is not in violation of the provisions of section 20, art. I of the Constitution of this state, which provides that no person shall be imprisoned in any civil action for debt.

3. **Information:** SUFFICIENCY: VENUE. An information whose caption gives the name of the state and the county, and which charges that the designated crime was committed in said county and state aforesaid, alleges the venue with sufficient certainty. *Dunn v. State*, 58 Neb. 807.

4. **Divorce:** NONCOMPLIANCE WITH DECREE: PROSECUTION: VENUE. A prosecution based on the provisions of chapter 186, Laws 1915, is

properly brought in the district court of the county in which the decree in the divorce proceeding was rendered.

5. **Criminal Law:** PROSECUTION: APPOINTMENT OF ASSISTANT. Error cannot be predicated in a misdemeanor case on the ground that the county attorney called to his assistance another lawyer without the order of the court.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Andrew P. Moran and *Anthony E. Langdon,* for plaintiff in error.

Willis E. Reed, Attorney General, and *John L. Cutright, contra.*

HAMER, J.

This is an appeal from a judgment in a criminal prosecution based on the provisions of chapter 186, Laws 1915, which reads as follows: "Whenever any husband, against whom a decree for divorce and alimony for the support of his children shall have been rendered by any court in this state, shall, without good cause, refuse or neglect to pay to the persons noted the amounts and in the manner provided by such decree, he shall be guilty of a misdemeanor and shall, on conviction, be imprisoned in the county jail not less than three nor more than six months for each offense, provided the refusal or neglect to so pay each separate instalment or payment of such money as provided by the decree shall be held to be a separate offense and punishable as such."

Le Roy Fussell was the defendant in the instant case, and his trial in the district court for Otoe county resulted in a verdict of guilty on eleven counts contained in the information. He was sentenced to serve a term of three months in the county jail on each of the counts, to be served consecutively, and that he pay the costs of prosecution. He has appealed.

The appellant by his brief assails the act as unconstitutional, and as one of his reasons for the attack

contends that the law is an *ex post facto* law; that it conflicts with section 10, art. I of the federal Constitution, and section 16, art. I of the Constitution of this state, the latter of which provides: "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed."

The record discloses that on the 14th day of January, 1915, the district court for Otoe county rendered a decree in a divorce case providing that defendant should pay the plaintiff, his divorced wife, $10 a month, commencing on the 1st day of January, 1915, for the support of their minor daughter, Eva Louise Fussell; and this prosecution was based on defendant's refusal to pay the sums of money so ordered by the decree of the court.

It is contended that, when the decree was rendered, there was no provision of the law for its enforcement other than the ordinary process of the court, such as execution, attachment, or garnishment; that the act in question placed the defendant in a worse situation than he was in prior to its enactment, and was therefore as to him an *ex post facto* law. Answering this contention, it may be said that the act in question was not amendatory of any statute, but was an independent act which was evidently passed by the legislature for the express purpose of giving the district court power to enforce orders and decrees in divorce cases. Ordinarily the court would have such power by a contempt proceeding; but this court having held in *Leeder v. State*, 55 Neb. 133, and *Segear v. Segear*, 23 Neb. 306, that a decree for permanent alimony is not so enforceable, the legislature, seeing the necessity for granting additional power to the court by which its decrees should be enforced, passed the act now under consideration for that purpose. The act, standing by itself, cannot be said to violate the provisions of either the federal Constitution or the Constitution of the state as

an *ex post facto* law. The legislature had the power to enact such a law as far as those constitutional provisions were concerned. The act does not amend or change any other statutory provision; and, as the defendant had not been guilty of any crime at the time it was enacted, it cannot be said to operate as an *ex post facto* law as to him. Again, the record shows that defendant did not refuse to comply with the terms of the decree in question until after the law went into effect. It is therefore difficult to see how it affected him in any way until after his refusal to obey the order of the court. 8 Cyc. 1035; *Jaehne v. New York*, 128 U. S. 189; *Flaherty v. Thomas*, 12 Allen (Mass.) 428; *Bittenhaus v. Johnston*, 92 Wis. 588. In 8 Cyc. 1035, it is said: "Laws which would be *ex post facto* if applied to offenses occurring before their passage will if possible be construed as having only a prospective effect." Many cases are cited in support of this view. Giving this statute a prospective effect precludes any question as to its constitutionality in this case.

It is defendant's second contention that the act in question is unconstitutional for the reason that it provides for imprisonment for debt, and is repugnant to section 20, art. I of the Constitution of this state, which reads: "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." This assignment presents a more difficult question. It is argued on the strength of the cases above cited that the decree, which provides that defendant shall pay $10 a month for the support of his minor child, creates a debt for the nonpayment of which he cannot be imprisoned under any pretext. Our statute seems to control the situation. In *Audubon v. Shufeldt*, 181 U. S. 575, it was said: "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to

support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by the court any time, as the circumstances of the parties may require." In *Bronk v. State,* 43 Fla. 461, 475, the court say: "It is almost universally settled that alimony or maintenance from the husband to the wife is not a debt within the meaning of the constitutional inhibition against imprisonment for debt." We need not pursue this question further, for the reason that the decree in question here does not provide for the payment of permanent alimony to defendant's wife. Its only provision is that defendant shall pay $10 a month for the support of his minor daughter, and therefore his refusal to make such payments brings him squarely within the provisions of the act in question. We do not think the allowance for the support of defendant's minor child bears any resemblance whatever to a debt, and therefore the constitution does not forbid imprisonment for the defendant's refusal to obey the order of the court.

Defendant further contends that the verdict is not sustained by the evidence. This assignment of error must be disposed of according to the rule so long established that, when there is a conflict of evidence on a material question, the verdict of the jury will not be set aside. In the instant case there was evidence that the defendant was able to pay the several instalments. It appears that he was the president of an insurance company which was doing a profitable business; that he said just before the complaint was filed in this case that he had $300 with which he could pay the amount claimed, which at that time was only $110, but he refused to make such payment for the reason that he would not pay anything to his former wife for fear she might obtain some benefit thereby. The jury, having considered this evidence, found a verdict against him, and we decline to set their verdict aside.

It is also contended that the court erred in overruling defendant's demurrer to the information because no venue was alleged, and that the court erred in overruling defendant's objection to the testimony of the state for the same reason. Without setting out the information, it is sufficient to say that the state and county are set out in the margin and in the caption, and the offense is alleged to have been then and there committed. In *Bartley v. State,* 53 Neb. 310, and in *Dunn v. State,* 58 Neb. 807, it is said that in such cases the venue is sufficiently alleged. Therefore this assignment should not be sustained.

It is also contended that because the plaintiff in the divorce suit had removed to Omaha, and the defendant in the instant case was residing there at the time this prosecution was commenced, the court had no jurisdiction to try the case. We think this contention is without merit. The prosecution was had for a refusal to comply with the order of the district court in the county where the decree was rendered, and this fact sufficiently answers this contention.

It is further contended that it was reversible error for the county attorney to have the assistance of attorney Livingston in the prosecution. The record discloses that this was a prosecution for a misdemeanor, and that as soon as the defendant objected to the appearance of Mr. Livingston he was promptly excluded from futher participation in the prosecution, and it is not shown that the defendant suffered any injury. Therefore defendant cannot complain, and this contention must be overruled.

Finally, it is contended that the gifts of small sums of money from time to time which defendant had made to his minor child without any regard to the decree in question should operate as payment according to the terms of the order of the district court, and should be a bar to this prosecution. The defendant's own testimony is a sufficient answer to this assignment. He nev-

er claimed that such gifts were paid on the decree, and the jury correctly found that they should not be so credited.

As we view the record, it contains no reversible error, and the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

HENRY MACKE, APPELLEE, v. JOHN W. JUNGELS; MARY WAGENER, APPELLANT.

FILED JANUARY 21, 1918. No. 19722.

1. **Notes:** CONSIDERATION: SLANDER. Language, if used attributing to another an uncontrollable sexual desire that caused her to commit an unmannerly and unwomanly act, is slanderous, and a note freely given in settlement of a claim for damages to her reputation resulting from such slander is not without consideration.

2. ———: UNDUE INFLUENCE: RELIEF IN EQUITY. Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party, which controls the free action of his will and prevents voluntary action in the giving of a note and mortgage, equity may relieve against the same on the ground of undue influence. *Munson v. Carter*, 19 Neb. 293.

3. ———: INJUNCTION: LIMITATION OF ACTIONS: ACTION FOR DAMAGES. A note, given in settlement of a claim of damages for tort, is *held* void because procured by undue influence exerted by others than the payee thereof. In this, a suit seeking to enjoin the collection of the note because procured by undue influence, the payee defended in good faith, believing that undue influence had not been exerted. *Held*, that the payee should in an action in equity be permitted to prosecute her claim of damages for tort, and that the statute of limitations does not run during the period covering the pendency of said action.

Appeal from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Modified and affirmed, and remanded.*

Dowling & Warner and *Vail & Flory*, for appellant.

Benjamin S. Baker, W. R. Patrick and *A. E. Garten, contra.*

CORNISH, J.

This is an action in equity in which the plaintiff asked that the defendant be enjoined from collecting or transferring certain notes and mortgages given by plaintiff and his wife to defendant, in settlement of a claim for damages, on the ground that they were without consideration and obtained by duress and by undue influence and fraud. The trial court found that the notes were without consideration, canceled the instruments, and granted a perpetual injunction. Defendant appeals.

The controversy arose out of an occurrence at a church meeting, in which the plaintiff used language toward the defendant which she contended was slanderous and damaging.

We are unable to agree with the trial court that the incident was of such trifling nature that the court can say, as a matter of law, that the words used were not slanderous, nor sufficient to base a claim for damages. What they were is in dispute. As interpreted from the German by some of the witnesses, they amounted to an accusation that defendant had an uncontrollable, sexual desire, causing her to do an unmannerly and unwomanly act in forcing her way to a seat supposed to be occupied only by men.

We are of opinion, however, that, taking all the facts and circumstances into consideration, coercion was exercised upon the plaintiff by persons connected with the church, other than defendant, to procure him to give the notes and mortgage in satisfaction of the demand, which, while not amounting to duress, did amount to a social and mental force exerted upon him, controlling the free action of his will, and preventing that voluntary action in the giving of the notes which equity will relieve against on the ground of undue influence. *Hartnett v. Hartnett,* 42 Neb. 23. The

notes should be canceled and the plaintiff released from all liability thereon.

The event occurred March 31, 1915. This action, enjoining the defendant from bringing suit on the note, was begun April 14, 1915. It would be inequitable that defendant's claim for damages should be lost by running of the statute of limitations during the time this action has been pending. The nature and extent of her claim have depended upon the results of this litigation. During its pendency she has not been free to otherwise prosecute it. While in this action she has defended upon the ground that undue influence was not exerted, she appears to have prosecuted her defense in good faith. Her situation may be likened to that of the person who has by mistake altered an instrument and yet may recover upon it. The principle is recognized in the rule that, because there may be a good-faith dispute whether an instrument was procured by fraud of duress, the party intending to rescind must do so within a reasonable time, if at all.

The defendant, so electing, should in equity be permitted to plead, setting up her alleged cause of action against the plaintiff, and, upon issues being joined, the cause tried as a law action for damages. *First Nat. Bank* v. *Gibson,* 74 Neb. 236.

The judgment of the district court is modified and affirmed, and the cause remanded for further proceedings, as herein indicated.

MODIFIED AND AFFIRMED, AND REMANDED.

ROSE, J., dissents.

LETTON, J., concurs in affirmance, and dissents from modification of decree.

I concur in the affirmance, but dissent from the modification of the decree. The result of the modification is to hold that one who ratifies an illegal act by seeking to sustain in court the validity of notes improperly extorted by duress may, even after the statute of limitations has run by reason of the delay caus-

ed by the suit, recover upon the original cause of action, if any. It gives one who ratifies the act of a wrongdoer the option to sue upon the notes, and, if unsuccessful, to retrace his steps and begin again after the statute has run.

MORRISSEY, C. J., concurs in this special concurrence and dissent.

GUS SULLWALD, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JANUARY 21, 1918. No. 19723.

Railroads: KILLING CATTLE: NEGLIGENCE. Evidence that one, driving cattle over a right of way, fails to discover an approaching train, even though such failure may amount to negligence, will not constitute a defense in an action for damages to cattle killed by the train, by reason of defendant's negligence or failure to maintain a proper gate, when the undisputed evidence shows that an earlier discovery of the train could not have prevented the accident.

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

Edson Rich and *Thomas F. Hamer,* for appellant.

H. M. Sinclair and *E. B. McDermott, contra.*

CORNISH, J.

Appeal from judgment for the wrongful killing of plaintiff's cattle by defendant's train.

Plaintiff and his hired man were driving 17 head of cattle over a private road. When within about 400 feet of defendant's track, the cattle, then being driven out of a corn field into which they had gone, stampeded, running toward home. The evidence is undisputed that the plaintiff did what he could to head them off, but was unable to do so. The defendant's gate and fence leading over the right of way was in such condition that it offered no obstruction to the cattle, and just as

they were crossing the track they were met by defendant's engine and seven of them killed.

The court instructed the jury that, if they found that the cattle got on the track as a result of defendant's failure to keep and maintain its gate in repair, then they should find for the plaintiff. The defendant in its answer alleged that the plaintiff was "guilty of negligence in the driving of said cattle upon the railroad of the defendant, which negligence was the proximate cause of the loss of said cattle." It is assigned as error that the instruction, above mentioned, did not take into account this defense.

It appears from the evidence that the plaintiff did not discover the approaching train until about the time of the accident, and it further appears that he knew the condition of the gate and fence. No doubt it was the duty of the plaintiff to watch for approaching trains. Considering the evidence as a whole, however, it would seem that, even though the plaintiff had made an early discovery of the train, this would and could have made no difference in the event. The failure to see the train could hardly be found to be the cause or a contributing cause of the accident. The defendant requested no instruction covering this theory of its defense, if such was its theory at the time. If the defendant desired such theory of the facts presented to the jury, it should at least have requested an instruction presenting it to the jury. *Bowers v. Chicago, B. & Q. R. Co.*, 91 Neb. 229.

Other assignments of error are made and have been considered. We are of opinion that the judgment of the trial court should be, and it is,

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

GEORGE BEIDECK, APPELLEE, v. ACME AMUSEMENT COMPANY, APPELLANT.

FILED JANUARY 21, 1918. No. 20249.

1. **Master and Servant:** EMPLOYERS' LIABILITY ACT: TRIAL: HARMLESS ERROR. Where defendant, in a tort action for damages for permanent injuries, pleaded in the answer that the liability, if any, is determinable under the employers' liability act (Rev. St. 1913, secs. 3551-3696), there was no prejudicial error as against defendant in discharging the jury and in retaining the case for trial before the presiding judge, though the testimony had been partially adduced.

2. ———: ———: TAXATION OF COSTS. In an action in tort for damages for personal injuries, where defendant answers that his sole liability is under the employers' liability act, and plaintiff takes issue upon that allegation, such costs as were occasioned by the trial of the tort action should be taxed against the plaintiff.

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

O. B. Clark, for appellant.

Boehmer & Boehmer, contra.

DEAN, J.

George Beideck began an action on November 14, 1916, against the Acme Amusement Company and the Orpheum Building Company to recover $25,000 damages for permanent personal injuries sustained by him on August 7, 1916, while in the employ of defendants as a janitor and also as a helper in decorating the walls and ceilings in the Orpheum theater building. The suit was dismissed as to the Orpheum Building Company.

Plaintiff alleges generally that in the course of his employment and without fault on his part he sustained the permanent injuries complained of upon his head and other parts of his body, and that the injuries were due to defendant's gross negligence and carelessness in

the erection of a certain hoist. At the time of the injury he was 46 years of age, and he alleges that immediately prior thereto he was physically sound and able to perform the work that is usual to a laboring man, and that he was then earning $65 a month, but that his injuries rendered him incapable of performing any labor or of earning any money.

The Acme Amusement Company answered, and among other averments as a defense alleged: "That pursuant to the said act (employers' liability act) under which this defendant and the plaintiff were operating, this defendant paid to this plaintiff the sum of $30, instalments of compensation due him as an injured employee under the laws above set out; that the plaintiff took and accepted such instalments and payments, and that this defendant tendered to plaintiff further instalments of the amount due plaintiff under the laws of Nebraska as the same became due, but that the plaintiff refused to accept said payments; that defendant stands ready and willing to make such compensations to the plaintiff as is just under the employers' liability act above set out." The answer was verified in the usual form, but it contained no prayer for a dismissal, nor for relief in any particular. The reply of plaintiff was a general denial.

A jury was impaneled, and when the testimony was practically all submitted the court adopted the theory advanced by defendant and announced that the case was one that should be tried by the court under the employers' liability act. Defendant then moved for a directed verdict "and to dismiss this action for the reason that the evidence plainly discloses that any cause of action which may be had by this plaintiff is a cause of action under article 8 of chapter 35 of the Revised Statutes of Nebraska for 1913, and part 2 thereof (employers' liability act), and that the plaintiff cannot maintain this action under the evidence in this case; and for the further reason, second, that the plaintiff has

affirmatively disclosed in this case in the evidence that he has no right of action against this defendant, the Acme Amusement Company, at this time." Defendant's motion was overruled, to which it excepted. The jury was thereupon discharged and the cause continued for about a week, when at the appointed time the parties again appeared and additional testimony was introduced by plaintiff, over defendant's objection "to any further testimony being taken in this case for the reason that the same is incompetent, immaterial, irrelevant, and for the further reason that the court has no jurisdiction to hear testimony herein, and for the further reason that the case was duly submitted and the jury discharged." This motion was overruled, to which defendant excepted. The court then on the merits found that plaintiff's injuries were permanent and rendered a judgment in his favor for $292.50, that amount being due him at the rate of $7.50 a week from September 25, 1916, until the date of the decree; plaintiff's wages at the time of the injury being $15 a week. The court also awarded plaintiff $7.50 a week for 254 additional weeks and $6 a week thereafter so long as he should live; the findings and judgment all being in pursuance of the employers' liability act. From this judgment defendant appealed. Plaintiff took no appeal.

The record presents an anomalous situation. The case was tried and judgment rendered in favor of plaintiff in pursuance of an act pleaded by defendant, and under which it averred its willingness to make just compensation. An act, too, that it recognized by making payments to plaintiff even before the action was begun. Nevertheless defendant in its brief argues that "the court had no jurisdiction to enter up a judgment in favor of plaintiff and against defendant on a theory or cause of action not set up in plaintiff's pleadings and inconsistent therewith," and that "the evidence did not show a total and permanent disability, and was not sufficient to support a judgment for a total and permanent disability."

Defendant's argument appears to be purely technical. Courts are instituted to find out the right and administer justice. In view of the pleadings of both parties and of the testimony, the judgment of the trial court on the merits was right. The employers' liability act was intended by the legislature to simplify legal proceedings and to bring about a speedy settlement of disputes between the injured employee and his employer. It was intended to take the place of the tort action with its tedious delays and technicalities that so often clog, and at times totally defeat, the administration of justice.

The act, in section 3678, Rev. St. 1913, expressly provides: "In case of a dispute over or failure to agree upon a claim for compensation between employer and employee, * * * either party may submit the claim * * * to the district court, * * * which court shall have authority to hear and determine the cause as a suit in equity and enter final judgment therein." In section 3680, Rev. St. 1913, the act provides generally that, in case of dispute, "either party may file in the district court a verified petition setting forth the names and residences of the parties and the facts relating to the employment at the time of the injury, * * * and also stating the matter or matters in dispute and the contention of the petitioner with reference thereto," * * * and that "the court shall proceed to hear and determine the cause without delay."

In view of the foregoing statutory provisions and of defendant's answer and of the pleadings generally, and the testimony in support thereof, we decline to vacate the judgment and submit the parties to the expense and annoyance of a new trial. It is obvious that another trial would result in the same conclusion. The judgment on the merits appears to us to be clearly right. Waiving technicalities, it seems to be immaterial under the act whether the cause of action is called to the attention of the court by the petition of the employee or,

as in the present case, by the answer of the employer. Section 3683, Rev. St. 1913, provides that the award may be increased or decreased at any time after six months from the date of the award as the facts may warrant upon application made to the court for that purpose. So that if plaintiff's injuries are not permanent, as defendant argues, it is not without remedy.

Ordinarily the application of purely technical rules of practice are not appealing to the court unless to prevent an injustice, and never less appealing than when invoked in a controversy that is properly triable under a legislative enactment that owes its origin, in part, to a desire to bring about a speedy settlement between the employer and the injured employee. *Mahowald v. Thompson-Starrett Co.*, 134 Minn. 113, is in point. There an administratrix sued and recovered a verdict and judgment for $6,500 for death of her intestate by wrongful act. On its application defendant was granted a new trial. On appeal it was held: "Instead of granting a new trial with privilege to plaintiff to proceed under the compensation act, we think the trial court should have reduced the verdict so as to correspond with the amount allowable under that act."

Defendant contends that it should not be charged with the costs in the action. From the first it conceded that the plaintiff was entitled to compensation under the employers' liability act. The plaintiff contended that his rights were not limited by that act, but that he was entitled to recover upon his action in tort for the full amount of any damages that he may have sustained. This contention involved only the right of the plaintiff to maintain the action in the form in which he brought it, and his right to recover costs against the defendant in that action. As the defendant prevailed respecting the form of action, it follows that the costs occasioned by the trial of the tort action were wholly unnecessary. When that question was determined, the one that remained was as to the amount of the plain-

tiff's recovery under the compensation act, and that was properly determined in favor of the plaintiff by the trial court, and upon that issue the plaintiff should recover his costs. We therefore conclude that the costs that accrued up to the time that the court discharged the jury and determined that the action was triable under the employers' liability act should be taxed against the plaintiff.

With this modification the judgment of the trial court is

AFFIRMED.

LETTON, J., not sitting.

CORNISH, J., dissenting.

Under Code procedure, the pleadings must be in writing. Parties going to trial may assume that only the issues made by the pleadings will be tried and that the judgment entered will be in accordance therewith. "If a petition fails to state a cause of action it will not support a judgment." *Burlington & M. R. R. Co. v. Kearney County,* 17 Neb. 511. The Code (Rev. St. 1913, sec. 7668) provides that the objection that the court has not jurisdiction over the subject-matter, or "that the petition does not state facts sufficient to constitute a cause of action," is never waived. Liberal provision is made for the amendment of pleadings. The cause pleaded, the proof, and the judgment must agree. The court is not at liberty to go anywhere in the pleadings—to the petition, answer or reply—to find the allegations of fact necessary to make the plaintiff's cause of action.

The provision in the Code (Rev. St. 1913, sec. 7713) that the court shall "disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party" merely permits a defective statement of the cause, generally arising by mistake, to be aided in certain cases by an allegation of fact or admission made by the adverse party. This

rule obtains only where the cause of action pleaded, or attempted to be pleaded, has omitted some necessary allegation. It applies only to a "defective" statement of the cause pleaded. *Railway Officials & Employees Accident Ass'n v. Drummond,* 56 Neb. 235, 240.

I do not understand my associates to disagree with the above statement of the law. The opinion is based upon a situation peculiar to this case and the law applicable to cases arising under the employers' liability act.

The plaintiff's action is in tort. The petition lacked no allegation necessary to make it a complete cause of action in tort for negligence. It was in no way defective, and did not allege or attempt to allege the facts necessary to show liability under the employers' liability act. The answer asked no affirmative relief, but, by way of defense, alleged facts showing that the defendant's liability was under the employers' liability act. The allegations of the answer were denied.

The court at the conclusion of the evidence took the case from the jury and proceeded, over the objections of defendant, to take more evidence as if the action were under the employers' liability act. Whether this could be done is questionable in my mind. Surely an action under the employers' liability act is not an action in tort. If it could be done, the proper procedure would have been for the trial court to permit amendment of the pleadings, so that issues could be joined, involving liability under the act. In such case, up to that time the costs should have been taxed to the plaintiff. No such order or amendment was made.

I am of opinion that, even though it may be thought conducive to justice and not contrary to law to permit the judgment to stand, it can only be done by permitting the plaintiff to amend his petition, paying all costs made up to the time of the amendment.

JACOB L. KALEY, APPELLANT, v. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

FILED FEBRUARY 1, 1918. No. 19766.

1. **Insurance:** SEMITONTINE POLICY: ESTIMATE BY AGENT. A paper entitled "A Conservative Estimate of a Semitontine Policy," inconsistent in several respects with the conditions of the policy, was shown to an applicant for life insurance by an agent and was signed by the agent. It was also attached by the agent to the policy when it was received by him from the main office of the insurance company, and it was then forwarded by him to the insured by mail. The application and policy both contained limitations on the authority of the agent, and the officers of the company had no knowledge of the existence of the paper or of its having been attached to the policy. In this action to recover the difference between the amount due under the policy and the amount stated in the "estimate," it is *held* that the policy and application constituted the contract, and that the insurer was not bound by such "estimate."

2. ———: AUTHORITY OF AGENT: ESTIMATE. An agent of a life insurance company, the limitation of whose power is set forth in the application for insurance, which limitation is expressly called to the attention of the applicant, cannot vary the terms of the policy by an estimate of results of the policy attached by him thereto.

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

John P. Breen, for appellant.

Montgomery, Hall & Young, contra.

This action is brought to recover $976.10 with interest, being the difference between the amount paid plaintiff by defendant on a policy of insurance and the amount which he claims is due under the terms of the policy. The trial court found for defendant. Plaintiff appeals.

In 1889 plaintiff purchased a semitontine, twenty-payment life insurance policy from the defendant. At the time he agreed to take the policy J. H. Mockett,

Jr., one of the firm of Mockett & Son, state agents for defendant, explained the nature of the insurance to him, and made out and signed the following "estimate" on a printed blank form:

"A Conservative Estimate of a Semitontine Policy in the Northwestern Mutual Life Insurance Company of Milwaukee, Wis.

Kind-20 Yr. S. T. 20-payment life. Age-36. Amount of policy-$2,500. Annual premium for 20 years-$87.25. At the expiration of 20 years you can choose from the following options: First Option. Surrender policy and take your entire share of its earnings in cash, namely:

Guaranteed reserve	$1,377.90
Surplus	$1,766.17
Total cash value	$3,144.07
Total premiums paid to the company	$1,745.00
Twenty years of life insurance and profit on investment	$1,399.07

"J. H. MOCKETT, JR., Agent."

The second and third options are not material in this case. According to plaintiff's evidence, Mockett promised that this paper would be sent to the home office of the company at Milwaukee with the application, and that the policy would contain the same when it was delivered to him. Plaintiff paid the first premium, and soon afterwards received the policy by mail from Mockett & Son. The estimate was attached with paste to the second page of the policy, and plaintiff supposed it had been attached at the home office. Shortly before the expiration of the 20-year period he notified the company at its home office that he elected to exercise the first option named in the "estimate" and take the cash value of $3,144.07 specified therein. In reply to this letter defendant stated that it knew nothing about any such option, and that the "estimate" had never

been signed or authorized by it or by any one for it. It offered to pay $1,377.09, the guaranteed reserve, and $790 surplus, with interest, amounting in all to $2,167.97. Plaintiff accepted this as a partial payment.

The policy provided: "This policy is issued on the semitontine plan, and its tontine dividend period is 20 years. This policy shall, if kept in force, share in the surplus, according to the company's usage, at each distribution after 20 years from the date hereof, until all contributions to the surplus found in the course of making such distributions to have arisen from this policy shall have been returned."

Among the conditions are the following:

"Eighth. No dividend shall be allowed or paid upon this policy, unless the insured shall survive the completion of its tontine dividend period, and unless this policy shall then be in force.

"Ninth. The condition last preceding being contained in all policies issued on the semitontine plan, all savings made in consequence of it shall be apportioned equitably among such policies issued on that plan as shall complete their tontine dividend periods."

It is also provided therein that upon completion of the tontine dividend period the insured shall have the options: "First, to withdraw in cash the accumulated surplus apportioned by the company to this policy; secondly, on furnishing satisfactory proof that the insured is then in good health, to apply said surplus to the purchase of a nonforfeitable participating paid-up addition to the amount insured under this policy; thirdly, to surrender this policy and receive therefor in cash its entire share of assets (that is, the accumulated reserve, together with the surplus apportioned), which reserve the company guarantees shall not be less than $1,377.90, in addition to said surplus."

On the back of the policy is printed: "Agents are not authorized to waive forfeitures, or to make, alter or discharge contracts."

In the answer defendant sets out certain provisions of the application limiting the authority of the agent, and alleges that the plaintiff at that time knew that the estimate executed by an agent was not and could not be a part of the policy. A number of other provisions of the policy are set out. It is also alleged that the estimate is inconsistent with the policy and does not refer to it; that the contract is a Wisconsin contract, and that under the law of that state such an estimate does not operate to change the terms of the policy as issued by the company or to guarantee or promise any other cash value than that already paid.

LETTON, J.

Both parties rely upon the law of Wisconsin. Plaintiff cites the case of *Timlin v. Equitable Life Assurance Society,* 141 Wis. 276. In this case the evidence established that the policy with the statement attached thereto was issued at the home office of the company. In the heading of the paper is found: "These estimates are the authorized figures of the society." It was held under the evidence that the statement constituted a part of the contract; that the amount of the life annuity which was in controversy was definitely fixed in the statement, and that the company was liable for the amount thus specified. Defendant relies upon the case of *Tourtellotte v. New York Life Ins. Co.,* 155 Wis. 455. In this case the jury found that an unsigned statement inclosed with the policy, but not attached thereto, allowing certain options, the first of which was to withdraw the cash value of $8,160, was a part of the contract of insurance, and that plaintiff was entitled to withdraw this amount. The supreme court said: "The question raised by the appeal is: Does the statement, exhibit 2, treating it as a part of the contract of insurance, change the policy so as to make it guarantee or promise a cash value of $8,160 at maturity? The trial court held that it did not. Was

such ruling correct? The statement purports to do nothing but illustrate or explain the contract. It contains no words of promise or guaranty." It is also said the statement in the *Timlin* case contained "words of promise as to the amount to be paid, while here we have language which purports only to illustrate the policy, and which states the source of the figures upon which the illustration is based." It was held that there was no liability by reason of this statement for more than the actual surplus and reserve. The opinion cites *Untermyer v. Mutual Life Ins. Co.*, 128 App. Div. (N. Y.) 615, *Langdon v. Northwestern Mutual Life Ins. Co.*, 199 N. Y. 188, and *Grange v. Penn Mutual Life Ins. Co.*, 235 Pa. St. 320, which support the conclusion reached. Of the two Wisconsin decisions, the facts in the *Tourtellotte* case are more nearly like the facts in this case. It is undisputed that the blank form of "estimate" was prepared and procured to be printed by J. H. Mockett & Son in conjunction with another agent of the company, and that no officer of the company was aware of its existence or use until plaintiff sought to exercise the option. There is testimony that the estimate was taken from a book issued by a private individual and sold to agents generally and used to the knowledge of the company by its soliciting agents, but there is no proof that the estimates shown in the book or set forth in the statement were not based on past experience, or that there was a wilful attempt to mislead and defraud. Plaintiff is a man of intelligence and education, and while he testifies that he was then not aware of the meaning of the word "tontine" or what the tontine plan of insurance was, we must conclude that he was aware of the meaning of the word "estimate," which is a word in common use. The statement is entitled "A Conservative Estimate of a Semitontine Policy." This is not the language of contract, but merely of expectation. The language used in the "estimate:" "At the expiration of 20 years you

can choose from the following options: First Option. Surrender policy and take your entire share of its earnings in cash, namely: Guaranteed reserve—$1,377.90. Surplus—$1,766.17''—shows that it was the amount of the reserve that was guaranteed, and not the amount of surplus. This of itself was significant. The policy stated the contract and the options which could be exercised under it. There was indorsed upon it a statement that agents had no power to make, alter, or discharge contracts. It provided in what manner the surplus which was to be divided at the end of 20 years should be accumulated, but made no attempt to specify its amount. Manifestly this would depend upon so many circumstances as to be impossible of accurate prediction. The number of policyholders in the tontine class, the number of lapses, the future condition of the money market which would determine the rate of interest which investments would draw were all uncertain factors. Legislation limiting forfeitures, increasing the rate of taxation, or changing the method of assessment, might reduce materially the funds which would otherwise fall into the surplus. The ''estimate'' fixes and liquidates matters which are left indefinite in the policy, and is so far inconsistent with its provisions.

The application shows that plaintiff affirmatively stated that he agreed and understood ''that no statements, representations or information made or given by or to the person soliciting or taking this application for a policy, or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, representations or information be reduced to writing and presented to the officers of the company at the home office in this application.'' This was no doubt designed to avoid just such controversies. The desire of an agent for commissions may tempt him to make promises which his principal is unable or unwilling to fulfil, hence the necessity of such a provision. Only such statements

as have been brought to the company's attention in writing in the application are authorized by it, and can be relied upon. Ordinarily the acts of an agent within the scope of his authority will bind the principal; but, where there is an express limitation of this brought to the knowledge of the person dealing with the agent, no act of the agent beyond the limitation can bind the principal.

Life insurance is based upon mathematical principles. Its plans of insurance, and the rates and premium payments to be made are prepared by actuaries and based upon mortality experiences. The safety and permanence of such associations and the welfare of their policyholders demand that their contracts may not be held subject to be changed at will by a mere agent whose limited powers have been brought to the knowledge of the applicant.

Plaintiff has called to our attention the case of *Forman v. Mutual Life Ins. Co.*, 173 Ky. 547. The facts in that case are not the same as in this; but, even if identical, we are of the opinion that the cases cited by the Wisconsin court, *supra,* and the following cases from other jurisdictions are more to be preferred as persuasive authority. *Donoho v. Equitable Life Assurance Society,* 22 Tex. Civ. App. 192; *Truly v. Mutual Life Ins. Co.,* 108 Miss. 453 (this case distinguishes a former case in that state cited by plaintiff); *O'Brien v. Equitable Life Assurance Society,* 173 Mich. 432; *Williams v. New York Life Ins. Co.,* 122 Md. 141.

If the evidence had established that the estimates were not based upon former experiences, were beyond reason and fraudulent, and that the insurance company had knowledge of the use of such false and fraudulent estimates by their agents, then the law would afford an appropriate remedy to one injured or defrauded. As the case stands, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

HAMER, J., concurring.

I concur in the conclusion. I do not think that the policy sued on justifies a conclusion that the paper entitled "A Conservative Estimate of a Semitontine Policy" was a part of the policy itself. The paper probably seemed to Kaley to have come from the home office, but it was signed, J. H. Mockett, Jr., Agent. It did not purport to be more than an estimate. It contained no words of promise, but it was a most artfully drawn estimate of the advantages likely to come to the insured. I have no doubt that the paper was very influential upon Kaley. It may have appeared to Kaley that the company put out the "estimate" and "authorized" the figures. The question is not before us to determine whether the company by its agent did Kaley a wrong for which it might be liable in tort, and therefore I do not wish to be understood as saying that an action in tort against the company will lie.

BURNHAM-MUNGER-ROOT DRY GOODS COMPANY, APPELLEE, v. E. J. STRAHL, APPELLANT.

FILED FEBRUARY 1, 1918. No. 19857.

Attachment: "DISCHARGE" BOND: EFFECT. After a defendant in an attachment proceeding has given a "forthcoming" bond under the provisions of section 7740, Rev. St. 1913, he may move to dissolve the attachment, because the attachment is still in force and effect; but he may not do so if he gives a "discharge" bond under section 7753, Rev. St. 1913, because the approval of such a bond *ipso facto* discharges the writ, and there is nothing left to dissolve.

APPEAL from the district court for Pierce county: ANDREW R. OLESON, JUDGE. *Affirmed.*

Fradenburg, Van Orsdel & Matthews, A. G. Cole and *M. H. Leamy,* for appellant.

Fred H. Free, contra.

LETTON, J.

This was an action for the recovery of money. A writ of attachment was issued and levied upon a stock of goods belonging to defendant. A few days afterwards defendant executed a bond with sureties, in which they "do hereby undertake to plaintiff in the sum of $5,177.54 that the defendant shall perform the judgment of the court in this action and pay the judgment and costs rendered against him." Afterwards defendant moved to dissolve the attachment on the ground that the affidavit was insufficient and that it was false and untrue. Plaintiff then moved to strike this motion from the files upon the grounds that the defendant is estopped from moving the dissolution of the attachment at this time by electing to discharge the attachment by giving the bond mentioned, instead of giving a forthcoming or redelivery bond, and that the attachment had already been wholly discharged by the act of the defendant and by operation of law. The motion to strike the motion to dissolve was sustained, and after a trial, judgment was rendered for plaintiff.

The only question presented is whether the court erred in refusing to consider the motion to dissolve the attachment after the giving of the bond to discharge the same. The statutes of Nebraska provide two methods by which the debtor may regain possession of property attached without a hearing upon the validity of the attachment. Section 7740, Rev. St. 1913, provides, in substance, that the sheriff shall deliver the property attached to the person in whose possession it was found upon the execution by such person in the presence of the sheriff of an undertaking to plaintiff "that the property or its appraised value in money shall be forthcoming to answer the judgment of the court in the action." This is usually known as a "redelivery" or "forthcoming" bond. In *Dewey & Stone v. Kavanaugh*, 45 Neb. 233, it was held that the defendant may move to dissolve the attachment after a forthcoming

or redelivery bond is given. This seems to be the general rule in all courts whenever a bond of this nature is given. The other manner of procuring the property is provided for by section 7753, Rev. St. 1913. This provides: "If the defendant, or any other person on his behalf, at any time before judgment, cause an undertaking to be executed to the plaintiff by one or more sureties resident in the county, to be approved by the court, in double the amount of the plaintiff's claim as stated in his affidavit, to the effect that the defendant shall perform the judgment of the court, the attachment in such action shall be discharged and restitution made of any property taken under it or the proceeds thereof. Such undertaking shall also discharge the liability of a garnishee in such action for any property of the defendant in his hands." The next section provides that in vacation the undertaking may be executed in the presence of the sheriff having the order of attachment, and the sureties be approved by him.

The appellant contends that the same right to contest the validity of the attachment exists after the giving of a discharge bond as in the case of a forthcoming bond. There is a decided conflict in the decisions. A full statement of the principles involved and a list of cases may be found in 6 C. J. 338, and it is said: "The decided weight of authority is in support of the view that the giving of such a bond operates as a waiver on the part of the attachment defendant to move for a dissolution of the attachment thereafter." The question is discussed at length in *Fox v. Mackenzie*, 1 N. Dak. 298, and the cases examined. In the recent case of *Moffitt v. Garrett*, 23 Okla. 398, it is held, under a statute word for word the same as section 7753, that an obligor in such a bond "is absolutely liable in an action against him on the bond for the amount recovered in the action in which the bond was given, without reference to the question whether the attachment was rightfully or wrongfully issued, and the defendant

is precluded by such bond from controverting the grounds of the attachment." A large number of decisions are set forth in the opinion, and it is said that, while there are a few authorities which appear to support a contrary view, the overwhelming weight of authority seems to support the view announced by that court. There is a monographic note to this case in 32 L. R. A. n. s. 401. It appears that in *Edwards Co. v. Goldstein*, 80 Ohio St. 303, the supreme court of Ohio, construing provisions of the Ohio Code identical with the provisions of sections 7753, 7769, Rev. St. 1913, hold that the latter provisions apply to all cases in which bonds have been given, and not alone to redelivery. The Ohio decisions were not uniform on this point until this case was decided. Its reasoning is not clear and satisfactory and we are convinced that the better rule was adopted by courts taking the other view.

The proper limits of this opinion will not permit a lengthy statement of the reasons given by the great majority of the courts for adopting this conclusion. Stated summarily, they are: The defendant has the choice of obtaining the possession of the attached property by giving the forthcoming bond (section 7740), which only renders him liable for the property or its appraised value, and which makes no provision for the discharge of the attachment, leaving it in existence and subject to attack; or, on the other hand, to give the discharge bond (section 7753) by which he becomes liable to perform the judgment of the court and by which the attachment is wholly discharged. In the one case the giving of the bond leaves the attachment in force, and in the other it procures its discharge. When defendant made the motion to dissolve the attachment in this case, it had already been dissolved by the giving of the bond and the property had been delivered to him. The provisions of section 7769, permitting a motion to dissolve to be made at any time before judgment, evidently can only apply to an attachment which

is in existence, and not to one which has already been discharged.

While it is true, as defendant contends, that the statutory provisions mentioned seem to have been adopted from the Ohio Code, and that as a general rule, where a statute has been copied from the statute of another state which has been theretofore judicially construed in that state, it will be presumed that the legislature intended to adopt both the statute and the construction given by the courts of that state, yet this is not a uniform rule and has been departed from for good reasons by this court on several occasions. Moreover, it is since this provision was inserted in our Code that the supreme court of Ohio passed upon it. Substantially the same provisions existed in other states before they were enacted by Ohio or adopted by this state; Missouri having a like statute in 1831. *Payne v. Snell*, 3 Mo. 410. There is as much reason for adopting the contrary construction given by the courts of such states as for adopting that given by the court of Ohio.

We believe that sound reason is in accordance with the majority rule, and that the district court committed no error when it refused to consider the motion to dissolve.

AFFIRMED.

HAMER, J., dissents.

SEDGWICK, J., not sitting.

DEAN, J., dissenting.

It seems that the giving of an undertaking, "to the effect that the defendant shall perform the judgment of the court," should presuppose the suing out of a valid attachment by plaintiff. Such must have been the legislative intent. Rev. St. 1913, sec. 7769. Will it be contended that, under the statutes in question, an attachment in which no undertaking has been given or one in which no affidavit has been filed would confer

jurisdiction of subject-matter? And if at any stage of the proceeding it should be shown that the affidavit is false, or that no undertaking had been given, and that the court therefore never in fact had jurisdiction of the subject-matter, it would seem that the situation would be the same as if no affidavit was filed in the first instance.

In 1909 the Ohio court in *Edwards Co. v. Goldstein*, 80 Ohio St. 303, cited in the main opinion, in construing statutes identical with ours, held: "A defendant may at any time before judgment, under section 6522, Revised Statutes, move for the discharge of an attachment under which his property has been taken, although he has previously given a bond for its discharge under section 6513, Revised Statutes." In the body of the opinion it is said: "Certainly the statute does not in terms express the legislative intention that the validity of the attachment may or may not be contested after the giving of the bond by the defendant."

The section under consideration has not heretofore been construed by this court, and, unless the Ohio interpretation is clearly wrong it should be adopted, and mainly for the reasons stated on this point in the majority opinion.

IN RE ESTATE OF EDWARD G. DOVEY.

FRANK E. SCHLATER, ADMINISTRATOR, APPELLANT, V. GEORGE E. DOVEY, ADMINISTRATOR, APPELLEE.

FILED FEBRUARY 1, 1918. No. 20334.

1. **Executors and Administrators:** ACCOUNTING: ESTOPPEL. An administrator was appointed, but filed no inventory. The widow and heirs thereafter consented that the funds belonging to the estate should be paid into a partnership business formerly owned and carried on by the deceased and his son, the administrator, and after the death of the father the business was conducted by the sons; each of the parties, including the widow, drawing money

from the firm from time to time. There were no debts. No report was ever made by the administrator, nor was one requested for more than 30 years, when the administrator of the widow, who had died a short time before, requested an accounting. *Held*, that by consent and acquiescence in this course of conduct for so many years the parties had virtually abandoned the administration proceedings, and, while the administrator of the widow is entitled to an accounting from the partnership, he is estopped to call upon the administrator to account other than to show that all money received was paid into the partnership.

2. ———: POSSESSION OF REALTY. An administrator may take possession and control of the lands and tenements belonging to the estate of his intestate during its settlement; but, unless it is necessary to collect the rents or to sell the land to pay debts, legacies or expenses, he is not compelled to take control of the real estate.

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

Jesse L. Root and *C. A. Rawls*, for appellant.

John L. Webster, William R. King, D. O. Dwyer, A. L. Tidd and *Matthew Gering, contra.*

LETTON, J.

This case was begun in the county court by a petition for a citation to George E. Dovey, as administrator of the estate of E. G. Dovey, deceased, for an accounting. Upon appeal to this court from a former judgment (opinion reported in *In re Estate of Dovey*, 99 Neb. 744) the judgment was reversed and the case remanded, with directions to the county court "to make a final accounting, settlement and order of distribution of the assets of the estate of E. G. Dovey, deceased, among those interested therein, and for such further proceedings as may be necessary in the premises, not in conflict with this opinion." An execution had been issued against George E. Dovey upon the judgment thus reversed. Pending appeal he sought by a petition in equity to restrain the execution of the judgment. The proceedings were dismissed in the district court,

but that judgment was reversed by this court. *Dovey v. Schlater,* 99 Neb. 735. In the petition in the latter action George E. Dovey alleged practically the same facts as are pleaded by him in this case in his answer. A full statement of the facts in controversy between the parties may be found in the reports of the decisions above referred to. The answer in the county court, after setting forth the facts alluded to, pleads that the administrator never received, and does not now have, any money or property in his possession as administrator of the estate of E. G. Dovey, and recites that the disposition which was made of the property was had with the knowledge, consent and approval of each of the parties in interest. He asks that his report be allowed and approved, and that he be discharged as administrator. After the case was remanded to the county court, Oliver C. Dovey and Horatio N. Dovey, who had taken no part in the proceedings, appeared, so that all parties interested are now before the court. The county court found against the administrator, and the case was again appealed to the district court. After the evidence was submitted, that court made findings of fact, and found generally for George E. Dovey, as administrator, as against all the other claimants, and from this judgment Frank E. Schlater, as administrator of the estate of Jane E. Dovey, appeals.

The action was dismissed without prejudice to the rights of the special administrator, Oliver C. Dovey, and Horatio N. Dovey to have an accounting in the case of George E. Dovey et al. v. Frank E. Schlater, now pending, in which an account has been directed.

The record is voluminous, but the principal facts upon which the result of the action depends are not in much dispute. It seems clear that George E. Dovey, while nominally administrator, acted in that capacity no farther than to collect several debts owing the estate of E. G. Dovey, deceased, and these proceeds, as well

as all the other personal property of the estate, were delivered to and retained by the partnership by common consent. It is not shown that he ever took possession of the real estate as administrator. Part of it was afterwards sold, not by George E. Dovey, as administrator, as alleged by appellant, but by the heirs, who joined in the conveyance. This money was also paid into the partnership funds, and an accurate account of it kept. In short, the mother and sons owned all the property and treated it and the business of the partnership as a family matter; no one else being interested. Mrs. Jane A. Dovey lived in the family of Horatio. She was apparently contented that her sons should conduct the partnership business, and contented to receive the income from her share of the estate after it had been turned in to the common mass. This manner of proceedings was concurred in by Jane A. Dovey and the other heirs for more than 30 years. In her lifetime she never requested an inventory or an accounting from George E. Dovey, as administrator, and none was ever filed, nor was any such request made by Horatio or Oliver. Administration was practically dispensed with by common consent. Apparently no money was ever paid by George, as administrator, to Mrs. Dovey, but many thousand dollars were paid to her from the funds of E. G. Dovey & Son.

It is contended that it was the duty of the administrator after one year from the date of his appointment to close up the estate, and that the statute of limitations is not available as a defense in the hands of a trustee as against the *cestui que trust.* Both of these contentions are sound, but we think the principles are not applicable to the facts in this case. The estate was practically wound up when the administrator collected the few debts due the estate and paid the money into the partnership. The heirs and the widow, who were the only parties interested, concurred in this abandonment of the proceedings. It was competent

for them to agree to an adjustment of their rights through other than the regular channels of the probate court. The statute of limitations is not the defense urged, but consent and acquiescence in a different course of procedure, and practically an estoppel against a change of position. The district court properly held that Mrs. Jane A. Dovey and the other heirs were bound by this course of conduct, and that after her death her administrator could not, after the lapse of so many years, assume a different position to the loss and detriment of George E. Dovey.

In this proceeding it is unnecessary to consider what interest, if any, Mrs. Jane A. Dovey held in the partnership fund after the settlement was made with Oliver and he retired from the firm. No relief could be granted her administrator, as against the firm, in this action, and the question is left open for determination in the other suit.

It is urged that the county court followed strictly the direction of this court when the former judgment was reversed. The order was then made that an accounting should be had and distribution made of the assets. The administrator accounted for the disposition of the property as consented to by the widow and heirs, and, having done so, there was nothing to distribute. It may be said that upon the reversal of the judgment in the other suit, at the same time, the district court was directed to settle and determine the principal questions sought to be tried in this case. If proper issues are made in that case, we see no reason why the whole controversy cannot be finally determined therein.

The appellant complains that the petition asked the court to determine the names of the heirs of the estate. The decree of the county court covered the matter, but that of the district court makes no finding in this respect. It is hereby modified so as to find that, on the death of E. G. Dovey, Jane A. Dovey became his

widow, and that his only heirs were George E. Dovey, Horatio N. Dovey, and Oliver C. Dovey, and it is so adjudged. As thus modified, the judgment is affirmed; costs taxed to appellant.

AFFIRMED AS MODIFIED.

SEDGWICK, J., not sitting.

NICHOLAS OPP, APPELLANT, V. FREDLIN W. SMITH ET AL., APPELLEES.*

FILED FEBRUARY 1, 1918. No. 19835.

1. **Taxation:** TAX SALE: REDEMPTION. Under the revenue law of 1879, a person seeking to redeem land from a tax sale was required to begin his action within three years from the making of the tax deed, unless such deed was void on its face, and the period was extended to five years by the revenue law of 1903. Comp. St. 1889, ch. 77, art. I, sec. 134; Comp. St. 1903, ch. 77, art. I, sec. 230.
2. **Evidence:** TAX DEED: CERTIFIED COPY. A duly certified copy of an authentic public record of a treasurer's tax deed, bearing the word "seal," and containing the recital, "given under my hand and official seal," is, in absence of evidence to the contrary, sufficient to show the use of such seal, if authorized by statute.
3. **Taxation:** TAX DEED: VALIDITY. A county treasurer could make a valid tax sale under the revenue law of 1879, and he could execute and deliver to the purchaser a valid tax deed under the revenue law of 1903, which preserved to such purchaser all rights acquired by him under the old law. Comp. St. 1889, ch. 77, art. I; Comp. St. 1903, ch. 77, art. I.

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

Fawcett & Mockett and *G. J. Hunt,* for appellant.

J. E. Philpott, F. E. Williams and *R. C. Hunter, contra.*

ROSE, J.

This is an action by a patentee to redeem from a tax sale a quarter section of land in Morrill county

*Rehearing allowed. See opinion, p. 155, *post.*

and to quiet his title on the ground that the tax deed was void. Title by adverse possession was pleaded as a defense, in addition to a denial of the facts constituting the plea of the invalidity of the treasurer's deed. From a judgment of dismissal, plaintiff has appealed.

The controversy is between plaintiff and defendant Alanson O. Taylor, who acquired the interests of the purchasers at the tax sale. December 22, 1893, plaintiff procured his final receipt for his entry, and the patent was issued January 2, 1895. The land was sold October 13, 1900, by the county treasurer at private tax sale for delinquent taxes for the years 1894 to 1898, inclusive, and the treasurer's certificate was issued on the day of the sale. The tax deed was issued September 28, 1903. At a former trial the district court dismissed the action on the ground that Taylor had established his plea of adverse possession, but the supreme court held otherwise, and remanded the cause for a determination of the validity of the tax deed. *Opp v. Smith,* 96 Neb. 224. A second trial resulted also in a dismissal of the action, and plaintiff has again appealed.

Taylor insists that the judgment below should be affirmed on the ground that the action is barred by the special statute of limitations embodied in the revenue law. If this point is well taken, the consideration of other questions becomes unnecessary. The treasurer sold the land October 13, 1900, under the revenue law of 1879. Comp. St. 1889, ch. 77, art. I. The treasurer's deed was executed September 28, 1903, when the revenue law of 1903 was in force. Comp. St. 1903, ch. 77, art. I. Taylor and his grantors have been in possession since September 28, 1903; plaintiff in the meantime residing in Cass county. The revenue law of 1879 provided: "No action for the recovery of real property sold for non-payment of taxes shall lie, unless the same be brought within three years after the treasur-

er's deed is made." Comp. St. 1889, ch. 77, art. I, sec. 134. This is followed by a proviso having no application to the present inquiry. The revenue law of 1903 contains practically the same provision, except that the period is five years instead of three. Comp. St. 1903, ch. 77, art. I, sec. 230. After the supreme court, on the former appeal, had remanded the cause for further proceedings in the district court, Taylor filed an amended answer, in which he pleaded the special statute of limitations, and alleged that, though the treasurer's deed was made September 28, 1903, this action to recover the land was not commenced until December 1, 1910. The record shows that plaintiff did not begin his suit within the time limited by either of the revenue laws cited. Plaintiff argues that Taylor is not entitled to the benefit of the special statute of limitations, for the asserted reason that the treasurer's deed is not valid on its face, citing *Housel v. Boggs,* 17 Neb. 94; *Bendexen v. Fenton,* 21 Neb. 184. It is argued that two fatal defects appear on the face of the deed—absence of a treasurer's seal and failure to recite that the land had been previously "offered at public sale and not sold for want of bidders." For want of a seal, no valid treasurer's deed could be executed under the act of 1879. The treasurer's deed in controversy did not contain the recital mentioned. The treasurer had authority to make the sale. Before he executed the deed the legislature passed new laws preserving to purchasers at tax sales all rights which had accrued under the old law and authorizing a treasurer's seal. Comp. St. 1903, ch. 77, art. I, sec. 242; ch. 83, art. IV, sec. 5. A valid sale could be made under the old law, and a valid deed could be executed under the new.

Plaintiff insists, however, that the record contains no evidence of the use of an official seal. The point is not well taken. The original deed could not be found, and a copy certified from the county records was introduced

in evidence. Though a reproduction of the seal itself does not appear on the copy, it bears the word "seal," and contains the clause "given under my hand and official seal." This was sufficient. *Colvin v. Republican Valley Land Ass'n*, 23 Neb. 75.

Is the deed void on its face because it does not contain the recital, "such lands having been offered at public sale and not sold for want of bidders?" The land was sold under a law which had been repealed before the deed was executed. The rights of the purchaser were preserved by the new law, which did not require such a recital in the deed. The deed, when executed, conformed to the requirements of the statute then in force. It does not show that plaintiff was deprived of any right granted by either law. It is, therefore, valid on its face, within the meaning of the special statute of limitations.

It follows that the action is barred and that the dismissal is without error.

AFFIRMED.

SEDGWICK, J., not sitting.

The following opinion on motion for rehearing was filed November 30, 1918. *Former judgment vacated, and judgment of district court reversed.*

1. **Taxation:** TAX DEED: EVIDENCE. A tax deed issued under the act of 1903 upon a private tax sale made under the act of 1879, and which does not contain the statement that the land was first offered at public sale, is not of itself sufficient proof that the sale was in that respect in compliance with the law under which it was made.

2. ———: SALE FOR TAXES: REDEMPTION: LIMITATIONS. Such deed so issued will not start the running of the five-year statute of limitations against an action to redeem.

SEDGWICK, J.

When this case was in this court before (96 Neb. 224) the court found that the action was not barred by the ten-year statute of limitations, and the judgment was reversed and the cause remanded, with instructions "to determine the question of the validity of the tax deed, set out in the pleadings, and of the tax sale upon which such deed is based, and, if the same are found to be void, to ascertain the amount which plaintiff should be required to pay in order to redeem the lands in controversy, and to permit such redemption." Upon another trial, the court again found for the defendants and dismissed the plaintiff's cause of action, and the plaintiff has appealed.

This court entered a judgment affirming the judgment of the district court, *ante,* p. 152. The principal facts disclosed by the record are sufficiently stated in that opinion, and it was there said: "A valid sale could be made under the old law, and a valid deed could be executed under the new * * * The land was sold under a law which had been repealed before the deed was executed. The rights of the purchaser were preserved by the new law, which did not require such a recital in the deed. The deed, when executed, conformed to the requirements of the statute then in force. It does not show that plaintiff was deprived of any right granted by either law." It was concluded that the deed is "valid on its face, within the meaning of the special statute of limitations." Upon the plaintiff's motion a rehearing was allowed, and the case again argued upon additional briefs. Upon further consideration we are satisfied that we were in error in our former decision. It is alleged in the amended petition that the land was sold by the treasurer at private sale without first having offered it at public sale. This is not specifically denied in the answer, and there is no allegation therein that the land was first offered for public sale. It appears to be conceded that, as a matter of fact, the sale was void for that reason, the claim being that the deed

issued under the new act was valid on its face, and that, therefore, the five-year statute of limitations provided in the new act applies in this case, and that the action is therefore barred.

The act of 1879 (Laws 1879, p. 276), under which this sale was made, required that the certificate of sale contain a statement that the land was offered at public sale and not sold for want of bidders, and that this certificate should be issued in duplicate, one to be delivered to the purchaser and the other to be filed with the county clerk, and that the record of the same in the county clerk's office should be received in evidence, and contained other similar provisions guarding against the very evil that is here complained of. Among other things, it required that the deed issued upon this certificate of sale should contain the statement that the land was offered at public sale and not sold for want of bidders, and that a deed so issued under that act should be sufficient proof that the statute requiring the lands to be first offered at public sale had been complied with. Therefore a deed issued under and in compliance with that act might be considered in that respect valid upon its face, and to start the running of the statute of limitations against an action to cancel a deed for failure to comply with this essential requirement of the law in the matter of the sale of land for taxes. The deed provided for in the act of 1903 (Laws 1903, ch. 73) is not sufficient for that purpose. That act does not require that the deed contain a statement that the land had first been offered at public sale. The new act, as to sales thereunder, contains other safeguards against depriving the owner of his land by private sale without having complied with this essential requirement that it must be first offered at public sale. It therefore seems clear that a deed executed under the new act will not be sufficient evidence that the sale made under the former act was made in compliance with the law, and this was expressly decided in *Wells v. Bloom,* 96 Neb. 430, in which case it was held: "A tax deed issued

in 1904, upon a tax sale certificate issued on a treasurer's tax sale made in 1902, without a previous compliance by the purchaser with the requirements of section 124, art. 1, ch. 77, Comp. St. 1901, is void and confers upon the grantee in such tax deed nothing more than color of title."

It follows that the five-year statute of limitations provided in the act of 1903 is not a bar to this action.

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

REVERSED.

MORRISSEY, C. J., and ROSE, J., dissent.

ALDRICH, J., not sitting.

WILLIAM E. CARR, APPELLANT, V. FLOYD N. CARR ET AL., APPELLEES.

FILED FEBRUARY 1, 1918. No. 19744.

1. **Executors and Administrators:** CLAIM: EVIDENCE. The evidence examined, stated in the opinion, and *held* to be insufficient to establish the plaintiff's contention that he had another sum of $3,000 coming to him from his father's estate as claimed in his supplemental amended petition.

2. **Descent and Distribution:** CLAIM: RELEASE. It is also further *held* that the $3,000 paid by the father, Newton E. Carr, to the plaintiff, William E. Carr, was in full settlement of a lawsuit between them in which certain other parties appeared, and that it was also the purpose of William E. Carr and Newton E. Carr that the said William E. Carr should, by the payment to him of the said sum of $3,000 by Newton E. Carr, be thereby paid in full for any and all sums of money due, or to come due, to him from said Newton E. Carr, or any interest in any way to come to him from his father's estate, and that he thereby released said estate from any and all claims that he might thereafter have against the same.

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

R. J. Greene, for appellant.

J. J. Ledwith, contra.

HAMER, J.

Newton E. Carr and his wife, Amanda, lived in Indiana and had a family of six children, of which William E. Carr, being the oldest son, is the appellant in this case. William E. Carr came to Nebraska in 1878. He returned to Indiana in February, 1879, and he and his family and the appellee Floyd N. Carr afterwards came to Nebraska for the purpose of residing here. They negotiated for the purchase of some land near Ceresco. It is claimed that, upon the testimony of Katherine Carr, Newton E. Carr promised to deed the Cass county land described in the petition to the appellant. It is contended on behalf of the defendants that there is no evidence of any consideration for the promise alleged to be made by Newton E. Carr, and that there is nothing by which such promise can be held to be binding.

The plaintiff appears to have rented a farm near Ceresco, and he and his brother, Floyd, farmed together for a period of three years. In 1880 Newton E. Carr came out with another son, Ernest E. Carr, and purchased two 80-acre tracts south of Greenwood, in Cass county, taking the deeds in his own name. He put Ernest E. Carr in possession of one tract, and the plaintiff, William E. Carr, in possession of the other tract. It appears that there was an agreement to the effect that each was to have the use of the land free of rent, and that each was to improve the tract which he occupied and pay the taxes upon it. It is contended by the defendants that there is nothing in the evidence to indicate that the father, Newton E. Carr, ever promised or intended to part with the title to any of the land.

It is claimed in the petition that Newton E. Carr died intestate as to the north half of lot "L" in Haw-

ley's addition to Lincoln, and that the plaintiff is entitled to a one-sixth interest therein as an heir at law of Newton E. Carr.

It is claimed in the second cause of action that in the settlement of the land controversy mentioned in the receipt introduced in evidence as exhibit No. 10 Newton E. Carr promised to pay the plaintiff an additional sum of $3,000 upon the death of Newton E. Carr, and that this promise became a charge upon all the real estate of said Newton E. Carr and became a trust to be enforced in equity.

The third cause of action appears to have set up that the plaintiff and plaintiff's mother had a life estate in all of the real estate, and that she was entitled to the rents, and that the other children appropriated the uncollected rents to which the mother, Amanda Carr, was entitled as a life tenant, and also her other personal property, and that they had taken out no administration upon her estate, and that the plaintiff as one of her children was entitled to recover from the defendants his share thereof, since she had died intestate. It is contended by the defendants that there is no evidence to prove anything in support of the third cause of action.

The court found generally against the plaintiff and in favor of the other heirs of Newton E. Carr, and ordered partition of the lot among the five heirs of Newton E. Carr other than the plaintiff, with the costs against the plaintiff William E. Carr. It is contended by the plaintiff that the finding and judgment of the district court is not sustained by the evidence.

The judgment finds that there is no equity in the plaintiff's petition, and finds generally in favor of the defendants and against the plaintiff as to all the issues tendered by plaintiff's petition, and finds upon the cross-petition of the defendants and the answer thereto that Newton E. Carr died in Lancaster county, Nebraska, on the 21st day of July, 1912, leaving a

last will and testament which was duly admitted to probate, and that by the terms of the will he vested a life estate in his wife, Amanda Carr, in all of his property, including the north half of said lot L; that by the death of the said Amanda Carr her life estate was terminated in said real estate and all her interest in the same, and that the plaintiff, William E. Carr, took no interest in said real estate, being excluded therefrom by the express terms of the will of his father, the said Newton E. Carr, and also by the settlement which he made with his father on or about the 14th day of March, 1891, whereby his father had paid to him the sum of $3,000, accepted by him as a full settlement of any and all interest which he had in the said estate at the time of the death of the said Newton E. Carr. As the decree is very long, we will not attempt to state its contents in detail.

It appears from the evidence that Frank Stradley and Newton E. Carr filed a petition in the district court for Lancaster county, Nebraska, against William E. Carr and C. S. Shaw. It appears by this petition and an affidavit and an agreement and an order of the court that this case of Frank Stradley and Newton E. Carr against William E. Carr and C. S. Shaw was dismissed and settled. A receipt was executed, signed by William E. Carr and Katherine Carr, and reciting, among other things, the filing of the said petition of Frank Stradley and Newton E. Carr against William E. Carr and C. S. Shaw; that the purpose of the petition was to enjoin William E. Carr and C. S. Shaw from interfering with the peaceable possession of Frank Stradley as tenant of said Newton E. Carr in possession of the land described. The receipt further recites a desire to settle the difference existing between Newton E. Carr and William E. Carr as to the right of ownership of certain property described in the said receipt without any litigation. Without re-

citing all the contents of this receipt, it may be said that it recites that William E. Carr and Katherine Carr, his wife, acknowledged the receipt of $3,000 from Newton E. Carr, the same being in full and a complete settlement of any and all interest "which William E. Carr or his heirs or any of them have or claim in and to any interest or right in the property and estate of the said Newton E. Carr." The receipt further contemplates that William E. Carr and his wife will never ask for or claim any interest of any kind in the estate of the said Newton E. Carr, and that the said sum of $3,000 shall be received in full of all claims by them, and that the said case of Frank Stradley and Newton E. Carr against William E. Carr and C. S. Shaw shall be dismissed.

It appears by the decree that William E. Carr is excluded from any interest in the real estate of Newton E. Carr. The consideration seems to be the payment of $3,000 intended to be accepted by the plaintiff, William E. Carr, as a full settlement of any and all interest which the said William E. Carr might otherwise have in the estate left by the said Newton E. Carr at the time of his death, and in full of any and all claims of interest which the said plaintiff might otherwise have in or against said estate. Mrs. Katherine Carr, the wife of William E. Carr, testified that there was to be an additional $3,000, but her testimony is very unsatisfactory on that point, and on cross-examination she excused herself for not having the paper to show that fact, and said that she had a reason for not taking the paper. She said that she did not consider that Newton E. Carr would have signed such a document unless he was under obligations to do so. Numerous tax receipts are introduced in evidence showing that William E. Carr paid the taxes on the land which he occupied; but this appears to have been by agreement with his father, and it was to continue while he occupied the land.

An examination of the evidence shows that the $3,000 paid was for the purpose of excluding the plaintiff from any interest in the estate of the father; and the father seems to have so understood it, as the fourth paragraph in his will provides: "Inasmuch as I have heretofore advanced to my son, William E. Carr, at his request, his share and proportion of my estate, which advancement was made to him in pursuance of an agreement entered into between the parties interested, as evidenced by his receipt to me, dated March 14, 1891, at which time he was paid the sum of three thousand dollars ($3,000) I make no bequest to him, leaving him nothing out of my property." The will mentions each of the other sons and daughters of the testator.

That the testator acquired the lot in question after he made his will would not prevent the will from excluding the plaintiff and appellant from an interest in that property. Section 1288, Rev. St. 1913, provides: "Any estate, right or interest acquired by the testator after the making of his will shall pass thereby in like manner as if possessed at the time of making the will, if such shall manifestly appear by the will to have been the intention of the testator."

The evidence entirely fails to show that there was a second $3,000 to be paid to the plaintiff. Much effort has been expended by plaintiff's counsel upon the pleadings and briefs in the case, and they show great industry. Unfortunately for the plaintiff's case they do not seem to have evidence to rest upon.

The judgment of the district court seems to be right and it is

AFFIRMED.

SEDGWICK, J., not sitting.

CHARLES BLAKELY, APPELLEE, v. RUTH BLAKELY, APPELLANT.

FILED FEBRUARY 1, 1918. No. 19774.

1. **Divorce:** DECREE: VACATION. The defendant, within six months of the rendition of a decree of the district court granting divorce and alimony, filed an application to vacate the decree, consisting of a motion, an affidavit, and subsequent petitions, the contents of which are stated in the opinion, *held*, that the court erred in refusing to grant the application.

2. ———: ———: ———: JURISDICTION. In such case an order made by the trial court after the term when the decree of divorce is entered, but within six months of its date, and based on alleged fraud and deceit, would be within the jurisdiction of the court. Section 1606, Rev. St. 1913; *Everson v. Everson*, 101 Neb. 705.

3. ———: ———: ———: ———. The original motion and the subsequent petitions will be considered together as parts of the same application, the court having assumed jurisdiction before the expiration of six months from the date of the decree and permitting the filing of the petitions.

4. ———: ALIMONY: ATTORNEYS' FEES: SUIT MONEY: DISALLOWANCE. It is ordinarily within the discretion of the district court to allow or to refuse to allow suit money, alimony, and attorneys' fees in a divorce suit, and the refusal to make such an allowance in the instant case was without error.

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

J. J. Sullivan and *T. E. Brady*, for appellant.

Lambert, Shotwell & Shotwell and *Hazlett & Jack*, *contra.*

HAMER, J.

This is an appeal from an order of the district court for Douglas county denying an application to set aside a decree of divorce and for a new trial.

The record discloses that on the 23d day of June, 1915, Charles Blakely filed a petition in the district court for Douglas county against his wife, Ruth Blakely, charging

her with extreme cruelty and praying for a divorce. On the same day she filed her answer, admitting the marriage and residence of the parties, and that there were no children, and denying the other facts alleged. At the same time by written stipulation she waived the issuance and service of summons, entered her voluntary appearance, waived the statutory time to plead, and submitted herself to the jurisdiction of the court. The case was heard and a decree of divorce rendered for the plaintiff. The defendant was given a judgment for $8,000 as permanent alimony, of which the sum of $2,000 was to be paid at once, and the remainder was to be paid, $3,000 in one year from the date of the decree, and $3,000 in two years from the date of such decree. The plaintiff paid the $2,000 in cash and executed notes secured by a mortgage in settlement of the deferred payments.

On September 18, 1915, the defendant filed a motion to vacate that portion of the decree relating to alimony, and on the same day the court adjourned the term without day. The motion was based on the ground that plaintiff had misrepresented the value of his property, that fraud had been practiced upon the defendant by the plaintiff and his counsel, and because the case had been tried in violation of a rule of the district court for Douglas county providing "that no divorce case shall be tried until after the statutory answer day;" that defendant was ill and could not attend the trial when it took place; that plaintiff had been guilty of adultery, and had thus violated his marriage vows.

The record discloses that on the 1st day of October, 1915, plaintiff filed his "special appearance" objecting to the jurisdiction of the court to hear and determine the motion to vacate, and that before that time, on the 18th day of September, 1915, the judges of the district court for Douglas county had made an order continuing all cases, motions, and matters then pending in the court, and not otherwise disposed of, until the next term

of the court. On the 21st day of October, 1915, the court sustained the said "special appearance" of the plaintiff. We think that this was reversible error.

On the 20th day of October, 1915, the defendant filed her petition to vacate the decree. The petition alleged the time of filing the petition, the answer, and the rendition of the decree to be June 23, 1915, and that the hearing was in disregard of rule 21 of the district court for Douglas county that "no divorce case will be tried until after the statutory answer day;" that the said case was tried before the answer day, and that the decree was entered before the answer day; that the plaintiff procured his decree by reason of misrepresentation concerning the amount and value of his property; that he represented that he had only a very little property, when as a matter of fact his property was of the value of $200,000; that the plaintiff and his attorneys conspired together with others to accuse the defendant of lack of chastity, and to accuse her of adultery with one Howard Ainslie; that the plaintiff and his attorney informed the defendant that they had arrested Ainslie, and had charged him with the offense of adultery, and that he had confessed; that the prosecution against Ainslie was afterwards dismissed when the divorce had been granted; that the conduct of plaintiff and his attorneys amounted to duress. There were also other allegations in the petition.

On the 22d day of November, 1915, the plaintiff filed his motion to strike out certain paragraphs of the defendant's petition, and on the 29th day of December, 1915, the said motion of plaintiff to strike out parts of defendant's petition to vacate and to set aside the decree was in part sustained and in part overruled. On the 26th day of January, 1916, the defendant filed her amended petition to vacate the decree. To the said amended petition the plaintiff filed his demurrer on the 7th day of February, 1916, and on the 16th day of March, 1916, the court sustained the said demurrer.

On the 10th day of April, 1916, the plaintiff filed a general demurrer to the third amended petition of the defendant. On the 13th day of April, 1916, the court made an order giving the defendant leave to file her amended petition by attaching thereto paragraph 14. On the 1st day of May, 1916, the court made an order sustaining the demurrer of the plaintiff to the third amended petition of the defendant.

On the 15th day of May, 1916, the court made an order giving the defendant leave to file a fourth amended and substituted petition instanter. This petition at great length sets forth the wrongs complained of by defendant, and adds additional charges to the original petition filed by her to vacate the said decree. On the 16th day of May, 1916, the plaintiff filed a motion to strike the said fourth amended and substituted petition from the files and to dismiss the proceedings.

On the 22d day of May, 1916, the defendant filed an application for temporary alimony and suit money and attorneys' fees. On the 25th day of May, 1916, the court made an order denying the said application for alimony and attorneys' fees and suit money.

On the 25th day of May, 1916, the court made an order sustaining the plaintiff's motion to strike the fourth amended and substituted petition from the files, and to dismiss said petition and the proceedings to vacate the decree. We think that this was reversible error. On the 26th day of June, 1916, a motion was filed by the defendant for permission to file a supplemental petition to vacate the decree. In the proposed petition there was to be set forth the allegations of the fourth amended and supplemental petition and certain other alleged facts. On the 26th day of June, 1916, the court made an order overruling said motion.

In the very recent case of *Everson v. Everson*, 101 Neb. 705, this court construed section 1606, Rev. St. 1913, "to mean that during the six months' period the

action is still pending before the court; that the trial court has power over it similar to that which trial courts have always exercised over their judgments during the term; that it is not a final order in any sense except for the purposes of appeal, but more in the nature of an interlocutory order which the court can, at any time, for good reason, vacate or modify." It is also further said: "We are of the opinion that this construction is consistent with the language of the statute, and that the enactment is within the legislative power vested by the Constitution."

The section of the statute referred to in the case reads: "A decree of divorce shall not become final or operative until six months after trial and decision except for the purpose of review by proceedings in error or by appeal and for such purposes only, the decree shall be treated as a final order as soon as rendered: Provided, if proceedings in error or by appeal shall have been instituted within said six months, such decree shall not become final until such proceedings are finally determined. If no such proceedings have been instituted, the district court may, at any time within said six months, vacate or modify its decree, but if such decree shall not have been vacated or modified, unless proceedings are then pending with that end in view, the original decree shall at the expiration of six months become final without any further action of the court."

It is the defendant's first contention that the court erred in sustaining the "special appearance" of the plaintiff objecting to the jurisdiction of the court, the ground of which was that the court had no jurisdiction to vacate the decree after the adjournment of the term at which it was rendered. The appellant contends that the court erred in denying her new application for temporary alimony, suit money, and attorneys' fees. Section 1574, Rev. St. 1913, provides: "The court may in its discretion, require the husband to pay any

sum necessary to enable the wife to carry on or defend the suit during its pendency." This statute gives the trial court a wide discretion. *Brasch v. Brasch,* 50 Neb. 73. We are of the opinion that the court was well within its discretion by refusing to grant the appellant's application.

In the *Everson* case the man was the plaintiff, as he is in the instant case. In that case it was contended that the judgment had been obtained by mistake and by inadvertence on the part of the defendant, and by fraud and deceit upon the part of the plaintiff. In the instant case the charges are of the same nature, and in addition it is set forth with much particularity that the plaintiff on many occasions committed adultery; that he successfully practiced a fraud upon the defendant concerning the amount of the property that he had, and represented that he had a very small amount of property, while he was in fact the owner of property of the value of $200,000; that the testimony of the plaintiff was untrue concerning the fact that the defendant had committed an unprovoked assault upon him; that as a matter of fact the plaintiff had been on a drunken spree and had been consorting with disreputable women; that when the defendant went after the plaintiff and found him in a restaurant he was drunk and abusive and assaulted the defendant, and that what the defendant did was done in self-defense; that the plaintiff falsely testified that the defendant struck him with a carpet sweeper causing a scar on his forehead; that the defendant caught the plaintiff in a compromising situation with her nurse; that the plaintiff while at home was receiving telephone calls from an immoral woman with whom he was making appointments; that the plaintiff was intoxicated a large share of the time, and kept servants and employees who abused and insulted the defendant; that, when the defendant went on a short visit to her former home and returned, she found the plaintiff living with

one of these disreputable women in the house which plaintiff and defendant occupied as a home; that the plaintiff offered evidence to the effect that the defendant had threatened him with a revolver, which was quite untrue; that the plaintiff kept and consorted with numerous women with whom he was criminally intimate; that when the defendant was ill the plaintiff called her vile and indecent names and beat her and shot at her with a revolver and threatened to kill her.

The charges made seem to demand a trial. The application to vacate the decree should have been granted, and the order denying such application and dismissing the proceedings is set aside, and the judgment of the district court is reversed. Because of the confused condition of the record and the multiplicity of motions and petitions, the parties will be permitted to file proper pleadings, and the application for a new trial will be heard on its merits.

REVERSED AND REMANDED.

SEDGWICK, J., not sitting.

IN RE ESTATE OF ANDERS L. ANDERSON.
ANNA MCWILLIAMS ET AL., APPELLANTS, V. JOHANNA ANDERSON ET AL., APPELLEES.

FILED FEBRUARY 1, 1918. No. 19656.

1. **Executors and Administrators:** APPOINTMENT OF TRUST COMPANY. Three sisters bear the relation of heir and next of kin to an intestate decedent. Of these, two joined in an application for the appointment of an administrator named by them, after the expiration of more than 30 days after the death of the intestate. The third filed objections, but suggested the appointment of any one of eight persons named by her "or any other good and reliable citizen of Lancaster county." The testimony indicated that under the circumstances the person proposed by the two sisters was unsuitable. *Held*, that the county court, in pursuance of section 1339, Rev. St. 1913, had power to appoint as administrator a duly authorized trust company, resident in Lancaster county, and whose principal place of business was therein.

2. ———: ———. Where the county court, in pursuance of section 743, Rev. St. 1913, appoints a trust company, resident in the county, administrator of the estate of an intestate decedent, such appointment on appeal should not be set aside merely because the appointee is not a natural person.

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

George W. Berge, for appellants.

George A. Adams, contra.

DEAN, J.

This is an action that involves the appointment of an administrator for the estate of an intestate decedent after the lapse of more than 30 days after his death, where the next of kin are not of one accord with respect to such appointment, and where no creditor has made application for administration.

The following facts are disclosed: Anders L. Anderson died intestate January 19, 1913. His wife's death preceded his demise by six days. His only surviving heirs and next of kin are three married daughters, namely Anna McWilliams and Marie Stieber, hereinafter called appellants, and Johanna Anderson, hereinafter called appellee. The county court appointed the Lincoln Trust Company as administrator, and on appeal its action was affirmed in the district court. Mrs. McWilliams and Mrs. Stieber bring the case here for review, alleging generally that as a matter of right and of law the county court was required to appoint Helmer C. Hanson as administrator in pursuance of their request.

Considerable litigation has grown out of controversies over the estate by the parties to this action to which we find it necessary to refer briefly. On January 24, 1913, appellee filed a petition in county court alleging the death of her father, and at the same time she presented an alleged will that named her as beneficiary of nearly all of his estate. On the same day Frank

Stieber, husband of Marie Stieber, filed his petition in the county court, and after the usual averments he prayed for the appointment of Helmer C. Hanson as administrator. The will was on May 24, 1913, admitted to probate, and the application of Mr. Stieber for the appointment of Mr. Hanson was dismissed. On appeal to the district court the will was, by verdict and judgment rendered thereon, on December 17, 1914, and that is now final, declared to be invalid.

On January 18, 1915, appellants filed an instrument in the county court entitled: "Motion on Petition on File for Appointment of Administrator." In this instrument appellants moved "for an order fixing a date for the hearing of the petition of the undersigned (appellants) filed * * * January 24, 1913, praying for the appointment of Helmer C. Hanson as administrator of said estate."

The instrument to which appellants refer as "the petition of the undersigned" is the petition that was filed by Frank Stieber, who does not bear to the decedent the relation of heir or next of kin, nor, so far as the record discloses, does it appear that the petition was filed by him at the request of appellants or either of them or at the request of any heir or next of kin of decedent, but of his own motion solely. In the absence of proof to the contrary, neither the county court nor the district court could properly assume that the petition was other or different than upon its face it purported to be, namely, the sole petition of Frank Stieber. *Haug v. Primeau,* 98 Mich. 91.

Appellee protested against the application of appellants for the appointment of Mr. Hanson, and among other things alleged that he "is an interested party having taken a great interest * * * in the contest of the will and * * * is bitterly opposed to the allowance of" a certain claim filed by appellee for several hundred dollars, and "that said Helmer C. Hanson is not a suitable person to administer said

estate." She closed with a request "for the appointment of some disinterested and competent person," and she suggested for appointment any one of eight residents of Lancaster county whom she named "or any other good and reliable citizen of Lancaster county." Appellants filed no counter showing, nor did they produce any testimony to refute that of Mrs. Anderson regarding Mr. Hanson's prejudice against her. The record discloses that she and Mr. Hanson were not on friendly terms and that they did not speak when they met. There is more in the record of a like nature that we find it unnecessary to review.

On March 9, 1915, the county court disallowed the motion of appellants for appointment of Mr. Hanson, but it practically adopted the suggestion of appellee by the appointment of the Lincoln Trust Company.

We find this statement in appellants' brief: "This case involves the one question whether appellants' two daughters out of three of a person dying intestate, have the right to name the administrator, or whether the county judge has any discretion in the matter under the circumstances in this case."

The controversy involves the construction of section 1339, Rev. St. 1913, viz.:

"Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled to the same in the following order:

"First. The widow, or next of kin, or both, as the judge of probate may think proper, or such person as the widow or next of kin may request to have appointed, if suitable and competent to discharge the trust.

"Second. If the widow, or next of kin, or the persons selected by them, shall be unsuitable or incompetent, or if the widow or next of kin shall neglect, for thirty days after the death of intestate, to apply for administration, or to request that administration be granted to some other person, the same may be granted

to one or more of the principal creditors, if any such are competent and willing to take it."

Appellants cite *In re Estate of Scott,* 76 Neb. 28. In the *Scott* case there were four persons who were next of kin, and they did not agree with respect to the administrator to be appointed. Three of them requested the appointment of a nonresident of the county, and the other requested the appointment of a resident. The resident was appointed, and on appeal to the district court the case was affirmed, and was again affirmed on appeal to this court, and again on rehearing. There is nothing inconsistent with this in the action of the district court in the present case.

Appellants point out that the county court's decree denying the appointment of Mr. Hanson did not in specific terms find that he was unsuitable. This objection seems to be technical. It is the policy of the law that estates of deceased persons be settled as speedily as the law will permit. While not reflecting at all upon Mr. Hanson, the court's refusal to appoint him, when the facts of the case are all considered together, seems sufficiently to show that the court considered his appointment unsuitable. But in any event, if the county court erred technically in that a specific finding was not made, it was apparently without prejudice to appellants; no valid reason having been advanced why the appointment of the trust company should not stand. Rev. St. 1913, sec. 743. From the amount of bickering that appears in the record it is clear that the county court was justified in adopting the suggestion of appellee in making the appointment.

Finding no reversible error, the judgment of the district court is

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

JOHN A. NATTINGER ET AL., APPELLEES, v. ANDREW J. HOWARD ET AL., APPELLANTS.

FILED FEBRUARY 1, 1918. No. 19800.

1. **Boundaries:** MONUMENTS. The location of original government corners, if clearly established, will control recitals in the original government field notes that may be at variance therewith, and such corners are controlling, no matter how inaccurate they may be nor how erroneously they may be placed.

2. ———: ———. In such case, where a discrepancy is shown as between monuments and measurements, the monuments control.

3. **Injunction:** REPEATED TRESPASSES. "Equity will afford relief by the process of injunction against repeated acts of trespass, especially where committed under a claim which indicates a continuance and constant repetition of it." *Hackney v. McIninch*, 79 Neb. 128.

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

Hoagland & Hoagland, James T. Keefe and *George N. Gibbs,* for appellants.

Wilcox & Halligan, contra.

DEAN, J.

This is an injunction suit begun in Lincoln county to enjoin the board of county commissioners from vacating road No. 28 and changing its location, for approximately 6 miles of its distance, to a point varying approximately 133 to 435 feet east of its present location. Andrew J. and Charles A. Howard were made party defendants to enjoin them from trespassing upon or attempting to gain possession of a strip of land 2 miles in length and about 300 feet in width that plaintiffs claim to own, and that lies east of the road where now established and west of the location of the road proposed to be established by defendants. Plaintiffs are owners of sections 24 and 25, and the defendants

Howard own the east half of sections 23 and 26, lying directly west of plaintiffs' land. The ownership of the two-mile strip is in dispute between plaintiffs and the Howards, but obviously that question cannot be decided in this action. In 1886 the road in dispute and as now located was established by the county commissioners in pursuance of a petition for its establishment on the section line. Plaintiffs maintain that the road as then established and as traveled ever since is on the section line as shown by the government survey and monuments, while the defendants argue that it is approximately from 133 to 435 feet west of the section line. In pursuance of their contention one of the defendants Howard and 26 other citizens, on January 31, 1914, filed a petition "for the vacation of a part of county road No. 28," being the road in dispute, and also a petition "for the establishment of a county road commencing at the northwest corner of section 1, * * * and running thence directly south on the section line." The board granted the prayers of both petitions.

At the close of the hearing by the trial court the county board was perpetually enjoined from vacating the 1886 road and from establishing the proposed 1914 road. The defendants Howard were likewise enjoined from interfering with plaintiffs' possession of the two-mile strip of land until such time as the defendants "in a proper action, establish their right to the possession of said lands claimed by them." All defendants appealed.

At the trial it developed that at least two surveys by county surveyors were made subsequent to the original government survey of 1869 or 1870. One of these was made in the eighties and is known as the Orr survey, and the other as the Cochran survey of 1912. Plaintiffs contend that the Orr survey and the 1886 road follow the original section-line monuments established by the government. The defendants argue that the Cochran

survey is on the true section line, but they locate it from 133 to 435 feet east of the 1886 road.

A. D. Orr was the main witness on the part of plaintiffs. He testified that he came to Lincoln county in July, 1884, and that soon after his arrival he saw substantially all of the original government monuments, stakes, and pits on the section line where the 1886 road was soon afterwards established. He filed and made settlement on government land in the immediate vicinity shortly after his arrival, and lived in the neighborhood from 1884 to 1903. In 1885 he helped to build a fence along the west side of section 25 on the line of the original government survey. He says the fence that is now on the east side of the 1886 road line is at the same place where the 1885 fence was built. He testified that fire guards, approximately a mile in length, were plowed out soon after or about the time that the 1886 road was established, and that both fence and fire guards bordered on what was then or afterwards became the east line of the 1886 road.

Mr. Orr was deputy county surveyor in 1886 and soon afterwards became county surveyor. From long residence and experience he had good opportunity to know by actual observation the location of the government monuments in question at a time when the country was comparatively new and when, as one witness testified, the government corners in dispute were so plainly marked that they could readily be seen from a passing wagon. As county surveyor or as deputy he made the survey for the establishment of the 1886 road, and said it was located with respect to the government monuments "just as close as you could get and not run into the holes, the old pits," and that the old 1886 road is now located, as then, on the line of the original government survey as disclosed by the monuments plainly to be seen at that time. The testimony of this witness in all essential points is clearly corroborated by that of five or six witnesses, old-time residents of the county,

some, if not all, of whom located in the vicinity of the road in the early eighties and have lived in the county ever since. They testified that they knew the location of the corners and other landmarks in dispute from actual observation.

Surveyor Cochran was the main witness produced by the defense. He testified: "Q. Now, * * * Mr. Cochran, in making this survey you made it entirely from the field notes? A. Yes, sir." He also testified that he located the line in part "by proportionate measurements north, south, east, and west." Defendants argue in their brief that "the Cochran line and corners are corroborated by the government field notes and by the equal distance on the two--mile strip going east and west for the entire distance through the township."

We do not understand the Cochran rule for which counsel contend to be correct, nor do we find ourselves in accord with defendants' conclusion. It is elementary that the corners established by the original survey under federal authority are controlling, no matter how inaccurate they may be nor how erroneously they may be placed. The location of original government corners, if clearly established, will control recitals in the original government field notes that may be at variance therewith. Where there is a conflict between monuments and measurements the monuments control. Any other rule would cause the utmost confusion. *Johnson v. Preston*, 9 Neb. 474; *Clark v. Thornburg*, 66 Neb. 717; *Diehl v. Zanger*, 39 Mich. 601; *Climer v. Wallace*, 28 Mo. 556; *Hoekman v. Iowa Civil Township*, 28 S. Dak. 206.

The testimony respecting the location of the government corners clearly preponderates in favor of plaintiffs. Fairly considered, the record discloses that the 1886 road has been continuously traveled at its present location and in all essential respects has been recognized and used as a public highway ever since the middle eighties. The trial court was clearly right in finding that the Orr survey is based upon and follows the section lines es-

tablished by the original government survey, and that the road in question from the northwest corner of section 1 to the southwest corner of section 36 is now established thereon as located in 1886. It is interesting to note that the board of county commissioners, in regard to the disputed road, granted the prayer of the 1914 petition of Howard and others "to establish a road on the true section line." To the same effect was the prayer of the 1886 road petition. So that a determination of the true location of the original government section line seems to settle the main dispute.

Plaintiffs deny the jurisdiction of the county board to entertain the 1914 road petition, but that point we do not find it necessary to decide. Questions pertaining to land titles have been raised by the respective parties, but we do not decide them.

Defendants argue that there is a misjoinder of causes of action and of parties defendant. The objection is technical. 22 Cyc. 916, gives this rule: "Where the act sought to be enjoined is threatened or being performed by more than one, all may be joined as defendants." In *Watson v. Sutherland,* 5 Wall. (U. S.) 74, Mr. Justice Davis for the court says: "The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the proceedings."

In the present case the county board were about to vacate a public road that had been established and used for about 30 years and relocate it at another point less than 500 feet distant, under an apparent misapprehension as to the true location of the government section line. The defendants Howard, in pursuance of an inaccurate survey, were claiming ownership of land adjacent to the road in question whereof the title is in dispute as between them and plaintiffs, and they actually took possession of a part of it. It was therefore proper

under all the circumstances disclosed by the record that the defendants Howard, in the language of the decree of the trial court, should be enjoined until such time as an appropriate action is brought to procure the settlement of disputed property rights. In this connection it may be observed that the defendants Howard in their brief announce an intention to begin such action. *Sillasen v. Winterer,* 76 Neb. 52; *Watson v. Sutherland,* 5 Wall. (U. S.) 74; *Hackney v. McIninch,* 79 Neb. 128; *Williams v. Riley,* 79 Neb. 554.

It is impractical to analyze at greater length the mass of testimony that we find in the voluminous record before us. To do so would extend this opinion to an unwarranted length. We deem it sufficient to say that we find no reversible error in the record. The judgment of the trial court is therefore in all respects

AFFIRMED.

SEDGWICK, J., not sitting.

FIRST NATIONAL BANK OF SIDNEY, APPELLEE, v. A. K. GREENLEE, APPELLANT.

FILED FEBRUARY 16, 1918. No. 19525.

1. **Notes:** WRITTEN AND PRINTED PROVISIONS. Where there is a conflict between the written and the printed provisions of a promissory note, the written provisions prevail. Rev. St. 1913, sec. 5335.

2. ——: ——: NEGOTIABILITY. Where a promissory note contains the printed words "pay to the order of" immediately before the name of the payee, and the written word "only" immediately after the name of the payee, *held,* the written word "only" prevails over the printed words "pay to the order of," and such note is nonnegotiable.

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

Radcliffe & Tewell, R. W. Devoe and *C. Petrus Peterson,* for appellant.

Hoagland & Hoagland, Stout, Rose & Wells and *B. A. Jones, contra.*

MORRISSEY, C. J.

Plaintiff brought this action on a promissory note and recovered a judgment against appellant Greenlee as maker, and against defendant Closman as indorser. Greenlee appeals.

The petition alleges that, December 12, 1912, Closman executed and delivered to plaintiff his promissory note for the sum of $1,000 and, as collateral security therefor, indorsed and delivered the note in suit to plaintiff; that the Closman note and the note in suit were both due and unpaid. Judgment was entered against Closman by default. Defendant Greenlee answered, admitting the execution and delivery of the note by him to Closman and alleged in substance that the note was nonnegotiable and that the consideration therefor had failed. The answer contains a number of allegations calculated to show the transaction between Greenlee and Closman, but their recital is unnecessary for a determination of this case. A jury was waived and the cause tried to the court.

Defendant offered to introduce evidence to show the agreement between the maker and the payee of the note and their understanding of the paper. This evidence was excluded, and the rulings of the court are assigned as error. As the controlling question is the negotiability of the paper as it appears on its face, it is unnecessary to discuss rulings on the admission or exclusion of evidence. The note was written on a standard printed form and reads as follows:

"1,000. Sidney, Nebr., Dec. 9th, 1912.

"One year after date I promise to pay to the order of L. F. Closman only one thousand & no/100 Dollars at Sidney, Nebr., with interest at eight per cent. per annum from date.

Value received. A. K. GREENLEE."

The date line is written with a pen; the words "one year" and the personal pronoun "I" are written, in the second line, with a pen; "L. F. Closman only," on the third line, is written with a pen; "one thousand & no/100," in the fourth line, is written with a pen; "Sidney, Nebr., with interest at eight per cent. per annum from date" is written with a pen, as is also the signature "A. K. Greenlee." All other parts are printed, including the words "pay to the order of."

There is an apparent conflict between the printed words "pay to the order of," preceding the name of the payee, and the written word "only" following the name of the payee.

Section 5335, Rev. St. 1913, provides: "Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail." To give full effect to this provision of the statute, the word "only," written with a pen, must be held to prevail over the printed words "pay to the order of." The negotiability of the instrument was restricted by the written word "only," and the plaintiff took the note subject to any defense the maker might have if it were in the hands of the original payee.

Appellant claims that under the pleadings and proof the judgment ought to be reversed and dismissed. We do not care to go so far as this. The negotiability of the note was somewhat clouded by the form of answer filed, and was not presented to the trial court, either by the answer or by the motion for a new trial, in the clear and concise language the question might have been presented. The answer may have misled the trial court, as well as attorneys for the plaintiff, and the admissions in the reply on which appellant now relies for a dismissal of the case may have been inserted because of the peculiar form of the answer. The indorsement and delivery of the note by Closman to plaintiff constituted an assignment thereof to plaintiff. As to

appellant Greenlee, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., concurring. Without reference to the point discussed in the opinion, in my judgment, the note is nonnegotiable on its face.

ROSE and SEDGWICK, JJ., not sitting.

HAMER, J., dissenting.

The note about which the controversy arose is made payable "to the order of L. F. Closman only." As the note is written, it appears to me to be a negotiable instrument. The insertion of the word "only" did not, so far as I can see, change the character of the instrument so that it became nonnegotiable. When the officer of the bank looked at it, he would see that it permitted Closman to indorse it. Whether the note read "to pay to the order of L. F. Closman only," or read "to pay to the order of L. F. Closman," made no difference. In any event, Closman could indorse the note and thereby transfer it. I am not prepared to say that the writing of the word "only" might not have attracted the attention of the officer of the bank who received it, but I most strenuously insist that a note payable to the order of any payee named in the instrument is transferable only by the indorsement of such payee.

Section 5348, Rev. St. 1913, provides the qualities which make an instrument negotiable. The first sentence of the section reads: "An instrument is negotiable when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof." No good reason is given why this note may not be transferred from one person to another so as to constitute the transferee the holder. The closing sentence in the section reads: "If payable to order it is negotiated by the indorsement of the holder completed by delivery." It was "payable to order."

It was indorsed by the holder, and the title to the bank appears to have been made complete "by delivery." It is difficult for me to understand why we should shut our eyes to the fact that the note was made "payable to order." Putting the word "only" in the note did not take away the words "payable to order." Only the payee of the note could properly indorse it. Calling him by name would not seem to have made any change in the intention of the maker.

DRAVO-DOYLE COMPANY, APPELLEE, V. METROPOLITAN WATER DISTRICT, APPELLANT.

FILED FEBRUARY 16, 1918. No. 19796.

Appeal: TRIAL TO COURT: FINDINGS. When a jury is waived, and a cause tried to the court, its finding of fact will not be disturbed if there is sufficient competent evidence in the record to sustain the finding.

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

John L. Webster, for appellant.

Mahoney & Kennedy and *Thomas Lynch, contra.*

MORRISSEY, C. J.

This is a law action, on contract, tried to the court without a jury. Plaintiff sued to recover $2,961.30 claimed to be due by way of bonus for superior efficiency of a pumping apparatus installed for the defendant. For answer defendant alleged that, as one of the considerations for entering into the contract, plaintiff had waived its right to a bonus. It also asserted that, in event any sum was due under the bonus clause of the contract, the amount was only $1,666.07, and, by way of counterclaim, pleaded a provision of the contract which provided that, in case of delay in installing the apparatus

beyond the contract period, defendant should recover, as stipulated damages, the sum of $50 for each day's delay, and alleged that under this provision it was entitled to recover $6,000 from the plaintiff. The court made a general finding that there was due the plaintiff $1,666.07, together with interest. Defendant appeals, and plaintiff has filed a cross-appeal.

Appellant's brief treats the judgment as if the court had found that plaintiff was entitled to recover on its cause of action the sum demanded, less one trifling item, and allowed the plaintiff's claim for stipulated damages of $50 a day for 25 days, but the record itself is silent as to the specific items which the court took into account in its finding.

The contract is long and complicated, and each party finds much therein to support the claim it makes. It is conceded that the provision for a bonus was a legitimate one; the greater the efficiency the greater the amount of the bonus, but the district would be compensated by the decreased cost of operation. Appellant claims that plaintiff, through its proper representative, had waived its right to insist upon this provision of the written contract, and its first assignment of error is that the court erred in failing to hold that this provision was waived. The question was submitted on conflicting evidence, and the finding of the court in favor of plaintiff is amply sustained, and will not be disturbed.

The contract provided for certain tests of the apparatus. In making the tests "the contractor may be represented by his own expert, * * * and it shall be understood and agreed that a third expert, who shall be appointed by the district and approved by the contractor, shall conduct that particular test which shall determine the economical duty performed by the pumping unit." The tests were made by experts thus selected, and the expert selected by defendant found the amount to which plaintiff would be entitled as a bonus, if the bonus had not been waived, to

be $1,666.07. Defendant claims this calculation is conclusive of the question. The court admitted testimony based on the data compiled by the district's expert, which testimony shows the amount to be greater than the amount fixed by the expert representing the district. Defendant says the expert selected by the district was the arbiter and his finding conclusive. It may be noted that the contract says that this expert is "to conduct" the test. It further provides that the test shall determine the economical duty performed by the pumping unit. It cannot be said from a fair reading of the contract that it was intended to make the expert the final arbiter. He was merely to supervise the work, and, by the work performed, the pumping unit should be judged. In view of the judgment, we are unable to say what effect the court gave to this evidence. He may have disregarded it altogether; and, even if it were incompetent, we cannot say that it was prejudicial.

There is still the question of defendant's right to recover the stipulated damages. Inferentially defendant's brief says that the court found in favor of the defendant on this counterclaim in the sum of $1,250. Brief of plaintiff and cross-appellant is to the same effect, but the record is silent. There is a conflict in the evidence on the question of the number of days' delay properly chargeable to plaintiff, if any. On this question of fact the finding of the court has the same effect as the verdict of a jury. The cross-appellant claims that the amount stipulated for delay in completion of the instalment is a penalty, and not liquidated damages; that defendant proved no damages and cannot recover. This point is disputed by defendant, but it is not necessary to discuss or to decide the question.

Plaintiff has taken a cross-appeal, but does not ask a reversal. It seeks to have us add $1,250 to the judgment; the basis of this request being that the trial court erroneously allowed this amount to defendant on its counterclaim. The court made no special findings. The finding is a general one, and, curiously enough it is for the exact amount defendant admits is due under plaintiff's cause

of action, if any sum whatever is due. The court may have found defendant liable for this amount on the bonus clause of the contract, and disallowed all other claims of both parties, or he may have found a greater amount due plaintiff on the bonus clause of the contract, and deducted therefrom the amount which he thought was due defendant on the counterclaim. We are not free to conjecture as to these items. It is clear that plaintiff is entitled to recover at least the amount awarded on its cause of action pleaded. As to other matters, there is such conflict in the evidence that a finding for either party would not be unsupported.

If either party desired special findings, it ought to have asked for them. The evidence fully sustained the judgment entered; and as plaintiff and cross-appellant does not seek a reversal, but prays only for relief we cannot give, the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

STATE OF NEBRASKA, APPELLEE, v. JAMES B. O'CONNOR ET AL., APPELLANTS.

FILED FEBRUARY 16, 1918. No. 19874.

1. **Courts:** COUNTY COURTS: JURISDICTION. The county court has exclusive original jurisdiction in matters of probate and in the settlement and distribution of the estates of deceased persons.

2. **Action:** DESCENT AND DISTRIBUTION: JURISDICTION. The district court has no jurisdiction to decide between the conflicting claims of persons alleging they are heirs to the lands of the deceased, and, pending administration proceedings and a decree of heirship in the county court, an action on the part of the state to quiet title to the same, which it asserts by virtue of escheat for want of heirs, should be abated until the determination of the question of heirship in that court.

APPEAL from the district court for Adams county: GEORGE F. CORCORAN, JUDGE. *Reversed, with directions.*

F. P. Olmstead, James B. O'Connor, McCreary & Danley, J. B. Barnes, McDonough & McDonough, D. L. Johnston, Frank E. McGray and *Tibbets, Morey, Fuller & Tibbets,* for appellants.

Willis E. Reed, Attorney General, Dexter T. Barrett and *W. T. Thompson, contra.*

LETTON, J.

Action to quiet title. The state of Nebraska filed a petition alleging that John O'Connor died intestate, leaving surviving him no widow or kindred; that he owned real estate, described in the petition, which upon his death escheated to the state, and that it is now the owner of the same. It also alleges that over one hundred persons, naming them, claim some interest or title to the real estate, and asks that the title be quieted in the state. Answers were filed by a large number of defendants claiming to be the owners of an interest in the property by reason of being heirs of John O'Connor, deceased. A large amount of testimony was taken. The court found that none of the defendants had any interest in the property, and quieted the title in the state.

Three different sets of persons, claiming to be heirs of John O'Connor, have appealed. Each member of these three groups of claimants, while contesting the claim of the state that the property has escheated for want of heirs, is equally positive in denying that the other sets of claimants have any interest in the property. It is contended by the appellants Oleson: (1) That the action was prematurely brought; (2) that the district court has no jurisdiction to determine the respective claims of persons claiming to be heirs of a deceased person; (3) that, proceedings to determine the question of heirship to the estate of John O'Connor being then pending between the same parties in the county court, this action cannot be maintained.

It is shown by the record that administration proceedings are still pending in the county court of

Adams county, and that no decree determining the question of heirship has been rendered. The Constitution provides: The county court "shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointments of guardians, and settlement of their accounts." Const., art. VI, sec. 16. In *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 48 Neb. 386, and in *Boales v. Ferguson*, 55 Neb. 565, it is held that the county court possesses exclusive original jurisdiction in probate matters. The powers of the county court in this respect have recently been considered at some length in the cases of *Fischer v. Sklenar*, 101 Neb. 553, and *State v. Keller*, 101 Neb. 552. In these cases it was held that the county court has exclusive original jurisdiction to determine the persons who are the heirs of a deceased person, and that its judgment in this respect is final, to the same degree and to the same extent as that of any other court of record. In addition to cases cited in these opinions, a discussion of the principle involved may be found in *Tilt v. Kelsey*, 207 U. S. 43, 28 Sup. Ct. Rep. 1, 5, with citation of many cases; *Wellner v. Eckstein*, 105 Minn. 444.

It was stated at the argument that the motive which prompted the bringing of this action in the district court while administration proceedings were still pending in the county court was that, during the pendency of *In re Estate of Keller*, the state of Nebraska had been denied the right to intervene and contest the question of heirship with an alleged heir whose claim was believed to be fraudulent. The judgment in that case was reversed; it being held that the state had a right to intervene, and to establish, if it could, that there were no heirs. *In Re Estate of Keller*, 101 Neb. 115.

When John O'Connor died, if he had no heirs, his real estate at once escheated to the state without the aid of legal proceedings, and the state has a right in such event to bring an action to quiet its title. But there

are many persons claiming to be his heirs, adversely to the state, and adversely to each other. In order to determine the main issue, viz., whether any heirs of John O'Connor in fact exist, the district court would be required to examine the evidence of heirship proffered by each of the claimants and to decide in the first place whether any of them were heirs of the deceased. This is the question which by the Constitution and the law is committed originally exclusively to the county court. The district court may, no doubt, in a controversy with respect to the title of land arising between one who is the undisputed heir of a deceased person and another person claiming title through another source, quiet the title of the heir. *Lewon v. Heath,* 53 Neb. 707; *Rakes v. Brown,* 34 Neb. 304; *Jetter v. Lyon,* 70 Neb. 429. But, in a case between rival heirs where the determination of title depends upon the question of heirship, the district court cannot make a final adjudication until that question has been settled by the county court. Should we examine the evidence in this case, find, as did the district court, that none of the defendants had established his title to the lands by virtue of heirship, and affirm the judgment, what would be the effect if, in the pending proceedings to settle the estate, the county court should determine that one or more of the defendants are heirs of O'Connor and this judgment should on appeal become final and conclusive? The state would by the judgment of the district court be declared to be the owner of the land because John O'Connor had no heirs, but the judgment of the county court would conclusively establish the fact that heirs existed. Such a condition ought not to be permitted. Even if the jurisdiction had been concurrent, it is the rule that the court first acquiring jurisdiction is entitled to retain it until the end of the suit.

This action should be abated until the final determination of the administration proceedings in the

county court. The judgment of the district court is reversed and the cause remanded, with directions that it stand abated until after the final judgment and decree in the proceedings to settle the estate of John O'Connor, deceased.

REVERSED.

SEDGWICK, J., not sitting.

NINA P. WORKMAN, ADMINISTRATRIX, APPELLEE, v. LINCOLN TELEPHONE & TELEGRAPH COMPANY, APPELLANT.

FILED FEBRUARY 16, 1918. No. 19775.

Electricity: PERSONAL INJURIES: LIABILITY. Damages may be recovered for the death of a person who, prompted by a purpose to protect others, was killed in voluntarily attempting to remove from a public street a heavily charged electric wire dangling there as the result of negligence, if he exercised reasonable precautions to protect himself.

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

F. M. Hall, H. W. Baird and *F. D. Williams,* for appellant.

Berge & McCarty, contra.

ROSE, J.

This is an action to recover damages in the sum of $30,000 for negligence resulting in the death of George B. Workman who was killed by an electric current at the intersection of Seventh and J streets, Lincoln Nebraska, October 7, 1913. The electricity was conveyed to him by a wire belonging to defendant's telephone system. The wire had been suspended on poles along J street, where it did not carry a dangerous current; but it broke, and in falling came in contact with a live wire connected with the lighting plant of the city of Lincoln. One end of the broken wire, with several

feet on the ground in the street, was thus charged from an electric light wire carrying 4,400 volts. After the telephone wire on the ground had been emitting sparks from 9 o'clock in the morning, or earlier, until 11 o'clock at night, Workman seized the end of it with pliers in his right hand, while holding a lantern in his left. The result was fatal. Plaintiff, his widow, is administratrix of his estate. In her petition she charged defendant with negligence in using a decayed wire; in failing to use insulation and guards as a protection from heavily charged wires beneath; in neglecting to make proper and timely inspection; in leaving the live wire on the ground in the public street for more than twelve hours. The negligence charged by plaintiff was denied in the answer, which contained also the plea that Workman, who had not been employed or directed by defendant, but prompted alone by his own will, went to the intersection of Seventh and J streets and voluntarily, unnecessarily and negligently attempted to handle the live wire, knowing the danger, assuming the risk, and losing his life in consequence. From a judgment on a verdict in favor of plaintiff for $6,000, defendant has appealed.

The evidence is sufficient to sustain a finding that the broken wire carrying the deadly current was on the ground in the street as the result of defendant's negligence. The record, therefore, presents this question: Did Workman's conduct prevent plaintiff from recovering damages? The position of defendant is indicated by the following excerpt from the brief:

"The evidence demonstrates that Workman's picking up the telephone wire, which was lying on the ground sparking and moving about with a manifestly heavy current of electricity, by the use of small pliers, inadequately insulated, when there was no immediate need for such action, which was entirely voluntary and not within his employment, but as a simple volunteer, was such negligence and assumption of risk of the mani-

fest danger involved as constitutes the proximate and only cause of his death and defeats recovery."

In this connection attention is directed by defendant to evidence tending to prove the following facts: Workman was not employed or directed by defendant to handle the broken telephone wire. He had been in the employ of the Lincoln Traction Company as a repairer of electric street cars. While thus engaged he left the repair shop at night without his employer's permission, went two or three blocks to the place where the telephone wire had fallen, and voluntarily attempted to handle it. The task was not a duty of his employment. The pliers used were too small and not sufficiently insulated to protect him. Neither the broken wire nor the electric light wire belonged to him or to his employer. The sparks gave their own warning. Workman was told by a bystander not to pick up the telephone wire. The two men were the only persons near the place of danger at the time. The police department of Lincoln and the proper experts in handling heavily charged wires had been notified of the trouble. On evidence of these facts counsel assert that there should have been a peremptory instruction for defendant.

Formidable as the defense appears in the light of able advocacy, a different aspect of the case requires consideration. The attribute of human nature which prompts a man, though acting voluntarily, to remove from a public street a menace to the life or to the property of others is not beyond the protection of the law. The subtle agency which instantly destroyed Workman's life in a public street was wrongfully set in motion there by defendant.

Considering on one side this negligence and on the other the conduct of Workman in voluntarily attempting to remove the menace, does the law recognize no alternative but a nonsuit? The answer to this question requires consideration of evidence tending to prove the following facts: The Lincoln Traction Company, the

employer of Workman, had a building at Seventh and J streets. Other buildings, including the office and the shops where Workman repaired electric street cars, were less than three blocks away. His employer, at the intersection mentioned, had electric wires beneath those of defendant. Learning that a live wire was down, Workman took a lantern and went to the scene of the trouble. When he arrived a barber was voluntarily acting for the moment as watchman. An uninsulated iron wire, an eighth of an inch in diameter perhaps, with several feet on the ground, was hanging in the street from an electric light wire. As indicated by sparks, the broken wire was not perfectly grounded. It did not receive the entire voltage of the electric light wire—a current sufficient to melt the small telephone wire. These were the conditions when Workman arrived. The barber, who was the only eye-witness, told Workman not to pick up the wire, but the latter showed a pair of pliers with the handles wrapped in insulating tape, said they were safe, that he knew how to handle the wire and that he would take it out of the way. For more than six years he had been repairing electric motors and applying currents of 500 volts. He was not without experience in handling wires carrying such a voltage. With his pliers he seized the wire, walked backward and pulled it after him several feet without mishap. He did not fall until the wire touched his lantern. There is proof tending to show the facts thus narrated.

Workman's conduct was consistent with his duties to his employer. He was not an idle or curious meddler or a trespasser. He had a right to be in the street. He did not know that others would promptly remove the dangling wire. The authority to remove from a public thoroughfare wrongful obstructions and other dangers is not limited to public officers or to representatives of the wrongdoers. In public places a volunteer, prompted by a purpose to protect the lives or the property of

others, may perform reasonable acts necessary to the accomplishment of such a purpose. The freedom to so act implies risks. In commercial enterprises, where dangerous agencies are at work in the streets of cities, such conduct may be anticipated, if the occasion arises. In maintaining conductors of electricity in a city, it is the duty of a telephone company to take proper measures to keep its wires away from public travel and to guard against the escape of electricity by contact with other wires. In the performance of such duties, reasonable attempts of volunteers to remove live wires, if they fall in the streets, should be anticipated. Under the verdict of the jury defendant is answerable to plaintiff for the death of Workman, unless his conduct as a matter of law was such as to defeat a recovery. His warning not to pick up the wire did not come from an expert or from any one with authority to direct him. The test of his conduct is the exercise of reasonable precautions to protect himself under the circumstances. When the evidence and the conditions herein summarized are considered, it cannot be said as a matter of law that Workman did not exercise reasonable precautions to protect himself. In this view of the record, error requiring a reversal has not been found.

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

HAMER, J., dissenting.

The deceased was injured by a telephone wire which appears to have been loose at one end and was throwing off electric sparks. The evidence shows that the telephone wire was fastened to a pole and was higher up than the electric light wires. It is claimed that it came in contact with the electric light wire and received a heavy charge from it. A witness for the plaintiff, George Bailey, saw the wire in the morning at about 8:30. This was in the morning before the man was killed. Ten or fifteen feet of the wire was upon

the ground. This witness also saw the wire in the afternoon. He testified that he said to himself that this wire was dangerous. He does not appear to have attempted to reach the office of the telephone company, nor did he communicate with the police. He appears to have stopped "the car and started to take a pair of pliers and move it over" the wire. He was driving a delivery car for the International Harvester Company. He took the pliers out of his car and got out to take hold of the wire, but he did not take hold of it. When asked why he did not take hold of it, he testified: "I thought I didn't have any right to fool with it." Apparently he exercised a wise discretion.

The Coroner, V. A. Matthews, testified that the wires next below the telephone wires were the city electric light wires; that this particular wire was in contact with "the city light." He testified that he took these pliers out of the dead man's hands. It was about 11:20 or 11:30 at night when Matthews got there. He testified that there were bare places on one handle of the pliers. He said the "char" had "been worn off of the bare places." He explained "the ashes that would natuarally be here where it is burned off." He explained that the ashes would be the tape that was burned. He testified: "Well, what caused those ashes, what was it ashes of? A. Insulation; this tape. Q. The ashes of the insulation, of that tape? Was that your answer? A. Yes, sir, it was either that or that of flesh; it would be hard to tell which. Q. You may state whether or not you could state from its appearance whether that was recent, or whether the destruction of that insulation was old? A. It was recent. Q. Now, you may tell the jury how you could tell it was recent. A. Why, as I handled it the char would crumble off. Q. Now, what crumbled off from these places that are now bare? A. Char, ashes."

I am under the impression that the barber who was present and who told the deceased not to take hold

of the wire gave him a sufficient warning. While I think that the telephone company was clearly guilty of negligence in permitting the wire to be in that condition from some time in the morning until after 11 o'clock at night, yet that would not authorize the decedent to commit suicide. I am under the impression that he did not exercise the prudence that would be exercised by an ordinarily prudent man under like circumstances. I have not sufficiently examined the instructions to see whether the trial court submitted to the jury the question of the defendant's negligence in using the pliers the way that he did. My impression is that the pliers were entirely insufficient, and that the deceased was guilty of a rash act when he took hold of the wire with the pliers. I think that the deceased should have sent the barber for help or he should have left the barber watching the wire while he went after help. There was no one thereabout to be killed, and, as there were two men there, one of them should have remained on the watch to protect the public from the wire and the other should have gone to notify the telephone company or the police or somebody else properly equipped to remove the wire. The pliers used were probably insufficiently insulated. Then they were probably too small, and therefore not adapted to handle a wire carrying so heavy a current.

While it is apparent that the telephone company was negligent because it permitted the wire to remain unprotected for many hours, the mere fact that its negligence gave the decedent the opportunity to risk his life and to lose it is no reason that it should be held liable. The decedent did not have to take the risk. What he did was done voluntarily and without any obligation upon his part. If the deceased undertook an unnecessary risk, there can be no recovery however heroic his conduct may have been. He could say to himself that any passer-by might come in contact with the wire and be killed, but it was easy to

prevent that by staying there by the wire or by getting some other person to stay. He was not in the employ of the telephone company. The current which killed the decedent came mostly from a live wire connected with the lighting plant of the city of Lincoln. The decedent had been in the employ of the Lincoln Traction Company as a repairer of electric street cars. Without his employer's permission he went to the place where the telephone wire had fallen and voluntarily attempted to handle it. The task which he set for himself was not a duty of his employment. It is said that Workman's conduct was consistent with his duties to his employer, but his relation to his employer imposed no duty upon him as to this wire.

If I had seen the wire sparking and apparently charged with a heavy current which made it dangerous I would not have taken hold of it. I would not have done that any more than I would have leaped to my death by jumping into a roaring cataract going down a steep declivity full of rocks. If I found another man there, as the decedent did, I would have said to him, "You stay and watch the wire while I go and get help, or I will stay and watch the wire and you go and get help." It was negligence to leave the broken wire dangling in the air, moving on the ground, charged with a heavy and dangerous current of electricity. The wrong of the company made the death possible, but it was not the proximate cause of the same. Did the conduct of the decedent contribute to his destruction? I think the rule is that he was required to exercise the prudence of an ordinarily prudent man under like circumstances. If the pliers were inadequately covered, if they were too small, or if they were for any other reason defective and inefficient and he took a risk which a reasonably prudent man would not have taken, then the verdict ought not to stand. There was nobody in immediate danger. It is one thing to protect the public and it is quite another thing to

take a needless risk. If I knowingly climb into a pen where there is an angry and vicious bull at large and I am gored to death because of the danger which I have invited, should the owner of the bull pay my administrator?

STATE, EX REL. ED. ENERSON, APPELLANT, v. COUNTY COMMISSIONERS OF BOONE COUNTY, APPELLEE.

FILED FEBRUARY 16, 1918. No. 19841.

1. **Mandamus:** DUTY OF COUNTY BOARD: REPAIR OF BRIDGES. The duty of a county board to repair or to restore a bridge which is part of a public highway in general use may be enforced by mandamus.

2. ———. "As a general rule, when a duty is at the proper time asked to be done, and improperly refused to be done, the right to compel it to be done is fixed." *Lewis v. Commissioners of Marshall County*, 16 Kan. 102.

3. **Highways:** VACATION. A public highway in general use can only be vacated by the county board in the manner prescribed by law.

4. **Mandamus:** DUTY OF COUNTY BOARD: REPAIR OF BRIDGES. A county board may be required by mandamus to restore a bridge on a public highway, where their only defense to the application for the writ is their discretion to abandon the highway, open a new one in a different place, and change the bridge-site; the answer and the evidence showing that, before their powers in these respects had been legally invoked, they had arbitrarily made up their minds not to rebuild the bridge on the existing highway.

APPEAL from the district court for Boone county: GEORGE H. THOMAS, JUDGE. *Reversed, with directions.*

W. L. Rose and *Vail & Flory*, for appellant.

W. J. Donahue and *J. A. Price, contra.*

ROSE, J.

Relator applied for a peremptory writ of mandamus to compel respondents, as county commissioners, to

restore a wrecked Cedar river bridge as part of a public road running east and west midway between the north and the south boundary of section 22, township 18, range 7, Boone county. Except when temporarily out of repair, the bridge has been used continuously by the public since 1879. Relator is seeking to coerce performance of the board's statutory duty to keep the highway, including the bridge, in a proper condition for travel. Respondents resist the application on two grounds: A plan to change the site and rebuild the bridge where the Cedar river crosses the northern boundary of the section described, and an undetermined proceeding to vacate the highway, discretion being an element of each defense. A demurrer to the answer was overruled. After a trial on the merits of the case the writ was denied. Relator has appealed.

On the record presented, is relator entitled to the writ? The duty of a county board to repair or restore a bridge which is part of a public highway in general use may be enforced by mandamus. *Dutton v. State,* 42 Neb. 804; *Iske v. State,* 72 Neb. 278; *State v. Board of Commissioners,* 80 Ind. 478. In another form the rule is:

"Mandamus is generally recognized as a proper remedy to compel public officers to perform their duty to take care of and keep in repair public highways and bridges and the like, whenever the necessity for its exercise is so apparent and obvious that the refusal to act is the result of a determination not to discharge a plain duty." 18 R. C. L. p. 241, sec. 165.

"As a general rule, when a duty is at the proper time asked to be done, and improperly refused to be done, the right to compel it to be done is fixed." *Lewis v. Commissioners of Marshall County,* 16 Kan. 102.

This court has taken the same view of the law. *State v. Cole,* 25 Neb. 342. A public highway, while being used as such, can only be vacated by the county board in the manner prescribed by law, a proper petition

for that purpose being necessary. Rev. St. 1913, sec. 2857; *McNair v. State,* 26 Neb. 257.

In the light of these principles, is any defense pleaded or proved? In substance respondents allege in their answer: The Cedar river crosses the section line half a mile north of the existing highway. This crossing is a better site, and the bridge there will be more accommodating to the traveling public. When the action was instituted respondents were preparing to build a bridge at the new site, and were also preparing the section line for public travel. The answer, however, contains no allegation showing that, at the time relator made his application for the writ, proper, proceedings to vacate the old road or to make use of the new one had been commenced in the manner prescribed by the statute. A plan or purpose to build a new bridge and open a new road, even if carried out, does not vacate an old road half a mile away, or comply with the statutory provisions for vacating an existing public highway, or justify a county board in refusing to perform the duty to keep the old road in repair. That part of the answer relating to the proceedings to vacate the old road is as follows:

"In pursuance of said plan to divert said travel to the section line, as aforesaid, and to construct and maintain an adequate highway and bridge on said section line, legal proceedings have been begun, and are now pending, before the proper authorities for the vacation of the said half-mile-line road and the abolition of such as a public highway, and for the opening and working of the said road on the section line as above set out."

When this paragraph is tested by demurrer, the terms, "legal proceedings" and "proper authorities," are mere conclusions of respondents. What were the proceedings? Did they conform to the statutes? Who were the "authorities" before whom the proceedings were instituted? Did a lawful tribunal acquire

jurisdiction? Facts enabling the court to answer these questions are not pleaded. Both the answer to the application and the evidence adduced at the trial show that respondents, before their jurisdiction or authority to abandon the old road and open a new one had been legally invoked, arbitrarily made up their minds not to restore the bridge on the old highway. In this condition of the record the discretion pleaded by respondents to prevent the allowance of the writ is unavailing for that purpose.

The judgment of the district court is therefore reversed and the cause remanded to the district court, with directions to allow the writ.

REVERSED.

SEDGWICK, J., not sitting.

LAWRENCE ALLERTZ, APPELLEE, V. LOU HANKINS; LEE BURROUGHS, APPELLANT.

FILED FEBRUARY 16, 1918. No. 19781.

1. **Master and Servant:** INJURY TO THIRD PERSON: LIABILITY OF MASTER: QUESTION FOR JURY. In an action to hold a master liable for the act of a servant, if the act complained of is within the scope of the agent's employment, the master may be liable if the servant did the act with a view to the service for which he was employed. If, then, the question is whether the servant at the time had some purpose of his own and not connected with his employment in doing the act, it becomes a question of fact for the jury.

2. ———: ———: ———. If the employment of a foreman in a restaurant includes the maintaining of decent order among the waiters and employees generally, with authority to discharge an employee if necessary for that purpose, it does not follow that the scope of the employment includes corporal punishment or personal violence. The employer will not be liable for such action on the part of his employee in the absence of evidence that he has directed or authorized it.

3. **Pleading:** AMENDMENT ON APPEAL. A pleading may be amended before or after judgment, in furtherance of justice, "when the

amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Rev. St. 1913, sec. 7712. If the evidence, without objection, clearly proved a "claim or defense," the pleading will, upon appeal, be considered amended accordingly.

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

John J. Ledwith, for appellant.

John B. Barnes, Clinton J. Campbell and *Harry R. Ankeny, contra.*

SEDGWICK, J.

The defendant Burroughs was the proprietor of a restaurant in the city of Lincoln. The plaintiff and the defendant Hankins were in his employ in the restaurant. The plaintiff brought this action in the district court for Lancaster county against Hankins and Burroughs jointly to recover damages alleged to have been caused by an assault upon him by the defendant Hankins. He recovered a judgment against both of the defendants, and the defendant Burroughs has appealed.

The defendant Hankins contends that he acted in self-defense only, and that the plaintiff was responsible for his own injuries. As Hankins is not a party to this appeal, that question is not discussed in the briefs, and it is assumed for the purpose of this decision that Hankins assaulted the plaintiff, and that the evidence justifies the recovery against him.

The plaintiff insists that, although Burroughs was not at the time in the room where the assault occurred, he is liable for the acts of Hankins under the circumstances. Hankins was foreman for the defendant Burroughs, and, in Burroughs' absence, had charge of the business and control of the employees. He also acted as cook, and plaintiff was one of the waiters. The difficulty between Hankins and the plaintiff arose from the manner of the latter's service of some of the pa-

trons of the restaurant. It is alleged, and we assume the jury were justified by the evidence in finding, that Hankins rebuked the plaintiff for his manner of performing the service, and, in anger and without cause, threw some articles, which were for use in the business, at plaintiff, which caused the plaintiff's injuries. It is suggested in the brief that Burroughs anticipated such conduct on Hankins' part and encouraged it, but the evidence wholly fails to warrant such a suggestion. It is contended that after the trouble Burroughs took the view that the plaintiff was at fault, and attempted to protect Hankins from prosecution or trouble on account thereof, but this evidence has no tendency to show that anything that Burroughs did could have been considered to have been the cause of the assault. The questions principally discussed in the briefs are: First, whether the act of Hankins in making this assault was within the scope of his employment or so connected with his duties as to make his employer responsible for his acts; and, second, whether Burroughs knew that Hankins was quarrelsome and vicious to such an extent as to make him a dangerous man in his position as foreman, and so was guilty of negligence in continuing him in such employment, which was the proximate cause of the plaintiff's injury.

Upon the first question the plaintiff quotes from the note in *Goodloe v. Memphis & C. R. Co.*, 54 Am. St. Rep. 67, 89, (107 Ala. 233): "Whether a servant did a tortious act with a view to his master's service, or to serve a purpose of his own, is a question of fact for the jury." When the act complained of is within the scope of the agent's employment, the master may be liable if the servant did the act with a view to the service for which he was employed, although the master would not be liable if the servant at the time had some purpose of his own and not connected with his employment in doing the act, and when the question depends upon the purpose and intention of the servant,

it becomes a question of fact for the jury. And the statement quoted, under such circumstances, would be accurate. A more complete statement and one of more general application is found in the quotation from *Nelson Business College Co. v. Lloyd,* 71 Am. St. Rep. 729 (60 Ohio St. 448): "In an action seeking to hold the master liable for an act of his servant, which, from its nature, is within his employment, the question is whether it was in fact done in the performance of his service to his master, or was done wholly for the purpose of injuring the plaintiff, and none other, that question must be determined by the jury." And this quotation suggests the vital question in this case. Was the act of Hankins in assaulting this plaintiff "from its nature within his employment?" If the nature and quality of the act is clearly shown without dispute in the evidence, the court must so determine, and not submit that question to the jury. When Burroughs authorized Hankins to act as foreman in his business, he gave him such authority over the persons there employed as he himself would possess under the same circumstances. It is said that Hankins had authority to direct the action of the employees, to rebuke them for misconduct, and even to discharge them from the employment altogether. If the evidence would justify the finding of such authority reposed in Hankins, it would not follow that he was authorized to commit violent assaults upon the employees, or that he was employed with a view to any such conduct on his part. In some cases, as in the employment of a street car conductor, the scope of the employment necessarily includes the proper use of force under some circumstances. If a drunken rowdy so conducts himself as to become dangerous to the passengers, it may become necessary to remove him from the car, and in such case to use necessary and proper force for that purpose is within the scope of the conductor's employment, so that his employer would be

liable for a misuse of force or for unnecessary violence. There is some evidence that this foreman was expected to maintain decent order in the restaurant, and that he might even discharge an employee if necessary for that purpose. But there is no evidence in this record that would justify the finding that to use corporal punishment, or personal violence, was within the scope of his employment. Indeed, the proprietor himself had no such function, and could not delegate such powers.

There is some evidence that upon a former occasion Hankins and another employee had had difficulty which possibly resulted in blows, and that Hankins was still retained in the employment, but this fact of itself is not sufficient to establish contemplating any such action on the part of Hankins, or any reason to suppose that it would be repeated.

There is evidence from which perhaps it might be inferred that Hankins was a quarrelsome man, so much so that it might possibly be considered dangerous to place him in such a position. If the evidence shows that Burroughs was aware of this fact, it is much more clearly proved that this plaintiff was also aware of Hankins' disposition and practices.

The plaintiff contends that Burroughs is not now in a position to avail himself of the defense of assumption of risk on the part of plaintiff, because that defense was not pleaded in his answer. The statute (Rev. St. 1913, sec. 7712) provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, * * * when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." It has been the settled practice in this state that, "where the ends of justice seem to demand it, leave will be given in the supreme court to amend a petition so as to fully state the cause of

action." *Humphries v. Spafford,* 14 Neb. 488. The statute quoted expressly applies "when the amendment does not change substantially the claim or defense," and the same rule must necessarily be applied to both "claim or defense."

The plaintiff's own evidence shows that he was familiar with the character and conduct of Hankins, and still continued in the employment without making any objection or complaint to the defendant Burroughs. He cannot, therefore, avail himself of this supposed negligence on the part of Burroughs.

The plaintiff has entirely failed to prove his cause of action against the defendant Burroughs, and the judgment of the district court is reversed and the cause remanded.

REVERSED.

LETTON and ROSE, JJ., not sitting.

HAMER, J., dissenting.

In the majority opinion it is said: "It is assumed for the purpose of this decision that Hankins assaulted the plaintiff, and that the evidence justifies the recovery against him." It is further said: "It is alleged, and we assume the jury were justified by the evidence in finding, that Hankins rebuked the plaintiff for his manner of performing the service, and, in anger and without cause, threw some articles, which were for use in the business, at plaintiff, which caused the plaintiff's injuries." The majority opinion takes the view that the evidence fails to warrant the suggestion in plaintiff's brief that Burroughs anticipated Hankin's conduct.

Whether the act of Hankins was within the scope of his employment is an important question to be ascertained from the evidence. It is also important whether Burroughs knew that Hankins was quarrelsome and accustomed to treat men with violence who were under his direction in the restaurant. These questions were for the jury and, as I think, from an examination

of the evidence, were probably rightly determined. The jury found for the plaintiff.

Let us first examine the evidence and see whether Hankins had the support of his employer, Burroughs, in the supervision which he attempted to exercise and in the discipline he undertook to administer. Hankins appears to have slapped a man named Bradley, and to have thrown him under the stairway. Bradley seems to have been a very small man. Burroughs seems to have known about it, because Bradley came out into the dining-room with his head bleeding. Burroughs appears to have been in the house at that time. John Downing was an old man and a helper. Hankins "got hold of him, jerked his apron off; he threw him out of the door and threw his apron after him." The witness thinks that Burroughs was around the restaurant at that time. The witness seems to have thought that Hankins was violent. "I seen him slam things around there. One instance, I seen him, an old gentleman there by the name of Colonel that was working. He slammed his knife down on the platform, and scared the old man, and he jumped over against a barrel." The old man claimed that he ruptured himself, and the witness saw him after that when "he was bandaged up." The witness recites that "the old Colonel was washing dishes there and did not hear very well. Lou hollered over after him for some dishes or something, and the old man did not seem to pay any attention to him, and he (Hankins) threw the ribs that was cut off the rest of the piece at the old gentleman, and it went through the window open right above his head where, if he had straightened up, he would have been hit." The witness says that Burroughs had to put the window in, and that "he knew that Lou broke it; that is all." The witness testified that he had heard these assaults discussed in Burroughs' hearing; "it would be amongst ourselves, in hearing distance." It does not appear that Burroughs found

fault with Hankins for making these assaults. He seems to have been violent in his conduct. The witness saw him "kick the meat block out of the house." Then he picked up the beef steak "and threw it on the range." Hankins assaulted W. A. Heskett. Heskett testified that he had a conversation with Burroughs immediately after the assault. Heskett asked him if he (Haskett) should work. "He says, 'You stay here until I come up,' and he went down stairs, and when he came up I went back in the kitchen, and he says, 'I want you fellows to forget about this.'" It appears that Heskett wanted to know who should pay for the dishes that were broken when Hankins and Heskett had an affray. The plaintiff offered to show that Hankins paid for all the dishes that were broken that time amounting in value to $5. There was an objection which was sustained. The money appears to have been paid to the defendant Burroughs. If admitted, this would have shown that Burroughs knew something of Hankin's disciplinary tendencies.

Burroughs testified: "Why, he (Hankins) was in charge of my kitchen, in charge of everybody that was in that kitchen any time and all the time." "Q. Now, this man Hankins, according to your system there, had charge of every one connected with that kitchen? A. Yes, sir." The altercation between Hankins and Allertz arose over the bringing out of an order for spinach. Burroughs seems to have wanted Allertz to bring out the spinach. "Q. And Hankins wanted it brought out? A. We both wanted it brought out. Q. And it was over the bringing out of that order that the altercation arose between Allertz and Hankins? A. Yes, sir." Burroughs seems to have paid a hospital bill of $1.50 at St. Elizabeth Hospital. He also seems to have paid $4 for a hack to convey his wife. That these violent exhibitions of temper could have gone on without Burroughs knowing it seems unreasonable. I think the evidence clearly shows that Burroughs

knew that Hankins was violent, and Hankins appears to have justified the conclusion of the jury. I am not quite sure that the evidence warrants the conclusion that Burroughs anticipated that Hankins would administer the chastisement which he did administer to the plaintiff. Of course, he could not justify the defendant Hankins in throwing a bowl at the plaintiff and breaking his skull or otherwise injuring him. Hankins was probably very efficient, and appears to have entertained strong ideas touching his right to administer chastisement to the waiters by the exercise of personal violence. The evidence appears to show that he had on several former occasions asserted his physical superiority on behalf of his employer.

In the majority opinion there is no effort to justify the conduct of Hankins, and it is contended, apparently, that because the plaintiff knew Hankins' violent character therefore he assumed the risk. It is said in the opinion: "The plaintiff's own evidence shows that he was familiar with the character and conduct of Hankins, and still continued in the employment without making any objection or complaint to the defendant Burroughs. He cannot, therefore, avail himself of this supposed negligence on the part of Burroughs." Whatever this may mean, it is not sufficient justification of the conduct of Burroughs in keeping this sort of a man in his employ. He ought not to be allowed to do so without paying the damage which the plaintiff sustained.

"Where, in an action at law, the evidence is conflicting, it is not the province of this court to examine it further than to see that there is sufficient evidence to justify the conclusion reached." *Young v. Kinney,* 85 Neb. 131. That the judgment should not be set aside, see City of *Omaha v. Houlihan,* 72 Neb. 326; *Shirley v. City of Minden,* 84 Neb. 544; *Tillson v. Holloway,* 94 Neb. 635; *First Nat. Bank. v. Hedgecock,* 87 Neb. 220; *Roden v. Williams,* 100 Neb. 46; *Dohner v.*

Barr, 100 Neb. 172; *Mundy v. Meyer*, 100 Neb. 296; *Shapiro v. Omaha & C. B. Street R. Co.*, 100 Neb. 452; *Holmvig v. Dakota County*, 90 Neb. 576; *Smith v. Chicago, St. P., M. & O. R. Co.*, 99 Neb. 719.

The district judge seems to have carefully and fairly submitted the case to the jury upon a conflict of testimony, and it seems that the verdict ought not to be disturbed, and that the judgment of the district court should be affirmed.

CHARLES E. MOORE, APPELLEE, v. VILLAGE OF NAPONEE, APPELLANT.

FILED FEBRUARY 16, 1918. No. 20379.

1. **Master and Servant:** INJURY TO SERVANT: LIABILITY OF MASTER. Where a laborer, without experience or previous knowledge of the work, is employed in digging a trench, no instructions or warning as to danger being given him, the failure of the master to shore up or brace the walls of the trench to prevent caving, it being customary and reasonably necessary so to do, and no materials or timbers being furnished to the workmen for that purpose, the sudden caving in of the walls of the excavation, by which the workman is injured, will render the master liable in damages.

2. ———: PLACE FOR WORK: LIABILITY. It is the duty of the master to exercise reasonable care to provide his servant with a reasonably safe place in which to work, and a failure to perform such duty, if it results in injury, will render the master liable in damages.

3. ———: ASSUMPTION OF RISK. One cannot be held to assume a risk of which he has no knowledge or warning unless such risk is so open and obvious to an ordinary person as to challenge his attention thereto.

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

Flansburg & Flansburg, for appellant.

W. H. Miller and *George A. Adams*, *contra.*

HAMER, J.

This is the second appeal in this case. The action was for damages caused by the alleged negligence of the defendant Village. The first trial in the district court resulted in a judgment for the plaintiff, and the defendant appealed. The cause was submitted to the commission, and a reversal was recommended. On the second trial the plaintiff had the verdict and judgment for $750. The defendant has appealed.

The facts as shown by the evidence are in substance as follows: On the second day of October, 1911, the defendant, an incorporated village of Franklin county, was engaged in constructing a sidewalk or bridge across a stream, called Turkey creek and within the corporate limits of said village. By an ordinance of the village trustees, the president of the village board, one G. C. Strimple, and one George S. Gillard, a member of the board, were designated to take charge of the work. They employed the plaintiff, Charles E. Moore, and one C. J. Hartt as day laborers, and set them to work. It seems that it was necessary to excavate a trench on the west bank of the creek in order to construct a concrete abutment for the bridge or sidewalk over the water-course. The plaintiff, together with Hartt, were set to work digging the trench by the president, Strimple, and the trustee Gillard. They proceeded to excavate a trench about 2 feet wide, 14 feet long, and from 7 to 8 feet deep. When they had about completed the excavation, the west bank of the trench caved in onto the plaintiff and injured him rather severely.

The negligence of which the plaintiff complains was defendant's failure to shore up or brace the walls of the trench, or to furnish the plaintiff and Hartt with timbers and materials with which they could have braced the walls of the trench, and thus have provided themselves with a safe place to work.

The record discloses that, after plaintiff had introduced his evidence, the defendant demurred to its sufficiency, and requested the court to direct the verdict in its favor. The demurrer was overruled, and the requested instruction was refused. For this ruling the defendant assigns error, and contends that the evidence was insufficient to show any negligence on its part.

It is a somewhat significant fact that, when the case was before us on the first appeal, the judgment was reversed, because of the recommendation of the commission, for the reason that the plaintiff had failed to produce any evidence of a custom or a necessity to brace or shore up the walls of the trench or excavation. The record of the second trial supplies this evidence. And Mr. Clarence Davis testified that he had been engaged in building bridges in Franklin county for more than two years, and had constructed a large number of them; that he knew the custom and the necessity of the work; that in excavating trenches in which to lay concrete abutments it was his custom, and it was necessary, to brace or shore up the side walls to prevent them from caving in. He also testified that he had constructed a foot-bridge across a creek in Naponee, near where the one in question was constructed. He thus showed his competency to testify as to such a custom and necessity.

The evidence on both sides of this case shows that no precaution whatever was taken by those in charge of the work, either by bracing the walls of the trench or furnishing any material with which either the plaintiff or Hartt could have braced them or prevented them from caving. It clearly appears that defendant's agents gave the workmen no warning, and that they had no knowledge of the danger, or the necessity of protecting the walls from caving. In such cases the rule is that a duty rests upon the master of using reasonable care to provide a reasonably safe place for

the servants to work, and a failure to perform that duty will render him liable. It follows that the defendant was guilty of actionable negligence in this case, and the ruling of the trial court is sustained.

It is the duty of the owner to know when props are needed, and then to supply them, without waiting for request by the workmen. *Bowerman v. Lackawanna Mining Co.*, 98 Mo. App. 308. "A master is bound to furnish the servant a reasonably safe place in which to work, considering the nature of the work." *McMahon v. Ida Mining Co.*, 95 Wis. 308.

In *English v. Chicago, M. & St. P. R. Co.*, 24 Fed. 906, it was said by Judge Brewer in the body of the opinion: "That where a master commands a servant to go outside of his regular employment to do a work which is attended with special danger, and the servant, in response to the specific commands of his master, goes and does the work in the way and at the time directed, the fact that the servant knew it was dangerous does not exonerate the master from responsibility, or make the servant guilty of contributory negligence, unless the character of the danger be so patent and so extreme that no one but a foolhardy, reckless man would attempt it. For instance, where an engineer was told to take his engine in advance of a regular train over a track which he knew to be dangerous, and to keep out of the way of a coming train, and the engineer did so, and was killed, the fact that he knew the track was dangerous was held not to be such a fact as would render him guilty of contributory negligence."

In 1 Bailey, Personal Injuries (2d ed.) sec. 150, it is said: "Thus, where an employee had been ordered to clean out certain underground water-pipes, and a trench had been opened for the purpose of furnishing him a proper place and opportunity to do the work by the defendant's section-men and other laborers, and, while he was so engaged in disconnecting such pipes, the earth caved in upon him, causing his death, it was

held the defendant was liable upon the ground of failure of duty to furnish him a reasonably safe place to work." Many authorities are cited in support of this proposition. In the same section it is further said: "And where it was alleged that the defendants, who were the selectmen of a town, were negligent in failing to provide suitable means of support for the sides of a trench, in which they had employed the plaintiff to lay pipe for the purpose of building a public sewer, it was held they were bound, when they hired him to work in a particular place, to see that it was reasonably safe, and that materials were furnished to make it so."

Assumption of risk is urged as another reason for the reversal of the judgment. The testimony clearly shows that the plaintiff had never been engaged in the work of digging ditches or trenches or in excavating for concrete foundations. Therefore he had no knowledge that the work was dangerous. To ordinary observers there would seem to be no danger connected with it. Plaintiff was not aware that he was assuming any risk whatever. The servant cannot be held to assume a risk of which he has no notice. In any event, the question presented in this case was one for the jury, and, they having resolved it in plaintiff's favor, their verdict will not be set aside. There was a conflict of evidence, and it was for the jury to determine what the verdict should be.

In conclusion, the record shows that the case was fairly tried and given to the jury under proper instructions. No reversible error has been pointed out, and the judgment of the district court seems to be right, and it is

AFFIRMED.

ROSE, J., dissents.

SEDGWICK, J., not sitting.

MINERVA OVERLANDER ET AL., APPELLEES, V. PETER WARE ET AL., APPELLEES: JOHN L. CLARK, APPELLANT.

FILED FEBRUARY 16, 1918. No. 19537.

1. **Specific Performance:** PAROL AGREEMENT: PART PERFORMANCE: STATUTE OF FRAUDS. In an action for specific performance of an oral agreement with a deceased person to convey land, *held*, that not only must the terms of the contract be established by evidence that is clear, satisfactory and unequivocal, but the work constituting the performance required under the statute of frauds must be such as is referable solely to the contract sought to be enforced, and not such as might reasonably be referable to some other and different contract or relation. Nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the agreement be fully performed. Equity interferes only to prevent fraud or unconscionable advantage.

2. **Evidence:** DECLARATIONS OF DECEDENT. Evidence of declarations of a deceased person, concerning a parol contract, does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight.

3. **Estoppel:** ADMINISTRATION OF ESTATE: ELECTION TO TAKE AS HEIR. An heir who participates in an administration proceeding and permits final decree therein, without asserting his claim to the entire estate, will be held to have elected to take as heir and not as owner, and is estopped from afterwards asserting ownership of the entire estate.

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

Alvin F. Johnson, for appellant.

Byron G. Burbank and *Amos Thomas, contra.*

CORNISH, J.

On June 20, 1912, James B. Kelly, an unmarried man, aged 72 years, died intestate. Three sisters, ten nieces and seven nephews are his sole surviving heirs and next of kin. Suit by certain of the heirs to partition his 200 acres of land, making the daughter of

defendant John L. Clark also a party, for the purpose of quieting title to 80 acres of the land, some of the heirs having deeded an interest to her, which deed, it is alleged, had been procured by fraud. As the issues were joined, defendant Clark claims to be the owner of all the land under an alleged oral contract made in January, 1891, between Kelly and Clark's father, wherein Kelly promised that if Clark, then 10 or 11 years old, would come from Missouri to Douglas county and live with and care for him as a son would do, until he died, then Kelly would care for and educate him, and arrange it so that Clark would get all his estate when he died. He alleges performance upon his part, but that Kelly did not, pursuant to the oral agreement, afterwards affirmed and renewed with the said Clark, make any arrangements by which his property at the time of his death became vested in Clark. The other heirs deny the making of the contract, allege that Clark is estopped to assert it, and that, being oral, it is void as within the statute of frauds. The trial court found that no contract was made between Clark's father and Kelly by which Clark was to have all of Kelly's property, found that title to 80 acres of the land should be quieted in Clark, in accordance with an agreement had between Clark and Kelly, and that title to the remainder of the land should be quieted in the heirs. All parties appeal.

The evidence is voluminous. An extended discussion of it will not be attempted. We are of opinion that the decree of the trial court should be affirmed.

In considering cases of this character, where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has

been such performance as the law requires. The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that non-performance by the other party would amount to fraud upon him.

It appears from the evidence that Clark's mother died when he was three years old, leaving several children. The baby and some of the other children were distributed among relatives. The father throughout his life was a tenant farmer in indigent circumstances; all of the children having to work out as soon as they were able to work. Kelly was an intelligent, money-making farmer in Nebraska. He first took Clark to his home on request of Clark's older sister, who thought he was not receiving good treatment at the hands of his stepmother. He stayed with Kelly for a time, and after about a year, when he was 10 or 11 years old, went to remain with him. It was at this time, it is alleged, that the original contract was made with Clark's father.

It is the testimony of the relatives, some of them very well-to-do citizens in the community where the Clarks lived, that they never heard of the contract until this suit was commenced. There is not the first bit of direct evidence of the making of such contract. The deceased never made a will, or a deed, or a memorandum, or wrote a letter, or signed any instrument proving or tending to prove such promise. It is nowhere suggested that he desired to violate a contract fairly made. It would seem incredible that, in absence of a desire on his part to defeat Clark of his rights, he should never do anything to fix and make secure those rights. It would be his duty to do so; his common sense would tell him that it was necessary, and,

ordinarily a man would do so. Although frequently urged to make deeds of part of his estate, he refused to do it.

The inquiry arises whether, from the circumstances and relations of the parties, it is probable that Kelly would have made the promise, or whether it is unreasonable to believe that the claimant would have performed the service that he did in the absence of the promise. When Kelly took Clark the second time, the boy was glad to go back with him. The relatives approved. No such contract would have been necessary, because the boy was a burden. As a matter of fact, the most fortunate day in Clark's life, financially considered, was the one when his uncle said he could come and live with him. He did go and live with him, and under the supposed contract, wherein it is said that he was to devote his time and services to his uncle, it so happens that after 20 or 21 years of service Clark, still being a young man, is comparatively rich. Under the evidence and the decision of the trial court, he is the owner of 160 acres of valuable land in Douglas county, besides the personal property which he has accumulated while living with his uncle and since. It is apparent from the evidence that his uncle missed no opportunity for the boy's financial and educational improvement. This is not a case where, if we deny the claim, his work and service go unrequited.

On the other hand, it seems extremely improbable that a man of Kelly's shrewdness and ability would have entered into the contract at the time alleged. The father and relatives would be glad, and were glad, to have him take the boy. How imprudent a contract for a man to make under such circumstances, to pledge his whole present and future estate in such a way. It would be reasonable for him to promise to do well by the boy, to take him and help him and remember him when he died if he had been a good boy and faith-

ful to him, but further than that no prudent man would go under the circumstances. He did do that, and has done as much for Clark as ordinary men would do. Clark has no reason to complain of the situation. Kelly was on good terms with his relatives. There is no direct evidence of any quarrel with any of them. As often as once in three or four years he made them long visits.

If Clark had believed, when Kelly died, that under the contract he was the owner of all the property, it is natural to suppose that he would have at once made claim to it upon that ground, as he was in duty and law bound to do if such was his claim. Instead, he makes application that letters of administration be granted, and permits the estate to be administered before asserting his rights. In requesting other heirs to sign deed of the eighty, in accordance with what the trial court found to be the subsequent agreement had between himself and Kelly, he did not give as a reason why they should sign that he was already the owner of the entire property.

The contract and its terms were sought to be shown by some 11 witnesses who had heard Kelly make declarations in his lifetime, containing admissions bearing more or less upon the question. No doubt Kelly thought well of and was attached to Clark, and during the 20 or 21 years that Clark was with him the big-hearted man would occasionally say good things about him and what he intended to do for him, and the witnesses heard him talk. Much of the testimony dated back many years, and the witnesses' recollection of what was said was more or less indistinct in their memory. Much of it goes only to intent, and some of it is inconsistent with the existence of the contract alleged. Kelly refused to make a deed or a will, though frequently urged to do so, and finally promised to go and make a deed to the eighty, which he had promised

Clark he would give him if he stayed there with his wife, as soon as he was well enough to go.

It is held by the courts that such evidence is unsatisfactory in its character. "It never amounts to direct proof of the facts claimed to have been admitted by those declarations." *Johnson v. Quarles,* 46 Mo. 423, 427. 3 Jones' Commentaries on Evidence, sec. 432. See, also, *Kinney v. Murray,* 170 Mo. 674, 700, 706. In *Peterson v. Estate of Bauer,* 76 Neb. 652, 658, we quote approvingly from *Dicken v. McKinley,* 163 Ill. 318, as follows: "Such contracts are looked upon with suspicion, and are only sustained when established by the clearest and strongest evidence"—and also from *Kinney v. Murray, supra*: "But, the proof of such a contract must be so cogent, clear and forcible as to leave no reasonable doubt in the mind of the chancellor as to its terms and character." So considered, the evidence as a whole does not sustain Clark's contention.

The attitude of Clark in participating in the administration proceedings and in permitting final decree therein, without asserting his rights to any part of the estate except the 80 acres, estops him from asserting ownership of the entire estate. As to that portion of the estate, it amounts to an election on his part to take as heir and not as owner.

We are of opinion that the evidence shows that, at the time Clark was married and was about to live with his wife apart from Kelly, it was agreed that if he would continue to live with Kelly he should have the 80 acres of land, the title to which was quieted in him by the trial judge.

The judgment of the trial court should be affirmed, the costs of this appeal to be paid by defendant John L. Clark.

AFFIRMED.

SEDGWICK, J., not sitting.

DEAN, J., dissenting.

The testimony of 11 disinterested witnesses seems to establish these material facts: First, that Kelly's declarations, made during a period of 21 years, disclose that he made an oral agreement with John Clark's father for John's services, and in consideration therefor he agreed that all of his property at his death was to become the property of John Clark; second, that John Clark, in reliance thereon, fully performed all of the services that the agreement contemplated he was to perform, and that the services so rendered are referable to that agreement; third, that Kelly for 21 years accepted the services rendered by John Clark, and thereby affirmed and acquiesced in the agreement; fourth, that Kelly never made a statement that is inconsistent with his often expressed declaration, made mostly to farmer neighbors whom he had known from 10 to 30 years, that all of his property at his death was to become the property of Clark; fifth, that Kelly died without having performed his part of the agreement.

Dr. Murphy was Mr. Kelly's physician and intimate friend for more than 15 years. He testified that Kelly told him that he lived alone, and "that he made an agreement with John Clark's father that, if John would come and live with him until he died, he should have everything on God's green earth that he had, and he said that many times," and that Kelly said "he went to Missouri after him. * * * I don't believe there has been a year that I have not heard Jim Kelly state the contract he made with John Clark's father." To another Kelly said he told Clark's father that, "if they would let Johnny come and stay with me, * * * when I died I would give him all that I had." To another, in speaking about renting the farm: "I would not rent it for more than one year at a time because * * * when I die everything goes to John, and he can do as he pleases with it. * * * I promised to give him eve-

rything I had, and I am going to live up to my contract." To another Kelly gave a like answer when asked about selling the farm. Another testified: "He said him and John had been trading, and that he tried to beat John in the trade. He said John has pretty —— good judgment. He said he traded with John the same as he would with anybody else, because he expected John to have what he had when he got through with it, and he wanted to know that he would know enough to take care of it." To another he made the same statement, and added: "He was going to leave John all his property, and he wanted to see if he could be cheated out of it." Two witnesses said that Kelly's declarations were made in Clark's presence. *Hannemann v. Ott,* 98 Neb. 492; *Harrison v. Harrison,* 80 Neb. 103; *O'Connor v. Waters,* 88 Neb. 224. Clark married 6 years before Kelly died. He brought his wife to the humble home, and there with their children they all lived and toiled together until the aged uncle died.

William H. Kerr, a neighbor, testified that he stayed over-night at Kelly's home about a year before Clark's marriage, and that Kelly said: "He told me in John Clark's presence that he wanted John to get married. * * * It would make it more comfortable for them if there was a woman in the house to keep house for them. He said if he done that, and stayed with him, that he would give him everything at his death. * * * He told me that he took John Clark when he was about seven years to raise him, and he said he told his father, * * * if he would let him take that boy and raise him, he would give him a good education and give him everything at his death. * * * Told me that that evening, in the presence of John Clark." This testimony supports the allegations of Clark's answer and cross-petition with respect to the parol renewal by Kelly with Clark of the 1891 agreement from time to time that, in consideration of Clark con-

tinuing to care for Kelly and continuing to live with him, Kelly would leave all his property to Clark at his death. Almost it seems that the judgment of the learned trial court, and its affirmance here, is based upon unrelated fragments of testimony, rather than on the weight of testimony.

The cross-appellants charge that Clark fraudulently obtained a deed from 14 of their number conveying their interest in 80 acres of the land to his minor daughter, Mary Clark, and that they executed the deed in pursuance of false representations made to them by Clark to the effect that it was his uncle's dying request that Mary have the 80-acre tract. In proof of this they introduced in evidence a series of letters written by Clark to certain of their number. Clark contends, and the proof seems to show, that the letters were written in pursuance of a proposed compromise settlement tendered to him by some of the cross-appellants, and which provided that, if all cross-appellants would join in the settlement and execute the deed, he would relinquish his claim to the remainder of the estate. The agreement was not consummated because only 14 cross-appellants would sign the deed, the remaining 5 refusing to sign. The agreement was afterwards repudiated by the 14 persons who signed the deed, and Clark acquiesced in the repudiation. The letters seem fairly to disclose an endeavor by Clark to fulfil his part of the agreement for settlement. All of Clark's references in the letters to any alleged dying request, or any request of his uncle, relate to statements that Mr. Ware and Mrs. Long attribute to Mr. Kelly as having been made by him shortly before he died about making a deed, and in one instance only two hours before that event. Mr. Ware is a husband of Kelly's deceased sister; Mrs. Long is a sister of Kelly; and Mrs. Kelly is the wife of a deceased brother. They are all directly or indirectly interested in the suit. Mrs. Long is a cross-appellant. The children

of Mr. Ware and the children of Mrs. Kelly are cross-appellants. The three persons named all came together from their respective Missouri homes, and arrived at the Kelly home 24 hours before their aged kinsman died, and were with him at the moment of final dissolution. It does not appear that Clark was present and heard any of the alleged statements of his dying uncle.

The letters are all addressed to certain of the cross-appellants, and relate in part to the visit of the three relatives. They were written in September, October, and November, 1912. In one Clark reports Mr. Ware as saying that, on the day his uncle died, "the last thing he ever said to anyone except the nurse, he told uncle John Ware that he felt so much better he was going to town in two or three days and make out a deed to me." In his deposition Mr. Ware denied hearing Mr. Kelly say that, but admitted that Mr. Kelly told him only two hours before he died "that he was going to leave Dolly a home." Dolly was Mr. Kelly's pet name for Clark's daughter Mary. It appears, however, in Mrs. Long's deposition that Mr. Ware told some members of his family on his return from the Kelly obsequies that Mr. Kelly told him in his last moments that he was going to give 80 acres to John Clark or to Mary. In the same letter Clark said that "Uncle had told him and several of the neighbors he was going to leave everything to me and Mary." In view of Clark's daughter being then in her second year and Clark a man of 31, it would seem that no one except Clark could be heard to complain of this statement as relating to any contract except that of 1891. Naturally there must have been some confusion among the stricken relatives as they anxiously waited at the bedside of their dying kinsman for the whispered word that was to direct the disposition of his estate. Small wonder if they did not accurately recall his statements.

The rule is well settled in Nebraska that even a will cannot divert the disposition of property in a proper case where a promisee has performed his part of a contract that provides the promisor is to convey. Much less can it be done orally. Clark cannot be held to have waived his claim to the estate by negotiating with the cross-appellants for a compromise settlement. In the present case the parties by mutuality of agreement, no matter by whom initiated, created a situation that was repudiated by one party. The other acquiesced in the repudiation. The former status of both seems thereby to have been restored. 16 Cyc. 725.

The argument that Clark is estopped from maintaining his action, and that his agreement to accept a part of the land as a compromise settlement constitutes an election and an abandonment of his claim to the estate, does not seem to be clearly supported by the record nor by the law. Clark made no election. The deed that was made by some of the cross-appellants to Clark's infant daughter was in pursuance of the proposed compromise settlement, and to avoid litigation. The cross-appellants are in no worse position now by any act of Clark's of which they complain than they were before some of them executed the deed that all of them have since repudiated. The probate proceedings and the actions to quiet title were begun by Clark in pursuance of the proposed settlement, and both of the latter actions were dismissed when the proposed settlement was abandoned by the cross-appellants. In any event the estate would have to be probated. In no respect does Clark seem to be either compromised or estopped. An election is generally held to be some decisive act that will so change the status of the parties with reference to the property or the rights involved that they cannot be restored to their former situation. In the present case there was no change of status. Clark was the owner of all of

the property from the time that his uncle died. The fact that the cross-appellants made claims that do not seem to be sustained should not be held to work to Clark's injury. It was while the proceedings for settlement were pending that Clark upon the advice of counsel applied to the county court of Douglas county for administration of the estate. That did not prejudice Clark. *Cobb v. Macfarland*, 87 Neb. 408.

Kelly never made a will, and the record tells why. He could read and write some, but was illiterate. It is not shown that he ever wrote a letter. Not long before he died Dr. Murphy advised him to make a will. Kelly answered: "I have seen so many wills, and the lawyers make them and then break them up, and there is no one in this bottom but knows I always said John Clark should have everything I have on God's green earth when I die." And that in speaking of lawyers he said: "He hated them; and the people here know, and we have always done our business together, and that he should have everything, as the contract that I made with his father." He preferred to rely on the trusted friends of many years to see that the only kinsman who helped to accumulate the estate should, as he expressed it, "have everything I have on God's green earth when I die."

All of Kelly's next of kin, 20 in number, are participating in this suit. Of these, John Clark, the son of Kelly's deceased sister, is the only one that ever assisted him in accumulating the property, and according to Kelly's statements the only one of his relatives that contributed to his comfort. Kelly's often expressed declaration that Clark "should have everything that he had" was prompted by a fine sense of honor and of justice. When his nephew came to live with him he had 160 acres of farm land almost void of improvements. Substantial improvements were afterwards added. After Clark had lived and worked with him about ten years Kelly bought an additional

40 acres, and it now forms a part of the 200-acre tract that cross-appellants seek to partition. On this point comment may be spared.

The rule seems to be well settled in this state that a parol contract to convey land will be specifically enforced where the testimony shows that the promisee has performed his part of the contract in good faith, and such contract, as against the estate of a promisor who subsequently died, may be proved by witnesses who testify to declarations made by the promisor. Where property rights have attached in pursuance of a rule that has been long adhered to, or where reliance is placed upon a rule with respect to the conveyance of property, such rule should not be lightly revoked. The following citations in this and other jurisdictions seem to be fairly in point: *Kofka v. Rosicky,* 41 Neb. 328; *Johnson v. Riseberg,* 90 Neb. 217; *Moline v. Carlson,* 92 Neb. 419; *Damkroeger v. James,* 95 Neb. 784; *Peterson v. Bauer,* 83 Neb. 405; *Bevington v. Bevington,* 133 Ia. 351, 9 L. R. A. n. s. 508; *Francis v. Francis,* 180 Ia. 1191; *Laughnan v. Laughnan,* 165 Wis. 348; *Drager v. Scegert,* 138 Minn. 6; *Hespin v. Wendeln,* 85 Neb. 172. In *Cobb v. Macfarland,* 87 Neb. 408, the agreement to convey was proved solely by the declarations of decedent. The *Cobb* case is particularly in point.

Excepting Clark alone, Kelly expressed an aversion for all of his relatives. He told two witnesses that they should not have a penny of his money. When he was ill his physician asked him why he did not send for his nearest relatives, and he said, "I don't want them. * * * All they come for is to raise ——."

Is it at all improbable that Kelly would have made an agreement that contemplated the active assistance and companionship of a robust nephew of ten years? Was it for him an imprudent agreement? In view of Kelly's situation in 1891, being then a bachelor of

51 who had always lived alone on a 160-acre farm in a little one-room cabin, was it either an improbable or an imprudent agreement? The main opinion seems in part to base the decision on the fact that from a financial viewpoint it was fortunate for Clark that he went to live with his uncle. Clark was a poor boy, but it will not of course be therefore assumed that his only avenue to fortune lay in the direction of Kelly's home. But these are merely incidents. It seems that the function of the court should end when it discovers and declares what the decedent in fact did, and not what the court believes he ought to have done. In view of the record and the law applying thereto, it seems that Kelly's agreement with John Clark's father should be specifically enforced. In *Peterson v. Bauer,* 83 Neb. 405, it is well said: "Whether an oral contract to devise realty shall be enforced by specific performance after it has been performed by plaintiff depends upon the facts and circumstances of each case." This lone and childless man had good reason to look upon Clark as the logical and the natural object of his bounty. And this aside from the fact that he was the only kinsman who was the companion of his middle age and the support of his declining years. Under the rule, John Clark may not speak for himself, but 21 years of faithful service and every declaration of James Kelly speaks for him.

The argument that the relatives, "some of them very well-to-do citizens," never heard of the 1891 contract upon which Clark relies until this suit was commenced, if established, would be corroborative of Kelly's declarations of his lack of interest in them. But the record shows that by counsel's statement the relatives knew before October 1913 that Clark claimed the entire Kelly estate. The record contains nearly 1,500 pages. More than 40 witnesses testified, and of these 21 by deposition, so that as to them our opportunity

to judge of their qualifications as witnesses equals that of the trial court.

I respectfully submit that neither the record nor the law seems to sustain the opinion that has been adopted by the majority.

HAMER, J., dissenting.

While I join in Judge Dean's dissent, additional thoughts are suggested by the record. There appears to have been an arrangement between the parties for a compromise. This arrangement was never carried out. The deed was never signed by all the parties. Anticipating that it would be signed, the plaintiff appears to have filed a petition for a partition. As the arrangement for a compromise was never carried out, this incident should not be considered on the merits of the case. The majority opinion appears to make much of certain things done or attempted to be done by the plaintiff under the proposed compromise. I submit that these things ought not to be used against the plaintiff, as he is in no sense bound by a compromise contemplated but never carried out. The petition filed in the district court for Douglas county July 19, 1913, was brought by John L. Clark as guardian and next friend of Mary V. Clark, a minor, v. Peter Ware, Anna Ware, his wife, Katherine Miller and John Miller, her husband, William B. Colliter, Lena C. Pella, John Pella, her husband, James Broyles and Hattie Broyles, his wife. It would extend this opinion to an unwarrantable length to recite the contents of the foregoing paper, and also other papers that were filed in contemplation of the compromise having been made. There appears also to have been a petition filed in the district court for Douglas county in which John L. Clark and Floy E. Clark, his wife, were plaintiffs against Minerva Overlander, Rufus B. Overlander, her husband, Martha Forsee and John B. Forsee, her husband, and others. The object of the above petition appears to have been to confirm the shares of the parties mentioned therein

and for a partition of the realty described according to the respective rights of the parties, or that the realty be sold and the proceeds divided. I quote from the majority opinion: "It is the testimony of the relatives * * * that they never heard of the contract until this suit was commenced." This particular suit was commenced on July 23, 1914. There must be some mistake about this, because the cross-appellants filed an answer in the district court for Douglas county October 17, 1913, in a proceeding between the same parties and concerning the same property involved in this suit. It was verified by the present attorney for the cross-appellants, as I understand it. In that answer, which is in evidence in this case, it is pleaded "that said John Clark falsely and fraudulently represented that he, the said Clark, was entitled to all the real estate left by said James B. Kelly, which was 200 acres." Of course the attorney may have conferred with his clients before verifying the pleading. While they did not verify this answer, counsel for them did verify it. He probably did not know except by communicating with them.

In *Shuman v. Willets,* 17 Neb. 478, this court held: "Where a contract in relation to real estate has been deliberately entered into by competent parties, and is not open to objection of fraud, undue means, etc., in obtaining it, a court of equity will carry out the intention of the parties by specifically enforcing its obligations." In that case this court cited *Gartrell v. Stafford,* 12 Neb. 545; *Vindquest v. Perky,* 16 Neb. 284; *Greenaway v. Adams,* 12 Ves. Jr. (Eng.) 395; *King v. Hamilton,* 4 Pet. (U. S.) *311. It also cited *Hall v. Warren,* 9 Ves. Jr. (Eng.) 608, quoting what Sir William Grant said, that "supposing the contract to have been entered into by a competent party, and to be in the nature and circumstances of it unobjectionable, it is as much of course in this court to decree a specific performance, as it is to give damages at law."

An examination of the decisions seems to sustain the contention made.

In *Hartman v. Streitz,* 17 Neb. 557, there was no contract in writing. So, also, in *Stevens v. Cooper,* 2 Neb. 373, and *Hughes v. Reese,* 22 Neb. 78. In *Palmer v. Palmer,* 114 Mich. 509, a farmer gave his son a bond for a deed of one-half of his 80-acre farm, conditioned upon the son living at home and working the farm, and the payment of a certain sum. Along the same line are *Hanlon v. Wilson,* 10 Neb. 138; *Ford v. Steele,* 31 Neb. 521; *Dawson v. McFaddin,* 22 Neb. 131; *Neale v. Neales,* 9 Wall. (U. S.) 1; *Guynn v. McCauley,* 32 Ark. 97; *Willard v. Tayloe,* 8 Wall. (U. S.) 557; *Young v. Young,* 51 N. J. Eq. 491.

In *Lacey v. Zeigler,* 98 Neb. 380, the action was for specific performance, and there was a decree which awarded the plaintiff specific performance of an alleged parol agreement by which Charles W. Zeigler agreed that he would at his death give to the plaintiff $5,000 in money, and the home place in the city of Columbus, and certain household furniture, in consideration that the plaintiff would devote her time and attention to caring for and nursing said Zeigler and keeping house for him as long as he should live. It was admitted that the plaintiff was in possession of the home place, but it was claimed that her possession was acquired after the death of Zeigler and by fraud, and that it was maintained by force, also that the contract was not in writing, and that the estate was solvent. The court found for the plaintiff and quieted and confirmed her title, and in addition directed that the administrator pay to the plaintiff from the assets of the estate $5,390, with interest.

In *Anderson v. Estate of Akins,* 99 Neb. 630, it was alleged that "services were rendered by plaintiff at the request of the deceased, 'who promised and agreed to pay plaintiff for the same,'" and it was held that such allegation was "supported by proof that the

deceased promised to convey or devise certain property in payment for services rendered, but refused or neglected to perform such agreement." In the body of the opinion it is said: "The objection that it was necessary under this allegation to prove an express contract fixing the price to be paid is without merit." The facts were that the plaintiff with his mother resided with the deceased from the infancy of the plaintiff, and both were supported as members of the family. When the plaintiff became of age he was about to seek employment for himself, but at the request of the deceased he remained and continued with the deceased for about 15 years, working on the farm and assisting in the accumulation of the property which was held by the deceased at the time of his death. The action was a law action, and the plaintiff recovered. It is similar to the case at bar in the fact that the deceased neglected to convey or devise the property to the plaintiff. The case supports the claim of the plaintiff, because it is held that the plaintiff was entitled to recover for the services performed. It is perhaps immaterial, so far as the principle is concerned, whether a law action was brought or an action for specific performance, as in the instant case.

FORT COLLINS NATIONAL BANK, APPELLANT, V. JAMES H. STRACHAN, APPELLEE.

FILED FEBRUARY 16, 1918. No. 19877.

Limitation of Actions: NONRESIDENT: PRESENCE IN STATE. Where a debtor comes into the state openly, without any attempt at concealment so as to prevent his creditors from knowing of his presence here, and his stay is for a sufficient period to afford requisite time for service of summons upon him, he has "come into the state" within the meaning of section 7577, Rev. St. 1913, even though his coming was at the time temporary in character, and not such as to give him a domicile or residence in this state.

Appeal from the district court for Scott's Bluff county: RALPH W. HOBART, JUDGE. *Affirmed.*

Morrow & Morrow, for appellant.

Wright & Mothersead, contra.

CORNISH, J.

When the cause of action sued upon accrued, defendant was outside and a nonresident of this state. Afterwards, and for nearly five years preceding the commencement of this action, he was a resident of this state, living here with his family. Prior to coming here to live, he was within the state, openly and without concealment, for temporary purposes, and looking for a location for feeding sheep. If this time should be added to the period of his residence here, more than five years had elapsed before the commencement of the action against him, and plaintiff's claim is outlawed, as adjudged in the trial court, from which judgment plaintiff appeals.

The question is: When did "he (defendant) come into the state" under the provisions of section 7577, Rev. St. 1913, so as to commence the running of the statute in his favor? Section 7577 reads as follows: "If, when a cause of action accrues against a person, he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

In *Webster v. Citizens Bank,* 2 Neb. (Unof.) 353, 356, the question is put, "whether we shall construe our statute to mean 'reside out of the state' when it says 'depart' and shall construe 'absence' as meaning nonresidence, or whether we shall recognize some force

in the omission of any reference to residence in our statute and give effect thereto." It seems that our statute is peculiar in omitting any reference to "residence." We held that the language of the statute refers not to domicile, nor to residence, but to personal presence. The words, "come into the state," must also be held to refer to personal presence within the state. Such would appear to be the literal meaning of the language used, and probably the legislative intent.

It follows that where the debtor comes into the state openly, so as to be visible to all who choose to seek after him, without resorting to any concealment to prevent his creditors from knowing of his presence, and his stay is such as to render him accessible to service of summons, then the statute commences running at once.

For cases bearing upon this question, see *Webster v. Citizens Bank, supra*; *Baxter v. Krause,* 79 Kan. 851; *Gibson v. Simmons,* 77 Kan. 461; *Stewart v. Stewart,* 152 Cal. 162; *Morrow v. Turner,* 2 Marv. (Del.) 332; *State Bank v. Seawell,* 18 Ala. 616; *Wilson & Co. v. Daggett,* 88 Tex. 375, 53 Am. St. Rep. 766; *Bassett v. Bassett,* 55 Barb. (N. Y.) 505; *Gibbons v. Ewell,* 1 Handy (Ohio) 562; *Stanley v. Stanley,* 47 Ohio St. 225; *Weille v. Levy,* 74 Miss. 34, 60 Am. St. Rep. 500; *Campbell v. White,* 22 Mich. 178; *Ridgeley v. Price,* 16 B. Mon. (Ky.) 409.

AFFIRMED.

SEDGWICK, J., not sitting.

CARL BERTON WHITCOMB v. STATE OF NEBRASKA.

FILED FEBRUARY 16, 1918. No. 20331.

Jury: QUALIFICATIONS. A juror, in his *voir dire* examination in a criminal case, answers that it will take evidence to remove an opinion which he has formed as to the guilt or innocence of the accused. *Held*, that such fact will not disqualify him as an impartial juror, required under section 11, art. I, of the Constitution, if such opinion was formed and he is otherwise qualified in accordance with the provision contained in subdivision 2, sec. 9109, Rev. St. 1913.

ERROR to the district court for Adams county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

W. P. McCreary, for plaintiff in error.

Willis E. Reed, Attorney General, and *John L. Cutright, contra.*

CORNISH, J.

The defendant (plaintiff in error), found guilty of felony, complains of error in the trial court's overruling of his challenges to seven jurors, made on their *voir dire* examination. These jurors answered that they had formed opinions as to the guilt or innocence of the defendant, and some of them answered that their opinions were such as it would take evidence to remove. These opinions had been formed from what they had heard or read in the newspapers, but not from conversations with any person who had witnessed or claimed to have witnessed the crime, or from a record of the testimony of such person. None said he had a fixed, conclusive opinion upon the facts, or prejudice of any kind. They all answered that they could lay aside the opinions which they had formed and try the case fairly and impartially upon the evidence and the law as presented.

The question is whether such forming of an opinion, or forming one which it would take evidence to remove, necessarily disqualifies the juror. Subdivision

2, sec. 9109, Rev. St. 1913, provides that such opinion shall not disqualify the juror if he "shall say on oath that he feels able notwithstanding such opinion to render an impartial verdict upon the law and the evidence," and the court is satisfied that he is impartial. Our attention is called to section 11, art. I, of the Constitution, which provides that the juror must be impartial.

The inquiry is somewhat psychological. Any person, hearing rumors of a crime or reading newspaper accounts of it, is likely to form an opinion. Called to try the guilt or innocence of the person charged with the crime, he may answer that the opinion formed is not such as will require evidence to remove. Or, though otherwise of the same general attitude of mind, he may answer to the contrary. The case of Juror Whiting illustrates the situation. At first he answers that it would not require evidence to remove his opinion formed. Counsel for defendant, evidently thinking such a condition impossible, suggests to him that he does not "understand the question," and the juror changes his mind. He is then asked if he can "start in on the trial of this case evenly balanced between the state and the accused." He answers: "Yes; I think I can. Q. Well, there would have to be some evidence first to remove your opinion, wouldn't there? A. There would have to be some, certainly. Q. Then you would not start in evenly balanced, would you? A. I guess I wouldn't, under those circumstances." Afterwards, he swears that he could be a fair and impartial juror and render a verdict according to the law and the evidence. The trial judge, exercising his discretion, overruled the challenge to the juror. Strictly speaking, for the purposes of the trial no such evidence would be required. The impression or opinion formed rests upon a basis, so uncertain and unsubstantial, compared with the sworn evidence of the event, that it will cut no figure among the real causes and influences bringing the juror to a mental conclusion.

The opinion formed is hypothetical; it will be naturally and easily put to one side.

We believe it is the experience of courts that such a juror may be as impartial a juror as another who has never heard of the case, and a more intelligent one. Of course, the juror may, from mere rumors or newspaper accounts, form such a fixed or decided opinion, or acquire such prejudice, as to disqualify him. If, however, as may well be the case, the juror is able to put aside the opinion formed and enter the trial giving the accused the benefit of the presumption of innocence, and the court believes he will be a fair and impartial juror, then the objection is not well made. *Basye v. State*, 45 Neb. 261; *Jahnke v. State*, 68 Neb. 154; *Dinsmore v. State*, 61 Neb. 418; *Bridges v. State*, 80 Neb. 91; *Taylor v. State*, 86 Neb. 795.

In so far as the holdings in *Olive v. State*, 11 Neb. 1, *Miller v. State*, 29 Neb. 437, and *Owens v. State*, 32 Neb. 167, upon this question are contrary to this opinion, those cases are overruled.

The judgment of the trial court is

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

NELS MARTINSON, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 1, 1918. No. 19803.

1. **Master and Servant:** ACTION FOR INJURY: PETITION: SUFFICIENCY: FEDERAL LIABILITY ACT. A petition in an action against a railroad company for personal injuries to plaintiff while he was in the employ of defendant, stating that defendant was the owner, and was "engaged in the operation of a system of steam commercial railroads traversing the states of Illinois, Iowa, Nebraska, Colorado, and other states," when not attacked by demurrer or motion, sufficiently alleges the interstate character of defendant so as to bring the cause of action within the federal employers' liability act. 35 U. S. St. at Large, ch. 149, p. 65.

2. **Pleading:** AMENDMENT: DATE OF INJURY. Plaintiff filed a petition stating a cause of action under the federal employers' liability act, but erroneously stated the date of the injury. *Held* proper to permit an amendment that correctly charged the date.

3. **Limitation of Actions:** AMENDMENT OF PETITION. In such case, the petition having been filed and service of summons having been made within two years from the date of injury, the cause of action was not barred by the statute of limitations, although more than two years had elapsed between the date of injury and the date of the amendment.

4. **Master and Servant:** ASSUMPTION OF RISK. In entering upon the work of a boilermaker's helper, plaintiff assumed the ordinary risks incident to the employment, but he did not assume the risk of injury arising from remaining in a tank for an unusual length of time, under the direction of his superior, if in so doing he acted with ordinary care under the circumstances.

5. **Evidence** discussed in the opinion, and *held* sufficient to support the verdict of the jury.

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

Byron Clark, Strode & Beghtol and *Jesse L. Root,* for appellant.

Wilmer B. Comstock, contra.

MORRISSEY, C. J.

Plaintiff recovered a judgment for injuries received while in defendant's employ, and defendant has appealed.

The petition alleged that the defendant owned and operated a railroad system traversing the states of Illinois, Iowa, Nebraska, Colorado, and other states, and owned, maintained and operated roundhouses and repair shops in Lincoln, Nebraska; that on January 17, 1914, the plaintiff, while employed by defendant as a boiler-maker's helper, through the negligence of the defendant, sustained injuries that destroyed his sense of hearing in the left ear. It was filed December 28, 1914. The cause was called for trial March 2, 1916. At the outset of the trial plaintiff, by leave of

court granted over the objection of the defendant, changed the allegation of his petition as to the date when the injury was received, and alleged the date of injury to be November 15, 1913. Defendant by its answer alleged that the cause of action, if any, accrued under the federal employers' liability act. This allegation is admitted in the reply. The defendant asks us to hold that the cause of action is barred by the statute of limitations because more than two years had elapsed between the date of the injury and the date of the amendment. By the alteration of the petition no new fact was alleged, nor was a new cause of action stated. The amendment was therefore properly allowed. Rev. St. 1913, sec. 7712. Our Code permits a liberal construction of pleadings, and, in the absence of demurrer or motion, it contained the necessary allegations to state a cause of action under the federal statute (*Seaboard Air Line Railway v. Duvall*, 225 U. S. 477), and the statute of limitations had not run. *Smith v. Atlantic C. L. R. Co.*, 210 Fed. 761.

The answer alleged that the right to recover, if any right of recovery existed, fell within the federal statute. This being admitted in the reply, no proof of the interstate character of defendant was required.

There is the further question of the sufficiency of the evidence. Plaintiff had been employed in the roundhouse, where the smaller repairs are usually made. The work on which he was engaged when he claims to have received the injury was a much larger job than that usually done at the roundhouse. He was assisting in putting a patch upon a water-tank attached to the tender of a locomotive engine. In order to do this work, plaintiff was sent inside to hold a heavy piece of iron against the end of each rivet, while another servant of the defendant applied an air hammer upon the rivet from the outside of the tank. The blows from the hammer made a great noise and din on the inside where plaintiff was working.

Plaintiff contends that at the time he entered the tank his hearing was good, but that after his day's work was done he was conscious of a roaring noise, and that he suffered great pain in his left ear, and that he has not since been able to hear in that ear. He claims that his injury is due to the negligence and carelessness of the defendant in not providing sufficient help and assistance while the work was being done, and in requiring him to continuously remain in the tank for an unusual and improper period of time. After plaintiff had been in the tank for some time, he emerged therefrom, and stated to Mr. Wolf, that the work was too hard for him. Plaintiff testifies that Wolf said he would see the boss; that Wolf went away and shortly thereafter returned and stated that the boss said there was no one else to put in plaintiff's place and that he would have to continue in the tank. Defendant assigns as error the ruling of the court permitting plaintiff to testify to what the foreman is claimed to have said to Wolf. At most, this was error without prejudice.

It is also claimed that the plaintiff assumed the risks incident to the services he was called upon to perform. He realized that the work was unusually hard, but we cannot say that this boy of 22, with little knowledge of our language and a very limited experience in the kind of work he was directed to do, realized, or might be expected to realize, that it would work a permanent injury to his hearing.

"A servant acting under the commands or threats of his master does not assume the risk incident to the act commanded, unless the danger incurred is fully appreciated and is such that no person of ordinary prudence would consent to encounter it; and the mere fact that the servant knows that there is some danger will not defeat his right to recover if in obeying he has acted with ordinary care under the circumstances." 26 Cyc. 1221. *Chesapeake & O. R. Co. v. De Atley,* 241

U. S. 310; *New York, N. H. & H. R. Co. v. Vizvari,* 210 Fed. 118.

The statute creates liability where the injury results in whole or in part from the negligence of the defendant, but provides that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 35 U. S. St. at Large, ch. 149, sec. 3, p. 66. The court properly submitted this question to the jury. There is evidence in the record from which the jury might have found that the plaintiff's loss of hearing was not caused from being required to remain too long in the tank, but the weight of the evidence supports the finding of the jury. Plaintiff first entered the service of the defendant in February, 1913. He was examined by one of its physicians for membership in its voluntary insurance association, and his hearing was not found to be impaired. He left the service some time during the succeeding summer, but, desiring to return again to the service of the defendant, submitted to another examination in September, 1913, passed this examination and was again admitted to membership in this voluntary insurance association. The testimony of experts also supports the verdict.

Exceptions are taken to instructions given and to instructions requested and refused, but the ruling of the court in the matter of the instructions, both given and refused, is in harmony with the views herein expressed, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

THOMAS BAKER, APPELLANT, v. DANIEL COON ET AL., APPELLEES.

FILED MARCH 1, 1918. No. 19887.

False Imprisonment: STATEMENTS TO OFFICERS: LIABILITY. One who merely states to an officer what he knows of a supposed offense, without making any charge or requesting an arrest, does not thereby make himself liable for false imprisonment.

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

Wilmer B. Comstock, for appellant.

Byron Clark, Strode & Beghtol and *Jesse L. Root, contra.*

MORRISSEY, C. J.

Action to recover damages for false imprisonment. Plaintiff had purchased a ticket entitling him to transportation over the Chicago, Burlington & Quincy Railroad from Lincoln to Denver, and was in the passenger depot awaiting the arrival of the train he expected to take, when the defendant Coon, who had also purchased a ticket from the same company, complained to defendant Hanson, who was then the passenger director of defendant railroad company, that plaintiff had picked his pocket. The passenger director went with Coon to plaintiff, and, according to the testimony of plaintiff, told Coon that he was under arrest, explaining that Coon charged him with having picked his pocket. The evidence does not entirely agree as to the exact language used, but for the purpose of this statement we are taking plaintiff's story as true. Plaintiff denied the truth of the charge, and offered to be searched. Presently a policeman in the employ of the city of Lincoln entered the depot. His attention was called to the complaint Coon had made. The passenger director then proceeded about his regular duties,

leaving plaintiff, Coon and the policeman together. Plaintiff again offered to submit to search, but the policeman declined to make the search in the depot. Plaintiff, Coon and the policeman went to the police station. Plaintiff was searched, with his consent, the money claimed to be lost was not found on his person, and his appearance, conduct and story so impressed the chief of police that he expressed the opinion that plaintiff was not guilty. Nevertheless, at the insistence of Coon, plaintiff was held three days without complaint having been filed against him. He was innocent of the crime charged; his detention was unlawful; the "bull pen" in which he was imprisoned was an unfit place in which to keep a prisoner, and the officers responsible for the condition of the jail are deserving of censure.

Plaintiff sued Coon, who made the complaint, Hanson, the passenger director, and the Chicago, Burlington & Quincy Railroad Company. The court instructed a verdict in favor of Hanson and the Railroad Company, but submitted the case to the jury as to Coon. The jury returned a verdict against Coon for $2,000. Coon has not appealed, but plaintiff appeals from the ruling of the court in dismissing the case as against Hanson and the railroad company.

Certain rulings relating to the introduction of evidence are first assigned as error, but, if the evidence excluded would not change the effect of the testimony received, these assignments do not call for consideration. Giving full effect to the testimony offered, but excluded, we do not see that it materially strengthens the story plaintiff told in chief. After detailing the conversation between himself and the passenger director, plaintiff testified that the passenger director said "that he could not do anything about it, that the police would have to do it." There appears to have been two or three minutes intervening between the time when the passenger director told plaintiff that

he was under arrest and the arrival of the policeman. The passenger director did not restrain him of his liberty. Plaintiff testifies that he wanted to remain to hear what story Coon was telling; that he offered to submit to a search in order to prove his innocence, but the policeman declined to search him there. He testifies that the passenger director was not present when he left for the police station, and that he went there of his own volition.

The testimony of Hanson and the police officer is to the effect that Hanson was not responsible for plaintiff's arrest or incarceration. This is the effect of plaintiff's own testimony given in chief, and it was not error for the court to refuse to permit plaintiff, either in rebuttal or by withdrawing his rest, to again go over this question. It was fully and exhaustively covered when plaintiff was first upon the witness-stand.

No liability attaches to defendant railroad company unless, through its agent Hanson, it was in some way responsible for plaintiff's arrest or detention.

A person may lawfully direct the attention of a police officer to a dispute between two persons, where one charges the other with the commission of a crime, and, where the officer, on his own responsibility, arrests and imprisons the person accused, the person who directed his attention to the controversy is not liable in damages to the person arrested.

There is not sufficient evidence to connect Hanson with the arrest or imprisonment, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

OTIS H. HULL, APPELLEE, v. UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT.

FILED MARCH 1, 1918. No. 20431.

Master and Servant: WORKMEN'S COMPENSATION ACT: LOSS OF LEG: COMPENSATION. Under a statute providing: "For all disability resulting from permanent injury of the following classes, the compensation shall be exclusively as follows: * * * For the loss of a leg, fifty per centum of wages during two hundred fifteen weeks" —and providing also that permanent loss of the use of a leg shall be considered as the equivalent of the loss of a leg, the compensation for the permanent loss of the use of a leg, unaccompanied by other physical injury or loss of health, cannot exceed the amount specified.

APPEAL from the district court for Kearney county: WILLIAM C. DORSEY, JUDGE. *Modified and remanded.*

L. C. Paulson and *Strode & Beghtol,* for appellant.

J. H. Robb, M. D. King, Horth & Ryan and *J. L. Cleary, contra.*

LETTON, J.

This is an appeal from a judgment awarding compensation to a workman. Plaintiff, a telephone lineman, while working upon a pole, fell to the ground sustaining a compound fracture of his left thigh bone and other injuries. As a result his left leg was shortened an inch or more and his left knee and ankle were rendered stiff and incapable of normal motion. He has no other business than that of a telephone lineman, is now totally disabled from following that occupation, and will be unable in the future to resume such work. The district court awarded compensation as for a total disability. The employer held a policy of insurance with the defendant insurance company, which is a party to the action and prosecutes this appeal.

Two errors are assigned: First, the court erred in failing to follow the provisions of the statute which

provides that for the loss of a leg the compensation shall be 50 per cent. of the wages during 215 weeks. As section 3662, Rev. St. 1913, stood before the later amendments, it classified injuries and established a schedule of compensation. It provided in subdivision 1 of the section for total disability, and in subdivision 2 for partial disabilities (except the particular cases mentioned in subdivision 3 of the section). Subdivision 3, so far as material, is as follows: "For all disability resulting from permanent injury of the following classes," i. e., the loss of a hand, arm, foot, leg, or eye, "the compensation shall be exclusively as follows: * * * For the loss of a leg, fifty per centum of wages during two hundred fifteen weeks: * * * The loss of both hands or both arms, or both feet, or both legs, or both eyes shall constitute total disability, to be compensated according to the provisions of subdivision 1 of this section." It also provided that "permanent loss of the use of a hand, arm, foot, leg, or eye shall be considered as the equivalent of the loss of such hand, arm, foot, leg, or eye." The argument is made that, since the evidence is undisputed that plaintiff is in good health other than the partial loss of the use of one leg, he is not totally disabled; that the legislature could not have intended to allow the same compensation for the loss of the use of one leg that is specified for the loss of the use of both legs and that the compensation for this injury has been absolutely fixed. On the other hand, it is argued that, since plaintiff is totally disabled from following his occupation of a lineman, and it is shown that he has no other business, this entitles him to compensation for total disability.

The legislature separated the specific injuries, the loss or the loss of the use of a hand, arm, foot, leg, or eye, from other partial disabilities, and by the use of the language "For all disability resulting" from the loss of a leg "the compensation shall be exclusively as follows," it conclusively determined that for the loss

of a leg or the loss of the use of a leg alone 50 per cent. of the wages for 215 weeks was proper compensation. The language is plain and unambiguous, and is not susceptible of other construction. *Epsten v. Hancock-Epsten Co.*, 101 Neb. 442. Perhaps it was thought that the period during which compensation was allowed would be sufficient to allow the injured workman to fit himself for some other kind of occupation, or that if a man lose the use of an eye, or hand, or arm, or leg, or foot, and is otherwise competent and in good health, this should not compel an employer, who perhaps has been guilty of no negligence, to bear the burden of his support indefinitely. The law seems intended to help the injured workman to help himself. Whatever the legislative motive or intent may have been, we cannot disregard the plain words of the statute.

The next error assigned is that the court failed to determine the question of liability between the insurance company and the hospital and doctors, and in failing to absolve it from all liability on account of hospital and doctor's bills. It is insisted that under section 7598, Rev. St. 1913, any person may be made defendant who has or claims an interest in the controversy or who is a necessary party to a complete determination or settlement of the question involved therein. In the petition the plaintiff made no reference to the issues between the hospital and the doctors and the defendant insurance company. A cross-petition was filed asking that they be brought in and the liability for fees determined. Issues upon a contract between the insurance company, to which plaintiff was not a party, and the hospital and doctors have no place in proceedings under this statute which is designed to furnish a special proceeding, summary and speedy in its nature, and designed for a particular purpose. The injection of other issues into the case was properly prevented, and there was no error in the ruling of the district court in this respect.

The time for which the award is payable is reduced to 215 weeks, and the case is remanded to the district court to modify the judgment and the allowance of attorneys' fees in accordance with this opinion.

MODIFIED AND REMANDED.

SEDGWICK and HAMER, JJ., not sitting.

JOHN T. FAHEY ET AL., APPELLANTS, v. UPDIKE ELEVATOR COMPANY, APPELLEE.

FILED MARCH 1, 1918. No. 19641.

1. **Sales:** EXECUTORY CONTRACT: CANCELATION: MEASURE OF DAMAGES. A buyer of grain to be shipped in the future may refuse to recognize the seller's cancelation of the unperformed contract of sale, may wait until the agreed shipping period has expired, and may then purchase on the open market the number of bushels which the seller agreed to, but did not, ship; and the measure of damages in such a case is the difference between the contract price and the market price paid at the stipulated time and place of delivery.

2. **Evidence:** MARKET PRICE. Where prices of grain on the open market with specific dates are properly shown by authentic publications or trade bulletins accepted by grain dealers generally as standards, testimony of a grain dealer as to individual transactions or bargains on the board of trade is not admissible on the issue of market prices.

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

Montgomery, Hall & Young and *R. E. L. Marshall*, for appellants.

Edward P. Smith and *William A. Schall, contra.*

ROSE, J.

Plaintiffs are grain dealers in Baltimore, Maryland. Defendant is a grain dealer and operates an elevator in Omaha, Nebraska. This is an action to recover damages aggregating $37,662.05 for failure of defendant to ship wheat to Baltimore according to the terms

of four written contracts. The petition contains four counts. In the first, plaintiffs allege that defendant sold them 100,000 bushels of wheat June 24, 1914, shipment to be made to them at Baltimore in August, 1914; that defendant delivered 96,466.80 bushels and refused to deliver the remainder of 3,533.20 bushels; and that the difference between the contract price, 86½ cents a bushel, and the market price on the last day of the shipping period, $1.18½, was 32 cents a bushel, resulting in a loss of $1,130.62, with interest from August 31, 1914. In the second count plaintiffs pleaded a similar contract July 6, 1914, for 100,000 bushels of wheat at 87¼ cents a bushel, shipment to be made at defendant's option in either the last half of August or in September, 1914; failure to ship any wheat; market price on the last day of the shipping period, $1.11½ a bushel; loss of 24¼ cents a bushel, or $24,250, with interest from September 30, 1914. The third count is based on a similar contract July 8, 1914, for 100,000 bushels of wheat at 87⅛ cents a bushel, shipment to be made in August, 1914; delivery of 87,350 bushels; failure to deliver 12,650 bushels; market price on last day of shipping period $1.18½; loss of 31⅜ cents a bushel, or $3,968.93, with interest from August 31, 1914. The fourth count is based on a contract July 11, 1914, for 25,000 bushels of wheat at 85¼ cents a bushel, shipment to be made in August, 1914; failure to ship any part of it; market price on last day of shipping period $1.18½ a bushel; loss of 33¼ cents a bushel, or $8,312.50, with interest from August 31, 1914. Defendant admitted the contracts of June 24 and July 8, and, among other things, alleged that it was willing to ship all of the wheat in the month of August, and elected to do so, but that plaintiffs had no facilities for receiving shipments at Baltimore, and that the carriers consequently refused to furnish cars; that defendant notified plaintiffs of the cancelation of the contracts after they failed to procure cars, and

that it was then their duty to buy wheat on the open market, which could have been bought for 92 9/10 cents a bushel, including freight charges to Baltimore. Upon a trial of the issues the court directed the jury to find in favor of plaintiffs and instructed that the measure of recovery was the difference between the contract prices and the market prices within a reasonable time after defendant had notified plaintiffs that it would not comply with the contracts. From a judgment on the verdict in favor of plaintiffs for $14,014.61 only, they have appealed.

The first assignment of error relates to the measure of damages. Defendant did not appeal from the judgment against it for $14,014.61. It follows that the sale of wheat, the defendant's breach of contract and the liability for resulting damages are established by the record. The contracts pleaded in the petition were made by the parties. Plaintiffs bought the wheat for export from Baltimore. An embargo on shipments for that purpose, effective from August 4, 1914, to August 19, 1914, prevented defendant in the meantime from getting cars. For this condition plaintiffs were in nowise responsible. Defendant wired them August 15, 1914, that it would cancel the purchase of the unshipped wheat under the contracts of June 24, 1914, July 8, 1914, and July 11, 1914. Cancelation of the contract of July 6, 1914, was wired to plaintiffs August 17, 1914. Plaintiffs did not consent to the cancelations, but waited until the shipping periods had expired and bought wheat on the open market to take the place of what defendant had agreed to, but did not, ship. The embargo prevented shipments during a part only of the shipping periods. It did not interfere with shipments after August 19, 1914. Defendant had until August 31, 1914, to complete the shipments under the contracts pleaded in the first, third and fourth counts, and until September 30, 1914, under the contract pleaded in the second count.

Plaintiffs take the position that the measure of damages is the difference between the contract prices and the market prices of the unshipped wheat at the stipulated times and place of delivery. Instead of adopting this view of the law, the trial court instructed the jury, as already stated, that the measure of recovery is the difference between the contract prices and the market prices within a reasonable time after defendant had notified plaintiffs, August 15, 1914, and August 17, 1914, that it would not comply with the contracts. Measured by this rule the jury allowed plaintiffs a part only of their claim.

When prices rise after sale and before delivery, the seller is exposed to a temptation to evade the purchase, if cancelation can be accomplished without a full measure of responsibility for resulting damages. The buyer is exposed to a similar temptation when prices begin to fall. Regardless of self-interest, honesty and fair-dealing require each party to respect his obligations. A seller of undelivered grain cannot arbitrarily shorten the stipulated period for delivery, and thus take the fruits of the buyer's bargain, without incurring liability for resulting damages. The rule generally applied was stated by this court as follows:

"The measure of damages for a breach of a contract by the vendor of personal property failing to make delivery to the vendee, generally, is the difference between the contract price and the fair market value of the property at the time and place specified in the agreement for delivery." *Graham v. Frazier*, 49 Neb. 90.

Plaintiffs had a right to make continuous demands for shipments of undelivered grain as long as the stipulated shipping periods lasted, though defendant gave notice of nonperformance. After plaintiffs refused to recognize the cancelations, defendant was free to ship the grain sold, and in that event to collect the contract prices. Under the circumstances, a cause

of action in favor of plaintiffs for damages did not accrue until the time fixed for performance had elapsed. While defendant, by incurring liability for damages, could refuse performance at any time, it could not, by a mere breach of contract, fix the date of accountability to suit its own interests. *Carstens v. McDonald,* 38 Neb. 858. The same result could not be accomplished by a mere tender of performance during a temporary suspension of shipping facilities, not attributable to either party; such facilities being restored in time for performance within the stipulated shipping periods.

There was therefore error in the instruction that the measure of recovery in the present case was the difference between the contract prices and the market prices within a reasonable time after defendant notified plaintiffs that it would not comply with the contracts.

A ruling which permitted a grain dealer to testify that he could buy "option wheat" below the market price for "cash wheat" is challenged as erroneous. This assignment is sustained. The prices of wheat on the open market at the expiration of the shipping periods were material inquiries. On that issue plaintiffs introduced the "Daily Bulletin," a publication accepted by the trade or by grain dealers generally as a standard or as an authentic record on the subject. In making their contracts for future deliveries the parties contemplated the usual and recognized sources of knowledge for determining prices on the open market. Proof of individual transactions or bargains by a dealer should have been excluded. *Chicago, B. & Q. R. Co. v. Todd,* 74 Neb. 712; *Sisson v. Cleveland & T. R. Co.,* 14 Mich. 489.

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

REVERSED.

SEDGWICK, J., not sitting.

LINCOLN TELEPHONE & TELEGRAPH COMPANY, APPELLANT, v. JOHNSON COUNTY, APPELLEE.

FILED MARCH 1, 1918. No. 19924.

Taxation: VALUATION. Under a mandatory, unambiguous statute making actual value the standard for the purposes of taxation, an owner of taxable property cannot require a board of equalization to value it at 75 per cent. of its actual value on the plea that taxing officers generally conform to a custom to make such a reduction. Rev. St. 1913, sec. 6300.

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

S. P. Davidson, for appellant.

Burkett, Wilson & Brown and *Jay C. Moore, contra.*

ROSE, J.

The relief sought is a reduction, for the purposes of taxation, in the valuation of plaintiff's personal property in Johnson county. In the year 1915 the property was valued at $172,225. Conceding that to be the actual value for the purposes of this proceeding, plaintiff asked the county board of equalization to reduce it to 75 per cent. of its actual value. This demand for a reduction is based on the plea that taxing officers in Johnson county and in the state at large conform to an established custom to value property generally for the purposes of taxation at 75 per cent. of its actual value. A mandatory statute in plain, unambiguous terms needing no interpretation requires the valuing of taxable property at its actual value and the assessing at 20 per cent. thereof. Rev. St. 1913, sec. 6300. No officer or custom of officers can make 75 per cent. of actual value a lawful standard for the purposes of taxation under the present revenue law. If plaintiff has pleaded the facts as they exist, its remedy is the valuing of all taxable property at 100

per cent. of its actual value, and not a reduction to 75 per cent. of the actual value of its own property.

The judgment of the district court conforms to this view of the law.

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

LOUISA A. PORTER, APPELLEE, v. PACKERS NATIONAL BANK, APPELLANT.*

FILED MARCH 1, 1918. No. 19592.

Fraud: EVIDENCE: SUFFICIENCY. Under the evidence in this case, the only damage, if any, to the plaintiff was in inducing her to sell the lot for less than she would have done if she had known the facts. If she was wrongfully induced to do this, the evidence does not show that this defendant had anything to do with that wrong.

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

Murphy & Winters, for appellant.

Edgar M. Morsman, Jr., contra.

SEDGWICK, J.

The plaintiff, a nonresident of the state, sold real estate in Douglas county through a real estate agent of South Omaha. She executed a warranty deed to the purchaser, and sent it to the defendant bank to be delivered upon the consummation of the deal. The bank rendered her a statement remitting the proceeds of the sale after deducting, among other things, $121.32 taxes alleged to have been due upon the land sold and to have been deducted from the purchase price. The plaintiff brought this action to recover from the bank the said $121.32, alleging that the bank was not authorized to make such deduction. The case was first tried upon a demurrer to the petition, and upon appeal to this court a judgment for the defendant was reversed.

*Rehearing allowed. See opinion, p. 258, *post.*

95 Neb. 223. Upon the second trial in the district court, a jury was waived, and the court found in favor of the plaintiff, and the defendant has appealed.

It is conceded that these taxes were a valid lien upon the land, and that the plaintiff covenanted in her deed that the title conveyed should be free and clear of such incumbrances. The transaction on this plaintiff's part was conducted wholly by correspondence, and it would seem that the agent, Murphy, was acting principally for the purchaser, but made strong representations to the plaintiff inducing her to make the sale at the price finally agreed upon, and it appears to be contended that these taxes were for special improvements so recently made that this plaintiff was not aware of such improvements, which should have been considered as adding value to the land, and that the plaintiff would not have sold the land at the price named if aware that she would be required to pay for these improvements; and that the transaction amounts to a perpetration of a fraud upon the plaintiff, and resulted in obtaining the plaintiff's property for a less price than she would have been willing to have taken for it. The question is not whether the agent has wronged the plaintiff and caused her to sell the property for less than its value and less than she would have taken for it if the truth had been explained to her. The question is whether the bank has wronged the plaintiff, and, if such fraud existed on the part of others, whether the bank participated in or knew of any such wrongdoing. When the plaintiff sent the deed to the bank, she sent specific instructions that it was to be delivered to the agent Murphy "upon payment of $1,650, less $25 commission and a reasonable charge for bringing the abstract covering this property down to date." The specified commission and the cost of the abstract were deducted by the bank, and no complaint is made of this, and the plaintiff insists that under these instructions the bank had no authority to allow for liens upon the land.

In Mr. Murphy's first letter to the plaintiff, he asked for her lowest price upon the property, "you to furnish an abstract showing the property free from all liens, and abstract up to date showing title clear, also furnish good and sufficient warranty deed." In reply to this letter in fixing her price, the plaintiff made no objection to the proposition that the property must be free from all liens, and, in a subsequent letter to the plaintiff, Murphy wrote making the final offer which was accepted, in which he said: "If this is satisfactory, you will send deed to the Packers National Bank of South Omaha, with instructions to the bank to turn the papers over to me or Mrs. Dolezal, upon receipt of $1,650, less $25 commission, the expense of extending abstract up to date and taxes, if any, against the property." When the deal was closed by Murphy and the money paid over to the bank, the bank wrote the plaintiff a statement of the transaction, in which the expenses in connection with the matter were stated to include the taxes, $121.32. There is evidence that the bank did not deliver the deed at the time of sending this letter, but retained it until the plaintiff should approve or disapprove of the transaction. It is insisted in the brief that this evidence is not reliable, but no contradictory evidence is referred to, and we have not seen any. We must consider then that the bank did not deliver the deed until the plaintiff might approve or disapprove of the transaction. In answer to the bank's statement, the plaintiff wrote: "I was not aware that there was any taxes against this lot, and wish to advise you that I am accepting this draft only in part payment of the purchase price of the lot in question, pending an investigation on my part as to the justice of the taxes for which you sent me receipt." It seems that the bank sent the receipt for the taxes in its first letter, and also sent a draft for the amount due the plaintiff. The plaintiff, not being aware that there were any such assessments

against the land, appears to have readily consented to Mr. Murphy's proposition that she must pay all taxes, and ignored that matter entirely in her letter sending the deed to the bank. As the deed was a warranty deed with covenants against such liens, and as the letters of Murphy asking the plaintiff to fix a price upon the land plainly specified that taxes, if any, should be deducted from the price so fixed, it would appear that the bank did all that it could be required to do in holding the deed until the plaintiff had an opportunity to approve or disapprove of the transaction, and the plaintiff's letter above quoted must be construed as approving of the transaction if her investigation showed that the taxes paid were just. No issue was made as to the justice of the taxes, and, if any fraud or wrong was perpetrated upon the plaintiff, there is no evidence that the bank participated therein or was aware thereof. The only damage, if any, to the plaintiff is not in paying the taxes on her land, but in selling the land for a less price than she otherwise would have done, and, if she was wrongly induced to do this, it was wholly the act of the agent Murphy, and not of the bank.

It follows that the bank is not liable in this case, and the judgment of the district court is

REVERSED.

The following opinion on motion for rehearing was filed July 8, 1918. *Former judgment of reversal set aside, and judgment of district court affirmed.*

SEDGWICK, J.,

This case upon this appeal was first argued before the court commission, and an opinion written by the court upon the facts reported by the commission, *ante*, p. 255. The plaintiff upon motion for rehearing com-

plained that there had been no opportunity to present the case to the court on argument, and the court ordered oral argument on the motion for rehearing, and the case was argued and submitted to the court.

It is contended in the brief that some of the statements of facts in the opinion are not supported by the evidence in the record. It is conceded that, at the close of the negotiations, the agent Murphy stated the understanding of the parties in his letter quoted in the former opinion, in which he said that the plaintiff should send the deed to the bank, with instructions to turn over the papers, "upon receipt of $1,650, less $25 commission, the expense of extending abstract up to date and taxes, if any, against the property." Pursuant to this statement of the matter the plaintiff sent a warranty deed to the bank to be delivered under their agreement, in which she guaranteed against all taxes. When the agent called upon the bank, proposed to make the payment, and demanded the deed, the bank found that there were discrepancies in the correspondence and misunderstandings between the parties. It is conceded by all parties that the taxes were just and were a valid lien upon the land. The natural thing for the bank to do, if disinterested, would be to receive the tenders made by the purchaser of the land upon condition that the deed should not be delivered until the plaintiff, after being informed of the amount deducted for the taxes, should consent to such a consummation of the transaction. The bank thereupon held the deed, but did not inform the plaintiff fully of the situation. The bank held the deed for at least ten days, but failed to inform the plaintiff of that fact, and, on the other hand, by sending the tax receipt to plaintiff and stating that it was hoped that the plaintiff would be satisfied, and in other ways, the bank led the plaintiff to understand that the transaction was closed. The taxes in question were mostly for improvements that are presumed to enhance the value of the property

more than the amount of the taxes. The plaintiff did not know that these improvements had been made, and stated her price upon the supposition that she was selling the property as she understood it to be, and was not aware that out of this purchase money she would be compelled to add largely to the value of the land without an equivalent return to herself. These taxes, although payable at once, were not collectable against the property then, but were payable in instalments running through a period of years. It is quite usual in such cases to sell subject to the lien, and, as these taxes represent the increased value of the property, it would not ordinarily be expected that the owner would pay them and still sell for the same price offered before the improvement was made. The majority of the judges conclude that the evidence shows that the bank knew of these circumstances, and caused the plaintiff to understand that the transaction was closed, and that she could not include the value of the improvements in the price to the purchaser, and that, in this view of the evidence, this defendant participated in this wrong to the plaintiff, and the judgment of the district court is sustained. The syllabus of our former opinion in that respect is incorrect.

Our former judgment is set aside, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

PERCY E. GWYNNE, APPELLANT, V. SAMUEL GOLDWARE, SR., ET AL., APPELLEES.

FILED MARCH 1, 1918. No. 19499.

1. **Vendor and Purchaser:** EXECUTORY CONTRACT: ASSIGNMENT: RIGHTS OF ASSIGNEE. One who takes an assignment of an executory contract for the purchase of land does not necessarily thereby acquire the legal title to the premises, nor does he occupy the position of an innocent purchaser, but, in the absence of estoppel or other special circumstances, takes only the rights of his assignor.

2. **Lis Pendens.** The filing of a notice of *lis pendens* according to the provisions of section 7651, Rev. St. 1913, at the commencement of an action to quiet title gives constructive notice of plaintiff's claims.

3. **Vendor and Purchaser:** CONTRACT: CONSTRUCTION. A clause in a contract for sale of land which provides that the assignment thereof must be approved by the owner is construed to have been made for the protection of the vendor, and third parties without equitable claims of ownership cannot take advantage of its provisions.

4. **Judgment:** CONCLUSIVENESS. A decree rendered in a case by a court having jurisdiction of the subject-matter and parties cannot be successfully assailed collaterally, and is binding on the parties and those claiming by, through or under them until it is reversed, modified or otherwise set aside.

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

Sutton, McKensie, Cox & Harris and *William J. Ballard*, for appellant.

Weaver & Giller, Edson Rich and *A. G. Ellick, contra.*

HAMER, J.

Appeal from district court for Kimball county. This action was brought by Percy E. Gwynne against Samuel Goldware and others to quiet title to section 33, township 14, range 58 west of the sixth P. M., in Kimball county, Nebraska.

The facts as shown by the record are that in 1906 the Union Pacific Railroad Company was the owner of the land and sold the same to Clara Pottle, to whom a contract was executed by which the company agreed to convey said premises to her or her assigns on the payment of ten equal annual payments of $160 each, with interest at 6 per cent. per annum. The contract provided, among other things, that assignments of said contract should not be made unless approved by the company. The contract was afterwards assigned to one Fred P. Smith, on January 24, 1910. Smith assigned the contract and duly acknowledged his assignment, but the name of the assignee was left blank.

It appears, however, that one A. A. Patzman obtained possession of the contract from one Sheeley, who at that time claimed to own it, and for a valuable consideration, the name of the assignee being still blank. Sheeley also claimed to be Smith's agent. It also appears that Patzman executed and delivered a warranty deed of the land to the plaintiff, which deed was dated in February, 1911. It was also shown that Patzman traded the contract to A. A. Brown, and that a contest arose between them in regard to the trade, and November 25, 1910, Patzman commenced an action in the district court for Kimball county against A. A. Brown and one Alfred Jones, alleging fraud in said trade, and praying for a decree quieting the title in said contract and in said land in him as against Brown and Jones, and all persons claiming by, through or under them, or either of them. Service was had on Brown by publication and personal service was obtained on Jones. Patzman at the time he commenced his action filed the proper *lis pendens* notice as provided by section 7651, Rev. St. 1913. Thereafter the district court on the 30th day of January, 1911, rendered a decree for Patzman in accordance with the prayer of his petition.

It appears, however, that Brown, disregarding the said action, claimed to have traded and assigned the contract in question to one G. W. Gray in December, 1910, whose name was inserted thereon as assignee. The record further shows that in 1910, while he was the owner of the tract, Patzman paid the amount due thereon to the railroad company, the amount then being $227.20; that since that time plaintiff has not paid anything more thereon. It appears that Gray paid the company the 1911 instalment and assigned his interest in the contract to John Anderson, who assigned the same to J. W. Rasp, who in time assigned it to the defendants Goldware, who claim to have kept up the payments to the time of the commence-

ment of this action, the last assignment being made on September 16, 1912. On the trial the district court rendered a decree for the defendants, and the plaintiff has appealed.

The case was first submitted to the commission, which recommended an affirmance. A rehearing was allowed, and on the reargument it was submitted to the court.

Appellant contends that the district court erred in rendering a judgment or decree for the defendants because the evidence was insufficient to constitute a defense to plaintiff's cause of action; that it was error for the trial court to disregard its former decree in the case of Patzman v. Brown and Jones, for the reason that defendants had constructive notice and are bound by the decree in that case. His argument is that an assignee of a contract for the purchase of land acquires no better right than the assignor had, and that he takes subject to any defense which would be good against his assignor. We think this argument is well founded. In 39 Cyc. 1667, it is said: "An assignee of a bond for title or other executory contract for the purchase of land, as he does not acquire the legal title, does not occupy the position of an innocent purchaser, but, in the absence of estoppel or other special circumstances, takes only the rights of his assignor." This declaration of law is supported by *Hamaker v. Coons,* 117 Ala. 603; *Thompson v. Allen,* 12 Ind. 539; *Hawley v. Hawley,* 43 Or. 352.

The appellant further claims that, after the filing of the *lis pendens* notice in the Patzman case against Brown & Jones, Brown and his assignees were bound by the decree in that case. This contention is supported by section 7651, Rev St. 1913; *Munger v. Beard & Bro.,* 79 Neb. 764.

The law infers that all persons have notice of the proceedings of courts of record. The law is that he who intermeddles with property in litigation does so

at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset. 2 Black, Judgments (2d ed.) sec. 550.

Finally, appellant contends that the district court for Kimball county had jurisdiction of the subject-matter and the parties in the case of Patzman v. Brown and Jones, and the decree in that case not having been reversed or modified, but remaining in full force and effect, cannot be assailed collaterally; that defendants are bound thereby. We think that this contention is sound. In *Watson v. Ulbrich,* 18 Neb. 186, it is said: "But the decree when rendered, if the court had jurisdiction, is valid until set aside, at least so far as *bona fide* purchasers are concerned." It is expressly contended by the defendants that the clause in the contract in question which provides that it shall not be assigned without the consent of the railroad company rendered the assignments to Patzman and others void, and, the company not having consented to such assignments, the plaintiff took nothing thereby. We are of the opinion that this contention should not be allowed to prevail. It has been frequently held that such a provision is made for the protection of the vendor only, and cannot be taken advantage of by third parties. *Wagner v. Cheney,* 16 Neb. 202. In that case this court held: "A condition in a contract for the sale of real estate requiring the assent of the vendor to an assignment of the same, but not providing for a penalty or forfeiture of the contract, will not defeat an action by an assignee thereof, who has fully performed, for specific performance."

The record further discloses that the railroad company does not seek to take advantage of that situation, but has filed an answer alleging in substance, that a controversy has arisen between the plaintiff and Goldware over the ownership of the land contract in

question; that it is unable to determine which of the parties is the owner thereof; that it has no interest in the controversy, and is ignorant of the rights of the parties; and that it is ready and willing to convey the property to the party entitled to the same on the payment of the remainder due on said contract. This should settle that part of the controversy.

From what we have said, it seems clear that the judgment of the district court must be reversed, and it is so ordered, and the case is remanded to that court, with directions to ascertain the several amounts paid by the defendants and their grantors on the contract to the railroad company, together with the taxes which have been paid by them, with interest on the several amounts; that said sums be paid into court for the benefit of defendants; that plaintiff be further required to pay the amount due the Union Pacific Railroad Company, with interest, the same to be paid into court, and on such payment being made the court will render a decree for the plaintiff as prayed for by his petition.

REVERSED.

SEDGWICK, J., not sitting.

ALMA SHAUL ET AL., APPELLANTS, V. ROBERT D. MANN ET AL., APPELLEES.

FILED MARCH 1, 1918. No. 19575.

1. **Appeal:** FINDINGS: PRESUMPTIONS. In an action tried to the court without a jury, it will be presumed on appeal that the court only considered competent evidence in its findings and judgment.

2. ———: ———: EVIDENCE. Where the competent evidence in a case so tried is sufficient to sustain the findings and judgment, the admission of incompetent evidence will not ordinarily constitute grounds for a reversal.

3. **Vendor's Lien:** SUFFICIENCY OF EVIDENCE. The evidence examined, its substance stated in the opinion, and *held* sufficient to sustain the judgment of the district court.

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

O. B. Clark and *A. B. Tollefson,* for appellants.

Fred A. Nye, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Buffalo county. The case is an action on a contract for the sale of real estate, to declare a lien in favor of the heirs of the vendor, and to foreclose the same.

It appears that in March, 1908, when Joseph O. Newman was the owner of lot 2 in the southwest quarter of the school section addition to Kearney Junction and on the 16th day of that month, he sold the same to Robert D. Mann for the sum of $2,700, of which $1,000 was to be paid in cash, and the remainder of $1,700 was to be paid on or before the 16th day of September, 1908. A written contract was entered into between the parties which, together with a warranty deed of the premises from Newman to Mann, was placed with the City National Bank of Kearney under an agreement that the deed should be delivered to Mann upon his payment of $1,700 (the remainder of the purchase price) to Newman on or before the 16th day of September, 1908. The bank accepted the trust and agreed to carry out the same. It further appears that Joseph O. Newman died in March, 1909, in Lincoln county, where he resided, leaving the plaintiffs herein as sole surviving heirs. Newman's estate was administered in Lincoln county. All of his debts were paid, and the administrator was discharged. It further appears that the plaintiffs had no knowledge at that time of the execution of the contract and deed above mentioned, and, when they afterwards learned that the deed and contract were in the hands of the bank, they brought this suit against Robert D. Mann and the bank; the latter of which had refused to deliver the deed and contract to them.

The bank by its answer admitted the making of the contract, and the execution of the deed by Newman, and the placing of the same in the bank, with instructions to hold the deed and deliver the same to Mann upon the payment of $1,700 to Newman on or before September 16, 1908, and that it agreed to carry out the terms of said instructions. For further answer the bank alleged that it was informed by Newman on or about the 16th day of September, 1908, that Mann had paid him the remainder due him on the contract; that thereupon the bank marked across the envelope containing the contract and deed the word "Paid," and that ever since that time it had held the deed and contract for the use and benefit of defendant Robert D. Mann. Mann by his answer admitted the same facts admitted by the answer of the bank, and also alleged that he had paid the full consideration mentioned in the contract to Joseph O. Newman at or about the time it became due, and that the bank now held the deed and contract for his use and benefit.

Plaintiffs by their reply denied the new matter contained in defendants' answer. On the trial of the issues the district court found generally for the defendants and dismissed the action, and the plaintiffs have appealed.

Appellants' first contention is that the judgment is not sustained by the evidence. It appears from an examination of the record that Joseph O. Newman lived in Kearney from March, 1908, until some time in October of that year; that September 24 he had a stroke of paralysis, and some little time afterwards he moved to Lincoln county, where he died in March, 1909. Plaintiffs' witnesses testified that no suit was ever brought on the contract in question prior to the present one. The cashier of the defendant bank testified that he had been connected with the bank for more than ten years; that in 1910 he found the contract and deed in an envelope among the bank's papers; that he had no

personal knowledge as to the payment of the $1,700 mentioned in the contract.

John A. Miller, who was called as a witness for plaintiffs and also for defendants, testified that he was cashier of the bank from September, 1899, to September, 1909; that the indorsement on the envelope containing the contract and deed "Paid by Mann" is in his (Miller's) own handwriting, but he did not recall when it was made; that the indorsement "Paid by Mann" was not made at the direction of Mr. Mann; that he (Miller) was transacting business for the bank at the time he made the indorsement.

Several witnesses testified that defendant Mann was prompt in the payment of his obligations, but was careless in taking care of his deeds, mortgages and other papers. It appears from the testimony that defendant Mann had been residing on the property in question ever since he purchased it in 1908. It further appears that the papers were prepared by Walter Barney, who conducted an abstracter's office in Kearney, and that the contract was signed in his office; that Barney figured up the amount due on the contract, and that Mann wrote and signed a check to Newman for that amount. Defendant Mann testified over plaintiffs' objections that he saw Newman in Barney's office and gave him a check for the $1,700 due on the contract, and that he afterwards found it among his paid checks returned to him by the bank; that Mary C. Horton was present when he found the check and saw it, her attention being called to it; that he had lost the deed and contract, but thought it was in Barney's office; that he had the habit of leaving his papers with attorneys and banks.

Mary C. Horton testified that she saw the paid check for $1,700 drawn to Joseph O. Newman; that Mr. Mann took this check and others and put them in an envelope; that the check was signed by Robert D. Mann.

The bank account of defendant Mann was produced by an officer of the defendant bank, and was properly

identified and introduced in evidence. The account showed, among other things, that on September 14, 1908, Mann had in the defendant bank $4,950.51 subject to check; that on September 18, 1908, there was checked out the sum of $1,765.65; that the said checks, with others, reduced the account to $558.70 by Sept. 19, 1908.

T. W. Moss testified that he was engaged in the insurance business in the city of Kearney for several years; that Joseph O. Newman came to his office, and at his request witness wrote the consent of the insurance company transferring the policy of insurance on the premises in question to Robert D. Mann; that Mr. Newman said he wanted the policy transferred to Mr. Mann, that he had sold the property to him without any reservation; that this occurred some time in September, 1908.

It is contended that Mann was not a competent witness in this case because he was interested in the result of the trial and the plaintiffs were the representatives of the estate of Joseph O. Newman, deceased.

It may be conceded that defendant Mann was not a competent witness, and his testimony may be rejected, and yet, as we view the record, there was sufficient competent evidence to sustain the judgment of the trial court. Certainly the officers of the bank which held the deed and contract were not interested in the result of the trial. Neither did T. W. Moss nor Mary C. Horton have any interest in the controversy so far as we can see. We find that the evidence is sufficient to sustain the judgment. The admission of the testimony of the defendant Mann, while it may have been erroneous, was error without prejudice, for it has long been settled by the decisions of this court that in the trial of a case to the court without a jury it will be presumed that the court only considered the evidence which was competent. *McConahey v. McConahey,* 21 Neb. 463; *Dewey v. Allgire,* 37 Neb. 6; *Monroe v. Reid, Murdock & Co.,* 46 Neb. 316.

In *Dewey v. Allgire, supra,* this court held: "A judgment in a case tried without a jury will not be disturbed because of the admission of immaterial testimony, where the testimony properly admitted justifies the finding."

In *Monroe v. Reid, Murdock & Co., supra,* this court held: "In trials of fact to the court without the intervention of a jury, if sufficient competent evidence is admitted to sustain the findings of the court, the case will not be reversed on the ground of the admission of immaterial and incompetent evidence."

It has also been frequently decided that, where there is sufficient competent evidence to sustain a finding in a case tried by the court without a jury, the admission of incompetent evidence is not a sufficient ground for a reversal of the judgment. *Richardson v. Doty,* 25 Neb. 420; *Blondel v. Bolander,* 80 Neb. 531; *Citizens Ins. Co. v. Herpolsheimer,* 77 Neb. 232.

In *Richardson v. Doty, supra,* this court held: "When a cause is tried to the court without the intervention of a jury, the judgment will not be reversed on the ground of the admission of immaterial or incompetent evidence, if sufficient material and competent evidence was introduced and admitted to sustain the finding of the court."

In *Blondel v. Bolander, supra,* this court held: "In a case tried to a court without a jury, the admission of improper evidence is not in itself ground for reversal; and, where this court finds it unnecessary to consider the evidence to which objection is made, it will not review the question raised by the objection to such evidence."

In *Citizens Ins. Co. v. Herpolsheimer, supra,* this court held: "In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted."

After a careful examination of the record, we are persuaded that plaintiffs had a fair trial, and that the district court committed no reversible error. The evidence sustains the findings of the district court, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

WILLIAM HENNIG V. STATE OF NEBRASKA.

FILED MARCH 1, 1918. No. 19892.

1. **False Pretenses: VERDICT: VALUE OF PROPERTY.** In a prosecution for obtaining property under false pretenses, it is mandatory that the jury on conviction shall declare in their verdict the value of the property falsely obtained, as provided in section 9129, Rev. St. 1913.

2. ——: ——: ——. Where on conviction in such case the jury has failed to declare in the verdict the value of the property unlawfully obtained, the court is without jurisdiction to pronounce sentence, and a judgment based thereon is erroneous.

3. ——: ——: SENTENCE: VALUE OF PROPERTY. Upon conviction in such case, the court should look to the verdict for the value of the property to determine the sentence to be imposed.

ERROR to the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

Fawcett & Mockett, Allen W. Field and *R. H. Hagelin,* for plaintiff in error.

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

J. C. McReynolds, amicus curiæ.

DEAN, J.

William Hennig was convicted under an information charging him with obtaining property from Dr. A. D. Mahaffey, in a trade, "by means of false and fraudulent pretenses." He was sentenced to serve a term in the

penitentiary of "not less than one year nor more than five years," and that he pay the costs of the prosecution. He brings the case here on error.

It is charged by the state that defendant induced Dr. Mahaffey to pay to "The Orchard Homes Company," of which defendant was president and agent, $260, and to convey to it "certain real estate located in * * * Hildreth, * * * of the value of $3,500," in exchange for a $4,000 interest-bearing note that defendant represented was secured by a first mortgage on 160 acres of irrigable land in Albany county, Wyoming, worth $9,600. It was also charged that at the time the Wyoming land was incumbered by a prior mortgage, but that defendant fraudulently concealed that fact from the assignee, whom it was alleged believed, relied and acted upon the foregoing false representations of defendant. Owing to the state of the record as to the value of the respective properties involved, and because the case is decided on another point, we do not discuss that feature.

Defendant argues that his conviction was unlawful, in that the jury failed to declare in the verdict the value of the property that he was convicted of having obtained unlawfully. Following is the verdict: "We, the jury, duly impaneled and sworn in the above entitled cause, do find the defendant William Hennig guilty as he stands charged in the information."

For reversal defendant relies principally on section 9129, Rev. St. 1913, and on our former interpretation of that statute. It reads: "When the indictment charges an offense against the property of another by larceny, embezzlement or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, embezzled or falsely obtained."

The statute is plain. Its provisions are mandatory and cannot well be misconstrued. The jury in the present case did not "declare in their verdict the value of the property * * * falsely obtained," and that

was one of the questions for it to determine that was put in issue by defendant's plea of "not guilty." The question is not new in this state, and in view of the language of the statute and of our former decisions on this point it follows the conviction cannot stand and the judgment must be reversed. *McCormick v. State,* 42 Neb. 866; *Holmes v. State,* 58 Neb. 297.

Clearly the legislature intended that the jury should by its verdict in this class of cases determine the grade of the offense. If the value of the property fraudulently obtained, as declared by the jury, is $35 or upwards, the offense is a felony, but if less than $35 it is a misdemeanor. Rev. St. 1913, sec. 8874. Where on conviction in such case the verdict does not declare the value of the property, the court is without jurisdiction to pronounce sentence. It is fundamental that to sustain a conviction for a felony the burden is on the state to establish all of the material elements of the offense. This was not done in the present case, where a material element is with respect to the value of the property alleged to have been fraudulently obtained.

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

REVERSED.

SEDGWICK and HAMER, JJ., not sitting.

RAYMOND H. ELLIOTT, ADMINISTRATOR, APPELLEE, v. CITY OF UNIVERSITY PLACE, APPELLANT.

FILED MARCH 1, 1918. No. 19933.

Death: DAMAGES. The damages recoverable under section 1429, Rev. St. 1913, are limited to money loss or its equivalent.

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

E. J. Clements and *H. B. Muffly,* for appellant.

Berge & McCarty, contra.

DEAN, J.

University Place is a city of the second class having less than 5,000 population. It owns, maintains and operates an electric lighting plant for commercial purposes and sells electric current to its citizens. To extend its wires about the city it uses some of the poles that by agreement are also used by the Lincoln Telephone & Telegraph Company. Raymond M. Elliott is administrator of the estate of Alfred W. Anderson, intestate decedent. As administrator he sued the defendent city to recover $25,000 damages for the death of the intestate that was occasioned, as he alleged, by reason of the grossly careless and inefficient manner in which the city maintained certain of its poles, wires and electric appliances generally that were used by it in the transmission of its product in and about the city. Plaintiff recovered a verdict and judgment for $12,010.52. Defendant's motion for a new trial was overruled on condition that plaintiff remit $2,010.52, this sum being the interest on $10,000 at 7 per cent. per annum from May 13, 1913, the date of the accident, until the date of the judgment. Plaintiff complied with the imposed condition, and the defendant city appealed.

Before the commencement of this action plaintiff as administrator of the estate sued the telephone company for damages arising out of the same accident, decedent being then in its employ, and upon trial to the court he recovered judgment for $5,000. This was subsequently paid, but it was agreed that the acceptance of this sum by plaintiff should not bar an action against defendant in the present case.

The accident occurred in substantially the following manner. In the course of his employment plaintiff's decedent ascended one of the poles that was used in common by the telephone company and the defendant city, for the purpose of attaching thereto a telephone wire. As he began his descent he seized with his right hand one of the iron straps which supported one

end of a cross-bar on the telephone pole, and which was electrified because of defective insulation on one of the primary wires. At the same time his left leg came in contact with the upper part of the metal conduit which contains the telephone ground wires. The electrical circuit being thereby completed, plaintiff's intestate was instantly killed. It seems the accident was brought about by faulty insulations and construction of defendant's electrical appliances on the pole in question.

The following facts are uncontradicted: Mr. Anderson just prior to his death was in the employ of the Lincoln Telephone & Telegraph Company as a repair-man. He worked for the company altogether about three years, and began at a monthly wage of $60. At the time of his death he was aged 32 years and was receiving $75 a month. The manager of the telephone company testified that he was unusually capable. He left as dependents a wife and one child under two years of age. He was strong and vigorous, of good habits, and constantly employed. He was industrious. He attended college for two years after his marriage, and was preparing himself for the ministry. That he was a man of more than average intelligence is conceded. In his habits he was frugal. He was not addicted to the use of intoxicants nor tobacco. In April, 1912, he bought a home for $1,450, and was paying for it by monthly instalments of $15, and had paid $650. The Carlisle table in evidence shows that his expectancy of life was about 33 years.

Such facts as these present an alluring field for the eloquence of able counsel, and it may be that the sympathy of a responsive jury was unduly aroused. In any event the verdict and the judgment appear to be greater than a fair construction of section 1429, Rev. St. 1913, will permit, which provides in this class of cases that "the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such

death." The damages recoverable under the statute are limited to money loss or its equivalent. Pain and anguish, loss of society and companionship are not proper elements of damage under this statute.

In oral argument defendant stated that a reversal was not sought on the ground of contributory negligence by plaintiff's decedent, but insisted that the judgment should be substantially reduced. We conclude that the judgment is at least 25 per cent. greater than the testimony will warrant under a fair construction of the statute, and unless plaintiff files a remittitur of $2,500 within 30 days the judgment of the district court will be reversed and the cause remanded for a new trial.

AFFIRMED ON CONDITION.

SEDGWICK, J., not sitting.

STATE, EX REL. JAMES J. SIMON, APPELLEE, V. HARLEY G. MOORHEAD, APPELLANT.

FILED MARCH 16, 1918. No. 20533.

1. **Regular Army.** "The regular army is the permanent military establishment, which is maintained both in peace and war according to law." 4 U. S. Comp. St. 1916, sec. 1716, p. 3608.

2. **Elections:** SOLDIERS: ELECTIVE FRANCHISE. An elector of this state who enters the military service of the United States to serve during the existing emergency under the provisions of the act of congress of May 18, 1917, is not in the "regular army" as that term is employed in section 3, art. VII of the Constitution, and may exercise the elective franchise at such places and under such conditions as may be provided by law.

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

George A. Magney, for appellant.

Arthur F. Mullen, contra.

MORRISSEY, C. J.

Relator presented himself at the office of respondent, election commissioner within and for the metropolitan

city of Omaha, and requested that he be registered as a voter in compliance with the statutes of Nebraska. Respondent refused to register relator. This action was then brought in the district court for Douglas county to compel respondent to perform such service. A peremptory writ of mandamus was issued, and respondent has appealed.

Relator possesses all the qualifications required to entitle him to such registration, and is entitled to exercise the right of franchise within the city of Omaha, unless he falls within the prohibition of section 3, art. VII of the Constitution of Nebraska, which reads as follows:

"Every elector in the actual military service of the United States or of this state, and not in the regular army, may exercise the right of suffrage at such place and under such regulations as may be provided by law."

It is admitted that December 9, 1917, relator took the following oath of enlistment: "I, James J. Simon, born in South Omaha, Douglas county, Nebraska, age 21 years and 6 months, by occupation a musician, do hereby acknowledge having voluntarily enlisted this 9th day of December, 1917, as a soldier of the army of the United States of America for the period of the emergency under the conditions prescribed by law, unless sooner discharged by proper authority, and do also agree to accept from the United States such bounty, pay, rations and clothing as are or may be established by law, and I do solemnly swear that I will bear true faith and allegiance to the United States of America; that I will serve it honestly and faithfully against all its enemies whomsoever; that I will obey the orders of the officers appointed over me according to the rules and articles of war."

At the suing out of this writ relator was stationed at Fort Crook, Nebraska, engaged in the military service of the United States. We are called upon to construe the paragraph of the Constitution above set

out. It will serve no useful purpose to review at length the history of this provision of the Constitution, or to assign reasons for its adoption.

"The regular army is the permanent military establishment, which is maintained both in peace and war according to law." This declaration of congress is in harmony with the generally accepted meaning of the term, and is no doubt the organization which the framers of our organic law had in mind when they drafted the section under consideration.

June 3, 1916, congress passed an act, entitled "An act for making further and more effectual provisions for the national defense, and for other purposes." 39 U. S. St. at Large, ch. 134, p. 166. Section 1 thereof provides: "The army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers Reserve Corps, the Enlisted Reserve Corps, the National Guard, while in the service of the United States, and such other land forces as are now or may hereafter be authorized by law."

It is clear from the language of this section that congress recognized a dividing line between "the permanent military establishment, which is maintained both in peace and war," and generally known as the "Regular Army" and the other branches of our military service.

May 18, 1917, congress passed an act, entitled "An act to authorize the president to increase temporarily the military establishment of the United States." U. S. Statutes, 1st Sess. Sixty-fifth Congress, p. 76. The opening sentence thereof reads: "That in view of the existing emergency, which demands the raising of troops in addition to those now available, the president be, and he is hereby authorized." This act is supplemental to the act of June 3, 1916. It authorizes voluntary enlistments in all the military branches of the government, and also authorizes the president to draft into the military service of the United States the various military organizations and individuals falling within

the classes therein prescribed, "for the period of the existing emergency." Like the act of June 3, 1916, it mentions the various military organizations, and distinguishes between the regular army and the other military organizations. It is apparent that congress by the passage of this act recognized a dividing line between the professional soldier who serves "in peace and war" and the man who enlists for the term of "the emergency" under the act of May 18, 1917.

As this section of the Constitution expressly provides for allowing electors not in the regular army to exercise the right of suffrage, it follows that electors of this state who have entered the military service under any of the provisions of the act of May 18, 1917, may be allowed such right. As the word "army" is, by some authorities, said to be of such general signification that it may be construed to include within its terms persons employed in the navy, we deem it advisable to point out that the section of the Constitution we are considering makes no prohibition whatever against those serving in the navy in any of its branches.

The legislature has the right to enact such legislation as will enable electors of this state to exercise the elective franchise, notwithstanding they have entered the military or naval service of the United States under the provisions of the act of May 18, 1917, to serve during the existing emergency.

AFFIRMED.

R. W. MARSHALL ET AL., APPELLEES, v. BENJAMIN F. BUSH, RECEIVER, APPELLANT.

FILED MARCH 16, 1918. No. 19922.

1. **Carriers:** ACCOMMODATIONS. Ordinarily the discomforts, dangers and inconveniences connected with the transportation of passengers upon freight trains require separate trains for the carriage of freight and live stock and for the carriage of passengers.

2. **Railroads:** BRANCH LINES. It may become necessary in order to furnish proper service that a railroad company be required to operate a branch line at a loss.

3. **Constitutional Law:** RAILROADS: REGULATION: DUE PROCESS OF LAW. An order of a railway commission requiring a railroad company to furnish separate trains for freight and passenger service is not *prima facie* unreasonable, but if it is shown that the installation of a separate passenger train would render the operation of the branch line unremunerative, and it is conceded that both passenger and freight business within the state do not pay expenses and that the whole interstate system is in the hands of a receiver on account of inability to pay fixed charges, such order may violate the due process clause of the Constitution.

4. **Evidence:** JUDICIAL NOTICE: STATE OF WAR: GOVERNMENT OPERATION OF RAILROADS. The court will take judicial notice that a state of war exists, and that congress has placed in the hands of the government the direction and operation of the railroads of the country.

APPEAL from the State Railway Commission. *Order vacated, and cause remanded.*

E. J. White, J. A. C. Kennedy and *M. V. Beghtol,* for appellant.

Willis E. Reed, Attorney General, John L. Cutright and *Hugh La Master, contra.*

The Missouri Pacific Railway Company operates a line of railroad from Omaha to Kansas City and St. Louis. In Nebraska the road runs southward. At the station of Talmage a branch line runs westward to Crete upon the main line of the Chicago, Burlington & Quincy Railroad Company. The length of this branch is 59 miles. The towns intervening between Crete and Talmage have a total population of 1,911. At Hickman a line of the Union Pacific Railroad Company and a main line of the Chicago, Burlington & Quincy Railroad Company cross the Missouri Pacific. The lines of the Chicago, Burlington & Quincy Railroad Company nearly parallel the branch under consideration, one about six miles to the north and one about six miles to the south of it. These lines both enter the city of Lincoln,

as do the Union Pacific line spoken of, and the main line of the Chicago, Rock Island & Pacific Railroad Company, which crosses this branch near the town of Sprague. The branch passes through a rich and well-settled agricultural region, but probably largely on account of the fact that the line reaches no city or large town, and so many other lines near-by do afford such access, there has been very little passenger traffic; people living along the line at points not reached by other railroads usually driving six or eight miles to the north or south to reach the line of the Chicago, Burlington & Quincy Railroad Company.

An informal petition was filed with the Nebraska state railway commission by a number of citizens of Panama, Auburn, Cook, Douglas and the vicinity, requesting better passenger service on this branch. The defendant at this time was operating a mixed freight and passenger train each day over this branch, daily except Sunday. The answer sets forth, in substance, that the railroad company was now in the hands of a receiver; that it is an interstate carrier; that it has annually since 1909 suffered a deficit on its total business in Nebraska, the net deficit since 1909 to 1916, inclusive, varying from $85,000 to nearly $300,000; and that under the Nebraska two-cent-fare act it is compelled to transport passengers at an actual loss.

After a hearing an order was made by the commission that a passenger train be operated daily except Sunday, but giving the defendant the option to make its freight service tri-weekly. An application was afterwards made by the defendant to set aside this order and allow further testimony to be taken. This was done, and after the hearing the commission found that by reason of the nature of the freight traffic it is necessary to schedule freight trains on this branch so as to make connection with the stock train on the main line from Kansas City to Auburn; that it is impossible to do this and to make connection with any passenger

trains on the main line or with passenger trains on the lines of the Burlington running to Lincoln; that it is impossible to know what the passenger traffic would be if adequate passenger trains were operated making connections at junction points. It was ordered that the defendant install and operate upon this branch a passenger train each way daily except Sunday. From this order defendant appeals.

Letton, J.

Four errors are assigned: (1) That the evidence does not sustain the order of the commission as to inadequacy of service; (2) that the trains required cause an unreasonable burden to be placed upon the interstate business of defendant; (3) that the receipts from the operation of the trains would be so light compared with the expense of operation as to be confiscatory; (4) that the order is unreasonable, denies the equal protection of the law to the railroad company, and deprives it of its property without due process of law.

By the decisions of the United States supreme court in the cases of *Chesapeake & O. R. Co. v. Public Service Commission,* 242 U. S. 603. *Wisconsin, M. & P. R. Co. v. Jacobson,* 179 U. S. 287, *Atlantic C. L. R. Co. v. North Carolina Corporation Commission,* 206 U. S. 1, and *Missouri P. R. Co. v. State of Kansas,* 216 U. S. 262, the following principles seem to be definitely established: By the acceptance of a charter which confers upon it the power of eminent domain and other valuable privileges a railroad company assumes certain duties. It must exercise the functions for which it was organized and in consideration of which the privileges were conferred. Under the statute of 1866 in force until 1913, railroad corporations were required to "furnish sufficient accommodations for the transportation of passengers and freight," and it was required also that every such corporation "shall take, transport, and discharge all passengers to and from such stations as the trains stop at, from or to all places

and stations upon their said road, on the due payment of fare or freight bill." Rev. St. 1866, ch. 25, sec. 121 (Ann. St. 1911, sec. 10596). They were also made liable in damages for refusal to transport any property or passenger. Rev. St. 1866, ch. 25, sec. 122 (Rev. St. 1913, sec. 6059). Long before the defendant railroad company entered the state, these provisions, which really are merely declaratory of the common law, imposed fixed duties upon every railroad corporation seeking to do business in the state, and defendant by accepting the benefits of the statute assumed the burdens imposed thereby. Railroads are public highways, and the right and duty of the government to regulate the conduct and business of railroad corporations have been founded on that fact. In relation to all highways the duty of regulation is governmental in its nature. It is because they are exercising a governmental function that the power of eminent domain is given to them. But the government cannot require a railroad corporation to carry on the duties imposed by its acceptance of its charter and at the same time by the imposition of unreasonable and confiscatory rates deprive it of its property without due process of law.

There is a distinction, however, between imposing the duty of service and the regulation of rates. It may become necessary, in order to furnish proper service as required under the charter, that a railroad company be required to operate a branch line at a loss, or to furnish certain other service for less than actual cost. It is also true that the nature and extent of the existing facilities furnished by a railroad company must be considered in determining whether a requirement that such facilities be increased is just and reasonable. If it were shown that the enforcement of the order would so affect the general scheme of the operation of the entire system that it would inevitably require its operation at a loss, then the order might be considered so unreasonable as to violate the Fourteenth Amendment,

U. S. Const. *Chesapeake & O. R. Co. v. Public Service Commission,* 242 U. S. 603.

Ordinarily the known discomforts, disadvantages, dangers and annoyances connected with the transportation of passengers upon freight trains require separate trains for the carriage of freight and live stock and for the carriage of passengers. A full discussion of this point may be found in *People v. St. Louis, A. & T. H. R. Co.,* 176 Ill. 512, 35 L. R. A. 656, and in *Missouri P. R. Co. v. State of Kansas,* 216 U. S. 262. We agree with the doctrine of these cases. The legislature of Nebraska has evidently taken the same view, as it has provided in the act specifying the necessary equipment to be placed upon gasoline motor cars or gasoline trains (Laws 1909, ch. 97) that the state railway commission shall have the power to release any railway company from such requirement "on new roads where steam passenger trains have not been regularly run, until such time as the business will warrant better service, also on parts of roads where at least one steam passenger train has run, which makes regular stops at least six days in the week; *provided, mixed freight and passenger trains shall not be considered passenger trains.*" Rev. St. 1913, sec. 5986.

Prima facie, therefore, an order requiring proper facilities to be furnished passengers is reasonable. It is shown that the expense of operating this train will amount to more than $22,000 a year. It is very doubtful whether the operation of a passenger train will pay expenses for many years, unless defendant is allowed to increase its rates. It is clear it will not be presently remunerative. The more fact that the rendition of a certain class of service by a railroad company may be unremunerative is not sufficient to relieve it from the duty of furnishing the same. *Cram v. Chicago, B. & Q. R. Co.* 84 Neb. 607; *Davison v. Chicago & N. W. R. Co.,* 100 Neb. 462. As pointed out in *Atlantic C. L. R. Co. v. North Carolina Corporation Commission,* 206 U.

S. 1, and in *Missouri P. R. Co. v. State of Kansas,* 216 U. S. 262, there is a distinction between requiring service to be performed upon a portion of a railroad system at a loss and the fixing of a schedule of rates for transportation so unreasonably low as to require the whole system to be operated at confiscatory rates. In the one case the loss incidental to the operation of a portion of the system in the prescribed manner may be met by a readjustment of train service or other economies on other parts of the system, whereas inadequate rates applying to the whole system must inevitably result in a form of confiscation forbidden by the Constitution of the United States. *Smyth v. Ames,* 169 U. S. 466, 526; *Chesapeake & O. R. Co. v. Public Service Commission,* 242 U. S. 603. It is undisputed that the returns from the operation of defendant's lines in Nebraska are not compensatory; it seems to be conceded that, being unable to pay the interest on its bonded debt and other charges, the corporation is in the hands of a receiver, and that the whole system is unremunerative. These conditions defendant insists bring the case within the principles of *Smyth v. Ames, supra.* If the defendant were at liberty to raise its rates to cover the increased cost of operation, this argument would have no force; but it has been decided that, the legislature having fixed the rates, the state railway commission is without power to alter them. *State v. Clarke,* 98 Neb. 566. It would be a violation of the statute if the defendant did so.

Since the rendition of the order complained of, a condition has arisen of which the court is justified in taking judicial notice. The country is now in a state of war, and the government of the United States has assumed control over the operation of the railroads. There is a deficiency in motive power and of cars, and a shortage of men. To take the necessary engines and rolling stock to operate this train may decrease to that extent the facilities of defendant for the patriotic duty

which is imposed upon it of doing everything possible to meet the demands in the transportation field imposed by the new conditions. Without deciding that the order was unreasonable when made—though inclined to so hold—we are reluctant to sustain it under these circumstances. We have concluded that the order should remain in abeyance until an opportunity is given to the railway commission to consider how far the order may impinge upon the powers given by congress to the director general of railways over the operation of the railroads during the war, and whether under the present conditions the order should not be vacated. The order is set aside and the matter remanded to the state railway commission for further hearing and consideration.

ORDER VACATED.

SEDGWICK, J., not sitting.

JOHN G. HALL, APPELLANT, V. CHARLES F. BALLARD, APPELLEE.

FILED MARCH 16, 1918. No. 19965.

1. **Appeal:** HARMLESS ERROR: STRIKING EVIDENCE. The testimony of a medical witness for plaintiff in an action for malpractice was stricken on motion of defendant. Error was assigned upon this ruling. The entire evidence in behalf of plaintiff, including that which was stricken, would not have warranted a verdict in his favor. *Held*, that the error, if any, was not prejudicial.

2. **Trial:** WITHDRAWAL OF REST: DIRECTION OF VERDICT. After plaintiff had rested, a motion to direct a verdict was submitted by defendant. The court announced that it was about to direct a verdict for lack of evidence. Plaintiff then asked leave to withd / his rest for the purpose of allowing further evidence, which was permitted. He then, without tendering further evidence, asked to withdraw a juror. This was refused. He then attempted to dismiss the case without prejudice, which was not permitted. The court then directed a verdict for defendant. *Held*, that the court had jurisdiction to set aside its order permitting the rest to be withdrawn, and to direct a verdict, and that, the final judgment being correct, no prejudicial error occurred.

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

F. M. Tyrrell and *J. H. Walker,* for appellant.

Jesse B. Strode and *Strode & Beghtol, contra.*

LETTON, J.

Action for malpractice. The plaintiff suffered an oblique fracture of both bones of the leg. The defendant was called soon after the accident and reduced the fracture. After straightening the leg and placing the bones in juxtaposition he applied a plaster cast. This was afterwards opened, the leg inspected and replaced until union had taken place. The oblique surface of the bones, however, did not exactly correspond with their former position, and as a result the leg was shortened about an inch: otherwise the operation seems to have been successful. Plaintiff had two X-ray pictures taken of the leg, which are in evidence, and the leg was afterwards examined by four or five surgeons, none of whom were called as witnesses.

A physician who had had some experience with fractures of other bones, but had never set a fracture of both bones of the leg, testified on behalf of plaintiff. The procedure she described as being theoretically correct was followed by defendant, except that he did not attach a weight to keep the leg extended. Plaintiff called the doctor who took the X-ray pictures. He testified he had taken hundreds of pictures of fractures. He stated that it was difficult to set oblique fractures of both bones of the leg without a slight resulting shortening of the limb, and the substance of his testimony was that there was no negligent operation shown by the X-ray pictures.

At the conclusion of the testimony of the woman physician, defendant moved to strike it, for the reason that she belonged to the eclectic school of medicine, while the defendant belonged to the allopathic school. The court reserved ruling on the motion. When plain-

tiff rested, defendant moved for a directed verdict. The court stated that the evidence was not sufficient to sustain a verdict. Plaintiff then asked leave to withdraw his rest. Leave was granted so that further evidence might be introduced. Plaintiff then asked leave to withdraw a juror. This request was refused, the court suggesting that if plaintiff had evidence to make a *prima facie* case there was no reason suggested why it could not be had at this time as well as in the future. He then attempted to dismiss the case without prejudice, but this was not permitted. The court then sustained the motion to strike the testimony referred to, and directed a verdict in favor of defendant.

The striking of the evidence and the refusal to allow the withdrawal of a juror or dismissal of the case are assigned as error. It is immaterial whether the court properly struck the evidence, since we are satisfied that, even if considered, it would still have been the duty of the court to sustain the motion for a directed verdict. By refusing to allow a juror to be withdrawn or the case dismissed, the court practically set aside the withdrawal of the rest, which it had the right to do in its discretion.

In the light of the facts disclosed at the trial, no prejudicial error occurred, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

HAMER, J., dissents.

FAWN LAKE RANCH COMPANY, APPELLANT, V. F. A. CUMBOW ET AL., APPELLEES.

FILED MARCH 16, 1918. No. 20436.

1. **Waste: REMOVAL OF MINERALS: SCHOOL LAND LEASES.** The removal of mineral from land lessens the value of the inheritance, and constitutes waste, which is forbidden by the terms of the school land lease under which plaintiff claims and by the statute relating to school lands.

2. **School Lands:** CONTROL. Under section 1, art. VIII of the Constitution, the Board of Educational Lands and Funds is vested with the power of sale, leasing and general management of school lands under the direction of the legislature and in such manner as may be prescribed by law.

3. ———: SALE. Under section 5855, Rev. St. 1913, as amended by chapter 103, Laws 1915, the sale of educational lands is prohibited except in certain instances specified in that section.

4. ———: ———. Except for instances mentioned in said section and for the sale of sand and gravel, there is no legislative sanction now existing for the sale and disposition of any part of the corpus of the real estate belonging to the state for the benefit of the common schools.

5. ———: CONTROL. The power of the Board of Educational Lands and Funds to lease, sell or dispose of school lands only exists in so far as it is directed or permitted by the legislature.

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

Walcott & Walcott and *Hainer, Craft & Lane,* for appellant.

John J. Sullivan, J. J. Harrington, J. C. Quigley, Willis E. Reed, Attorney General, and *George W. Ayres, contra.*

John M. Macfarland and *Howell M. Uttley, amici curiæ.*

The plaintiff avers that it is in possession as lessor of section 16, township 29, range 39, by virtue of certain leases executed by the state of Nebraska; that defendant trespassed thereupon, and threatens to sink a pipe line and extract mineral from a lake thereupon; that the lease does not expire until 1925. The prayer is for an injunction to prevent the trespass and the removal of any mineral water from the lake.

The land is held under three leases which are set forth as exhibits to the petition. Each of the leases is executed by the then public commissioner of lands and buildings. It recites it is issued "in pursuance and

by virtue of the power and authority vested in me by the state of Nebraska." It provides, among other things, that the lessor will pay semi-annually in advance 6 per cent. upon the appraised value of the lands, and "that he will not commit any waste or spoil in or upon said lands." The answer admits that defendant intends to enter upon the land for the sole purpose of extracting potash and other minerals from the water of the lake and to convert the same to his own use; alleges that he duly leased the land from the state of Nebraska for the purpose of prospecting for minerals, gas, petroleum, potash, and other valuable substances; that the plaintiff's lease is an agricultural lease solely; that plaintiff has no right by virtue of said lease to take any minerals; that the rent paid by plaintiff is upon the appraised value for agricultural purposes; that there is no open mine on the land, and none has ever been upon it or operated thereon; that the doing of anything which the defendant proposes to do will not diminish the value of plaintiff's lease; that the mineral waters and minerals are of no value for stock-raising purposes; that the land has no value except for grazing; that unless plaintiff is restrained and enjoined he will prevent defendant and his employees from laying pipe lines or extracting mineral potash, which is of high value at the present time on account of the war, and which could not successfully be extracted with profit in ordinary times; and that, if prevented from extracting the minerals, it will be of great injury and damage to himself and to the state of Nebraska. He prays for an injunction to prevent plaintiff from interfering with his rights in the premises. A copy of the lease mentioned is attached.

The substance of the lease is that the commissioner of public lands and buildings has leased and granted the right to defendant, his heirs or assigns, "to enter upon and occupy the premises as herein below described, for the purpose of prospecting for minerals,

petroleum, gas, potash, or other valuable substances, and for producing the same to excavate, drill wells, lay pipe lines, erect necessary buildings, tanks or structures, to release or subdivide the premises described." The lease is to extend for a term of three years, and as long thereafter as minerals are produced in paying quantities and the rental terms are complied with. The lessor agrees to pay one-eighth part of all minerals, petroleum, gas, potash, or other valuable material, or at the option of the state to pay into the proper fund of the state the market value thereof in cash. The lessor agrees to commence the analysis of the chemicals within six months, the actual construction of buildings or structures, or the beginning of excavations, boring, or drilling within one year, and for a complete test within three years from the execution of the lease, and he shall have the right at any time on the payment of $1 to the lessor to surrender the lease for cancelation.

The state of Nebraska filed a petition of intervention, setting forth that plaintiff's lease was for agricultural and grazing purposes only; that the defendant will only occupy a small portion of the land; that it is willing to deduct a reasonable amount from the rent for damage to the plaintiff on account of the occupation; that potash is now very valuable, and at the close of the war it may be greatly reduced. It joins with defendant in asking for an injunction.

The court found for defendant and intervener, and enjoined plaintiff from interfering with the use or possession of the premises by the defendant for the purpose stated.

LETTON, J.

It was conceded at the argument that the owner of land holds from the center of earth to the sky, and that he may subdivide his estate laterally, conveying the right to the surface only to one individual, and reserving the right to the minerals to himself with power of dis-

posal. It is also conceded that, even without an express reservation in a conveyance of the surface, the grantor impliedly reserves a right to so much of the surface as is necessary for mining operations, or for the purpose of reducing the subsurface estate to possession. These concessions, which seem to state the settled law (27 Cyc. 688; *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538, 14 Am. Rep. 322; *Kemmerer v. Midland Oil & Drilling Co.*, 229 Fed. 872; *Chartiers Block Coal Co. v. Mellon*, 152 Pa. St. 286; *Porter v. Mack Mfg. Co.*, 65 W. Va. 636) materially narrow the matters in controversy in this case. Two points alone are left to determine: (1) Was the lease to plaintiff solely an agricultural lease which gave no right to remove minerals? If this point be decided in favor of defendant's contention, (2) has the board of educational lands and funds, without express legislative sanction, power to convey to him the right to enter upon and remove minerals from the lands already leased to plaintiff?

1. The lease to plaintiff is not by its terms an agricultural lease; in other words, the plaintiff has the right to use the premises for any purpose which he desires as long as he does not commit waste or spoliation. Has plaintiff the right to extract and remove the mineral from the land or from the waters standing upon it? 1 Washburn, Real Property (4th ed.) *108, defines waste as follows: "Waste, in short, may be defined to be whatever does a lasting damage to the freehold or inheritance, and tends to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance." Any act which tends to diminish the estate and cause a permanent loss to the owner of the fee constitutes waste. *United States Fidelity & Guaranty Co. v. Rieck*, 76 Neb. 300. There can be no question that the opening of a new mine or quarry upon leased premises, the taking of rock or minerals, or sand, or gravel, or oil therefrom, is waste under these definitions. To remove potash is as clearly waste as would

be the removal of the other substances mentioned. Plaintiff therefore has no right to the mineral.

The land in question forms part of that granted to the state by the United States in the enabling act "for the support of common schools." The only provision in the Constitution of 1866 with reference to school lands is as follows: "The university lands, school lands, and all other lands which have been acquired by the territory of Nebraska or which may hereafter be acquired by the state of Nebraska for educational or school purposes, shall not be aliened or sold for a less sum than five dollars per acre." When the state was admitted to the Union and the grant became effective, the legislature, under the Constitution of 1866, made the auditor of state land commissioner, for the purpose of selling and leasing school lands, and by statute he was authorized to dispose of them by sale or lease in the manner prescribed in the act (Gen. St. 1873, ch. 70). In 1875 the present Constitution was adopted. Article VIII relates to education. Section 1 of this article is as follows: "The governor, secretary of state, treasurer, attorney general, and commissioner of public lands and buildings shall, under the direction of the legislature, constitute a board of commissioners, for the sale, leasing, and general management of all lands and funds set apart for educational purposes, and for the investment of school funds, in such manner as may be prescribed by law." The first session of the legislature after the adoption of this Constitution passed an act (Laws 1877, p. 174) "to provide for the registry, sale, leasing and general management of all lands and funds set apart for educational purposes, and for the investment of funds arising from the sale of such lands." This act provided with much detail the manner in which the sale or lease of school lands should be made. In 1897 an act was passed which prohibited the further sale of school lands except in certain specified instances mentioned in the act. Laws 1897, ch. 71. In 1899 a new

and general act was passed covering the whole subject of the disposal of school lands and providing that "none of the educational lands may hereafter be sold except for school, church, or cemetery purposes as hereinafter provided." Laws 1899, ch. 69. Section 1 of this act provides that the board shall cause the educational lands "to be registered, leased and sold as hereinafter provided, and shall have the general management and control of said lands and make therefor the necessary rules not provided by law."

It is argued that this provision as to rules confers power upon the board to convey the right to remove minerals or oil. The section consists of two divisions and treats of two subjects. The first division provides for the registration, leasing and sale of lands "as hereinafter provided." The quoted clause is a limitation on the powers conferred. The second division of the section is devoted to the subject of the general management and control of the lands. The board "shall have the general management and control of the lands and make *therefor* the necessary rules not provided by law." This language clearly means that the rules are for the regulation of "the general management and control, in so far as not already provided by law." The word "therefor" belongs to the last antecedent, and does not modify that part of the section relating to the leasing and sale of lands. There is a clear distinction between the general management and control of the lands and the power to sell the same. One may be given the management and control of the business of a corporation or of another person, and it would not generally be understood he had the power to sell or dispose of it. Later amendments are not material to this inquiry. Rev. St. 1913, sec. 5855; Laws 1915, ch. 103.

Each of the laws pertaining to the sale on time and leasing of school lands expressly protected the state from waste committed upon the lands in its care, and made its commission a criminal offense. Purchasers

of timber lands before receiving fee-simple title therefor were prohibited from cutting or destroying any timber thereon more than actually necessary for building and repairing of fences and for family use. In 1909 an act was passed allowing the lessee to remove sand and gravel from the land leased after the determination by the commissioner of public lands of the value of the right to do so and the payment by the amount of rental to be paid semiannually in advance for such right. The validity of this act, so far as allowing the value to be fixed by another official than the board, may be doubted. *State v. Bartley,* 40 Neb. 298. However this may be, the legislature evidently considered that the power to control and direct the disposition of school lands, in so far as it had not already been provided for by statute, rested solely in that body. This is a legislative construction of section 1, art. VIII of the Constitution. It is worthy of remark that it has not been shown that, during the term of more than 40 years that has elapsed since the adoption of the Constitution, the right to dispose of school lands of the state otherwise than as provided by statute has ever been asserted by the board. Except for the sale of sand and gravel and the instances mentioned in section 5855, there is no legislative sanction existing for the sale or disposition of any part of the corpus of the estate. The board of educational lands and funds are trustees for the protection and preservation to the people of this state of the lands granted to it for the benefit of the common schools thereof. Their power to lease, sell or dispose of the same only exists in so far as it is directed or permitted by the legislature. Until that body has acted, no power resides in them to dispose of the property. They are agents selected to carry out the legislative will in this regard.

The removal of minerals, whether held in solution upon the land or resting in the soil and subsurface, is the removal of a component part of the real estate itself. The severance changes the character of the property, but it remains real estate until detached.

In *Williamson v. Jones,* 39 W. Va. 231, 257, 25 L. R. A. 222, upon the question whether mineral oil in place is part of the realty, it was held that it was, and that its removal constituted waste, the court saying:

"The courts of the state of Pennsylvania have had many cases, some involving property rights of great value, in which the point arose, and have examined the question thoroughly, considered it with great care with reference to its being property where it is found, and its character and nature as property in general. 'Oil is a mineral, and, being a mineral, is part of the realty. *Funk v. Haldeman,* 53 Pa. St. 229. In this it is like coal or any other natural product which *in situ* forms part of the land. It may become, by serverance, personalty, or there may be a right to use or take it, originating in custom or prescription, as the right of a life tenant to work open mines, or to use timber for repairing buildings or fences on a farm, or for fire-bote. Nevertheless, whenever conveyance is made of it, whether that conveyance be called a lease or deed, it is, in effect, the grant of a part of the corpus of the estate, and not of a mere incorporeal right. Not infrequently the oil forms by far the most valuable part of the estate.' *Appeal of Stoughton,* 88 Pa. St. 198; *Westmoreland & Cambria Natural Gas. Co. v. DeWitt,* 130 Pa. St. 235, 5 L. R. A. 731; *Hague v. Wheeler,* 157 Pa. St. 324, 22 L. R. A. 141. As to ownership *in situ* of subterranean waters, see *Collins v. Chartiers Valley Gas Co.,* 131 Pa. St. 143, 6 L. R. A. 280. As to ownership by different ones of the surface, coal, iron ore, oil, gas, etc., see *Chartiers Block Coal Co. v. Mellon,* 152 Pa. St. 286, 293, 18 L. R. A. 702; *Wheatley v. Baugh,* 25 Pa. St. 528, 64 Am. Dec. 721, where there is a full note on the subject: 'Where percolating water is found, it belongs to the realty where it is found.' *Chasemore v. Richards,* 7 H. L. Cas. (Eng.)* 349. In *Findlay v. Smith,* 6 Munf. (Va.) 134, 8 Am. Dec. 733, subterranean

salt water is treated as part of the inheritance of which waste could be committed." See *People v. Bell,* 237 Ill. 332, 19 L. R. A. n. s. 746; *Hyatt v. Vincennes Nat. Bank,* 113 U. S. 408.

Defendant insists that his lease is a chattel real, and that such instruments or the rights given thereby are personal property, and hence do not constitute a lease of the land or a sale of any part of it. A number of decisions are cited in support of this proposition. In a number of states chattels real are personal property, but in this state the statute has settled the law in that respect. Rev. St. 1913, sec. 6187. Under section 6187 in the chapter of the statute relating to real property, the term "real estate" is construed "as coextensive in meaning with lands, tenements and hereditaments and as embracing all chattels real, except leases for a term not exceeding one year." By section 6188 a purchaser is construed "to embrace every person to whom any real estate or interest therein shall be conveyed for a valuable consideration, and also any assignee of a mortgage or lease." By section 6189 the term "deed," as used in this chapter, embraces every instrument in writing by which any real estate or interest therein is created, or assigned. In the statute relating to revenue we find the following: "The terms 'real property,' 'real estate,' and 'lands,' when used in this chapter, except as otherwise provided, shall include city and village lots and all other lands and all buildings, fixtures, improvements, mines, minerals, quarries, mineral-springs and wells, oil and gas rights, and privileges pertaining thereto." Rev. St. 1913, sec. 6289.

Whatever view may be taken in some states with reference to the nature and character of such an instrument and of the right to remove minerals from the land, the legislative definition prevails, and the property must be considered as real estate. Without express authority from the legislature, the board has no power

to execute such a lease as the one under consideration.

It is possible, under the war conditions now existing, that, unless the legislature promptly confers upon the board the right and authority to dispose of these minerals, the school fund of the state may lose a large amount of money and the interests of the state suffer, but as said by JUDGE HOLCOMB in *State v. Tanner*, 73 Neb. 104, 120: "This hardship cannot rightfully be obviated by the violation of a sacred trust imposed upon a state and those chosen to administer its affairs relating to the lands and funds belonging to the common schools, which should ever be kept inviolate and used and disposed of only in the execution of the trust. While the legislature no doubt may grant to the defendant, if in its wisdom it sees fit so to do, some measure of relief, in so doing due regard must be had for the greater interests of the state, which, if observed, require the faithful administration of affairs pertaining to the management and disposition of the school lands and funds as contemplated by the constitutional provisions."

What has been said is not in any way in criticism of the well-intended action of the board in attempting to preserve to the state the values which may perhaps temporarily inhere in these minerals. We merely decide that legislative action is necessary before the power is vested in them so to act.

The judgment of the district court is reversed. The facts being undisputed, the plaintiff is entitled to the use and occupation of the land until the legislature sees fit to confer upon the board power to vest others with the right to enter upon the lands and remove the minerals therefrom.

JUDGMENT ACCORDINGLY.

MORRISSEY, C. J., took no part in this decision.

CHARLES W. REYNOLDS, APPELLEE, v. HARRY C. HATHAWAY ET AL., APPELLANTS.

FILED MARCH 16, 1918. No. 19654.

1. **Carriers:** DELIVERYMEN: LIABILITY. The plaintiff sent a boy of 18 years with a team and a wagon to take a load of ice to defendant's place of business. After this was done, the defendant, without knowledge of the plaintiff, instructed this driver to deliver certain articles for defendant. *Held*, that the law will not imply authority of the driver to contract for plaintiff that the defendant's articles should be delivered within a specified time.

2. ——: NEGLIGENCE. Upon the evidence indicated in the opinion, it is *held* that the verdict of the jury, finding that defendant's damages were not caused by negligence of plaintiff, is not clearly wrong so as to require a reversal.

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

D. J. Flaherty, for appellants.

George A. Adams and *Clark Jeary, contra.*

SEDGWICK, J.

In the trial court the defendant admitted the plaintiff's claim as alleged, and in his cross-petition alleged a claim for damages against the plaintiff. The plaintiff was engaged in the general delivery business in Lincoln, and employed teams and men for that purpose. It seems to be conceded that the plaintiff is in this case to be considered as a common carrier, subject to liability as such. It is also conceded that one of the plaintiff's drivers undertook to carry eleven large cans of ice cream from the defendant's place of business to the express office, something over a mile distant, and he was told that the ice cream was to be shipped on a certain train, and that it was necessary that it should be delivered promptly for that reason, and that he failed to deliver it in time, and the defendant was compelled to hire an engine and car to deliver the ice cream at the

point to which it was to be shipped, and that defendant was damaged by reason of the delay in delivering the ice cream to the express office. The defendant alleged that the train upon which the ice cream was to be shipped was scheduled to leave and did leave Lincoln in about one hour after the ice cream was received and loaded by the plaintiff's driver, and that the plaintiff agreed that it should be delivered to the express office in time for this outgoing train. The petition of the defendant, after alleging this contract in detail and with particularity, alleged that the plaintiff did not "fulfil his agreement" to deliver the ice cream in time for the train, but, on the contrary, "plaintiff did so carelessly and negligently misbehave in his said calling as common carrier that he failed to deliver said 55 gallons of ice cream, and every part thereof, at the said office of the Adams Express Company," in time for shipment on the said train. Although there was no specific allegation of the facts in regard to the misbehavior of the plaintiff in the delivery of the ice cream, the trial court treated this as a sufficient allegation of negligence causing injury, and submitted the question of the plaintiff's negligence at large to the jury. Indeed, the evidence in the case is most largely devoted to that question, and that appears to be the principal issue tried, so far as the evidence is concerned. The plaintiff might be held to have undertaken that this driver would use ordinary care and diligence to perform such services if they were entrusted to him, and would therefore be liable for any gross negligence or carelessness in performing those duties. The question of the negligence of this driver was submitted to the jury with appropriate instructions, and, without discussing this voluminous evidence at large, it is sufficient to say that it supports the finding of the jury upon that question.

The trial court appears to have regarded that the evidence entirely failed to prove a contract on the part of plaintiff to deliver the ice cream in time for the train, and did not submit that question to the jury. The

defendant asked for no further instructions on the part of the trial court, and so the question presented is whether there was a special contract on the part of the plaintiff as alleged, and whether the failure to perform such special contract on the part of the plaintiff was the cause of the defendant's damage. The driver of the plaintiff's team was a boy of eighteen years of age, who had been in plaintiff's employ at that time about two months, and apparently had done some delivering of goods for the defendant in the city of Lincoln. On this occasion he was sent by the plaintiff to take a wagon load of ice to the defendant's place of business, and, when the ice was unloaded, was instructed by the defendant to take this ice cream to the express office. There appears to be no evidence that the plaintiff knew that the driver was to take this ice cream to the express office, but it is insisted that the plaintiff would be liable for the implied agreement of the driver to deliver the ice cream in time. One of the defendant's witnesses testified that he informed the driver of the time the train left and of the imperative necessity of delivering the cream in time, and that the driver remarked, "all right." It would appear from the evidence that when this driver was sent by his employer, as upon this occasion, to deliver a load of ice or with other similar specified duties to perform, it was the custom of this young man to accept other specific jobs from various parties, and perhaps upon some occasions from this defendant, receiving his instructions from the parties for whom he performed the services. Under these circumstances, and in this condition of the record, it cannot be found that the driver was authorized by his employer to make a special contract to deliver this ice cream in a specified time, or that he did attempt to make such special contract. At the most, he undertook to do his part as well as he could to deliver the ice cream. The court then committed no error in failing to submit to the jury the question whether there was a

special contract on the part of the plaintiff to deliver this ice cream in time for the outgoing train.

Our attention has not been called to any error in this case that requires a reversal of the judgment, and it is therefore

AFFIRMED.

LETTON, ROSE and CORNISH, JJ., not sitting.

EFFIE A. RUMSEY, APPELLANT, v. SALINE COUNTY, APPELLEE.

FILED MARCH 16, 1918. No. 20281.

Constitutional Law: MOTHERS' PENSION LAW. Chapter 187, Laws 1915, providing pensions for mothers and guardians, is not invalid as being in conflict with section 11, art III, or section 5, art. IX of the Constitution. It is not an amendment of the poor laws of the state, but is independent and complete in itself.

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

R. M. Proudfit, for appellant.

Charles F. Barth, contra.

SEDGWICK, J.

The plaintiff applied to the county court of Saline county for a pension under chapter 187, Laws 1915. Upon appeal to the district court a general demurrer to her petition was sustained and the proceedings dismissed, and she has appealed to this court.

It is conceded that her petition was not subject to demurrer, unless the statute under which she applied is unconstitutional. Many reasons are suggested in the brief for holding the act unconstitutional. It is suggested that the act is in conflict with section 11, art. III of the Constitution, which provides that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title," because the title pro-

vides for pensions for "mothers and guardians," and the brief says that the body of the act provides a pension for the parent of any child or children; and because "the title provides a pension for dependent *and* neglected children," whereas the act itself provides a pension for dependent *or* neglected children; and because the act provides a pension "for those who are liable to become dependent or neglected," and not those who are already dependent or neglected. None of these objections are well taken. The provisions of the act referred to in these objections are found in the first section, which only regulates the substance of the petition that must be filed in order to obtain the action of the court. It is the second section that provides for the relief, and the provision there is that, if the court finds "that the petitioner is poor and unable to properly care for such child or children but otherwise is a proper guardian and that it is for the welfare of the child or children to remain at home under the guardianship of their mother, or guardian, the court may make an order finding such facts and fixing the amount of money necessary to enable the petitioner to properly care for such child or children." It is unnecessary to determine in this case under what circumstances the father of children might be entitled to a pension. If he is "the proper guardian," he comes within the provision of section 2 of the act. This application is made by the mother, and there is no doubt that she is qualified to make such application.

It is also suggested that the act violates the provision of the Constitution which requires, when statutes are amended that the section so amended shall be repealed, etc. This objection is predicated upon the idea that this act is an amendment to the poor laws of the state, but the poor laws do not cover, nor attempt to cover, the idea of assisting a worthy and competent mother to properly care for herself and her children. The subject of this act is entirely distinct from the

subject of the various statutes for supporting the poor.

It is also suggested that the act violates the constitutional provision (Const., art. IX, sec. 5) which limits the aggregate amount of taxes which the county authorities may assess. The act limits the amount to be allowed for the care of each child to $10 a month, and that the allowance shall not be "effective for more than six months, unless renewed by the court at or after the expiration of that period," and that such payments are to be made from the general fund of the county. The limitation to assessment by counties is that the aggregate shall not exceed $1.50 per $100 valuation. This objection to this statute assumes that the allowance of this pension will necessarily cause the tax assessment to exceed the constitutional limit. There is nothing in the act which warrants such an assumption.

We do not find that any of the objections to the constitutionality of this act are well taken. The trial court, therefore, erred in sustaining the demurrer to the petition, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

CORNISH, J., not sitting.

WOODBURY GRANITE COMPANY, APPELLANT, V. CARL J. MILLER, APPELLEE.

FILED MARCH 16, 1918. No. 19842.

Interest: UNSETTLED ACCOUNTS. In an action covering unsettled accounts between parties, the interest shall not begin to run until after the expiration of six months from the date of the last item, whether the same shall be a debit or a credit.

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

J. E. Willits, for appellant.

Stiner & Boslaugh, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Adams county. The petition alleged that the plaintiff was a corporation engaged in the marble and granite business at Hardwick, Vermont, and that it had sold and delivered certain goods, wares and merchandise to the defendant, amounting to $2,725.25. It acknowledged payment by the defendant of $2,498.34. There was a prayer for judgment for the plaintiff and against the defendant for $363 and interest at the rate of 7 per cent. per annum from the 8th day of September, 1914, and the costs. There was an agreement that the plaintiff had sold and delivered to the defendant certain goods, wares and merchandise, commencing on July 1, 1908, and ending on August 8, 1911, as shown by the statement made a part of the petition of the plaintiff. It was also stipulated that the defendant had paid certain amounts as shown by the agreement of the parties, the last payment being September 8, 1914. The court found that the plaintiff was not entitled to any interest on the amount due him until six months "from and after the 8th day of September, A. D. 1914, and that the interest did not commence to run on the amount due plaintiff until the 8th day of March, A. D. 1915." It will be seen that the court allowed interest from the expiration of six months from the 8th day of September, 1914, which was the date of the last payment. There was a finding and judgment in favor of the plaintiff for the sum of $226.91 and the interest due thereon at the rate of 7 per cent. per annum from the 8th day of March, 1915, amounting to $14.75, the total amount being $241.66.

It is claimed that the court erred in not computing interest after six months from date of the last item sold and delivered on such sum as was then due. The appellant appears to have disclosed that the last item of this unsettled account bore the date of September 8, 1914. This was a credit item. It is the last item of

the account. It is claimed by the defendant that the action of the district court was in harmony with the statute, and also the construction thereof heretofore given by this court. The statute reads: "Unsettled accounts between parties shall bear interest after six months from the date of the last item thereof." Rev. St. 1913, sec. 3349. In *Garneau v. Omaha Printing Co.*, 52 Neb. 383, this court held: "In the absence of a contract upon the subject, unsettled accounts do not draw interest until six months after the date of the last item." In the opinion the court said: "The actions are upon 'unsettled accounts.' and the computation made by the jury, of the amount due is wrong, since the accounts contain both items of credits and debits. That certainly constituted accounts between the parties. Plaintiff below not only exhibited its own accounts, but those of its adversary as well. This court, in obedience to the express provision of the statute, has more than once decided that in the absence of a contract unsettled accounts do not draw interest until the expiration of six months from the date of the last item therein." Of course, if it is the last item therein, and the subject under discussion is "unsettled accounts," then it is immaterial whether the last item was a debit or a credit. In the instant case the last item was a credit. Giving the construction of the statute which it seems to demand, the "last item thereof" may be either a debit or a credit.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF FLOYD O. GREEN.

H. P. LAU COMPANY, APPELLEE, V. CHARLES R. ELGAS, ADMINISTRATOR, APPELLANT.

FILED MARCH 16, 1918. No. 19829.

1. **Justice of the Peace:** ADJOURNMENT. Section 8406, Rev. St. 1913, providing that upon return day a justice of the peace may, with-

out consent of parties, adjourn the trial for a period not exceeding eight days "if the justice be actually engaged in other official business," does not authorize the justice to make such adjournment at a time subsequent to the return day.

2. ———: ———: JURISDICTION. An unauthorized continuance or adjournment of a case will oust a justice of the peace of jurisdiction to take any further action in it.

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

R. J. Greene, for appellant.

Burkett, Wilson & Brown, contra.

CORNISH, J.

On return day, March 3, on application of defendant, an action in justice court was continued to April 2, and again to April 22. Upon the last-mentioned date an order was entered as follows: "April 22, 1908. The court being otherwise engaged, this case continued on the court's own motion to April 27, 1908, at 1 p. m." At 2 o'clock p. m., on April 27, defendant's default was entered, trial had, and judgment entered. Had the court jurisdiction to enter judgment at that time?

When the record of a justice court shows that jurisdiction has once attached, as in this case, the presumption that such proceedings were regular will be indulged until the contrary is shown. *Kuker v. Beindorff,* 63 Neb. 91. An unauthorized continuance or adjournment of a cause will oust a justice of jurisdiction to take any further action in it. 24 Cyc. 488, 576. Sections 8406, 8407, 8408, 8532, Rev. St. 1913, are controlling (sections 8407, 8408, amended by chapter 102, Laws 1915). They contain an explicit statement of what adjournments may be had. An adjournment on return day for not exceeding eight days, without consent of parties, "if the justice be actually engaged in other official business," is provided for. By necessary implication, it would seem that an adjournment for this reason on any other day is not permitted. *Stadler v. Moors,* 9 Mich. 263. No

doubt if, when the time arrives to which a case has been adjourned, the justice is engaged in the trial of another case, then the adjourned case must wait until the conclusion of the other trial. It would seem impossible to indulge the presumption that such was the situation here. The cause appears to have been adjourned under the mistaken notion that the above provision of the statute applies. Such adjournment operated to divest the justice of further jurisdiction of the cause and to make the judgment void.

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

REVERSED.

FRANCIS J. BURKLEY, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED MARCH 16, 1918. No. 19883.

1. **Municipal Corporations:** VACATION OF STREETS: DAMAGES. "Where part of a street is vacated, the general rule is that only those property owners whose property abuts upon the vacated part of the street, and who are thus cut off from access to their property, are entitled to damages on account of such vacation." *Enders v. Friday*, 78 Neb. 510.
2. ———: ———: ———. Under this rule, the fact that the property, by reason of the vacation, is left located in a cul-de-sac makes no difference.
3. **Judgment:** SPECIAL TRIBUNALS: DECISIONS: CONCLUSIVENESS. "The decision of a special tribunal, where it has jurisdiction of the subject-matter and parties, is conclusive, unless reversed or modified in the mode provided by law." *State v. Nelson*, 21 Neb. 572.
4. **Municipal Corporations:** SPECIAL ASSESSMENTS: FAILURE TO APPEAL: ESTOPPEL. Property owners who have appeared before the city council and urged their objections to a proposed special assessment for a public improvement, and have failed to appeal from the action of the council with respect thereto, are thereafter estopped to question the assessment or maintain an action to enjoin its enforcement, unless the council was wholly without jurisdiction to order the same.

5. ———: GRADING OF STREET: CLAIMS FOR DAMAGES: NOTICE. Section 4089, Rev. St. 1913, empowers the mayor and council of the city of Omaha to provide by ordinance for notice to property owners of a hearing of claims for damages arising from the grading of a street.

6. ———: ———: RESOLUTION. The language of a resolution, declaring it "expedient and necessary" to grade a street, is a sufficient compliance with section 4306, Rev. St. 1913, providing for such resolution.

7. ———: ———: CLAIMS FOR DAMAGES: RIGHT TO HEARING. Plaintiff appeared before a special tribunal for a hearing of claims for damages by reason of the grading of a street. The hearing was postponed to a time to be fixed in the future. Afterwards, the appraisers, constituting the special tribunal, made their report without giving the plaintiff further opportunity to be heard, awarding him, however $200 damages. The law under which the proceedings were had provided for an appeal from the award of the special tribunal, which appeal the plaintiff had opportunity to take. *Held*, that the failure of the special tribunal to give the plaintiff further opportunity to be heard would not render the proceedings void as a denial to plaintiff of due process of law. It is sufficient if the party has an opportunity to appear at some time before a tribunal having jurisdiction, and there procure an adjustment of his rights or liabilities.

8. **Statutes:** CONSTRUCTION: TIME. When a statute specifies the time at or within which an act is to be done, it is usually held to be directory, unless time is of the essence of the thing to be done, or the language of the act contains negative words or shows that the designation of the time was intended as a limitation of the power, authority or right.

9. **Muncipal Corporations:** DIRECTORY STATUTE. The provision of section 115 (Laws 1905, ch. 14) of the Omaha charter (Rev. St. 1913, sec. 4309), which provides that the committee shall make its report within ten days after its appointment, is directory, not mandatory.

10. ———: GRADING OF STREET: CLAIMS FOR DAMAGES: IRREGULARITIES: WAIVER. The plaintiff, by filing his claim for damages after the expiration of the ten days, and by filing his bond for appeal after the adoption of the appraisers' report, waived all irregularities in the proceedings not objected to at the time.

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

John A. Rine and *W. C. Lambert*, for appellant.

Mahoney & Kennedy and *Guy C. Kiddoo, contra.*

CORNISH, J.

Plaintiff's property was located some 20 feet from a cross street, which was so graded by the defendant city as to make the street in front of his property impassable at the point where it meets the cross street, leaving plaintiff's property in what is denominated a cul-de-sac, or "blind alley." The plaintiff, refusing to accept as in full the damages awarded him in proceedings by the city at the time the city graded the cross street, and failing to prosecute an appeal therefrom, brought this separate action for damages, and recovered judgment therefor, from which the defendant appeals.

Plaintiff's property did not abut upon the part of the street vacated. In *Lee v. City of McCook*, 82 Neb. 26, it is held: "Where a part of a street is vacated, the general rule is that only those property owners whose property abuts upon the vacated part of the street, and who are thus cut off from access to their property, are entitled to damages on account of such vacation." In the body of the opinion, quoting from the opinion in *Enders v. Friday*, 78 Neb. 510, it is said (p. 29): " 'The general rule is that only those property owners whose property abuts upon that part of the street, and who are thus cut off from access to their property, are entitled to damages on account of such vacation.' It would follow, therefore, that the plaintiffs suffered no wrong that would be actionable at law for damages. The only injuries they sustain are such as are common to the community generally. It is true that it is alleged that the appellant Lee will suffer damages, and that his ice plant will be practically destroyed; but the nature of the injury he sustains is not different from that sustained by other persons. He, like others, may be compelled to travel a greater distance in order to reach the north part of the city." See, also, *Van Valkenberg v. Rutherford*, 92 Neb. 803, and *Jones v. City of Aurora*, 97 Neb. 825. In the case last cited, the plaintiff owned three lots, one of which

abutted on the side street vacated. The court said (p. 830): "The three lots are used as one tract, having common improvements, and, in assessing damages, must be treated as a single piece of property." This holding is not inconsistent with former holdings. In the body of the opinion the decision in *Vanderburgh v. City of Minneapolis,* 98 Minn. 329, is cited as one where the facts were analogous, and in which it was held that, where one's property is made to front on a cul-de-sac, his injury is different, not only in degree but in kind, from others. How far the court approved of this holding is not further shown. The question involved was not at all necessary to the decision. So long as the damages sustained depend upon being "compelled to travel a greater distance in order to reach" other parts of the city, it would seem that the difference in damages is one of degree and not of kind. The damages to the person located in a cul-de-sac may not be appreciably more, may be substantially less, than the damages to the person located a block away from him on the same street. This court has heretofore recognized the fact that all the property owners in one part of town may be appreciably and substantially damaged, whereas the public generally will not be damaged at all, but benefited. When one's property abuts upon the street vacated, he clearly stands upon a different footing. His easement is taken away from him and his use of the property may be destroyed altogether. *Gillespie v. City of South Omaha,* 79 Neb. 441, is cited by plaintiff. In this case, "the city closed L street (the street in front of plaintiff's property) from Thirty-eighth street west to Thirty-ninth street, and vacated the south half of L street between Thirty-eighth and Thirty-ninth streets." Here, too, the damages suffered were different in kind from that of the community generally. The easement of the street in front of plaintiff's property was taken in part for the building of a viaduct.

All public improvements are liable to be beneficial to some and damaging to others. Even the changing of

the location of a post office will affect the ownership of property unequally. It is a better rule to hold that people purchasing property must contemplate public improvements of this character and make their purchases upon such basis. The making of improvements should not be imperiled by the danger of whole neighborhoods bringing suits for damages.

At the time the improvement at the cross street was ordered in this case, the defendant city, through its special tribunal created for that purpose, undertook to determine the damages occasioned by the grading of the street. The law, under which the proceedings for appraisement and assessment of damages were had, provided for an appeal from the assessment to the district court, and provided further that "the remedy by appeal herein allowed shall be deemed and held to be exclusive." Rev. St. 1913, sec. 4398. "The decision of a special tribunal, where it has jurisdiction of the subject-matter and parties, is conclusive, unless reversed and modified in the mode provided by law." *State v. Nelson,* 21 Neb. 572.

In this case an appeal was attempted, but no valid appeal taken. The plaintiff contends that the proceedings for appraisement of damages were vitiated by the violation of constitutional rights and statutory requirements. We will consider the objections made as they appear in the brief:

(1) It is said that the procedure was void because the law made no provision for notice to the owner (plaintiff) and an opportunity for him to be heard. If the law were unconstitutional because it made no provision for notice or hearing, it is very likely that proceedings had under it would be void. Section 4089, Rev. St. 1913 (Omaha charter), provides as follows: "When by this chapter the power is conferred upon the mayor and council to do and perform any act or thing, and the manner of exercising such power is not specially pointed out, the mayor and council may provide by ordi-

nance the details necessary for the full exercise of such power." In pursuance of this enactment the city did pass an ordinance providing for "notice (to the property owners) of the time, place and purpose" of the hearing. The plaintiff did have notice of the meeting and appeared. We are of opinion, therefore, that there is no merit in this contention.

(2) It is contended that the proceedings are void because the city proceeded neither by resolution nor ordinance, as required by sections 4306, 4309, Rev. St. 1913. Under these sections of the law, the city acquires jurisdiction to grade the street either by published resolution, declaring the necessity of grading, and giving property owners 30 days in which to protest, or by ordinance after the filing of the petition of a certain per cent. of the property owners. We are of opinion that the resolution of February 1, declaring it "expedient and necessary" to grade Twenty-fourth street, which was published as provided by the law, constitutes a sufficient compliance with section 4306, *supra*, which provides for an order for grading by resolution. Following this resolution, no protest being filed, the ordinance approved March 19 was passed, declaring it "proper and necessary to grade" the street. This ordinance, appointing an appraisement committee, was a compliance with section 4309, *supra*, requiring such appointment before streets are ordered graded.

(3) The law gives property owners 30 days from the time of the published resolution in which to file protests. No protests were filed. The fact that in the published resolution the time for filing protests is stated as if expiring March 2, instead of March 3, would not deprive the property owner of his right to file, nor deprive the city of its jurisdiction to proceed.

(4) The plaintiff had notice of the day fixed for hearing, appeared, and filed his claim for damages. The hearing was then postponed to a time to be fixed in the future. Twenty days after this meeting, the apprais-

ers made their report without giving the plaintiff further opportunity to be heard, awarding him, however, $200 damages. The appraisement committee had acquired jurisdiction of the parties and the subject-matter, and we are of opinion that this irregularity would not amount to such a denial of due process of law as to deprive the city of its jurisdiction. The plaintiff still had his right of appeal. He did afterwards file his appeal bond and transcript of the proceedings within the time required. As long as the plaintiff was still given an opportunity to appear at some time before a tribunal having jurisdiction and there procure an adjustment of his rights, the rule requiring due process of law has not been violated. The plaintiff had this opportunity in the district court, but failed to avail himself thereof, and he is estopped from bringing a separate action.

(5) At the time originally set for hearing, only two of the three commissioners, constituting the appraisement board, were present, and the hearing was postponed. No claim of fraud upon the part of the commissioners is made. It is argued that it required the presence of the whole board to constitute a valid hearing. The record shows that the whole board did join in the final report. If there was any irregularity in this respect, the plaintiff's remedy was by appeal.

(6) The charter provided that the appraisement committee should make its report within 10 days from the time of its appointment. In this case the report was not made until 48 days after the appointment. It is contended that this operated to deprive the board of its jurisdiction to proceed. The evidence shows that oftentimes it would occur that such board would be unable to give notice and conduct its investigation and complete its deliberations within ten days. We are of opinion that this provision of the statute should be construed as directory rather than as mandatory. At most, it would constitute a mere irregularity.

(7) It is contended that the report of the appraisers is void because it did not show that they took into consideration the amount of special benefits, as required by the law. This provision of the law is intended for the benefit of those who may be assessed, and not for those who are to be awarded damages. It is difficult to see how the plaintiff could in this way be prejudiced. We are of opinion, however, that the record does show affirmatively that the committee did take benefits into consideration. The ordinance under which it was acting so provided. The appraisers made their oath that they would do so, and their report discloses that they had considered "all matters in relation to the damages occasioned by said proposed grading, as declared necessary by Ordinance No. 6647."

(8) The further contention is made that the proceedings are void because no opportunity to protest against the report was given before its adoption by the council, as provided by section 4308, providing for an appeal. As was held in *Creighton University v. City of Omaha,* 91 Neb, 486, the right to appeal from the appraisers' report is not given by section 4308, but by section 4398 of the statute, which does not make the right depend upon the filing of the protest.

As before stated, the plaintiff attempted to make an appeal, but did not perfect it. It is argued that an abortive appeal from a void appraisal does not make the appraisal valid, nor estop the plaintiff from recovering his damages in a common-law action. We are of opinion that the appraisal was not void. The law under which the appraisal proceeded was not unconstitutional. The jurisdiction over the parties and the subject-matter was acquired by the special tribunal. Mere irregularities in procedure would not be sufficient to oust them of jurisdiction in any event. If irregularities were committed prejudicial to the plaintiff, his remedy was by appeal, and, having failed to avail himself of the remedy provided by law, declared

to be exclusive, this separate action should be dismissed.

For additional cases bearing on the questions involved, see *Harmon v. City of Omaha,* 53 Neb. 164; *Medland v. Linton,* 60 Neb. 249; *Omaha & N. P. R. Co. v. Sarpy County,* 82 Neb. 140; *State v. Several Parcels of Land,* 83 Neb. 13; *Dettman v. Pittenger,* 89 Neb. 825; *Heller v. Atchison, T. & S. F. R. Co.,* 28 Kan. 625; *Davis v. County Commissioners,* 153 Mass. 218; *Dantzer v. Indianapolis U. R. Co.,* 141 Ind. 604; *People v. Board of Supervisors of Lake County,* 33 Cal. 487; *Weaver v. City of Chickasha,* 36 Okla. 226; *Beaumont v. Wilkes-Barre City,* 142 Pa. St. 198; *City of Newark v. Hatt,* 77 N. J. Law, 48, 30 L. R. A. n. s. 637; 1 Lewis, Eminent Domain (3d ed.) sec. 202; 3 McQuillin, Municipal Corporations, sec. 1408.

For the reasons given in this opinion, the judgment of the trial court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

JOHN T. BRIDGES, APPELLEE, V. ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLANT, CONSOLIDATED WITH ALBERT BROWN, APPELLEE, V. ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLANT.

FILED MARCH 16, 1918. No. 19903.

1. **Insurance:** AGENT: CONTRACT. In an alleged contract between an insurance agency and the owner of certain property, by the terms of which the agency promises to keep the owner's property insured from year to year in some one of the various companies for which it is agent, to be selected by the agent, *held,* that no contract of insurance would arise between the owner and any of the companies represented by the agency until the agent had selected the company in which the insurance was to be written

2. ———: ———: RENEWAL CONTRACT. An insurance agent has, ordinarily, no apparent authority, and in the absence of express authority is not authorized to make a contract, so as to bind an

insurance company, for renewal insurance from year to year for an indefinite period in the future.

3. ———: AGREEMENT FOR INSURANCE: VALIDITY. An agreement for insurance to be valid must be certain as to time, amount, rate, property, and other material facts.

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

Montgomery, Hall & Young, for appellant.

W. D. Oldham and *Fred A. Nye, contra.*

CORNISH, J.

More than 10 years before the fire, the occasion of this suit, one Robinson, a bank cashier, maintained an insurance agency, representing defendant and other insurance companies. Afterwards, some four years before the fire, he sold his interests in the bank and agency to one Kennedy, who became cashier and agent. Plaintiffs allege that at the beginning of this period each orally "contracted with the said agency of the defendant to keep his property, hereinafter described, insured at all times against loss," etc.; that, in accordance with said agreement, the defendant did, from year to year, issue its policies through said agency, and "the premium therefor would be charged against the account of the plaintiff in said bank or collected by said agency from the plaintiff on demand;" that the defendant did not, in accordance with the agreement, renew its policies, expiring May 20 and 24, 1914; and that the property was destroyed by fire November 3, 1914. The defendant, besides denying such agreement or custom, denies all liability by reason thereof. From a judgment against defendant for the losses as if upon policies in full force and effect, defendant appeals.

The evidence shows that at the time of the expiration of the old policies in May, 1914, neither of the plaintiffs had any money in the bank, and the bank examiner was calling the bank's attention to the overdrafts. During the five and one-half months intervening before the fire no premium was tendered nor policy demanded. During

the ten-year period the amount of one policy at least was changed, and the insurance on one of the properties was changed by the agency from another company to the defendant. When Kennedy bought out Robinson, no new contract was made, according to plaintiffs, except that Kennedy was to continue the insurance the same as Robinson had.

As stated in plaintiffs' brief: "The agents themselves selected which company they would insure these men in." As sworn to by plaintiff Bridges, after the agent had transferred the insurance from one company to another: "I told him it didn't make a bit of difference. * * * I didn't know one insurance company from another, and all I wanted was insurance; and he said I didn't need to worry, he would take care of that." The agency clearly was given the privilege of making such selection as its own business or convenience would suggest.

Admitting the agreement and custom, as sworn to, between plaintiffs and the agency representing several companies, it must be held that, in the making of a selection of companies and procuring insurance, the agency would be acting either for itself or as the agent of the plaintiffs, and not of the defendant company. Until a selection was made the company selected would be an entire stranger to the transaction. To constitute a contract the minds of the parties to it must meet. There must be an offer and acceptance. This could not happen between plaintiffs and defendant so long as Robinson or Kennedy had the option of selecting one company or another at his pleasure. In short, it is not possible, rationally, to conceive that in making the selection the agent would be acting for the company. In its very nature, the thing to be done is done by the party procuring the insurance. Hence, at the time of the fire no contract of insurance existed between plaintiffs and defendant, and no cause of action arose.

We are of opinion, however, that plaintiffs' case must fail for other reasons, even though the original agreement had been with reference to a policy in a specified company. In the absence of express authority, an insurance agent has no apparent authority to make a contract, like this, for insurance from year to year for an indefinite period, 10 to 20 years in the future. There would be nothing in the transaction which would inform the company of its existence. Insurance companies must be given the privilege of refusing insurance, of changing rates or amounts, or of quitting the field. The apparent authority of the agent, if it exists at all, must be limited to policies which are to be issued within a reasonable time.

Again, the agreement is wanting in that mutuality required to make a valid contract. The plaintiffs, according to their testimony, could stop renewals whenever they desired. The defendant must have the same right. If it is said that the defendant had the same right by implication, then, aside from want of certainty required, it must be further said that it exercised the right in not issuing the policies, the plaintiffs having neither paid for them, tendered payment, nor demanded them during the over five months which elapsed after the old policies expired.

Again, it is not contended by plaintiffs that in the arrangements had they would have issued to them new policies without paying the premiums. The custom sworn to, that the amount of the premium was to be charged to their accounts at the bank, must be taken to mean an account having money to its credit. Under any conception of the oral contract, in the absence of some agreement, express or implied, to extend credit for over five months, the defendant would not be bound to issue its policy until the consideration was paid.

Again, even though it should be the law that an insurance agent may bind the company by an oral agreement for insurance *in præsenti* or *in futuro,* we know of no case holding that the agreement must not

be clear and explicit in its terms. It must be certain as to parties, time, amount, rate, property, and other material facts. The agreement sworn to was uncertain as to parties (the insurance company was once changed); as to time (it was indefinite); as to amount (the amount was once changed); as to rate (nothing was said about rate, and it would be unreasonable to suppose that the parties contemplated that the rate would never change, or its payment be deferred five and one-half months).

Defendant in its brief argues that such contract, being oral and not to be performed within one year, would be void as within the statute of frauds; also that in all undertakings by an agent to procure insurance for another, although in a specific company, the agent acts for the other or for himself until the application is in fact made; also a question of pleading: that a petition alleging an insurance contract *in præsenti* will not support a judgment based upon evidence of a contract for insurance *in futuro*. It is not necessary to decide these questions here.

For cases bearing upon the questions involved, see *Parker v. Knights Templars & Masons Life Indemnity Co.*, 70 Neb. 268; *Willson v. German-American Ins. Co.*, 95 Neb. 774; *Clark v. Bankers Accident Ins. Co.*, 96 Neb. 381; *Sargent v. National Fire Ins. Co.*, 86 N. Y. 626; *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 92 Mich. 482; *Connecticut Fire Ins. Co. v. Bennett & Bros.*, 1 Ohio Dec. 60; *Wood v. Prussian National Ins. Co.*, 99 Wis. 497; *Stehlick v. Milwaukee Mechanics' Ins. Co.*, 87 Wis. 322; *Taylor v. Phœnix Ins. Co.*, 47 Wis. 365; *Whitman v. Milwaukee Fire Ins. Co.*, 128 Wis. 124; *Benner v. Fire Ass'n of Philadelphia*, 229 Pa. St. 75; *Mooney v. Merriam*, 77 Kan. 305.

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

REVERSED AND DISMISSED.

SEDGWICK, J. not sitting.

DEAN, J., dissents.

ARLOWE D. SUTTER v. STATE OF NEBRASKA.

FILED MARCH 16, 1918. No. 20398.

1. **Homicide:** EVIDENCE: MATERIALITY. Evidence of an intention to commit suicide is not immaterial in a murder case, where deceased was found dead under circumstances not inconsistent with the theory of suicide.

2. ———: ———: ———. Evidence of declarations by deceased of intention to commit suicide, or evidence consisting of the written statements of the deceased bearing upon the question of intention to commit suicide, is admissible in a murder case, if introduced solely to show the state of mind or intention of the one making them, at the time they were made.

ERROR to the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

R. J. Greene, for plaintiff in error.

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

Sterling F. Mutz, amicus curiæ.

CORNISH, J.

On the night of March 10, 1917, defendant's wife was found dead, with a bullet hole in her body, under circumstances which did not negative the possibility of death by suicide. The defendant (plaintiff in error), on trial charged with killing her, sought to prove suicide by evidence of threats made by her to commit suicide and letters written by her within three weeks of the time of her death. This evidence was excluded by the trial court, which ruling of the court the defendant, convicted of murder in the first degree, assigns as error.

Where one is found dead under circumstances making doubtful the manner of his death, if the theory of suicide is suggested, we naturally inquire concerning the state of mind of the dead person—whether by his

acts, writing or speech suicidal intent was indicated or shown. If one on whom we could rely would quote the dead person as having declared an intention to commit suicide, and the known circumstances of his death were consistent with such intention, we might at once accept suicide as the explanation of the tragedy. And yet, in spite of this instinctive, common sense, and, we believe, scientific mode of inquiry, some courts—a minority—have excluded the testimony on the ground that the declaration, not being a dying declaration or part of the *res gestæ,* is hearsay.

We are of opinion that such evidence is not hearsay, but is original evidence bearing upon state of mind, and, when the undisputed facts and circumstances of the case furnish a reasonable basis for the theory of suicide as a defense, the evidence should, ordinarily, be admitted. The reasons for this conclusion might be stated thus: (1) Defendant is not guilty if death was self-inflicted, and must be permitted to prove it, if provable. (2) If suicidal intent existed, then, indisputably, the mere fact of such intent renders more probable the theory of death by suicide. (3) It follows that, if suicidal intent may be evidenced by previous conduct, writings or speech, proof of them must be permitted. (4) Suicidal intent is a state of mind, distinguishable from acts done in pursuance of the intent.

State of mind is indicated more or less by appearances, conduct and speech. Every word and act may bespeak the real mind, in fact, does, to a being who knows. The same, you say, is true of hearsay. But hearsay is rejected because the immediate object is the truth of the statement, not the intent or state of mind. Just as a declaration may unmistakably show knowledge or notice, so may it be evidence of intent. The mere fact of the coincidence, death following the declaration, is evidential. It would be suggestive, even though the person had protested that he never would

take his own life. The thought at least was entertained.

A declaration containing a statement of fact external to the mind is, of course, as to that fact, hearsay. While declarations have in them some of the elements of hearsay, yet they are frequently natural expressions of feeling which have never been regarded in the law as hearsay. The question is: What actual inferences of fact may be reasonably drawn from them as to an existing state of mind? In personal injury cases, the courts permit exclamations and declarations as evidence of pain and suffering, and permit the doctor, as an expert, to draw conclusions as to bodily conditions from the person's narrative of his condition. In will cases, the condition or intention of the testator is permitted to be evidenced by his declarations. Cases involving the validity of a gift furnish another example. In cases of alienation of affection, the statements and declarations of the wife, bearing upon her affections for her husband, before the alleged seduction, are permitted. In these cases, we recognize that the words of the person, whose state of mind is the subject of inquiry, may be false. Evidence of them is admitted because they do have evidential value in determining the condition of mind or intention.

Evidence that the accused threatened to do the killing, or, the defense being self-defense, evidence that the deceased had threatened the accused, is permitted.

The real reason, we are inclined to believe, why the courts have hesitated to admit the testimony under consideration is similar to that contained in the various statutes of frauds requiring a certain kind of testimony to establish certain facts. The person alleged to have made the declaration is dead, and the evidence of it, possibly manufactured, is difficult or impossible to meet. But, as said in 1 Wigmore, Evidence, sec. 143: "That the evidence, may be manufactured, is no reason for its exclusion; for it may also *not* be manufactured,

and, if not, it is most cogent." That such evidence may not always be entirely trustworthy goes only to the weight of it. The jury should be told that the evidence is to be considered only as it may tend to prove an existing state of mind, showing suicidal intent, should be weighed with caution, must appear to have been made in a natural manner, and not under circumstances of suspicion, and must tend to explain the facts connected with the killing.

In such a case as this, where the life and liberty of the accused are at stake, no evidence, whether of declarations or written words of the deceased, which reasonably bears upon the issues should be excluded. Justice and humanity require its consideration.

For the reasons given in this opinion, the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK and HAMER, JJ., not sitting.

EXCHANGE BANK OF WILCOX, APPELLANT, v. H. A. GIFFORD ET AL., APPELLEES.

FILED MARCH 16, 1918. No. 19652.

1. **Appeal:** NEW TRIAL. "Immaterial and irrelevant testimony admitted over defendant's objection, and which may have a tendency to mislead the jury, is good ground for a new trial." *Harrison v. Baker*, 15 Neb. 43.
2. ———: ———. "When it is clear that material testimony has been disregarded by the jury, and which, if considered and given due weight, would require a different verdict from that returned, a new trial will be granted." *Dunbier v. Day*, 12 Neb. 596.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed as to Louisa Gifford, and reversed as to H. A. Gifford.*

F. L. Carrico, for appellant.

O. E. Shelburn, contra.

DEAN, J.

The plaintiff sued H. A. Gifford and Louisa Gifford, his mother, to recover $2,335 on two promisory notes. Judgment for defendants was rendered on the verdict, and plaintiff appeals.

The petition is in the usual form. Defendants filed a joint answer pleading a general denial and alleging forgery. When the taking of testimony was concluded the court, over plaintiff's objection, permitted defendants to file separate answers pleading the same defense in each answer that was before pleaded in the joint answer. Plaintiff contends that in this the court erred, but we do not find it necessary to decide that point in view of this statement in plaintiff's brief: "As to the defendant Louisa Gifford, the jury's verdict would not be assailed had she filed a separate answer in the beginning. * * * The record discloses but little evidence of her liability. * * * None of plaintiff's witnesses saw her sign them (the notes), nor heard her admit her liability."

Defendants argue that there is only one contested fact in the case, namely: "Who committed the forgery? * * * If Minkner (a former assistant cashier) forged the notes, then the judgment is right; if Gifford is the guilty party, then the judgment should have been for the plaintiff as against him." In view of the admissions of the respective parties, and in the present state of the record, the issue is confined to an inquiry respecting H. A. Gifford's liability on the notes.

Plaintiff produced two witnesses, officers of the bank when the notes were given, who testified that the notes in suit were signed by H. A. Gifford at the bank, and that as soon as he signed them he took them away to get his mother's signature, as he stated at the time, and that in each instance he returned shortly with the notes with his mother's name written thereon. Two witnesses called by plaintiff testified in substance that they saw H. A. Gifford sign a note for about $1,400 on January 2, 1912, and that this note on renewal

with its accrued interest and some overdrafts for small amounts and a little borrowed money made up the larger of the two notes in suit; namely, the note for $1,812.20. At the trial Mr. Gifford denied signing the notes in suit, and denied that he wrote his mother's name on either of them. He denied signing the $1,400 note, and failed to recognize practically all of his own signatures. A considerable number of his signatures on bank checks and other instruments that were proved to have been written by him and also his name that he wrote six times while the trial was in progress are in evidence. He testified that he didn't know whether the signatures that purported to be his were genuine or forgeries by the bank. During the trial he also wrote the name "Louisa Gifford" six times, and this handwriting is in the record. All of the signatures so written by him and the name "Louisa Gifford" that he wrote while the trial was in progress and his own and his mother's name that appear on the notes in suit were all apparently written by the same person. On this point as relating to Mr. Gifford the jury seem to have disregarded material testimony offered by plaintiff, and as to him the judgment does not seem to be supported by sufficient testimony.

As there must be a new trial, we are of the opinion that another assignment of error pointed out by plaintiff should be noticed. Plaintiff argues that there was "a studied effort on defendants' part to insinuate before the jury that plaintiff had been doing 'crooked work.'" Ora Brawner is a son-in-law of Mrs. Louisa Gifford, and was called as a witness on the part of the defendants. He testified: "Q. Since this suit has been brought, have you had any conversation with Mr. Gishwiller, the president of the plaintiff bank, with reference to this case? A. Yes, sir. Q. Where was that conversation? A. At Mrs. Gifford's house, out on the porch. Q. Who was present? A. Mr. Woollen and his wife, myself and my wife, and Wilbur Brawner, my son. Q. What time in the day was that conversation?

A. It was in the evening. Q. Repeat the conversation, as nearly as you can. Plaintiff objects as incompetent, irrelevant and immaterial under the issues. Objection overruled. Plaintiff excepts. A. Mr. Gishwiller came down and went in the house to talk to Grandma. He was in there a while, and when he came out he stopped on the porch and talked to the rest of us about getting Grandma to settle the business and not let it go to court. And I asked him if he thought Grandma Gifford signed these notes and then would deny them; and he said, 'No, I don't think she signed these notes.' Q. Go ahead and repeat the rest of the conversation, if you can. A. I got to talking I expect a little rough, and Mr. Gishwiller told us he knew there was crooked work going on up there at the bank; 'but' he said 'I am in' — Plaintiff moves to strike out all reference to 'crooked work in the bank' as irrelevant, immaterial and incompetent; not referring to the notes in question. Motion overruled. Plaintiff excepts. (Witness resuming) And he said he couldn't get out and he couldn't get the other fellows out. And he said, 'I am going to make it a point to be there after this, and look after the business myself.' Plaintiff moves to strike out the answer of the witness as incompetent, irrelevant and immaterial under the issues, for the reason that it does not relate to the notes in this controversy. Motion overruled. Plaintiff excepts."

We know of no rule of evidence that would permit this testimony to be admitted. It was wholly incompetent, and its admission was clearly erroneous. The testimony in no manner related to any disputed point respecting the notes in suit. *Dunbier v. Day,* 12 Neb. 596; *Harrison v. Baker,* 15 Neb. 43; *Monitor Plow Works v. Born,* 33 Neb. 747. There was more testimony of a like nature that we do not find it necessary to discuss. The judgment as to Louisa Gifford is affirmed. As to H. A. Gifford, the judgment is reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., not sitting.

ROSE LEVIN, ADMINISTRATRIX, APPELLEE, v. CITY OF OMAHA, APPELLANT.

FILED MARCH 30, 1918. No. 19789.

1. **Municipal Corporations:** EMPLOYEE. When a policeman of a metropolitan city is assigned to work outside the duties of a peace officer, but falling within the corporate functions of the municipality, he becomes a servant of the municipality in its corporate capacity.

2. ———: ———: NEGLIGENCE: LIABILITY. A municipal corporation is liable for the negligence of one whom it sends upon an errand in connection with its corporate functions to the same extent as an individual or a private corporation.

3. **Master and Servant:** VOLUNTEER ASSISTANT TO EMPLOYEE: NEGLIGENCE: LIABILITY. An employer is not liable for the negligent act of a volunteer assistant procured by his employee, unless the latter can be said to have been clothed with authority express or implied to avail himself of such assistance. But such authority may be implied from the nature of the work to be performed, and also from the general course of conducting the business for so long a time that knowledge and consent on the part of the employer may be inferred. It is not necessary that a formal or express employment on behalf of the employer should exist, or that compensation should be paid by or expected from him.

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

John A. Rine, W. C. Lambert and *L. J. TePoel,* for appellant.

Ringer & Bednar and *Henry Monsky, contra.*

MORRISSEY, C. J.

Plaintiff recovered a judgment for the death of Isadore Levin caused by the negligence of one Roy Furstenberg in driving an automobile at a reckless rate of speed upon the streets of defendant city. That Furstenberg was negligent is admitted, but defendant denies responsibility for his acts.

At the time of inflicting the injury, Furstenberg was driving an automobile owned by a private party, which had been taken to the city garage by its owner in the expectation of making a sale thereof to the city. Furstenberg appears to have been a friend of the owner of the car and to have hung around the garage for several days. On the day of the accident, and for some time before, one Baughman was foreman of the garage, and Mr. Kugel was a member of the city commission and in charge of the street department. Baughman was carried on the city pay roll as a police officer. The garage of which he was foreman made repairs on the police department's automobiles, and also upon the automobiles in use by the street department of which Mr. Kugel was the head. One Davis, the chauffeur for the street commissioner, drove the commissioner's car to this garage for the purpose of changing an inner tube. The tube he desired to use was at another garage. Furstenberg asked Baughman if he should go after the tube for Davis. Baughman, according to one witness, said, "Yes; go and hurry back." According to another he said, "Yes; go ahead." The record does not disclose whether Baughman directed Furstenberg to take this automobile or not, but Baughman testified: "It is implied around that place if you go out any place you are going to take a car if you can get it." Furstenberg took the car, went after the repair needed for the street commissioner's car, and while on this errand negligently killed plaintiff's intestate.

On behalf of the city it is urged that Furstenberg was not an officer, agent or employee of the city; that Baughman was a police officer; that the garage of which he was foreman was under the police department and maintained principally for looking after cars in use in the police department; that no direction given by Baughman would bind the city; that he was without authority to hire or discharge persons in behalf of the

city, and that there was laid upon him no duty to make repairs on any car not engaged in the police department; that the city would not be liable for the negligence of its police officers, and no liability could attach under any authorization that Baughman might give to Furstenberg.

The evidence discloses that the car of the street department had regularly been repaired at this garage; that, although Baughman was carried on the city's payroll as a policeman, the service he rendered was that of a shop foreman. That he had the right, and that perhaps it was his duty to make the repairs on the street commissioner's car, had long been recognized by the custom of making such repairs. If it were his duty to make the repairs, he surely had the authority to send after the necessary articles, and, if he could direct his helpers to jack up the car and change the tires, he could, no doubt, direct a helper to go to another building and bring the inner tube. In making such repairs and in giving such orders Baughman was acting in behalf of the corporate interests of the city, and not as a police officer. The fact that he was enrolled as a policeman and might have been clothed in a policeman's uniform and given a beat upon the street does not change the character of his employment, when he was in fact doing the work of a shop foreman. The character of the employment will govern, and he must be held to have the power incident to the duties which the city imposed upon him. His work was inconsistent with the duties of a peace officer, but entirely consistent with the duties of an employee engaged by the city in its corporate capacity.

The car which Furstenberg drove, it is true, was not owned by the city, and had been taken to this garage by its owner to be sold to the police department; but it had been stored in this garage as city cars were stored, the oil and gasoline for its use had been fur-

nished by the city, and to some extent it had been used in the city service. It was under the control of the city, was being driven by one authorized by the foreman of the city's garage to drive it, and was on a mission for the street department.

The defendant is not liable for the negligence of its police officers while engaged in the police department, but Baughman had lost the character of a peace officer, and had become the servant of the municipality in its corporate capacity. As foreman of the shops he gave directions to those engaged in the handling of cars and directed the making of repairs. The character of this work was such, under the circumstances, that the employment of assistants on the master's account must necessarily have been contemplated. The authority to send Furstenberg on this errand, if not directly given, was implied, and the negligence of the messenger must be regarded as the negligence of the city. See article by Mechem on "The Liability of a Master to Third Persons for the Negligence of a Stranger Assisting his Servant," in 3 Michigan Law Review, 198; also, 18 R. C. L. 785, sec. 245; and note to *Thyssen v. Davenport Ice & Cold Storage Co.*, 13 L. R. A. n. s. 572 (134 Ia. 749).

The instructions complained of are in line with this view of the law, and the judgment is

AFFIRMED.

SEDGWICK, J., concurring.

The city established an automobile repair shop, and placed it in charge of Mr. Baughman as foreman and manager. He must be presumed to be an expert automobile repairer and fully competent to conduct such a shop and manage such a business. We have generally held that, when a municipal corporation engages in such business, its responsibilities and liabilities are the same as are those of private corporations or individuals in the conduct of such an enterprise. The city sent an

automobile to this shop for repairs, and the foreman found that it was necessary to send for an article to be used in such repair. He did not apply to the mayor and council to send for the article, but himself sent the young man Furstenberg for it. It is said that Furstenberg was "a stranger," and the foreman of the shop was not authorized to send "a stranger." He was 18 years of age and accustomed to driving an automobile, and there could be no objection to him personally as a proper party to perform such a duty for the repair shop. He was a stranger in the sense that he was not a regular employee of the city. It was "implied around that place if you go out any place you are going to take a car if you can get it." They were in the automobile business, and when the foreman found it necessary to have such a service performed without delay, as the evidence shows it was in this case, the mayor and every member of the council must have known (if they knew anything about how their repair shop was conducted) that automobiles were so used. A great deal is said about driving an automobile as "a hazardous occupation," etc. It may be driven in a hazardous way, and evidently was in this case. But, would the city authorities have any right to contend that, if the foreman of their repair shop had immediate need of an article to be used in the general business of the shop, and was sending a young man, two years older than the law names as the age to qualify him to drive an automobile, he should forbid the one so selected to take one of the automobiles that were customarily used upon such errands, on the ground that an automobile is a dangerous thing? The foreman of the repair shop was in charge of that business. He was expressly and necessarily authorized to do those things that were ordinarily and reasonably necessary in carrying on the business. There was no one else to do it. The mayor and council could not do it if they were qualified. The city was running this shop by its foreman, and every act he did in the proper discharge

of his duties in that business was the act of the city. The city, therefore, sent Furstenberg with this automobile to perform this service for the city, and the city is responsible for the manner in which it was performed.

CORNISH, J., dissenting.

Law and common sense generally do and should agree. I do not say the opinion is not common sense, but I do believe that hundreds of business men, farmers, shop-owners, factory-owners, and others will be surprised to learn that their foremen (mere servants), without power to hire men, can engage a stranger at work operating another stranger's automobile through the congested streets of a city, and do it in the master's name so as to make him responsible for the negligence of the stranger so engaged. Operating an automobile is a hazardous occupation and is so recognized in the law.

One can imagine that the law might be that, when one is injured by the negligence of another, and the accident is one which would not have occurred but for the fact that a third party was engaged in a business enterprise, which thus became an incidental cause or occasion of the injury, then the third party should be responsible for the damages sustained. It could be said that the business should bear the loss which it had made possible. But this would be neither good law nor good sense. Such a rule would be destructive of business enterprise. It would make it impossible for a talented young man of limited means to pass from the wage-earning to the proprietor class. One such judgment as in the instant case might exhaust his capital.

The law as it is may, I think, be stated in a sentence. It holds those only liable for negligence who are guilty of it, either by their own act or that of another acting for them. It says to the individual employing men, either as agents or servants: "You must not be negligent in your selection of them, but must have a

care to see that they are safe men for the work they are to do. Having so selected them, you are responsible for their acts done in the course of their employment. Having these liabilities imposed upon you, you are privileged to select your own agents or servants."

The trust committed to an agent is exclusively personal, and cannot be delegated by him. A servant, which term includes foreman, has not the power to make contracts in the name of his master. Neither an agent nor a servant has, ordinarily, the power to employ men.

Applying these general principles of law, Baughman, the foreman, was not empowered in the name of his master to put Furstenberg at work operating the automobile, and the master was not liable for Furstenberg's negligence in operating the car.

But there are certain exceptions, or apparent exceptions, to the general rule above stated. Among these are the following:

(1) The master being liable for his servant's negligence while acting within the scope of his employment, it follows that, if the servant is himself negligent in permitting a stranger to engage in his master's work, then in certain cases the master may be liable for the servant's negligence. This rule has no application to the instant case, because this action is based, not upon the negligence of Baughman, foreman, but upon the negligence of Furstenberg.

(2) Cases have arisen where the servant or agent permitted a stranger to help him in his work, under his control and direction, in which the master has been held liable for the stranger's negligence, on the principle *dominus pro tempore;* the stranger's acts are the servant's acts. In *Slothower v. Clark,* 191 Mo. App. 105, 110, Lord Abinger is quoted as having said in an early case, where the servant permitted another, sitting beside him, to drive the team: "I think that the reins being held by another man makes no difference, it was the same as if the servant had held them himself." The court also said (quoting from *James v. Muehlebach,* 34 Mo.

App. 512): "But not so if the servant had quit the carriage and substituted the stranger in charge, generally, in his stead, without the knowledge of the master."

(3) Authority of the agent, and sometimes of the servant, to engage others may be implied in certain cases growing out of the exigencies or necessities of the situation, the nature of the authority given, or based upon the custom or usage of trade in similiar cases. An instance arises when in a sudden emergency the agent or servant is unable to consult with his master or principal, and the law implies authority to procure the necessary help.

The majority opinion seems to be based upon implied authority growing out of the nature of the authority given to Baughman, foreman, or possibly based upon implied authority growing out of the custom of trade in similar cases. Baughman as foreman would, I think, have no authority either to employ a man or to delegate his authority to a stranger. This involves a question of fact. The law implies authority only where it is necessary or customary. If a man were needed to go after the tube, that end could be accomplished by telephoning the messenger or express service; or it could be done by dealing with Furstenberg as an independent contractor to procure the tube, and in doing so he would act under his own direction and control, in either of which cases no liability could arise against the city. Assuming, however, that Baughman as foreman of the shop had implied authority to send another after the tube, it by no means follows that he could send him in an automobile, a hazardous occupation. Mechem, in his work on Agency, vol. 1, (2d ed.) sec. 315, in discussing this exception to the general rule, states: "Where in the execution of the authority an act is to be performed which is of a purely mechanical, ministerial or executive nature, involving no elements of judgment, discretion or personal skill, the reason for the general rule does not apply, and the power to entrust the performance of it to a subagent may be

implied." As was held by this court in *Home Fire Ins. Co. v. Garbacz,* 48 Neb. 827: "Authority conferred upon an agent requiring the exercise by him of special skill, judgment, or discretion cannot, in the absence of a known usage, unless justified by the necessities of the case, without the consent of the principal, be delegated to another." Can it be doubted that the operating of an automobile in a crowded street requires the exercise of skill and discretion? In many states individual licenses are required, and the statute of this state recognizes the attending dangers. Is it suggested that, by usage or custom of the trade or business, foremen who need to go by themselves or send others upon errands can and do send them in automobiles. Such custom was neither pleaded nor proved. We all know it does not exist. By custom foremen would no more assume to exercise this power than other servants. There is no more need. The ordinary owner of an automobile would think it absurd that his own servant (not a chauffeur) could, without permission, general or special, use his automobile to go upon a necessary errand. He would think it more absurd that his chauffeur could, without permission, delegate to a stranger the power to use his automobile on such errand. Assuming, as I said, that Baughman, foreman, from the nature of his position and work, had implied authority to send for the tube, his power, both in reason and in law, would be limited to sending one on foot, by street car, or in some manner where extra care and skill would not be required. As long as the law recognizes no principle of vicarious liability, which it does not, only the person who is guilty of negligence should suffer from it. The city of Omaha never authorized Furstenberg to operate the automobile. It never authorized the foreman to delegate to others the power to operate automobiles; and the proposition, if it were advanced, that there is any usage or custom of business in accordance with which foremen are accustomed to assume power to send strangers on errands,

driving an automobile, it seems to me is too absurd for discussion.

Mechem is cited as an authority in the opinion. He is a safe authority. I call attention to the following sections in the recent edition of his work on the Law of Agency, vol. 1, (2d ed.) secs. 305, 306, 313, 315, 335, 336, 988, and vol. 2, sec. 1866. For other authorities, see 2 C. J. p. 689; *Long v. Richmond,* 68 N. Y. App. Div. 466; *Mangan v. Foley,* 33 Mo. App. 250; *James v. Muehlebach,* 34 Mo. App. 512; *Slothower v. Clark, supra; Geiss v. Twin City Taxicab Co.,* 120 Minn. 368; *Gwilliam v. Twist,* 2 Q. B. Div. 1895 (Eng.) 84.

ROSE, J., dissenting.

In my judgment the doctrine announced in the majority opinion and in the concurring opinion fastens upon cities a new and indefensible liability for the wrongs of strangers. A person on the city pay roll as a policeman, but in charge of a municipal garage where automobiles are repaired for the police department, permitted a stranger to go to another garage for a rubber tube. The stranger took a powerful automobile belonging to another stranger, and while rushing along a public street negligently killed a man. For the negligence or wrong thus described, the city in this lawsuit was adjudged to pay $8,877. In affirming the judgment, as I view the decision, negligence is traced from the dangerous agency of a stranger's rapidly-moving automobile in a populous city to another stranger, and from the latter through a policeman or foreman of a municipal repair shop to the city itself. I cannot agree with the majority. In my opinion the conclusion has no substantial foundation in fact or law. The private citizens who bear the pecuniary burdens of municipal government ought to find the limits of official power in state statutes, in ordinances enacted pursuant to those statutes, and in contracts or employments authorized by such statutes and ordinances. I do not observe in

the majority opinions, in the record, or in the arguments any reference to a statute, an ordinance, a contract, or an employment conferring upon the policeman or foreman in charge of the municipal garage authority to send a stranger, in a powerful and dangerous automobile belonging to another stranger, through the streets of a populous city to get a rubber tube. Municipal power making a city and its inhabitants liable for the wrongs of strangers should not emanate from the whim or caprice of a policeman or foreman of a municipal garage. Following a former opinion holding in effect that the policeman or foreman cannot be summarily removed, his implied power to speak for the city and to make it liable in damages for the wrongful acts of strangers will, in my view of the decision, add a new and startling chapter to municipal law. Such power, if granted, ought to come from the legislature. If the duties of the policeman or foreman in the municipal repair shop required the use of a rubber tube, his implied power in that respect went no further than to get it himself or to employ an available, independent contractor engaged in furnishing a recognized messenger service—an agency without power to create a municipal liability for damages. Under existing conditions the doctrine announced in the majority opinion and in the concurring opinion should, in my judgment, be rejected.

OSCAR ROOS, APPELLANT, V. JACOB KLUMP, APPELLEE.

FILED MARCH 30, 1918. No. 19846.

Appeal: CONFLICTING EVIDENCE. When, on a trial for damages alleged to have been caused by the failure of an employer to equip a wood planer with a safety device, the defendant denies that plaintiff was his employee at the time he received the injury, and also pleads that the machine was suitably equipped, but the plain-

tiff negligently failed to use the safety appliance furnished, and the issues are submitted to a jury on conflicting evidence, a verdict in favor of defendant will not be set aside, if there is sufficient competent evidence in the record to sustain the verdict on either issue tendered.

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

Charles W. Beal and *Morrow & Morrow,* for appellant.

Sullivan, Squires & Johnson and *Guy T. Tou Velle, contra.*

MORRISSEY, C. J.

Plaintiff brought suit against defendant to recover damages for injury to his left hand. The cause of action is predicated upon section 3597, Rev. St. 1913, sometimes called the "Safety Appliance Act."

Plaintiff alleged that at the time of the injury he was the employee of defendant, and while operating a wood planer, without a proper safety device, he suffered the injury. Defendant denied that plaintiff was his employee, and also asserts that a proper safety device for the planer was furnished, but that plaintiff negligently failed and refused to place the same in position, and that his injury was due to his own negligence. There was a verdict and judgment for defendant, and plaintiff has appealed.

Defendant was the owner of a shop equipped for doing woodwork. He was 80 years of age or more, and, because of his advanced age, the shop was not regularly operated. Plaintiff was about 35 years of age, and had had considerable experience as a woodworker. Their stories vary as to the exact arrangement under which plaintiff went into the shop, but the general import of the testimony is that it was agreed that plaintiff might use the shop and tools and such materials as defendant had on hand; make ch[illegible] as he thought proper; that defendant should firs[illegible] aid for any of his material that was used, and an[illegible] balance remaining should be

equally divided between the two. The planer was one of the pieces of machinery that was thus turned over to plaintiff to be operated. A proper safety device was in the shop, but it appears that different classes of work were done upon the machine, and in order to conveniently operate the machine it was necessary, from time to time, readjust the safety device, or if the timber to be planed was large the safety device might be removed from the machine as the timber would take the place of the safety device. There is testimony to the effect that plaintiff was shown this safety device, which was then temporarily detached from the machine, and informed as to its use. The testimony also shows that he was a man of many years experience in woodworking.

The court submitted to the jury the question as to whether a partnership existed between plaintiff and defendant, and also the question as to whether the machine was properly equipped. The finding is a general one. The evidence, which we shall not undertake to set out, is sufficient to sustain the finding on either defense made.

Appellant filed a very able brief in which instructions given are analyzed and criticised; but, when the instructions are read together and taken in connection with the evidence submitted on behalf of the respective parties, they appear to be free from error.

The law advanced by appellant as to the duty of the employer to properly equip his machine is not open to dispute, but the jury might have found that the relation of employer and employee did not exist, and, again, the jury might have found that the machine was properly equipped, but that plaintiff failed to avail himself of the protection the equipment afforded him.

The record is free from error, and the judgment is

AFFIRMED.

SEDGWICK AND DEAN, JJ., not sitting.

EDWARD F. KRAUSE, APPELLEE, v. ALBERT NAIMAN ET AL., APPELLEES; MARY BOHLMEYER ET AL., APPELLANTS.

FILED MARCH 30, 1918. No. 19884.

Life Estates: INCUMBRANCES: PAYMENT BY LIFE TENANT. "Where a life tenant of real estate pays off a past due incumbrance which is a lien upon the entire estate, he is entitled to contribution from the remainderman, and should recover from him the difference between the principal debt and the present value of an annuity equal to the annual interest charge running during the years which constitute the life tenant's expectancy of life." *Draper v. Clayton*, 87 Neb. 443.

APPEAL from the district court for Thayer county: LESLIE G. HURD, JUDGE. *Affirmed in part, and remanded, with directions.*

W. E. Goodhue and *W. G. Hastings*, for appellants.

M. H. Weiss, W. C. Weiss, J. T. McCuistion, J. J. Burke, J. P. Baldwin and *C. L. Richards, contra.*

MORRISSEY, C. J.

This is a suit to impress a lien upon a quarter section of land. In 1891 Thador Naiman purchased a quarter section of land in Thayer county, which was then mortgaged for $1,600 to the Mutual Benefit Life Insurance Company. As part of the purchase price he assumed and agreed to pay this mortgage. He departed this life in 1894, intestate, leaving surviving him his widow, Mathilda Naiman, and four minor children. The widow married one Henry Koch. Koch was appointed administrator of the Naiman estate, and obtained license to sell the real estate at administrator's sale. He made the sale to his wife, Mathilda Koch, formerly Mathilda Naiman. She took the title subject to the mortgage mentioned. Mathilda Koch and her husband subsequently conveyed the real estate by warranty deed to Henry Bohlmeyer, subject to the $1,600 mortgage. Bohlmeyer subsequently procured a loan from the Con-

servative Investment Company, and with the proceeds thereof paid the original mortgage of $1,600 held by the Mutual Benefit Life Insurance Company, and also paid a $500 mortgage which he had given to Mrs. Koch as part of the purchase price. Henry Bohlmeyer died, leaving several minor children. A guardian was appointed, who, under license from the court, borrowed $1,000 from this plaintiff, which was used in payment of a balance then due and owing on the mortgage which Henry Bohlmeyer in his lifetime had given to the Conservative Investment Company. At the time of these various transactions all parties believed that Henry Bohlmeyer had taken good title to the real estate under his deed from Mathilda Koch and her husband. Subsequently suit was brought to have that deed set aside because the land conveyed was the homestead of Thador Naiman and his family and was not subject to his debts. The case finally reached this court, where it was held that the deed was void so far as the conveyance of the fee was concerned, and that Bohlmeyer took nothing but the life estate of Mathilda Koch.

There is no dispute as to the facts alleged in plaintiff's petition. The money he loaned was used to discharge the debt which rested against the fee title. He asked that the mortgage releases which had theretofore been filed be set aside and canceled, and that he be subrogated to the rights of the original mortgagee. The court granted this relief. The Bohlmeyer heirs appeal.

Appellants' brief is not written in compliance with our rules, and under some circumstances would be disregarded.

Plaintiff should recover the money he advanced to pay off the indebtedness on this farm. Appellants have an estate for the life of Mary Bohlmeyer, and the Naiman heirs have a reversionary interest. The decree made plaintiff's mortgage a first lien on the life estate, and reserved for future adjudication the issues between the life tenants and the remaindermen. We

are of opinion that the amount chargeable to each should be settled by this decree, and if the life tenants are called upon to pay the whole in order to protect their interests they will have a right to contribution from the remaindermen and a lien upon the real estate for the amount.

The judgment is affirmed in so far as it gives plaintiff the relief prayed, but remanded, with directions to determine the issues between the tenants and the remaindermen.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., not sitting.

ROBERT E. MARBLE, APPELLEE, V. NICHOLAS SENN HOSPITAL ASSOCIATION, APPELLANT.

FILED MARCH 30, 1918. No. 19864.

1. **Charitable Institutions:** NEGLIGENCE: LIABILITY. The doctrine that a charitable institution, conducting a hospital solely for philanthropic and benevolent purposes, is not liable to inmates for the negligence of its servants does not extend to a physician who, by invitation, enters the hospital with a patient to procure a radiograph for the latter and is injured through the negligence of the X-ray operator.
2. **Appeal:** HARMLESS ERROR. Error in admitting testimony out of the regular order, if admissible later in the trial, is not sufficient ground for a reversal, where the record for review fails to show that appellant was prejudiced. *Hoskovec v. Omaha Street R. Co.*, 85 Neb. 295; *Smith v. McKay*, 90 Neb. 703.

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

Sullivan, Rait & Thummel, for appellant.

Mahoney, Kennedy, Holland & Horan, contra.

ROSE, J.

This is an action to recover $25,000 in damages for personal injuries. On the verdict of a jury judgment

was rendered in favor of plaintiff for $8,500. Defendant has appealed.

At Omaha defendant conducts a hospital where medicine and surgery are practiced. In one of the rooms there is an X-ray machine operated by Dr. Keugle for defendant. Plaintiff, who is a practicing physician, went to the X-ray room with a patient, the little daughter of David Thimgan, to get a radiograph of the child's head. Thimgan sat on a chair in front of the X-ray machine with his daughter on his lap. While they were in the position thus indicated, plaintiff attempted to comply with a request of the operator to hold the child's head, plaintiff's own head at the time being near the wires which carry the electric currents to the X-ray tubes. After the electricity had been applied to the wires plaintiff fell to the floor, breaking his left leg. Defendant is charged with negligence in placing plaintiff where his body made a short circuit for escaping electric currents; in failing to warn plaintiff of the dangers of such close proximity to the wires; in failing to use an available appliance to keep the wires a safe distance from plaintiff; in failing to place the X-ray machine where the dangerous wires would be vertical, thus keeping them at a safe distance; in failing to provide a competent and experienced X-ray operator. Defendant denied negligence on its part, and pleaded that it is an eleemosynary institution, and as such is not liable for the negligence of its servants; that plaintiff assumed the risk of contact with the electric currents, knowing the obvious, existing dangers; that plaintiff fell in an epileptic convulsion, his injury being the result.

Defendant argues that there should have been a nonsuit on the ground that defendant is an eleemosynary institution, and that as such it is not pecuniarily liable for the negligence of its servants. This proposition is based on the following principle of law:

"A charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses." *Duncan v.*

Nebraska Sanitarium & Benevolent Ass'n, 92 Neb. 162, 41 L. R. A. n. s. 973.

In the case cited immunity from liability is limited to "inmates." The rule thus announced has the support of precedent, but in a recent opinion of the supreme court of Virginia, after an extended analysis of the cases, it was held that the doctrine of non-liability to inmates did not extend to strangers, the modern theory being as follows:

"One who at the request of a patient about to enter a hospital accompanies him to render reasonably necessary assistance is an invitee of the hospital, to whom it owes the duty of exercising ordinary care to have the premises reasonably safe." *Hospital of St. Vincent of Paul v. Thompson,* 51 L. R. A. n. s. 1025 (116 Va. 101).

In a recent article on hospitals it was said:

"The theories of the immunity of a hospital from liability on the ground of public policy and on the ground that the assets are a trust fund having been very generally rejected by the courts, and the doctrine of waiver by acceptance of benefits being applicable only to patients, the law has come to be that as to others not the recipient of the institution's charity the rule of responsibility for the negligence of its servants and agents is applied as in cases of the ordinary business corporation." 13 R. C. L. 948, sec. 12.

This view of the law conforms to correct standards of justice, and defeats the immunity pleaded in the answer of defendant.

One of the assignments of error challenges the admission of testimony that Dr. Keugle, the X-ray operator, told plaintiff he got too near the electric wire, and that it carried 250,000 volts. It is argued that the statements of this character, if made, related to acts of negligence or to transactions occurring at an earlier date, and that they had no connection with the *res gestæ* and were merely hearsay, or were declarations made by an agent without authority to bind his principal. Should the judgment be reversed because

the trial court overruled objections to testimony of this nature? An issue of fact was raised by defendant's plea that epilepsy was the proximate cause of plaintiff's fall and resulting injury. On that issue defendant called the X-ray operator, a physician, who testified that, from what he knew of conditions at the time of the accident, he was of the opinion that plaintiff had an "epileptic seizure;" that plaintiff was from twelve to fifteen inches from the wire—a safe distance; that it was not possible for a spark to jump that far; that 45,000 to 50,000 volts were generally used for such an exposure; that the X-ray machine would develop between 95,000 and 100,000 volts, but would not develop 250,000 volts. At some stage in the trial the challenged testimony was admissible to weaken conflicting testimony of the X-ray operator. For that purpose, however, the testimony assailed was not adduced in the regular order, but the record fails to show that defendant was prejudiced by the irregularity. Tested by the following rule, the assignment is overruled: Error in admitting testimony out of the regular order, if admissible later in the trial, is not sufficient ground for a reversal, where the record for review fails to show that appellant was prejudiced. *Hoskovec v. Omaha Street R. Co.*, 85 Neb. 295; *Smith v. McKay*, 90 Neb. 703.

An instruction permitting the jury to recognize as negligence the failure to provide a competent and experienced operator and the failure to provide for the safety of those around the X-ray machine is criticised as being without support in the evidence. Negligence in both particulars may fairly be inferred from the testimony. Error prejudicial to defendant has not been found in the record.

AFFIRMED.

SEDGWICK, J., not sitting.

CLARENCE T. JOHNSON ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 101, APPELLANT.

FILED MARCH 30, 1918. No. 20320.

1. **Statutes:** AMENDMENT: CONSTITUTIONAL PROVISIONS. Chapter 121, Laws 1915, which amends section 6942, Rev. St. 1913, is germane to the subject of that section, and, as it contains the section so amended and repeals the original section, it complied with the Constitution in that regard.

2. ———: ———: ———. Section 1, ch. 121, Laws 1915, is also germane to the act amended, and is valid.

APPEAL from the district court for Saunders county: EDWARD E. GOOD, JUDGE. *Reversed.*

Charles H. Slama, for appellant.

A. Z. Donato, contra.

SEDGWICK, J.

A petition praying for a change of school district boundaries was presented by school district No. 101 of Saunders county, acting through its trustee, to the board of county commissioners, the county superintendent and the county clerk of that county, under the provisions of chapter 121, Laws 1915. The petition set forth that the district maintained a graded school of twelve grades and had an area of less than six sections of land. The plaintiffs, who are taxpayers and legal voters in two of the school districts affected, prosecuted a petition in error to the district court, assigning that the board erred in failing to give notice of the petition, in failing to set a day for a hearing and to give notice of the same to the landowners or legal voters of the school districts affected, and that the board erred in assuming jurisdiction in the matter. The district court found that the board was without jurisdiction because the act is in contravention of section 11, art. III of the Constitution of the state of Nebraska,

which provides: "No law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." The action of the board was reversed and the petition dismissed.

It is conceded by both parties that the only question presented is the constitutionality of the act of 1915. The district court so regarded it, and held that the act was unconstitutional. The main purpose of the act of 1915 was to amend section 6942, Rev. St. 1913. That section, among many other things, provides for allowing children of one district to attend school in another when they reside at a great distance from the school in their own district and much nearer to the school in an adjoining district. That section is stated in the title of the act to be amended and repealed, and the section as amended is incorporated in full in the new act. The new act changes the purport of the section entirely. It provides: "Districts contiguous to each other may unite and form one consolidated district in the manner following." It then proceeds to provide for changing the boundaries of contiguous districts, and as this would ordinarily remedy the evil that was aimed at in the original section by putting the residence of the scholars in the district that had the schoolhouse nearer to their residence, so that it would not any longer be necessary to transfer scholars in one district so as to attend school in another, the new act is germane to the section amended. The first section of the act, which provides for changing the boundaries of very small districts containing less than six sections of land, is as much germane to the old section 6942 as the remainder of the new act is, and can be supported upon that ground; that is to say, if section 1 had been inserted as a clause or a subdivision of the new act, it would have been germane to section 2, and so would have been as much germane to the original section 6942 as any part of the new act would be. One purpose of the new

act was to amend section 6942 by making a more rational way of bringing scholars nearer to the school that they are required to attend, and so was germane to the section amended and repealed, and section 1 was also germane to the original section.

It follows that the act does not violate any provision of the Constitution, and the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

MIDLAND GLASS & PAINT COMPANY, APPELLANT, V. OCEAN ACCIDENT & GUARANTEE CORPORATION, APPELLEE.

FILED MARCH 30, 1918. No. 19718.

1. **Insurance:** INDEMNITY POLICY: NOTICE OF ACCIDENT. "A provision in an accident indemnity policy that the assured on the occurrence of an accident shall give immediate written notice thereof, with the fullest information obtainable at the time, to the assurer is a reasonable requirement, but the term 'immediately' is to be reasonably construed in connection with the attendant circumstances." *Chapin v. Ocean Accident & Guarantee Corporation*, 96 Neb. 213.

2. ———: ———: ———. In a case where no bodily injury is apparent at the time of the accidental occurrence, and there is no reasonable ground for believing that a claim for damages may arise therefrom, the assured is not required to give the insurer notice until the subsequent facts as to injury are brought to his attention, and if notice is given immediately thereafter with full information as to the accident, such notice will be a sufficient compliance with the provision above mentioned.

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

Baldrige & Keller, for appellant.

Nolan & Woodland, contra.

HAMER, J.

This was an action to recover on an employer's liability policy issued by the Ocean Accident & Guarantee

Corporation, by which it insured the Midland Glass & Paint Company against loss from liability on account of bodily injuries accidentally suffered by any of the employees of the assured. The record discloses that the assured was sued by one Omar Earl in the district court for Douglas county for damages which he claimed to have suffered while he was employed by the assured. Judgment was rendered against assured for the sum of $575 and costs, which, with attorney's fees, amounted to $602 which the Midland company was required to pay, and this suit was brought to recover that sum from the defendant herein on its policy of insurance. The cause was tried to the court without a jury, and resulted in findings and a judgment for the defendant dismissing plaintiff's action. Appellant's main contention is that the trial court erred in a conclusion of law that the failure of the assured to give notice to the defendant company of the alleged accident to Omar Earl at the time or shortly after it occurred released the insurance company from all liability to plaintiff on its policy.

There was no dispute between the parties as to the issuance of the policy on which the suit was brought or as to its terms, one of which was: "The assured, upon the occurrence of an accident, shall give immediate written notice thereof, with the fullest information obtainable at the time, to the American head office of the corporation, or to one of its duly authorized agents. The assured shall give like notice, with full particulars, of any claim made on account of such accident. If thereafter any suit is brought against the assured to enforce such claim, the assured shall immediately forward to the American head office of the corporation every summons or other process that may be served upon the assured."

This provision was pleaded as a defense, and on this provision the court found for the defendant and dismissed the plaintiff's action. The record and bill of exceptions show without serious dispute that on the 20th

day of May, 1911, while the policy in question was in force, Omar Earl, while employed by the appellant as a janitor in its plant, was struck by a fire door, and was found down a stairway between the first floor and the basement of this building; that he fell down on the steps and rolled down the stairs until he reached the third or fourth step from the bottom, when he was caught by a fellow workman and helped the rest of the way to the basement floor. Earl immediately stated to all of those present that he was not injured or hurt in any way except a slight abrasion of the skin on one of his fingers. He went on with his work at once, refusing to consult a doctor, and continued his employment for many months thereafter, drawing full pay and never making any complaint of any injury to any one. More than a year afterwards Earl left the employment of the Midland company and engaged in keeping a rooming house, and on the 18th day of April, 1914, without any notice or making any claim of injury, commenced an action against the company for damages, alleging that he sustained injuries by reason of the accident of May 20, 1911. As soon as summons was served on the Midland Glass & Paint Company, and it had notice of Earl's claim, it immediately sent the summons to the insurance company and gave it notice of the claim, together with a full statement of all the facts and requested the defendant company to defend the suit. This the defendant refused to do, and claimed that it was under no obligation to the assured, because it had not been notified of the accident of May 20, 1911; that the policy was void for that reason. The appellant then filed an answer in the said action, but finally, after notifying the insurance company of its intention to do so, settled the suit by allowing the plaintiff to take judgment for $575, costs and attorney's fees, as above stated, and after paying the judgment brought the suit against the insurance company on its policy.

Appellant in support of its contention cites *Chapin v. Ocean Accident & Guarantee Corporation*, 96 Neb. 213. That case seems to be decisive of the instant case. In that case the appellee herein was the defendant, and pleaded the same provision of the policy as in this case. It was then held that the facts, which were much the same as those in the instant case, were sufficient to excuse the plaintiff from notifying the insurance company of the alleged accident at or immediately after it occurred, and the defendant was held liable on its policy. In the opinion of LETTON, J., it was said: "As used in an indemnity policy such as this, we are of opinion that the word 'accident' means an undesigned and unforeseen occurrence of an afflictive or unfortunate character resulting in bodily injury to a person other than the insured. It is evident that it cannot have been the intention of the parties that such an accident as a mishap, casualty or misadventure occurring without bodily injury to any one should be reported, since with such an occurrence defendant has no concern. To illustrate, suppose that in carelessly closing the door of an automobile the man in charge should inflict a slight or trivial bruise upon a passenger or bystander, of which no present external indication appeared, and as to which the individual disclaimed any injury, or suppose that the finger of such a one was pricked or his skin abrased in some manner, resulting from the use of the automobile, would the policy make it imperative that immediate notice of such occurrence should be given, upon the penalty of a loss or forfeiture of the insurance in case an injury later developed? We cannot take this view. If no apparent injury occurred from the mishap, and there was no reasonable ground for believing at the time that bodily injury would result from the accident, there was no duty upon the assured to notify the insurer."

We quote the foregoing language with approval, and it seems clear that the assured in this case was under

no obligation to notify the insurance company of the slight accident May 20, 1911. He was not required to give notice of an injury so long as there was no evidence that the injury existed. *Woodmen Accident Ass'n v. Pratt,* 62 Neb. 673; *South Knoxville Brick Co. v. Empire State Surety Co.,* 126 Tenn. 402; *Empire State Surety Co. v. Northwestern Lumber Co.,* 203 Fed. 417.

This court does not look favorably on conditions of forfeiture, and they are not to be adopted unless such was the obvious intention of the parties. In *Phenix Ins. Co. v. Holcombe,* 57 Neb. 622, MR. JUSTICE SULLIVAN, speaking for this court, said: "Forfeitures are not favored, and in contracts of insurance a construction resulting in a loss of the indemnity for which the insured has contracted will not be adopted except to give effect to the obvious intention of the parties."

In *Woodmen Accident Ass'n v. Pratt, supra,* it was held: "When a time is fixed in a policy of accident insurance for the giving of the notice of an accident and injury resulting therefrom for which indemnity is claimed, with the particulars thereof, which is reasonable in its character, this will ordinarily be regarded as a condition precedent to be complied with before a recovery can be had. * * * The question of the sufficiency of the excuse offered, and the reasonableness of the time in which the act is performed, (is) to be determined according to the nature and circumstances of each individual case; the beneficiary in all cases being required to act with diligence, and without laches on his part."

In the case at bar it clearly appears that no one had any idea that a claim for damages would ever result therefrom. Indeed, Earl himself at all times stated that he was not hurt, and the abrasion on his finger was so slight that it never interfered with his work. In fact, he continued to perform his duties without complaint, receiving full pay for many months, and never notified the insured until his suit was brought. Notice of his

claim was given to the defendant company as soon as the assured knew of it, and under the circumstances we hold that the policy was not forfeited by the failure to give defendant notice on or immediately after the 20th day of May, 1911. It follows that appellant's contention is well founded.

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

REVERSED.

SEDGWICK, J., not sitting.

GRACE A. BRIGGS, APPELLEE, v. HENRY M. KEMP, APPELLANT.

FILED MARCH 30, 1918. No. 19977.

1. **Pleading:** AMENDMENT. It is not error for the district court in furtherance of justice to allow plaintiff to amend his petition to conform to the facts proved on the trial. *Blondel v. Bolander*, 80 Neb. 531.

2. **Evidence** examined, and *held* sufficient to sustain the decree of the district court.

3. **Appeal:** AFFIRMANCE. A decree of the district court in a case tried to the court without a jury will not ordinarily be reversed for the admission of some incompetent evidence; the presumption being that only competent evidence was considered by the court in arriving at the judgment.

APPEAL from the district court for Colfax county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

George W. Wertz, for appellant.

Cain & Mapes, contra.

HAMER, J.

This is an appeal from a decree of the district court for Colfax county for the specific performance of a conveyance of lots 1, 2, 3 and 4, in block 7, in Groat's addition to the city of Schuyler, Nebraska, to plaintiff.

The defendant Kemp has appealed. He contends that the trial court erred in allowing plaintiff to amend her petition to conform to the facts proved on the trial. His argument is that the amendment changes plaintiff's cause of action. An examination of the pleadings fails to sustain his contention. It has always been the rule of this court to allow an amendment in furtherance of justice to conform to the facts proved. *Blondel v. Bolander,* 80 Neb. 531. Therefore the court did not err in permitting the amendment.

It is next contended that the evidence was insufficient to sustain the findings and judgment. The record discloses that the plaintiff, Grace A. Briggs, was born at Hesperia, Michigan, on the 10th day of March, 1879. Her parents were Silas James and Medora James, husband and wife. Before the plaintiff was one year old her parents placed her in the home of William Case and his wife, Catherine, to board, her own mother being ill and unable to care for her. On June 24, 1880, her parents entered into a written contract with Case and his wife by which Grace was legally adopted. The deed of adoption was introduced in evidence and is in the record. On the face of this contract Case and his wife took plaintiff into their home as their own daughter and heir at law, and her real parents wholly relinquished her to her foster father and mother, who received her with the understanding that, having no children of their own, Grace, at their death, should inherit all of their property; and in a petition to the probate court of Montcalm county, Michigan, Catherine Case swore that Grace was her adopted daughter and only heir at law. The evidence further shows that Mr. and Mrs. Case told their neighbors and friends, among whom was Mrs. Blanche Kennedy, and her husband, who was a member of the Michigan state board of control, as late as 1892, that Grace was their heir and at their death should have all of their property. This was what plaintiff was led to believe, and these facts were well known to defendant Kemp.

The record further shows that the plaintiff fully performed her part as a daughter of Mr. and Mrs. Case. Meanwhile Case as a veteran of the civil war received a pension from the United States amounting to about $850, and invested the same in a home in Lakeside, Michigan, to which place they moved, taking plaintiff with them as their daughter. The title to their home in Lakeside was taken in the name of Mrs. Case, the wife of William, and plaintiff's foster mother. Plaintiff continued to live with her foster parents as their daughter, performing duties as a daughter, and nursed and cared for Mr. Case through his last illness until his death, which occurred on the 2d day of August, 1902. His widow, Catherine, and the plaintiff are his sole heirs at law. The plaintiff continued to make her home with her foster mother, and worked hard to help support her until after Mrs. Case married the defendant Kemp and went to live with him as his wife in Schuyler, Nebraska. The following evidence shows how well plaintiff performed her duties as a daughter. "Q. What did you do during that time? Tell the court what you did. A. When I was seven years old Mr. Case was taken very badly sick—a total invalid, with total paralysis all over him, so I had to wait on him like he was a baby seven months old, and I stayed at home and took care of him until I was pretty near thirteen, when he died. Then I—during the time he was sick, my mother did laundry work, and in the daytime— Q. Wait a minute. When you say mother, you mean Mrs. Kemp? A. Yes; Mrs. Case. I used to go all over Lakeview and get the washing and take it home, and my mother did the washing; we were poor; and then I took them back home again, and I worked very hard at every kind of work from the time I was seven years old until I was twelve. Mr. Case died in August, and I started to school in September, and the next February my mother fell down cellar, and she broke her right arm, and she was a total cripple with her right hand to her

death, and then when I was fifteen I went to Charles F. French and did their housework for three years, and every cent I earned I paid my mother and helped her to live, and then in 1898 she moved to Greenville, and I went to Belding and worked in the silk mills—Richards Silk Mills—for a year and a half, and all I earned over my living expenses I gave my mother for her living."

The evidence shows that plaintiff married Mr. Briggs and is now his wife. Mrs. Case, when she came to Schuyler, sold her house in Lakeside and invested the proceeds in the lots in question in this case, taking title in her own name as Catherine Case. She died on the 12th day of July, 1912, leaving a will by which she gave all of her property to her husband, defendant Kemp, without making any provision for her foster daughter, the plaintiff. The defendant Kemp procured the will to be probated and claimed title to the lots in question to the exclusion and in violation of the plaintiff's rights under the adoption agreement. The evidence also shows that the defendant knew of plaintiff's rights and often wrote to her in terms of affection calling her his dear daughter and asking for her advice. Defendant, instead of according her her rights in the premises, filed a petition in the county court of Colfax county after the death of his wife alleging that Cora Osborne, Mary Leland and the Schuyler National Bank were the only persons except himself who were interested in the estate of the deceased wife. He also instituted a search in the state of Michigan for the articles of plaintiff's adoption, and told one Pierce, a lawyer at Belvidere in that state, that if he could find the record of the adoption it would mean $800 to him. The testimony in this case is too voluminous to be quoted at length, but we conclude as an independent finding that the evidence is amply sufficient to sustain the decree of the trial court. *Sharkey v. McDermott,* 91 Mo. 647; *Lacey v. Zeigler,* 98 Neb. 380; *Moline v. Carlson,* 92 Neb. 419; *Rine v. Rine,* 100 Neb. 225.

Finally, it is contended that the trial court erred in the admission of certain evidence, and for that reason the judgment should be reversed. The rule in this state is that, when a cause is tried to the court without a jury, it will be presumed that the court considered only competent evidence, and this assignment of error does not require a reversal of the decree. It must be observed that all of the other defendants defaulted and failed to claim any interest in the property in question.

After a careful review of the record we conclude that the judgment of the district court was right, and it is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

WALLACE & COMPANY, APPELLEE, V. FIRST NATIONAL BANK OF SUPERIOR ET AL., APPELLANTS.

FILED APRIL 12, 1918. No. 19970.

1. **Fraud**: PETITION: SUFFICIENCY. In an action for deceit, a petition alleging that plaintiff exchanged a promissory note, which it then owned, with defendants for a promissory note represented by defendants to be "gilt-edged" and amply secured by mortgage, that these representations were relied upon by plaintiff, that they were false, and the note received was without value, states a cause of action for the face value of the note received.
2. **Banks and Banking**: AUTHORITY OF CASHIER: ESTOPPEL. Where the cashier of a bank negotiates the sale of commercial paper under circumstances that indicate that he is acting for his bank, and receives in payment thereof a draft made payable to him as cashier, the bank will be estopped to deny that he was acting in its behalf.
3. **Evidence** examined, and *held* sufficient to sustain the judgment.

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

H. H. Mauck and *Bernard McNeny,* for appellants.

R. M. Proudfit, contra.

MORRISSEY, C. J.

This is an action brought against the First National Bank of Superior, its cashier, and its receiver, for alleged false representations made by the bank and its cashier in the sale of a note and mortgage. There was a trial to the court without a jury. Plaintiff had judgment, and defendants appeal.

The note was executed by the partnership of Bosserman & McAdams in favor of "A. C. Felt," the cashier of defendant bank. It was negotiated to plaintiff in exchange for a prior note made by the same parties. Attached to the note was an instrument purporting to be a first mortgage upon live stock. A duly recorded mortgage given by Bosserman & McAdams already existed upon these cattle in favor of the Kansas City Live Stock Commission Company, which subsequently exercised its rights thereunder, so that plaintiff derived no benefit from its security. The fact that plaintiff's collateral was not a first mortgage constituted the basis of the present action; the note itself being uncollectible because of the insolvency of the makers.

All of the above facts are set forth in the plaintiff's petition, which contains the further allegation that the insolvency existed at the time of the surrender of the previous note for the instrument involved in the present suit. Defendants interposed a general demurrer to the petition, and argue that plaintiff's pleading shows on its face that the transaction between plaintiff and defendants merely amounted to the exchange of one worthless note for another worthless note, and therefore no damage could result. The trial court overruled this demurrer, and this ruling constitutes the first assignment of error.

Plaintiff's action is founded in deceit. The question is not whether a financial loss has arisen out of the transaction by reason of a difference in the value of the things exchanged, but whether plaintiff received all that defendants' representations led him to believe he would receive. 12 R. C. L. p. 452, sec. 198; *Chapman v.*

Bible, 171 Mich. 663; *Woolman v. Wirtsbaugh*, 22 Neb. 490. Had the mortgage been a first lien, the note would have been worth its face value, or the amount sought to be recovered in the present suit, whereas under the circumstances it was absolutely worthless. The petition states a cause of action and the demurrer was properly overruled.

The second assignment of error is that there was no competent evidence to show any transaction between plaintiff and the defendant bank. The note was one of a series of four given by Bosserman & McAdams and received by plaintiff in the course of, what it believed, a series of transactions with defendant bank. Plaintiff paid for the first of these notes by draft drawn in favor of "A. C. Felt, Cashier." The second, third and fourth notes were successively received in exchange for the surrender of the note immediately preceding, after such note had been sent to the defendant bank for collection. Each time a letter was received by plaintiff signed by "A. C. Felt, Cashier." These facts sufficiently connect defendant bank with the transaction.

Defendants' final contention is that there is "an utter failure of any competent proof" to show the existence of another prior mortgage. The proof offered consisted of the correspondence between the parties, the deposition of one Hale, an officer of the Kansas City Live Stock Commission Company which held the prior mortgage, a copy of the chattel mortgage from the files of Nuckolls county, and a stipulation as to certain shipments of cattle made by Bosserman & McAdams to the Kansas City Live Stock Commission Company. The admission of the chattel mortgage filed over proper objection may have been error, but, if so, it was error without prejudice. There was sufficient competent evidence in the record from which the court might find that such mortgage existed.

There is no error in the record, and the judgment is

AFFIRMED.

ROSE AND SEDGWICK, JJ., not sitting.

PAUL B. FITCH v. STATE OF NEBRASKA.

FILED APRIL 12, 1918. No. 20135.

1. **Intoxicating Liquors:** INFORMATION: SUFFICIENCY. In a prosecution under chapter 187, Laws 1917, for having possession of intoxicating liquor, the information need not negative the exceptions under which its possession may be lawful, but these are available in defense.
2. ———: SALE: PROHIBITION. Under chapter 187, Laws 1917, the sale of intoxicating liquors is absolutely prohibited within this state, except as they may be sold under permit issued by the governor to those bringing themselves within the terms of the act, namely, to a wholesale druggist to "sell wine for sacramental purposes to *bona fide* religious organizations or churches qualified to purchase the same;" and to sell "pure ethyl alcohol to registered pharmacists;" and to "sell to any registered pharmacist owning or conducting a retail drug store, or actually employed in a retail drug store, pure ethyl alcohol and alcohol treated according to some formula permitted by the United States commissioner of internal revenue so as to render it unfit to be used as a beverage;" to any church goods house, having a stock of goods of the value of $25,000, to sell wine for sacramental purposes as in the case of wholesale druggists; to any registered pharmacist to "sell and keep for sale alcohol so treated according to some formula permitted by the United States commissioner of internal revenue so as to render it unfit to be used as a beverage."
3. ———: ———: PROHIBITORY ACT: VALIDITY. Section 11, ch. 187, Laws 1917, bears a reasonable relation to the peace and order of the state and to the enforcement of the law designed to prohibit traffic in intoxicating liquors, and is, therefore, a constitutional enactment.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

F. W. Fitch, for plaintiff in error.

Willis E. Reed, Attorney General, and *John L. Cutright, contra.*

MORRISSEY, C. J.

At the election held in November, 1916, the following constitutional amendment was adopted:

"On and after May 1, 1917, the manufacture, the sale, the keeping for sale or barter, the sale or barter under any pretext of malt, spirituous, vinous or other intoxicating liquors, are forever prohibited in this state, except for medicinal, scientific, or mechanical, or sacramental purposes."

The succeeding session of the legislature enacted chapter 187, Laws 1917, the purpose and scope of the act being to carry into effect the constitutional provision hereinbefore quoted. Section 11 of this act provides:

"It shall be unlawful for any person to have, possess or permit any intoxicating liquor to be in, upon or about any room, office, building or in any other place except in such person's private dwelling house, and except when and where and in the manner especially authorized as herein otherwise provided."

This statute became operative simultaneously with the quoted section of the Constitution.

May 3, 1917, there was filed in the proper court of Douglas county an information charging: "That Paul B. Fitch on or about the 2d day of May, A. D. 1917, in the county aforesaid and within the incorporate limits of the city of Omaha aforesaid, then and there being, did then and there unlawfully keep and maintain certain intoxicating liquors in his possession, to wit, whiskey, at 624 North Sixteenth street, Omaha, not having a permit from the governor." A jury being waived, and on trial had to the court, defendant demurred to the complaint, which demurrer was overruled. The court found the defendant guilty as charged, and imposed a penalty in the form of a fine in the sum of $100 and costs. Defendant's motion for a new trial was overruled, and he has brought the case here for review.

The act under which the prosecution was brought being of far reaching importance, and this being the first prosecution brought thereunder, the questions presented are of unusual interest.

The first assignment on which defendant relies has to do with the sufficiency of the information. It is

argued that the information is defective because it does not contain the words "room," "office," "building," or "other place than such person's private dwelling house." The act permits under certain restrictions the keeping of intoxicating liquors at a private dwelling house, and the argument is based on the theory that the information ought to have negatived the exceptions contained in the act. Under the old common-law form of information there can be little question that the point would be well taken, but in the instant case we are dealing with a special statute, drafted for the purpose of carrying into effect the aims and purposes of the constitutional amendment. By section 46 of this statute it is provided:

"In any indictment, information, complaint or affidavit for any violation of this act, it shall not be necessary to describe the place where the offense was committed, except to allege that it was committed in the county where the prosecution was had, unless the particular place where the violation occurred constitutes one of the specific ingredients of the offense, nor shall it be necessary to negative any of the exceptions contained in this act, nor shall it be necessary to state the day or the hour when the offense was committed unless the day or hour constitutes a special element or ingredient of the offense."

This provision appears to have been incorporated in the act to make easier its enforcement. Its framers were probably aware of the necessity for making more simple the drafting of informations under a statute the enforcement of which would be left to a great extent to inexperienced village attorneys and police magistrates, and without intending to invade the defendant's constitutional right "to demand the nature and cause of the accusation" (Const., art. I, sec. 11) provided for a less technical form of information than that which has come down to us through the ages. But defendant was deprived of no constitutional right, for the excep-

tions in the statute are reserved to him in his defense. *State v. Bartow,* 95 Wash. 480.

The chief assignment challenges the constitutionality of that part of section 11 which reads: "It shall be unlawful for any person to have, possess or permit any intoxicating liquor to be in, upon or about any room, office, building or any other place except in such person's private dwelling house." It is argued that this clause discriminates between him who owns and occupies a private dwelling house and the less fortunate who "lives in a hotel, boarding house, rents a room, sleeps in a tent or 'hangs his hat on another's hook,' " and denies to the latter class the equal protection of the law; that it violates sections 1 and 3 of the Bill of Rights, and section 1, art. XIV of the amendments of the federal Constitution.

Prior to the time when this act became operative, defendant was a registered pharmacist, licensed to dispense intoxicating liquors, and the liquor which he is charged with unlawfully having in his possession was then lawfully held by him for the purpose of sale. When the statute under consideration became effective, defendant ceased to sell or dispense this liquor, but kept it at his place of business under the belief that he might procure from the governor a permit authorizing him to sell the liquor for medicinal purposes. At the time the complaint was filed he had not sold or offered to sell any thereof, and still contends that it is within the province of the governor to issue a permit for its sale for the purpose stated.

Section 17 provides: "Any registered pharmacist * * * may keep pure ethyl alcohol to be used by him for scientific, mechanical and medicinal purposes only and may sell and keep for sale alcohol so treated according to some formula permitted by the United States commissioner of internal revenue so as to render it unfit to be used as a beverage."

The same section makes it the duty of such druggist or pharmacist to file a monthly report with the clerk

of the county in which he does business "setting forth the amount, kind and value of all intoxicating liquors in their possession and all purchases made by them of intoxicating liquors during the month immediately preceding."

Section 18 requires wholesale druggists selling "intoxicating liquors" to make a monthly report to the governor. Section 19 provides: "Every wholesale druggist or registered pharmacist or manufacturer of alcohol before entering into the business of manufacturing, selling or keeping intoxicating liquors for the purposes herein provided, shall first secure a permit therefor from the governor. * * * The governor, if satisfied with the good faith and truthfulness of said application and affidavits, and that the applicant has not been guilty of any violations of this act, * * * shall, upon payment of an annual fee of two dollars by retail druggists, and ten dollars by wholesale druggists or manufacturers of alcohol, issue to such persons a permit to engage in the business of manufacturing or selling and keeping intoxicating liquors for medicinal, mechanical, scientific or sacramental purposes at wholesale, or at retail, as the case may be, under all the provisions and restrictions of this act."

Because the legislature in dealing with these different classes of business used the term "intoxicating liquors," defendant would have us construe the statute so as to authorize the governor to issue a permit for the sale, not alone of pure ethyl alcohol, and "alcohol treated according to some formula permitted by the United States commissioner of internal revenue so as to render it unfit to be used as a beverage," and wine for sacramental purposes, but all other intoxicating liquors as well.

Section 12 provides: "It shall be unlawful for any railroad company, express company, common carrier, or any other carrier or person, or any officer, agent, servant, or employee thereof, to deliver or permit, aid, or abet in delivering, or carry for the purpose of de-

livery, any intoxicating liquor, to any person, except pure ethyl alcohol to wholesale druggists, retail druggists, scientific institutions and hospitals and wine for sacramental purposes to wholesale druggists, church goods houses and to authorized representatives of churches and religious societies as provided in this act."

This language plainly shows that it was the intention of the legislature to prohibit the transportation of all intoxicating liquors except those mentioned in section 12. Since the right to transport is denied, it would be incompatible to hold that a license to sell may be granted.

Section 15 provides terms under which wholesale druggists may sell wine for sacramental purposes to *bona fide* religious organizations or churches qualified to purchase the same, and pure ethyl alcohol and "alcohol treated according to some formula permitted by the United States commissioner of internal revenue so as to render it unfit to be used as a beverage," but there is no provision anywhere in the act authorizing the sale of whiskey to any person under any condition, or authorizing its possession by any person except only as it is permitted to be kept in a private dwelling house.

Keeping in mind the purpose of the constitutional prohibition against the liquor traffic, we may well assume that it was the intention of the legislature to absolutely prohibit the traffic in whiskey, and to limit the traffic in intoxicating liquor even for medicinal purposes to pure ethyl alcohol and "alcohol treated according to some formula permitted by the United States commissioner of internal revenue so as to render it unfit to be used as a beverage," with suitable provision to enable church societies to procure, keep and use wine for sacramental purposes. Where the words "intoxicating liquors" are used, they appear to be employed so as to include wine for sacramental purposes as well as pure ethyl alcohol and "alcohol treated according to some formula permitted by the United States

commissioner of internal revenue so as to render it unfit to be used as a beverage," but it cannot be said that it was ever contemplated that whiskey might be sold under any pretense whatsoever.

It is further argued that the statute is beyond the legislative power and violates the Constitution; that the state may not legislate against the possession of intoxicating liquor where it is not shown that the liquor is kept for an unlawful purpose; that it is an unwarranted interference with property rights, and is not within the reasonable exercise of the police power. This contention is not without respectable authority to support it. *Commonwealth v. Campbell,* 133 Ky. 50, and note thereto in 24 L. R. A. n. s. 172; *Commonwealth v. Smith,* 163 Ky. 227, and note thereto in L. R. A. 1915D, 172.

But there is also respectable authority for a contrary holding.

"It may be said in a general way that the police power extends to all great public needs. *Camfield v. United States,* 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Haskell,* 219 U. S. 104.

"The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United states, and essentially exclusive. * * * In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual states, and cannot be assumed by the national government, and that in this respect it is not interfered with by the fourteenth amendment." *Barbier v. Connolly,* 113 U. S. 27. See also, *In re Rahrer,* 140 U. S. 545.

Intoxicating liquor is universally regarded as a proper subject of application of the police power. Its power to create evils prejudicial to the highest social order and the welfare of the community is now universally admitted, and the power of the state to prohibit its manufacture or sale is no longer open to question. The general purpose of all of our laws on the subject is to promote temperance and to prevent drunkenness, and this purpose has found expression in our organic law. A statute does not interfere with or impair "any one's constitutional rights of liberty or property when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society. * * * Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare." *Mugler v. Kansas,* 123 U. S. 623, 663.

The fourteenth amendment was not designed to interfere with the power of the state, sometimes termed its police power to prescribe regulations calculated to promote the health, morals and good order of all the people. *Barbier v. Connolly,* 113 U. S. 27. "A state may absolutely prohibit the manufacture, gift, purchase, sale, or transportation of intoxicating liquors, and may adopt such measures as are reasonably appropriate or needful to render the exercise of this power effective." *Crane v. Campbell,* 245 U. S. 304.

The state having adopted a constitutional amendment forbidding the traffic in liquor, it was left to the legislature to devise a plan to successfully put that policy into operation. In forbidding the keeping of intoxicating liquors at any other place than a private dwelling house, the lawmakers were not attempting to make class distinctions, and, inasmuch as no person is forbidden by the law to own or occupy a private dwelling house, it did

not do so. We have only to consider whether this limitation upon the possession of liquor, even when not held for an unlawful purpose, is a reasonable one. It is idle to forbid the traffic in intoxicants and yet fail to provide an adequate method of enforcing the prohibition. It is common knowledge that officers of the law find it difficult to enforce prohibitory measures. If parties are free to keep quantities of intoxicating liquor in rooms, offices and buildings other than private dwelling houses, the work of the police officers is that much more difficult.

"It is also well established that, when a state exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. * * * With the wisdom of the exercise of that judgment the court has no concern; and, unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended." *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192.

It was proper for the legislature to recognize the difficulties which would beset the administration of the new prohibitory law, and the enactment complained of is a proper and reasonable exercise of legislative power.

The judgment is

AFFIRMED.

SEDGWICK, J., dissenting.

The majority opinion concludes that the purpose of the constitutional amendment and the statute is to prevent the manufacture and sale of any and all liquors

except denatured alcohol and ethyl alcohol, and wine for religious purposes, and to prevent qualified druggists, who have a permit under the statute, from selling anything but denatured and ethyl alcohol. The section of the act providing for druggists' permits expressly says that they shall sell for "sacramental" purposes, but denatured and ethyl alcohol cannot be used for sacramental purposes. The same section also provides that druggists' permits shall authorize them to sell for "medicinal" purposes. Under this decision, if physicians can get any liquors for medicinal purposes at all, it can only be from druggists with permits, and then only denatured or ethyl alcohol. There seems to be many other similar violations of the statute in this decision. It seems clear that the purpose of the constitutional amendment and of the statute was to do away with the saloon and drunkenness, and to that end to prohibit the manufacture and sale of any intoxicating liquor to be used as a beverage, and not to prevent the manufacture and sale of intoxicating liquors "for medicinal, scientific, or mechanical, or sacramental purposes" only. The details of this lengthy statute are for the purpose of making sure of that result. How unfortunate it is that the statute is so construed as to hamper and embarass the enforcement of the will of the people of the state so plainly expressed in their amendment to the Constitution and in subsequent legislation. To prevent the manufacture and sale for use as a beverage, the lawful use is clearly defined and provided for by the most careful regulations and safeguards, and there are many very stringent provisions to prevent unlawful sale and use. In the absence of constitutional or statutory prohibition, the right to manufacture and sell an article of value exists, and of course continues to exist except so far as the law expressly prohibits it. The prohibition of the statute is found in the second section of the act, which prohibits the manufacture, sale, etc., of liquors specified in the first section of the act, except "for medicinal, mechanical, scientific, or sacra-

mental purposes." It does not prohibit the manufacture and sale of liquors for the four purposes named, and it will of course be presumed that it was not the intention to prohibit for those purposes in subsequent sections of the act, unless such intention appears from a reasonable construction of the whole act. As the act, by its title, relates to intoxicating liquors, it very properly, in the first section, defines what shall be meant by "intoxicating liquors." The provision is that intoxicating liquor or liquors, as used in the act, "shall be construed to embrace all malt, fermented, vinous or spirituous liquors, wine, porter, beer, ale or any intoxicating drink, mixture or preparation of like nature, and all malt or brewed drinks, and all mixtures or preparations, whether patented or not, which will produce intoxication, and, in addition thereto, such liquors of a different character and not hereinbefore enumerated *capable of use as a beverage* containing over one-half of one per centum of alcohol." There are 15 or 16 sections intended to prevent evasions of the act; that is, to prevent the sale or transfer of intoxicating liquors "to be used as a beverage." A druggist or registered pharmacist, who sells intoxicating liquors, must obtain a permit for that purpose (section 19). He must be a person of "good reputation and standing," not guilty of any violations of the act. He must make a sworn application to the governor, supported by the oaths "of three disinterested freeholders of the county." He must give 20 days' notice of his application for a permit. He must have a trial before the county judge as to his fitness. Any objector may appeal to the courts, and, if finally it is determined that he is a fit person for so important a responsibility, he may engage in the business of selling "intoxicating liquors for medicinal, mechanical, scientific, or sacramental purposes," unless his permit is canceled upon "petition to revoke" the permit, filed by "any resident of the county." Under the majority opinion, "intoxicating liquors" here means only denatured and ethyl alcohol; that is, only ethyl

alcohol is covered by the permit because by section 17 "any registered pharmacist" may "sell and keep for sale" denatured alcohol without a permit. If it was intended that all these formalities related only to the sale of ethyl alcohol, why not say so at once? Before selling or keeping ethyl alcohol, as herein provided, he shall secure a permit, etc. But the permit is to sell not one particular liquor, it is intoxicating liquors generally.

This construction is inconsistent with the very section under which this prosecution is brought (section 11). It specifies, "any intoxicating liquor," and allows keeping in "private dwelling house," but under this opinion there is no possible way to get any liquor for any ordinary use, but ethyl alcohol, except denatured alcohol which under section 11 "any person may purchase and keep." The implication of the section, of course, is that any person may keep intoxicating liquors in his private dwelling. If nothing but ethyl alcohol was contemplated in that section, how much more direct and sensible to say, "If any person shall keep said ethyl alcohol," instead of "any intoxicating liquors." The construction is also inconsistent with section 25. Physicians can get no liquors for medicinal purposes except ethyl alcohol, but by section 25 they may use "intoxicating liquors," not one particular kind. Why not, in this section, say ethyl alcohol if that alone was intended.

The second section of the act contains the "prohibitions on liquors in general." It embraces all intoxicating liquors, naming them, and prohibits the manufacture and sale, etc., specifying in detail what is prohibited by the act. We would not expect to find further regulations of the manufacture and sale in a provision as to common carriers. But it is that provision of the act that is relied upon for the construction given. The opinion quotes from section 12: "It shall be unlawful for any railroad company, express company, common carrier, or any other carrier or person, or any officer, agent, servant, or employee thereof, to

deliver or permit, aid, or abet in delivering, or carry for the purpose of delivery, any intoxicating liquor, to any person, except pure ethyl alcohol to wholesale druggists, retail druggists, scientific institutions and hospitals and wine for sacramental purposes to wholesale druggists, church goods houses and to authorized representatives of churches and religious societies as provided in this act." And it then says: "This language plainly shows that it was the intention of the legislature to prohibit the transportation of all intoxicating liquors except those mentioned in section 12. Since the right to transport is denied, it would be incompatible to hold that a license to sell may be granted." That is to say, carriers cannot deliver to druggists any liquor except ethyl and denatured alcohol, and therefore the statute does not mean what it says—that the permit shall be "to engage in the business of manufacturing or selling and keeping intoxicating liquors for medicinal, mechanical, scientific or sacramental purposes" (section 19). If the provisions of the statute are really inconsistent, the construction should be in harmony with the declared purpose and intention of the act. The section as to permits, being later in the statute, is, under a familiar rule, to be regarded as the final word of legislation.

The section in regard to common carriers, as quoted above, is indeed peculiar. That section, as originally introduced in the legislature, was in harmony with the true purpose and intention of the act. It related to deliveries to individual persons, and not to authorized agencies for furnishing liquors for the purposes named in the act—"medicinal, mechanical, scientific or sacramental purposes." It was proposed to amend the act by striking out the section. Afterwards there were more than a dozen different amendments of the section, by striking out a word or a line here and there, and by inserting words and lines in different places. The record of these amendments indicates that some persons interested desired to make the whole act unpopular and incapable of enforcement, and the legislators who de-

sired to make that section harmonize with the other provisions and with the purpose and intention of the act were only partially able to do so. If the language of this section, taken by itself and construed literally, would prevent the carriers of this state from making deliveries to qualified druggists, so that they could sell for "medicinal, mechanical, scientific or sacramental purposes," as they were specifically authorized by their permits to do, it cannot under any accepted rule of construction be held that the legislature intended such result. Such inconsistencies, if any, must be harmonized so as to carry out the plain intention of the people as expressed by their Constitution and Legislature.

Section 20 describes the authorized permit as a permit to "manufacture or sell ethyl alcohol or sell or keep intoxicating liquors for the purpose authorized in this act." This is an express declaration that the permit is to sell both ethyl alcohol and intoxicating liquors as defined in the beginning of the act. Section 22 also uses the words "for the purpose aforesaid." This and the three preceding sections regulate the sale of intoxicating liquors for "medicinal, mechanical, scientific or sacramental purposes," and these purposes are mentioned in each of the preceding sections. So that it is clear that the words, "for the purpose aforesaid," relate to these four uses, and that, when a druggist has complied with these sections and obtained a permit, he may sell for those purposes. This is another express statement that intoxicating liquors may be sold by one having a permit for those purposes. The same section also provides: "*Authority to sell intoxicating liquors* shall be granted only to *bona fide* citizens of this state or to corporations duly authorized to transact business in this state." The office of the word "only" is to exclude others than *bona fide* citizens and certain corporations. How such repeated language as this can be so misunderstood is remarkable, to say the least.

Pure ethyl alcohol is rarely used for medicinal purposes, except in the preparation of drugs, and the "fruit

of the vine," and not alcohol, is used for sacramental purposes. To provide, therefore, that only alcohol shall be used for medicinal purposes practically prohibits the use of all liquor for such purpose. The state in its brief in this case has not presumed to ask for such a construction of the statute.

It is suggested that, as the statute does not give authority to druggists who obtain the necessary permit to buy liquors, therefore we cannot assume that the legislature intended to allow them to sell. The buying of intoxicating liquors is nowhere mentioned in the act, and therefore, as it is a prohibitory and not an enabling act, the act does not prohibit the buying of intoxicating liquors. It follows that the authority to sell assumes and includes the authority to buy, since it cannot be supposed that the legislature intended that all registered pharmacists having permit to sell would be able to manufacture their own liquors.

The constitutional amendment by its terms took effect on the 1st day of May, but the statute we are considering by the emergency clause was to "take effect and be in force from and after May 1st," that is, at midnight after that day. A few hours later, on the 2d day of May, the authorities began proceedings against the defendant by entering his drug store and seizing the property. The brief for the prosecution says that the defendant "is a registered pharmacist conducting a retail drug business with a stock of drugs and medicines valued at some $5,000" in the city of Omaha. His possession of these liquors, therefore, was lawful, and it is conceded that he carefully conducted a lawful business until midnight after the 1st day of May. He promptly made application for a permit under this new statute, which, by the terms of the statute itself, he could not obtain until the matter had been considered for 20 days. In the meantime he made no sales and took no action of any kind in violation of law. Under the construction now given to the statute, he could not after this act took effect legally in any manner dispose of the prop-

erty seized. His violation of law consists in not having disposed of it before the act took effect. As a retail druggist he was not authorized to sell at wholesale, so that there was nothing left for him to do but to destroy the goods before the law took effect. Such legislation would be of the nature of an "*ex post facto*" law, and under such construction the statute itself destroyed defendant's property, and violates both sections 3 and 16 of the Bill of Rights. Section 3: "No person shall be deprived of life, liberty, or property, without due process of law." Section 16: "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed." It is inconceivable that the people of this state, either by their votes upon the adoption of the constitutional amendment or through the action of the legislature, intended such a result.

It is said in the majority opinion that it was not intended "to invade the defendant's constitutional right 'to demand the nature and cause of accusation,'" "*and to have a copy thereof.*" Const., art. I, sec. 11. It alleged in the information that he did not have a permit, and the conclusion is that the information was sufficient, and that it was not necessary to allege therein that the defendant had, possessed, or permitted "any intoxicating liquor to be in, upon, or about any room, office, building, or in any other place" than his "private dwelling house." This construction of the statute is predicated upon the use of the word "except" in section 11 of the act, and the provision in section 46 of the act, which is that it shall not be necessary in the information "to describe the place where the offense was committed, * * * unless the particular place where the violation occurred constitutes one of the specific ingredients of the offense." And so the defendant at the time was keeping these liquors in the wrong place, and yet the fact that he did so is not thought to be one of the "specific ingredients of the offense." If instead

of the use of the word "except" in section 11 the provision had been, "It shall be unlawful for any person to have, possess, or permit any intoxicating liquor to be in, upon or about any room, office, building or in any other place *than* in such person's private dwelling house," the meaning would have been the same and the language would have been more accurate. The meaning clearly is that if kept in his private dwelling house he is innocent, but if kept in any other place he is guilty. And the use of the word "except" here instead of the word "than" is not at all within the meaning intended in the provision of section 46 that it shall not be necessary to negative exceptions contained in the act. The substance of the offense is in having the intoxicating liquors in a place specified in the statute, and no crime can be charged without the allegation that the defendant had them in some one or more of the places specified. The fact that the liquors were not kept in a "private dwelling house" is more than a "specific ingredient of the offense." It is the very substance of the offense itself, and no offense can be charged under this provision of section 11 without charging that the liquors were so kept. The legislature recognized the importance of this fact, and in the first section took particular pains to define definitely what shall be considered a "private dwelling house." The information is clearly insufficient. This, however, is a matter in which the temperance people of the state are not so vitally interested.

The statute clearly intends to conform to the Constitution, and prohibit the manufacture and sale of intoxicating liquors as a beverage, and to so guard its sale for the lawful uses named as to make the prohibition of unlawful use effective. By the forced construction now given, to a statute which was intended to abolish the open saloon and prevent drunkenness and crime, the whole legislation is thrown into confusion and the real purpose of the people largely thwarted.

CORNISH, J., concurs in this dissent.

THOMAS F. SWIFT, APPELLANT, V. SARPY COUNTY, APPELLEE.

FILED APRIL 12, 1918. No. 20205.

Parties: ACTION FOR DEATH. An action against a county for damages resulting from the death of an individual caused by the negligence of the county in failing to maintain its highway as the law requires must be brought in the name of the administrator of the estate of the person whose death was so caused.

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

Mahoney, Kennedy, Holland & Horan, for appellant.

Matthew Gering, E. S. Nickerson, W. R. Patrick and *E. H. McCarthy, contra.*

SEDGWICK, J.

The plaintiff and his wife, Mary Swift, and four other persons, were driving in an automobile along a highway in Sarpy county, Nebraska. This highway terminated very abruptly at the bank of the Missouri river. The surface of the road, as plaintiff alleges, continued unbroken except for marks of travel to the point where it suddenly ended in the river. The plaintiff further alleges that the condition was well known to the county authorities, and that there was no warning of any kind to indicate the dangerous situation. The automobile plunged into the river, and all the occupants were drowned except the plaintiff. The plaintiff, as husband of the deceased, brings this action to recover damages for the death of his wife, the said Mary Swift. The defendant county interposed a demurrer, contending that the action should have been brought in the name of the administrator, instead of the husband of deceased. The demurrer was sustained by the trial court and the action was dismissed. From that judgment the plaintiff has appealed.

1. The question depends upon the construction of the statutes. About 30 years ago our legislature enacted a statute making counties liable for damage caused by its negligence in repairing highways or bridges: "If special damage happens to any person, his team, carriage or other property by means of insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county." Rev. St. 1913, sec. 2995. In such case the damages are of two kinds, general and special. General damages that the public suffers by reason of the imperfect highways, loss of time in traveling over them, and additional expense connected with it are not recoverable. No damages are recoverable that are general and are sustained by the public in general. All other damages are special damages, and if they happen to any person—that is, if any person suffers any damage that is peculiar to him, and not the same as the public in general suffers—he may recover it against the county. Before this statute was enacted it was uniformly held that the county was not liable in the absence of statute, but after the statute was enacted any one who suffered any damages that were not general to the public could recover them.

2. At the old common law a person could recover against carriers or individuals such damages as he might suffer by reason of negligence, unless the damages he sustained resulted from the death of some individual. If a man was killed and his wife and children were robbed of their means of support there was no remedy. This anomaly of the law was remedied by special legislation in England at an early date, and afterwards was remedied in this state by the act of 1873, which provided: "Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person, company or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action

and recover damages, in respect thereof," then the person, company or corporation "shall be liable to an action for damages." Rev. St. 1913, sec. 1428. The legislature intended to provide for all cases where death was caused by negligence and some party was damaged thereby. If it had been suggested in the legislature to make the language as comprehensive as possible, so that it would cover all cases of damage, it is difficult to say what more general words would probably have been used than "any person, company or corporation." There was no reason why it should not apply to all cases where damages were caused by the death, and it is difficult to say what change would be made in order to make it more certain that that was intended. This statute provided that all such actions should be brought in the name of the personal representative of the deceased person. Rev. St. 1913, sec. 1429. The reason of this provision is that, in case a man is killed, ordinarily there would be a widow and perhaps several children that would be damaged, and to bring an action in the name of each one of them would be unnecessarily multiplying lawsuits. When damage results from the death of an individual this statute applies, and requires that an action for negligently causing such death shall be brought in the name of the administrator of the deceased individual. *Seyfer v. Otoe County,* 66 Neb. 566, was an action against the county, and was brought in the name of the administrator of the estate of the deceased, and no objection was made to the bringing of the action in the name of the administrator, evidently because that question was plain and had been set at rest by other cases. The brief cites *Johnson County v. Carmen,* 71 Neb. 682; *Lyons v. Greeley County,* 95 Neb. 104; and *Bethel v. Pawnee County,* 95 Neb. 203.

By the express language of the statute, a county is not liable unless it is its duty to maintain roads and highways, so that when a county is under township organization, and that duty devolves upon the town-

ship, of course no action could be brought against the county. Any other holding would be a very technical attempt to evade the spirit and intention of the statute. Such actions must be brought in the name of the administrator of the estate of the deceased.

The demurrer to the petition was properly sustained, and the judgment of the district court is

AFFIRMED.

HAMER, J., dissenting.

I am unable to agree with the majority opinion. On the night of July 30, 1916, plaintiff and his wife, Mary Swift, and four other persons, were driving eastward in an automobile along the highway in Sarpy county, Nebraska. This highway terminated very abruptly at its eastern end, which is within said county, at the bank of the Missouri river. The surface of the road, as plaintiff alleges, continued unbroken except for marks of travel to the point where it suddenly ended in the river. The plaintiff further alleges that the condition was well known to the county authorities, and that there was no warning of any kind to indicate the dangerous situation. The automobile upon reaching the point above referred to plunged into the river, and all the occupants were drowned except the plaintiff. The plaintiff, as husband of deceased, brought this action to recover damages for the death of his wife, the said Mary Swift. The defendant county interposed a demurrer to the petition, raising the point that the action should have been brought in the name of the administrator instead of the husband of the deceased. It was alleged in the demurrer that the plaintiff had not the legal capacity to sue, had no authority in law to maintain the action, and that the petition did not state sufficient facts to constitute a cause of action. The demurrer was sustained by the trial court and the action was dismissed. From that judgment the plaintiff appealed.

The case calls attention to the act of 1873, commonly known as Lord Campbell's act, and also requires a construction of the statute of 1889 making counties

liable for negligence in failing to keep their highways in proper repair. Counsel for the defendant county contends that the act of 1873, called Lord Campbell's act, and the statute of 1889 making counties liable for injuries to persons on highways, are separate and distinct; that they are not in *pari materia* and should not be taken as one enactment. It is contended that the former provides for an action by the administrator of a deceased person, while the other authorizes one who is damaged by reason of the negligence of a county in failing to properly maintain its highways to maintain an action for the damage which he has sustained.

I think the majority opinion disregards the statute itself and also the prior decisions of this court. The legislature of the state in 1889 enacted a law relating to highways and bridges and liabilities of counties for not keeping the same in repair. Laws 1889, ch. 7, sec. 4 (Rev. St. 1913, sec. 2995). The section reads: "If special damage happens to any person, his team, carriage or other property by means of insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county: * * * Provided, however, that such action is commenced within thirty days of the time of the injury or damage occurring." I desire to ask the members of this court who voted for the majority opinion whether there was any statute of this state that authorized the bringing of an action against a county for not keeping its roads in repair prior to this statute. I think no one of the court will have the temerity to say that such right existed prior to the statute which we have cited and quoted. The foregoing statute is construed in *Hollingsworth v. Saunders County,* 36 Neb. 141. It is there said: "Again, we conclude that the statute of 1889, which imposed a liability upon counties for damages resulting from the failure to keep roads and bridges in repair, authorized

the bringing an original suit in any court of competent jurisdiction to recover such damages." I do not see why the foregoing statute and the foregoing decision should leave any doubt on the question that such an action can be brought. Perhaps it should be remembered that there is no statute so plain and no decision under it that may not be disregarded.

In *Bryant v. Dakota County,* 53 Neb. 755, this act of the legislature was under discussion. The court said: "The act is designated as 'An act relating to highways and bridges and liabilities of counties for not keeping the same in repair.' Prior to the adoption of this piece of legislation there existed in this state no right of action against a county for the recovery of damages resulting from defective highways or bridges (*Woods v. Colfax County,* 10 Neb. 552), while by the law under consideration the authority to bring such a suit was granted (*Hollingsworth v. Saunders County,* 36 Neb. 141; *Raasch v. Dodge County,* 43 Neb. 508)."

It is contended that Lord Campbell's act, passed by the legislature of 1873, and the act of 1889 relating to highways and bridges, and the liability of counties for keeping the same in repair, are to be considered together and as parts of the same legislation. I do not think so. Under the statute of 1889 the action is to be brought by "the person sustaining the damage." That is not in Lord Campbell's act. *Murphy v. Willow Springs Brewing Co.,* 81 Neb. 223. By the act of 1889 the only liability of a county is for "special damage * * * to any person, his team, carriage or other property." A county is an agent of the state. It owes no duty to the public except such as is imposed by law. Unless a right of action is expressly given by statute a county is not liable. *Crowell v. Sonoma County,* 25 Cal. 313; *Madden v. Lancaster County,* 65 Fed. 188.

In *Hopper v. Douglas County,* 75 Neb. 331, it was said: "It has been uniformly held by this court that a county is not liable for the negligent acts of its officers,

unless made so by legislative enactment. * * * This rule is grounded on the fact that a county is an arm of the sovereign state and cannot, as such, be sued by an individual, without express permission."

In *Rex v. Robinson,* 2 Burr. (Eng.) 799, 803, announcing the English rule, Lord Mansfield said: "The rule is certain 'that where a statute creates a new offense, by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offense (not antecedently unlawful), by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other.'"

In *Storms v. Stevens,* 104 Ind. 46, the court said: "Where a statute creates a new right and prescribes a mode of enforcing it, that mode must be pursued to the exclusion of all other remedies. Such has been the settled law in this state for more than 60 years, and such is the law elsewhere."

In *Wilson v. Ulysses Township,* 72 Neb. 807, 814, this court said: "In this state the rule of the common law has been adopted, and counties being only quasi-corporations are held not liable to parties injured by defects in highways. * * * By the enactment of the law of 1889, * * * which provides that, under certain circumstances and for a limited period after the injury is sustained, an action may be maintained against the county for such injury, the rule has been changed to a limited degree only, and, unless a party injured brings himself strictly within the letter of the statute, the common-law rule still applies."

Lord Campbell's act was never intended to apply to a county. By specific language it was made to apply "whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person, company or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and to recover damages, in respect thereof." A county is not a

person; neither is a corporation. Neither was Lord Campbell's act intended to apply to an injury of the kind alleged in the petition. It is not made to apply to the condition of roads and bridges. The act of 1889, under which this action is brought, does not contemplate the bringing of an action by an administrator of an estate. It is to be brought by the person sustaining the damage. It would seem that the act of 1889, being in derogation of the common law, for the reason that it created a liability where none existed, should be strictly construed, and the remedy given in that act is exclusive. It must be brought by "the person sustaining the damage." Tom Swift is such person.

In *Goes v. Gage County*, 67 Neb. 616, this court held that the statute must be strictly construed, and that after a county had adopted township organization, and was therefore not required to maintain and repair the highways and bridges, it being the duty of the several townships to keep the roads in repair, therefore the county would not be liable. It can readily be seen that Lord Campbell's act did not include counties, and did not refer to roads and bridges, was a separate and independent act, and that the legislation of 1889 was in no way connected with it. The act of 1889, being complete in itself, cannot be considered in *pari materia* as to Lord Campbell's act. *State v. Cornell*, 50 Neb. 526; *Bryant v. Dakota County*, 53 Neb. 755; *Swaney v. Gage County*, 64 Neb. 627.

A county is not liable, except it is made so by the statute. *Wehn v. Commissioners of Gage County*, 5 Neb. 494; *Woods v. Colfax County*, 10 Neb. 552. In the latter case it was held: "A county is not liable in damages at common law, or under the Revised Statute of 1866, for injuries caused by the breaking down of a public bridge, which was caused by the negligence of the county commissioners." In the opinion it is said: "The question presented is, whether the

county is liable for the neglect of the county commissioners in failing to keep a public bridge in a safe condition. If the negligence complained of in the petition and consequent injury to the plaintiff had been occasioned by a natural person or a municipal corporation proper, the right to recover would be unquestioned." It is then held that the county is not a municipal corporation, and many authorities are cited.

In *McClay v. City of Lincoln,* 32 Neb. 412, this court quoted with approval the language of the supreme court in *Commissioners of Hamilton County v. Mighels,* 7 Ohio St. 109: "A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." In that case it was held that a county could not be held liable for negligence, unless there was some special act fixing the liability of that kind on the county.

I think I may say without fear of successful contradiction that a county is a quasi-public corporation, and is an agent of the state, owing no duty to the public or to individuals, except such as may be imposed by legislative enactment.

CHARLES E. BYERS ET AL., APPELLANTS, V. M. CHASE ET AL., APPELLEES.

FILED APRIL 12, 1918. No. 19899.

1. **Mortgages:** DISCHARGE. A note taken for a pre-existing debt which is secured by a mortgage, the original note not being surrendered or canceled, does not operate to discharge the lien of the mortgage.

2. ———: MECHANICS' LIEN: PRIORITIES. When property is subject to a mortgage at the time of the inception of a mechanics' lien, such mortgage retains its priority, notwithstanding the value of the mortgage security is increased by the labor and material of the mechanics' lien claimant.

3. ———: RENEWAL: PRIORITY. Priority of a mortgage is not lost by a renewal thereof, when the debt secured is the same, and the property is not released from the lien.

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

J. G. Thompson, for appellants.

Lambe & Butler and *J. M. Mohney, contra.*

HAMER, J.

This is an appeal from the district court for Furnas county in an action to foreclose a mechanics' lien. The record discloses that the plaintiff Byers Lumber Company entered into a verbal contract with one M. Chase, who was the owner of lots 4 and 5, in block 3, of Smith's addition to the village of Edison, in said county, to furnish him material with which to build a house on said lots. The plaintiff furnished such material to Chase between the 27th day of October, 1910, and the 18th day of May, 1911, and duly perfected a lien for $280.50. The lien was not paid, and plaintiff commenced this suit to foreclose the same, making the Bank of Edison and James Parmenter defendants with Chase and his wife. The Chases defaulted, but the Bank of Edison filed an answer and cross-petition, alleging, in substance, that defendant Chase and his wife on the 22d day of December, 1909, executed and delivered their promissory note for $1,900 to the bank, together with a mortage on lots 4 and 5, and lots 18, 19 and 20, in Smith's First addition to the town of Edison, to secure the payment of said note. This mortgage was duly recorded, and it was set forth that the note had not been paid, that by reason thereof the bank had a first lien on the premises, and therefore prayed for a foreclosure of its mortgage. It

appears from the bill of exceptions that, while the material for the construction of the house on lots 4 and 5 was being furnished, a contract was entered into between Chase and the bank by which the bank extended the time for the payment of Chase's note, taking a new note for $1,628, but the original note for $1,900 was never canceled or delivered to Chase. There was a claim in the extension agreement by which the bank agreed, in case plaintiff's mechanics' lien was paid, lots 18, 19 and 20 should be released. The trial court found for the plaintiff and foreclosed the mechanics' lien; but in settling the priority of liens the court found that the defendant bank had a first lien on the premises in question by reason of its mortgage, and on confirmation of sale of the premises made distribution of the proceeds accordingly. The plaintiff has appealed, and now contends that the trial court was right in its findings and judgment, and that plaintiff should have been given a first lien, and the proceeds of the sale should have been distributed accordingly.

Appellant has cited no authorities in support of its contention, while, on the other hand, appellees in support of the decree have directed our attention to *Chamberlain Banking House v. Woolsey,* 60 Neb. 516, and *Chicago, B. & Q. R. Co. v. Burns,* 61 Neb. 793.

In *Chamberlain Banking House v. Woolsey* it is held: "Where, in a transaction involving the sale of mortgaged personal property, the debt is transferred to the purchaser thereof, and a new note and mortgage are executed, the note evidencing the original indebtness being canceled and surrendered, the presumption of law is that the execution and delivery of the new note and mortgage is in payment and satisfaction of the prior indebtedness, and the burden is on the creditor to prove to the contrary.

"Where, in such transaction, the note and mortgage evidencing the prior indebtedness are retained by the creditor, and a new note and mortgage taken for the amount due on the same indebtedness, the taking of

such new note and mortgage will not effectuate payment of the prior indebtedness, unless there is an express agreement of the parties that such new note and mortgage were received in payment and satisfaction of such prior indebtedness."

In the opinion it is said: "The note last given was held as collateral security to the original debt, unless there was an agreement that the debt should be paid by such note, and the plaintiff was at liberty to resort to such security for the satisfaction of the debt without in any way prejudicing him or his right to look to the makers of the prior note or the security given therefor."

In *Chicago, B. & Q. R. Co. v. Burns,* 61 Neb. 793, it is held: "The giving and acceptance of an order, bill of exchange or promissory note for a prior indebtedness will not be regarded as payment, unless there be an express agreement between the parties to that effect."

It was held in those cases that taking a note for a pre-existing debt will not discharge the original indebtedness, unless by special agreement. We find no evidence of such an agreement in the record. It follows that, if the debt evidenced by defendant's $1,900 note was not discharged by the new note of $1,628, the lien of the defendant's mortgage was not discharged, but was prior to the mechanics' lien in question.

Appellant also contends that the value of lots 4 and 5 was enhanced by the erection of the building for which appellant furnished the material, and therefore the lien of the bank should be postponed and the workmen's lien should be declared the prior one. This contention is fully answered by statements of this court in *Boggs v. McEwen,* 69 Neb. 705, *Henry & Coatsworth Co. v. Halter,* 58 Neb. 685, *Grand Island Banking Co. v. Koehler,* 57 Neb. 649, and *Patrick Land Co. v. Leavenworth,* 42 Neb. 715. It is said, in substance, in those cases that a mortgage retains its priority over a mechanics' lien, notwithstanding the fact that the

value of the mortgage security is increased by the labor and material of a mechanics' lien claimant.

In *Henry & Coatsworth Co. v. Halter, supra,* it is held: "The lien of an ordinary mortgage is not subordinate to mechanics' liens, merely because the money which it was given to secure was loaned for the purpose of improving the mortgaged premises, and under an express contract that it should be so used."

In *Grand Island Banking Co. v. Koehler, supra,* it is held: "A mortgage filed during the erection of a building on the premises mortgaged has priority over the rights of a person who subsequently began to furnish material for such erection."

It is seemingly contended by counsel for the plaintiff that the mere giving of the release of lots 18, 19 and 20 in the First addition to Edison released the mortgage first taken, and therefore left the mechanics' lien in force. That question is disposed of by the decisions we have cited. But it is further contended by the plaintiff that the bank "released property worth at least double that which they got in lieu thereof." No such testimony is referred to, and a careful examination of the evidence clearly shows that this contention is wholly without support. The property taken in lieu of lots 18, 19 and 20 was appraised at $500, but no one testifies that $500 was its full value, or that it was worth less than the lots released from the mortgage, and Mohney testified that the land accepted in lieu of lots 18, 19 and 20 was reasonably worth "about $1,500, and was so estimated by them." There is, therefore, a failure of evidence to show that the plaintiff suffered any injury because of the transaction, and there is a total failure of any evidence tending to establish bad faith on the part of the bank.

After a careful examination of the record, we are satisfied that the decree of the district court was right, and it is, therefore

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT, v. WILLIAM H. QUEENAN ET AL., APPELLEES.

FILED APRIL 12, 1918. No. 19918.

Carriers: FREIGHT CHARGES: LIABILITY. In a suit brought by a railway company against the consignors, Kinney & Allen, and the consignee, William H. Queenan, it was shown that 36 carloads of hay were shipped by the consignors, Kinney & Allen, from Newport, Nebraska, to South Omaha, f. o. b., the shipment being made under the tariff regulations of the Nebraska railway commission, and it being shown that the hay was delivered to the Union Stock Yards Company at the place of destination on Queenan's order and without collecting the freight charges, and that Queenan had become insolvent. *Held*, that, as shippers, Kinney & Allen were liable for the legal freight charges with Queenan, and that they had not been released.

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

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

McGilton, Gaines & Smith, contra.

HAMER, J.

This action was brought by the Chicago & Northwestern Railway Company to recover the freight charges on 36 carloads of hay shipped by the firm of Kinney & Allen, from Newport, Nebraska, to one William H. Queenan, at South Omaha, in said state. The shipments were made in the ordinary way by Kinney & Allen to Queenan, f. o. b., and were delivered to the consignee on his order. The freight charges were never paid by any one. The action was commenced against Kinney & Allen and Queenan, who is insolvent. Queenan made default, and judgment was rendered against him for $931.94. Kinney & Allen filed an answer, by which they admitted that they were a partnership engaged in buying and shipping hay in large quantities at Newport, Nebraska; that at the time

mentioned in plaintiff's petition they sold the hay in question to Queenan and delivered the same to the plaintiff railroad company at Newport for shipment to him at South Omaha. They alleged that by their arrangement with Queenan the freight was to be paid by him at the place of destination. The answer further alleged that the plaintiff company delivered the hay to the consignee without collecting the freight charges, whereby it waived all claims against Kinney & Allen therefor, and that no demand was made upon them until long after the shipments were delivered to Queenan and he had become insolvent. It was also alleged that the plaintiff company knew that the hay was owned by the consignee.

Plaintiff by its reply denied all of the new matter contained in the answer, and alleged that Kinney & Allen were the shippers of the hay over plaintiff's railroad, and as such shipper became indebted to plaintiff for all freight charges on said shipments, regardless of the agreements or promises of other parties respecting the said freight, and that the liability of defendants Kinney & Allen could only be discharged by the payment of the same, and that they had never been paid. The plaintiff by its reply further alleged that the hay was sold by Queenan to the Union Stock Yards Company that agreed to pay plaintiff's freight charges, but that said company did not pay said charges, and that plaintiff advised defendants Kinney & Allen that the stock-yards company had refused to pay the same; that, by an arrangement made between the defendants and the stock-yards company, the defendants Kinney & Allen had received the purchase price of the hay, and no provision had been made for the payment of plaintiff's freight charges. Therefore Kinney & Allen were estopped to deny liability for said charges. On these issues the case was tried to a jury. At the conclusion of the evidence plaintiff requested the court to direct a verdict in its favor against all the defendants. This request was refused, and by agree-

ment of the parties the jury were discharged and the cause was submitted to the court. The finding and judgment was for defendants Kinney & Allen, and the plaintiff has appealed.

Appellant contends that the judgment of the district court is contrary to the evidence and is contrary to law. The record discloses that the 36 carloads of hay were shipped by defendants Kinney & Allen, from Newport, Nebraska, to Queenan at South Omaha; that the plaintiff transported the hay over its line of railroad; that when it received the shipments it issued to Kinney & Allen a bill of lading or receipt as follows:

"Chicago & Northwestern R. R. Co.

"Received subject to the classifications and tariffs in effect on the date of issue of this shipping order from Kinney & Allen at Newport, Neb., Oct. 9, 1914, the property described below. * * * Consigned to W. H. Queenan, South Omaha, Nebraska."

On the reverse side of the bill of lading was the following:

"The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

There is also contained in the record the tariff regulation provided by the Nebraska railway commission under which Kinney & Allen made the shipments in question, which reads as follows: "Hay prepaid or guaranteed.— Shipments of hay for Omaha or South Omaha must not be received unless charges are prepaid or guaranteed."

There seems to be no dispute as to the amount of the shipments or of the correctness of the freight charges. There was no agreement between the plaintiff company and Kinney & Allen releasing them from legal liability for the payment of the freight charges on said ship-

ments. The record further shows without dispute that the hay in question was delivered to the Union Stock Yards Company at the order of Queenan, and that the freight charges were never paid by any one; that the plaintiff never made proper efforts to collect the freight from the stock-yards company and Queenan, and gave notice of non-payment to Kinney & Allen and of the failure and inability to collect the same from the consignee of said company. The plaintiff therefore insists that the consignors are liable for the freight charges, and that it is entitled to a judgment against Kinney & Allen therefor. In support of this contention appellant has cited a great number of authorities, from some of which we quote.

Appellant says: "A shipper of goods by railway under a straight bill of lading is primarily and absolutely liable for the lawful tariff charges, and that liability can only be discharged by payment."

In 2 Hutchinson, Carriers (3d ed.) sec. 810, it is said: "But the remedy against the consignee is not exclusive, although he may be the owner of the goods. It is held not to be obligatory upon the carrier to collect the freight of him, even when the bill of lading contains the usual clause, 'he paying the freight thereon.' Such provision, it has been decided, is intended for the exclusive benefit or accommodation of the freighter or shipper of the goods, and imposes no duty upon the carrier to collect the freight of the consignee; but he may even waive his lien upon the goods by delivering them to the consignee, without requiring payment of the freight, and still hold the shipper or consignor liable upon the contract of shipment. So far as the carrier is concerned, the consignee will be considered as merely the agent of the shipper to pay the freight, and if he fails to pay it the party who has reposed the confidence must take the consequences of the breach of duty. It will alter none of the rights of the carrier, to whom the shipper became bound for the freight as soon as the goods were delivered for carriage." See,

also, 6 Cyc. 500; *Central R. Co. v. MacCartney,* 68 N. J. Law, 165; *Central of Georgia R. Co. v. Birmingham Sand & Brick Co.,* 9 Ala. App. 419; *Baltimore & O. S. W. R. Co. v. New Albany Box & Basket Co.,* 48 Ind. App. 647.

In *Cincinnati, N. O. & T. P. R. Co. v. Vredenburgh Sawmill Co.,* 13 Ala. App. 442, it was said: "The appellee was neither the owner nor the consignee of the shipment, but was the shipper or consignor, and, while the bill of lading contained no express stipulation on the part of the consignor to pay the freight there was an implied contract that it would, as the shipper who had on its own account engaged the services of the plaintiff as a carrier, pay the legally established transportation charges if the consignee should refuse to accept the shipment and pay the lawful charges. 6 Cyc. 500, sec. 5, and authorities cited in note 1. Otherwise there would be no way in those cases where the consignee rightfully refuses to accept the shipment and is not responsible for the charges of carriage to enforce the statutes requiring common carriers under stipulated penalty in case of failure to exact and collect lawful published and established rates and charges."

In *Jelks v. Philadelphia & R. R. Co.,* 14 Ga. App. 96, the court said: "Since the law imposes upon a carrier the absolute duty to collect freight charges, it may proceed against either the consignee or the consignor; and, to relieve itself from the penalty imposed by law for failure to exact the charges, if it fails to collect them from the consignee it must proceed against the consignor. This is required as a matter of public policy. It is not only the right, but the duty, of the carrier to thus collect the charges."

The foregoing language is especially applicable to the case at bar, in view of the Nebraska statutes on the subject.

Section 6147, Rev. St., 1913, provides: "If any railway company or common carrier subject to the provisions of this article, directly or indirectly, through or

by its agents, officers or employees, by any special rate, rebate, drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, the same shall constitute an unjust discrimination, which is hereby forbidden and declared to be unlawful."

Section 6148 provides: "If any railway company or common carrier subject to the provisions of this article, through or by its officers, agents or employees, makes or gives any undue or unreasonable preference or advantage to any particular person, company, firm or corporation or locality, or subjects any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever, the same shall constitute an unjust discrimination, which is hereby prohibited."

Section 6151 provides a fine of not less than $500 nor more than $5,000 for violation; and section 6152 provides fine and imprisonment for individuals violating the foregoing sections.

Section 6153 provides: "Any officer, agent or employee of any railway company or common carrier subject to the provisions of this article, who, by means of false billing, false classification, false weight, or by any other device, shall suffer or permit any person or persons to obtain transportation for property at less than the regular rates then in force on the line of such railway company or common carrier, or any part thereof, or who, by means of false billing, false classification, false weighing, or by any device whatsoever, shall charge any person, firm or corporation for the transporation of property other than the rates fixed and established, upon the line of said railway company or common carrier, shall be guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not less than

$100 nor more than $5,000 or be imprisoned in the county jail in the county wherein conviction was had, not less than ten days nor more than thirty days or both, within the discretion of the court."

The defendants Kinney & Allen claim exemption from the general liability, because they contend that they made their shipments under a private agreement between themselves and Queenan on the basis of f. o. b. Newport. It is admitted, however, that the shipments were made pursuant to tariffs established in the manner required by law. They do not claim to have had any contract or agreement with the plaintiff absolving them from liability for the freight charges. In support of the contention that Kinney & Allen are not liable for these charges, there is cited *Barker v. Havens,* 17 Johns. (N. Y.) 234; *McEwen v. Jeffersonville, M. & I. R. Co.*, 33 Ind. 368; *Chicago, R. I. & G. R. Co. v. Floyd,* 161 S. W. (*Tex. Civ. App.*) 954. A careful examination of these anthorities does not seem to justify the contention made by counsel for the defendants.

It would seem that the provision in the bill of lading, "consignee or owner paying freight," is for the benefit of the carrier, and does not relieve the shipper from his primary and absolute liability for the lawful charges. *Coal & Coke R. Co. v. Buckhannon River Coal & Coke Co.* 77 W. Va. 309.

In the above case it was held: "A consignor, who signs a bill of lading on his own account, and not as agent for the consignee, is liable to the carrier for the freight, although title to the goods passed to the consignee on delivery to the carrier. * * * In the absence of a special contract, both consignor and consignee, who has accepted the goods, are liable to the carrier." In the body of the opinion it is said: "Delivery of the coal to the consignee, although a waiver of its lien for the freight by the carrier, did not exempt the consignor from liability for the freight."

A shipper is conclusively presumed to know the contents of lawfully established tariffs applicable to his

shipments, and, when such tariffs require that the freight charges be prepaid or guaranteed, the act of shipping *ipso facto* imposes on the shipper absolute liability for the payment of lawful charges. *Kansas City S. R. Co. v. Carl,* 227 U. S. 639. To relieve Kinney & Allen from the payment of the freight charges in this case would amount to a rebate, and would be a discrimination in their favor, which the law does not tolerate.

The judgment of the district court is reversed, and the cause is remanded, with directions to enter a judgment for plaintiff, and against all the defendants, in accordance with this opinion.

REVERSED.

SEDGWICK, J., not sitting.

J. L. FISHER, APPELLEE V. FRED J. H. LAWSON, APPELLANT.

FILED APRIL 12, 1918. No. 19934.

1. **Land Contract:** AGREEMENT TO ASSIGN: RIGHTS OF ASSIGNEE. An agreement to assign a land contract between third parties for the sale and purchase of real estate is not a contract for the sale of land. The assignee of the contract takes only the rights of the assignor.
2. **Specific Performance:** REVIEW. The evidence reviewed, and found sufficient to sustain the findings and decree of the district court, and the same are adopted by this court.

APPEAL from the district court for Wheeler county: JAMES R. HANNA, JUDGE. *Affirmed.*

T. F. A. Williams, A. L. Bishop and *F. J. Lawson,* for appellant.

O. A. Williams, Williams & Kryger and *R. O. Williams, contra.*

HAMER, J.

This action was brought in the district court for Wheeler county to foreclose a contract between the plain-

tiff and defendant by which the plaintiff sold a certain contract between the Omaha Safe Deposit & Trust Company, by which the trust company agreed to sell to one Russell O. Woodworth the northeast quarter of section 19, township 24 north, of range 10 west, of the sixth principal meridian, situated in said Wheeler county, and by which Woodworth agreed to purchase said land and pay $2,400 therefor. By the terms of the contract in question in the case Lawson agreed to pay Fisher the sum of $2,800 for the said contract and the assignment of it to him as follows: $1,600 to be secured by a mortgage on land owned by Lawson, and to assume the payment of $1,200 the remainder due to the Omaha Company. When such payments were made, the Omaha Safe Deposit & Trust Company was to transfer said premises to Fisher's assignee. A trial in the district court for Wheeler county resulted in a decree for plaintiff, and the defendant has appealed.

Appellant contends first that the contract in question was one for the sale of land, and that plaintiff was required to furnish him with a good merchantable title to said real estate before appellant paid any part of the purchase price for the assignment of the contract in question, and that the finding and judgment were erroneous for that reason. An examination of the contract is a sufficient answer to this assignment. The agreement between Fisher and the appellant is one whereby Fisher simply agreed to assign and deliver the contract between the Omaha Safe Deposit & Trust Company and Woodworth to Lawson, with the consent of the trust company, which the plaintiff obtained in writing. The finding of the district court on that point appears to be right.

It is further contended that the evidence is insufficient to sustain the decree. The record shows that Lawson was to have possession of the premises in question when he executed the mortgage for $1,600 to the plaintiff. It clearly appears that appellant took

possession of the land without executing the mortgage for about four years; that plaintiff sent a note and mortgage to the bank at Elgin, Nebraska, for $1,600 for appellant to execute; that the bank gave him notice that they were there to be signed and acknowledged, yet the defendant failed and refused to sign and execute the same. It further appears that appellant never paid the remainder due on the Woodworth contract to the trust company, and never assumed the payment of the $1,200, or any other sum whatever, and never carried out any part of his contract with Fisher.

Defendant never paid any taxes on the land in question, but purchased an outstanding certificate of tax sale when he ought to have paid the taxes himself. His only excuse for his conduct was that plaintiff had not furnished him with a good title. It appears that there was a mortgage of record on the land in question which had not been released of record, and to comply with the defendant's demands the Omaha Safe Deposit & Trust Company brought a suit in the district court for Douglas county for a cancelation of the $800 mortgage and to quiet the title to the land described in the Woodworth contract, and obtained a decree quieting the title and perfecting the same so that it could make a good, perfect and merchantable title to the defendant; that the plaintiff paid the trust company the remainder due on the Woodworth contract, and has always been ready and willing to make a good and perfect deed to the said land in question to defendant upon the performance by him of the conditions of the contract between them. As we view the record, there appears to be no sufficient excuse for defendant's failure to perform his agreement.

While it is earnestly contended that the land itself was sold, the language of the contract is: "Within 30 days after this date, upon the payment of said party of the second part of the price above named and delivery of said securities, said J. L. Fisher agrees to assign contract for the (describing the land)." This

would clearly appear to be an agreement to assign the contract. It is certainly not an agreement to execute a deed. The contract made does not seem to justify the defendant's contention, and the finding and judgment of the district court is fully justified by the evidence.

The decree of the district court seems to be clearly right, and it is

AFFIRMED.

SEDGWICK, J., not sitting.

PORTER C. BAKER, APPELLEE, v. VALENTINE THOMAS, APPELLANT.

FILED APRIL 12, 1918. No. 19827.

1. **Notes: CONSIDERATION: PLEADING.** The words, "for value received," in a promissory note import a consideration, and in an action upon the note, although non-negotiable, consideration need not be alleged.

2. **Fraudulent Sale: REMEDIES.** One who has been fraudulently induced to enter into a sale contract may repudiate the contract, and, tendering back what he has received under it, may recover what he has parted with, or its value; or he may affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action of deceit for damages caused by the fraud. As a general rule, he cannot treat the sale as void, in order to recover the price, and as valid, in order to recover damages, the remedies being inconsistent.

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

Wright & Mothersead and *A. A. Kearney,* for appellant.

Morrow & Morrow and *L. L. Raymond, contra.*

CORNISH, J.

Action upon a promissory note given in part payment for a patent right. The defense, besides deny-

ing liability on the note, seeks judgment on a counterclaim for damages for fraudulent representations at the time of the purchase of an interest in that patent right. Judgment for plaintiff. Defendant appeals.

The defendant contends that the note as alleged is non-negotiable, and, there being no allegation in the petition that it was given for a consideration, no cause of action is stated. The note does, however, show that it was given "for value received." These words import a consideration, and the allegation was not necessary. 8 C. J. 867; *Bourne v. Ward,* 51 Me. 191; *Owens v. Blackburn,* 146 N. Y. Supp. 966.

The note contained a provision that it should be void if patent No. 724823 should not be issued. The patent had not issued when the note became due, and, when issued, bore a different number than its application number, above stated. It is argued that these facts made the note void. The evidence shows that the patent issued was the patent which the parties contemplated, and that the parties contemplated that there might be delay in the issuance of the patent. No objection was made because of the delay, but the defendant took and has since retained his interest in the patent. Neither of these objections constitutes a good defense to the note.

It is assigned as error that the court in its instructions required the defendant to show a total failure of consideration. There is no evidence of partial failure. The defendant got all that he bargained for, an interest in the patent. The fact, if it is a fact, that the patent did not turn out to be of the value that the parties anticipated, or that it did not have a value in the amount of the consideration paid, would not constitute a partial failure of consideration. The trial court was right in instructing the jury that, if they found that the patent was of substantial value, then there was a consideration for the note sued upon in the amount for which it was given.

One who has been fraudulently induced to enter into a sale contract may repudiate the contract, and, tendering back what he has received under it, may recover what he has parted with, or its value; or he may affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action of deceit for damages caused by the fraud. He cannot treat the sale as void, in order to recover the price, and as valid, in order to recover damages, the remedies being inconsistent. *Alfree Mfg. Co. v. Grape,* 59 Neb, 777; *Sloan Commission Co. v. Fry & Co.,* 4 Neb. (Unof.) 647; 20 Cyc. 87.

In the instant case, the defendant, denying liability on the note, seeks to treat the note as void, and also to recover damages in the amount paid. He has never tendered back the interest in the patent right, assigned to him, nor was evidence introduced or offered from which the jury could find the difference in value between the patent right as it is and either the purchase price or what would have been its value if as represented. It may be that, if the thing purchased were entirely worthless, the law would not impose the obligation of tendering it back in order to rescind. The question whether the patent right was worthless was submitted by the trial judge to the jury, which found that it was not. The defendant, if he wished to rescind the sale for fraud, should have tendered back to plaintiff the patent right.

The defendant, in not tendering back, but still retaining, the patent right, could not claim rescission of the contract on the ground of fraud. In denying liability on the note sued on he did not affirm the contract. In seeking to recover back the consideration paid, and in not offering evidence from which the jury could find the actual or market value of the patent, if it had value, he appears to be attempting to rescind the contract, because, when one elects to stand upon his contract and recoup in damages for fraud, the measure of his recovery is what would have been the benefits to him of

the contract as made. The trial court, however, appears to have permitted evidence and submitted instructions bearing upon defendant's counterclaim for damages for fraud, limiting the evidence as to fraudulent representation to the representation that the patent was a good, automatic, working dam of practical use. The court, apparently upon the theory that such misrepresentation, if made, would not tend to show injury or damage to the defendant, did not permit evidence of the alleged misrepresentation that the plaintiff had already sold 1,000 of the patents and had an organized force of sales agents over the territory. While it is true that injury or damage, as a result of fraudulent representations, must be pleaded and proved, yet, where the question of fraud is in issue, the general rule is that any misrepresentation of a material fact relied on is admissible as bearing upon the fraudulent intent and inducement to purchase, whether it goes directly to the amount of damages sustained or not. However, if there was error in this respect, it was error without prejudice. The court did submit to the jury the question whether the patent right was of practical use for the purposes intended, and, under the pleadings and issues as made, this was the only issue of fact, touching value, necessary or proper to be submitted to the jury.

The judgment of the district court is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

CECELIA CARTER, APPELLANT, v. WILLIAM GAHAGAN ET AL., APPELLEES.

FILED APRIL 12, 1918. No. 19860.

1. **Wills:** COMPETENCY. A testatrix who knows and understands the nature of the act she is performing, and the amount and character of her property and the disposition she wants to make of it, and also knows her kindred whose relationship to her would nat-

urally make them the object of her consideration, is of disposing mind and memory and is competent to make a will.

2. **Evidence:** MENTAL CAPACITY: NONEXPERTS. Where a nonexpert witness testifies to the unsoundness of mind of a testatrix, he must relate the particular acts and conduct of such testatrix upon which his conclusion is based.

3. **Wills:** MENTAL CAPACITY: EVIDENCE. The record examined, and *held* that it was error to admit in evidence the guardianship proceedings that are discussed in the opinion on the question of mental capacity of the testatrix.

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

Matthew Gering and *P. A. Wells,* for appellant.

Arthur F. Mullen and *James A. Donohoe, contra.*

DEAN J.

Bridget Gahagan died in Douglas county on November 6, 1914. Her will was probated there in county court, and on appeal and trial to a jury the judgment of the county court was reversed. The proponent, Cecelia Carter, who is a daughter of decedent, has appealed.

Patrick Gahagan and Bridget, his wife, were pioneer settlers in Holt county. He died there in 1907. In October, 1909, Mrs. Gahagan moved to Omaha, where she lived with Cecelia until she died. She executed the will in Douglas county on February 19, 1910, and named Cecelia as sole beneficiary and executrix. There are ten children, but the residence of four of them has long been unknown. Five have joined in this suit as contestants. The estate consists of about $5,000, all but about $200 of this being the proceeds of the sale of 160 acres of land in Holt county that was given to decedent by her son Stephen in 1892, and on which she resided for many years. He is one of the children who disappeared. Contestants argue that by undue influence Mrs. Carter induced her mother to execute the will, and that she was mentally incompetent to make a will.

On January 28, 1910, Mrs. Gahagan sold her land for $4,800 through an O'Neill real estate agency to her son William, who resided in Holt county. The money was deposited in an Omaha bank, and within a few days Mrs. Maggie Fluckey, a daughter of Mrs. Gahagan, began two actions in Douglas county, namely, one in the district court to restrain her mother and Cecelia from withdrawing the money from the bank, and one to have a guardian appointed for her mother, alleging mental incompetency. About a week afterwards William came from O'Neill to Omaha, bringing with him Mr. P. J. McManus and Andrew Smith, residents of Holt county, for the purpose, as he testified, of inducing his mother to return with them to O'Neill to have a guardian appointed for her there. After some talk among the children and their mother, and the two friends, Mrs. Gahagan agreed that she would go to O'Neill and have a guardian appointed there, provided Mrs. Fluckey and those associated with her would dismiss the two suits then pending against her in Douglas county. Under the terms of this agreement the suits were dismissed, and William and his two friends at once returned to O'Neill, taking Mrs. Gahagan with them. On March 12, 1910, on William's application Mr. McManus was there appointed guardian of his mother. Cecelia followed the party to O'Neill a few days before the appointment was made on receipt of word from her mother that her presence was desired there.

In the district court the jury found specially that Mrs. Gahagan was a resident of Douglas county when the guardian was appointed in Holt county. Contestants concede that the effect of the jury's findings "made the so-called guardian proceedings in Holt county a nullity." But the record of the guardianship proceedings is in evidence, and proponent argues that the court erred in admitting it over her objection, and insists that the jury were thereby prejudiced against her. She contends that the record was misleading. The evidence shows that the facts and circumstances sur-

rounding the appointment of a guardian for Mrs. Gahagan afford no reasonable ground for inferring an admission upon her part that she was in need of a guardian to manage her business. We conclude the record should have been excluded. *Mulholland's Estate,* 217 Pa. St. 65; *Jenckes v. Court of Probate of Smithfield,* 2 R. I. 255; *Dewey v. Allgire,* 37 Neb. 6.

In a record of unusual length we are unable to discover testimony that will support contestants' argument that Mrs. Gahagan was unduly influenced to make the will or that she was mentally incompetent. The verdict does not seem to be supported by the evidence. Our conclusion is based on the following among other facts appearing in the record. Mrs. Gahagan for more than 30 years before her death seems to have been competent to take care of her business affairs. She was careful about her expenditures. About two years before her death she deplored the fact that some of her children began the two Douglas county suits against her, and said it showed, as she expressed it, "a good deal of nerve" for them to do that and then compel her to pay the expenses. There was no trouble in the Gahagan family until the land was sold. She wanted to sell it because, as she said, the rentals were only about $200 a year, and she could realize more if the land were sold and the money put out at interest. In October, 1909, just before she came to Omaha the last time, there to live with Cecelia, she had been boarding in Holt county with an old lady who was not related to her. When she accompanied William and his party to O'Neill to have the guardian appointed she went to a hotel, and there too she stayed among strangers for two weeks or more, and was apparently always capable of taking care of herself. Her son William, who lived less than 10 miles away, called on her at the hotel only three times during this period. A witness for contestants was a guest for a week at the hotel while she was there and talked with her frequently. Her conversation as

related by him does not disclose mental weakness. Mr. McManus testified that she was gratified upon inquiry to know that the principal sum of her money was not being depleted, and that the interest was supporting her. Contestants' witnesses, who were nonexperts, testified to conclusions respecting Mrs. Gahagan's lack of mentality. Their testimony does not seem to be based on particular acts or conduct indicating unsoundness of mind, but was mainly to the effect that she could neither read nor write nor make change, and that she was at times forgetful.

William testified that his mother was of unsound mind, but admitted that she executed a deed to the land that he bought only three weeks before the will was signed. The contract was signed by her in 1908 under which the land was sold in 1910. He also testified that, up to the time the will was executed, his mother rented the land and collected the rent, and also that the drafts that were sent to his mother in payment for the land were mostly, if not all payable to her order. William Gahagan's wife testified that Mrs. Gahagan had asthma, coughed a good deal, had Bright's disease, that she moved around slowly, sat or lay down most of the time, could not talk very long, and that she was forgetful and would repeat herself frequently, and could not count money. To substantially the same effect was the testimony of Mrs. Maggie Fluckey and her husband.

Two physicians were called by proponent who had attended Mrs. Gahagan. One of these testified that he saw her every day for two weeks in December, 1910, and that he treated her for asthma and coughing spells. He said her replies were intelligent, and that there was nothing about her ailment that would affect mentality. He noticed nothing unusual in her manner, and said that her condition was such as is common to a woman of her age. The other physician testified that he knew Mrs. Gahagan in Holt county from his boyhood until 1898, and that he had a passing acquaintance with her until her death. He treated her for about a week in her

last illness for asthma and coughing spells that brought on heart complications that resulted in death. He said her answers to his questions were normal, and that there was nothing to indicate that her mental condition was unsound. As a boy and young man in Holt county he did not recall anything out of the ordinary in her mental condition.

A witness called by proponent testified that for the last two years of Mrs. Gahagan's life she lived only three doors from her, and she saw her not less than three times a week during that period, and that she often saw her at the store buying groceries and paying for them, making change, and the like, and that once or more she saw her pay the rent and pay for coal, taking receipts for the payments. It is not shown that Mrs. Gahagan's mentality was any different in the last two years of her life than it had been for some years preceding that period. To the same substantial effect is the testimony of two or more other witnesses called on the part of the proponent who had known Mrs. Gahagan during the entire period of her residence in Omaha. Contestants argue that they, and not Cecelia, helped make their mother's estate. But credit for the enhanced value of the land, practically her sole estate, that was given to Mrs. Gahagan by her son in 1892 cannot be claimed by any of the children.

The execution of the will appears to have been in all respects regular. There is no attempt to conceal the fact that Cecelia went with her mother to the office of the lawyer who wrote it, and that she was present when it was signed. It is shown that Cecelia remained in an outer office while her mother told counsel the disposition that she wanted to make of her property, and that a stenographer was called in, and in Mrs. Gahagan's presence and hearing the will was dictated and signed by Mrs. Gahagan by her mark and by competent witnesses. The stenographer testified that Cecelia accompanied her from the outer office into the room where the will was dictated, and after the will was prepared

she was present when it was read to Mrs. Gahagan, but that Cecelia, as nearly as she could recall, took no part in the talk respecting the will while she was in the office with her mother. It is shown that Mrs. Gahagan from time to time told some of her friends that she had written a will giving to Cecelia all of her property because her daughter had always been good to her and took care of her when she was ill and needed care. *Isaac v. Halderman,* 76 Neb. 823; *In re Estate of Wilson,* 78 Neb. 758; *Lamb v. Lynch,* 56 Neb. 135.

It sufficiently appears that the testatrix, though advanced in years and subject to the usual infirmities of age, was nevertheless capable of attending to business affairs. It also appears that she knew and understood the nature of the will she signed, and the amount of her property and its character, and those who were, or should be, the objects of her bounty. The judgment does not seem to be supported by the testimony.

The judgment is reversed and the cause remanded.

REVERSED.

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

ANNA E. ACOM, APPELLEE, v. GEORGE ZIEGLER, APPELLANT.

FILED APRIL 12, 1918. No. 19975.

1. **Fraudulent Conveyances.** The facts surrounding a conveyance of land between near relatives will be closely examined, where fraud is charged, to discover if the conveyance was made fraudulently or for the purpose of hindering, delaying or defrauding creditors.

2. ———: PROOF. The fraudulent character of such conveyance may be proved by testimony that is in its nature circumstantial.

3. ———: CONSTRUCTIVE NOTICE. Where a grantee knows of his grantor's fraudulent intention, or knows such facts as would put an ordinarily prudent person upon inquiry that would lead to a knowledge of the fraud, such person has constructive notice of the fraud and is bound thereby.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed.*

Sutton, McKenzie, Cox & Harris, for appellant.

Cain & Mapes, contra.

DEAN, J.

This is an injunction suit begun by Anna E. Acom, plaintiff and appellee, against George Ziegler, William G. Condit, sheriff of Dodge county, and William A. Johnson, deputy sheriff, defendants and appellants, to enjoin them from advertising and offering for sale an 80-acre tract of farm land in Dodge county under an execution issued on a judgment obtained by George Ziegler against James D. Raitt, Gilbert A. Palmer, and Fred R. Acom, husband of plaintiff, on June 3, 1916, in the district court for Douglas county in the principal sum of $12,566.80 and costs of suit taxed at $149.10. The court found that plaintiff, "ever since the 29th day of March, 1916, has been the absolute owner in fee" of the land involved in this action. The sheriff and his deputy and their successors were perpetually enjoined from advertising or selling the land for the satisfaction of the judgment sued on. There was no finding nor judgment as to whether the land was or was not a homestead. The decree is silent on that point. From the judgment so rendered in favor of plaintiff, defendant Ziegler appealed.

Plaintiff in her brief contends: "The plaintiff claims ownership of the said property by virtue of conveyances in writing executed before the rendition of the judgment, and founded upon a written antenuptial agreement and her marriage in pursuance thereof as the consideration therefor." The reference to personal property in the record is merely incidental. It is not involved in this action.

Plaintiff was married to Acom on March 18, 1916. He was a bachelor of 46 years and she was 47 years of age and had been a widow about 2 years. A daughter

15 years of age, the child of her former husband, lived with her. Acom then owned the land in controversy and about $2,000 worth of personal property that plaintiff now maintains she owns. He was acquainted with plaintiff from childhood. Before her marriage to Acom, plaintiff and her daughter made their home with Ed Ives, a brother at North Bend, for whom she had been keeping house for a little more than 2 years. Ed was married on September 8, 1915, and plaintiff testified that his marriage necessitated the procuring by her of another home for herself and daughter. When she married Acom it appears that she had very little if any property.

Plaintiff's petition charges that the Douglas county judgment obtained by Ziegler against Raitt, Palmer and her husband was "for damages on account of an alleged fraudulent transaction." The transaction to which she refers in her petition was had between the parties in the early part of July, 1914, or about that time. She testified that she never heard of Ziegler, nor of the facts connected with the Douglas county suit for fraud, nor the judgment, until Ziegler undertook to have the 80-acre tract levied on. She says she married Acom mainly to get a home for herself and daughter. She also testified that she married him in consideration of a voluntary promise made by him to her that was afterwards executed by him, without request or demand by her, to convey to plaintiff all of the property that he owned, namely, the 80-acre tract and all of his personal property, worth about $2,000. It appears from plaintiff's testimony and from Acom's that he did not reserve so much as a dollar's worth of his property for himself. All was gratuitously and voluntarily bestowed by him upon plaintiff that he might gain her hand in wedlock. And this too in the absence of demand or even request by her that he give to her any property. In support of her contention she produced the following two letters:

"North Bend, Nebraska, Aug. 20, 1915.

"Mrs. Anna Hasting
Bolder Col

"Dear Anna Your most welcome letter received this morning I have some news for you your Brother Edd is going to be married some time in September I do not know the date yet, he told me he was going to give his Bride a deed to the house in town for a wedding present. Now I have not got a house in town but I will give you a deed to the 80 acre east of town for a wedding present. The place is rented for this year but we will get poseen the first of March but we will talk that over when you get home you let me know what train you will be on and I will meet you in fremont I can drive down any time You did not say how the Bolder friend were geting along I will close hoping to see you in a few days

"With Love Res.
"Fred R. Acom."

"North Bend, Nebraska Sep 6 1915

"Dear Anna I would like to know for certain how I stand with you I wrote you a Bolder that I would give you the 80 acres east of North Bend if you would marry me now I will transfer all my Personal Property So you see that all I can do. Pleas be reddy to give me a final Answer on the day of the Wedding a David City We have to start about 8 o'clock in the morning Its about 40 miles to David City

"With Love
"Fred R. Acom"

These letters considered together constitute "the written antenuptial agreement" for the transfer of the land in suit from Acom to plaintiff, to which repeated reference is made in her brief as "being amply sufficient to comply with all the requirements of the statute of frauds." She said that she received both letters in due course of mail within a day or two after their respective dates, the first one at Boulder while visiting there and the second at North Bend while she

was yet living at her brother's home and at a time when Acom lived in the same village and only two blocks away. No envelopes were produced. She said she carried the letters "in the front of her dress" until the envelopes were almost worn out and then destroyed them.

Plaintiff testified that her husband and her brother Ed were good friends. Acom testified that he called on her frequently at Ed 's home as a suitor. Living as he did in the same village and only two blocks away, we will not assume without proof that Acom's courtship would be any different from that which ordinarily prevails elsewhere under like circumstances. Without more extended discussion, it appears to us that both letters were fraudulently conceived and antedated by plaintiff's husband in an attempt to bolster up a fraudulent transfer of his property. Apparently they were not written for an honest purpose, and in view of the record we decline to hold that plaintiff was an innocent recipient of either letter. Even if plaintiff in good faith contemplated marrying Acom in consideration of the conveyance by him of his property to her, she was not therefore relieved from making such inquiry as a reasonably prudent person would be required to make in an ordinary business transaction. Sufficient appears in the record to have caused inquiry by plaintiff respecting the *bona fides* of the transaction on the part of Acom, even though she did not have actual knowledge of the fraud. Following are some of the circumstances that indicate the conveyance was fraudulently contrived by plaintiff and her husband:

Acom testified that he had a diamond ring mounted for plaintiff as long ago as July, 1915, and that on September 8, 1915, he presented it to her as a wedding ring. On this point plaintiff testified: "Well, he gave me a ring and I would not wear it only as a friendship ring at first, and that day (September 8, 1915) I wore it as a wedding ring." Neither witness seems to corroborate the other on this point, and the "friend-

ship ring at first" feature was doubtless an afterthought.

The deed and bill of sale from Acom to plaintiff are both dated March 29, 1916. Acom testified that they were prepared by the same person and on the same day and in the same bank, and that he delivered them to plaintiff on that day. Plaintiff testified that her husband delivered both instruments to her in her daughter's presence a few days after the marriage. Her daughter was not called as a witness. Mrs. Acom said they were taken by her to Fremont to be recorded, but neither plaintiff nor her husband satisfactorily explain why the deed was recorded on May 4, 1916, and the bill of sale on June 5 following, which will be presently noted. A witness testified that he examined the bill of sale the day after it was recorded, and that the signature of Acom was in ink that when first written is blue and afterwards becomes black, and that the signature then had the appearance of having been very recently written. He examined the signature a month later and it was found to be almost perfectly black.

Respecting the fraud action that was commenced in the district court for Douglas county against Raitt, Acom and Palmer on January 8, 1916, the parties stipulated that it was first tried in the Douglas county district court on April 19, 1916, and that the jury failed to agree. The record shows that only 14 days thereafter, namely, on May 4, 1916, the deed to the land in question was recorded. It was also stipulated that on the second trial the verdict of the jury was rendered on June 3, 1916, for $12,556.81 in favor of Ziegler. It is disclosed by the record that only two days thereafter, namely, on June 5, 1916, the bill of sale was recorded.

On May 15, 1916, plaintiff and her husband executed and acknowledged a mortgage on the land in suit for $12,000 due in five years. This mortgage was recorded the next day. In this mortgage the notary public who prepared, acknowledged and witnessed the deed from

Acom to plaintiff was named as grantee. It does not clearly appear from plaintiff's testimony that she signed a promissory note in connection with the mortgage, and she testified that she received no consideration for its execution, but that she did so merely because Acom wanted the money. The grantee was not called as a witness. Mr. Acom did not testify repecting the $12,000 mortgage. No witness except plaintiff testified respecting this important financial transaction that involved perhaps more than the value of the land. All of the instruments that purport to affect the title to the land appear for some reason to have been antedated. It is not without significance that, with the exception of the deputy sheriff who testified merely as to the levy that he made, plaintiff and her husband were the only witnesses who testified on the part of plaintiff. Plaintiff's husband carried on the farming operations and all the business connected with the land in all respects after the purported transfer, and apparently retained possession of all of the property the same as before. The personal property referred to by plaintiff was assessed in the name of her husband for the year 1916.

In a supplemental memorandum brief defendant argues and cites authorities to the effect that an antenuptial agreement of which no note in writing is made until after the marriage, while good between the parties, is not binding on creditors or innocent purchasers intervening. 12 R. C. L. 522, sec. 50; *Flory v. Houck*, 186 Pa. St. 263; 20 Cyc. 507. We do not find it necessary to decide that point in view of the present state of the record.

The facts surrounding a conveyance of land between near relatives will be closely examined, where fraud is charged, to discover if the conveyance was made fraudulently or for the purpose of hindering, delaying or defrauding creditors. The fraudulent character of such conveyance may be proved by testimony that is in its nature circumstantial. Where a grantee knows

of his grantor's fraudulent intention, or knows such facts as would put an ordinarily prudent person upon inquiry that would lead to a knowledge of the fraud, such person has constructive notice of the fraud and is bound thereby.

We are convinced that Acom transferred his property to plaintiff with knowledge by her at the time of the fraud and of his fraudulent intention in the premises. The alleged fraudulent transaction that she referred to in her petition was perpetrated by Acom and his associates as against appellant Ziegler in July, 1914, as appears by an exhibit in the present case, which was long before plaintiff or her husband even pretend that the property was conveyed to her.

The record abounds with badges of bad faith. 20 Cyc. 439. There appears the studied pose of innocence and the laborious attempt to give an appearance of fairness and of good faith to the transaction that did not in fact exist. The statement that Acom without demand for any property gave up every vestige of his property to induce plaintiff to marry him is so unusual that it taxes our credulity. These facts convince us of the bad faith of the transaction. We do not deem it necessary to extend this opinion by a more elaborate discussion of the facts. The burden of proof was on plaintiff, and she has failed to establish her case. Rev. St. 1913, sec. 2648. The judgment is not supported by the testimony, and it is therefore reversed and the cause remanded.

REVERSED.

LETTON and SEDGWICK, JJ., not sitting.

HAMER, J., dissenting.

I am unable to agree with the views expressed in the majority opinion. The marriage took place March 18, 1916. The judgment was not rendered until the 3d day of June, 1916, two and one-half months afterwards. The mere fact that a case was pending against the prospective husband would confer no lien upon

the land. Besides, there were other defendants in the case. The case might be continued or compromised or settled. The other defendants might pay in case a judgment should be rendered. I see nothing to prevent Mrs. Acom from getting a good title to the land which her husband promised to convey to her, and which he did convey to her, and which became her homestead.

As to the home, the plaintiff, is shown to be the owner, and the prayer seeks an order enjoining the defendants and each of them from proceeding with the advertisement and sale of the land and that such injunction be made perpetual. I think the creditors have failed to make a case against the land. There is no evidence tending to show that the plaintiff participated in any fraud or attempted fraud.

Mrs. Acom testified that she was a widow, and that she married her husband to get a home for herself and for her daughter. The daughter was 14. The mother was therefore approaching middle life. By the fact that her brother had recently married she was ousted of the home with him which she had previously occupied after the death of her husband. It was natural for a woman, always handicapped in the struggle of life by her sex, to marry for a husband and a home if she could get them, and especially if she had a child she was not well able to provide for. Perhaps no man is quite able to understand the anxieties of a woman thus circumstanced. It must be apparent to every person of mature years and observation that marriages with the purpose of getting a home are not uncommon. That a husband comes with the home should be no objection. Her husband had a right to give the little 80-acre homestead to her, and he did so. Because he was in debt did not deny him the privilege to get married, nor did it hinder him from providing his wife with the home that was necessary to both of them in their new condition. It is dangerous to the welfare of society to deny a man and woman the right to get married and to deny them a

home because the man is in debt at the time the marriage takes place.

I do not feel like putting a lever under the homestead right of these people to pry them loose from what I conceive they are justly entitled to, even against the claims of creditors, especially contingent creditors. I think the burden of proof is upon the creditors to show that the transfer of the land made to the wife was fraudulent, that it was made after a judgment rendered, and that she knowingly participated in a fraud with the sole motive of assisting her husband to defeat creditors who were known to have valid claims. She had a right to marry him for a husband and for a home. Husbands and homes go together, and they ought to. She had a chance to get a home and a husband at the same time. She took the chance and got them both. The majority opinion would leave her without a home, although the creditors had no lien on the home at the time she married him, and the claim was contingent and shadowy. It will be a dangerous thing, a very dangerous thing, if the creditors can go behind the marriage certificate and enforce the lien of a judgment which had no existence at the time the ceremony was performed and the certificate issued, nor until after the homestead right attached.

I think it is clearly against public policy to make the lien of this judgment in effect relate back to a time before the judgment was procured and before the plaintiff and her husband were married. If this farm can be taken away from the plaintiff, then the husband is to be considered as performing a fraudulent act as to his creditors because he contemplates marriage, and then becomes a husband and gives his wife a little homestead. To hold for the creditors is to say that a man has no right to get married and to give a homestead to his wife unless he is out of debt, and that if the wife marries him she gets no home that she can keep, although her husband is willing that she may have it and conveys it to her by a good and sufficient

deed before the judgment is obtained, and when there is no certainty that it will be obtained. No illustration can be plainer than this case itself. The husband had incurred a contingent liability, as he was jointly obligated with others. No one could know what the result might be. Suppose we give this majority opinion its natural effect. It would mean that no marriageable woman can take a husband if he furnishes her with a home unless he is solely without obligations of any kind. There must be no liability on any bond in any judicial proceeding, or upon the bond of any officer, or any contingent liability of any kind. If there is, and the woman marries him, she is likely to be thrown out and left without the homestead that the statute contemplates she is entitled to as a matter of right.

If Mrs. Acom and her husband got married and a part of the transaction contemplated was the conveyance of this tract of land to Mrs. Acom, and it was conveyed to her, it is immaterial whether a part of the transaction may have been in some respects irregular or questionable, as the land in any event is not to lose its homestead character. *McMahon v. Speilman,* 15 Neb. 653; *McHugh v. Smiley,* 17 Neb. 626.

That this court will most zealously defend the rights of the owner of the homestead, see *Van Doren v. Wiedeman,* 68 Neb. 243, where this court held that a sheriff's deed, made in pursuance of a sale of a debtor's homestead which, at the time of the levy, was occupied as such by the debtor and his family, will not divest the debtor of his title to the homestead nor invest the purchaser with any title thereto. In that case Mrs. Van Doren asked for the surplus, and the trial court held that she waived her homestead right by reason of the fact that she demanded the surplus. But this court held that Mrs. Van Doren was not bound, although her husband had signed the receipt with her for the surplus. While the homestead had been sold and Mr. and Mrs. Van Doren receipted for the excess of the purchase price above the amount of the execution, yet this court

protected the homestead and held they were not bound by what they had done.

Suppose that Acom, instead of conveying the land to Mrs. Acom, had conveyed it to somebody else for a valid consideration, would anybody contend that the grantee would not have title to the premises? No consideration can be more substantial than the consideration of marriage. Mrs. Acom by this marriage linked her life and her companionship with Acom for the uncertainties of half a lifetime to come. Is that worth nothing?

The deed to Mrs. Acom conveying her the land appears to have been recorded on May 4, 1916, and was delivered to her a few days after the marriage. The action brought in the district court for Douglas county by George Ziegler against James D. Raitt, Fred A. Acom, and Gilbert A. Palmer was commenced on the 8th day of January, 1916. There appears to have been an amended petition filed in that case, and there was a first trial beginning on April 19, 1916. At this trial the jury failed to agree upon a verdict. At the second trial the jury arrived at a verdict on the 3d day of June 1916. It is stipulated by counsel that a judgment was obtained in that case on the 3d day of June, 1916, in favor of Ziegler and against said James D. Raitt, Fred A. Acom and Gilbert A. Palmer. The petition in that case alleges an oral contract in a land transaction and a conspiracy. Plaintiff had trouble to prove it, because the jury did not agree at the first trial. The subjects considered in that case seem to have included alleged mortgages, accreted lands, and titles possibly defective, and a wide field of controversy was covered. The majority opinion refers to the alleged merits of that controversy, which we are of course unable to determine in this case.

The view of the writer is that plaintiff's husband had a right to convey to her the little homestead without any reference to the uncertainties of the Ziegler case, and that Mrs. Acom had a right to receive the

title, and that she should not be deterred from marrying Acom or receiving a deed to the homestead because of any possible uncertain financial condition of her husband. Besides, there is no evidence that she knew of his financial embarrassment in the Ziegler case, or anything about it. And when men go courting they are said to put "the best foot foremost." I think an ancient rhymster put it something like this:

> "When people do a-courting go,
> They always go with pomp and show,
> And aye the foot
> They foremost put
> Is just the foot most comely."

I can understand that the little home may have been given to Mrs. Acom with a sort of generous, manly gallantry and a splendid munificence of manner, just as if it were but a single rose and the giver was the owner of an unbounded garden. In the view of the writer the majority opinion as to the homestead is only the law because it is declared to be so, but I would not allow the injunction as to the personal property, and in that respect the majority opinion seems to be right. The husband had only the lawful right to provide his wife with a homestead, and the personal property should be subjected to the payment of his debts.

This case is properly a subject for the consideration of the women of the state, and especially those who desire to preside in homes of their own where they do not stand in fear of a writ in the hands of the sheriff to disposess them because of some contingent debt of the husband not adjudicated to be valid until after the marriage is solemnized. As the law always grows and always grows in the direction of civilization and humanity, let us anticipate its immediate further growth as the rights, duties, and privileges of women increase and approach the rights, duties and privileges of men.

ANTON ESKELSEN, APPELLEE, v. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED APTIL 12, 1918. No. 20416.

1. **Master and Servant:** FEDERAL EMPLOYERS' LIABILITY ACT: PETITION. Plaintiff's original petition pleaded that the defendant owned and operated a railroad throughout Nebraska and other states named in the petition, and that he was employed by the company as a baggage handler at its Omaha depot, and while so engaged a fellow employee negligently caused a heavy trunk to fall upon him whereby he sustained personal injuries, for which he sought to recover damages. The petition did not state that it was brought under a law of Nebraska. *Held*, that the petition stated a cause of action under the federal employers' liability act, 8 U. S. Comp. St. 1916, secs. 8657-8665.

2. **Limitation of Actions:** AMENDMENT OF PETITION. In such case an amended petition filed more than two years after the accident, that in specific terms alleged the interstate character of defendant and of plaintiff's employment, did not state a new cause of action, but related back to the filing of the original petition, and the action was not barred by the federal statute of limitations.

3. **Commerce:** FEDERAL EMPLOYERS' LIABILITY ACT: SCOPE. It is the carrier engaged in interstate commerce that this act (federal employers' liability act) seeks to regulate in relation to its duties to its employees, and the power of congress extends to, and the act was intended to cover, all the employees whose employment relates to such commerce; and if such common carrier is also at the same time engaged in intrastate commerce, using the same means and agencies for both, the power of congress extends to, and the act was intended to cover, all the employees whose employment relates to such means and agencies. *Kelley v. Great N. R. Co.*, 152 Fed. 211.

4. **Master and Servant:** FEDERAL EMPLOYERS' LIABILITY ACT: ASSUMPTION OF RISK. Where a railroad company and an employee are both engaged in interstate commerce, such employee does not assume the risk of an injury that is inflicted as the result of the negligence of a fellow employee. 8 U. S. Comp. St. 1916, secs. 8657-8665.

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

Edson Rich, A. G. Ellick and *C. A. Magaw,* for appellant.

Weaver & Giller, contra.

DEAN, J.

Anton Eskelsen, aged 25, was a baggage handler for the Union Pacific Railroad company at its Omaha station and was earning $55 a month. On June 1, 1912, he began an action against the company for $3,000 damages for personal injuries sustained on April 3, 1912, by being violently struck on the head by a trunk that he alleged was negligently pushed from the top of a loaded truck by N. Nelson, a fellow employee in the station. He recovered judgment for $3,000. On appeal the judgment was, by the commission, reversed. The case was tried a second time, and on March 9, 1917, under an amended petition, he recovered a verdict and judgment for $3,500. Defendant has again appealed.

In the original petition plaintiff alleged, among other things, that the defendant "owns and operates a railroad throughout the states of Nebraska, Wyoming, Utah, and other states. * * * That he was employed by the defendant in the capacity of a baggage handler * * * on the 3d day of April, 1912, * * * and while engaged in this work, * * * in accordance with the direction of his foreman, a baggage handler on the top of another truck carelessly and negligently allowed a trunk weighing 150 pounds to fall down a distance of several feet upon plaintiff, striking him on the top and back of his head, causing plaintiff serious and severe injuries."

On March 3, 1916, on retrial plaintiff filed an amended petition, and besides praying for $15,000 damages it contained these additional averments: "That the defendant at all times herein complained of was a common carrier engaged in interstate commerce. * * * That the nature of the work being done by him (plaintiff) at the time of receiving the injuries complained of was in-

terstate in character." Defendant filed a motion to "strike from the files the amended petition," because it was based on the federal employers' liability act (8 U. S. Comp. St. 1916, secs. 8657-8665), while the original petition as alleged was based on the laws of Nebraska, and was therefore a different cause of action, and because the action was barred on April 4, 1914, by the federal statute of limitations. The motion was overruled, and it seems to us properly so. Where in this class of cases a carrier is engaged in both interstate and intrastate commerce, some liberality must be permitted in the amendment of pleadings. *Walker v. Iowa C. R. Co.,* 241 Fed. 395. The original petition, though perhaps somewhat informal, did not allege that the cause of action arose under the laws of Nebraska, and did allege that defendant was operating "a railroad throughout the states of Nebraska, Wyoming, Utah, and other states," and that when plaintiff was injured he was handling baggage that was carried by defendant's trains generally, and that the injury was caused by the negligence of "a baggage handler" who was a fellow servant. It appears to us that the cause of action was sufficiently pleaded in the original petition. In the absence of an attack by motion or demurrer there was no need of amendment. The amended petition merely emphasized in more specific terms the interstate character of defendant, and of plaintiff's employment, and did not introduce a new cause of action that, but for the averments of the original petition, would have been barred by the statute of limitations. *Seaboard A. L. Railway v. Renn,* 241 U. S. 290.

Upon defendant's motion being overruled, it answered the amended petition, admitting the injury and plaintiff's employment as baggage handler, but denied that the injury was serious and denied that either defendant or plaintiff's fellow servant were guilty of negligence, and alleged that the injuries were due solely to the gross carelessness and negligence of plaintiff and to risks

which he assumed and that were known to him and that were incident to his employment.

Defendant argues that the evidence will not sustain a cause of action against it under the federal employers' liability act. It contends that negligence by defendant is not shown, nor does it appear that plaintiff was employed or engaged in interstate commerce when he was injured, and that plaintiff's testimony, in so far as it "relates to the negligence charged, and the employment of plaintiff in interstate commerce, is based solely upon evidence given by the plaintiff, which is materially inconsistent with his testimony at the former trial, upon matters within his personal knowledge."

We cannot sustain defendant's contention in the respects noted. It appears clearly to us that plaintiff was regularly employed by defendant in work that was practically all interstate in character. In view of the record, we are of the opinion it would be unreasonable to hold that it was incumbent on plaintiff to allege and to prove that it was an interstate trunk that fell upon him. It is obvious that to announce a rule so narrow would amount in many instances to a denial of a right of recovery. In the apparent confusion that ordinarily attends the transfer and loading of large quantities of baggage at transcontinental stations, it is obvious that an injured employee, whose injuries were incurred as in the case at bar, might not be able to identify the article of baggage that fell on him. The rule seems to be that if the employee at the time of the injury is engaged in interstate work, or in work so closely related thereto as to be practically a part thereof, he comes within the statute. In the present case nearly all the baggage handled by defendant at the Omaha depot at the time of the accident was interstate in character. The intrastate baggage was negligible in quantity. *New York C. & H. R. R. Co. v. Carr,* 238 U. S. 260; *St. Louis, S. F. & T. R. Co. v. Seale,* 229 U. S. 156; *Kelley v. Great N. R. Co.,* 152 Fed. 211.

Defendant's argument that plaintiff's testimony at the second trial differed from his testimony at the first trial, mainly with respect to whether the trunk was interstate in character and with respect to the negligence of Nelson, does not seem to be open to the objections urged. The question involved the credibility of witnesses, and on this point the jury were correctly informed and found for plaintiff. Under the act in question plaintiff can not be held to have assumed the risk of an injury that arose from the negligence of a fellow employee. *Malloy v. Northern P. R. Co.*, 151 Fed. 1019.

In the trial court plaintiff was required to file a remittitur for $1,500, which left the amount of recovery at $2,000. He now insists that the amount so remitted should be added to the judgment under the provisions of chapter 247, Laws 1915. Doubtless there may be cases where for good cause the legislative authority so conferred should be exercised by us, but ordinarily the trial court, having the opportunity of seeing the injured person and of hearing him testify, is better qualified to pass on a question of this character than is a reviewing court with only the inanimate page of a printed record for its guidance. It is apparent that plaintiff's injuries were severe, but we are not convinced that the painstaking trial court erred in requiring the remittitur, and we therefore decline to disturb its ruling in the respect noted.

The judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

HAMER, J., dissents.

The following opinion on motion for rehearing was filed July 8, 1918. *Modified, and rehearing denied.*

1. **Commerce:** FEDERAL EMPLOYERS' LIABILITY ACT: SCOPE. The federal employers' liability act refers to interstate commerce in a practical sense; and the test is whether the employee at the time of the injury was engaged in interstate transportation, or

in work so closely related thereto as to be practically a part thereof. *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 178, citing *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556.

2. ———: ———: POWER OF CONGRESS. Congress, in the exercise of its power over interstate commerce, and subject to the limitations prescribed in the Constitution, may regulate those relations of common carriers by railroad and their employees which have a substantial connection with interstate commerce, and while both carrier and employee are engaged therein. *Second Employers' Liability Cases*, 223 U. S. 1.

DEAN, J.

Upon re-examination we find that paragraph 3 of the syllabus of our former opinion, citing *Kelley v. Great N. R. Co.*, 152 Fed. 211, does not correctly state the law, and it is therefore withdrawn. The 1906 federal employers' liability act construed in *Kelly v. Great N. R. Co.* was held unconstitutional in *Employers' Liability Cases*, 207 U. S. 463. Subsequently the 1906 act was repealed, and on April 22, 1908, an amended act was passed. That act was held constitutional in *Second Employers' Liability Cases*, 223 U. S. 1, where it was said, in substance, that the act was intended to regulate the relations of common carriers and their employees which have a substantial connection with interstate commerce when both carrier and employee are engaged therein.

The record in the present case, fairly construed, discloses that the parties were both actually engaged in interstate commerce at the time when plaintiff was injured. It is fundamental that in cases arising under the act in question the plaintiff must plead and prove that he and the defendant were actually engaged in interstate commerce at the time of the injury. With respect to this feature the supreme court of the United States has placed a reasonable construction on the act in recent decisions. In *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, it is said:

"Having in mind the nature and usual course of the business to which the act relates and the evident pur-

pose of congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, * * * and that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it." The foregoing language is cited and approved in *Chicago, B. & Q. R. Co. v. Harrington,* 241 U. S. 178, in an opinion by Mr. Justice Hughes.

Our re-examination of the evidence convinces us as before that the trial court did not err in overruling defendant's motion for a new trial. The application for a rehearing is denied, and our former opinion, except as to paragraph 3 of the syllabus, is adhered to.

REHEARING DENIED.

ERNEST C. HODDER ET AL., APPELLANTS, V. LARS OLSON, APPELLEE.

FILED MAY 4, 1918. No. 19885.

New Trial: UNAVOIDABLE CASUALTY. The facts are stated in the opinion, and *held* sufficient to sustain the judgment of the district court.

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

Jacob Fawcett and *E. C. Hodder,* for appellants.

Wilcox & Halligan, contra.

MORRISSEY, C. J.

Plaintiffs brought this action under subdivision 7, sec. 8207, Rev. St. 1913, for a new trial. There was judgment for defendant, and plaintiffs appeal.

Plaintiffs are the owners of a half section of land in Keith county. In June, 1905, defendant bought this land at private tax sale for the years 1894 to 1903, in-

clusive, and subsequently paid the tax assessed for the years 1905 and 1906, and in 1907 brought suit to foreclose the tax lien. The major part of the tax paid was "irrigation tax." There was then pending in the federal court an action involving the organization of the irrigation district, the validity of the bonds issued, and the validity of the taxes assessed against the lands within the district. A number of other actions were pending in the state courts raising the same questions. Olson's foreclosure suit, together with other suits of the same character, were continued to await the outcome in the cases just mentioned. July 11, 1914, this court rendered a decision (*Orcutt v. McGinley,* 96 Neb. 619) holding the tax a valid lien upon the land within the irrigation district. Subsequently a motion for rehearing was overruled, and a mandate issued to the district court to carry the judgment into effect. After the mandate had issued, a second motion for rehearing was filed in this court. While this motion was pending, the district court for Keith county convened in regular session and entered a decree in the case then pending wherein Olson sought a foreclosure of his tax lien against the lands owned by defendants. Decree was entered in the sum of $2,084.73, and it was ordered that an order of sale be not issued for 90 days after the entry of the decree. After the adjournment of the October term of court for Keith county, this court sustained the second motion for rehearing in the case of *Orcutt v. McGinley, supra.* The court set aside its former judgment to the extent of holding the irrigation tax void. 97 Neb. 762.

Plaintiffs' petition is based upon the action of the court in setting aside its judgment entered in *Orcutt v. McGinley,* 96 Neb. 619, and entering the judgment found in 97 Neb. 762. In the instant case the district court found that, at the time the decree was entered for a foreclosure of Olson's tax sale certificate, "there was no dispute between the parties as to the amount due, but there was some dispute as to the rate of interest. De-

fendant contended that the rate was 10 per cent., while plaintiff contended for the statutory rate. After some discussion among themselves, the plaintiff agreed to accept 10 per cent., and the decree was by the court entered accordingly."

Olson now contends that all parties had full knowledge of the filing of the second motion for rehearing; but, realizing the uncertainty of litigation, Olson consented to a decree for several hundred dollars less than the amount which would be due if the full statutory rate were figured, and also agreed that the issuance of the order of sale might be deferred for 90 days, and that plaintiffs Hodder consented to this decree because they did not believe the second motion for rehearing would be allowed, or the former judgment of the court reversed, and were desirious of securing this reduction in the amount of interest, as well as of securing an extension of time within which to make payment. The trial court found: "There is no newly discovered evidence. * * * The court is satisfied that the surprise 'unavoidable casualty or misfortune' shown in this case is not the unavoidable casualty or misfortune contemplated by the statute."

It is not necessary to review at length the evidence. It shows that the plaintiffs and all parties interested knew, on October 26, 1914, that a second motion for rehearing was pending in the case of *Orcutt v. McGinley, supra.* Plaintiff Ernest C. Hodder is a practicing attorney. He appeared for himself and his co-plaintiff. It is evident that he believed this court would adhere to the judgment formerly entered, and he made what appeared to be an advantageous settlement. Had this court adhered to the judgment entered, he and his co-plaintiff would have profited several hundred dollars by the settlement. When the court set aside its former judgment and held the taxes void, the decree placed him at a disadvantage, but the statute was not calculated to grant relief to parties who merely make a mistake of

judgment with full knowledge of all the facts. The district court is correct in finding that "unavoidable casualty or misfortune" has not been shown.

It is argued on behalf of plaintiffs that, if relief is not granted in this proceeding, plaintiffs will be compelled to pay this judgment, based upon a void tax, and their property will be again subjected to a tax to pay the irrigation bonds, thus subjecting their land to double taxation. Defendant argues that if plaintiffs are granted the relief sought, and the decree set aside, defendant will have no redress and the money invested in these tax certificates will be a total loss. Defendant also points out what he regards as an equitable remedy for plaintiffs Hodder, arguing that the money paid by Olson to the county treasurer was in turn paid to the irrigation district; that the district has had the benefit of this money; and that a court of equity will grant plaintiffs relief in a proper action. These questions are not before us, and we do not pass upon them.

The judgment of the district court is sustained by the evidence, and is AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

IN RE GUARDIANSHIP OF MICHAEL LANGDON.
WILLIAM KIERNAN LANGDON ET AL., APPELLEES, v. MARGARET LANGDON, GUARDIAN, APPELLANT.

FILED MAY 4, 1918. No. 20023.

Appeal: SUPERSEDEAS BOND. Under section 1528, Rev. St. 1913, an executor, administrator or guardian or guardian *ad litem* is not required to give bond on appeal when the appeal is taken in his representative capacity for the benefit of the estate, or the ward; but when the appeal is taken in furtherance of his individual interests he must give bond like other suitors.

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

T. J. Doyle and *John J. Ledwith,* for appellant.

Anthony E. Langdon, William R. Patrick, and *D. A. Murphy, contra.*

MORRISSEY, C. J.

Defendant was duly appointed guardian of the person and estate of her husband, insane. As such guardian a large amount of property came into her hands. Subsequently her ward died intestate, leaving defendant and an incompetent son as his sole heirs. Many years went by without her making any account of her doings as such guardian. This suit was instituted for the purpose of compelling an accounting and recovering the amount due the son. The county court entered a decree directing her to pay over the amount found to be due the son, to wit, $10,688.78. Defendant undertook to prosecute an appeal to the district court, but gave no supersedeas bond. On motion of plaintiff the appeal was dismissed. From the order of dismissal, defendant prosecutes this appeal.

"An executor, administrator, guardian, or guardian *ad litem* shall not be required to enter into bond in order to enable him to an appeal." Rev. St. 1913, sec. 1528. The appeal is based upon the foregoing provisions of the statute. We are firmly committed to the doctrine that it does not apply to appeals not prosecuted in the interest of the estate. It means only that executors, administrators and guardians are not required to give bond when they appeal in their representative capacity. When they appeal to protect individual interests, they should give the same bond that is required of other litigants. *In re Estate of Craig,* 101 Neb. 439; *In re Williams,* 97 Neb. 726, and cases cited therein. The judgment is against defendant, not against the estate; she is the only person interested in the appeal, and she is not entitled to prosecute the same without giving the bond.

The judgment is

AFFIRMED.

SEDGWICK, J., not sitting.