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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1923—JANUARY TERM, 1924

VOLUME CXI

HENRY P. STODDART,

OFFICIAL REPORTER

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BY HENRY P. STODDART, REPORTER OF THE SUPREME COURT,

For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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		Willard E. Stewart	Lincoln
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Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Lovel S. Hastings	David City
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IN MEMORIAM

ALFRED M. POST

At the session of the Supreme Court of the State of Nebraska, January 7, 1924, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable Charles B. Letton, Honorable William B. Rose, Honorable James R. Dean, Honorable Chester H. Aldrich, Honorable George A. Day, and Honorable Edward E. Good, Associate Justices, the following proceedings were had:

MAY IT PLEASE THE COURT: Your committee, appointed to draft resolutions in memory of Honorable Alfred M. Post, beg to submit the following:

Whereas, Alfred M. Post, who for half a century was a member of the bar, for more than ten years a district judge of this state, and for six years a member of this honorable court, died at his residence in the city of Columbus, Nebraska, on the 26th day of August, 1923, and

Whereas, his long and honorable career as a lawyer, his distinguished services as a judge, his fame as a jurist, and his exemplary life are deserving of formal recognition on the records of this court, therefore,

RESOLVED, That this court and its several officers are deeply conscious of the fact that, in the death of Alfred M. Post, the bar lost one of its most capable and honorable members, and one who throughout his long membership was true to its best traditions; the bench, a judge who combined with a profound knowledge of the law the courage to apply it impartially; and the state, a distinguished jurist and an exemplary citizen.

That these resolutions be spread at length upon the records of this court, and that the clerk be directed to forward a copy of the same to the family of the deceased.

O. A. ABBOTT, J. H. BROADY,
W. G. HASTINGS, FRANK D. WILLIAMS,
I. L. ALBERT.

JUDGE I. L. ALBERT:

MAY IT PLEASE THE COURT: I move the adoption of the resolutions just presented, and crave permission to supplement them by a few words on the life and character of Judge Post.

He was born in Greenfield, Pennsylvania, on the 10th day of August, 1847. After the usual course in the public schools, he took a full course in the law department of the University of Ohio, from which he graduated in 1869. On the 6th day of October, 1873, he was united in marriage to Miss Ella Munsell, who survives him. Eight children were born of this marriage, seven of whom are still living. In De-

cember, 1874, he was appointed by President Grant to a consulship in the Cape Verde Islands, and continued in the consular service until 1876, when he resigned, and engaged in the practice of law in the city of Columbus, Nebraska, where he maintained his residence until his death. In 1883 he was appointed judge of the Fourth Judicial District, and continued to serve in that capacity until 1891, when he was elected a member of this court, where he served until the expiration of his term of six years. Shortly after his retirement from the bench, he was appointed United States attorney for the Territory of Alaska, but resigned after a short time, and resumed the practice of law in Columbus. From 1911 to 1913 he served as chairman of the commission for the revision of the statutes of Nebraska. In 1920 he was appointed to succeed Judge George H. Thomas, as judge of the Sixth Judicial District, and at the succeeding election was elected to that position—a position which he held at the time of his death.

As a lawyer, Judge Post was capable, tireless and successful, but his successes inured chiefly to the benefit of his clients; his career as a lawyer is untainted by commercialism. To him the case was the thing, and his interest therein was never affected in the slightest degree by the pecuniary reward it would bring to him.

His profound knowledge of the law, alert mind, quickness of perception, fearlessness, coupled with a fine presence and courteous bearing, made him an ideal *nisi prius* judge. As judge of this court, he will long be remembered. It is doubtful whether the published opinions of any judge of this country show a more intimate knowledge of the law, faultless logic, or finer discrimination in the choice of words, than those of Judge Post.

But let others speak of Judge Post, the lawyer and jurist; it is Judge Post, the man, the neighbor and friend, who comes to my mind today. Our first meeting was shortly after I had located in Columbus, more than thirty years ago. There was a pleasing dignity in his bearing, an air of culture and refinement about him, that at once impressed me. He was among the first to welcome me to the Platte county bar and to assure me that it held a place for me. During all the years that have followed, I lived within sight of his home. Within that time I practiced in the district courts over which he presided, and in this court during the six years he was one of its members; met him from time to time as an opponent in the trial of causes, and in consultations and trials in which we were associated on the same side; traveled with him from court to court, and associated with him as a friend and neighbor.

In all those relations, I found him a gentleman, with all that term implies—honorable, self-respecting, and considerate of the rights of others. His manners were irreproachable. In the presence of a court, and in the presence of authority generally, he was deferential, but not obsequious; toward his associates, he was courteous,

obliging, and companionable, but not unduly familiar; toward the less fortunate, he was kind and considerate, but with no hint of condescension. He was even-minded, never bitter in defeat, nor exultant in victory.

He did not form friendships quickly, but, when formed, they were lasting. Those not intimately acquainted with him were apt to regard him as cold, unapproachable, and unfeeling. Never a more mistaken estimate. In truth, he was a man of warm and generous impulses, sympathetic and charitable, a man deeply moved by the misfortunes of his fellows, a loyal friend, a delightful companion, a kind and helpful neighbor. There are those living today, who, if they could follow back the tangled threads of their lives, would find that at some point, by word or deed, Judge Post interposed between them and disaster. He died as one might well be content to die—in the harness, in possession of his splendid faculties, with the wife of his youth and his children beside him—serene and unafraid—poor in this world's goods, but rich in honors, and in the respect and esteem of his fellow men.

HONORABLE O. A. ABBOTT:

MAY IT PLEASE THE COURT: It is eminently fit and proper that the living should, in the most solemn and impressive manner, take note of the death of their fellow man, and that they should place on permanent record some word of appreciation of the stainless record of the deceased, when his voice has been forever silenced by his untimely death after his long years of service at the bar and on the bench.

Soon after the close of the spring terms of court Judge Post sought a brief rest far away from the scene of his almost daily round of toil —far away from books and briefs—far away from courts and cases—in the mountain solitudes of Wyoming. He found no rest in those solitudes. His increasing bodily weariness precluded him from following his favorite pastime of fishing in those mountain streams and warned him to return. He came back with the heavy hand of death upon him, and never again left his bed unaided.

The stern Messenger of Death granted him a brief respite to enable him to meet and greet some of the many friends who had been associated with him for many years in his daily round of toil, and granted him the inestimable privilege of retaining his mind unimpaired in his last hour while his wife and children gathered around his bed to catch his last whispered words before passing into that dreamless sleep from which no man ever wakens.

He came to Columbus nearly fifty years ago, joining the early pioneers in shaping the destinies of this, then, new state, and lived to see the wayside town of Columbus grow to be one of the prosperous and important cities of the state—lived to see the sparsely settled frontier territory become a thriving commonwealth—and, by his sterling worth, slowly winning his way into the confidence and esteem of all law-abiding men who came here in those early days to make their homes in the new state.

He was early chosen to preside as judge of the district court, and finally elected judge of the supreme bench, where he served a busy six years' term.

As a man in the daily walks of life, he gave his best efforts to the upbuilding of city and state. He formed his opinions as to his political action after a careful study of the best interests of state and nation, and, after forming them, they were steadily upheld and maintained; but he was not controversial. He respected the opinions of others, giving to each and all full credit for good motives and honest intentions. Unswerved by the sophistries or clamors of the hour, he "Stood four square to every wind that blew."

As a lawyer, he was true to his clients at all times. No fee was too small when right and justice were on the side of his client. No fee large enough to induce him to desert his client or to aid the side of wrong, injustice, or oppression. He was courteous and obliging to opposing counsel, considerate and courteous to witnesses, and scrupulously fair to the court.

His office was his workshop. He studied the law because he loved it. He compared conflicting cases with studious care, cautiously regarding conclusions, and treasuring in his mind those cases prefaced with clear statements of basic facts and based on the undisputed principles of law or sustained by clear and cogent reasoning. These were the monuments and lights of the law, and on these he relied for success.

In the trial of every cause, he first settled in his own mind a clear and concise statement of the basic facts in the case, and an equally clear and concise statement of the legal principles based on these facts. To these he adhered closely, carefully avoiding collateral issues.

As a trial judge, he was, above all, a patient listener, quick to perceive the main points at issue, readily discerning between sophistry and reasoning, between arguments based on the underlying principle of law and arguments based on collateral or incidental matters. In the construction of all written laws, he conclusively presumed that the object and purpose of the act was to assure equal and exact justice to all, and that rules of court were made to accomplish the same beneficent purpose, but always followed with scrupulous care the construction given to the act by the supreme court.

He maintained the dignity of the court by his own quiet and careful demeanor, and was slow to assume that counsel in their earnest assertion of the assumed rights of their clients intended to show disrespect to the court or disregard of its rulings, and extended every possible aid to counsel in their efforts to review his decision in the appellate tribunal, or to correct any mistake or error that may have crept into the record from oversight or mistake on his part.

As a member of this court, we of the outside know of his work only from the many opinions written by his hand. Of the more impor-

tant work in the council chamber of outlining the general character of the decision and of so shaping an opinion as to decide only the questions submitted, and making that decision speak plainly the "Law of the Land," as well as the sentiments of the majority of the court, we know practically nothing; our only knowledge of the differences in opinion in the council room is based on here and there a case where practically each member of the court has prepared and placed on record an individual opinion, or in the more common form of the dissenting opinion concurred in by one or more members of the court.

We realize fully that those opinions as formulated by him constitute a lasting memorial record that will be read and treasured long after anything we may say on this occasion has been forgotten. Fair criticism of his words was always welcome, but unmerited denunciation of his words or of the result of his judgment he allowed to pass by in silence, leaving time and human experience to place their mark of approval thereon.

His life work will remain an inspiration and example for all who shall follow him. He loved life, but he did not fear death. He heeded well the poet's admonition:

"So live, that when thy summons comes to join
The innumerable caravan that moves
To that pale realm of shade, where each shall take
His chamber in the silent halls of death,
Thou go not, like the quarry-slave at night,
Scourged to his dungeon; but, sustained and soothed
By an unfaltering trust, approach thy grave
Like one who wraps the drapery of his couch
About him, and lies down to pleasant dreams."

JUDGE WILLIAM G. HASTINGS:

IF YOUR HONORS PLEASE: As one of those honored by your appointment upon this Memorial Committee, I wish, if I may, to add a few words to what has been so well said by Governor Abbott and Judge Albert, and to do so from my own personal standpoint.

My own relations with Judge Post were wholly official, with only such personal or social contact with him as was incidental to such official relations, but those official relations were remarkably satisfactory. In the eighties, some forty years ago, I had occasion to bring an action in the district court of Colfax county, an action for divorce against a member of a wealthy and influential family in that county. I was without acquaintance there. When I attended for the trial of that case, I found Judge A. M. Post presiding in the district court at Schuyler. He was still engaged in the effort to finish the jury work of the term, which I had been told was likely to be done by the date of my arrival, but which in fact was not. I had never met Judge Post. I was somewhat apprehensive that invading another county under the circumstances of my case I

would be at a disadvantage. It may be imagined that I watched the operations of the court with a great deal of interest. Long before my case was called, I had reached the conclusion that the presiding official was a real judge; that to gain a case before him it was only necessary to present a clear and definite right, and it would be recognized and acted upon at once. It was clear that a litigant in that court did not need to have behind him either money or votes, either political or social influence, in order to get the rights which he could show were distinctly his. The result in my own case was clearly right, and was always remembered with pleasure and gratitude.

It happened a few years later that, in the same year in which Judge Post became a member of this court, I myself assumed the duties of district judge in the Seventh Judicial District of this state, and for six years my own official work was under his supervision as such official superior, and I never for an instant changed or wavered in the opinion of his official character and capacity which I had acquired by my first experience with him at Schuyler. Whatever work of mine was sent up here to be reexamined, I felt sure that it would always receive the consideration which it deserved, and that the conclusion upon its record would be that of an honest and capable mind applied to the real questions in dispute, and on no occasion that I can recall was that anticipation ever in the least disappointed.

In the difficult matter of adjusting the claims of individuals appearing before the court to courtesy and consideration with the requirements that the public business be energetically dispatched, Judge Post was one of the most successful of all those whose work in administering justice has fallen under my observation. It was because he had, evidently, such a profound feeling of the claims of each lawyer and litigant upon his personal consideration and also of his obligation to the community at large to get his work done. Himself, he was evidently an individualist thoroughly respecting the individualistic system which he was called upon to administer, and his success in administering it was such as to lead us all to believe that the continued prosperity and success of Anglo-American legal institutions depends upon their finding such officials for their administration as was Judge Post. His memory will remain as long as those who had official relations with him are able to recall anything.

JUDGE J. H. BROADY:

MAY IT PLEASE THE COURT: Nearly three years close association with Judge Post, as a member of the commission, appointed by this court, for the revision of the Statutes of this state, gave me a wonderful opportunity to know a wonderful man. Judge Post has been a great inspiration to me, both in his work as a great lawyer and in his appealing personality. In our work on the revision of the Statutes, Mr. King, my other associate, and I were repeatedly amazed at his never failing capacity to bring forth, from his store of knowledge, a

complete history of the statutes and also of the decisions of the court of the state. On many, many occasions, in discussing modern legislative enactment, Judge Post would clearly show us ancient laws, of early Egypt, Rome, or Greece, which were, no doubt, the beginning of what appeared to be very modern laws. I think Judge Post must have made a complete study of the fundamental laws of all peoples. And his memory and application of them seldom, if ever, failed him. His knowledge and apparently complete memory of the decisions of the supreme court of Nebraska more than astonished me.

Judge Post possessed a wonderful faculty of precision of expression. There are no surplus words in his writings, and his literary construction is faultless. The opinions, which he wrote as a judge of this court, disclose the legal learning, all know he possessed, and are a model of grammatical construction.

My official contact with Judge Post soon developed into a close and continued intimate personal friendship. And, though there was a great difference in our ages, it was not long until I grew to love and to look forward to his company. He possessed an unlimited fund of general information. His judgment of men and affairs was always sound. He was always charitable in his criticism of others; full of dignified fun and mirth; warm in his sympathy for those in trouble; devoted to his family first, and fond of, and happy in the company of his friends.

In all my association with Judge Post, I have never seen him in act, nor heard him in expression, other than that of a real learned gentleman.

To me Judge Post was a wonderful man, a wonderful inspiration, and an esteemed friend.

JUDGE CHARLES B. LETTON, ACTING CHIEF JUSTICE:

The court concurs in the resolutions presented in memory of Judge A. M. Post, a former judge and chief justice of this court, in the sincere expressions of regret by his friends and fellow members of the bar, and in the eulogies delivered respecting the value of his life, his work, and his character to this state, in which he lived for practically all his life. His industry, his learning, and the logical quality of his mental processes are plainly demonstrated by his many lucid, forcible, and well-reasoned opinions contained in over twenty volumes of the reports of the decisions of this court.

When a difficult question of law has been presented for consideration, it has always been a source of gratification if an opinion by Judge Post bearing upon the disputed point could be found, as it usually evidenced patient, untiring, and exhaustive investigation and sound reasoning. The state was fortunate, indeed, that such a jurist was a member of its court of last resort during the earlier years when the foundations of its jurisprudence were being laid.

The resolutions will be spread upon the journal of the court and a copy furnished to the family of the deceased.

IN MEMORIAM

CHESTER H. ALDRICH

At the session of the Supreme Court of the State of Nebraska, September 15, 1924, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable Charles B. Letton, Honorable William B. Rose, Honorable James R. Dean, Honorable George A. Day, Honorable Edward E. Good, and Honorable William H. Thompson, Associate Justices, the following proceedings were had:

MAY IT PLEASE THE COURT: Your committee on resolutions as to the life and service of the late Chester H. Aldrich report as follows:

Chester Hardy Aldrich was born on a farm near Pierpont, Ashtabula county, Ohio, November 10, 1862. His father, George W. Aldrich, was born in the same county in 1840, and his grandfather was a native of Canada, and of Scotch-Irish descent.

Chester H. Aldrich was the oldest of five children. He attended district school and worked on a farm until his fifteenth year. At that age he entered the Pierpont, Ohio, high school, and completed the course there. At the age of eighteen he entered the Hillsdale, Michigan college, preparatory course, and continued there for three years, teaching school part of that time to secure funds to complete his course. He entered the freshman class of the Ohio State University in 1883, and was graduated with an A. B. degree in June, 1888.

The following August he moved to Nebraska and settled at Ulysses, in Butler county, and was married on June 4, 1889, to Miss Sylvia Stroman, of Ulysses. He became principal of the high school at Ulysses and taught there three years, and at the same time was reading law with George E. Waldo.

He was admitted to the bar in 1890 and began the practice of law at David City in 1891. In his practice there he was identified with much important litigation, especially with many prominent criminal cases.

He was a republican in politics. He served two terms as mayor of David City, and eight years on the town board, and almost continuously on the school board. In 1906 he was elected state senator and served in the senate in the session of 1907, where he was one of the leaders of the republican side of the house. In 1910 he was elected governor of the state of Nebraska, and served in that office from 1911 to 1913. At the end of his term as governor, he re-entered the practice of law, locating in the city of Lincoln, and in November, 1918, was elected associate judge of the state supreme court, to fill the place of Judge Francis G. Hamer who died the preceding August. Mr. Aldrich, immediately after the result of the election was learned, was appointed to take the judgeship instead of waiting until January

to go into office, and served as supreme judge from that time up to the time of his death.

He died on Monday, March 10, 1924, at the home of his son, George S. Aldrich, at Superior, Nebraska, and was at that time of the age of sixty-one.

Few men connected with the history of Nebraska have had the record of public service rendered by Judge Aldrich. The best test as to the value of these services in behalf of the public is the fact that he was honored many times by the electors voting him into places of power and influence, including the highest offices in the executive and judicial branch of our state government.

He was an able and fearless official in the discharge of the public duties imposed upon him. One of his most striking characteristics was the democracy of his attitude toward his fellow men. The most humble citizen could approach him freely at all times and be sure of a cordial greeting. As senator, as governor, as judge, or as a private citizen, he was always the same in this respect—approachable, companionable, and democratic.

The son of a pioneer Ohio family, working his way through public school and university, coming to Nebraska a school teacher, entering the practice of law, and living to serve his state as a senator, governor and judge, renders his life an inspiration to every young man.

His untimely death is a distinct loss to the commonwealth.

Therefore, be it resolved that, in the death of Chester H. Aldrich, the bar has lost an able member, the state one of her most distinguished citizens, and this court an honored judge:

That these resolutions be spread upon the records of the court, and that a copy thereof be transmitted by the clerk, under the seal of the court, to Sylvia E. Aldrich and her four sons.

Respectfully submitted,

LEONARD A. FLANSBURG, E. J. PATTERSON,
L. B. FULLER, W. A. PRINCE,
BURCH REYNOLDS.

JUDGE LEONARD A. FLANSBURG:

MAY IT PLEASE THE COURT: It was my privilege for a time to be associated with Judge Aldrich as a member of this court, and it was then that I became intimately acquainted with him. My association with him is one to which I can always look back with a high degree of pleasure.

He was a most companionable man.

He was a man, too, who was aggressive, forceful, and determined.

He was a man of decision, frank in his opinions and outspoken in his beliefs, staunch in character and always courageous.

In one public office after another he was deservedly honored by the people of the state.

His domestic life was an admirable one, and in his sons he has left a fine example of American young manhood to follow him.

I grieve the passing of Judge Aldrich and feel his loss as the loss of an intimate and valued friend.

MR. L. B. FULLER:

MAY IT PLEASE THE COURT: In presenting to this court resolutions commemorative of the life and work of Judge Aldrich, it was deemed expedient to confine the same to a bare outline. Your committee felt that, inasmuch as his life work was so much a part of the history of our state, extensive detail in this regard was unnecessary.

Being intimately associated with him for something over twenty years, I desire to speak of him at this time personally, as a neighbor, friend, and partner, rather than as a public man. The prominence given to this latter phase of his life has obscured in a great degree the former. In its resolutions, your committee has mentioned the democracy of Judge Aldrich in his daily associations with his fellow men. Another prominent personal characteristic of his was the variety of his interests, or hobbies, as we sometimes say, which undoubtedly had a great deal to do with his popularity. All of us take pleasure in some one or two things outside the regular routine of our occupation, and most of our personal friendships are based on the common interest in such things as golf, gardening, hunting, etc. I never knew a man who had so many different interests with which he could come in contact with his fellow men.

He loved horses. At different times he owned some famous trotters. Furthermore, he was well versed in the origin and development of this type of horse. I distinctly recall lengthy correspondence between him and the late O. P. Shallenberger, Palmer M. Clark, and Monroe Salsbury, as to certain obscurities in the early part of the pedigree of Pactolus, a famous horse owned for many years by Judge Aldrich.

He was equally fond of blooded cattle, his preference running to the Hereford for beef, and the Holstein for milk. The foundation of some of the finest beef herds in Nebraska was built from stock furnished by his farm in the Platte valley near Schuyler. He was also an authority on beef cattle of his favorite type.

He took a great delight in hunting and fishing, and in the early days made long trips into the sandhill country and western Nebraska for this purpose. He was interested in all outdoor sports, baseball probably being his favorite.

He was fond of working around his yard in his active days, being a great lover of flowers, trees, and ornamental shrubs. He took pride in developing his home along these lines.

His keen interest in education is shown by the fact of his years of service on the David City school board. In educational matters he

was a "stand patter." He believed in the old-fashioned classical education, with a liberal sprinkling of Latin and Greek, as the best means of combining proper means of mental discipline and culture. He always contended that education was the best way to solve the problems of the race, and thought that an educational test should always be a condition to the right to vote. I have often heard him say that a man who could not read and mark his own ballot, barring physical disability, should not be allowed the elective franchise.

Judge Aldrich was a man of ready and sometimes caustic wit. It was not often, however, that he indulged in this at the expense of any man. While quick tempered, he was kind-hearted, and always regretted hurting the feelings of any one, if he spoke hastily. Shams and hypocrisy, however, he despised, and for the pretender, the conceited, and the arrogant self-seeker, he had no patience and no mercy; but for the unfortunate, the downtrodden, the broken-spirited, and those in trouble, he was all kindness and thoughtful consideration. Particularly was this true of young men. He was always giving inspiring, cheerful, and hopeful advice to discharged convicts, and other unfortunates, during his term as governor.

His family life was singularly beautiful. His greatest interest in life centered around his own hearthstone. He was a devoted husband and a good father. He was always a boy with his boys: their interests were his interests; their battles were his battles; their joys and sorrows were his joys and sorrows. I shall always remember that it was my privilege to be so intimately associated for so many years with such an interesting man.

His going was a distinct and keen personal loss to myself and all his intimate friends. A good husband, a good father, a good friend, and a good and useful citizen has gone to his reward.

MR. BURCH REYNOLDS:

MAY IT PLEASE THE COURT: It was my privilege to serve the Honorable Chester H. Aldrich as his secretary from November, 1919, until the time of his death. By friendly counsel and advice he personally gave me the benefit of his experience; to me he was a friend. It was across the desk that I discovered the quality of his steel, and I accord it a high privilege to pay tribute to his memory here today.

What Judge Aldrich appeared to be he was; and what he was, was apparent. He was a man of strong convictions, and fought for them relentlessly. His fearless nature, his rugged honesty, his independent spirit, his plain matter-of-fact manner, his industrious habits, his cordiality, his genial disposition—all—were inherent. Courage and hope, rather than fear and despair, characterized his attitude toward life. Being positive in his nature, he had enemies, but they were few and unable to do him lasting injury, and his virtues so outweighed and outshone his faults that his friends admired him and his state honored

him. This was evidenced by the people's choice of him to serve in the senate of our state legislature, later, as the state's chief executive, and lastly, as a member of this honorable court. It may be here appropriately observed that Judge Aldrich was one of only three men who served Nebraska in the first fifty years of its history as governor and as judge of the supreme court. That he was a successful man in every relation of life, the reputation he sustained, his happy home, the friends he made, the honors we accord him today, do well attest. The world is better because he lived.

No shaft of sculptured marble is needed, no words of praise, his memory is his monument, his character his epitaph.

CHIEF JUSTICE ANDREW M. MORRISSEY:

So well do the resolutions presented and the addresses delivered portray the character and record the achievements of our late associate, and so accurately do they express the sentiments entertained by the several members of the court, it is ordered that they be spread upon the journal and printed in the official reports as a lasting testimonial to the memory of Judge Aldrich.

During the period covered by these reports, in addition to the cases reported in this volume, there were 45 cases affirmed by the court without opinion.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1923.

BRIDGET ROONEY, APPELLANT, V. CITY OF SOUTH SIOUX CITY ET AL., APPELLEES.

FILED OCTOBER 20, 1923. No. 23181.

1. **Municipal Corporations:** VOID ASSESSMENT: INJUNCTION: DEFENSE OF ESTOPPEL. In a suit for an injunction to prevent a city from collecting void assessments for special benefits accruing to plaintiff's land by municipal paving, estoppel by knowledge of the improvement and by failure to object thereto or to the assessments is not available as a defense.

2. ———: ———: ———. A court of equity may grant an injunction to prevent the collection of void assessments of private property to pay for special benefits resulting from the paving of streets.

3. ———: ORDINANCES: APPROVAL. A city council in passing an ordinance may make the time of its going into effect depend upon its approval by the mayor.

4. ———: ———: ———. A city ordinance which, by its own terms, is not to become operative until approved by the mayor does not go into effect before the happening of that event, evidenced, as it must be, by a public record of approval bearing his genuine or authorized signature.

5. ———: ———: ———. A person who was formerly mayor of a city, after expiration of his term of office and his retirement therefrom, has no authority to approve a city ordinance passed during his incumbency and depending for its becoming operative upon the approval of the mayor.

6. ———: ———: ———. Where a city charter makes the approval or rejection of an ordinance the exclusive function of the mayor, and that officer, during his incumbency, fails to approve an ordinance which, by its terms, goes into effect upon approval, the council has no authority to correct its minutes to

show his oral approval while mayor and to permit him, after his retirement upon expiration of his term, to write his name in a blank under a form of approval indorsed on the ordinance.

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

W. V. Steuteville, for appellant.

Sidney T. Frum and *George W. Leamer, contra.*

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

ROSE, J.

This is a suit for an injunction to prevent defendants from collecting for special benefits municipal paving assessments of $9,830.24 on 81.5 acres of land owned by plaintiff in South Sioux City. Defendants are South Sioux City, its treasurer, and the treasurer of Dakota county. The city council passed an ordinance April 17, 1920, authorizing in one improvement district composed of the entire city the paving of its principal street and two lateral streets, one of the latter intersecting plaintiff's land. South Sioux City is a city of the second class. Authority to pave its streets is granted by its charter. Comp. St. 1922, sec. 4283. The paving contract was let under the city ordinance May 17, 1920, and the pavement was completed in August, 1921. It is to prevent the collection of assessments for special benefits accruing to plaintiff's land by reason of the paving that the injunction is sought. The petition contains allegations amounting to pleas that the improvement ordinance never went into effect; that a few acres only of plaintiff's assessed land is tillable, a portion being swampy and the rest fit for pasturage alone; that her land has not been benefited by the paving, and that the assessments therefor are confiscatory and void. Facts constituting grounds for an injunction were put in issue by an answer. A trial below resulted in a dismissal of the action. Plaintiff has appealed.

To justify the dismissal, defendants call attention to the

undisputed fact that plaintiff, with knowledge of the paving, made no objection thereto or to the incurring of the expenses thereof and failed to appear before the assessing officers to resist or correct assessments. The argument on this proposition, however, does not answer the plea that the ordinance authorizing the paving never went into effect and that consequently the assessments for special benefits were void. If the assessments are void, estoppel is no defense to the petition. A familiar rule of equity authorizes an injunction to prevent the collection of void assessments of private property to pay special benefits resulting from the paving of streets.

Are the assessments void? The concluding sentence of the paving ordinance in question is in these words:

"This ordinance shall be in full force and effect from and after its passage, approval, posting and publication, according to law."

"Approval" included the genuine or authorized signature of the mayor. Ordinances which become laws of a city do not rest in parol. The time of their going into effect does not depend on oral proof. Under the city charter the mayor had power to approve or veto the ordinance. Comp. St. 1922, sec. 4172. He did not sign an approval during his term of office. When he retired the place for his name under the form of approval on the ordinance itself was a blank. In the meantime the streets were paved and the assessments levied. Under the specific provision quoted, the ordinance was not to go into effect until approved by the mayor. He was the chief executive officer. The council had authority to make his approval a condition of allowing the ordinance to go into effect. His approval bore a proper relation to the subject-matter of the ordinance—was germane to the legislation. Both the provision for the paving of the streets and the contingency of approval were valid when the council adopted the ordinance. Making the enactment effective upon its approval was not a prohibited delegation of legislative power to the mayor, but was a legitimate exercise of authority making it effective upon

the happening of a contingent event germane to the subject-matter of the legislation. *Mayor and City Council of Baltimore v. Clunet*, 23 Md. 449; *Heman Construction Co. v. Loevy*, 64 Mo. App. 430; *Thomas v. City of Grand Junction*, 13 Colo. App. 80; *City of Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575. A text-writer familiar with legal principles and precedents stated the law as follows:

"Municipal ordinances, otherwise valid, may, like an act of the legislature, be adopted to take effect in the future and upon the happening of a contingent event." 1 Dillon, Municipal Corporations (4th ed.) sec. 309.

The provision requiring the mayor's approval being valid when adopted, the ordinance could not become effective until the happening of that event. *State v. Kirkley*, 29 Md. 85; *City of Buffalo v. Chadeayne*, 134 N. Y. 163; *Bradley-Ramsey Lumber Co. v. Perkins*, 109 La. 317. After the mayor's term of office expired and after the paving was completed, the private individual who had formerly been mayor wrote his name on the original ordinance under a formal approval thereof, acting pursuant to an attempt on the part of the council to make the municipal record conform to what had previously taken place. When the term of the mayor expired he had no official power as such and his signature as a private individual added nothing to the blank filled by his name. To meet the logic of this situation, defendants assert that the mayor promptly approved the ordinance, but inadvertently failed to sign the approval thereon. In this connection defendants invoke the doctrine that the city council, after the improvement had been made, had authority to correct its former minutes to speak the truth in regard to the approval—a step said to have been taken. The answer to this argument is that the council had no authority to correct its record to make the ordinance show on its face a timely and legal approval when the truth was that there had never been such an approval. The council by resorting to a correction had no power to discharge a duty imposed by the charter upon the mayor exclusively. Had plaintiff examined this ordinance before the paving was

completed, she would have seen that it was to take effect upon its approval—an unperformed official act of the mayor. She was not bound by his undisclosed, unrecorded mental operations or intentions. Penalties and the enforcement of assessments on private property to pay for public improvements do not rest on such a precarious correction. This phase of state and municipal legislation was subjected to former judicial scrutiny. In *State v. Kirkley*, 29 Md. 85, 109, the court said:

"A law which, by its own terms, is to have no effect until the happening of a future contingent event, cannot be made effective *before* the event happens by any acts or series of supplements passed upon the assumption that the event *has* happened, and that the law is in force. All such acts, instead of possessing any curative powers, merely multiply errors."

It is argued further that the council had power to pass the ordinance over the mayor's veto, that the approval of the mayor was unnecessary, that the members of the council were unanimous in passing the ordinance, that the action of the council could have been taken by resolution or motion, and that the affirmative vote of the entire council was all that the city charter required. The fallacy in this argument is the disregarding of the proposition that the action of the council, whatever its form, was to become effective upon the approval of the mayor—an unperformed official act or contingent event which never came to pass.

There seems to be no escape from the conclusion that the paving ordinance never went into effect and that consequently the assessments against the land of plaintiff are void. It follows that she is entitled to an injunction. For the purpose of granting that relief, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

JOSEPH P. CROUNSE, APPELLANT, V. BOOTH FISHERIES COMPANY, APPELLEE.

FILED OCTOBER 20, 1923. No. 22416.

Master and Servant: ACTION FOR ASSAULT: PETITION: SUFFICIENCY. Plaintiff pleaded that an unprovoked assault was made upon him and that he was severely beaten by an agent of the defendant in its place of business. The agent was alleged to be "querulous," but it was not alleged that the employer knew, if such was the fact, that the agent was a quarrelsome or a dangerous man. *Held*, that the court did not err in sustaining defendant's demurrer and dismissing the action.

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

John O. Yeiser and *John O. Yeiser, Jr.*, for appellant.

Kennedy, Holland, De Lacy & McLaughlin and *E. M. Clennon, contra.*

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

DEAN, J.

Plaintiff sued to recover damages for personal injuries arising from an unprovoked assault, as alleged, inflicted by one of defendant's employees in its place of business at Omaha while he was there making purchases. Defendant demurred on the ground that the petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained, the suit was dismissed, and plaintiff appealed.

The action is based substantially on the allegations which follow:

"Plaintiff alleges that the defendant is a corporation engaged in the sale of fish and oysters and other sea foods, having a monopoly of said business in the city of Omaha, maintaining salesmen to visit the trade in said city and maintaining a place of business where the trade are invited to come and deal with said defendant. Plaintiff alleges that he is a Jew, and according to his religion is operating a market in the city of Omaha at 924 North Sixteenth street

and is permitted to keep his store open on Sundays. Plaintiff alleges that for some time he has been ordering deliveries of fish from the defendant on Friday in order to supply his customers on Sunday."

In addition to the foregoing, plaintiff pleaded generally that defendant employed a certain salesman to solicit trade and take orders who "was known to be a person of querulous disposition," and that on or about February 25, 1921, the salesman, as defendant's agent, called upon plaintiff and objected to his giving fish orders for Friday delivery; that because plaintiff insisted upon a Friday delivery the agent "for the purpose of coercion and intimidation became loud and abusive and profane and cursed the plaintiff in the presence of his family;" that plaintiff immediately notified defendant by telephone of the agent's unseemly conduct, "but that the defendant in no way restrained or admonished their agent as aforesaid," but retained him in its employ; that about four days thereafter plaintiff called at defendant's headquarters to make purchases and to leave orders for fish in connection with his business; that while plaintiff was in defendant's store "as its guest and upon the invitation of the defendant under the implied obligation of hospitality and good treatment on the part of the defendant and all of its agents and servants on the said premises, the said defendant violated said obligation and agreement, and while there as such invitee and guest for the transaction of business, the said agent and servant of the defendant, Ed. Morrell, without provocation other than the transaction alleged above, assaulted the plaintiff and struck him," and thereby inflicted upon him severe contusions and wounds over the face and body which caused him great physical pain and suffering; that the injuries so inflicted "permanently injured the nerves and some of the tissues of his body and caused plaintiff great humiliation and mortification."

It will be noted that in respect of the salesman's characteristics, aside from the allegation involving the assault, as relating to disposition, or proneness to assault another without justification, plaintiff did not allege other than that

he "was known to be a person of querulous disposition." As applied to the individual, the following is accepted as a definition of the word "querulous:" "Apt to find fault; habitually complaining; disposed to murmur; as, a querulous man or people. * * * Expressing, or suggestive of complaint; fretful; whining; as, a querulous tone of voice." Webster's New International Dictionary.

It is not alleged that the salesman was quarrelsome or that he was given to brawls or that he was a dangerous man. He might be "querulous," within the accepted meaning of that word, and still he might not be a dangerous man or even quarrelsome. The demurrer admits that he was "querulous," but it goes no further. And it will, of course, be presumed that the pleader presented his case in the light most favorable to himself. It seems clear to us that an employer of a city salesman who solicits orders among his employer's city customers is under no obligation to discharge such agent merely because he is querulous. It is said that, even as applied to domestic animals, where the owner of a dog does not know "and has no reason to believe that the animal is suffering from rabies, he is not liable for the death of an animal which is bitten by the dog and contracts the disease." 3 C. J. 100, sec. 333.

We are unable to find an allegation that would connect the beating that plaintiff received which would even remotely tend to bring it within the scope of the agent's employment, nor did it come within any duty which he owed to his employer. Nor does it appear that defendant knew, if such was the fact, that its agent was a quarrelsome or a dangerous man. For anything that appears in the petition the assault may have been committed because of personal dislike.

Plaintiff in his brief argues the existence of a contractual relation between plaintiff and the defendant, to insure good treatment, substantially the same as that which exists between a passenger and a railroad company, and many cases are cited in support of the argument. But the rule, as applied to carriers, is not applicable here, because the

passenger submits the care of his person to the company, and because in a special sense he is under the direction and subject to the control of its employees while on its train or upon its property; it is bound to take reasonable precaution to see that no harm befalls him through the negligence or carelessness of its employees or by the overt act of an employee.

"While an assault by a servant may be within the scope of the employment so as to render the master liable, an assault by a servant not committed as a means or for the purpose of performing the work which he was employed to do is ordinarily not within the scope of his employment, and the master is not liable therefor." 26 Cyc. 1539.

The conclusion is that the petition does not state a cause of action. Other questions are presented by the record which in view of our decision we do not find it necessary to discuss and do not decide.

The judgment of the district court is

AFFIRMED.

OTTO BROOKS, APPELLANT, V. OMER C. FLORA, APPELLEE.

FILED OCTOBER 20, 1923. No. 22449.

Appearance. Where a defect in the service of process upon a defendant in an action *in personam* appears on the face of the record and he appears specially to object to the jurisdiction of the court over his person, and the objections are overruled, if such defendant answers over to the merits he thereby enters a general appearance in the action.

APPEAL from the district court for Deuel county: J. LEONARD TEWELL, JUDGE. *Reversed.*

McKillip & Barth, for appellant.

Halligan, Beatty & Halligan, contra.

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

DEAN, J.

This action originated in the county court of Deuel county, where plaintiff sued to recover $509 for the alleged conversion by defendant of a quantity of wheat. Defendant, at all times material to this inquiry, was a resident of Sedgwick county, Colorado, and was served in that county with a summons issued out of the county court of Deuel county, Nebraska, by the sheriff of Sedgwick county, Colorado, who was regularly appointed by the sheriff of Deuel county for that purpose. Defendant appeared specially in county court and objected to the jurisdiction of the court. His objections were overruled. Thereupon he filed his answer in the county court repeating therein his objections to jurisdiction which he had formerly filed. In his answer he pleaded additional defenses in respect of the merits. Upon the hearing the county court found in plaintiff's favor and rendered judgment against defendant for $509 and costs. Defendant appealed to the district court from the judgment of the county court.

The district court held, *inter alia*, that the facts, as pleaded, presented "an action *in personam*," and that when the action was begun "defendant was absent from and not a resident of Deuel county," but was a resident of Julesburg, Colorado, and dismissed the action. Alleging error, plaintiff executed an appeal bond and brought the case to this court for review.

In the case before us the alleged defect in respect of the summons and its service upon defendant appears on the face of the record. In the answer, in respect of the merits, this statement, *inter alia*, appears:

"The defendant hereby offers to do equity in the premises and tenders the amount due upon said execution into the court together with interest and costs to date. Wherefore this defendant prays that the plaintiff's action be dismissed and that he recover his costs herein expended."

It does not appear that defendant actually tendered any money into court, but from the pleadings, and particularly from defendant's answer, it is obvious that the power of the

court must necessarily be invoked to determine the sum that was due. This appears from the fact that in his petition plaintiff sued to recover $509. In his answer defendant pleaded that less than half of that sum was due. But that defendant did not have it in mind to tender $509 into court for plaintiff is apparent. It follows that an undetermined question of fact was thereby tendered by defendant which, in view of the record, must necessarily be determined by the court, or by a jury, as occasion might warrant. Human nature is such that it is only natural to conclude that in the case before us a disagreement would at once have arisen between the parties on the question of the amount which was due. It follows that affirmative action would have been required on the part of the court to hear and determine the controversy, and that "such appearance calls for the judgment of the court upon matters outside of the mere question of the jurisdiction of the court, and amounts to a general appearance in the case." *Barkhurst v. Nevins*, 106 Neb. 33. In brief, the defendant, having invoked the power of the court on a question other than jurisdiction, thereby, under our earlier and our more recent decisions, submitted to its jurisdiction.

Crowell & Crowell v. Galloway, 3 Neb. 215, is an early case where Judge Lake, speaking for the court, said: "If a defendant intend to rely on the want of personal jurisdiction, as a defense to a judgment entered against him, he must appear, if at all, for the sole purpose of objecting to the jurisdiction of the court; if he appear for any other purpose, such appearance is general and a waiver of all defects in the original process, and an acknowledgment of the complete jurisdiction of the court in the action." In *Pearson v. Kansas Mfg. Co.*, 14 Neb. 211, we held: "An appeal from a judgment in a personal action gives the appellate court jurisdiction of the appellant regardless of whether the lower court had acquired jurisdiction over him or not." The *Pearson* case was cited with approval in *Dunn v. Haines*, 17 Neb. 560. In *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170, we held: "If a defendant invoke the judgment

of the court, in any manner, upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general." To substantially the same effect is *Montague v. Marunda*, 71 Neb. 805. In *Sampson v. Northwestern Nat. Life Ins. Co.*, 85 Neb. 319, this court held: "Where a defect in the service of process appears upon the face of the record, and a special appearance questioning the jurisdiction is overruled, if the defendant answers over to the merits, he thereby enters a general appearance in the action." In *Grand Lodge, A. O. U. W., v. Bartes*, 64 Neb. 800, we held: "Where such (fraternal beneficiary) association is not privileged from being sued in the county where the action against it is commenced, and it appears in such action and files an answer which contains an objection to the jurisdiction, and also a defense to the action upon the merits thereof, such answer is a waiver of the jurisdictional questions, and the case should be proceeded in and tried upon its merits."

Some confusion has crept into the decisions of our court on the question of special appearance, in this class of cases, and the rule applicable to the pleader who answers over to the merits. The early rule in the state, and the more recent rule as well, is stated in the excerpt from the *Sampson* case which is above cited.

Subsequent to the earlier decisions on this question the rule was modified in some respects and thereby its application became confused. However in *Banker's Life Ins. Co. v. Robbins*, 59 Neb. 170, which was decided in 1899, and herein cited, and in the *Sampson* case as well, the earlier rule was followed and both cases have been cited and approved continuously from the time of their adoption. We believe it to be the preferable rule and adhere thereto.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

F. C. HAVER, TRUSTEE, APPELLEE, V. NORTH AMERICAN HOTEL COMPANY ET AL., APPELLANTS.

FILED OCTOBER 20, 1923. No. 22505.

1. **Mortgages:** DESCRIPTION. Where the descriptive clause in a real estate mortgage, after describing the parcel of land, contained the following language: "Together with any and all buildings, improvements and appurtenances now standing, or at any time hereafter constructed or placed upon said land, or any part thereof, including all screens, curtain fixtures, window shades, wall beds, ice boxes, * * * and furniture and furnishings of every kind, in, or that shall be placed in any building now or hereafter standing on said premises, or any part thereof"—*held* not to limit the specific articles mentioned to those coming within the meaning of the words "buildings, improvements and appurtenances."

2. ———: ———: LIEN. When the descriptive clause of a real estate mortgage, or trust deed, includes "all screens, curtain fixtures, window shades, wall beds, * * * plumbing, * * * machinery, appliances, plants, apparatus and fittings and fixtures, and furniture and furnishings of every kind, in, or that shall be placed in any building now or hereafter standing on said premises, or any part thereof," *held*, that articles, consisting of plumbing supplies, hardware and lumber, although purchased by the mortgagor for use in the construction and completion of the building on the premises, but which had never been placed in the building or on the premises, are not subject to the lien of the mortgage.

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

Kimball, Peterson & Smith and *Baker & Ready*, for appellants.

R. S. Norval, F. H. Gaines and *William H. Pitzer, contra.*

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

GOOD, J.

This is an action to foreclose a mortgage on certain real estate in the city of Grand Island on which, at the time of trial, there was an uncompleted hotel and business block.

Plaintiff was given a decree of foreclosure, and defendant has appealed.

The mortgage provided that within seven months mortgagor should erect and construct on the lots a ten-story, fire-proof hotel and business block. The mortgagor entered upon the construction of this building, but became financially embarrassed and abandoned the work before the building was completed. At the time of the trial the defendant had on hand a large quantity of material, consisting of hardware, plumbing supplies, fixtures, fittings and lumber, and other material, that had been purchased for use in the construction of the building. Some of this material was on the premises and in the uncompleted building, but a part thereof was not on the premises but stored in other buildings in the city of Grand Island. The trial court held that the mortgage covered all of this material, whether on the premises or stored in other buildings, and gave plaintiff a decree of foreclosure covering this material. The defendant complains of that part of the decree which gave plaintiff a lien on the unused material, whether on the premises or stored elsewhere.

As there is no bill of exceptions, the only question for determination is whether the decree is supported by the pleadings. A copy of the mortgage is incorporated in the petition. The description therein of the mortgaged property is as follows:

"Lots C, D, E, and F of Gilbert's subdivision of the northerly two-thirds (2/3) of lots three (3) and four (4) in block seventy-nine (79) of the original town of Grand Island, Hall county, Nebraska, together with a strip twenty-two (22) feet by eight (8) feet adjoining lot C on the east, with all the easements in connection therewith, as surveyed, platted and recorded, together with any and all buildings, improvements and appurtenances now standing, or at any time hereafter constructed or placed upon said land, or any part thereof, including all screens, curtain fixtures, window shades, wall beds, ice boxes, ranges, furnaces, vacuum cleaners, refrigerating, heating, plumbing, venti-

lating, gas and electric light fixtures, elevators and fittings, and machinery, appliances, plants, apparatus and fittings and fixtures, and furniture and furnishings of every kind, in, or that shall be placed in any building now or hereafter standing on said premises, or any part thereof, and the reversion or reversions, remainder and remainders in and to said premises and each and every part thereof, and together with all the rents, issues and profits thereof (which are hereby specifically assigned), and together with all and singular the tenements, hereditaments, assessments, appendages and appurtenances to said estate and property belonging or in any wise appertaining, and all the estate, right, title, interest, claim or demand whatsoever of said mortgagor, either in law or in equity, either in possession or expectancy, of, in and to the above described land and estate (all of which estate, property and rights hereby conveyed, assigned and mortgaged or pledged, or intended so to be, are hereinafter in this instrument sometimes referred to as the 'premises')."

Among other things, the trial court found: "That all and singular of the buildings, *materials*, fixtures and appliances of every kind and nature belonging to the said defendant North American Hotel Company, and stored on said premises and in and about the buildings located thereon and stored in the warehouses and other places and buildings in Grand Island, Nebraska, and purchased for the construction and erection of the hotel and business block described in said petition, form a part of the tenements and hereditaments, appurtenances and appliances of and to said real estate and property and appertain thereto, and are fully covered by the lien of said trust deed in favor of said plaintiff, and that said trust deed is a first, valid, and best lien thereon and upon all of said property and estate, including said real estate and buildings, and all of the materials, fixtures, and appliances stored therein and thereabout, and also including the following building materials, fixtures, appliances and appurtenances, viz., 80 bath tubs and fixtures; 94 lavatories, Peerless, with fixtures; 110 toilets; 51

seats and covers; 11 slop sinks; 30 shower heads and fixtures; 30 urinals and fixtures; 3 shampoo fixtures with all fixtures; and 12,000 feet of maple flooring, stored in the Grand Island Storage & Forwarding Company building in Grand Island, Nebraska, and 40 boxes of hardware and 3 cartons of hardware stored in the Hehnke-Lohman Storehouse in Grand Island, Nebraska, all of which was purchased for the construction and erection and completion of said hotel and business block."

The defendant insists that the general language of the descriptive clause of the mortgage, above quoted, has reference to "buildings, improvements and appurtenances," and that the enumeration of items following the word "including" must be limited to such articles as come within the meaning and classification indicated by the three general words "buildings, improvements and appurtenances." We think, however, that a reading of the whole clause shows that the intention was not to so limit the articles to such things as would come within the meaning of the three general words. It could scarcely be contended that furniture and furnishings and such articles would come within the term of an appurtenance or improvement to the building. We are of opinion that it was the intention of the parties that the lien should attach not only to the buildings and appurtenances, but to all of the designated articles that might be placed in the building, either then or thereafter erected upon the premises.

With reference to the complaint of defendant that the decree erroneously includes personal property that was stored on the premises but had not yet been attached to the real estate, we are unable to say that there was any error on the part of the trial court. The record before us does not advise us as to the nature, quantity or value of material stored on the premises. For anything that appears, it may have consisted of such items as are enumerated in the descriptive clause of the mortgage, and, if so, we think that, under the terms of the mortgage, it was the intention of the parties that all such items, when placed on the premises,

should be subject to the mortgage lien. No error in that particular is apparent.

As to the articles of property, consisting of bath tubs and fixtures, lavatories, toilets, seats and covers, slop sinks, shower heads and fixtures, urinals and fixtures, shampoo fixtures, maple flooring, and boxes and cartons of hardware, that were stored in the buildings of the Grand Island Storage & Forwarding Company and of the Hehnke-Lohman Storehouse, it seems too plain to admit of argument that, until placed on the premises, they could not be attached to or become a part of the realty, and that they were not and never had been appurtenances to the buildings or the real estate covered by the mortgage, and were not subject to the lien of the mortgage by virtue of the mortgage on the real estate. The lien of the mortgage on the specific articles mentioned in the descriptive clause of the mortgage is, by the terms of that clause, limited to such articles as are "in, or that shall be placed in any building now or hereafter standing on said premises, or any part thereof." The specific articles mentioned in the decree as being located in the above named buildings were not and never had been in any building upon any of the real estate described in the mortgage.

It follows that the mortgage lien could not and did not attach to these items of personal property, and that the district court erred in declaring them subject to the lien of plaintiff's mortgage. In all other respects the decree of the district court is right; but, because of the error in including the above-mentioned articles, the decree of the district court is modified so as to exclude from the operation of the mortgage lien all of the specific items of personal property mentioned in the decree and described as located in the buildings of the Grand Island Storage & Forwarding Company and of the Hehnke-Lohman Storehouse, in Grand Island, Nebraska. As modified, the decree should be and is affirmed.

AFFIRMED AS MODIFIED.

BELL OIL & GAS COMPANY, APPELLEE, V. A. B. A. INDEPENDENT OIL & GASOLINE COMPANY, APPELLANT.

FILED OCTOBER 20, 1923. No. 22506.

1. **Sales: CONTRACT: BREACH: MEASURE OF DAMAGES.** When a vendee of personal property breaches the contract of purchase by a wrongful refusal to receive the property at the stipulated time and place, and the vendor sues to recover damages, the measure of his recovery is, ordinarily, the difference between the contract price and the market price at the stipulated time and place of delivery. But if the vendor resells the property for less than the contract price and for more than the market price at the time and place of delivery, then the measure of his recovery is the difference between the contract and the resale prices.
2. ———:———:———: **PROOF.** When a vendee of personal property breaches his contract of purchase by wrongfully refusing to receive the property at the stipulated time and place, the vendor, in an action to recover damages for such breach, is required to prove that the property tendered complies with all the material requirements of the contract.
3. **Evidence: HEARSAY.** Testimony of a witness as to the specific gravity of gasoline, which he has not tested nor seen tested for specific gravity, and whose only source of information is a written report by another, whom he had directed to test the gasoline, is hearsay and incompetent.

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

McCarty & Hager, for appellant.

Reavis & Beghtol, contra.

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

GOOD, J.

Action to recover damages for breach of contract. Plaintiff had a verdict and judgment thereon, and defendant has appealed.

In June, 1919, the parties to this action entered into a contract, by the terms of which plaintiff sold to defendant

10 cars of gasoline at 18¾ cents a gallon, to be delivered at Lincoln, Nebraska. The gasoline was to have a specific gravity of 58 to 60 and to test not higher than 428 end point distillation; that is, when distilled, all of it must vaporize at a temperature not exceeding 428 degrees Fahrenheit. Plaintiff shipped 4 cars of gasoline to defendant. Defendant refused to receive them. Plaintiff then resold 10 cars of gasoline to other parties at a price somewhat less than the price agreed upon with defendant, and seeks in this action to recover the difference between the contract price and the price at which it resold the gasoline to other parties.

Defendant assigns as error: (1) That the verdict is not sustained by sufficient evidence; (2) error in the giving of instruction No. 6, relative to the measure of damages; and (3) error in the admission of evidence, with reference to the testing of the gasoline.

By the instruction complained of, the court directed the jury that the measure of plaintiff's damage was the difference between the value of the gasoline in question at the contract price and the value of the same at the price for which plaintiff afterwards resold it. When a vendee of personal property breaches the contract of purchase by his wrongful refusal to receive the property at the time and place stipulated, and the vendor seeks to recover damages for such breach, the measure of his recovery is, ordinarily, the difference between the contract price and the market price at the stipulated time and place of delivery. *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623; *Tacoma Mill Co. v. Gilcrest Lumber Co.*, 90 Neb. 104. However, if the vendor resells the property at a price below the contract price and above the market price at the stipulated time and place of delivery, then the measure of his recovery would be the difference between the contract price and the resale price. In the instant case, the evidence indicates that plaintiff resold the gasoline, after defendant's refusal to accept it, at a price somewhat in excess of the market price at the stipulated time and place of delivery.

Under the circumstances proved, the instruction was properly given.

The first and third assignments will be discussed together. When a vendee of personal property breaches his contract of purchase by wrongfully refusing to receive the property at the stipulated time and place, the vendor, in an action to recover damages for the breach, is required to prove that the property tendered complies with all the material requirements of the contract. In this case the contract provided that the gasoline should have a specific gravity of 58 to 60 and a distillation end point of 428 degrees Fahrenheit. The burden was upon plaintiff to establish that the gasoline tendered met these requirements. Plaintiff assumed and undertook to carry this burden.

With reference to seven cars of the gasoline, the witness Donnelly, over objection, testified that the 7 cars of gasoline had a specific gravity of between 58 and 60, but the record discloses that he personally did not make any test of the gasoline, nor was any test made in his presence, and that the source of his information was a written report or memorandum made by his brother, whom he had directed to test the gasoline. It is evident that he had no personal knowledge. The testimony offered was hearsay and incompetent and should have been rejected. There is no other evidence in the record to establish the specific gravity of these 7 cars of gasoline, and there is no competent evidence in the record to prove the end point of distillation, as to any of the cars of gasoline, so that there is a total failure, on this point, to show that the gasoline complied with the specifications of the contract.

As the jury returned a verdict of practically the full amount claimed by plaintiff, it is evident that defendant was prejudiced by the admission of the incompetent evidence, and that the verdict is not sustained by sufficient evidence.

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

REVERSED.

MOLLIE ENGEL, ADMINISTRATRIX, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED OCTOBER 20, 1923. No. 22467.

1. **Appeal:** INSTRUCTIONS. The instructions given by the court examined, and found to be proper under the issues and to state the law of the case correctly.
2. **Negligence:** ALLEGATION AND PROOF. The fact that an accident happened raises no presumption that either party thereto was negligent, but the material, specific act of negligence alleged in the petition must be proved to authorize a recovery
3. **Railroads:** CARE REQUIRED. A railroad company is bound, in all cases, to exercise reasonable care to avoid injuring persons who are known to be, or who may be expected to be, upon its tracks or grounds, and if it fails to use such care, it is liable for the damages resulting proximately from such failure.
4. **Master and Servant:** CARE REQUIRED. "An employee is not bound to exercise care to discover extraordinary dangers arising from the negligence of the employer or of those for whose conduct the employer is responsible, but may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them." *Chesapeake & O. R. Co. v. DeAtley*, 241 U. S. 310.
5. ———: ———. The employee has the right to assume that those operating engines or trains will use due care and caution for his safety, and when a railroad company knows that its employees are engaged in work on or about its tracks, it is its duty to maintain a careful lookout for such employees to prevent injuring them.
6. ———: ———. While it is the duty of employees to watch for dangers and to protect themselves against them, this does not relieve the railroad company and its employees of the duty of using care and caution for the safety of its employees.
7. ———: DEATH OF SERVANT: CONTRIBUTORY NEGLIGENCE: PRESUMPTION. Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown.

8. ———: QUESTIONS FOR JURY. The questions of negligence on the part of deceased and on the part of defendant and its employees were properly submitted by the court to the jury for their determination upon the consideration of all the evidence.

9. ———: VERDICT SUSTAINED. Under the pleadings and evidence, the verdict of the jury in this case was warranted and justified.

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

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

McCarty & Hager, contra.

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

COLBY, District Judge.

This is an action brought in the district court for Lancaster county, prosecuted under the federal employers' liability act by the legal representative of Adam Engel, deceased, who in his lifetime was a section foreman in appellant's employ in the city of Lincoln, to recover damages because of the alleged negligent fatal injury of the said Adam Engel by appellant.

The amended petition, after alleging matters of jurisdiction, besides pleading the violation of an ordinance of the city of Lincoln restricting the speed of locomotives or trains to four miles an hour within the city, pleads as other negligent acts by the appellant causing said injury, in substance, as follows: (1) In not keeping a look-out on the advancing end of the locomotive which was running backward; (2) in not seeing said deceased and warning him of his danger; (3) in not having the locomotive under control at the time it struck deceased; (4) in not stopping the locomotive before striking deceased; (5) in operating the locomotive backward without a look-out on the rear or advancing end; (6) in operating the locomotive at a speed in excess of 10 miles an hour; (7) in not sounding a whistle

or ringing a bell as it moved backward at the time and immediately prior to the time of the accident; (8) in not warning the deceased before the locomotive struck him and in time to permit him to have escaped injury; (9) in not stopping the locomotive after appellant and its agents and employees in the locomotive, in charge thereof, saw said deceased and realized his danger.

Appellant's answer admitted its corporate capacity and the relation between itself and Adam Engel at and before the time of his death; admitted that appellant is a railroad corporation engaged in interstate transportation by rail of freight and passengers; that said Engel, on the day of the accident which resulted in his death, was a foreman of a gang of men engaged in maintaining and repairing appellant's roadbed and side-tracks in the city of Lincoln used in its business as an interstate carrier by rail, and that such work was necessary to maintain its tracks in proper condition; and also admitted the collision and the injury, and that the locomotive was being driven backward at the time of the accident; admitted Engel's age, and that there survived him a widow, daughter, and a son, but denied all other allegations of the petition.

The appellant further alleged that the ordinance pleaded in plaintiff's petition was void; that at the time of the accident the day was clear and that there were no obstructions to Engel's view of the approaching locomotive, which he knew was moving backward and was liable to pass over the track at any time. The answer also alleged that the whistle had been sounded and the bell was ringing, and that Engel, in going on the tracks under the circumstances, assumed the risk of his injuries, and that his death grew out of such assumption and his own carelessness and negligence.

In reply it was alleged, among other things, that there were many cars, locomotives and trains moving about the yard in the vicinity of the accident and men were constantly at work in that neighborhood.

The case was tried and submitted to a jury, who returned a verdict in appellee's favor in the sum of $10,000; motion

for new trial was overruled and the case appealed to this court; appellant setting forth 49 separate assignments of error upon which a reversal is asked, also stating 15 propositions of law relied upon for the reversal of the case.

It is plain that under the issues the burden of proof rested upon plaintiff to show by a preponderance of the evidence one or more of the material specific acts of negligence of the defendant alleged in the petition, and that such act or acts caused the fatal injury to Adam Engel, and, unless it appears that such act or acts were proved, the verdict of the jury cannot be sustained.

There seems to be a duplication of some of the specific acts of negligence alleged, but this fact is not material. It appears from the record that there was very little conflict in the evidence on the trial, such conflict being mainly in relation to whether the bell on the advancing locomotive was ringing from the time it passed the Ravenna crossing to the time of the accident, or not. The employees on the engine testified in the affirmative, but witnesses for the plaintiff testified that they did not hear the ringing of the bell. It also appears that the whistle was not blown after the locomotive entered the yards passing through the gate at the Ravenna crossing.

The evidence shows that the deceased, who was a section foreman and foreman of a gang of some 16 to 18 men, was engaged on the day of the injury in shoveling snow and clearing the depot and tracks, and that on such day the weather was blustery and stormy, the ground covered with snow, and the tracks wet. The accident occurred in the extensive Burlington yards at Lincoln, in that part westward from the passenger station. It appears that deceased was fatally injured by the engine and tender of train No. 18, and that at or about that time the engine of train No. 39, coming from the roundhouse, was moving forward toward the deceased, with bell ringing, and that the engine and tender of train No. 18 had come from its regular run from Hastings to Lincoln and was going backward to the roundhouse to lay up until its next run.

The defendant and its employees on the locomotive knew that deceased and the gang of men under him were constantly crossing and recrossing the tracks at the place where the accident occurred, that locomotives were traveling backward and forward on the many tracks in the yards and bells were ringing on the different engines that were at times passing to and fro, and that there were 50 to 60 engines backing over the track every eight hours. It is unquestioned that the yard in which the deceased was working with his gang of men was a place of danger at nearly all times, and that this must have been known to deceased as well as to the defendant railroad company and its employees on the engine of train No. 18, and it would seem that the care, caution and prudence which a reasonable person, under the circumstances, should exercise were required both of employer and employee at all times to insure the safety of those employed in labors about the yards.

It further appears from the record that the Ravenna crossing, or the Ravenna-Billings crossing, as it is sometimes called, was about three blocks, or a distance of 400 or 500 feet from the place of the accident; that train No. 18 was late 10 or 15 minutes; and that there was a way for No. 18's locomotive to have gone to the roundhouse not over the west-bound track where the accident occurred, and that such way was generally or sometimes used when the trains were late.

The first error assigned by appellant for reversal of the judgment of the lower court is that such court overruled appellant's motion to strike from the amended petition reference to the ordinance of the city of Lincoln forbidding the operation of trains, engines, cars or trucks within the corporate limits of the city of Lincoln at a greater rate of speed than 4 miles an hour, and that this alleged error also includes the rulings of the court on the same subject in the introduction of evidence. While it is true that the district court overruled the motion to strike from the amended petition the ordinance of the city of Lincoln referred to, and also true that evidence of such ordinance

was introduced, over objections, on the trial of the case, yet the district court corrected these errors, if they were errors, by giving the jury instruction No. 11, as follows:

"You are instructed that an ordinance of the city of Lincoln, respecting the regulation of speed of trains in said city, was received in evidence, and has been since withdrawn, and you will treat that item of evidence as though it had not been read in your hearing."

This ordinance was introduced the last thing before the adjournment of court in the evening, and it does not appear that the same was even read to the jury, but it does appear that the next morning such ordinance was withdrawn from the evidence and that on the submission of the case the court gave the instruction quoted. This will surely relieve the case of the burden of any prejudicial errors by reason of the ordinance having been introduced or the overruling of the motion to strike the reference thereto from the amended petition.

The next assignments of error include objections to the admission of evidence on the trial, and more especially to the rulings of the court upon appellant's objections to a large number of interrogatories and the answers thereto, chief among which might be mentioned the inquiries as to the habitual conduct of the deceased regarding the care used by him toward his men and in the management of his business as an employee of the railroad company.

Plaintiff's amended petition avers that deceased had been in the employ of defendant for 22 years, and was skilled, competent and efficient in the upkeep, repair and maintenance of railroad rights of way and tracks and in the working, controlling and handling of men under him; that he was a man of good habits, strong, robust and in good health, sober and industrious, a constant and steady worker.

Defendant's answer admits its employment of deceased, and that deceased was a skilled, competent and efficient workman, of good habits. While the interrogatories and testimony brought out thereby do not show the conduct of deceased at the time of the accident, or what care and cau-

tion were actually exercised by him at said time, yet they do have a bearing upon the known or uncontroverted facts in the case and might properly be considered by the jury in connection with all the other facts and circumstances shown by the evidence. As the exact facts of the fatal injury were not known to any witness and the accident was not seen, the only way for the jury to arrive at the real cause of the accident was by a consideration of all the known facts and circumstances surrounding the case and the conditions which might have existed at the time of and immediately prior thereto. We can see no prejudicial or reversible error in the rulings of the court regarding such previous conduct and character of the deceased.

The other objections by appellant's counsel to the introduction of evidence and the rulings of the court thereon seem to be of a general nature and the rulings not such as to prejudice defendant's case. We discover no serious prejudicial error sufficient to warrant the reversal of the case in these rulings, and none has been pointed out or called to our attention by appellant's counsel.

Counsel for appellant also urge as grounds for reversal the refusal by the court to give the paragraphs of instructions 1 to 14 requested by defendant, and the giving of instructions 1 to 14 on the court's own motion. Reserving the questions involved in instruction No. 1 requested by defendant, which will be considered later, we find no error in the refusal to give the other instructions, and, in fact, no specific errors are urged by appellant or brought to our attention.

As to the instructions given by the court on its own motion, upon diligent examination and consideration we are convinced that the district court recognized and carefully guarded the rights and interests of both parties and stated to the jury clearly the law applicable to the issues involved.

In the first three instructions the court correctly states the issues, giving the material substance of the pleadings, and these instructions are not subject to the objections

made, nor are the authorities cited by defendant's counsel, when rightly understood, applicable to them.

The court in instruction No. 4 fairly advised the jury of the law as to the burden of proof, negligence, and proximate cause, as well as the amount of damages.

In instruction No. 5 the court instructed the jury regarding the duties of the engineer and fireman in watching for objects on the track, so far as compatible with properly operating the engine, and of the warnings required to be given employees such as an ordinarily prudent person would do under existing circumstances.

In instruction No. 6 the court correctly defined negligence, and in instruction No. 7 the liability of a person guilty of negligence or of the want of the exercise of due care in certain cases is explained and limited. In the latter part of such instruction the court uses this language: "The law presumes that the deceased was exercising ordinary care at the time of his injury, with a view to his own safety. However, there is no liability on the part of the defendant company without proof of its negligence which was the proximate cause of the death in question. The fact that an accident happened raises no presumption that either party thereto was negligent, but the specific act of negligence alleged in the petition must be proved by the preponderance of the evidence." It will readily be seen that this instruction meets and does away with many of the objections made by defendant's counsel and correctly includes the principles of law in regard to such matters strenuously contended for by them.

In instructions 8 and 9 the district court advised the jury of the dangers necessarily incident to railroad tracks and yards, and of the duties devolving upon a person, employee or otherwise, in using due caution to avoid such dangers and the injuries which might result therefrom. Instruction No. 9 correctly and without ambiguity gives the law governing this case in regard to the reasonable care required to be used by employers as follows: "You are instructed that a railroad company is bound in all cases to exercise reason-

able care to avoid injuring all persons who are known to be, or who may be expected to be, upon its tracks or grounds; and if you find from the evidence that the deceased might have reasonably been expected to be on the main track of the defendant in front of the engine that ran over him, then it was the duty of the defendant to use reasonable care to avoid injuring deceased, and if it failed to use such reasonable care, it is liable for whatever damages resulted to plaintiff as the proximate result of such failure." This law is based upon humane principles and a proper regard for human life and is supported by the best legal authorities.

Under the federal employers' liability act, while the employee assumes the risks of his employment, he does not, under all circumstances, assume risks occurring by reason of the negligence of the employer, nor of the employer's employees or agents. *Erie R. Co. v. Purucker,* 244 U. S. 320; *Kalashian v. Hines,* 171 Wis. 429; *Armbrecht v. Delaware, L. & W. R. Co.,* 90 N. J. Law, 529; *Grybowski v. Erie R. Co.,* 88 N. J. Law, 1; *Trinity & B. V. R. Co. v. Elgin,* 56 Tex. Civ. App. 573.

Where a railroad company knows its employees are engaged in work on or about its tracks, it is its duty to maintain a careful lookout for such employees to prevent injuring them. *Chicago & E. R. Co. v. Mitchell,* 184 Ind. 588; *Grybowski v. Erie R. Co., supra; Kommerstad v. Great N. R. Co.,* 128 Minn. 505.

The other instructions given on the court's own motion are not erroneous and were proper to be given to the jury to enable them to fully understand the facts and apply to the evidence the principles of law applicable to the issues.

We now come to the most serious assignment of errors, and upon which counsel for appellant seem to rely mainly for a reversal of this case. At the close of the evidence, and also in instruction No. 1 requested on submission of the case, appellant moved the court to instruct the jury to return a verdict in appellant's favor for the reason that the evidence was insufficient to establish the charges of negli-

gence in the petition or to establish a liability in favor of appellee and against appellant. The question, in brief, is: Was there sufficient evidence, when all the facts and circumstances were taken into consideration, to authorize the submission of the case to the jury and to warrant the verdict?

Witness Adams testified that shortly after the passage of train No. 18's engine he heard a moaning sound and found Adam Engel lying on the outside of the west track with his left arm cut off at the shoulder and his left leg run over twice and cut off. This witness is corroborated by two others. It appears, however, that no human eye saw the accident which resulted in the death of Adam Engel. Were there circumstances, facts and conditions shown by the evidence sufficient for the jury to decide, under the instructions given, the questions of negligence made by the pleadings?

There is no contention but that the burden of proving the material allegations, or some of them, of negligence on the part of the defendant company, or its employees, was upon the plaintiff, but it is not required that these be proved by direct and positive evidence. They may be legally proved by facts and circumstances from which such negligence will be legitimately inferred. Circumstantial evidence, when full and complete, is oftentimes just as conclusive and convincing as direct evidence. In very many of the most important cases tried in our courts the evidence is largely or wholly circumstantial. Take it in murder cases, where the life and liberty of the defendant on trial are at stake, and where all the presumptions are in his favor, the courts uniformly hold that the circumstances proving or tending to prove the material elements of the crime charged and showing the guilt of defendant should all go to and be considered by the jury in arriving at their verdict, and that, because no human eye saw the fatal shot fired or the blow struck, yet the circumstances proved surrounding the case are often of such a nature that the jury can legally and properly infer the defendant's guilt. If it is proper in cases

involving the dearest of all rights for the jury to give such consideration to circumstantial evidence it certainly is admissible in a case involving only questions of negligence and civil liability and not those of criminal intent and moral turpitude.

There are nine allegations of negligence pleaded in the amended petition as causing the fatal injury, and from an examination of the record it appears that the greater number of these are uncontroverted. Of course, it was a question for the jury whether the acts of defendant charged and complained of really constituted negligence and caused the injury under all the facts and circumstances shown by the evidence.

Among the first acts of negligence complained of is that the defendant did not have a look-out on the advancing end of the locomotive with its tender which was being backed into the yards. This fact is undisputed and is admitted by both parties—there was no look-out on the tender or on the advancing end of the locomotive which struck plaintiff and caused his fatal injuries.

The second is the charge of negligence in not seeing the deceased and warning him of his danger. This fact is also uncontroverted, as engineer Wilson and fireman Weber on No. 18's engine both testified that they could not see a man 100 feet ahead of the tender, and that they did not see the deceased and hence did not warn him, and, in fact, could not see him or the place where the accident occurred by reason of the curvature in the track over which the locomotive was passing; that it was impossible for either of them, from where they were located and riding in the engine cab, to see the place of the accident by looking out on either side of or over the engine and tender.

It is also charged that the employees of defendant did not stop the locomotive before striking deceased. This is also admitted, as the testimony shows that the defendant, or its employees, had no knowledge of the running down or striking of deceased at the time.

It is charged that defendant and its employees were also

negligent in not sounding the whistle and ringing the bell as the engine and tender moved backward at the time of and immediately prior to the accident. The evidence shows that the whistle was not sounded after passing into the yards through the gate, which was about three blocks distant from the point of the accident. The employees testified that the bell rang automatically, while witnesses for plaintiff testified that they did not hear the ringing of the bell, although only about 50 feet distant from the place of the accident.

It is also charged that the defendant and its employees were negligent in not warning deceased before the locomotive or tender struck him in time to have permitted him to escape injury. It is undisputed that no warning whatever was given deceased before he was struck, nor did defendant, or its employees, furnish him any opportunity to escape the impending injury.

It is also charged that defendant was negligent in not stopping the locomotive and tender after appellant and its employees on the locomotive saw said deceased and realized his danger. There is no evidence that the defendant or its employees attempted to stop the locomotive or that they saw deceased prior to his fatal injury.

It is contended by appellant's counsel that because the deceased understood and appreciated the dangers which arose from his employment, or by the reasonable use of his senses, having in view his age, intelligence, and years of experience, ought to have understood and appreciated such dangers, and voluntarily undertook to work under those conditions and expose himself to those dangers, he cannot recover against his employer for the resulting injuries.

This statement of the law is fairly correct, providing the injuries resulting to the plaintiff came from the dangers assumed by him, and were incident to and a part of his employment, and did not come or result from the negligence of defendant or its employees. It cannot be successfully contended that deceased assumed by his employment any injuries which were liable to result from the negligence

and carelessness of defendant or its employees. The employee's assumption of risk only applies to the dangers incident to and arising out of the conditions of the machinery, premises and his employment. It was the duty of deceased to watch for dangers and protect himself against them, if possible, and to exercise great vigilance in looking out for approaching engines and trains, but it was also the duty of the railroad company and its employees to use due care and caution for the safety of the employees; and where a railroad company knows that its employees are engaged in work on or about its tracks, it is its plain duty to maintain a careful look-out for such employees to prevent injuring them. Because the deceased had been employed by the railroad company for 22 years, a part of which time as foreman of a gang of men, and was aware of the many dangers incident to such employment, these facts did not authorize the railroad company to operate its engine and tender negligently and without regard to his safety or without using the ordinary care which an individual is obliged to use, under like circumstances, for the protection of his employees. The deceased had a right to presume that those operating the locomotive would use proper care and caution for his safety, that they would maintain a careful look-out to prevent injuring him, and that they would take the reasonable, ordinary and usual precautions necessary to protect him in his employment. It cannot be claimed that under the federal employers liability act an employee assumes the risks of the negligence of the employer or of the employer's employees or agents, at least until knowledge of the particular negligence which caused or was liable to cause the injury is brought to his attention.

Now the matter of the care and caution to be used by defendant and its employees upon the locomotive, under the circumstances of this case, was a question of fact to be submitted to the jury for their consideration, and not necessarily a question of law. In some cases it might be that the automatic ringing of the bell would not be sufficient and

that ordinary care would require the sounding of the whistle, and that in this case, where they were rounding a curve in the tracks and could not see the place where the accident occurred, ordinary care required the stationing of a lookout on the advancing end of the engine or of the tender, and that where it was known to defendant that deceased was working on the very track which the locomotive was obliged to pass over, a prudent watch should be provided, and that the engine should be kept in readiness to stop, when it was seen that there was danger of running down the deceased, and that timely warning should be given and other necessary precautions taken for the due protection of the faithful and efficient employee who had devoted 22 years of his life to the service of defendant. These matters were all proper to be considered by the jury under all the facts and circumstances shown by the evidence, and it was their duty, under the instructions of the court, to give the deceased the benefit of the presumptions arising in his favor, as well as to give defendant the benefit of those arising in its favor, and to decide, under all the circumstances and facts disclosed, whether the fatal accident was caused by the negligence or want of proper care on the part of defendant, as charged in plaintiff's petition.

Under some circumstances and in many cases it has been held by the courts that negligence is a matter of law. This court in *Union P. R. Co. v. Elliott*, 54 Neb. 299, announced in the fourth paragraph of the syllabus: "Irrespective of a statute on the subject, the starting or running of a switch-engine in a switch-yard filled with a network of tracks, upon which cars are constantly moving and in which yard men are at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence." And the commissioner, in the opinion of the court, comments as follows: "Elliott was in the discharge of his duty, and while he stood nearer the south track than was necessary before commencing his work, he stood there for a very short space of time, and if at the moment he thought of his dangerous proximity to the south track, he had the right to suppose

that no engine would pass on that track without signalling its approach by bell or whistle or otherwise."

In *Wise v. Delaware, L. & W. R. Co.*, 81 N. J. Law, 397, the court, in the first paragraph of the syllabus, uses this language: "Evidence that the defendant's locomotive engine was not running on schedule time, was being driven backwards, and omitted to give the statutory signal of its approach to the crossing, clearly made out a *prima facie* case of negligence on the part of the defendant."

Again, in *Huxoll v. Union P. R. Co.*, 99 Neb. 170, 180, this court makes the following statement: "The court is committed to the doctrine of the *Glantz* case (*Glantz v. Chicago, B. & Q. R. Co.*, 90 Neb. 606) that to run a high-tank road engine backwards through railroad yards without a lookout, when to have one is the usual custom in such yards, is a negligent act. This is a humane doctrine and we adhere to it."

In *Southern R. Co. v. Daves*, 108 Va. 378, the court say: "Whether it is negligence or not for the servants of a railroad company to run an engine backwards or push cars ahead of an engine without stationing some one on the tender, or foremost car, to signal its approach to a person who may be on the track, is a question which is controlled by the circumstances under which the engine or train is operated. Under some circumstances, the act has been held to be negligence as a matter of law; but in most cases it has been held to be a question of fact to be submitted to the jury."

From a careful examination of the many adjudicated cases, we conclude that the question of negligence, while sometimes a matter of law, is generally a question of fact to be submitted to the jury for their determination from a consideration of all the circumstances, conditions and facts shown by the evidence as surrounding the case.

The testimony of the employees on No. 18's locomotive is that the engine, in passing to its roundhouse, needed no special care, and that all the employees had to do was to watch; that the curve in the tracks made it impossible for

the engineer and fireman in the cab to see the location of the accident; that the cab window on the side of the fireman was closed, so that he did not and could not look out on that side at all; that no one was on the tender or advancing end of the engine; that no one was on the track in front of the locomotive to give warning of its approach, and, in fact, that these two employees did not put themselves in any position to watch intelligently and see what might be in front, or to enable them to look over the tracks on which the advancing engine and tender were going. Witnesses testified that the engineer and fireman could not have seen a man on the track 100 feet ahead of the engine by looking over the engine or tender or alongside the tender. The employees on train No. 39's engine testified that their duties were in keeping watch ahead with reference to the track on which they were moving, and that they were instructed that if they saw any persons coming on the track to notify or warn them. From the evidence, the engine and tender of No. 18 were running blindly in the vicinity of and on the tracks where deceased and other employees were known to be working, and the employees riding on the engine saw nothing and were so situated that they could see nothing; that they did not pretend to nor seek to give any warning whatever of the approach of the locomotive and tender, which the evidence shows was under control, with sand in the boxes, and could have been easily stopped within a distance of from 25 to 30 feet; that the locomotive was running light, which means that it would make but very little noise; that no whistle was blown within three blocks after entering the yards, and that it was a very grave question whether the automatic bell was ringing. All these facts, under the law, should go, and did go, to the jury for their consideration in solving the question of negligence under the issues.

Under the law, each particular case is to be determined by the circumstances and facts of such case. In some instances the sounding of a whistle might be required; in others a man on the advancing end of the engine or tender

or a man walking on the track in front or other precautionary measures are necessary to insure ordinary safety. *Topore v. Boston & M. Railroad,* 79 N. H. 169; *Moore v. Minneapolis & St. L. R. Co.,* 123 Minn. 191; *Huxoll v. Union P. R. Co.,* 99 Neb. 170; *Southern R. Co. v. Daves,* 108 Va. 378; *Louisville & N. R. Co. v. Potts,* 92 Ky. 30; *Boyd v. Southern R. Co.,* 115 Va. 11; *Wise v. Delaware, L. & W. R. Co.,* 81 N. J. Law, 397.

The jury might well have found from a consideration of all the facts and circumstances shown by the evidence that the automatic bell did not ring. Some of the workmen testified that they did not hear it, and the jury would have the right to consider the experience of deceased and his instinct of self-preservation in determining whether the automatic bell rang or not, as the evidence shows that his sight and hearing were normal. *Sullivan v. New York, N. H. & H. R. Co.,* 73 Conn. 203; *Western Travelers Accident Ass'n v. Munson,* 73 Neb. 858; *Philadelphia & Reading Coal & Iron Co. v. Oravage,* 229 Fed. 383.

Again, it appears from the evidence that when the trains were late there was another track by which the locomotive and tender were accustomed to pass to the roundhouse, and it is shown that the Ravenna train was late and the engine of train No. 18 did not arrive at the gate of the yards till 10 or 15 minutes after time. Under these circumstances, did not the deceased have a right to presume that No. 18's engine had taken the other track and would not pass over the track upon and around which he and his gang of men were at work? And to this might properly be added the reasonable presumption that, if No. 18's locomotive should pass late and out of time down the track where he was at work, ordinary care and caution would be used for his protection. All of these matters were proper for the consideration of the jury in determining the question of fact whether the fatal injury was caused by the negligence of the defendant and its employees or by the negligence of the deceased.

While there are certain presumptions of law as to negli-

gence recognized in certain cases, as we have seen, yet under the facts disclosed by the record in this case the negligence of the defendant was clearly a question of fact and properly submitted to the jury for their consideration. *Kalashian v. Hines*, 171 Wis. 429; *Glunt v. Pennsylvania R. Co.*, 249 Pa. St. 522; *Indiana I. & I. R. Co. v. Otstot*, 212 Ill. 429; *McLeod v. Chicago & N. W. R. Co.*, 104 Ia. 139.

When all these matters shown by the evidence were submitted to and were under consideration by the jury, and there being no eye-witness to the accident, it would seem to be proper for the jury to consider the testimony that the deceased was habitually careful in his work for the protection of himself and the men under him, and they certainly could not draw the inference that he was not in the exercise of due care when he was run down by the offending engine. *Casey v. Chicago R. Co.*, 269 Ill. 386; *Lyman v. Boston & M. Railroad*, 66 N. H. 200; *Missouri P. R. Co. v. Moffatt*, 60 Kan. 113; *Chicago & A. R. Co. v. Wilson*, 225 Ill. 50.

Some of the authorities hold that an employee injured while engaged in his duties, under such circumstances as are disclosed in this record, is not, as a matter of law, guilty of contributory negligence, but this is a question of fact for the jury. *Union P. R. Co. v. Elliott*, 54 Neb. 299; *Mitchell v. Toledo, St. L. & W. R. Co.*, 197 Fed. 528; *Koski v. Chicago, M. & St. P. R. Co.*, 116 Minn. 137; *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 588; *Louisville & N. R. Co. v. Potts*, 92 Ky. 30.

This legal proposition, however, need not be considered exhaustively nor settled in the present case, because the evidence would have sustained a verdict larger than was returned by the jury, and it must be presumed that in determining the amount of the verdict the jury compared the negligence of deceased, if any were shown, and deducted the amount thereof from the full damages, and that the verdict represented the balance. No instructions were asked by defendant on the subject of contributory or comparative negligence. *Bombolis v. Minneapolis & St. L. R.*

Co., 128 Minn. 112, affirmed in *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211; *Fitzpatrick v. Hines*, 105 Neb. 134.

Under the federal employers' liability act contributory negligence does not bar a recovery unless it is the sole cause of the injury. If there is any negligence of the defendant contributing as a proximate cause, plaintiff is entitled to a verdict representing defendant's proportionate share in such proximate cause or causes. 8 Fed. St. Ann. 1339, sec. 3; *Fitzpatrick v. Hines, supra.*

As we have seen, no human eye saw the accident in question, and the facts and circumstances thereof could be proved only by circumstantial evidence, and not by direct evidence. This condition of the case introduces another legal proposition which has been recognized specially by this court and generally by other adjudicated cases, which is, that where there is no direct evidence, that is, no eyewitness to the accident, the instinct of self-preservation in human nature raises the presumption that deceased was not guilty of contributory negligence but was in the exercise of due care and caution for his own safety. *Albrecht v. Morris*, 91 Neb. 442; *Chase v. Chicago, B. & Q. R. Co.*, 91 Neb. 81; *Sorensen v. Selden-Breck Construction Co.*, 98 Neb. 689; *Nilson v. Chicago, B. & Q. R. Co.*, 84 Neb. 595; *Northern P. R. Co. v. Freeman*, 83 Fed. 82; *Gordon v. Illinois C. R. Co.*, 168 Wis. 244; *Chicago & A. R. Co. v. Wilson*, 225 Ill. 50; *Tyrrell v. Boston & M. Railroad*, 77 N. H. 320; *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 495; *Illinois C. R. Co. v. Nowicki*, 148 Ill. 29; *Missouri P. R. Co. v. Moffatt*, 60 Kan. 113; *Golinvaux v. Burlington, C. R. & N. R. Co.*, 125 Ia. 652; *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461.

Counsel for appellant quote excerpts from the opinion in *Tsiampras v. Union P. R. Co.*, 104 Neb. 205, but these very excerpts show a different state of facts from those existing in the instant case. The learned judge, in his opinion, says: "We find no negligence upon the part of the trainmen in failing to give the usual warnings, in fail-

ing to discover the dangerous condition of decedent, or in failing to do what they might have done after discovering him in a place of danger."

In the case at bar the negligence and in fact many acts of negligence of defendant and its employees are unquestioned. No warnings were given, if we except the automatic ringing of the bell, which fact is in dispute, no whistle was blown after entering the yards, no one was on watch, and no effort was made to discover the dangerous situation of decedent or to protect him in any way by using even the common, ordinary care and caution which a reasonably prudent man would use to protect his employees under like circumstances.

From a careful examination of the whole record, we are of the opinion that a fair trial was had, that the rulings of the district court were without prejudicial error, that the instructions correctly stated the law, and the findings of the jury were fairly justified and warranted by the evidence. The proceedings and judgment of the district court are

AFFIRMED.

BRONDERSLEV MOTOR SALES COMPANY, APPELLEE, V. NEBRASKA BUICK AUTO COMPANY, APPELLANT.

FILED OCTOBER 20, 1923. No. 22514.

Corporations: PROCESS: "MANAGING AGENT." Under the contract, the material points of which are set forth in the opinion, and the evidence, it is *held* that the persons served with summons as "managing agents" of defendant were not such, and that by such service the court did not acquire jurisdiction of the person of defendant.

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

Reavis & Beghtol and *J. L. McPheely*, for appellant.

M. D. King and *B. H. Bracken, contra.*

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

REDICK, District Judge.

This action is based upon a written contract between the plaintiff and defendant, to recover damages or commissions claimed to be due plaintiff under said contract. The contract is quite lengthy and need not be quoted in full, but the following excerpts are the material portions thereof necessary for an understanding and decision of the questions presented:

"The seller agrees to sell the dealer Buick automobiles, hereinafter described by model number, terms sight draft with bill of lading attached (payable with collection charges) f. o. b. Flint, Michigan, at a discount of 10 per cent. from list prices hereinafter mentioned (at which price all such Buick automobiles shipped under this agreement will be billed). In addition to the purchase prices mentioned below, the dealer agrees also to pay the seller the amount of any taxes which the seller is or may be required to pay upon the automobiles, parts, accessories, tires or other goods sold hereunder, by any present or future, municipal, state, or federal law or taxing authority whether retroactive or otherwise.

"The seller reserves the right to change any of the above prices upon notice in writing duly mailed to the dealer, and also to make changes in design or add any equipment to, or make improvements on Buick automobiles at any time without incurring any obligations to install same on automobiles previously purchased.

"The seller further agrees to sell the dealer Buick repair parts of their manufacture as may be made for such automobiles and bill same, net cash, payable the tenth of the month following the date of billing, at a discount of fifteen per cent. from list prices established from time to time by the seller and which are subject to change without notice, and provided the dealer carries in stock at all times during the life of this agreement Buick repair parts

to the amount of $3,000 or more an additional 10 per cent. discount will be allowed, provided the dealer makes a deposit with the seller at the time of signing this agreement of $100. However, in case the dealer does not make said deposit or at any time fails to make prompt remittance to the seller, as provided in the foregoing, said parts discount will be 10 per cent. from said list prices, and parts will be shipped C. O. D.

"Provided this contract is not canceled for any cause and the dealer does not violate any of the provisions of this contract, the seller on July 31, 1921, or as soon thereafter as possible, will credit the account or pay said dealer an additional discount based on the net prices of the respective automobiles as follows:

"The dealer agrees First: That he will thoroughly canvass and devote his best energies to promote the sale of Buick automobiles purchased under this agreement to persons residing within, and will not sell such automobiles to persons residing outside of the following district. (In case any of the automobiles sold or delivered by the dealer are used in another territory within four months from date of original sale or delivery, and remain in another dealer's territory for a period of five months or more, the dealer making the original sale or delivery will pay the dealer within whose territory the car is being used, an amount equal to 10 per cent. of the list price of the automobile in question as compensation for rendering customary gratis service due the purchaser.)

"(Then are stated the boundaries of the district.)

"Second: To approve the appointment by the seller of such dealers for such subdistricts as in the opinion of the seller are necessary to thoroughly canvass and promote the sale of the seller's product in the foregoing territory."

"Fifth: That the dealer is not authorized or empowered to act as agent for the Buick Motor Company or for the seller; nor to transact business, incur obligations or bill goods in its name, or for its account; nor on its behalf to make any promise, warranty or representation with re-

spect to goods or any other matter; and that the seller shall not be bound by the acts or conduct of the dealer."

"Eleventh: That the Buick Motor Company is the owner of the word 'Buick,' as applied to automobiles, and of the good-will attached thereto, and further that, if the word 'Buick' is used in the name under which the dealer's business is conducted, or in any sign or advertising displayed by him, he will, upon termination of this contract, or upon the request of the seller, or of the Buick Motor Company, discontinue the use of the word 'Buick' in such name, sign, or advertising, and thereafter he will not use either directly or indirectly in connection with any automobile business the word 'Buick' or any other name, title or expression so nearly resembling the same as to be likely to lead to confusion or uncertainty or to deceive the public.

"Twelfth: The seller will, at its option, furnish the dealer with an authorized 'Buick Service' sign, which the dealer will display in such manner and place as may be satisfactory to the seller. The dealer agrees properly to care for such sign, to furnish electrical connections and equipment therefor, and to keep the same lighted at proper times at the dealer's expense. Said sign shall be and remain the property of the seller and may be removed at its option at the termination of this contract or at any time prior thereto.

"Thirteenth: That the dealer will furnish the seller, with the signing of this agreement, a list of the names of Buick owners and prospects to whom the seller may mail each month a copy of the Buick Bulletin, the number of names on such list to be determined by the seller, and further that the dealer will pay to the seller each month the amount of postage required on such Bulletins. The dealer further agrees that the seller may cancel any portion or all of the list at any time, even before the termination or cancelation of this agreement."

"Sixteenth: The dealer agrees to sell back to the seller, at the latter's option, on the expiration, termination or cancelation of this contract any new Buick automobiles or parts therefor which the dealer may then have on hand, at

the same net price which the dealer paid to the seller therefor."

The above excerpts are taken from a contract with the "Car Sales Co.," but are substantially the same as the contract with plaintiff, and are so selected because one of the questions presented depends upon the proper construction of that contract. The defendant's principal place of business is in Lancaster county, but the suit was brought in Kearney county, the summons having been served upon "Fay Rogers and Soren Peterson as its managing agents." The persons served were partners doing business as Car Sales Company. Defendant filed a special appearance objecting to the jurisdiction of the Kearney county district court over the person of the defendant, upon the ground that the persons served were not its managing agents, and that defendant maintained and had no agent or office in Kearney county, and that, therefore, no summons had been served upon the defendant as required by law. The objection was supported by affidavits and oral testimony taken thereon and submitted to the court, which overruled the objections. A bill of exceptions upon the special appearance was preserved and is filed with the record in the case. Thereupon defendant filed a demurrer, which was overruled, and subsequently an amended answer, in both of which pleadings defendant pleaded to the jurisdiction and reserved its exception to the ruling of the court overruling its special appearance. The answer was to the merits and need not be referred to more particularly at this time. The case was presented to a jury and resulted in a verdict for the plaintiff for $1,398; motion for new trial having been overruled, defendant appeals.

The first question presented for our decision is presented by the first assignment of error: The court erred in overruling defendant's special appearance. As the alleged defect in the service is not apparent upon the face of the record, and the defendant having preserved his objection to the jurisdiction both by demurrer and the amended answer, the question of waiver is not pertinent, in fact the

point is not made by appellee. The question then is whether or not, under the evidence presented, the persons served were the managing agents of the defendant; if so, the ruling of the district court was correct, otherwise the court acquired no jurisdiction over the person of the defendant. Section 7634, Rev. St. 1913, provides that a summons against a corporation may be served upon its "managing agent," which term has been defined by this court several times:

"An agent of a foreign corporation, whose contract of agency demands of him the exercise of judgment in the business matters of his principal, and who has charge of the business of his principal in the territory covered by his contract, is a managing agent within the meaning of * * * the Code providing for the service of summons upon the managing agent of foreign corporations." *Ord Hardware Co. v. Case Threshing Machine Co.*, 77 Neb. 847.

"A 'managing agent' must be some person vested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of executing it." Taken from 5 Words & Phrases, 4320. Quoted in *Ritchie v. Illinois C. R. Co.*, 87 Neb. 631.

The precise question here presented has not been passed upon by this court, and its proper solution depends upon the construction and meaning of the above contract. Appellee cites *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 522, but in that case the service was upon a confessed managing agent, and the only question decided was whether service upon the managing agent in Douglas county, Nebraska, was permissible, his residence being in Iowa. Also *Fremont Butter & Egg Co. v. Snyder*, 39 Neb. 632, but in that case defendant had a branch house in the county of service, and maintained a sign thereon "Fremont Butter & Egg Co., Buyers of Butter and Eggs," and the person served had charge of its business, making contracts on behalf of defendant

for the purchase of butter and eggs; the work involved the fixing of the price and determination of the quality of the butter and eggs, and involved the judgment and discretion of the agent exercised for and on behalf of the defendant. Also *Ord Hardware Co. v. Case Threshing Machine Co., supra,* where the machine company entered into a contract with Cornell Bros., upon whom service was had as managing agents, whereby they were appointed agents for the sale of its machine and repairs in the city of Ord; the machines were to be sent to the agents, stored and cared for, and insured as the property of defendant; the agents were required to satisfy themselves that all notes were signed by responsible men of known credit and reputation for paying debts; and it was held that they were managing agents within the definition of those terms quoted above. Also *Brown v. Chicago, M. & St. P. R. Co.,* 12 N. Dak. 61, in which it was held that "a station agent for a railroad company, authorized to sell and collect for passenger tickets, and to receive and deliver freight and collect for freight shipments, is sufficient of a managing agent" to authorize service of summons upon them.

It will be noted in all these cases the person served was beyond question the agent of the defendant, actually engaged upon the defendant's business, and the only question determined was whether or not he was a managing agent within the meaning of the statute providing for service of summons upon corporations.

Defendant also cites *Pugh v. Bothne Co.,* 178 Ia. 601, and insists that it is decisive of the question here. In that case plaintiff sued Bothne Company and Great Western Automobile Company, a nonresident corporation, for breach of warranty in the sale of an automobile, and procured the summons to be served upon A. T. Bothne as the agent of the automobile company, and the question was squarely presented upon a plea to the jurisdiction, which was sustained and case dismissed as to the automobile company, which ruling was reversed by the supreme court, which held that

the service was sufficient under section 3532 of the Iowa Code, which reads as follows:

"When a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

The contract between Bothne Company and the automobile company in that case is quite lengthy and is similar in many respects to the contract under construction. By it the automobile company was termed the manufacturer and Bothne the dealer; an exclusive right to sell defendant's automobiles was granted the dealer in certain territory, the dealer agreeing not to solicit orders outside thereof; the dealer was to purchase catalogue equipment furnished by manufacturer; and the contract contained a large number of provisions not material to our present inquiry; and contained the following:

"(3) As a part of the consideration for the granting of the exclusive right of sale aforesaid, the dealer agrees to push the sale of Great Western automobiles to the best of his ability within the territory aforesaid, employing a sufficient number of salesmen to cover the territory thoroughly.

"(4) For the proper handling of the Great Western line the dealer agrees to provide in the city of Des Moines a building suitably located and arranged for the conduct of business, containing a sales room or repository of sufficient size to display the complete line. The dealer also agrees to maintain in addition a well-equipped repair shop, with a competent mechanic in charge at all times, so that purchasers of Great Western cars can have same repaired and adjusted promptly and at reasonable rates.

"(5) The dealer agrees to make no contracts for the sale of Great Western automobiles with other parties acting for such dealer in said territory, without filing promptly with the manufacturer copies of all contracts so made,

so that it may have a complete record and a full knowledge of the conditions and volume of the business in every locality."

"(15) It is understood and agreed that this contract shall not in any respect make the dealer agent for the manufacturer to transact any business in its name or for it in any form, it being intended and expressly agreed that this contract is simply to give the dealer exclusive right to sell Great Western automobiles in the territory hereinbefore specified.

"(16) The dealer agrees to keep in stock, at all times during the term of this agreement, at least one automobile produced by the manufacturer, for the sole purpose of demonstrating and exhibiting to intended purchasers, and will maintain same in good order and repair."

The court held that the dealer under this contract was an agent of the defendant within the meaning of the section of the Code above quoted, concluding as follows:

"Construing this contract in the light of ordinary practical sense, Bothne was the 'dealer' of the Great Western Automobile Company, and was its sole representative in the specified territory to all retail purchasing customers. We think, therefore, that he and his place of business constituted an agency of the principal defendant, within the meaning of our statute above quoted." The court's conclusion was based upon the consideration that—

"Although the dealer agreed to purchase, he did so for the purpose of a resale. He was not a purchasing customer in the ordinary sense. The ultimate customer for the vehicle was to be found by the dealer. The dealer was not even purchasing at wholesale in the ordinary sense. He was not in the market buying automobiles in quantities where he could buy the best. The foregoing contract contains 21 specifications. Comparatively few of them deal with the relation of purchaser and seller. If no other relation than that of purchaser and seller was contemplated, then many of the provisions of the contract are not only unnecessary, but are impertinent. The dealer binds

himself therein to certain conduct in the handling of the product of the manufacturer even after its purchase. He undertook to furnish a place for the exhibition of the product of the manufacturer. He receives its literature and distributes its advertising. He delivers its printed warranties to his retail customers. He is entitled to the benefit of the advertising of the manufacturer, and the manufacturer is entitled to the benefit of his diligence in pushing sales to the end that the business of the manufacturer as well as that of the dealer may be increased."

We think that this case might be clearly distinguished from the case at bar by a comparison of the provisions of the two statutes, the Iowa statute providing for service upon any agent of the defendant, while the Nebraska statute provides for service only upon a managing agent, the distinction between whom was well pointed out in *Ritchie v. Illinois C. R. Co., supra.* In *Atlas Glass Co. v. Ball Bros.*, 87 Fed. 418, the court said with reference to a statute of similar import:

"In construing the statute the doctrine of *noscitur a sociis* is applicable; the term 'managing agent' is found associated with 'president,' 'secretary,' 'clerk,' 'cashier,' 'treasurer,' and 'director,' and it is to be presumed that the lawmakers intended to describe an agent possessing powers analogous to those of the executive officers of the corporation. He must be an agent employed by the corporation, representing it in some capacity and acting for it to a limited extent at least."

But the above quoted provisions of the Bothne contract, and upon which the court in great part rests its conclusion, are not to be found in the contract of defendant, unless, perhaps, in two particulars: Number "three" is similar to "first" in defendant's contract, but it will be noted in number "three" the obligation of the dealer is to promote the sale of Western automobiles generally within his territory, while in defendant's contract his obligation is only "to promote the sale of Buick automobiles purchased under this agreement." The distinction is important, the

greater obligation in the Bothne contract having evidently been inserted for the special benefit of defendant's business. And number "fifteen" is similar to "fifth" in defendant's contract, but the court disregards this provision, which may be permissible, though in our judgment it has a tendency to clarify the intentions of the parties. From the above considerations, without discussing the correctness of the ruling in the *Pugh* case, we do not think it decisive in this.

It is argued, however, by appellee, that the provision for the approval by the dealer of appointments of dealers in sub-districts, and the permission to use the word "Buick" in connection with the dealer's business, and the furnishing by the seller of an authorized sign, "Buick Service," which the dealer agrees to display in a manner satisfactory to the seller, and that the dealer shall furnish a list of names to whom the company should mail its magazine, the Buick Bulletin, and the agreement that the dealer will sell back to the company any new Buick automobiles or parts on hand at the termination of the contract, give support to the claim that the dealer was an agent in control of the business of the defendant. But we think no such inference properly arises, and these and kindred provisions are appropriate as a part consideration of the contract granting to the dealer exclusive right to sell automobiles in the territory stated; they grant no authority to the seller to bind the defendant by any contract, nor do they leave to the dealer any judgment or discretion to be exercised by him with relation to the business of the defendant. True, they are provisions which were expected to redound to the benefit of both parties, but the idea of the employment of the dealer as agent in connection with those matters cannot be found to arise from the words used or the nature of the transaction. The provision for payment of 10 per cent. of list price on cars sold by the dealer and used in territory other than his own, and reciprocal provisions in contracts of other dealers for the benefit of the plaintiff in *his* territory, afford no inference of agency,

though in the correspondence between the parties such payments were styled "commissions," for the reason that sales referred to were not to be made for or by defendant, but by dealers. As to whether or not defendant assumed any responsibility as to these transactions we express no opinion, as it is not material to our present inquiry. We have examined this contract with great care and are unable to wrest from its language or the transactions to which it relates any authority conferred upon the dealer to bind the defendant to any contract in any way, much less have we been able to discover that the dealer has been clothed with any such authority as is requisite to constitute a managing agent.

We are clearly of the opinion that the district court erred in overruling the special appearance of the defendant, and that the court was without jurisdiction. In view of this conclusion it is not necessary, nor would it be proper, to discuss questions connected with the merits of the defendant's case.

REVERSED AND DISMISSED.

BEULAH VAN VLEET, ADMINISTRATRIX, APPELLEE, V. PUBLIC SERVICE COMPANY OF YORK, APPELLANT.

FILED OCTOBER 20, 1923. No. 23458.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: COMPENSABLE ACCIDENT.** Where an employee of a gas company engaged in making service connection with a gas main is suddenly overcome by gas, becomes unconscious, weak and sick, *held*, an accident producing objective symptoms of injury within the meaning of the employers' liability law.

2. ———: ———: ———. Death or injury arising solely as the result of an occupational disease is not compensable under the workmen's compensation act; but, where the result is attributable in whole or in part to an accident, the fact that, but for the accident, the disease of which claimant died would be classed as occupational, will not prevent compensation, which in such case is awarded for the accident, not the disease.

3. Evidence examined, and *held* to establish that death was the result of accident.

APPEAL from the district court for York county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

John G. Kuhn, for appellant.

C. E. Sandall, contra.

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

REDICK, District Judge.

Action under the workmen's compensation act. The defendant and appellant is engaged in the manufacturing and distributing of illuminating gas in the city of York. The deceased, Frank M. Van Vleet, was in the employ of defendant as a gas-man, his duties consisting in a general way in looking after the gas distribution, capping mains, and installing the gas service in residences and places of business, and in making repairs. On November 1, 1921, while making a connection with one of the gas mains of the defendant, and down in a hole in the ground about two and one-half or three feet deep, he was overcome by escaping gas to such an extent that he could not walk without assistance, was hauled out of the hole and dragged back and forth in the open air for some time, and a physician called who conveyed him to his home, assisting him from the car to the house; he was put to bed and remained at home for four or five days, and went back to work. About the 1st of February thereafter he was gassed again while changing a booster at the gas plant, and came home complaining that he was sick, went to bed and stayed home three or four days. He went back to work, continuing until the 1st of March, when he came home sick, and after a few days, on the 5th of March, went to bed, where he remained until his death on March 18, 1922. There is some suggestion that he was gassed again on February 29 or March 1, but the inference arises only from the fact that he exhibited symptoms similar to those when he had been gassed. The de-

ceased had been gassed seven or eight times during his employment with defendant, extending over a period of about four years.

The administratrix was awarded compensation by the commissioner, and upon appeal by defendant to the district court the award was confirmed and judgment rendered awarding compensation, from which judgment defendant appealed.

The position of the claimant is that the death of the employee was the result of accident arising out of and in the course of the employment, while the defendant claims that there was no accident, and that the death was the result of an occupational disease which would not be compensable under the statute. The case is thus stated and presents two questions for determination: First, was there an accident? And, if so, second, was death the result thereof?

The Nebraska statute defines an accident as "An unexpected or unforeseen event happening suddenly or violently, with or without human fault, and producing objective symptoms of an injury." This definition was under consideration in the case of *Manning v. Pomerene*, 101 Neb. 127, in which it was held that, where the plaintiff attempted to move some iron beams by pushing with his body, when he felt pain in his stomach, became faint and weak, was compelled to cease work and be assisted home, and on the third day vomited blood and afterward had a slight paralytic stroke, his condition was the result of an accident, the court saying: "The unforseen event was the straining, weakening or lesion of the blood vessels of the brain or stomach, and this was an unforeseen event happening suddenly." It was also contended in that case that there were no objective symptoms of an injury; this was disposed of by the court in the following words: "Defendant's idea is that by objective symptoms are meant symptoms of an injury which can be seen or ascertained by touch. We are of the opinion that the expression has a wider meaning, and that symptoms of pain, and anguish,

such as weakness, pallor, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute." We approve this exposition of the meaning of the terms "accident" and "objective symptoms" as contained in the statute quoted, and the facts of this case bring it clearly within the terms as so defined. The testimony is undisputed that while tapping a gas main he was suddenly overcome by the gas and went clear down so that he had to be dragged out, was unconscious, could not move and could not talk. Surely this was an unexpected and unforeseen event happening suddenly and producing at the time objective symptoms of an injury. No details are given of the gassing about February 1, but there is evidence that he came home complaining that he had been gassed, went to bed, and was home three or four days, and from that on "he had a kind of deathly look, pale all the time, from that on until his death, and he complained of that heavy feeling in his stomach again, and it seemed as though he couldn't move the gas at that time." It is a fair inference from the evidence that this second event was of a character similar to the one of November 1, and was an accident producing objective symptoms of injury. As was said in *Matthiessen & Hegiler Zinc Co. v. Industrial Board,* 284 Ill. 378: "An injury is accidental, within the meaning of the act, which occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee."

Suppose that in this case the employee had been overcome by gas in the manner shown, and suffered disability for a period of ten days, would the employer be heard to deny compensation on the ground that the disability was caused by an occupational disease? We think clearly not. While the evidence shows that gassing in a mild form is not uncommon among gas-workers, it is equally proved that for workmen to be overcome to such an extent as to produce unconsciousness is very uncommon.

The fact that the accident occurred while the employee

was in the performance of duties which subjected him to the danger of being the victim of an occupational disease does not convert the accident into an ordinary occurrence incident to the employment, nor the deleterious effects thereof upon the body of the employee into an occupational disease, even though the symptoms are identical, for the very obvious reason that the law awards compensation for *accidental injuries,* regardless of their character; and disease which is fairly attributable to an accident, and death resulting therefrom, is compensable, even though without the occurrence of the accident such disease would fall within the class occupational; otherwise, effect could not be given to the statute; it is the accident, not the disease, which is compensated. See *Industrial Commission v. Roth,* 98 Ohio St. 34, in which it was held: "The term 'occupational disease' must be restricted to a disease that is not only incident to an occupation, but the natural, usual and ordinary result thereof; and held not to include one occasioned by accident or misadventure." See, also, *Tintic Milling Co. v. Industrial Commission,* 60 Utah, 14. We are of the opinion that the proof of accident is ample, and that the question of the occupational character of the disease is therefore immaterial.

The second question presents greater difficulties: Did the death of the employee result from, or was it contributed to by, the accident? If the employee had died immediately or within a few hours or days after the happening of the accident, we think all must agree that the accident was the cause of his death. But it appears that he worked rather steadily during the following three months and did not take to his bed until about the 5th of March, and died, on the 18th, of a disease termed by the doctors encephalitis, which, in ordinary language, means inflammation of the brain. The dispute is whether or not that disease may be caused by carbon-monoxide poisoning, which was the active agent by which the deceased was overcome on November 1 and February 1, and the determination of this question rests very largely upon the testimony of expert physicians.

The evidence establishes that up to the attack of November 1 deceased was in a normal state of health, was ambitious, anxious to work, and worked overtime. After that date his health began to fail; later on, especially after the gassing of February 1, his appetite failed, he belched gas, had the odor of gas about him, was weak and irritable, staggered when he walked, had a deathly pallor, would sit on the floor and stare, had double vision for a short time, became very inattentive when spoken to, would have to be spoken to three or four times, and would have to be roused and wakened up for the purpose of taking nourishment. These symptoms, physicians who testified all agree, indicated degenerative processes in the body. The attending physician, who testified for the plaintiff, gave it as his opinion that these symptoms were indicative of encephalitis or inflammation of the brain, and also that degenerative processes in the brain might be set up by carbon-monoxide poisoning, and that the deceased died of encephalitis induced by gas poisoning. Dr. Updegraff, called by defendant, had not seen the patient, but, answering hypothetical questions, gave it as his opinion that encephalitis was the cause of death, but stated that in his opinion that disease was due to infection and could not be caused by gas poisoning. He admitted, however, that he did not know the cause of encephalitis, and said it might be a question of whether the number of times deceased had been gassed would be a contributing factor. He further testified that many people die from gas poisoning, but in 15 years' experience as physician for the Omaha Gas Company he had known of no case of death from that cause among the employees, and that the ordinary cases of gas poisoning among persons engaged in that occupation did not result in death. Dr. Delaney, called by defendant, testified that, except for the supposed gassing on the last day of February, the previous gassings were too remote to cause death; he distinguishes between chronic and acute gas poisoning, and says that the former is of slow and insidious onset, while in the latter the effects are more immediate, the eyes may

be affected, and lack of coordination for a short period, and that coma is present in the acute and not in the chronic. He further testified that he could not say that the deceased did not die of carbon-monoxide poisoning. Dr. Shidler, called for the defendant, testified that the gassing would have a tendency to lower resistance and might cause fatty degeneration of the nervous system, and you may have mimic brain tumor or mimic encephalitis lethargic.

There was considerable discussion between counsel and the physicians about chronic and acute gas poisoning. Dr. Updegraff said there was no such thing as chronic gas poisoning, that all such cases were acute. The occasion of the dispute on this point, in the opinion of the writer, arises from the failure to distinguish repeated gassing from the pathological conditions resulting therefrom, counsel emphasizing the numerous occurrences, and the physicians the results thereof to the patient; but we think this discussion does not aid us.

From a painstaking study and consideration of the evidence of the expert physicians, we think the fair inference is in accordance with the finding of the labor commissioner and of the district court, that the death of the employee was caused, at least in part, by the gassings of November 1 and February 1, that the immediate cause of death was encephalitis due to gas poisoning. While the case is close to the line, we are unable to say that the finding of the lower court is manifestly wrong. The case is clearly distinguishable from *Blair v. Omaha Ice & Cold Storage Co.*, 102 Neb. 16, as in that case there was no accident. The case presents a reasonable controversy upon the question of liability, and does not call for the imposition of the penalties provided by the statute. We think, however, that the plaintiff should recover interest on the unpaid instalments provided for in the decree, and that he should be allowed attorney's fees in this court.

AFFIRMED.

ROY J. RASMUSSEN, APPELLEE, V. HUNGERFORD POTATO GROWERS ASSOCIATION ET AL., APPELLANTS.

FILED OCTOBER 20, 1923. No. 22520.

1. **Appeal: JURISDICTION: QUESTION OF FACT.** Where the matter of jurisdiction turns on a question of fact, the ruling of the trial court thereon will not be disturbed unless it is certain from the record that it was wrong.
2. **Election of Remedies: RESCISSION: DAMAGES.** The two remedies of damages and rescission are inconsistent, the former proceeding upon affirmance, and the latter upon disaffirmance, of the contract; and one who has prosecuted his action in damages to a first trial will not be permitted to change his front upon the eve of a second trial and proceed in rescission.
3. **Contracts: RESCISSION.** One who rescinds for fraud must act promptly upon discovery of the facts, announcing his intention to his adversary and returning what he has received. This should be done before he begins his action, nor should he fail to allege in his petition that he has so rescinded.
4. **Election of Remedies.** A mistaken and unsuccessful attempt to select a remedy will not annul a former election, nor preclude a plaintiff from pursuing the remedy first selected.

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

Wharton & Waldron and *J. E. Porter*, for appellants.

McKenzie, Cox, Burton & Harris, contra.

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

SHEPHERD, District Judge.

In the court below the first trial to a jury resulted in a disagreement. In the second, both parties moved for a directed verdict, and the court found for the plaintiff, Rasmussen, against all of the defendants, Hungerford, Hungerford Potato Growers Association, a corporation, and Snowden. The suit was brought in Douglas county, where summons was served upon Snowden personally and upon the corporation by delivering a copy to Snowden as its secre-

tary-treasurer. Service was then had upon Hungerford in Dawes county.

The defendants, or some of them, represented to plaintiff that they owned, and could sell him, a certain 80 acres of land in Dawes county, and that they would convey the same to him for $1,800 and a two years' use of the land; $300 of said $1,800 to be paid in cash and the other $1,500 March 5, 1917, when deed and abstract were to be delivered. Plaintiff believed, relied and bought, paying the $300 down. Contract was made and deposited in escrow. This was on January 27, 1917. On the 5th of March following plaintiff found by the abstract, which had by that time been furnished, that there was a $500 mortgage on the eighty and it was arranged that the defendant company should take only $1,000 of the escrow money, leaving $500 to await the payment of the mortgage. This it did. Plaintiff went out to look at the land in May of 1917, was shown the 80 acres by employees of the company, and returned well pleased with his bargain. Later in May Hungerford, who was the president of the corporation, learned, so he says, that the sections containing the land involved abutted the range line on the west and were short, so that the company could not convey the land sold, or at least a considerable portion of it. He wrote plaintiff a letter so explaining and offered to give him other land in lieu thereof or to return him his purchase money. Plaintiff wrote back saying that he wanted his land; that if it was short because of mistake in the government survey "Uncle Sam" was good for it. The matter ran along until February of 1918, the mortgage still unpaid, the plaintiff urging specific performance. Then Hungerford went to Omaha and repeated to Rasmussen in person what he had said in his letter, told him that he believed the section short and that there was no land there, explained to him how that might happen because of error in the government survey despite the fact that the abstract showed as it did, explained that he did not want to pay off the mortgage because that would be throwing good money after bad if the land was lacking as he believed, and urged

him to take another eighty or to accept a return of his money. Plaintiff refused, demanding the payment of the mortgage and the delivery of his deed, and stating that the land sold him was worth $5,000 or $6,000. Hungerford testified that he then asked plaintiff if he would agree not to hold him or his company if the mortgage was paid off and the deed delivered, and that plaintiff said "yes." Plaintiff denies this utterly. However this may be, the mortgage was paid, the deed taken from escrow by the plaintiff, and the remaining $500 taken down by the company.

On June 22, 1918, plaintiff brought suit in damages for fraudulent representation, alleging, as above stated, that defendants had told him that they owned the land and could sell it to him, etc., and alleging further that their statements were false and that he had been damaged in the sum of $6,000. Defendant Snowden did not answer. Defendants Hungerford and the company appeared specially, objecting to the jurisdiction, and setting forth by affidavit that at the time of the commencement of the suit Snowden had sold his stock and resigned his office, and that the company had closed its Omaha office and established its headquarters at Chadron, where Hungerford resided. The court overruled their special appearance. Both answered, saving their jurisdictional question. Hungerford pleaded that he was acting for the company, and generally denied the petition. The company set out all of the matters appearing in the foregoing statement of facts. Trial was had, as above stated, resulting in a disagreement of the jury. Thereupon, upon the second trial, the one presently in question, the plaintiff asked to obtain leave to amend his petition by interlining these two paragraphs, to wit:

"Plaintiff has offered to return to the defendant the deeds which plaintiff received from said defendant, and herewith brings the same into court and tenders the same back to the said defendant.

"Wherefore, plaintiff prays for judgment against the said defendant for the sum of $1,800 and interest thereon at the

rate of seven per cent. per annum, from the 27th day of January, 1917."

And in connection with this the following explanation took place between the two parties and the court: "The Court: You say here, 'Wherefore, plaintiff prays for judgment against the said defendant for the sum of $1,800 and interest thereon at the rate of seven per cent.' Mr. McKenzie: That is in lieu of the other prayer. Mr. Porter: Well, then paragraph 6 is intended to be stricken, is it? Mr. McKenzie: Yes, I don't care about paragraph 6. Mr. Porter: The defendant then would ask that the answer which was filed to the original petition stand as the answer to the amended petition. Mr. McKenzie: Oh, yes; that is agreeable. The Court: It is merely a suit now to determine whether you are entitled to the $1,800 back? Mr. McKenzie: That is all. The Court: Narrows the issue down to that? Mr. Porter: Yes."

First of all should be considered the special appearance and whether the trial court was in error in overruling the same. Miss Hungerford, daughter of the defendant of that name, testified that she was the secretary-treasurer of the corporation at the time the suit was commenced, succeeding Snowden, who had resigned in 1917. Her father corroborated her. But she was not permitted to testify as to the contents of minute book or record in that regard, no foundation for such testimony having been laid. The minutes had not been lost and there was no evidence that she was present when they were made. It appears that defendant omitted to produce them in court.

The presiding judge could properly have refused to believe the statement that Miss Hungerford was such officer, and found that Snowden remained secretary and treasurer at the time of the beginning of the action. He was entitled to rely upon the law that an officer holds his office until his successor is elected and qualified, rather than upon testimony somewhat in the nature of a conclusion. The action was brought in the county where the principal place of business of the corporation was fixed by its articles. This

was proper. The statute authorizes it and the court approves it. Comp. St. 1922, sec. 8577; *Fremont Butter & Egg Co. v. Snyder & Co.*, 39 Neb. 632. If jurisdiction over the company was obtained, it follows that Hungerford also was in court. We are not disposed to review the decision of the district court upon this point, regarding it as turning upon the question of fact which the trial judge was at liberty to determine as he did.

If the action became an action in rescission by the agreement made upon the second trial, it cannot be maintained and the judgment cannot be affirmed. The suit, as originally brought and as first tried, was clearly for damages for fraudulent representations. As amended upon the trial in question, it simply prays for the money paid by the plaintiff, and the case seems to have proceeded upon the theory of a disavowal of the contract and a placing of the parties in *statu quo*. Not only did the plaintiff ask for the exact amount of the purchase money paid by him, instead of for the $6,000 claimed in the original petition, but his proof was in rescission only. He tendered back the deed which he had received, a repudiation, rather than an affirmance of, the contract. He expressly stated to the court upon trial that his suit was only to determine whether he was entitled to his $1,800 back.

The two actions are inconsistent, the one proceeding upon affirmance and the other upon disaffirmance. Moreover, he who rescinds must act promptly. Immediately upon learning the facts he should announce to his adversary that he does not intend to be bound by the terms of the agreement made, and tender back what he has received under it. To maintain rescission at law, he must do this at or prior to the time of the commencement of his action. Due allegation of his acts of rescission should be made in the petition. *Alfree Mfg. Co. v. Grape*, 59 Neb. 777; *Pollock v. Smith*, 49 Neb. 864; *First Nat. Bank v. McKinney*, 47 Neb. 149; *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434; *Baker v. Thomas*, 102 Neb. 401; *First Nat. Bank v. Yocum*, 11 Neb. 328; *Symns & Co. v. Benner*, 31 Neb. 593.

The rule of practice is too well established to be gainsaid in cases where objection is made, as in the case at bar. It is a most salutary rule, having its basis in truth and natural justice, like unto the one which declares that a litigant cannot plead two causes, the truth of one of which destroys the other. In the instant case the defendant wanted to rescind before any action was brought, and the plaintiff would not. It offered to return him his money, the very thing he now asks for, and call the contract off. To have done so would have saved all the costs of this suit. To have done so would have relieved the company from the payment of $500 on a doubtful mortgage. But plaintiff demanded his deed and insisted on the payment of said mortgage. Not until costs were made and the mortgage paid, not until his case for affirmance of the contract and for damages had been tried, and not until after a considerable interval he was facing the court and jury in a second trial, was plaintiff ready to take what had been offered and what he is now willing to accept. This case differs from *Carson v. Greeley*, 107 Neb. 609, in that plaintiff's election of damages as to remedy resulted in a detriment to the defendant. By his pursuit of another remedy, by his delay, by his failure to take preliminary rescinding steps, the plaintiff destroyed his right of rescission and deprived himself of any recovery on that score. The court is satisfied that in the second trial he proceeded in rescission and that the judgment must be reversed.

But his contention, both in his brief and upon oral argument, was that the action remained an action for damages in which he merely asked for a less amount. Assuming this, and assuming that there was enough in the petition after the amendment to sustain a recovery of damages for fraudulent representations, we have examined the record with care to see if there was evidence to sustain such a recovery. For it is desirable to end litigation already too protracted, and, though one elect a remedy, he cannot be concluded thereby if it be inapplicable and if he has before selected a proper one. But the trouble is that, while there

was abundant evidence to prove an amount to be recovered in rescission, there was none adduced or offered to prove damages for deceit inducing purchase. In rescission the measure of recovery is the amount paid with interest. In damages the measure is the difference between the amount agreed to be paid and the value of the property, had it been as represented. There is no evidence as to that value. No recovery of damages can be predicated upon petition without evidence.

So the decision must be the same. The circumstance of no proof on this necessary point is simply another evidence of intention on the part of the plaintiff to pursue rescission, rather than damages. The plaintiff could have testified as to the value in question; but he was not interrogated.

Obviously we cannot enter judgment in this court dismissing the plaintiff's action. He elected rescission when there was no relief for him in that form of action, but his petition sufficiently stated a cause of action in damages. We make no criticism of the cases cited by appellants on this point, nor is it necessary to discuss them. Applied to the case at bar and given full weight, they are not convincing to the proposition that judgment should here be entered upon the merits in favor of defendants. The contract of purchase was made in Omaha, far distant from the land. Plaintiff had then no opportunity to investigate and was therefore entitled to believe and rely upon what defendants told him in regard to the quality and extent of the property sold. The contract was made then. From that time forth he was entitled to the benefit of it. He denies that he agreed not to hold the defendants on said contract in the conversation in February, 1918. We are of opinion that he is entitled to have his case remanded for a new trial.

REVERSED AND REMANDED.

CLAUS SCHLESSELMAN, APPELLEE, V. TRAVELERS INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 20, 1923. No. 23555.

1. **Master and Servant.** COMPENSATION: APPEALABLE JUDGMENT. A judgment entered by the district court, upon appeal and full trial of a compensation case, to the effect that the plaintiff have and recover a certain sum weekly until the further order of the court, is appealable to the supreme court.

2. ———: ———: RIGHT TO FINAL DETERMINATION. In such a case either party is entitled to a final determination of the character of the disability, the full amount to be recovered, and the times at which this amount shall be paid; in other words, to a complete disposition of the case.

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

Hall, Cline & Williams, for appellant.

Charles S. Roe, contra.

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

SHEPHERD, District Judge.

This is a compensation case. The appellee, Claus Schlesselman, was badly burned by scalding water, resulting in serious injury to both legs and to his arms, breast and eyes. He alleges that he suffered permanent partial disability. It is conceded that he was injured in the course of his employment, and that the appellant was the insurance carrier. The latter gave him many months of medical treatment and compensation at the maximum of $15 a week during the course of the same. Upon conclusion of such payments he applied to the commissioner, and the latter awarded him 15 additional weeks, whereupon he appealed to the district court. After an extended trial there, in which the doctors differed widely as to the permanency and degree of his disability, the court entered judgment as follows:

"The court finds that while engaged in the performance of his duties as an employee of the defendant's assured, on October 11, 1921, as a result of an accident arising out of and in the course of such employment, the plaintiff sustained an injury, which entitled him to compensation under the law; the court finds that defendant has paid plaintiff at $15 per week until May 3, 1923, that there is now due said plaintiff from the defendant the sum of $75, for which execution is hereby awarded, and the further sum of $15 per week from this date until further ordered by this court, payable weekly, and the costs of this proceeding, including $100 for attorney for plaintiff. To which defendant excepts.

"It is therefore considered, ordered and adjudged by the court that the said plaintiff and appellant Claus Schlesselman do have and recover of and from the said defendant and appellee Travelers Insurance Company the sum of seventy-five and no/100 ($75) dollars, for which execution is hereby awarded, and do have and recover the further sum of fifteen and no/100 ($15) dollars per week from this date until further ordered by this court, payable weekly, and the costs of this proceeding, taxed at $————, including $100 attorney fee for the plaintiff's attorney. To which defendant excepts."

The appellant asserts that appeal lies from this order, and that it is entitled to a full and final determination of this case. The entire court is of opinion that this order is appealable. Section 9128, Rev. St. 1922, provides that "an order affecting a substantial right made in a special proceeding" may be vacated, modified or reversed upon appeal. The proceeding in compensation cases is special. The law contemplates speedy joining of issue, speedy trial, and speedy appeal in these cases. Orders of the kind complained of would certainly result in great delay, and possibly in endless postponement of a final decision. It is evident from the record that the trial had proceeded to a full conclusion; all evidence having been received and the case having been finally submitted. By this order a substantial

right of the appellant was affected. It was entitled to a final determination in the district court. All of the authorities cited upon the question of appeal have been carefully examined, and, without lengthy discussion, it may be said that few of them are in opposition to the conclusion above reached.

The considerations hereinbefore expressed also lead us to conclude that the appellant was entitled to a judgment fully determining the character and extent of appellee's disability, the total amount to be awarded him as compensation, and the time of the payment. Appellee's brief contains no citation of authority to the contrary.

REVERSED AND REMANDED.

HENRY FURRER ET AL., PLAINTIFFS, V. NEBRASKA BUILDING & INVESTMENT COMPANY ET AL., DEFENDANTS. ANDREW M. WALRADT, INTERVENER, APPELLANT, V. W. E. BARKLEY, RECEIVER, APPELLEE: F. B. BAYLOR, TRUSTEE, INTERVENER.

FILED NOVEMBER 16, 1923. No. 22808

Corporations: SALE OF STOCK: FRAUD. In an action on a written option permitting plaintiff to surrender shares of corporate stock issued to him by defendant and obligating the latter to return the purchase price upon a demand therefor, the defense that the option was a secret agreement operating as a fraud on subsequent stockholders is not established by mere testimony that none of them, so far as the president of the corporation knew, had any knowledge of the option or of the details of the transactions with plaintiff in purchasing his stock.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Reversed.*

Clarence G. Miles, for appellant.

Johnson, Moorhead & Rine, Good & Good, F. C. Foster Boehmer & Boehmer, C. C. Flansburg, C. J. Campbell and *F. B. Baylor, contra.*

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

PER CURIAM.

This is a proceeding instituted in the district court for Lancaster county, Nebraska, by Andrew M. Walradt, intervener, against the Nebraska Building & Investment Company, a corporation, and W. E. Barkley, its receiver, to recover back $9,520 paid for 85 shares of preferred stock issued by that corporation. Intervener's claim consists of two items, one for $3,024 paid for 27 shares February 28, 1920, and the other for $6,496 paid for 58 shares March 6, 1920.

The case of intervener is based on two written options permitting him to withdraw March 1, 1921, the money paid by him for the capital stock. He pleaded timely exercise of his options, a demand for a return of the amounts paid for the shares, a breach of the agreements for repayment and an offer to return the capital stock held by him. When intervener instituted his suit, the corporation, its business and its assets were in the hands of a receiver appointed by the district court for Lancaster county, Nebraska. It was in the action to wind up the affairs of the corporation that the intervening petition was filed.

In an answer by the corporation and the receiver, liability on the options was denied. It was alleged that each option was a secret agreement not binding on creditors or subsequent stockholders who had no such options.

The issues raised by the pleadings were tried as a controversy between intervener and the corporation and its receiver. From a judgment denying the relief sought by intervener and dismissing his cause of action he has appealed.

It is argued by intervener that the options are valid parts of the purchase and of the consideration for the capital stock; that he did not participate in any fraud; that the corporation was and is solvent, mere impairment of capital stock, if shown, not destroying his contractual rights; that

he is entitled to judgment for the amount of his investments.

Was a defense established? Intervener purchased the shares of capital stock and paid the consideration relying on the two options or privileges, which were formally reduced to writing. Each was signed and delivered as a part of a single transaction between him and the corporation. The options are similar in nature and appear in the record as exhibits 1 and 2. One of them is in this form:

"This agreement made and entered into this twenty-eighth day of February, nineteen hundred and twenty, by and between the Nebraska Building & Investment Company, a corporation duly organized under the laws of the state of Nebraska, hereinafter designated as party of the first part, and A. M. Walradt, of Bethany, Lancaster county, Nebraska, hereinafter designated as party of the second part,

"Witnesseth: Party of the second part has this day purchased twenty-seven (27) shares of stock in the Nebraska Building & Investment Company, making in all an investment of three thousand twenty-four and no/100 ($3,024) dollars on a basis of one hundred twelve and no/100 ($112) dollars per share.

"Party of the second part is to have the privilege of withdrawing this money from party of the first part on March 1st, nineteen hundred and twenty-one, on the basis of the present investment, or whatever may be added to it in the way of accumulations, if any.

"Party of the second part hereby agrees with party of the first part that in the event he does not ask for this money, or withdraw it on March 1st, nineteen hundred and twenty-one, then he agrees to leave it one more year, and this same contract will apply on the same basis for withdrawal on March 1st, nineteen hundred and twenty-two. After that, it shall be a matter with party of the second part as to how much additional time he may want to leave it.

"Nebraska Building & Investment Company,
"By Frank E. Schaaf, Pres.,

Party of the First Part.
"A. M. Walradt,
Party of the Second Part."
"In presence of E. O. Gregg."

Frank E. Schaaf was president of the corporation. E. O. Gregg was also an officer. Both participated in the sales. Gregg received from intervener the purchase money. There is nothing to show that intervener was prompted by any evil design or that he participated in any active fraud. The inference from the evidence is that he confidently relied on Schaaf, Gregg, and the corporation, believing he had entered into legal contracts protecting him in his investments. He had served them as a laborer and as a driver of a truck. These officers knew he had some money, and, acting for the corporation, induced him to buy the capital stock, using the options for that purpose. He demanded repayment within the stipulated period and offered to return the capital stock purchased. The evidence submitted to the trial court shows that the corporation was not insolvent. On the contrary, it was stipulated that, after payment of the creditors, the preferred stockholders would, according to the best estimates, receive between 25 and 30 dollars a share.

Were the options shown to be secret agreements? The only proof tending to support this defense is the following:

"It is stipulated that Frank E. Schaaf, president of the Nebraska Building & Investment Company, if present, would testify that no stockholder of the Nebraska Building & Investment Company, other than the officers and directors of the company, and no stockholders employed by the said company had any knowledge whatsoever of the agreements, exhibits 1 and 2, or of the details of the transactions with Andrew M. Walradt at or about the dates the contracts bear, so far as he knew."

This is wholly insufficient to prove that the options were secret agreements or that subsequent stockholders made their purchases without knowledge of the facts, relying on intervener as a prior subscriber without any undisclosed

advantage over stockholders generally. For anything appearing in the evidence, the secretary may have entered the options on the records of the corporation. From other sources subsequent stockholders may have been fully acquainted with the facts. No stockholder testified to lack of knowledge or that he relied to any extent on intervener as a purchaser on the terms exacted of others. The evidence is insufficient to prove the defense interposed.

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

REVERSED.

MARY JANE MATHEWS, APPELLANT, V. CHONE MOZER ET AL., APPELLEES.

FILED NOVEMBER 16, 1923. No. 22540.

Nuisance: INJUNCTION. In this an action to restrain the maintenance of a poultry business as a nuisance on account of the exhalation of noisome and offensive odors and to recover damages caused thereby, the evidence is found insufficient to sustain a judgment for damages or on which to grant an injunction restraining generally the operation of defendant's business, but is *held* sufficient to sustain the partial relief granted plaintiff by the trial court.

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

Wilmer B. Comstock, for appellant.

Fred C. Foster, O. K. Perrin and *S. M. Kier, contra.*

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

MORRISSEY, C. J.

Plaintiff brought this action to enjoin defendant from maintaining a place of business at the corner of Eleventh and K streets in the city of Lincoln, wherein defendant conducts an extensive poultry business, and slaughters an-

nually large numbers of poultry. Plaintiff is the owner of the life estate in real estate adjoining the property occupied by defendant. The petition alleges that for many years preceding the bringing of this suit plaintiff and her family occupied the dwelling-house upon her premises; that plaintiff's husband died May 30, 1919, and plaintiff succeeded to the life estate in the premises; that the property owned by plaintiff and the property occupied by defendant lie within five blocks of the center of the retail district of the city of Lincoln; that every lot adjacent to or near the premises described is occupied either by a dwelling-house or a business building; that the premises are situated upon one of the principal streets of the city and that thousands of persons pass to and fro daily in front of the respective properties. The petition alleges that for more than five years prior to the filing thereof defendant has maintained a nuisance upon the premises occupied by him, and alleges that during that period defendant has kept thousands of chickens, turkeys, geese and ducks and has kept calves and other animals upon the premises, housing and stabling such poultry and animals thereon, and has habitually and continuously slaughtered and dressed thousands of poultry, and great numbers of calves and other animals, and has thus converted his place of business into a slaughter-house. There is a further allegation of the manner in which refuse and offal has been permitted to remain upon the premises; and that the business of defendant has been so conducted as to create noisome, nauseating and offensive smells impossible of human endurance, and extremely injurious to the health of plaintiff, the members of her family, and her tenants, and that by reason of the conditions thus created her premises have been rendered untenantable and impossible for occupancy, either for residence or for business purposes. The building on plaintiff's premises is described as a large dwelling-house above and a large commodious store-room on the ground floor. The building is alleged to be well situated and an attractive rental property for both business and residential purposes, were it

not for the nuisance alleged to be maintained by defendant. It is alleged that the rental value of plaintiff's property is $200 a month, but that because of the nuisance complained of plaintiff is unable to keep the premises rented, and that she has had to vacate her own residence therein, and that her health has been permanently injured. There is a prayer for a judgment in damages in the sum of $10,000, and that defendant be perpetually enjoined from continuing the business upon the premises described.

Chone Mozer and three brothers were named as defendants, but with the exception of Chone Mozer each defendant filed an answer disclaiming interest in the business, and the action proceeded against Chone Mozer alone, who in his separate answer set out the titles under which he maintains occupancy of the premises and admits the ownership of the business. The answer admits that the business is located upon one of the principal streets of the city of Lincoln along which thousands of people pass daily; that defendant is engaged in buying and selling poultry, and alleges that his predecessors had been so engaged at the same location for a period of not less than 25 years; that the premises are sanitary and have been much improved within the last five years, for the reason that the owners of the real estate occupied by defendant have constructed modern brick buildings, equipped with the latest devices for conducting a general poultry business; and denies that the business has been so conducted as to constitute a nuisance. And it is alleged that whatever conditions give rise to the complaint have been openly, notoriously and adversely maintained by defendant and his predecessors in business for the last 25 years; that defendant now has the right to maintain his business by right of prescription, and that plaintiff's cause of action did not accrue within ten years next before the commencement of this action. There was a further allegation that, because of the new buildings and improvements which defendant had placed upon the premises occupied by him in his business, the value of plaintiff's property had been greatly enhanced; that plaintiff and her

predecessors in title had stood by and permitted costly improvements to be made, knowing the business to which they would be devoted, and that defendant is estopped to complain at this time.

A large volume of evidence is presented, and if the testimony submitted on behalf of plaintiff stood uncontradicted and unexplained it would fully support a judgment and decree as prayed. On the other hand, if the testimony offered on behalf of defendant were accepted, it might fully defeat plaintiff's cause of action. It would serve no useful purpose to set out in this opinion a synopsis of the evidence, for the decision must of necessity depend on the conclusion drawn by the court from an examination of the whole record. By consent of the parties the trial judge made an inspection of the premises and thus he was the better able to weigh the evidence submitted, and in reviewing the evidence he said: "The place has an odor, a perceptible odor, but not a stench, except as the latter arises at particular and specific times, as when by the oversight of the owner or employees refuse is dropped in the alley, or dead chickens are allowed to lie upon the floor. Inherently and necessarily, when properly conducted, the place should not be a nuisance to either the public or the plaintiff. The odor which comes to the plaintiff, under proper conduct of the place, is occasional rather than constant, not injurious to health, not unbearable, not destructive of comfort, and not worse than the city dweller in business sections commonly endures, and must be required to endure. Nor does it appear that this cannot be rendered still less perceptible and even negligible by various additional safeguards and appliances."

The court found also that the modern buildings erected on the premises occupied by defendant added to the value of plaintiff's property, and that plaintiff has not suffered pecuniary damages and denies her any recovery in the way of a money judgment, but the court found that defendant, at times, had failed to exercise proper care in the conduct of his business. Plaintiff's application for an injunction

which would restrain defendant generally from continuing his business on the premises described was denied but the court decreed that defendant "be perpetually enjoined from killing cattle or hogs or other animals than poultry and from causing or permitting refuse to be spilled and to remain in the alley adjacent to the premises in process of removal from the plant, and from at any time permitting dead poultry to remain uncared for upon the floors of the place, and from in any wise maintaining the plant as a nuisance." The court ordered that the costs be equally divided between the parties. Each of the parties took exceptions, but plaintiff only has appealed.

Plaintiff's counsel has cited many authorities in support of his demand for an order that would utterly forbid defendant to further carry on his business at its present location. However, this record presents primarily a question of fact, and we do not feel bound to follow the authorities cited from other jurisdictions, persuasive as they may be. This court has heretofore had questions presented similar to the one before us and the rules announced support the judgment of the trial court.

In *Francisco v. Furry*, 82 Neb. 754, it was held: "A decree enjoining the use of a feed yard and limiting the use of the owner to the yarding of cattle and hogs therein temporarily and in limited numbers, where the evidence does not make it apparent that it cannot be used as a feed yard without becoming a nuisance, is erroneous."

In a case very similar to the one before us plaintiff sought to restrain defendant from conducting a tannery in the proximity of plaintiff's home, and the court said: "We cannot believe that there is no smell in connection with this factory, but we doubt very much whether the odors which escape therefrom are so noxious and injurious and so reduced the value of plaintiff's property or the comfort of their residence as to warrant the issuance of an injunction. It should be a clear case to justify a decree which would entail such grave consequences upon the defendant." *Rush v. Smith-Lockwood Mfg. Co.*, 95 Neb. 133.

Defendant is enjoined "from in any wise maintaining the plant as a nuisance." It will be seen that, while the court refused to utterly suppress defendant's business, it gave plaintiff that measure of relief which protects her in the enjoyment of her premises, and this, we are persuaded, is as far as the order ought to go until it appears that defendant either cannot, or will not, obey the judgment entered.

No cross-appeal has been taken and it is not necessary to discuss the estoppel pleaded. On a consideration of the whole record, the judgment on the merits is found to be in harmony with the evidence and is adopted as the judgment of this court. We find, however, that, inasmuch as plaintiff was awarded substantial relief, the entire costs, in both courts, should be taxed against defendant, and, with this modification, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

AUGUST F. WITTE, APPELLEE AND CROSS-APPELLANT, V. JOHN J. BROZ ET AL., APPELLEES AND CROSS-APPELLEES: B. R. HENDRIX ET AL., APPELLANTS AND CROSS-APPELLEES.

FILED NOVEMBER 16, 1923. No. 22507.

1. **Bills and Notes**: CONDITIONAL DELIVERY: PAROL EVIDENCE. Under the provisions of the negotiable instruments act, section 4627, Comp. St. 1922, as between the immediate parties and as regards a remote party other than a holder in due course, the delivery of a negotiable instrument may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument.

2. ———: DELIVERY: PRESUMPTION. Where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed, until the contrary is proved.

3. ———: CONDITIONAL DELIVERY: PAROL EVIDENCE. Under these

provisions and as between such parties, parol evidence is admissible to show a conditional delivery of a promissory note.

4. ———: ———: BURDEN OF PROOF. The burden of proof is upon the parties asserting a conditional delivery to establish the same.

5. ———: DEFENSES: PROOF. "The fact that the circumstances surrounding the purchase of a negotiable promissory note before its maturity were sufficient to excite the suspicion of a prudent man concerning the instrument will not defeat a recovery. The proof must establish that the purchase was made with knowledge of the facts concerning the execution of the note, that plaintiff believed that there was a defense to the instrument, or that he acted in bad faith or dishonestly." *First State Bank v. Borchers*, 83 Neb. 530.

6. ———: PRESENTMENT: NOTICE. The fact that the maker of a promissory note may have a valid defense does not excuse the lack of presentment for payment and notice of nonpayment if it is sought to hold the indorsers.

7. ———: ———: DISCHARGE OF INDORSERS. The holder of a note, with two makers, not partners, payable at a bank, was present at the bank a part of the day of maturity of the note, with the note in his possession. Neither of the makers was present. He made no demand upon the bank to pay the note, did not exhibit the instrument, and omitted to mention the name of one of the makers, to the bank. He had no excuse for failing to present it to one of the makers. *Held*, no sufficient presentment was made and the indorsers are discharged from liability.

8. ———: ———: ———. Even if the holder had a valid excuse for failing to present the note for payment to one of the makers, this did not excuse him for failing to present the note to the other maker, in order to hold the indorsers.

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

Glenn N. Venrick and *John E. Mekota*, for appellants.

Dort & Witte, Bartos & Bartos and *Hall, Cline & Williams, contra.*

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

LETTON, J.

This is an action at law brought by August F. Witte as the indorsee and holder in due course of a promissory note. Defendants John J. Broz and Adela Broz are the makers of the note, and defendants Realty Investment & Holding Company, a corporation, and B. R. Hendrix are indorsers. Defendant John J. Broz admits that he signed the note, but alleges fraud by the other defendant in its procurement, and denies that the plaintiff was an innocent purchaser for value before maturity. His wife, Adela Broz, in addition, sets up the defense of coverture. Hendrix and the Realty Investment & Holding Company, of which corporation he was president and manager, each set up the defense that the promissory note was never duly presented for payment, that no notice of dishonor was ever given, and therefore each claims to be discharged from liability as an indorser, and denies fraud, and that the note was delivered on a condition.

To support the defense of fraud, defendant John J. Broz testified about as follows: He is a farmer living a few miles from the towns of Swanton and Western, in Saline county. He had been acquainted with Hendrix for many years. About the last week of March, 1920, Hendrix approached him while he was talking with a neighbor on the street at Swanton and endeavored to sell the neighbor a farm lying within a short distance of Western, enlarging upon the fact that the farm was close to town, convenient to school and church, and well improved. He asked $250 an acre for it. When he failed to interest the neighbor he endeavored to sell it to Broz, telling him that he would sell the farm that Broz then owned for $240 an acre, in a short time, and he could apply the proceeds on the purchase price of the farm near Western. He refused to buy, but sometime after this Hendrix and his brother came to him and urged him to purchase, making the same representations in regard to selling his farm, saying that they had a buyer for his farm, and adding that his note for the first payment could lie in the bank with the contract until March 1,

1921, and if they could not sell his farm by that time his note would be returned to him; that shortly afterwards the banker at Swanton, Adolph Pivonka, who was acting for Hendrix, offered to sell the farm to him for $240 an acre, repeating that they had a buyer for his farm. He finally consented to make the purchase with the understanding and agreement that the notes which he gave were to be returned to him unless his own farm was sold before the date mentioned. There is other evidence which tends to corroborate Broz as to some of these conversations. Pivonka did not testify.

That any agreement was made to return his note in case the farm was not sold within the period mentioned is emphatically denied by Hendrix. The admission in evidence of the alleged oral agreement was strenuously objected to by plaintiff at the trial. It was received over his objections and exceptions. This is the first ground of error assigned.

In the absence of a statute, it would be somewhat difficult to draw a line between the cases in which such parol evidence may be admitted and those in which it is inadmissible as tending to vary the terms of a written instrument. The distinction drawn by the courts seems to be that, if the instrument is delivered—not a mere manual delivery, but with the minds of both parties understanding that it is a completed transaction—then the evidence is inadmissible since the instrument has been completely delivered, and this even though there may have been a contemporaneous oral agreement that on the happening of some contingency the instrument should be of no force and effect. If, however, the instrument is merely manually delivered, upon the condition and understanding that it is to be retained by the holder or put in escrow until the happening of a certain event, and that it shall not take effect until the occurrence of that event, and shall be returned if the event does not occur within the time limited, then, although there has been a manual delivery, there is no actual delivery as a completed instrument until the happening of the stipulated event.

The negotiable instruments act, section 4627, Comp. St. 1922, provides: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case *the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument.* But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed, until the contrary is proved."

This permits the reception of parol evidence to show a conditional delivery as between other parties than holders in due course.

The matter is by no means free from doubt, considering the recitals in the contract of sale as to the notes and considering the fact that the burden of proof is upon the defendants Broz to establish conditional delivery, but there is sufficient evidence to carry the question to the jury; and its finding upon this branch of the case will not be disturbed.

The next question presented is whether the plaintiff is a "holder in due course" as defined in section 4663, Comp. St. 1922. "The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument * * * by fraud, * * * or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Comp. St. 1922, sec. 4666. If, as the jury found, the note was delivered to Hendrix, acting for the Realty Investment & Holding Company, only upon a condition, when it was negotiated by that corporation in violation of the condition, this was done "under

such circumstances as amount to a fraud." Its title therefore was defective. But, if Witte took the note in good faith and for value, under section 4667, unless he had actual knowledge of the defect, "or knowledge of such facts that his action in taking the instrument amounted to bad faith," he is a holder in due course. If so, he "holds the instrument free from any defect of title," and "free from defenses available to prior parties among themselves." Comp. St. 1922, sec. 4668. Under section 4670, "When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims, acquired the title as a holder in due course."

With these provisions in mind, let us consider the evidence. There is no dispute as to the following facts: Plaintiff had been in the hardware, harness and furniture business at Swanton for years, and was well acquainted with the financial standing of defendants Broz. In fact, all parties to the action seem to have known each other for a long time. Witte sold his business and removed to Lincoln. On April 10, 1919, he purchased $2,000 of the common stock of the Realty Investment & Holding Company (which had been organized 6 months or a year before) from Hendrix, at par, and was later elected a director, and secretary and treasurer, of the corporation. He was paid $100 a month for his services. He had practically no voice in the management of the corporation, or of its finances, merely acting as Hendrix directed. His salary was mainly for his services in the inspection of land and for endeavoring to negotiate purchases and sales of real estate among his acquaintances. He had an agreement with Hendrix that, if he bought preferred stock of the corporation and held it for a year, he should have 7 per cent. interest on it. Soon afterwards he purchased $1,500 worth of preferred stock at par; the last purchase being in July, 1919. Within a year from his purchase of common stock it was found that the corporation could not afford to pay him his salary. Hendrix repurchased his common stock, paying him $2,600

for it, and on April 10, 1920, he resigned as director and as secretary and treasurer. It was then agreed that he would surrender his preferred stock and be paid par with 7 per cent. interest at the expiration of one year from the date of its purchase. On July 6, 1920, the year expired. He went to the office of the corporation to surrender the stock. Hendrix told him the corporation was somewhat short of cash, but that it had two notes it would like to dispose of to him in payment for his stock. One was the note in controversy, another was of another Saline county party of Witte's acquaintance. The notes drew no interest until after maturity. Hendrix offered to discount them 8 per cent. Witte accepted the offer. He surrendered his preferred stock. The amount due on it according to agreement was computed. This was applied on the purchase. He gave his check for $1,342.25 to cover the balance due on the Broz note and for $284 for the balance on the other note. Witte had no knowledge of any representations or agreement with Broz as to conditional delivery. The sale to him took place after he had left the office and employ of the corporation. There is further evidence which is material both as bearing upon the question whether Witte is a holder for value and on the question of whether there was sufficient presentment to hold the indorsers. The evidence of Witte is to the effect that, on the day when the note became due, he went with the note to the Bank of Swanton, where by its terms it was made payable; that Broz, the maker, was not there; that he called him by telephone at his home on the farm. He told him that he was the owner of the note and was waiting there for him to come in and pay it, and that Broz answered that he did not intend to pay the note; that Hendrix had promised to sell his farm by March 1, and that if it was not sold the deal was not to go through. Broz testified that when he was first called on the telephone he thought it was Hendrix, but that Witte said to him, "this is not Bert Hendrix, this is August Witte, Bert Hendrix' partner." It is claimed that this testimony is sufficient with the other

evidence to support the finding that Witte was not a holder for value.

In some cases circumstantial evidence may be sufficient to outweigh positive testimony as to a fact or facts, but when such evidence has such an unsubstantial basis as a statement said to have been made in a conversation over a rural telephone line, where there seems to have been some difficulty in understanding all that was said, where the alleged statement is collateral to the main issue and is susceptible of two constructions, where it is positively denied and there is no extraneous matter to substantiate it, and all the other proof tends to discredit it, the mere fact that it has been testified to will not be held sufficient to overcome direct, substantial and positive testimony. The expression Broz testified to might have been used in the past tense or in a loose sense, since the men had formerly been associated as officers in the corporation. But, even if it was used, it could not have been in the sense in which Broz testifies, since Hendrix and Witte were never partners. A verdict cannot be based on mere suspicion. The verdict, in so far as it holds that Witte is not a holder in due course, seems to have been based upon mere conjecture, or perhaps in view of its consequences. *Martin v. Johnston,* 34 Neb. 797; *First State Bank v. Borchers,* 83 Neb. 530. Further evidence may be produced at another trial, and perhaps the parties will not offer nor the court permit, if offered, the introduction of a mass of irrelevant and immaterial corporate records which might have had a tendency to obscure the real issue in the case and prejudicially affect the plaintiff. We think no fair-minded person reading this evidence can draw any other inference but that Witte is a holder in due course. This issue should be tried again. The instructions should follow closely the provisions of the negotiable instruments law.

Was there a sufficient presentment of the note to the makers to render the indorsers liable? Witte testifies that late in the day of the telephone conversation he met Hendrix at the Bank of Swanton; that he told him Broz had

refused to pay the note; that something had to be done, and that if he did not pay it he would have to sue them all, and that Hendrix said "of course."

The negotiable instruments act, section 4683, Comp. St. 1922, provides: "Presentment for payment to be sufficient must be made * * * at a reasonable hour on a business day; at a proper place as herein defined; to the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made." Section 4684 provides: "Presentment for payment is made at the proper place: First. Where a place of payment is specified in the instrument and it is there presented." Section 4686 provides: "Where the instrument is payable at a bank, presentment for payment must be made during banking hours." Section 4693 provides: "Presentment for payment is dispensed with * * * Third. By waiver of presentment, express or implied." Section 4685 provides: "The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it."

Since the note was made payable at the Bank of Swanton, the presence of the holder or his authorized agent at the bank with the note in his possession ready to be delivered upon payment was necessary to hold the indorser, if the note was dishonored. Witte was there with the note in his possession. There is no testimony that he actually exhibited the paper and demanded payment by the cashier of the bank, or that he ever mentioned the name of Adela Broz. When he was notified by Broz that he refused to pay the note, its actual production was probably waived as to him. The note was not presented to Adela Broz in any manner whatever, nor is any waiver by her disclosed by the evidence. It is not shown on the face of the note that Adela Broz is the wife of John J. Broz. She appears to be primarily liable upon it with John J. Broz. The rule is that presentment must be made to all the makers of a note in order to hold the indorsers. *Blake v. McMillen*, 22 Ia. 358; *Closz & Mickelson v. Miracle*, 103 Ia. 198; *Shutts v. Fingar*,

100 N. Y. 539; *Benedict v. Schmieg*, 13 Wash. 476; and note to cases, 36 L. R. A. 703. There was no waiver of presentment on the part of Mrs. Broz, and consequently the presentment to the makers was insufficient, and the indorsers are discharged. The fact that Adela Broz may have a defense to the note on the ground of coverture, as she pleads, does not affect the right of the indorsers to presentment to her and notice of nonpayment, since she might have waived her disability and paid it when presented. Decisions rendered before the enactment are applicable: *Roper v. Gould*, 22 Cal. App. 114; *Peabody Ins. Co. v. Wilson & Beasley*, 29 W. Va. 528. The judgment against Hendrix and the Realty Investment & Holding Company as indorsers must therefore be reversed.

The judgment of the district court is reversed, and since all the evidence procurable as to presentment is in the record, the action is dismissed as to defendants Hendrix and the Realty Investment & Holding Company, and it is reversed and remanded for further proceedings as to the other defendants.

REVERSED.

KATHERINE FERBER ET AL., APPELLANTS, V. WALKER D. HINES, DIRECTOR GENERAL, ET AL., APPELLEES.

FILED NOVEMBER 16, 1923. No. 22529.

Adverse Possession: QUIETING TITLE. Unless the evidence preponderates that claimants of title to land by adverse possession and those under whom they assert title have occupied the same for the statutory period, a court of equity is justified in refusing to quiet title in them.

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

John L. Webster and *William M. Burton*, for appellants.

Wymer Dressler, Robert D. Neely, Paul S. Topping, J. J. McCarthy and *A. R. Davis, contra.*

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

LETTON, J.

This is an action to quiet title to certain real estate consisting of block 49, in the city of Ponca, except lot 4, and to lots 20 and 21, South addition to Ponca. The ownership by plaintiffs of lot 20 is admitted. The court found the title to lots 5 and 6, in block 49, and to lot 21, to be in the defendant, the Farmers Union Cooperative Association, and the title to lot 1 to be in the defendant railway company, and their respective titles were quieted to the respective tracts. Plaintiffs appeal.

Since the ownership of plaintiffs to lot 20 was admitted and is not contested, they are entitled to the relief prayed as to that lot. Plaintiffs claim through Henry Ferber, who died in 1902. He was the husband of one of the plaintiffs and the father of the ward of the other. Their claim is that he was in open, notorious and adverse possession, claiming title to block 49 and all of the land adjoining it on the south as far as the bank of Aoway creek (being lots 20 and 21) for more than 10 years prior to his death; that his title became complete, and that to this they have succeeded. The defendant railway company asserts title to lot 1 (which it is stipulated includes lots 2 and 3) in block 49, by more than 10 years' adverse possession under color of title. The Farmers Union Cooperative Association claims title to lots 5 and 6, in block 49, and also to all of lot 21, by conveyances and by more than 10 years' adverse possession.

As to lots 5 and 6, in block 49, the record shows that the taxes upon the same were paid from the year 1884 to 1919 by persons, claiming ownership, other than the plaintiff or her husband. The taxes on lot 20 have been paid by Mrs. Ferber. The taxes on lot 21 were paid from 1904 to 1918 by other parties than the Ferbers, claiming title. Mrs. Ferber paid taxes from 1904 to 1910 on lots 1, 2, and 3, in block 49. This property was afterwards sold for taxes, and the railroad company now has a quitclaim deed from

the purchaser at tax sale. The evidence on behalf of plaintiffs to establish adverse possession consists almost wholly of statements based upon the recollections of certain witnesses as to the enclosure by a fence of all of block 49 and the two lots adjoining it upon the south. The evidence of these witnesses is not clear and satisfactory. It is fairly definite as to the time where the fence paralleled the railroad track, but it is uncertain and indefinite both as to position, and the time it was maintained elsewhere. Part of the testimony in behalf of plaintiffs was disputed and contradicted by the witnesses for defendants. Considering the facts as to nonpayment of taxes by Mr. Ferber in his lifetime, and by plaintiffs since then, upon a portion of the tract, and considering the uncertainty of the memory of witnesses having no interest in the land, extending back for 25 or 30 years, we cannot say that the plaintiffs have sustained the burden of proof of ownership of more of the real estate involved than lot 20. The proper limits of this opinion will not permit the setting out in detail of the substance of the evidence, and, since the questions are of fact, it would serve no useful purpose either to the profession or to the public to do so.

It seems clear that plaintiffs and Mr. Ferber exercised acts of ownership over a considerable portion of the property involved for some years. It is equally clear that defendants and their grantors have been in adverse possession of the property, claimed respectively by each under color of title, for more than 10 years and have paid taxes upon the same most of the time. The essential proof that the Ferbers were in actual and exclusive adverse possession, claiming title, for 10 years, of the real estate other than lot 20, is lacking. We are of the opinion that the decree quieting title in the defendants is borne out by the evidence. Plaintiffs having prayed that their title to lot 20 be quieted, and this not having been done, the decree of the district court should be modified so as to quiet title to them in that property. The decree, in so far as it quiets title to the other property in the defendants, is affirmed

and the cause is remanded to the district court, with directions to enter a decree quieting the title to lot 20 in the plaintiffs.

AFFIRMED AS MODIFIED.

HARLEY J. DAVOLL, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED NOVEMBER 16, 1923. No. 22559.

1. **Trial:** DIRECTION OF VERDICT. It is not error to refuse to direct a verdict where there is a substantial conflict in the testimony upon a material point.

2. **Street Railways:** COLLISION: NEGLIGENCE: INSTRUCTION. An instruction that a person is not necessarily negligent if, on seeing a street car approaching, he is reasonably justified in believing that he could pass over the tracks before the car, if propelled at its usual and ordinary rate of speed, would reach the point of such crossing, is not erroneous as inapplicable to the facts in this case.

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

Hall, Cline & Williams, for appellant.

Doyle & Halligan and *W. B. Comstock, contra.*

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

LETTON, J.

Plaintiff, while riding in an automobile coupé, was struck by a street car belonging to defendant company and sustained severe injuries. He recovered a judgment for $5,000 on the ground of negligence in the operation of the street car. The answer denies negligence on the part of the defendant, and pleads negligence on the part of the plaintiff in attempting to cross the track when the street car was only a few feet from the automobile. Defendant appeals.

The street car was running west on O street, in the city

of Lincoln, at the time of the accident. The collision occurred, according to the testimony of the manager of defendant, who examined the place very soon after the collision, at a point 103 feet west from the west curb line of Twenty-second street, which is at right angles with O street on the north. He testified that marks upon the dirt by the side of the track showed that some object had been pushed along the track from that point to where the car stopped. Plaintiff was driving west on the north side of O street. There is an oil filling station at the northwest corner of O and Twenty-second streets, with a curved driveway extending from Twenty-second street to O street. At a point just about opposite the west line of this driveway on O street, plaintiff attempted to cross to the south side of the street car track. The rear end of the coupé in which he was riding was struck by the front end of the street car. The vehicle was overturned and he was severely injured, his skull being fractured and other permanent injuries sustained.

He charges that there was negligence in running the street car at an unusual and dangerous rate of speed, and in the motorman not reducing the speed of the car or stopping it when he saw or could have seen the plaintiff, if he had been in the exercise of ordinary care.

The testimony of plaintiff's witnesses is to the effect that the defendant was guilty of negligence in running the street car at an unusual and dangerous rate of speed, and that the attention of the motorman was diverted from the proper operation and control of the car until too late to prevent the collision. This testimony was clear and positive. Plaintiff was also guilty of negligence. A comparison of the extent of his negligence with that of the defendant was left for the jury to make, and the small amount of the verdict, considering the serious and permanent injuries to the plaintiff, demonstrates very clearly that the jury took his negligence into consideration. If it were not for the comparative negligence statute, we are of the opinion that the plaintiff could not have recovered in this action.

It was first assigned as error that the court should have directed a verdict for defendant. To do so would have been manifest error. The conflict in the testimony required submission to the jury.

It is complained that the court erred in giving instruction No. 10, because it instructs the jury that a person is not necessarily negligent if, on seeing a car approaching, he is reasonably justified in believing that he could pass over the tracks before the car, "if propelled at its usual and ordinary rate of speed, will reach the point of such crossing." The complaint is that this ignores the plaintiff's testimony that he saw the car approaching at a speed of 30 miles an hour. But he did not so testify as to the speed when he first saw the car. It was not until he was crossing the track that he observed the unusual rate of speed, and the car was too close at that time for him to do anything except try to accelerate his speed in order to clear the tracks. He first saw the street car through the back window of the automobile when it was about 20 feet east of the intersection and did not observe unusual speed. It is difficult to judge of the speed of an object directly approaching. If approaching at the usual rate, and he was driving about 15 miles an hour, as he testifies, he could safely have crossed the track.

Complaint is made of other instructions. We have examined them carefully and find no prejudicial error. A strong element in favor of plaintiff is that a number of witnesses testified that the street car was exceeding 25 miles an hour, and that the motorman was not looking in front of his car as he approached the street crossing, but was looking northward, apparently talking to a passenger. This is contradicted by several witnesses for the defendant, who seem to be disinterested. Considering the testimony in behalf of plaintiff and the testimony of the manager and employees of the defendant with relation to the distance from the intersection to the point where the accident occurred, the evidence is ample to sustain the verdict. It is apparent that the jury diminished the recovery because

they considered that plaintiff was not entirely free from blame. We see no reason to disturb the verdict.

AFFIRMED.

HENRY HARRIS, EXECUTOR, APPELLANT, V. CITY OF GENOA, APPELLEE.

FILED NOVEMBER 16, 1923. No. 22566.

1. **Municipal Corporations:** NOTICE OF INJURY. Where a person injured in an accident upon a street and seeking to recover damages from the city was mentally and physically able to direct or procure the giving of the notice required by section 4384, Comp. St. 1922, for at least two weeks of the thirty-day period allowed by the statute, the fact that she became incapacitated to do so upon the 27th day after the accident does not excuse her failure to give notice in proper time.
2. ———: ———. The giving of such notice in due time is a condition precedent to the recovery of damages from a city of the second class. *Chaney v. Village of Riverton*, 104 Neb. 189.

APPEAL from the district court for Nance county: A. M. POST, JUDGE. *Affirmed.*

Vail & Flory and *George F. Rose*, for appellant.

John C. Martin, contra.

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

LETTON, J.

This action was originally brought by Ida M. Harris, now deceased, against the city of Genoa, to recover damages for injuries received by her by reason of being thrown against the side and back of an automobile in which she was riding on account of negligence of the city in allowing an open ditch across a street to be unprotected by guard rails or danger signals. While the case was pending Mrs. Harris died, and the action was revived in the name of her

husband, as executor. The jury found for defendant and the action was dismissed. Plaintiff appeals.

The only error assigned which it is necessary to consider is that the court erred in giving instruction No. 8 which relates to the question of notice. Section 4384, Comp. St. 1922, so far as applicable, is as follows: "No city of the second class or village in the state of Nebraska shall be liable for damages arising from defective streets, alleys, sidewalks, public parks or other public places within such city or village, unless actual notice in writing of the accident or injury complained of with a statement of the nature and extent thereof, so far as the extent of the injury is known at the time, and of the time when and the place where the same occurred, shall be proved to have been given to the mayor or chairman of the city, or board of trustees, or to the city or village clerk within thirty days after the occurrence of such accident or injury: Provided, if the person injured be deprived by reason of the injury of the physical or mental capacity to give the notice required, the time of giving such notice be extended for the period of ten days after the incapacity is removed; and it is hereby made the duty of the clerk to keep a record of such notice showing the time when and by whom such notice was given and describing the defect complained of; to at once file such notice and to report the same to the council or village board at its next meeting."

Instruction No. 8 is as follows: "All persons are charged with a knowledge of the law, and ignorance of the statute above mentioned would not excuse the giving by the deceased, Ida M. Harris, of the required notice; provided she was not incapable of giving the same within said period of thirty days. Nor would the giving of such notice be excused by reason of the incapacity of the deceased to manually prepare and deliver the same to the defendant city. It was permissible for her to give such notice by agent, and if during said period she was mentally sound and able to direct the giving of such notice, her failure to take such action within such period would prevent her recovery in

this case, although you find she was physically unable by her own hand to prepare and serve said notice."

The evidence establishes that Mrs. Harris suffered pain, more or less severe, from the time of the accident on June 30, 1918, until July 27, 1918. She became very much worse on that day and remained incapacitated until after the expiration of the thirty-day period. The statutory notice was served upon the city upon August 2. For at least two weeks in July she was able to sit up in bed. Her deposition was taken. When asked if she was able to attend to business within the first 30 days, she answered: "Well, I generally wrote all checks and kept books." Her husband testifies that she wrote a number of checks, he telling her the amounts. This, with other evidence, establishes that for several weeks in July she was able to have instructed her husband or some other agent to prepare and serve the requisite notice on the city. Her death occurred in November, 1920. It was caused by a tubercular and cancerous condition of the pelvic organs, which plaintiff asserts was aggravated by the injuries suffered at the time of the accident.

The question presented, while novel in this court, has been raised and decided in other states having statutes practically identical with respect to the giving of a notice within a fixed period and the extension of time in case of physical and mental disability. It will be observed that the statute does not require the notice to be either signed or sworn to by the person injured. It may be given by any one having authority from the claimant. *Schweer v. City of Chicago Heights,* 168 Ill. App. 52; *Pipher v. Township of Whitchurch,* 12 Ont. W. N. 87. This differentiates the case from those in which the statute requires the notice to be given by the injured person. There is much more reason to construe statutes strictly where all that the injured person is required to do is to call the facts and circumstances of the injury to the attention of a parent, friend or agent, and authorize the notice to be given by one of them, than there is, where the person injured must furnish the spe-

cific facts required to be inserted in the notice, and must sign and swear to the notice personally, and yet strict performance has been required under such a statute. *Reid v. Kansas City,* 195 Mo. App. 457, holds that such a statute should be strictly construed as to time limit, but liberally construed as to the contents of the notice. Such provisions have been construed repeatedly in Massachusetts, where the statute requiring notice provides: "If, by reason of physical or mental incapacity, it is impossible for the person injured to give the notice within the time required, he may give it within ten days after such incapacity has been removed." R. L. Mass. (1902) ch. 51, sec. 21. This provision has been construed by that court not to excuse the failure to give notice if the person injured was clear of mind for a length of time within the 30 days that she had the physical or mental capacity to procure the service of the notice. Under varying circumstances the question has been presented to that court many times. The purpose of the statute being to prevent fraudulent claims and to give the authorities of the municipality an opportunity to investigate the facts attending the alleged accident while the matter is fresh in the minds of witnesses and before they might become dispersed, that court has always held that the statute should be strictly construed as to the necessity of notice within the required time if the person injured was reasonably capable of procuring this to be done.

In *Mitchell v. City of Worcester,* 129 Mass. 525, Chief Justice Gray said: "The rulings at the trial were correct. The notice required by the St. of 1877, c. 234, secs. 3, 4, before bringing an action for an injury occasioned by a defect in a highway, may be given by the person injured, or by any other person in his behalf; and, if the person injured is neither physically nor mentally incapacitated to give such notice himself or through another person, is a condition precedent to the right of action. *Kenady v. Lawrence,* 128 Mass. 318; *Gay v. City of Cambridge,* 128 Mass. 387; *Larkin v. City of Boston,* 128 Mass. 521." Later cases are *Lyon v. City of Cambridge,* 136 Mass. 419; *Lyons v. City*

of Cambridge, 132 Mass. 534; *May v. City of Boston,* 150 Mass. 517; *Saunders v. City of Boston,* 167 Mass. 595; *Goodwin v. City of Fall River,* 228 Mass. 529.

In the state of Washington the earlier decisions are based upon charters which required notice, but did not contain a disability clause extending the time if the person injured suffered from physical or mental incapacity. The court, however, held in *Borne v. City of Spokane,* 27 Wash. 719, that if physical or mental incapacity existed so as to make it impossible for the injured person to procure the notice to be served, this would operate to extend the time. In *Ehrhardt v. City of Seattle,* 40 Wash. 221, the plaintiff suffered from a compound fracture of the left humerus. He suffered great pain a portion of the time during the 30 days immediately succeeding the accident, but he was able to transact business within this time and his mind was not so affected that he could not have employed an attorney to present his claim. The court said: "A person might be incapacitated from being physically present at the presentation of a claim of this kind, but that could not justify him in not presenting the claim seasonably, if he were mentally capable of having the claim presented for him." To the same effect, though under a statute extending the time if disability occurred, are *Hall v. City of Spokane,* 79 Wash. 303; *Dickie v. City of Centralia,* 91 Wash. 467.

In *Hartsell v. City of Asheville,* 166 N. Car. 633, the court said: "It is not necessary that the injured party should be in physical and mental condition to make such claim and give due notice for the whole period of 90 days. The 90 days is prescribed with the view that at some time within that period the injured party will be in condition to give the notice, and it should be given to permit the city to make prompt investigation and to avoid imposition. All that is necessary is that there should be reasonable opportunity within that time in which the plaintiff will be able to give the required notice."

In *City of Hastings v. Foxworthy,* 45 Neb. 676, and in *Chaney v. Village of Riverton,* 104 Neb. 189, the necessity

and purpose of such a notice is considered and the views expressed in these decisions are in harmony with those of the courts above mentioned.

We are convinced that the instruction complained of is a correct statement of the law. This disposing of the case, it is unnecessary to consider the other errors assigned.

AFFIRMED.

ELMER BEEM ET AL., APPELLANTS, V. ESSIE E. DAVIS ET AL., APPELLEES.

FILED NOVEMBER 16, 1923. No. 22567.

Judgment: DEFAULT: SETTING ASIDE. While ordinarily the negligence of an attorney in failing to protect the interests of his client, by filing pleadings in proper time and in preventing default judgments, is imputed to the client, there may be special circumstances in such a case which will render it erroneous for a court to refuse to set aside a default judgment and let the parties against whom such judgment has been rendered in to defend.

APPEAL from the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Reversed on condition.*

Holmes, Chambers & Mann, for appellants.

James C. Quigley and *J. J. Harrington, contra.*

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

LETTON, J.

A suit was begun by the defendants in this proceeding on the first of June, 1920, against the plaintiffs herein to restrain and enjoin them from constructing ditches to drain a body of water known as Felts lake situated in Cherry county. The petition charges that, if the defendants (now plaintiffs) completed the work of digging the ditches they were then at work upon, it would cause large volumes of water to be thrown out of their natural courses over the

hay and meadow lands of the petitioners to their great and irreparable damage. Summons was duly served. At the November, 1920, term of court in that county, defendants in the suit being in default of pleading, testimony was taken and a decree rendered perpetually enjoining the plaintiffs here from proceeding to drain the lake. On January 14, 1921, at a subsequent term of court, the plaintiffs herein filed a petition praying that the default judgment be set aside and that they be let in to defend. A summary statement of the allegations of their petition is that immediately after the service of the summons in June, 1920, a firm of lawyers at Broken Bow, Nebraska, was engaged by one of the defendants, who was authorized to act for the others, to represent them; that the attorneys accepted the employment and informed plaintiffs they would do all that was necessary to protect their rights and interests in the suit; that from letters and personal visits from that time until November 29, 1920, plaintiffs believed that these attorneys were carefully looking after their interests; that on November 29, on visiting the office of their lawyers, the party who had employed them was informed by the attorneys that they had sent a telegram to the judge of the district court before whom the suit was pending, and had arranged for further time to file the answer; and also that the case would be set down for trial and hearing at a future date, and that the attorneys had arranged for a future date. The answer was then verified by him and left with the attorneys to file. Depending upon their counsel to notify them, they paid no further attention to the case. They lived many miles from the county seat of Cherry county and many miles from Broken Bow. They allege that they have suffered great misfortune and unavoidable casualty on account of the action and statements of the attorneys; that they have a complete defense, and that an irreparable injustice will result to them in case the default judgment is not set aside. They tender an answer which alleges that the lake or lagoon in controversy is filled with surface water; that in dry years it is dry, and in ordinary years it is dry

except in the springtime; that the general course of drainage of the land is to the south and southeast, and when the water overflows from the lake or lagoon it flows through a natural depression or water-course to the Middle Loup river; that the ditch which defendants intend to dig is wholly upon the lands of the defendants, and the water discharged will join a natural water-course to the Middle Loup river.

A demurrer was filed to this petition. The demurrer was sustained and the case dismissed.

Appellants insist, first, that the original petition to restrain the draining of the lake does not state a cause of action; and, second, that the petition filed by them for a new trial states sufficient grounds, when considered together with the answer tendered, to require the court to set aside the default judgment and allow them in to defend. It has been the general rule that a party will not be permitted to plead the default of his attorney as unavoidable casualty or misfortune which will justify a court in setting aside a judgment rendered at a former term. But there are instances of default by attorneys which seem to create a peculiar hardship, and where the petitioner is not at fault, in which a court will in furtherance of justice and equity set aside such a judgment and permit a defense to be made. Do the facts in this case warrant such relief? The drainage and reclamation of swamps or ponds is a matter advantageous to the state and the public at large. *Todd v. York County*, 72 Neb. 207; *Aldritt v. Fleischauer*, 74 Neb. 66. On the other hand, the preservation of large bodies of water which form refuges for wild fowl and afford places for sport and recreation is also a matter of public concern. This has been recognized by the legislature in the enactment of sections 8480-8486, Comp. St. 1922. If it is desired to drain natural or perennial lakes, exceeding 20 acres in extent at low water, application must be made to the department of public works for a permit to do so. If the permit is refused the applicant may appeal to the district court. If the body of water is not a natural or peren-

nial lake, and defendants herein are only slightly damaged by its drainage through a natural waterway, as alleged, the rule in *Todd v. York County* and *Aldritt v. Fleischauer, supra,* applies, and the owner may drain into a natural waterway upon his own land, using reasonable care not to damage the lower lands. But, if the lake belongs in the other category, then the injunction should be allowed, because plaintiffs have not applied for a permit to drain it as the statute requires. This question is one of fact which must be determined from evidence.

The allegations of the petition as to due diligence are not of the strongest character, and yet we can see that a person residing in a sparsely settled country, about 200 miles away from his attorney, with only long and circuitous railroad communications, may be entitled to greater latitude than one living under different circumstances; and what would be negligence in the one case would not be so in the other.

While the matter of setting aside such a default is within the discretion of the district court, the case is of such an important nature that we believe the issues should be tried. We think the ends of justice will be best subserved by reversing the judgment, and directing the district court to open the former judgment—if the facts alleged in this petition are established by the evidence—and to try the issues of fact in the former case, upon the condition that plaintiffs, within 30 days from the filing hereof, first pay all previous costs in both courts. If they fail to do this, the judgment will stand affirmed.

REVERSED ON CONDITION.

CLARA E. KIVETT, APPELLEE, V. OSCAR KIVETT, APPELLANT.

FILED NOVEMBER 16, 1923. No. 22575.

Divorce: NONSUIT: SEPARATE MAINTENANCE. Where the trial of a suit by a wife for an absolute divorce and permanent alimony results in general findings and a judgment in favor of the husband, a subsequent order on the husband in the same case for

separate maintenance on application of the wife may be erroneous, if made without notice to the husband who had no knowledge of the motion or an opportunity to resist it.

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

Bernard McNeny, for appellant.

E. G. Caldwell and *Harry S. Dungan, contra.*

Heard before LETTON, ROSE and GOOD, JJ., SHEPHERD, District Judge.

ROSE, J.

This is a suit by a wife against her husband for a divorce on the ground of extreme cruelty. Defendant denied the charges made against him. Upon a trial of the case the district court made a general finding in favor of defendant and denied plaintiff a divorce. This action, according to the journal entry, was taken March 4, 1921. The journal entry also recites that the trial court, on motion of plaintiff, made an order March 7, 1921, allowing plaintiff separate maintenance and directing defendant to pay her monthly instalments of $25 until the further order of the court. Afterward defendant applied for an order striking from the decree that part of the journal entry appearing under the date of March 7, 1921, on the ground that it was made upon the hearing of plaintiff's motion without notice to, or knowledge of, defendant or his counsel, after the litigation had apparently ended in an involuntary nonsuit. The trial court declined to change the journal entry, and defendant appealed.

The question is not one of jurisdiction to allow separate maintenance after the making of a formal order denying a divorce or to correct a journal entry, but is one of assigned error in the proceedings. In her petition plaintiff prayed for an absolute divorce and for permanent alimony without an alternative plea or a specific prayer for separate maintenance. The defense was formally sustained and relief

denied on the issues raised by the pleadings on which the parties went to trial. The contest seemed to result in a dismissal of the suit. Under the circumstances defendant should have had notice of the application for separate maintenance and an opportunity to resist it before being concluded by a decree. In overruling the motion to strike from the journal entry the order made without notice or an opportunity for defendant to be heard, the trial court made a mistake. For the purpose of correcting the error, the judgment below is reversed and the cause remanded for further proceedings.

REVERSED.

PEARL E. FRANK, TRUSTEE, APPELLEE, V. FRANK E. STEARNS, APPELLANT: LESLIE WINTER, APPELLEE.

FILED NOVEMBER 16, 1923. No. 22511.

1. **Bankruptcy**: ACTION FOR CONVERSION: SUFFICIENCY OF PETITION. A petition filed by the trustee in bankruptcy of W., seeking to obtain a judgment against S. for wrongfully converting a part of W's estate, alleged that W. had been adjudged a bankrupt; that plaintiff was the duly appointed and qualified trustee; that, at the time W. sold the property to S., W. was insolvent; and that S. knew that W. was insolvent; and that the sale was in violation of the bulk sales law of the state. *Held*, that the allegations of the petition were sufficient to state a cause of action, and were not vulnerable to an attack upon the ground that it was not alleged that the assets in the hands of the trustee were not sufficient to pay the debts.
2. **Limitation of Actions.** Where a petition is filed which states a cause of action before the statute of limitations has run, and thereafter, after the period of the statute of limitations, an amended petition is filed, amplifying the facts but alleging the same cause of action, the amended petition is not vulnerable to a plea that the cause of action is barred by the statute of limitations.
3. **Judgment**: ACTION IN REPLEVIN: ALLEGATION AS TO CONVERSION SURPLUSAGE. Where plaintiff in a replevin action, in addition to his claim for a return of the property, seeks to recover damages against the defendant for a conversion of a part of the

property before the suit was brought, the court may rightly treat the allegations for damages for conversion as surplusage, and the judgment of the court adjudging the rights of the parties to the goods sought to be replevied is not an adjudication of the claim for damages for the conversion.

4. **Bankruptcy**: ACTION FOR CONVERSION: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* not sufficient to support the judgment rendered.

5. **Cases Distinguished**: The rule announced in *Depriest v. McKinstry*, 38 Neb. 194, and in *Singer Sewing Machine Co. v. Robertson*, 87 Neb. 542, distinguished.

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

Mothersead & York, for appellant.

Halligan, Beatty & Halligan and *C. G. Perry, contra.*

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

DAY, J.

Claiborne G. Perry, as trustee in bankruptcy of Noah E. Workman, brought this action against Frank E. Stearns and Leslie Winter, to recover the value of certain merchandise claimed to be the property of the bankrupt, and which it is alleged the defendants converted to their own use. A jury was waived and trial had to the court, resulting in a judgment in favor of the defendant Leslie Winter, and dismissing the action against him. As against defendant Stearns, the court found in favor of the plaintiff, and rendered judgment for $3,220.13. Defendant Stearns appeals.

It appears that in November, 1914, Workman owned and operated a hardware and furniture store in the town of Bayard, Nebraska. He also conducted an implement business, and bought and sold grain. In the latter part of November of that year, he sold the hardware and furniture stock to the defendant Stearns, who took possession of the stock and commenced to operate the store, selling merchandise to the trade, and replenishing the stock from time to

time. At the time of the sale the inventory indicated the value of the stock to be approximately $7,650. Stearns paid $1,600 in cash at the time of the transfer of the stock to him, and for the balance agreed to turn over certain mortgages to be thereafter agreed upon. This part of the transaction was never consummated. In March, 1915, Workman was adjudged a bankrupt, Perry was appointed receiver, and later the creditors elected Perry trustee in bankruptcy. While acting as receiver, on March 31, 1915, Perry commenced an action in replevin against Stearns and Winter to obtain possession of the stock of hardware and furniture, based upon the theory that the stock belonged to the bankrupt estate, because the sale to Stearns was made in contravention of the bulk sales law. Later Perry, as trustee, intervened alleging that, as trustee, he was entitled to the possession of the stock, and also alleging that the defendants Stearns and Winter, while wrongfully in possession of the stock, had sold merchandise therefrom to the amount and value of $3,246.50, and had converted the same to their own use. The sheriff under the writ of replevin took possession of all the stock of merchandise in the possession of the defendants, including the fixtures, and such merchandise then in the store purchased by Stearns since he took possession of the stock. Upon the trial of the replevin suit, the jury returned two verdicts, one finding that at the commencement of the action the plaintiff "was entitled to the possession of the certain stock of goods in dispute, to wit, the stock of goods purchased by defendant from Noah E. Workman." The other verdict found in favor of the defendant Stearns, that "he was the owner of and entitled to the possession of all fixtures purchased by him from Noah E. Workman, being the fixtures in dispute in this action; and also that he was the owner of and entitled to the possession of all goods purchased by him after the purchase of said stock of goods in dispute from the said Noah E. Workman, and added to said stock, and we find his damages for the detention of said fixtures and said goods in the sum of $980.50."

On November 23, 1915, the court entered judgment based on the two verdicts. The judgment recited that the plaintiff have and recover of the defendant the possession of "the stock of goods purchased by the defendant from Noah E. Workman, and * * * that the defendant Frank E. Stearns was at the commencement of this action the owner of and entitled to the possession of all fixtures purchased by him from Noah E. Workman, being the fixtures in dispute in this action, and also that he was the owner of and entitled to the possession of all goods purchased by him after the purchase of said stock of goods in dispute from the said Noah E. Workman, and added to said stock, and that he recover from the plaintiff the sum of $980.50, his damages by reason of the premises."

Whatever may be said of the manner in which the replevin action was tried, no appeal was taken from the judgment.

In February, 1916, Perry commenced the present action to recover the value of the merchandise which had been sold during the period the stock was in possession of Stearns and Winter, but for unexplained reasons the action was not brought to trial until in February, 1921.

In January, 1920, Pearl E. Frank, trustee, was substituted as party plaintiff, and by leave of court filed an amended petition. A demurrer was filed to this petition upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and an answer filed.

It is first urged that the court erred in not sustaining the demurrer. It is argued that the petition fails to state a cause of action, because it is not alleged that the trustee in bankruptcy did not have in his hands sufficient assets to pay all the creditors of the bankrupt. It is undoubtedly true that the trustee in bankruptcy would have no standing to prosecute this action if in fact the assets in his hands were sufficient to pay the debts, and the petition should allege facts showing the right of the trustee to maintain the action. In some form it must appear that the assets are

insufficient to pay the debts. The amended petition alleged that Workman was adjudged a bankrupt; that the plaintiff was the trustee in bankruptcy; that, at the time of the sale of the stock to Stearns, Workman was insolvent; and that at the time of the sale Stearns knew that Workman was insolvent. The amended petition contained other averments not pertinent to the point now being considered.

Are the allegations of the petition equivalent to a charge that the trustee did not have sufficient assets in his hands to pay the debts of the bankrupt? It may be conceded that in some instances an act of bankruptcy may exist, and the bankrupt still have assets sufficient to pay his debts. So that we pass the allegation that Workman was duly adjudged a bankrupt. But, it is charged that he was "insolvent." What interpretation is to be given to this term in the light of the general allegation of the amended petition? "Insolvency," as that term is ordinarily used, is not the same thing as a mere failure to pay debts, but, as applied to an individual or a corporation, it means an insufficient amount of property to pay debts. In construing a petition the court will give the language used its ordinary and well-understood meaning. If Workman was insolvent and the trustee had in his hands all of the assets of the bankrupt, he would still have insufficient funds to pay the debts. We think, when fairly construed, the amended petition stated a cause of action, and that the court did not err in overruling the demurrer.

It is next urged by the defendant that the court erred in not holding that the cause of action was barred by the statute of limitations. This contention is based upon the idea that a cause of action was stated for the first time in the amended petition. As before stated, the original petition was filed in February, 1916. The amended petition was filed in January, 1920. The acts of conversion occurred prior to March 31, 1915. We think, however, that the defendant is in error in the contention that a new cause of action is set up in the amended petition. The gist of the cause of action in both petitions is the wrongful conversion

of the property by the defendants. The amended petition is but an amplification of the facts. No new or independent cause of action is set up. The trial court was right in holding that the statute of limitations had not run against the cause of action.

It is next urged that the controversy between the parties had become *res judicata*. This claim is based upon the theory that Perry, as trustee, in his petition of intervention in the replevin suit, prayed for the possession of the property described in the writ of replevin, and also for $3,500, the value of that portion of the stock wrongfully sold by the defendant. It is claimed by the plaintiff that the portion of the petition of intervention which seeks to recover the value of the goods purchased by Stearns, and which had been sold by him before the replevin suit was instituted, was stricken from the petition of intervention. There is a recital in the proceedings in the replevin action, "Motion to strike sustained," but there is nothing in the record to indicate to what motion this order relates. In this state of the record, we are unable to say that the order sustaining the motion to strike referred to the intervener's petition. But we think that the allegations of the petition of intervention, in so far as it sought to recover the value of the goods sold by Stearns during the time he was in possession of the stock, must be regarded as mere surplusage. The action was one in replevin, and it would not have been proper for the court in such an action to have determined the value of that portion of the stock which had been sold by Stearns prior to the institution of the action.

An action in replevin is primarily for possession, and must be brought against one having the custody or control of the property. If such person has parted with its possession, the remedy must be against him in some other form of action. In Cobbey, Replevin (2d ed.) sec. 64, it is said: "Replevin will not lie against one who is not detaining the property when the writ is sued out. It is the condition of things when the suit is commenced which furnishes the ground for the action." This principle has been approved

in *Heidiman-Benoist Saddlery Co. v. Schott,* 59 Neb. 20, and in *Burr v. McCallum,* 59 Neb. 326.

Under the doctrine announced in *Burr v. McCallum,* 59 Neb. 326, it would have been error for the trial court in the replevin action to have rendered judgment for the value of the goods which the defendant had sold prior to the institution of that action. In the replevin suit the trial court did not assume to pass upon the claim of the trustee in his petition of intervention for damages arising out of the sale of a part of the goods by defendant before the replevin action was instituted. The court evidently treated that part of the petition of intervention as surplusage, and was right in so doing. The matter of damages for the sale of the goods was not considered or determined. We think, therefore, that the plaintiff's contention that the matters now in issue have been adjudicated must fail.

It is finally urged that the award of damages is not sustained by the evidence. The action being one for the recovery of damages for the wrongful conversion of the goods, the plaintiff's measure of damages is the value of the goods at the time they were converted, with interest at the legal rate. Apparently this was the theory upon which the court acted. The books kept by the store were lost, so there was no way of determining from any record the character of the goods sold by the defendant while in his possession. Evidence was introduced, however, which fairly showed that the defendant had sold goods from the stock amounting to $3,246.50 a part of which was new goods purchased by him and commingled with the general stock.

The judgment of the trial court found that the amount of sales made during the time Stearns had possession was $3,246.50; that the amount of new goods sold, and included in the aggregate, was $479.76, leaving a balance of $2,766.74. There is a recital in the judgment indicating the manner in which the figures were arrived at. It is stated that in the replevin suit the defendant recovered from the trustee in bankruptcy, for goods taken belonging to the defendant, the sum of $433; that the new goods purchased

and added to the stock by the defendant amounted to $912.76. The difference between these sums is $479.76. There is nothing in the record, however, from which a conclusion can be drawn that the value of the new goods recovered in the replevin suit was $433. The judgment in the replevin suit in favor of the defendant for the goods and fixtures is $980.50. No attempt was made to apportion the amount between the goods and the fixtures. Taking $2,766.74 as the value of the goods converted by Stearns, the court found that the cost of selling the goods to the retail trade was $1,000. This finding is supported by the evidence. But the court found that the defendant at the time he was conducting the store, was also engaged in buying and selling grain, which was no part of the store business, and not connected with it in any way, and that one-half of the expenses was properly chargeable to the selling of the stock. The court then deducted $500 from the $2,766.74, leaving a balance of $2,266.74, for which, with interest, judgment was rendered in favor of the plaintiff, the aggregate sum being $3,220.13. There is no testimony in the record which seems to justify the apportionment of the expenses of conducting the store and the grain business in the manner adopted. In fact, there is no testimony in the record upon this subject. We are inclined to believe from the errors which appear in the record that the bill of exceptions, although agreed to by the parties, does not contain all the evidence or the admissions on the trial, as it hardly seems probable that the court would have arbitrarily fixed figures as heretofore indicated without testimony.

The rule of damages in cases of this character, where goods are wrongfully taken and retained from the owner, is that the owner is entitled to recover the value of the goods so taken with legal interest from the date of the conversion. This was the theory adopted by the trial court. Owing to the fact that the books were lost, and the goods could not be identified, the method of arriving at their value was perhaps the only means available, and was the best proof under all the circumstances.

We think, however, the record fails to support the judgment with respect to the two matters above discussed. An argument on behalf of defendant, and an array of figures based upon exhibit 7, is found in the brief, but the record shows the objection to this exhibit was sustained, and it is not properly in the record.

In this discussion we are not unmindful of the rule announced in *Depriest v. McKinstry*, 38 Neb. 194, and in *Singer Sewing Machine Co. v. Robertson*, 87 Neb. 542, in which, on first blush, a contrary view might seem to have been announced. In those cases, however, it appears that the property was disposed of by the defendants for the very purpose of avoiding the writ. It is pointed out in *Singer Sewing Machine Co. v. Robertson, supra*, that the common-law rule is correctly announced in *Heidiman-Benoist Saddlery Co. v. Schott, supra*, but that the facts in the *Singer Sewing Machine* case bring it within a recognized exception to the rule. In the case before us there is nothing to suggest that it is within any exception to the rule.

From what has been said, it follows that the judgment is reversed, and the cause remanded for further proceedings.

REVERSED.

The following opinion on motion for rehearing was filed April 30, 1924. *Affirmed on condition.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DAY, JJ., BLACKLEDGE and REDICK, District Judges.

PER CURIAM.

This case was before this court on a former occasion, our opinion being reported *ante*, p. 101. By our former opinion the judgment in favor of the plaintiff for $2,266.74 with interest, amounting in the aggregate to $3,220.13, was reversed for reasons therein stated, and the cause remanded for further proceedings. The plaintiff filed a motion for a rehearing, upon which a reargument

was ordered by the court. In the motion for a rehearing, the plaintiff states that, if the views of the court as expressed in the opinion are adhered to, to the effect that the defendant is entitled to credit for the value of new goods placed by him in the stock, and also for the expense of operating the store in making the sales, then he be permitted to file a remittitur of the total amount of the two items upon which the judgment of the lower court was reversed, and the judgment be then affirmed.

Upon a review of the record, we adhere to the conclusions reached in our former opinion, but in the state of the record we see no objection to the filing of the remittitur as suggested in the brief for rehearing, and that the judgment should then be affirmed. It is established that the defendant sold goods from the stock during the time he had possession thereof, amounting to $3,246.50. It is also shown that new goods were purchased and put into the stock by the defendant to the amount of $912.76; that the cost of conducting the store business, together with a grain business (the latter business being wholly disconnected with the matter in dispute), was $1,000, making a total of $1,912.76. Our former opinion held that there was no evidence in the record that justified the trial court in finding that $479.76 was the amount of sales of new merchandise placed in the store by the defendant. We also held that there was nothing in the record to justify the apportionment of the expense of $1,000 equally between the store business and the grain business. This was the basis upon which the judgment was reversed. It is established that the total amount of sales from the stock during the period the defendant had possession thereof amounted to $3,246.50; that the total amount of new goods placed therein was $912.76, and the cost of conducting the store and grain business was $1,000. Deducting these two items, which the plaintiff is willing to confess, leaves a balance of $1,333.74, which with interest from December 1, 1914, to the date of the judgment, April 4, 1921, aggregate $1,925.81. If the plaintiff files within 20 days a remittitur of all in excess of $1,925.81, so that

the judgment will stand as a judgment for this amount as of date April 4, 1921, the judgment of the district court will be affirmed; otherwise, it will stand reversed as stated in the former opinion.

AFFIRMED ON CONDITION.

HARRY J. GINGRICH, APPELLANT, V. CASSIE BLANK ET AL., APPELLEES.

FILED NOVEMBER 16, 1923. No. 22558.

1. **Contracts**: QUIETING TITLE: DISMISSAL. Where, in an action founded on contract, it appears that the time of performance of certain conditions precedent to the plaintiff's right to recover has not arrived, the action will be dismissed as prematurely brought.
2. **Adverse Possession**: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* not sufficient to sustain the issue of adverse possession claimed by plaintiff.

APPEAL from the district court for Chase county: CHARLES E. ELDRED, JUDGE. *Reversed and dismissed.*

Charles W. Meeker, for appellant.

Edmund D. Shipley, contra.

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

DAY, J.

Action by Harry J. Gingrich against Cassie Blank, August Blank, her husband, and Rodney Davis as administrator of the estate of John Gingrich, deceased, to quiet title in plaintiff to the southwest quarter of section 28, township 7, range 41 west of the 6th P. M., in Chase county, Nebraska. The trial court found that the plaintiff was the owner of an undivided three-fourths interest in the land above described; that he was the owner by assignment of the dower interest of Leah Gingrich, widow of John Gingrich; that

Cassie Blank was the owner of an undivided one-fourth interest in the land, subject to the dower interest of the widow, and also subject to the right of the plaintiff to be reimbursed for a proportionate share of all improvements put upon the land, all mortgages, and liens paid. In accordance with the above findings the court entered judgment confirming the title in the above described land in Harry J. Gingrich and Cassie Blank, as their respective interests appear, and taxed the costs to the plaintiff. From this judgment plaintiff appeals, claiming that he is entitled to a decree confirming title in himself to the entire quarter section above described.

The principal controversy is between the plaintiff and his sister, Cassie Blank.

The plaintiff's claim to ownership of the land in dispute is under and by virtue of a written contract between himself and his father; and, further, by reason of adverse possession for a period of more than 10 years prior to the commencement of the action.

The record discloses the following facts: In 1892 John Gingrich, now deceased, lived on the land in question with his wife and four children. In 1894 all of the children, except plaintiff herein, had married or left home, and at this time John Gingrich and his son, plaintiff herein, appeared before A. A. Leachey, a banker and notary public at Lamar, Nebraska, and had a contract drawn up by Mr. Leachey. The record clearly shows that this contract was executed and acknowledged, and left for safe keeping with Mr. Leachey, but that it was either misplaced or lost by said Leachey, and was never again found. It was shown by parol testimony that the contract provided that Harry J. Gingrich was to have the use and benefits of the farm, free of all charges of any kind, on condition and on consideration that he would care and provide for his father and mother during their natural lives; that he was to pay the mortgages on the farm, pay the taxes, and his father's debts, and upon the death of the father and mother he was to have the farm.

From and after the time the contract was made in 1894, up to the date of the trial, Harry J. Gingrich paid the taxes upon the land, paid two mortgages, kept up the place, put valuable improvements thereon, and provided for his father and mother in accordance with the contract up to the date of his father's death, and thereafter has continued to provide for his mother. In 1903 John Gingrich died, leaving surviving him, as his heirs at law, his widow, Leah, and the following named children: Mary Pickett, Cassie Blank, Edwin L. Gingrich, and Harry J. Gingrich.

In March, 1907, Mary Pickett executed and delivered to her mother a quitclaim deed for her interest in the property. In June, 1908, the widow, Leah Gingrich, executed and delivered to her son, Harry J. Gingrich, a quitclaim deed for all her interest in the property; and in October, 1908, Edwin L. Gingrich executed and delivered to plaintiff a quitclaim deed for his interest in the property. Thus, by the laws of descent, and by the quitclaim deeds above mentioned, plaintiff herein acquired a three-fourths interest in the property now in controversy. In July, 1907, plaintiff wrote a letter to his sister, Cassie Blank, defendant herein, requesting her to quitclaim her interest in the property to him. This she refused to do, and instead instituted proceedings for the administration of the estate of her deceased father, John Gingrich, and to obtain her legal share in said estate.

One of the questions presented by the record is whether the plaintiff is entitled to the property in question under and by virtue of the contract made in 1894 between himself and his father. The contract in question provided th t the plaintiff herein was to have the farm on the condition that he take care of his father and mother *during their natural lives*. Has he fully performed his part of this contract? This must be answered in the negative. It clearly appears that the mother is still living. She testified as a witness in the trial of this case. Before the plaintiff can establish full performance of the contract on his part, it must appear that the mother is not living, and that he had

provided for her up to the time of her death. This being true, it seems clear that this action is prematurely brought.

As to the plaintiff's claim to the title by reason of adverse possession for a period of more than 10 years, there is a failure to prove this issue. All of the acts which he performed, except the construction of improvements on the land, were in performance of his contract. Nowhere does he say that he was claiming the land as his own. He was asked how long he had been in the open, notorious, adverse and peaceable possession of the property, but an objection to this question was sustained, upon the ground that it was a conclusion of law. The action being prematurely brought, it seems clear that the issue based upon the contract could not be determined. The relief granted by the judgment does not conform to the prayer of either the plaintiff or the defendant. The plaintiff asked to have his title quieted in the entire quarter section. There was no dispute as to his ownership of a three-fourths interest therein. The defendant, Cassie Blank, asked for no affirmative relief.

The judgment of the district court is reversed, and the cause of action dismissed at costs of plaintiff, without prejudice to renew the action at a proper time.

REVERSED AND DISMISSED.

STATE, EX REL. ROLEY W. ARTERBURN ET AL., APPELLEES, V. THOMAS CRUISE ET AL.,, APPELLANTS.

FILED NOVEMBER 16, 1923. No. 22579.

1. **Schools and School Districts:** CHANGE OF SCHOOLHOUSE SITE: NOTICE. The qualified electors of a school district have no power to change a schoolhouse site at any annual or special meeting of the electors of such district, unless notice shall have been given that such subject will be considered. Comp. St. 1922, sec. 6270.

2. ———: SCHOOLHOUSES: LOCATION OF SITE BY COUNTY SUPERINTENDENT. Section 6276, Comp. St. 1922, authorizes the county superintendent to determine the location of school site only when no site can be selected by the electors of the district.

3. ———: ———: ———. Under the circumstances presented by the record, the county superintendent had no power to determine the location of the schoolhouse site.

APPEAL from the district court for Chase county: CHARLES E. ELDRED, Judge. *Affirmed.*

Charles W. Meeker, for appellants.

Edmund D. Shipley and *Scott & Scott, contra.*

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

DAY, J.

This is an action in mandamus by relators, who are resident taxpayers and electors of school district No. 8 in Chase county, against respondents, who are officers of the school district, to compel the respondents to move the district schoolhouse from its location in section 17 to its former location in section 18; to restore it to its condition before it was moved from its first location; and to cause the district school to be held and taught therein when removed and restored. The court found in favor of the relators, and entered judgment accordingly. The respondents have appealed.

The record shows that for more than 20 years prior to the commencement of this action a schoolhouse has been maintained in school district No. 8 upon a site near the northwest corner of the northeast quarter of section 18, township 6, range 40. The regular district school during all this period was maintained on this site, except for a short period when the schoolhouse was being rebuilt, the first building having been destroyed by fire. On September 14, 1921, the respondents removed the schoolhouse to a point near the northwest corner of the southwest quarter of section 17, in the same township and range as the former site. The new location was about half a mile east and half a mile south of the former location. The respondents seek to justify their action in removing the schoolhouse, because they claim the school district electors at their annual meet-

ing held in June, 1921, and also at an adjourned meeting of the annual meeting, held June, 20, 1921, authorized that it be done. The records of the annual meeting are not very clear, but it does appear that a vote was in favor of a new site. The relators contend that this action of the electors is of no validity, because the notice of the annual meeting did not include a statement that the question of changing the schoolhouse site in the district would be considered. The record shows that the notice of the annual meeting did not include the question of changing the schoolhouse site. Section 6270, Comp. St. 1922, contains provisions for the giving of notice of annual or special meetings of the electors of the school district, in which the day, hour, and place of meeting is required to be stated, and contains the further provision: "No schoolhouse site shall be changed nor taxes voted for building, purchase or lease of a schoolhouse at any district meeting unless notices shall have been given of such meeting, as above provided, including therein the fact that such subjects will then be considered."

It seems clear that the school district electors had no power under the notice given to take any binding action changing the schoolhouse site.

It is further urged by the respondents that their action was justified, because the county superintendent authorized it to be done. It appears that the county superintendent on petition of a number of the electors selected a site in section 17. Under the circumstances presented in this record, the county superintendent had no authority to change the schoolhouse site. Section 6276, Comp. St. 1922, provides that, when no site can be established by the inhabitants, the county superintendent shall determine where such site shall be. A situation had not arisen which called for the exercise of the authority of the superintendent under this section of the statute. Upon the trial it was sought to be shown that the school district had no title to the site in section 18. Be this as it may, the site in section 18 was the only site the school district had. It had used and oc-

cupied the site for about 24 years. Whether title by adverse possession had been obtained could not be determined in a mandamus action.

Upon the argument it was stated that the judgment of the district court had been fully executed, and it may be that we have before us merely a moot question.

We are satisfied that the record sustains the judgment of the district court, and it is, therefore,

AFFIRMED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. FARMERS STATE BANK OF HALSEY, APPELLEE: COMMERCIAL SAVINGS BANK OF DES MOINES ET AL., INTERVENERS, APPELLANTS.

FILED NOVEMBER 16, 1923. No. 23053.

1. **Banks and Banking**: LOANS TO OFFICERS. Under section 8012, Comp. St. 1922, an officer or employee of a banking corporation is not permitted to borrow money from the bank, either directly or indirectly.

2. ———: ———: DEPOSITS. Where an officer of a bank presents a note of a third party payable to the bank, and takes therefor certificates of deposit issued to himself, and where the circumstances of the transaction indicate that it was a mere device on the part of the officer to obtain a loan to himself by selling the certificates, such certificates are not deposits within the protection of the guaranty law.

3. ———: GUARANTY FUND: DEPOSITS. In order to create a deposit which will be protected by the guaranty law, as the term "deposit" is understood in section 8033, Comp. St. 1922, it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law.

4. ———: ———: ———. Where an officer of the bank, for the ostensible purpose of bolstering up the cash reserve of the bank, has issued to himself certificates of deposit, nothing being put into the bank therefor, and where such certificates are acquired by a purchaser in due course, the transaction of the issuance of

the certificates is not a deposit within the meaning of the guaranty law, nor entitled to the protection of the guaranty fund.

5. ———: ———: ———. Where two certificates of deposit for $1,000 each are issued to an officer of the bank, bearing 5 per cent. interest, for the ostensible purpose of bolstering up the cash reserve of the bank, nothing being put into the bank at the time, and later the certificates are acquired by a purchaser in due course, the officer then paying to the bank $1,980 for such certificates, such transaction will not be considered as a deposit within the meaning of the guaranty law, the effect of the transaction being that a greater rate of interest than 5 per cent. was paid on the certificate by the bank, which is prohibited by section 8008, Comp. St. 1922.

6. ———: ———: ———. Under the facts stated in the opinion, *held* that the transactions do not constitute a deposit within the meaning of the depositors' guaranty fund act.

APPEAL from the district court for Thomas county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Stough & Dunn, Dale & Harvison, and *Edwin F. Myers,* for appellants.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

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

DAY, J.

In an action, styled State of Nebraska, ex rel. Clarence A. Davis, Attorney General, v. Farmers State Bank of Halsey, Nebraska, hereinafter designated the Nebraska Bank, a receiver was duly appointed who was proceeding to wind up the affairs of the Nebraska bank in the manner provided by law.

Five banks, the Commercial Savings Bank of Des Moines, Iowa, hereinafter called the Des Moines Bank, the Farmers Exchange bank of Grafton, Iowa, hereinafter referred to as the Grafton Bank, the Farmers and Merchants Savings Bank of Manley, Iowa, hereinafter called the Manley Bank,

the First National Bank of Nora Springs, Iowa, hereinafter called the Nora Springs Bank, and the Security Bank of Caddo, Texas, hereinafter called the Texas Bank, intervened in said action and prayed that their respective claims against the Nebraska Bank, which were evidenced by certificates of deposit, be established as valid claims against the Nebraska Bank and its receiver, with the right of recourse to the guaranty fund in case it be found that the general assets of the Nebraska Bank were insufficient to pay the respective claims.

The trial court found, and entered judgment accordingly, that the interveners respectively were purchasers of their several claims in due course, and that the several certificates of deposit were general obligations of the Nebraska Bank, but denied the several interveners recourse to the guaranty fund for payment of their respective certificates. From this judgment each of the interveners named have separately appealed.

All of the certificates referred to were issued by the Nebraska Bank, and properly signed. The Des Moines Bank is the owner and holder of certificates Nos. 23, 24, and 25, each for $1,000. The Grafton Bank is the owner and holder of certificate No. 31 for $1,000. The Manley Bank is the owner and holder of certificates Nos. 40 and 41, each for $1,000. The Nora Springs Bank is the owner and holder of certificates Nos. 26, 27, 28, and 32, each for $1,000. The Texas Bank is the owner and holder of certificates Nos. 51, 53, 54, 55, and 56, each for $1,000.

The important question presented by this appeal is whether resort may be had to the guaranty fund for the payment of the several certificates.

The record shows that the Nebraska Bank was a duly organized state bank with a capital stock of $10,000, and was conducting a banking business at Halsey, Nebraska. Sometime prior to May 29, 1919, R. Earle Capron, a resident of Minneapolis, Minnesota, acquired 53 shares of the capital stock in the Nebraska Bank, and arranged with E. N. Dion, a young man without banking experience, to

conduct the bank and become its cashier. Under Capron's direction Dion went to Omaha, where he met B. Vedeler, who, for the purposes of the transaction, was Capron's representative, and together they proceeded to Halsey, arriving there on the morning of May 29, 1919. The shares of stock purchased by Capron were transferred on the books of the bank, five shares being issued to Dion. A meeting of the stockholders was held, followed by a meeting of the board of directors, at which Capron was elected president, and Dion cashier, and the business of the bank was turned over to Dion. In the afternoon of May 31, 1919, Vedeler presented a letter to Dion, purporting to have been written and signed by Capron, inclosing two notes, each for $2,000, dated May 27, 1919, and payable to the Nebraska Bank. Attached to each note were four certificates of stock of the Great Western Live Stock Company, each for $500. The notes were signed, respectively, H. D. Haggerty, and Warren H. Reck. The letter directed Dion to put the notes in the bank, and to issue to Capron therefor four certificates of deposit for $1,000 each. Dion, being ignorant of banking affairs, did not know how to make the proper entries in the books, and was assisted in this respect by Vedeler. Accordingly Dion issued certificates of deposit Nos. 21, 22, 23, and 24 to Capron, and delivered them to Vedeler. Certificates Nos. 21 and 22 were payable in three months, and were paid at maturity. Certificates Nos. 23 and 24 were payable in six months from date. These four certificates, together with No. 25, which will be hereinafter referred to, came into the possession of the Des Moines Bank, in due course of business. On the morning of June 5, 1919, Capron and F. M. Ridings appeared at the Nebraska Bank, and informed Dion that Ridings had purchased Capron's stock in the bank. A transfer of the shares of stock was made on the books, a directors' meeting held, and Ridings was elected president, and left town at 2 o'clock the same day. Before leaving, Ridings produced four notes, each for $2,000, attached to each of said notes being $2,000 of stock in the Great Western Live Stock Company. Rid-

ings instructed Dion to enter the notes with the bills receivable, and to issue therefor eight certificates of deposit, each for $1,000, payable to Ridings. Dion obeyed the direction of the new president and issued the certificates. One of the notes, signed by V. C. Haggerty, was payable to the Citizens State Bank of Bathgate, North Dakota, and indorsed: "Pay Farmers State Bank, Halsey, Neb. Without recourse. Citizens State Bank, F. M. Ridings, Pres." One of the notes was signed "Great Western Live Stock Company, by F. M. Ridings, Sec'y & Treas.," was payable to H. D. Haggerty, Incorporated, and indorsed: "Pay to the order of Farmers State Bank, Halsey, Nebraska, H. D. Haggerty, Incorporated, by F. M. Ridings, Sec'y & Treas." One of the notes was signed Warren H. Reck, and payable to Farmers State Bank of Halsey. One of the notes was signed by T. W. Jewell, payable to Farmers Savings Bank and indorsed: "Farmers Savings Bank, Plymouth, Ia. R. Earle Capron, Cashier." Capron and Ridings were present in the bank when Dion wrote the eight certificates, which were handed to Ridings. The certificates issued to Ridings June 5, 1919, were Nos. 25, 26, 27, 28, 29, 30, 31, and 32, each for $1,000. On July 30, 1919, Dion received a letter from Ridings directing him to send five certificates of deposit for $1,000 each for the purpose of raising money to bolster up the cash reserve of the bank. Accordingly Dion issued certificates Nos. 40, 41, 42, 43, and 45, payable to the order of Ridings. No notes were placed in the bank covering this transaction. No money was ever received by the bank for the certificates issued to Ridings July 30. About October 1, 1919, Dion received a letter from Ridings requesting him to send ten certificates of deposit, payable to the latter, for $1,000 each, stating that he had a place to put them. Instead of sending the certificates, Dion took a pad of blank certificates and went to Minneapolis. There he met Ridings and Vedeler. After some conversation, in which Vedeler stated that he could place ten certificates in a Texas Bank, Dion, at the direction of Ridings, issued ten certificates, each for $1,000, payable to Ridings, and delivered the same

to him. The purpose of this, as disclosed by the conversation, was to obtain money to bolster up the cash reserve of the bank. The certificates were issued, dated October 4, 1919, and were Nos. 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56. Nothing was put in the bank for these certificates. On October 15, 1919, Vedeler sent $1,980 to the bank for certificates Nos. 51 and 53.

Each of the five appellants insists that because the certificates of deposit are negotiable instruments, and were acquired by the respective holders in due course, therefore they are entitled to recourse to the guaranty fund for ultimate payment.

In this contention we think the appellants fail to distinguish between the liability of the maker of a negotiable instrument, which rests upon the law pertaining to negotiable paper, and the liability of the guaranty fund, which is purely statutory. The circumstances under which the guaranty fund may be liable are entirely apart from the law pertaining to negotiable paper. A holder of a certificate of deposit in a bank who seeks to hold the guaranty fund liable for its payment must show that the transaction leading up to the issuance of the certificate was such that the law holds the guaranty fund liable for its payment. The mere fact that a certificate recites on its face that a certain sum has been deposited, or that officers of the bank may have stated that the deposit is protected by the guaranty law, does not make the guaranty fund liable for payment, if in fact a deposit has not been made, as that term is understood in the guaranty law. The banks have nothing to do with the guaranty fund as such. It is a fund raised by assessments against all state banks, administered by officers of the state to protect deposits in banks. Section 8033, Comp. St. 1922, relating to the guaranty fund, provides in substance that claims of depositors for deposits shall have priority over all other claims, with certain exceptions not necessary to be noted; and where the cash in the hands of the receiver available for the payment of depositors is insufficient to pay such claims, the court having jurisdiction of

the receivership shall ascertain the amount required to supply the deficiency, and shall certify the amount required to supply the deficiency to the department of trade and commerce, which shall draw against the guaranty fund in the amount required, and transmit the same to the receiver to be applied on the claims of depositors. From this language it is clear that the legislature intended that the guaranty fund should be liable only for claims of depositors for deposits. What is meant, then, by the term "deposits," as used in the guaranty law? It is not easy to frame a definition which will meet all the situations which may arise in business affairs. In *State v. Banking House of A. Castetter,* 110 Neb. 564, it was said, quoting from *Fourth Nat. Bank v. Bank Commissioner,* 110 Kan. 380: "Speaking generally, to create a deposit, within the meaning of the statute, money or the equivalent of money must in intention and effect be placed in or at the command of the bank, under circumstances which do not transgress specific limitations of the bank guaranty law." In *Iams v. Farmers State Bank,* 101 Neb. 778, the claimant Iams was the holder of a certificate of deposit issued to him by the bank, regular on its face, and providing for the payment of interest at 5 per cent. The statute limits the amount of interest a bank can pay on certificates of deposit to 5 per cent. Comp. St. 1922, sec. 8008. Iams had a secret agreement by which he was to secure 6 per cent. It was held that the transaction was not a deposit within the meaning of the bank depositors' guaranty act. Section 8012, Comp. St. 1922, in force at the time of the transactions, provides in substance that no officer of a corporation transacting a banking business shall be permitted to borrow any of the funds of the bank, directly or indirectly. A severe penalty is attached to the violation of the law.

We come now to consider the transactions which led up to the issuance of the certificates to Capron on May 31, 1919, and to Ridings on June 5, 1919.

As before stated, within two days after Capron became president of the bank, he presented to the bank, through

his agent Vedeler, the notes of Haggerty and Reck, and had issued to himself certificates Nos. 21, 22, 23, and 24. A week later Capron transferred his interest in the bank to Ridings, who was elected president, and, within four hours, Ridings presented notes to the bank and had issued to himself certificates Nos. 25, 26, 27, 28, 29, 30, 31, and 32. If in good faith the makers of the several notes had borrowed the money from the bank, and in turn lent or given it to Capron and Ridings, who deposited it in the bank and took certificates therefor, there would be nothing in the transaction prohibited by law. But the circumstances of the transactions by which Capron and Ridings obtained the certificates brand the transactions as mere subterfuge to obtain for themselves a loan from the bank, a thing prohibited by law. Here we have men in a distant city executing their notes to a bank, all of which were secured by stock in a corporation in which Ridings was an officer, and one of the makers was president. The certificates were issued, not to the makers of the notes, but to a stranger, a fact in itself out of the ordinary. The makers of the notes and Capron and Ridings are shown to be associated in a number of business transactions. While the evidence is not entirely clear, part of it being stricken out after it was given, we think it fairly appears that the notes were given as accommodation, with no thought that payment would ever be demanded. There is some testimony in the record which tends to show that the notes have some considerable value, but, as we view it, it is entirely immaterial whether the notes are collectable or otherwise. The statute in direct terms prohibits an officer of a bank from borrowing its money, directly or indirectly, regardless of the amount or value of the security which may be given. A thorough examination of the record convinces us that the transactions of Capron and Ridings on May 31 and June 5, respectively, were but cunningly devised schemes to obtain loans from the bank. It was an attempt to evade the law. That the issuance of the certificates to them was not a good faith

deposit as that term is understood in the guaranty law seems clear.

As was said in the *Iams* case, *supra*: "The act creating the depositors' guaranty fund was intended by the legislature to be a shield of protection against loss to those who in good faith deposit their money in state banks in compliance with the terms of the statute. Unless its provisions are fairly construed and impartially enforced, this salutary law might become a destructive sword in the hands of unscrupulous persons having unlawful designs on the depositors' guaranty fund."

Referring now to the transactions out of which certificates Nos. 40 and 41, held by the Manley Bank, and certificates Nos. 51, 53, 54, 55, and 56, held by the Texas Bank, were issued, there is no pretext that anything was ever put into the bank for their issuance, except for certificates Nos. 51 and 53, which will be considered later. The certificates were issued to Ridings upon the claim on his part that they would be sold and the money placed in the bank to bolster up the cash reserve of the bank. It needs no argument to show that such a transaction is illegal, and that the certificates of deposit so issued cannot be regarded as deposits within the protection of the guaranty law. But, it is argued, as to certificates Nos. 51 and 53, that the bank received $1,980 in payment therefor, and that they should be protected by the guaranty law. The record shows that some ten days after the certificates were issued the bank received $1,980 for certificates Nos. 51 and 53. This fact, however, would not render the certificates deposits within the protection of the guaranty act. Reduced to its simplest terms, the transaction would be this: The bank receives $1,980 and issues therefor two certificates of deposit for $1,000 each, bearing interest at 5 per cent. The effect of such a transaction would be to enable the holder to obtain a greater rate of interest on his certificate than 5 per cent., which is prohibited by law. In principle the transaction is within the rule announced in the *Iams* case, heretofore cited.

The argument is made by appellants that, they being

owners of the several certificates of deposit, therefore, they were "holders of exchange," and entitled to priority over other claims, as provided by section 8033, Comp. St. 1922. This contention, in so far as it seeks to hold the guaranty fund liable, is, we think, without merit. The term "holders of exchange" as used in this section relates to those transactions where money or its equivalent has been deposited in the bank and a bill of exchange upon some other bank has been issued in lieu thereof.

Other suggestions have been made in the brief which we do not deem it necessary to answer, but which have been considered.

From an examination of the record in the light of the principles of law which must be applied, we are satisfied that the present holders of the certificates are not entitled to recourse to the guaranty fund for their payment. They were issued in violation of law, and cannot be considered as deposits within the meaning of that term as used in the guaranty law.

We conclude that the judgment of the trial court was right in every particular, and it is, therefore,

AFFIRMED.

MORRISSEY, C. J,. dissents.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, v. PEOPLES STATE BANK OF ANSELMO.

W. L. MCCANDLESS, COUNTY TREASURER, APPELLEE, v. STATE OF NEBRASKA ET AL., APPELLANTS.

FILED NOVEMBER 16, 1923. No. 23328.

Banks and Banking: GUARANTY FUND: LIABILITY. Where a county treasurer, in violation of section 6193, Comp. St. 1922, deposits county funds in a state bank, in excess of 50 per cent. of the capital stock of such bank, the depositors' guaranty fund is not liable for such excess.

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

O. S. Spillman, Attorney General, and *Sullivan, Squires & Johnson,* for appellants.

Jacob Fawcett and *N. T. Gadd, contra.*

William C. Schaper and *Halligan, Beatty & Halligan, amici curiæ.*

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

DAY, J.

The Peoples State Bank of Anselmo, Custer county, Nebraska, hereinafter referred to as the "bank," was a duly organized banking corporation under the laws of this state, with a capital stock of $15,000. The bank became insolvent, and on June 9, 1921, a receiver was duly appointed to wind up its affairs. At the time the bank failed, W. L. McCandless, as county treasurer of Custer county, had on deposit therein $44,000. As county treasurer, McCandless duly filed a claim for this amount with the receiver, asking that it be allowed and paid out of the depositors' guaranty fund of the state. The attorney general, in behalf of the department of trade and commerce, objected to the payment of the full amount out of the guaranty fund, but conceded that the guaranty fund was liable to the claimant for $7,500, being 50 per cent. of the capital stock of the bank. An arrangement was made by which the sum of $7,500 was paid forthwith out of the guaranty fund. As to the remainder, to-wit, $36,500, an issue was tendered by the state and the receiver, denying the liability of the guaranty fund for reasons which will hereinafter be discussed. The trial resulted in a judgment in favor of McCandless. An order was made by the court directing the department of trade and commerce to pay to the receiver $36,500 out of the depositors' guaranty fund, and that the receiver pay that amount to W. L. McCandless, county treasurer, for the use and benefit of Custer county. From this judgment the state and the receiver have appealed.

The important question presented by the record is wheth-

er the guaranty fund is liable for the payment of the amount deposited in the bank by the county treasurer in excess of 50 per cent. of the capital stock of the bank. A determination of this question involves an examination of several statutory provisions.

Sections 6191 and 6193, Comp. St. 1922, in force at the time of the transaction now under consideration, among other things, provide:

Section 6191: "It shall be the duty of the county board to act on such application or applications of any and all banks, state, national or private, as may ask for the privilege of becoming the depository of such moneys, as well as to approve the bonds of those selected incident to such relation, and the county treasurer shall not deposit such money or any part thereof in any bank or banks other than such as may have been so selected by the county board for such purposes, if any such bank or banks have been so selected by the county board. * * * And where more than one bank may have been so selected by the county board for such purpose, he shall not give a preference to any one or more of them in the money he may so deposit, but shall keep deposited with each of said banks, such a part of the moneys as the paid-up capital stock of such bank is a part of the amount of all the paid-up capital stock of all the banks so selected, so that such moneys may at all times be deposited with said banks pro rata as to their paid-up capital stock."

Section 6193: "For the security of the funds so deposited under the provisions of this article the county treasurer shall require all such depositories to give bonds for the safe-keeping and payment of such deposits and the accretions thereof, which bond shall run to the people of the county and be approved by the county board and conditioned that such depository shall, at the end of each and every month, render to the treasurer and county board a statement in duplicate, showing the several daily balances and the amounts of moneys of the county held by it during the month, and the amount of the accretion thereof,

and how credited. * * * No person in any way connected with any depository bank as officer or stockholder shall be accepted as a surety on any bond given by said bank. * * * The treasurer shall not have on deposit in any bank at any time more than the maximum amount of the bond given by said bank in cases where the bank gives a guaranty bond, nor in any bank giving a personal bond more than one-half of the amount of the bond of such bank, and the amount so on deposit at any time with any such bank shall not in either case exceed fifty per cent. of the paid-up capital stock of such bank. * * * Where banks located in the county refuse or neglect to bid on said money, or where there are not banks in the county, or where the banks located in the county have not sufficient capital stock to receive said money, * * * then any surplus over the fifty per cent. that banks in the county may receive shall be deposited in banks outside of the county having sufficient capital stock under the same conditions and terms as if in the county."

These sections of the statute in their present form are the outgrowth of prior legislation relating to the general subject of depositing state and county funds. The first act was passed in 1891. It required the county treasurer to deposit and at all times keep on deposit for safe-keeping in the state or national banks doing business in the county money belonging to the several current funds of the county. Section 8 of this act provided that banks desiring to become depositories should give bond for the safe-keeping and payment of deposits and accretions thereof, and limited the amount that the treasurer should have on deposit in any bank at any one time to one-half the amount of the bond given by the bank. Laws 1891, ch. 50. In 1907 section 8, above referred to, was amended, limiting the amount which might be deposited by the treasurer, so that it should not exceed 50 per cent. of the capital stock of the bank in which the deposit was made. Laws 1907, ch. 39. This same section was again amended in 1909 (Laws 1909, ch. 35) and, as amended, comprises section 6193, Comp. St. 1922. In 1909 the legislature passed an act, the outstanding fea-

tures of which were provisions for the regulation, supervision and control of the banks organized under the laws of the state, and the establishment of a guaranty fund for the protection of depositors. By this act the general supervision of the state banks, and the administration of the guaranty fund which was raised by an assessment upon all of the state banks, was placed in the hands of the state banking board. Laws 1909, ch. 10. By later enactment the supervision of banks and the administration of the guaranty fund is placed in the hands of the department of trade and commerce. In 1911 (Laws 1911, ch. 8) the legislature amended several sections of the act of 1909, among them section 46, now section 8027, Comp. St. 1922. The amendment, so far as pertinent to the question now in hand, is as follows: "No bank which has complied in full with all of the provisions of this article shall be required to give any further security or bond for the purpose of becoming a depository for any public funds, but depository funds shall be secured in the same manner that private funds are secured." It will be observed that section 6193, Comp. St. 1922, above quoted, not only provides that banks desiring to become depositories of public funds shall give bond for the safe-keeping and payment of money deposited by the county treasurer, but also places a limitation upon the amount which a county treasurer may legally have on deposit in any bank at any one time. The limitation of the amount is fixed by clear language. In precise terms it states: "And the amount so on deposit at any time with any such bank shall not in either case (referring to the kind of bond given) exceed fifty per cent. of the paid-up capital stock of such bank."

It is urged by the appellee, however, that the effect of section 8027, Comp. St. 1922, is to repeal the provisions of section 6193, in so far as it relates to state banks. The argument is made that the substitution of the guaranty fund as provided in section 8027, in lieu of the bond required in section 6193, by implication repeals that part of section 6193 limiting the amount of deposits to 50 per cent.

of the paid-up capital stock of such banks. We think it must be admitted that sections 6193 and 8027 are *in pari materia,* and in any event must be construed together. An examination of the two sections shows that the only provisions thereof wherein there is an inconsistency is that relating to the giving of a bond. Section 6193 clearly provides for the giving of bonds by state as well as national banks. Section 8027 provides that state banks which have complied with the provisions of the act (relating to filing with the department certain statements) shall not be required to give any further security or bond. The relation of these two sections was considered by this court in *State v. Hevelone,* 92 Neb. 748. In that action the bank sought a writ of mandamus against the county treasurer to require him to deposit with the relator its pro rata share of the county money, as provided in section 6191, without relator giving a bond as provided in section 6193. The court said: "By this amendment (amendment to section 8027, hereinbefore quoted) it is made clear that the legislature intended the provisions of the banking act requiring a depositors' guaranty fund should operate as a substitute for the approved security required by the depository act (section 6193), where the deposit is public funds." The court held that the provisions of section 8027 were inconsistent with so much of section 6193 as requires a bond to be given by state banks to secure the safe-keeping of deposits of public money, and to the extent that section 6193 requires a bond to be given by state banks, it was repealed by implication.

We are of the view that the provisions of section 6193, limiting the amount which a county treasurer may legally deposit in a bank to 50 per cent. of its paid-up capital stock, is still obligatory on the treasurer. This limitation was made for, and serves, a good purpose. If, then, the limitation is still effective, it follows as a matter of course that the deposits made by the treasurer in the bank in excess of $7,500 were in violation of the express terms of the statute.

The question then arises whether the guaranty fund is

liable for the payment of the excess. The liability of the guaranty fund is somewhat analogous to the liability of a surety or guarantor. As a surety or guarantor are not liable beyond the terms of their contract, so the guaranty fund is not liable beyond the terms of the statute which is in point of law the contract. The guaranty fund is a creature of the statute, and the legislature, by fair construction of the statute, has fixed the conditions upon which deposits in banks are protected. The guaranty fund is not available as security in every case where money is put into a bank. Its liability extends only to those transactions which under the law may be said to be deposits. It is not easy to frame a definition of what constitutes a deposit, which is within the protection of the guaranty law, so as to meet the complexities in business affairs. Each case must stand upon its own peculiar facts.

In a case decided at the present term, *State v. Farmers State Bank, ante,* p. 117, it was held that, in order to create a deposit which will be protected by the guaranty law, it was necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law.

In *Iams v. Farmers State Bank,* 101 Neb. 778, Iams deposited a sum of money in the bank and took a certificate of deposit therefor which on its face drew interest at 5 per cent., the amount of interest which banks were permitted to pay on time deposits. He had a secret agreement with the bank by which he was paid a greater rate of interest. The bank failed, and Iams sought to hold the guaranty fund liable for the payment of the certificate. It was held that the transaction was not a deposit within the meaning of the guaranty law, so as to render the guaranty fund liable. In commenting upon the transaction, it was said: "The act creating the depositors' guaranty fund was intended by the legislature to be a shield of protection against loss to those who in good faith deposit their money in state banks in compliance with the terms of the statute."

The same principle was again announced in *State v. Banking House of A. Castetter*, 110 Neb. 564.

These cases are cited to show that not every deposit of money in a bank is a "deposit" within the meaning of that term in the guaranty fund law.

In determining the liability of the guaranty fund as applied to the facts before us, it seems that the several provisions of the statute hereinbefore referred to must be construed together. These provisions of the statute make the contract of liability. In effect they say that the treasurer may lawfully deposit public money in depository banks up to an amount of 50 per cent. of the paid-up capital of the bank; that deposits made in excess of the limitation are illegal; and that the guaranty fund is liable for deposits legally made. These provisions of the statute are binding on all the parties.

Some reference has been made to a series of cases entitled *State v. American State Bank*, 108 Neb. 92, 98, 111, 119, 124, and 129. There the facts were essentially different, and there was no limitation upon the amount of deposits which the depositor could make.

The appellant also bases an argument upon the theory that the treasurer violated the provisions of section 6191 in failing to prorate the county funds among the several banks of the county, as provided therein. We deem it unnecessary to prolong this opinion by a discussion of that proposition, as the view we have taken seems to be decisive of the question presented by the record.

The treasurer having deposited the county funds in the bank in violation of precise terms of the law, the excess so deposited is not entitled to the protection afforded to depositors by the guaranty law.

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

REVERSED.

GOOD, J., dissenting.

It seems that the majority opinion fails to give full force

and effect to section 8027, Comp. St. 1922, and particularly to the last sentence of said section, in the following language: "No bank which has complied in full with all of the provisions of this article shall be required to give any further security or bond for the purpose of becoming a depository for any public funds, but depository funds shall be secured in the same manner that private funds are secured." The words, "secured in the same manner that private funds are secured," evidently signify that depository funds are to be secured by the depositors' guaranty fund. There is no limit to the amount a private individual or private corporation may deposit in a state bank, and all deposits, without limit as to amount, by private individuals or private corporations in state banks are protected by the guaranty fund. If public funds are secured in the same manner as private funds, then they are protected by the guaranty fund, regardless of the amount of such deposits, and it would be immaterial whether such deposits exceeded 50 per cent. of the capital stock of the bank.

The majority opinion seems to be grounded on the proposition that the guaranty fund is liable only where no law has been violated by the depositor in making the deposit. Followed to its logical conclusion, if a county treasurer should take the public funds in his charge to a state bank and deposit them in his individual name, though the amount of such deposit may not equal 50 per cent. of the capital stock of the bank, the guaranty fund would not be liable, because, by the very act of so depositing the fund in his name, he has violated the criminal law and made himself liable to prosecution for embezzlement. I do not think that such was the intention or purpose of the lawmakers. Even if a county treasurer, in making a deposit of public funds in his charge in a state bank in excess of 50 per cent. of the capital stock, has committed a breach of the depository law, still the bank violates no provision of law in receiving such deposit. The bank is authorized to receive deposits, and the law puts no restriction on the bank as to the amount of deposits it may receive. In the *Iams* case,

referred to in the majority opinion, the bank was guilty of a direct violation of the depositors' guaranty fund law, and the depositor in that case was a party to and induced the violation by the bank. The fact should not be overlooked that the funds deposited in the bank, in the instant case, belong to the public and not to the county treasurer. A violation of the depository law by the treasurer should not deprive the public of the same protection and security that the depositors' guaranty fund affords to private funds.

It is argued that the amendment of 1909 to section 8027, Comp. St. 1922, which relieved state banks from the necessity of giving a bond to become depositories for public funds, had only the effect of substituting the guaranty fund as a surety. Granting, for the sake of the argument, that this is true (which, by the way, is not conceded), still, in the opinion of the writer, the guaranty fund would not be relieved from liability for a deposit of public funds in excess of 50 per cent. of the capital stock of the bank. A national bank is not subject to the guaranty law and must give a bond to become a depository of public funds. I can scarcely think that my associates, who concur in the majority opinion, would contend that the depository bond of a national bank would not be liable for a deposit by a county treasurer of public funds in such bank in an amount in excess of 50 per cent. of its capital stock. I think, in such case, that the liability would be for the whole amount of the deposit, but not exceeding the amount of the depository bond. If the guaranty fund is not liable for the deposit by a county treasurer of public funds in a state bank in excess of the 50 per cent. capital stock limitation, by what process of reasoning can it be contended that the depository bond of a national bank would be liable for a deposit in excess of the 50 per cent. capital stock limitation?

It seems clear that the holding of this court should be that the guaranty fund is liable for the entire amount of the deposit made by the county treasurer.

Morrissey, C. J., and Letton, J., concur in this dissent.

The following opinion on motion for rehearing was filed May 8, 1924. *Former judgment of this court vacated and judgment of the district court affirmed.*

1. **Banks and Banking: GUARANTY FUND: LIABILITY.** Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of said bank, the entire deposit is within the protection of the depositors' guaranty fund.
2. **Opinion** in *State v. Peoples State Bank*, *ante*, p. 126, vacated.

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

GOOD, J.

This case is now before us on rehearing. The opinion on the first submission of the case is reported, *ante*, p. 126.

This appeal presents for decision this question: Is the depositors' guaranty fund liable for a deposit of public funds in a state bank by a county treasurer in excess of 50 per cent. of the paid-up capital stock of the bank? In the majority opinion on the first hearing, the question is answered in the negative. The opinion is based on the propositions that the guaranty fund stands in the position of a surety or guarantor; that a deposit by a county treasurer of public funds in excess of the statutory limitation is illegal, and that the depositors' guaranty fund is liable only for deposits legally made.

For a better understanding of the facts and statutory provisions bearing on the question, reference is made to the former opinion in this case, where the pertinent legislation and the history of its enactment are set forth. After more extended argument and a thorough consideration of the question, a majority of the court now entertains a different view.

The question is largely controlled by determining the legislative intent and meaning of section 8027, Comp. St. 1922, which is in part as follows: "No bank which has complied in full with all of the provisions of this article

shall be required to give any further security or bond for the purpose of becoming a depository for any public funds, but depository funds shall be secured in the same manner that private funds are secured." For some years prior to the enactment of this section, no bank could lawfully become a depository of public funds unless it gave bond for the safe-keeping and return of such funds. See sections 6191, 6193, Comp. St. 1922. One of the aims and purposes of the legislature in enacting section 8027, *supra,* was to relieve state banks from the necessity of giving bond for the safekeeping and return of public funds therein deposited.

We think there is little or no doubt that the main purpose of the legislature in limiting the amount of public funds a county treasurer might deposit in any bank to 50 per cent. of its capital stock was to secure the greater safety and protection of public funds. By the enactment of the depositors' guaranty fund law, pursuant to the provisions of which all banks, organized under the laws of the state, become liable for assessments to create and maintain the depositors' guaranty fund, the legislature no doubt believed that ample protection and security would be furnished for any public funds deposited in state banks.

It might, with good reason, be urged that the legislature, in enacting section 8027, *supra,* intended to repeal the provisions of the depository law, in so far as it affected state banks, and to thereby remove any limitation as to the amount of public funds that a county treasurer could deposit in such banks. However, we do not find it necessary to so hold, to sustain our present view. Even if it be conceded that the depository statute, limiting the deposit of public funds in banks to 50 per cent. of the paid-up capital stock of such banks, has not been repealed by implication, so far as relates to state banks, we still feel confident that the proper construction of said section renders the guaranty fund liable for the deposit of all public funds, even though they are in excess of 50 per cent. of the paid-up capital stock. The latter part of said section provides that depos-

itory funds (meaning thereby public funds) shall be secured in the same manner that private funds are secured. Private funds deposited in state banks are secured and protected by the depositors' guaranty fund, and there is no limit to the amount a private individual or corporation may deposit in state banks. If public funds are secured in the same manner as private funds, then they too are protected by the guaranty fund, regardless of the amount thereof, and it would be wholly immaterial whether such deposits exceeded 50 per cent. of the paid-up capital stock of the bank.

It is argued that, if the county treasurer violated a statutory provision in making the excess deposit of public funds, then the excess was not a legal deposit and was not, therefore, protected. In support of this assignment, plaintiff cites and relies upon the decisions of this court in *Iams v. Farmers State Bank*, 101 Neb. 778, *State v. Banking House of A. Castetter*, 110 Neb. 564, *Cole v. Myers*, 100 Neb. 480, and *State v. Corning State Savings Bank*, 136 Ia. 79.

In the *Iams* case, money was placed in a state bank, and a certificate of deposit, bearing interest at 5 per cent. per annum, was issued to the purported depositor. In order to evade a provision of the guaranty fund law, limiting the rate of interest on time deposits to 5 per cent., the bank agreed to pay Iams a bonus of 1 per cent. per annum on the money. The bank was guilty of a direct violation of the guaranty fund law. Iams was a party to and induced the violation. Both parties participated in the unlawful act. It was held that the transaction was a loan, and did not constitute a deposit, within the meaning of the guaranty fund act, and that, where the bank failed, the certificate so obtained could not be paid out of the depositors' guaranty fund.

In *State v. Banking House of A. Castetter, supra*, interest on a deposit in the bank was calculated at the rate of 8 per cent. and added to the amount, and a cashier's check issued therefor. It was held, following the *Iams* case, that the holder was not entitled to the protection of the guaran-

ty fund, because the inclusion of a greater rate of interest than 5 per cent. was in violation of the express prohibition contained in the depositors' guaranty fund law. *Cole v. Myers, supra,* involved the right of different sets of sureties to subrogation, and does not seem to have any application to the question presented in this case. In *State v. Corning State Savings Bank, supra,* a recovery was sought against a savings bank upon a certificate of deposit, but which, in fact, represented a loan to the bank, and not a deposit. It was held that where savings banks are prohibited by statute from borrowing money, but a loan is made to a savings bank and the indebtedness represented by a certificate of deposit, no recovery can be had upon the certificate itself.

We think none of these cases is applicable to the present situation. The depositors' guaranty fund law did not prohibit a treasurer from depositing public funds in a state bank in excess of 50 per cent. of its paid-up capital stock; nor was there any law forbidding state banks to accept such deposits. In this instance, an excess deposit was made in the bank, but no illegal or excessive rate of interest was agreed to be paid. It was in no sense a loan. If any wrongful act was committed, it was the act of the county treasurer alone. The funds deposited belonged not to him but to the public. The public was innocent of any wrongful act. It should not be deprived of the protection the law was intended to afford. The reasons, given in the cases referred to, for denying liability of the guaranty fund do not exist in this case. It may further be observed that the state is the custodian of, and has the legal title as trustee to, the depositors' guaranty fund, and is charged with its control, management and distribution through and by the department of trade and commerce. This same department is charged with the examination, regulation and control of all the state banks, and by its examiners had full knowledge, or the means of full knowledge, that the county treasurer, claimant in this case, was making deposits in the defendant bank in excess of 50 per cent. of its paid-up capital stock. It is a matter of common knowledge that such

excess deposits are habitually and constantly being made by the county treasurers of the state, and yet the state has made no objection to such excess deposits, and, by its failure to object, has tacitly placed its approval upon such practice. It amounts to placing the same construction upon the statute by an administrative branch of the state government that is now placed upon it by this court.

The law prohibits state banks from making any loan in excess of a certain percentage of its paid-up capital stock and surplus; yet such loans are frequently made and their payment has always been, by this court, enforced whenever suit has been brought upon such loans. The argument of plaintiff, if carried to its logical conclusion, would deny the protection of the depositors' guaranty fund for any deposit that was made in violation of law. If a county treasurer should take the public funds and deposit them in a state bank in his individual name, he would thereby violate the law and make himself liable for criminal prosecution, but we think there can be no doubt that in such case the treasurer, or the county, as the beneficial owner of the fund, could claim the deposit and would be entitled to the protection of the depositors' guaranty fund. Such, in effect, was the holding of this court in the following cases: *State v. American State Bank,* 108 Neb. 92; *State v. American State Bank,* 108 Neb. 98; *State v. American State Bank,* 108 Neb. 111; *State v. American State Bank,* 108 Neb. 119; *State v. American State Bank,* 108 Neb. 124; *State v. American State Bank,* 108 Neb. 129.

We are forced to the conclusion that, where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of said bank, the entire deposit is within the protection of the depositors' guaranty fund.

It follows that our former opinion in this case should be vacated. The judgment of the district court is

AFFIRMED.

Rose and Day, JJ., and Redick, District Judge, dissent for the reasons stated in the former opinion.

BERWYN STATE BANK, APPELLANT, V. JOSEPH S. SWANSON ET AL., APPELLEES.

FILED NOVEMBER 16, 1923. No. 22500.

1. **Bills and Notes:** RENEWALS: DEFENSES. "The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt. As between the original parties and as against transferees who are not *bona fide* purchasers for value, a renewal note is open to all defenses which might have been made against the original note." *Auld v. Walker*, 107 Neb. 676.
2. **Pleading:** AMENDMENT AFTER JUDGMENT. A pleading may be amended after judgment in the furtherance of justice, when the amendment sought does not change substantially the claim or defense, by conforming the pleadings to the facts proved, and if the evidence, adduced without objection, clearly proves the claim or defense, the supreme court may, on appeal, consider the pleading amended accordingly.
3. **Appeal:** PLEADING: AMENDMENT. "The power of the supreme court to permit an amendment of a pleading to conform to the proof is, as a rule, only exercised to sustain a judgment, and not to reverse it, except where it clearly appears that a refusal to permit the amendment would cause a miscarriage of justice." *Peterson v. Lincoln County*, 92 Neb. 167.
4. ———: ———: ———. Evidence examined, and *held* that it does not clearly appear that the refusal to permit an amendment to the reply would cause a miscarriage of justice.

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

Kelly & Schnell and *Sullivan, Wright & Thummel*, for appellant.

Sullivan, Squires & Johnson and *Prince & Prince, contra.*

Heard before ROSE, DEAN and GOOD, JJ., REDICK, District Judge.

GOOD, J.

Plaintiff, the holder of a promissory note for $3,750 in which it was named as payee, brought this action thereon

against the defendants, Joseph S. and Charley A. Swanson, makers of said note.

The defendants admitted the execution of the note, and for defense alleged that it was the second renewal of a note for a like amount executed by them to the Douglas Motors Corporation; that said original note was procured from them without consideration by means of false and fraudulent representations; that after its execution said note had been fraudulently altered by inserting therein, after the name of the payee, the words "or bearer;" that said promissory note had never been properly or legally indorsed to plaintiff, and that plaintiff, when it purchased said note, had knowledge of the defenses thereto and was not a holder in due course. Plaintiff in its reply alleged that in due course and without notice it became an innocent purchaser for value before maturity of the promissory note, executed by defendants and delivered to Douglas Motors Corporation; that when said note became due defendants paid the same by paying the interest and executing a new note to plaintiff for the same amount as the original note, and that the original note was canceled and surrendered to defendants; that when said second note became due defendants paid the interest thereon in cash and executed a new note to plaintiff, as payee, for the same amount, which note is the one sued on in this action; and that by reason of such facts the defendants are estopped from setting up any defense that might have existed to said original note.

Upon a trial of the issues and after all the evidence had been taken, each of the parties moved for an instructed verdict. The court directed a verdict for the defendants and entered judgment thereon, and plaintiff has appealed.

The record shows without dispute that in September, 1919, two men, named Moorefield and Tennant, representing themselves to be agents of the Douglas Motors Corporation for the sale of its treasury stock, by means of false and fraudulent representations induced the defendants to subscribe for 50 shares of the capital stock of said cor-

poration at $150 a share, and, in payment therefor, to execute two promissory notes, each for $3,750, payable to the Douglas Motors Corporation; that said notes were to be sent to said corporation at Omaha, Nebraska, and it was to issue and send to defendants by registered mail the 50 shares of capital stock. None of the capital stock of the corporation was ever issued and sent to the defendants. The original notes were not negotiable in form. After their execution and delivery, the words "or bearer" were inserted in said notes immediately after the name of the payee, without the knowledge or consent of the defendants. Soon after the execution of the notes, Tennant sold one of the notes to the plaintiff, and, at the time, indorsed on the back of the note the words, "Douglas Motor Co., without recourse, by C. E. Tennant, Agent." Tennant was not the agent of the Douglas Motors Corporation and was without any authority to sell, transfer or indorse any of its promissory notes, whether negotiable or otherwise. The plaintiff paid for the promissory note, when it purchased it, by giving to Tennant a certificate of deposit for $3,750, payable to the order of the Douglas Motors Corporation and due one month after the maturity of the promissory note. Plaintiff, at the time of the purchase of the note, had no knowledge of any fraud practiced upon the defendants to induce them to execute the notes, and no knowledge that the note had been altered, but was advised that the note was given in payment for stock in the Douglas Motors Corporation. Tennant and Moorefield at the time agreed with the plaintiff that the stock, when issued, should be sent to the bank and held by it as collateral security for the Swanson note, and represented that this was in pursuance of an arrangement with the defendants. Some months later, either Moorefield or Tennant procured, from some persons owning stock of the corporation, 25 shares of the capital stock of the Douglas Motors Corporation and had it transferred on the books of the corporation to the defendants, and sent the certificates to the plaintiff, which certificates, pursuant to its arrangement with Moore-

field and Tennant, were received and held by plaintiff as collateral security for the Swanson note. Some time after the plaintiff purchased the note from Tennant, it notified defendants that it held their note. The defendants at that time did not know that any fraud had been practiced upon them and did not know of the alteration of the note. Defendant Joseph S. Swanson testified that sometime before the maturity of the note he had a conversation with Fox, cashier of plaintiff; that Fox wanted to know if the note was all right, and that he told Fox, "If this is a fair and straight deal on the part of the company and the parties that sold it to me, the note would be honored;" that at a later date and before the maturity of the note he had another conversation with Fox, in which he said to Fox, "There seems to be some suspicion about this note. The company has never yet recognized, themselves recognized, this purchase," and that Fox said, "There was something that didn't look just right to him about it;" that, "if it wasn't, why he was in a position to protect me, being he had not yet paid the obligation. And I told him, 'I will depend on that,' and I thanked him." He further testified that when the note became due Fox came out to see him on his farm and brought the papers to be fixed up; that at that time he had not made any investigation as to the condition of the Douglas Motors Corporation, and that he so told Mr. Fox; that Fox said "it would be all right, and that it would be just the same—he said he was just coming out through the country and had to go out through there anyway, and he thought he would bring these papers along and get them in shape so as to make a better showing for the bank department, as he was expecting the bank examiner, and he said it was only for that;" and that defendants at that time signed the renewal note.

Defendants testified that they never authorized any one to pledge the stock they had purchased as collateral security for their note, had never authorized any one to send it to plaintiff for them, and had no knowledge until after

the execution of the note sued on that any stock had been sent to plaintiff for them. Fox, the cashier, testified that within a month after the purchase of the note he wrote to the defendants, informing them that he had purchased the note; that he did not remember to have talked with defendants until after the note was due; that Joseph S. Swanson then said "he didn't know whether there was anything wrong with the purchase that he had made, or not, and I told him that I had not paid the time certificate of deposit yet, that it would be due in about 30 days, and I would try and protect him if he would get me any evidence within 30 days, before I paid the time certificate," and that the defendants did not, within the 30 days or before he had paid the time certificate, give him any information as to any defense to the note.

Plaintiff now concedes that, because there was never any proper indorsement of the note which it purchased from Tennant, it was not the holder thereof in due course, but it contends that by twice renewing the note the defendants have waived the defense to the original note, and, by reason of the fact that the bank had changed its position in reliance upon the renewal, the defendants are estopped from denying liability. In support of this contention, plaintiff cites decisions from the courts of other jurisdictions. The authorities cited and relied upon apparently do hold that one who renews a note, with knowledge of facts that would constitute a defense, or, by the exercise of ordinary diligence, could have discovered the facts and ascertained his rights, waives such defense, and especially if his conduct has misled the holder of the note to his prejudice. But, whatever the rule may be in other jurisdictions, it is well settled in this state that—"The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt. As between the original parties and as against transferees who are not *bona fide* purchasers for value, a renewal note is open to all defenses

which might have been made against the original note." *Auld v. Walker*, 107 Neb. 676. Other decisions of this court to the same effect are *Davis v. Thomas*, 66 Neb. 26, and *Exeter Nat. Bank v. Orchard*, 39 Neb. 485. The record does not show any agreement by the parties that the giving of the new note should extinguish the original debt.

Plaintiff now insists that defendants are estopped from setting up any defense they might have had to the original note, because plaintiff has changed its position to its detriment by reason of defendants' failure to inform plaintiff of such defense prior to the time it paid the certificate of deposit, which it issued as the purchase price of the original note. While plaintiff did not plead this fact as an estoppel in its reply, it now asks leave in this court to amend its reply by inserting appropriate allegations setting forth the facts constituting the estoppel. To this the defendants strenuously object. The statute authorizes a pleading to be amended, before or after judgment, when the amendment does not substantially change the claim or defense, by conforming the pleadings to the facts proved. If the evidence, admitted without objection, clearly proves a claim or defense, the pleading will, upon appeal, be considered amended accordingly. *Allertz v. Hankins*, 102 Neb. 202.

This court held in the case of *Peterson v. Lincoln County*, 92 Neb. 167: "The power of the supreme court to permit an amendment of a pleading to conform to the proof is, as a rule, only exercised to sustain a judgment, and not to reverse it, except where it clearly appears that a refusal to permit the amendment would cause a miscarriage of justice."

The record discloses that both parties proceeded in the district court as though the issue, sought to be tendered by the proposed amendment, was, in fact, presented by the pleadings. Under these circumstances, if it clearly appeared that a refusal to permit the amendment requested by plaintiff would cause a miscarriage of justice, we would feel constrained, under the rule announced in the case last

cited, to permit the amendment. As we view the record, however, it does not present any such situation. If the amendment were permitted, it would avail plaintiff nothing for two reasons: First, the evidence is in conflict upon the question as to whether the defendants knew when the certificate of deposit would be due or when it would be paid, and a determination of that question by the trial court upon conflicting evidence will not be disturbed by this court. The other reason is that the evidence shows that the certificate of deposit, issued by plaintiff in payment of the original note, was a negotiable instrument, and plaintiff failed to show that, at the time of the conversation with the defendants when the original note became due, the certificate of deposit was then in the possession of the payee thereof. For all that appears in the record, the certificate of deposit may at that time have been the property of an innocent holder for value in due course, in which case plaintiff could not have successfully resisted its payment. It does not appear that plaintiff at that time would have been able to protect itself by resisting payment of the certificate of deposit; and it follows that it does not appear that plaintiff changed its position to its detriment.

The judgment of the district court seems to be supported by the evidence and to be in conformity with the law, and is

AFFIRMED.

ALVIN KRON, APPELLEE, V. J. C. ROBINSON SEED COMPANY, APPELLANT.

FILED NOVEMBER 16, 1923. No. 22535.

1. Corporations: SERVICE OF SUMMONS: "MANAGING AGENT." "An agent of a domestic corporation, whose principal place of business is in another county in this state, whose contract of employment demands of him the exercise of judgment and discretion in the business affairs of his principal, and who has charge of the property and business of his principal in the locality where he is stationed, is 'a managing agent,' upon whom

service of summons may be made." *Brophy v. Fairmont Creamery Co.*, 98 Neb. 307.

2. Sales: SEED CORN: TESTING. Where a contract between K., a farmer, and R., a wholesale seed company, for the growing of seed corn by K. for R., provides, as a condition of the acceptance of the corn by R., that it shall possess stipulated germinating qualities, but no time or place is fixed in the contract for testing the germinating qualities, it may be tested before delivery by fair, average samples furnished by K. to R. for that purpose.

3. ———: ———: ACCEPTANCE: QUESTION FOR JURY. When a contract between K., a farmer, and R., a wholesale seed dealer, for the growing by K. for R. of seed corn, provides, as a condition to the acceptance thereof by R., that it shall possess certain germinating qualities, and shortly previous to the time for delivery K. furnishes to R. samples of the corn, to be tested for germinating qualities, which are tested and found satisfactory by R., and the corn is thereafter delivered to and received by R., and the corn does not possess germinating qualities equal to the samples, nor to the contract requirement, such delivery and receipt will not constitute an acceptance of the corn so as to require R. to pay the contract price therefor. Under such circumstances, whether the corn delivered was equal in germinating qualities to the samples, or at least equal to the contract requirement, was a question of fact to be determined by the jury.

4. Appeal: FAILURE TO INSTRUCT AS TO DEFENSE. Failure of the trial court to submit to the jury by appropriate instruction a defense, properly pleaded and supported by competent evidence, is prejudicial error.

APPEAL from the district court for Valley county: EDWIN P. CLEMENTS, JUDGE. *Reversed.*

Brown, Baxter & Van Dusen and *Davis & Davis*, for appellant.

Munn & Norman, contra.

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

GOOD, J.

This is an action to recover the contract price for seed corn, grown by plaintiff for defendant and delivered to it,

pursuant to the terms of a written contract. The defense to the merits of the action is that the seed corn delivered did not measure up to the requirements of the contract, in that it was not in a merchantable condition, was not bright and well cured, and did not possess the stipulated germinating qualities, and that samples of the corn, sent by plaintiff to defendant prior to delivery for testing, were not fair, average samples of the corn, but that, to procure acceptance of the corn by defendant, plaintiff submitted a sample from the very best of such corn. The trial resulted in a verdict for plaintiff for the full amount claimed, and defendant has appealed.

Defendant also objected to the jurisdiction of the court, and the first assignment of error to be considered relates to that question. Defendant is a corporation, engaged in the wholesale seed business, with its principal place of business located at Waterloo, Nebraska. A part of its business is the growing of sweet and field corn for seed purposes. It makes contracts with farmers to grow certain kinds of corn, to be delivered to it either at Waterloo or at other points. For many years the defendant has been entering into contracts with numerous farmers in Valley county, Nebraska, to grow seed corn for its business. It kept and maintained a warehouse and an office at North Loup, Nebraska. In charge thereof was one Earnest. Service of summons upon the corporation was obtained by delivery of summons to Earnest in Valley county. Defendant contends that it did not maintain an office and place of business in North Loup, and that Earnest was not a managing agent, and that therefore the court obtained no jurisdiction over it by service upon Earnest. This question was presented to the court upon affidavits, and objection to jurisdiction overruled, and defendant has preserved the objection in its answer to the merits of the case.

From the record it appears that Earnest had been in the employ of the defendant for a period of 16 years. Among the duties that he had to perform, and did perform, for the defendant was to make, in the name of defendant, con-

tracts with the farmers in the vicinity for the growing of the corn. In these contracts he agreed with the parties as to the price to be paid for the corn; agreed upon a fixed time of delivery; delivered to the farmers the proper amount of seed to be planted upon the number of acres agreed upon; when the time came for harvesting, he delivered to the farmers the sacks in which the corn was to be placed before delivery; he received and weighed the corn at North Loup and shipped it to the defendant at Waterloo; he made records of the weights; reported the weights; drew upon the defendant for the amount due to the farmers upon their contracts; examined the corn and passed upon it, to a certain extent, when it was delivered; made reports upon blanks furnished by the defendant as its agent; and defendant, in letters to some of the farmers in the vicinity, advised them as to the care of the corn, and that if they were in doubt to confer with its agent, Mr. Earnest, at North Loup.

Many other facts and circumstances are disclosed by the record, indicating that Earnest was required to exercise his own judgment and discretion in the performance of his duties pertaining to the business of the defendant in Valley county. The rule of law applicable is well stated in *Brophy v. Fairmont Creamery Co.*, 98 Neb. 307, wherein it is held: "An agent of a domestic corporation, whose principal place of business is in another county in this state, whose contract of employment demands of him the exercise of judgment and discretion in the business affairs of his principal, and who has charge of the property and business of his principal in the locality where he is stationed, is 'a managing agent,' upon whom service of summons may be made." The facts in this case unmistakably show that Earnest was the managing agent upon whom service of summons could be properly made.

The contract which gives rise to this controversy was entered into by the parties to this action in January, 1920. Among other things, it provided that defendant should furnish seed corn to plant 15 acres of Early Minnesota

sweet and 25 acres of Sanford Flint corn; that plaintiff should prepare the ground, plant the corn in season, cultivate the crop, harvest the same in season, and deliver the entire merchantable crop raised on or before January 1, 1921. The contract required the corn, when delivered, to be in a bright, well cured, merchantable condition; the corn to be well sorted at the sheller and to have a germinating quality which would test 85 per cent. for sweet corn and 90 per cent. for field corn. It further provided: "When field corns are delivered the market elevator price at the point of delivery shall be due and the balance be due as soon as a proper test for germination has been made. * * * Provided, that in case said vine seeds or corn are not in a merchantable condition, as above provided, at the time of delivery, first party (defendant) may, at his option, reject any part or all of such seeds or corn." There were no other provisions in the contract as to when the corn should be tested for germinating qualities. The contract further provided that plaintiff should receive $4.25 a hundred pounds for the sweet corn and $1.75 a bushel for the Sanford Flint corn. It was agreed that plaintiff delivered 38,300 pounds of Early Minnesota sweet corn and 1,031.73 bushels of Sanford Flint corn.

In November, 1920, the defendant wrote to plaintiff, stating that the previous year it had sustained a heavy loss because much of the corn grown in the vicinity of Ord was not delivered in a merchantable condition, requesting the plaintiff to observe the conditions of his contract as to caring for the corn, and ending the letter in the following language: "Mr. J. F. Earnest, who is acting as our agent at North Loup, will be very glad to cooperate with you in every possible way, and in cases where there is the least doubt as to the quality, suggest that you get in communication with him, and together select a representative sample from the crib-run, sending same to us for germination test." About the 1st of December plaintiff went to see defendant's agent, Earnest, at North Loup and asked for bags in which to deliver the corn. Earnest asked

for samples of the corn to be sent to the defendant and furnished plaintiff with small bags and receptacles for samples of the corn. Plaintiff procured and delivered samples of both varieties of the corn to Earnest, who forwarded them to defendant at Waterloo. Defendant tested the samples and found them satisfactory, and so reported to plaintiff. Several times thereafter plaintiff asked Earnest for sacks in which to deliver the corn, but they were not furnished until some time in March, 1921. Defendant claims that it was unable to obtain the sacks at an earlier date. Within a few days after receiving the sacks plaintiff shelled and delivered the corn to defendant at North Loup.

There is a conflict in the evidence as to the condition of the corn when delivered. Evidence on behalf of plaintiff is to the effect that the corn was bright, dry and in a good, merchantable condition, and, on behalf of the defendant, that the corn was damp, not of good color, some of it dirty and some rotten or moldy. Evidence for both parties shows that there was ice on the outside of some of the sacks, due to sleet or rain which had fallen after the corn was sacked, and which adhered to the outside of the sacks. Plaintiff was docked 300 pounds on his corn on account of this ice. Defendant's agent caused the samples of the corn to be tested for moisture content. He claims that, for this purpose, he took samples from six or eight bags, and that some of the bags were from those that were wet and some were from others, and that the samples tested showed 22 per cent. of moisture. There is some evidence that corn should not be shipped that possesses more than 16 per cent. of moisture content. The evidence on behalf of plaintiff was to the effect that Earnest admitted that he had selected the corn for the moisture test from the wet or damp sacks. The corn was shipped to the defendant and received by it at Waterloo about March 20. On the 22d of March defendant wrote to plaintiff: "In reference to your crop of Sanford Flint corn, sample of which has just reached the writer's desk this morning, beg to state that this does not look to be suitable for seed purposes in any respect what-

ever. Its appearance alone would condemn it as seed corn, and we don't believe it will grow over 65 or 70 per cent. if the grains are taken just as they run. We are not able to use the corn for seed purposes." And again, on April 16, 1921, the defendant wrote to plaintiff: "We have already written you about the Sanford corn you sent in here, and we are inclosing herewith papers showing the weights on this corn and also on your sweet corn. This sweet corn we have just had to run over our mills to keep it from molding, it is awfully wet and utterly useless for seed purposes, and we don't know what to do with it. It could be dried so as to save it if we had our drier in shape. * * * Your Sanford will not keep a great while. We have written you in reference to this." Some time after the middle of April, defendant made germination tests of both varieties of the corn, and the testimony as to these tests is to the effect that the corn was far below the contract requirement in germinating qualities.

Defendant now contends that the testing of the samples of the corn made in December was simply a preliminary test and was not to be determinative of the germinating qualities of the corn; that the contract contemplated that the corn should be tested for germination purposes after it had been shipped to defendant at Waterloo. Defendant charges in its answer that plaintiff did not select and furnish defendant with a fair, average sample of the corn so grown, but that, for the purpose of deceiving defendant and in an effort to obtain acceptance by defendant of the seed corn so grown, he selected samples of only the very best of such corn, which he polished and prepared, to the end that it conform to the terms of the contract as being in merchantable condition for seed purposes; and also that the final acceptance or rejection of the seed corn, according to the terms of the contract, and in accordance with the general custom of the seed business, known to and relied upon by the parties, was dependent on an inspection of such seed corn, as to its condition and the results obtained by germination tests thereof at Waterloo,

Nebraska, within a reasonable time after its arrival at said place.

A careful examination of the contract does not disclose whether the tests for germination purposes were to be made at Waterloo or elsewhere; nor does it fix a time when they should be made; nor does the contract mention any preliminary test, nor what the occasion was for any preliminary test. If the corn was not to be tested until after it had been received at Waterloo, we are unable to perceive any occcasion for the tests that were made in December previous to its shipment. It could serve no purpose; it would fulfill no terms or conditions of the contract.

We are of the opinion that, in the absence of any specified time or place for the test to be made, it was competent for the parties to have the test made prior to the delivery of the corn at North Loup, and that when the defendant requested samples of the corn for testing purposes, if fair, average samples were furnished and found to be satisfactory, and if the corn delivered was in accordance with the samples, then the contract was complied with, and plaintiff would be entitled to the contract price. However, if plaintiff did not furnish fair, average samples of the corn, and it subsequently developed that the corn delivered did not possess the germinating qualities equal to those disclosed by the samples, or at least equal to the contract requirements, then defendant would not be bound to accept the corn at the contract price. This question was raised by the pleadings, and defendant offered evidence which tended strongly to support its contention that the corn delivered was not in accordance with the samples which had been previously furnished. Whether or not the corn delivered was equal in germinating qualities to the samples, or at least equal to the requirements of the contract, was a question of fact for the jury which should have been submitted to them by proper instruction. Although an instruction along these lines was requested by defendant, none was submitted by the court, but instead thereof the court, by its ninth instruction, directed the jury that, if

plaintiff delivered the corn in question at defendant's warehouse in North Loup and defendant received such corn without objection and thereafter shipped the same to Waterloo, Nebraska, such conduct on the part of the defendant would constitute an acceptance of the corn under the contract, and it could not rightfully thereafter refuse to pay for the corn on the ground that it did not possess the qualities provided by the contract.

It is apparent that the germinating qualities of the corn cannot, ordinarily, be determined by its appearance, or by a casual inspection. When defendant received the corn at North Loup, it had a right to assume that the germinating quality of the corn would be equal to that of the sample previously furnished defendant, or at least that the corn would comply with the requirements of the contract in that respect. If, in fact, the corn delivered was not equal in germinating qualities to the sample and was not equal in quality to the contract requirements, and defendant was deceived and induced to receive the corn by reason of the furnishing of a sample which was not a fair, average sample of the corn, then the receipt of the corn would not constitute an acceptance on the part of the defendant, and would not preclude it from insisting that the corn should meet the requirements of the contract. Under the circumstances, the giving of the instruction was erroneous, and it was likewise error to refuse to instruct the jury that the receipt of the corn at North Loup would not be binding and constitute an acceptance on the part of the defendant, unless the sample previously furnished had been a fair, average sample of the corn.

The failure to give the requested instruction and the giving of the ninth instruction were both prejudicial to the defendant, and for these errors the judgment of the district court must be, and is, reversed, and the cause remanded for further proceedings.

REVERSED.

ARTHUR M. HOUSEHOLDER, APPELLEE, V. PETER E. NISPEL ET AL., APPELLANTS.

FILED NOVEMBER 16, 1923. No. 22585.

1. Contracts: BREACH: LIABILITY. A party to a contract cannot wilfully and in bad faith disable himself from complying with any condition thereof, nor fraudulently prevent performance by the opposite party of any of its conditions, and thereby derive any benefit or escape any liability.
2. Vendor and Purchaser: BREACH OF CONTRACT: MEASURE OF DAMAGES. In an action by a vendee against the vendor for breach of a contract of sale of land, the measure of recovery is the difference between the contract price and the market value of the land at the time of the breach, plus any amount the vendee may have paid on the purchase price.

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

Bernard McNeny, James S. Gilham and *Stiner & Boslaugh,* for appellants.

F. J. Munday, contra.

Heard before LETTON, ROSE and GOOD, JJ., SHEPHERD, District Judge.

GOOD, J.

This is an action by a vendee to recover damages for a breach of contract for the sale of land. Plaintiff had the verdict and judgment thereon, and defendants have appealed.

On October 6, 1917, plaintiff and defendants entered into a written contract, by the terms of which defendants sold and agreed to convey to plaintiff, on or before March 1, 1918, the west half of section 9, township 14, range 44, in Deuel county, Nebraska, for a consideration of $28,000. At the making of the contract plaintiff paid $4,000 of the purchase price and agreed to pay $12,000 on March 1, 1918, and to then secure the remainder by a mortgage upon the land. At the time of the making of the contract defendants did not own the land and plaintiff was so informed. The

land, in fact, was owned by Ritchie and Townsend, but plaintiff had no knowledge of the names or residence of the owners. The following clause was inserted in the contract: "It is further agreed that this sale is made subject to approval of owner." On October 17, 1917, the defendants entered into a contract with one Rhodes, whereby they sold and agreed to convey to him 800 acres of land in Deuel county, which included the land they had previously sold to plaintiff. On October 22, 1917, defendants entered into a contract with Ritchie and Townsend, whereby the former purchased from the latter the 800 acres of land which they had contracted to sell to Rhodes. On or about the 1st of November, 1917, the defendants sent a check to plaintiff for $4,000, which he received and cashed. Prior to March 1, 1918, title to the land in question was conveyed to said Rhodes.

Plaintiff in his petition sets forth the foregoing facts and alleges that defendants, by the contract entered into, impliedly agreed to use their best efforts to induce the owners of the land to approve the contract of sale to plaintiff, but that defendants never presented said contract of sale to the owners of the land, nor informed them thereof; that, for the purpose of inducing plaintiff to accept a return of the $4,000 which he had paid, defendants falsely and fraudulently represented to him that they were unable to procure the approval of the contract by the owners of the land; that said owners had sold it to other parties, so that the contract could not become binding; that, relying upon such representations, he accepted the return of the $4,000 previously paid, and did not tender further compliance with the terms of the contract because he did not discover the fraud practiced upon him until "towards the spring of 1919;" that because of the fraud practiced plaintiff's assent to the abandonment of the contract was not binding upon him. He claims damages for the loss of his bargain in the sum of $6,400.

The defendants admit the making of the contract, the payment of $4,000 by plaintiff and the return thereof to

plaintiff, and deny all the other allegations of the petition, and for affirmative defenses they allege that on the 6th of October, 1917, defendants were authorized to sell all of section 9, and the northeast quarter of section 8, in township 14, range 44, but were not authorized to sell any less quantity than the whole of the 800-acre tract; that at that time negotiations were pending between defendants and the owners, whereby they were expecting to acquire title to said 800 acres of land by trading in therefor, as part payment, a 320-acre tract of land owned by them; that Ritchie and Townsend, the owners of said 800-acre tract, were not willing to trade unless a purchaser could be found for the half section of land which defendants desired to exchange as a part of the purchase price; that the owners of the 800-acre tract had a prospective purchaser for said 320-acre tract; that at the time of the making of the contract with plaintiff all of these facts were made known to him, and the clause in the contract, "This sale is made subject to approval of owner," was understood and agreed and intended by the parties to refer to the negotiations between defendants and the owners of the land for the purchase thereof by defendants. They allege that they put forth every effort possible to complete the purchase of the 800-acre tract under the negotiations pending between them and the owners thereof, but were unable to do so, and that by reason thereof the contract never became operative or effective. For a second defense, defendants allege that on the 11th of October, 1918, an accord and satisfaction was entered into between plaintiff and defendants for the release of all claims on the part of the plaintiff against the defendants, including the claim for damages by reason of the alleged breach of the contract, by virtue of which agreement they paid to plaintiff the sum of $200, which he accepted in full payment and release of all claims against the defendants. The reply admits the receipt of $200 in October, 1918, but alleges that it was in settlement of other matters, and did not refer to plaintiff's claim for damages for breach of the contract, and denies all the other allegations of the answer.

The jury returned a verdict for plaintiff in the sum of $2,400.

Defendants' first assignment of error is that the petition does not state a cause of action. They argue that the contract was a conditional one, depending upon the will of a third party, the owner of the land, whose assent to the contract of sale was never obtained; that before the time had arrived for the performance of the contract there had been a mutual rescission thereof; that plaintiff cannot base a cause of action upon the ground that the rescission was procured by fraud, without first returning that which was procured by virtue of the rescission and a tender of performance of the original contract on the part of the plaintiff. We do not think this contention is sound.

The rule is well settled that a party to a contract cannot take advantage of his own act of omission to escape liability thereon, and, where he procures a breach of the contract, he can neither recover damages for nonperformance by the adverse party or interpose the breach as a defense to an action upon the contract. The principle has been well expressed by Justice Brewer in the leading case of *Dill v. Pope*, 29 Kan. 289, in the following language: "A party to a contract who prevents the performance of any condition can neither claim benefit nor escape liability from the failure of such condition. * * * The rule is clear and well settled, and founded in absolute justice, that no party to a contract can either prevent performance by another of any of its conditions, or, on the other hand, disable himself from complying with any condition, and derive any benefit or escape any liability thereby." Other authorities announcing the same principle are *Case v. Beyer*, 142 Wis. 496; *Thatcher v. Darr*, 27 Wyo. 452; *Teachenor v. Tibbals*, 31 Utah, 10; *Marvin v. Rogers*, 53 Tex. Civ. App. 423; *Wolf v. Marsh*, 54 Cal. 228; 13 C. J. 647, sec. 721.

The petition sufficiently sets forth that defendants failed and neglected to present the contract to Ritchie and Townsend, the owners of the land, for their approval, and that, without their knowledge of such contract, defendants

procured a conveyance to themselves by the owners, thus putting it out of the power of the then owners of the land to approve the contract, and when defendants had acquired the right to a conveyance of the land to themselves, there was no longer any condition in the contract to be performed. They had agreed to convey, subject to the approval of the owner, and when they became the owners their agreement to convey became absolute. True, they afterwards procured a rescission or abandonment of the contract; but, according to the allegations of the petition, this was done by their own fraud, which fraud was not discovered by plaintiff until long after the time for performance. The defendants could not, by their own fraud, acquire any right, nor avoid any liability they had previously incurred; nor can they now urge that the plaintiff, in order to recover, must first tender back the $4,000 and tender performance of the original contract, for the reason that defendants had made performance of the contract impossible. It would have been a vain and useless thing for plaintiff to have returned the $4,000 and tender performance of his contract after he had discovered the fraud. Had he repaid the $4,000 to the defendants and tendered the $12,000 and offered to execute a mortgage, it would not have availed anything, because it was then out of the power of the defendants, by their own act, to fulfill the terms of their contract with plaintiff. If the $4,000 had been returned again to the defendants, plaintiff would have been entitled to recover $4,000 more than he would otherwise have been entitled to. The law does not require the doing of a vain and useless act.

In *Jones v. Walker*, 13 B. Mon. (Ky.) 163, the rule is stated in this language: "He who himself prevents the happening or performance of a condition precedent, upon which his liability, by the terms of the contract, is made to depend, cannot avail himself * * * of a nonperformance." And again in *Williams v. Bank of the United States*, 27 U. S. *96, it is said: "If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his

responsibility is to arise, dispense with, or by any act of his own prevent, the performance, the opposite party is excused from proving a strict compliance with the condition."

By the allegations of the petition, it appears that defendants, by their own wrongful conduct, placed themselves in a position where they could not perform the contract on their part, and also, by their wrongful conduct, prevented the plaintiff from performing the conditions upon his part to be observed. The allegations of the petition are sufficient to entitle plaintiff to relief.

It is next contended that the verdict is not sustained by the evidence. We have examined the record with care and think that every material allegation in the petition has ample evidence in the record to support it. It is true that the evidence on the part of defendants tends to sustain the allegations of the defenses, as set forth in their answer, but on both the affirmative defenses pleaded by defendants the evidence is in conflict, and the verdict of the jury upon those questions is conclusive.

Defendants complain of instruction No. 2. The instruction recites a number of salient facts which are not disputed and so informs the jury. It then points out the material allegations of the petition which plaintiff must prove before he can recover, and informs the jury that, if any of these material allegations have not been established by the greater weight of the evidence, they must find for the defendants. It then sets forth the two affirmative defenses, alleged by defendants, and informs the jury that, if either of these defenses is sustained by the weight of the evidence, plaintiff cannot recover. Defendants criticize the instruction because it does not set out other admitted facts in the record, but we do not find that defendants were in any wise prejudiced, or could have been prejudiced, by the failure to set forth all of the admitted facts, nor could it have injured them because attention was called to certain facts that were uncontroverted in the testimony. We find no error in the instruction, either prejudicial or otherwise.

Defendants also complain that instruction No. 3 does not give the correct rule for the measure of damages in an action upon an abandoned conditional contract, but they do not point out any error in the instruction. It informs the jury that if they found for plaintiff the measure of his recovery would be the difference between the contract price and the market value of the land at the time of the breach of the contract. This is a correct statement of the rule applicable to the case.

We find no prejudicial error in the record. The judgment of the district court is

AFFIRMED.

A. L. DENT, APPELLEE, V. P. R. JOHNSON, APPELLANT.

FILED NOVEMBER 16, 1923. No. 22548.

1. Vendor and Purchaser: FAILURE TO PERFORM. A vendor in a contract for the sale of real estate, in order to insist upon a forfeiture of part of the purchase money paid, must himself be in position to convey; and where by his own act he rendered himself incapable of doing so at a time when vendee was ready, able and willing to perform, he must restore the purchase money paid.

2. ———: ———: RECOVERY OF PURCHASE MONEY. Where vendee is able and willing to perform and vendor is unable to convey for want of title, the vendee may recover the purchase money paid.

3. ———: ———: ———. Even though vendee was in default, if vendor by his own act, before a forfeiture of the contract might be declared, or, as in this case, where no forfeiture was provided for in the contract (only a provision for liquidated damages), puts it out of his power to convey, vendee may recover the purchase money paid.

APPEAL from the district court for Hitchcock county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Lambe & Butler and *Walter D. James*, for appellant.

Cordeal & Colfer, contra.

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

REDICK, District Judge.

Action to recover $1,000 paid upon a contract for the sale and purchase of land in Hitchcock county, based upon the alleged failure of the vendor to convey. The facts are substantially as follows: Defendant Johnson, prior to September 13, 1919, had a contract for the purchase of land from Crews for $11,200, upon which he had paid $1,000 cash and was to pay $4,700 March 1, 1920, and give a mortgage upon the land for the balance, on five-year terms. On September 13, 1919, he entered into a contract for the sale of the land to plaintiff for $12,600, payable, $1,000 cash, $5,300 March 1, 1920, the remainder secured by mortgage on five years' time. Plaintiff paid the $1,000 cash payment, went into possession of the land February 28, 1920, did not make the payment March 1, or at any other time, and the contract was never completed. On March 10 or 11 defendant Johnson surrendered his contract to Crews, but was not repaid the $1,000. Plaintiff remained in possession of the land, and on or about October 1, 1920, without any offer to surrender possession, attempted to rescind his contract with Johnson, and demanded repayment of $1,000 which he had paid thereon, and, upon Johnson's refusal, brought this action. Trial to a jury resulted in verdict and judgment for plaintiff, and defendant appeals.

The dispute is as to whether the plaintiff or the defendant was responsible for the failure to carry out the contract, each contending that he was ready, able and willing to perform, but that the other was not, and the testimony upon this question is very conflicting. We think, however, that if the jury believed the testimony of the plaintiff and that of his banker, they were justified in finding plaintiff was willing and able to secure the money necessary to carry the deal through; at least it was a question for the jury, and we cannot say their finding was manifestly wrong. Plaintiff testified that he made an appointment with de-

fendant for March 11 at the bank in Culbertson for the purpose of closing the transaction, but that defendant did not show up. Defendant admits the appointment, but says it was for the 10th, and that he went to Crews' house and plaintiff did not appear there, but he made no search for him; he did not go to the bank where previous meetings had taken place.

Assuming, then, that plaintiff was able to complete the contract, we find that defendant, instead of giving him the opportunity to do so, on March 10 or 11 delivered up his contract to Crews and surrendered all claim to a conveyance of the land. By that act he abandoned the contract with plaintiff and placed it out of his power to perform it. He was not the owner or entitled to the possession, and therefore it was not necessary for plaintiff to tender the posesssion to him, which would be a vain thing in view of the fact that defendant had surrendered all rights in the land. The defendant is in the attitude of insisting upon a forfeiture of the money paid, when he is not in position to comply with the contract himself. This he is not entitled to do. *Platte Land Co. v. Hubbard*, 12 Colo. App. 465; *Seiberling v. Lewis*, 93 Ill. App. 549, where vendor executed a declaration in trust in favor of third parties, thereby putting it out of his power to convey; also *Bidwell v. Rice*, 19 Wash. 146; *Wells v. Page*, 48 Or. 74, where the same rule was announced, even though vendee was in default. In *Eaton v. Redick*, 1 Neb. 305, it was held that failure of vendee to perform did not terminate the contract, and a subsequent sale of the property by the vendor amounted to a rescission by him whereby he became liable for the purchase money paid. See, also, *Durland Trust Co. v. Augustyn*, 110 Neb. 800.

Considerable evidence was introduced tending to prove that on March 11, 1920, after defendant had surrendered his contract, the plaintiff leased the land from Crews for the year 1920 for $1,000, it being agreed at the time between plaintiff and Crews that, if plaintiff bought the land at $12,600, the $1,000 rent money would be credited upon the pur-

chase; that about October 1, 1920, the plaintiff did purchase the land from Crews and paid therefor $11,600 cash in addition to the $1,000 rent already paid. In this situation plaintiff's possession was under the lease and subsequent purchase from Crews at the time of his attempted rescission and demand for the repayment of the $1,000 from defendant, and this would furnish an additional reason why he was not required to surrender possession to defendant. But all testimony as to these transactions between plaintiff and Crews, after having been received, was stricken out by the district judge and the jury instructed to disregard it; so, for the purposes of this appeal, those facts cannot be considered. Defendant also offered evidence that by his contract with Crews he was to purchase the land at $11,200, which was ruled out by the court; and the defendant alleges error on such ruling, as well as upon the instruction of the court to disregard the evidence above referred to. In this behalf defendant contends that the evidence of the price he was to pay Crews was material as tending to show defendent's willingness to carry out the contract, the argument being that it showed a profit to him on the contract with plaintiff of $1,400, and it is not to be presumed that he would willingly forego that profit. But the undisputed fact remains that he abandoned the contract and put himself in a position where he could not perform it, and we think that in the face of those facts such contention could not be maintained. By the same reasoning the transactions between Crews and the plaintiff after defendant had surrendered his contract were immaterial. By that act the rights of the respective parties became fixed. It is difficult to understand the motive which prompted defendant to surrender his contract with Crews, but it seems clear to us that, if he desired to hold plaintiff, he should have at least maintained a position which would have enabled him to comply with the contract.

A number of objections to the instructions given and refused by the trial court are urged upon our attention; especially one in which the jury were instructed that, be-

fore defendant could retain the money deposited by the plaintiff, he must have been able to perform and offered to perform his part of the contract within a reasonable time. We do not deem it necessary to discuss the questions thus presented, for the reason that it appears beyond dispute that defendant abandoned the contract. While delivery of title and payment of the consideration were acts to be performed concurrently, it was unquestionably the duty of defendant to be in a position to convey at the time stipulated; that is, there was nothing in the contract between him and the plaintiff which entitled defendant to rely upon performance by the plaintiff to put him in a position to convey, but rather it was defendant's duty to secure the title from Crews and be prepared to convey to the plaintiff. This, we think, was the effect of the instruction complained of, and it was therefore correct. The court correctly instructed the jury that, if both parties failed to perform their mutual obligations at the time stipulated, strict performance as to time was waived, and the contract would remain unimpaired for a reasonable time thereafter, and the jury must have found that Johnson's repudiation of the contract eleven days later was too soon. Defendant was never in position to convey and by his own act rendered himself incapable of doing so.

From a careful consideration of the record and briefs, we are of opinion that plaintiff is entitled to recover, and that no prejudicial error is shown.

AFFIRMED.

ROSS P. CURTICE COMPANY, APPELLANT, V. ESTATE OF OWEN L. JONES, APPELLEE.

FILED NOVEMBER 16, 1923. No. 22554.

1. Trial: MOTION FOR DIRECTED VERDICT. Upon motion by defendant for directed verdict at the conclusion of the plaintiff's evidence, the motion must be treated as an admission of the truth of all material and relevant evidence admitted and all proper inferences to be drawn therefrom, and if the evidence tends to sustain the allegations of the petition, and the petition states

a cause of action, the case should be submitted to the jury. *Wheeler v. Abbott*, 89 Neb. 455.

2. **Attorney and Client: AUTHORITY OF ATTORNEY: PRESUMPTION.** Ordinarily the power of an attorney to act for his client in an action is to be considered valid and sufficient till disproved, not void or insufficient until proved. And this applies to the power of an attorney in dealing with claims or prospective claims against an estate which he is actually engaged in settling.

APPEAL from the district court for Gage county: LEONARD W. COLBY, JUDGE. *Reversed.*

Stewart, Perry & Stewart and *Hazlett, Jack & Laughlin*, for appellant.

McCandless & McGuire, contra.

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

SHEPHERD, District Judge.

Owen L. Jones purchased an Ampico Franklin piano from the Ross P. Curtice Company, appellant, on a conditional sale contract note, a note of the kind long upheld by the courts and now generally used throughout the state. Shortly afterward the company shipped the instrument with bench, cabinet and records to Jones at Wymore, Nebraska, where the latter was then staying. It was received there and delivered, as appellant contends, to Owen L. Jones, through his brother, R. J. Jones. It is established that this brother receipted to the Chicago, Burlington & Quincy Railroad Company's agent for it, "O. L. Jones, by R. J. Jones," and thereupon proceeded to load the piano on a wagon for the purpose of hauling it to the house where Owen L. Jones then was. In the loading, however, the instrument fell to the ground and was considerably damaged. R. J. Jones immediately telephoned the Curtice company (the telephone conversation was excluded by the court) and arranged for the return of the piano to it for repairs. This was promptly done. Owen L. Jones died shortly thereafter. Upon completion of the repairs the company wrote the attorneys for

his estate informing them of the fact and requesting advice as to the piano's disposition. The attorneys wrote back advising the company to file its claim for repairs, saying that the piano had been damaged in shipment and that the estate could not be compelled to take it, and suggesting that it be sold. In an earlier letter they stated that they were the attorneys in charge of the settlement of the estate, requested appellant to take proper care of the piano, and advised it that the bench, etc., were subject to the company's order. The court ruled out both of these letters.

In due course, no settlement having been made, appellant filed claim against the estate of the deceased, both for the price of the piano and for its repair bill. The claim was disallowed in the county court. The district court directed a verdict for the defendant on appeal; and the case is now here for review.

Other pertinent facts are that the said Owen L. Jones signed the contract note, "O. L. and R. J. Jones, by Owen L. Jones," and paid $200 on it, $100 in cash and $100 in services; also, that the bench, cabinet and records had never been returned to the appellant.

In the amended petition the appellant declared on the contract note and on the bill of repairs in separate counts, setting out the note in *hæc verba* and duly making all necessary allegations as to the facts above recited. Granting that the contract is valid and enforceable, the petition fully stated a cause of action on each of the two counts referred to. The appellee, Estate of Owen L. Jones, deceased, answered by its administrator, admitting the execution of the contract note and that Owen L. Jones had paid $200 thereon, and averring that appellant had been fully paid all sums due on said contract, and that the piano was never delivered to said Jones, but retained in the possession of the appellant. The answer further states that Jones was ill and physically and mentally incompetent to transact business when the contract was entered into, and that the piano "came to Wymore and was shipped back to the plaintiff" without his knowledge. The answer also generally

denies the second cause of action. The appellant filed reply denying all of the allegations of the answer except those admitting the allegations of its petition.

Complaint is made because the court refused to permit William A. Howland, treasurer of the plaintiff company, to testify concerning a telephone call which he received from R. J. Jones, of Wymore, Nebraska, requesting that certain repairs be made on the piano; also in refusing to receive in evidence that portion of the deposition of Marshall E. Johnson concerning a telephone call which he received from R. J. Jones, in which said Jones stated that the piano had been damaged and was being returned to the plaintiff for repairs; also because the court directed a verdict for the appellee, defendant.

We think the letters in question should have been received. They were in the ordinary course of business, and tend to show, in connection with the other evidence, that the company took back the piano to repair it, and not to recover it upon condition broken, or to disavow the sale, or to assert title or right of possession. Even if we concede that the attorneys were not agents of the estate, the appellant would seem entitled to the evidence offered for the purpose of showing the character of its possession. One of these letters states that said attorneys were in charge of the settlement of the estate. It is usually so in practice. Attorneys of an estate are peculiarly its guardians against claims, particularly advised of the facts in relation thereto, particularly careful not to concede or admit. This was a claim which was denied and which would obviously be contested. The letters are important. In one of them it is suggested that the company take proper care of the piano, inferentially showing, or tending to show, that the estate had an interest in it. In the other it is advised that a claim for repairs be filed against the estate. Ordinarily the power of an attorney to act for his client in an action is to be considered sufficient till disproved, not void or insufficient until proved. This applies to the power of an attorney in deal-

ing with claims or prospective claims against an estate which he is actually engaged in settling.

But, without regard to this, we are of opinion that there was enough in the evidence received to entitle the plaintiff to go to the jury. The contract note was a good conditional sale contract. *Osborne Co. v. Plano Mfg. Co.*, 51 Neb. 502; *Racine-Sattley Co. v. Meinen*, 79 Neb. 33. When plaintiff filed its claim against the estate it elected to, and did, make said sale absolute, at least if delivery had been made to Jones in his lifetime and the piano had not been repossessed on claim of right of possession. *Mathews Piano Co. v. Markle*, 86 Neb. 123. It appears that Owen L. Jones not only made payment on the contract, but directed its delivery at Wymore. The witness Johnson testified: "He wanted to know at the time if we would lay the piano down f. o. b. Wymore, which I agreed to." This evidence, though of an oral conversation before the execution of the contract, was not inconsistent with any of the contract terms, and proper as indicating the place of delivery which was not fully fixed therein. The written contract shows that the piano was to be kept at Wymore. The testimony shows that Owen L. Jones was there when it arrived. The brother who received it had been with him in Lincoln during a part of the negotiations for its purchase. He was the Jones whose name Owen L. affixed with his own to the contract note. He receipted for the instrument in the name of Owen L. He said when it was turned over to him by the station agent that he was taking it to Owen L. at the house where he then was. All this is enough, and more than enough, to tend to prove that delivery was made to Owen L. Jones. There was further direct evidence that the appellant company had the instrument back for repairs only, and has held it ever since subject to the order of the estate. It is undisputed that there remains due on the note $725, and that the expense of repairs and freight was $34.

It is entirely possible that the estate could maintain its defense of nondelivery by the testimony of R. J. Jones and others. It is possible that its further defense on the ground

that Owen L. Jones was incompetent to contract could be made good. We decide only that the appellant made a case for the jury. This conclusion is amply sustained by authority. Upon motion by defendant for directed verdict at the conclusion of plaintiff's evidence, such motion must be treated as an admission of the truth of all material and relevant evidence admitted and all proper inferences to be drawn therefrom, and if the evidence tends to sustain the allegations of the petition, and the petition states a cause of action, the case should be submitted to the jury. *Wheeler v. Abbott*, 89 Neb. 455; *Oleson v. Oleson*, 90 Neb. 738. Citations to this effect might be multiplied, but the rule is so well recognized as to render this unnecessary.

For the reasons above stated, the court holds that the court below was in error in directing a verdict, and that the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

AVINGTON A. EDGINGTON, APPELLEE, V. JAY H. HOWLAND ET AL., APPELLANTS.

FILED NOVEMBER 16, 1923. No. 22593.

1. **Appeal**: AFFIRMANCE. Where, in an action at law, the evidence is sufficient to support a finding of fact by a trial court, the supreme court will not disturb such finding, even though a different conclusion might have been reached had the case been before it in the first instance.
2. **Deeds**: VALIDITY: DEED IN BLANK. If a deed in blank be delivered to a certain person without authority to insert the name of any one except himself as grantee, it is voidable in the hands of a third person who knows the facts, even if it passed for value; provided that, if such third person be an innocent purchaser, such deed will be upheld.
3. **Evidence** examined, and *held* sufficient to support the finding and judgment appealed from.

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

Hugh A. Myers, for appellants.

Carl E. Herring, contra.

Heard before LETTON, GOOD and ROSE, JJ., SHEPHERD, District Judge.

SHEPHERD, District Judge.

The appellee, who was the plaintiff in the district court, declared on a covenant of warranty against incumbrances, and obtained judgment in full for the amount of his claim. The appellants bring the case here for review, asserting that the judgment of the court below (the cause was tried without jury) was not sustained by the evidence, was contrary to the evidence, and was contrary to law.

About the 29th day of December, 1919, appellants, who were defendants in the lower court, traded properties with one Barnhardt and conveyed to him a certain acreage by warranty deed in blank. It was agreed that Barnhardt was to pay the special city taxes on the property thus conveyed to him, but by inadvertence this agreement was omitted from the deed. In March following the said Barnhardt, representing himself to be an agent for the sale of said acreage, sold it upon a day's negotiation to the appellee, entering the latter's name as grantee in the described blank deed and delivering said deed to close the deal. The appellee testified with apparent candor and directness that he had no knowledge of any oral agreements as to taxes or otherwise between the appellants and Barnhardt; that he did not know that he was taking title by a deed made in blank; that he did not notice the date of the deed; and that he did not inquire as to who the grantors were. It appears that he depended on the abstract, except as to tax conditions, which at that time (shortly after the Omaha courthouse fire) were not being certified by the abstractors. He said that he had said abstract examined by his attorney, and upon favorable opinion paid his money and took his deed, observing only that it was a deed of warranty. There were special assessments for grading against the property.

In connection with the foregoing statement of facts, it

should be further said that the appellants insist that they gave the deed in blank, not only upon condition that Barnhardt should pay these special assessments, but also with the understanding that he was to insert his own name as grantee. However, this is not undisputed in the evidence. Though Barnhardt was not sworn as a witness, the appellants' own testimony contains enough to justify the trial court in finding to the contrary, and in finding as a matter of fact that the makers of the deed knew that Barnhardt was taking it in blank in order that it might be passed on to the customer to whom he might sell. It appears that a first deed was made by the appellants, in which Barnhardt duly appeared as the grantee, but that the latter did not want it so, and had the deed in blank made and delivered in its stead. It sounds simple to say that Barnhardt did not want a certain deed because his name appeared in it as grantee, but did want another deed precisely like it, except in blank, so that he might write himself in as grantee. If he wanted it in blank so that he could write in either himself or some one else as grantee, there would be some reason in asking as he did and some reason in acceding to his request. That was probably the way it was; for when the witness Howland (one of the appellants) was on the subject of the two deeds, and had explained that the deed finally given was a second one made in blank to take the place of a first regularly designating Barnhardt as the grantee, he testified as follows: "It was in the agreement in the first place that he was to assume the grading tax, or *whoever held the property.*" Undoubtedly "he" refers to Barnhardt. And just as certainly "whoever" refers to the person to whom Barnhardt might sell. This indicates a contemplation on the part of the appellants that the grantee of their deed might turn out to be a customer of Barnhardt, just as transpired. We repeat that the court might properly so have found. Where the evidence is sufficient to fairly support a finding of fact by a trial court the supreme court will not disturb such finding, even though it might have reached a different conclusion had the case been before it

in the first instance. Moreover, where one of two innocent parties must suffer because of the wrongful act of a third person, courts commonly hold that that one must bear the burden who placed it within the power of the third person to do the wrong. Putting it most favorably for the appellants, they turned over their blank deed to Barnhardt, carelessly omitting to specify therein that he was to pay the grading tax, and thereby enabled him to guilefully profit at their expense or at the expense of his customer.

An interesting question is whether or not the deed itself, antedating the sale by at least two months, was notice to appellee requiring him to ascertain from the appellants that Barnhardt had their authority to fill in his name as grantee, or to assume the burden of the reservation as to taxes above referred to. And that comes down, in analysis, to whether or not such a deed would convey any title. This question only becomes material upon the hypothesis that the appellants authorized Barnhardt to insert only his own name in the blank space left for the grantee, and that the court so found. The discussion of the parties is largely upon this point.

The English doctrine was, and is, that a deed of the kind which we are considering does not become the valid and subsisting deed of the grantor till the name of the grantee is inserted, and that an agent cannot insert the grantee's name in the absence of the grantor unless thereunto authorized in writing. Some of the states have applied this rule in cases where fraud is involved, as Alabama, Georgia, Texas, Illinois, and California. *Upton v. Archer*, 41 Cal. 85, and *Barden v. Grace*, 167 Ala. 453, are cases in point.

Many states, less inclined to the English doctrine, hold that where the name of the grantee is written in by a person who has neither written nor oral authority so to do, or where the deed is completed by such person in a manner contrary to the directions of the grantor, the deed will be held invalid as to any person advised as to the facts. *Thummel v. Holden*, 149 Mo. 677; *Westlake v. Dunn*, 184 Mass. 260; *Whitaker v. Miller*, 83 Ill. 381. Yet it is doubtful that the

courts of any of these jurisdictions would deny validity of such a conveyance for value to A. solely upon the ground that the agent to whom it was delivered was instructed by the grantor to insert the name of B. as grantee. Certainly none would, we think, without requiring a return to A. of the valuable consideration paid by him. *Guthrie v. Field*, 85 Kan. 58. 37 L. R. A. n. s. 326. The rule which seems most wise and just is that, if a deed in blank be delivered to a certain person without authority to insert the name of any one except himself as grantee, it is voidable in the hands of a third person who knows the facts, even if it passed for value; provided that if such third person be an innocent purchaser such deed will be upheld.

Measured by either provision of the rule, it is plain that appellants are in no position to escape the judgment entered by the district court. Construing the evidence favorably to the appellee, because of the equities involved, we incline to the opinion, as the trial court doubtless did, that said appellee was an innocent purchaser. But, if the contrary be true, it remains undisputed that he gave full value for the land, and the appellants are in no better position so far as the present controversy is concerned. For, even if the deed was voidable, they did not offer to return the purchase money paid by the appellee, or otherwise attempt to void the deed.

Because of this and because of the views before expressed in this opinion, the judgment appealed from is

AFFIRMED.

HOUGHTON W. KENYON V. STATE OF NEBRASKA.

FILED NOVEMBER 16, 1923. No. 23254.

1. **Receiving Stolen Goods: USING EMBEZZLED STOCK CERTIFICATE.** One who participates in using, as collateral security to a note which he signs either as principal or surety, a stock certificate which he knows to be the property of a third person, and to have been embezzled from the latter, receives a benefit in the transaction and is guilty of receiving embezzled property, if he intends thereby to deprive the owner of the same.

2. Criminal Law: DENIAL OF CONTINUANCE. Ordinarily the denial of a continuance is within the sound discretion of the trial court, and no reversal can be had therefor unless such discretion has been abused. *Held* in this case that there was no error in refusing the continuance requested.
3. ———: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A new trial will not ordinarily be granted upon newly discovered evidence which merely tends to discredit some of the state's witnesses.
4. ———: INSTRUCTIONS. Where the instructions as a whole correctly advise the jury as to the law upon a point in issue, a single instruction which might by itself be misleading will not be permitted to work a reversal of the judgment.
5. ———: SECONDARY EVIDENCE: FOUNDATION. A wide discretion is permitted to the trial court in the matter of foundation required for the introduction of secondary evidence of the contents of a writing not produced; and where, in addition to testimony on the part of the one last known to have had such writing in his possession to the effect that he had destroyed it or misfiled it, and believes it lost or destroyed, the objecting party himself testified to the substance of said writing without conflict as to the particulars, the reception of a proved copy was not erroneous.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Leonard A. Flansburg, Bernard G. Westover and *Frank M. Tyrrell,* for plaintiff in error.

O. S. Spillman, Attorney General, and *Lloyd Dort, contra.*

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

SHEPHERD, District Judge.

This is a proceeding in error from the conviction of Houghton W. Kenyon on an indictment charging him with taking, receiving and converting to his own use 1,600 shares of the capital stock of the Bankers Fire Insurance Company, of the value of $16,000, the property of Otto H. Brockman and the Ceresco State Bank, knowing that it had been embezzled, and intending to deprive the bank and said Brockman of the same.

Among other things, the evidence tended to prove the following: Otto H. Brockman was the owner of 2,000 shares of the capital stock of the Bankers Fire Insurance Company, issued to him in a single certificate under date of December 17, 1919. The defendant Kenyon was the secretary of said company. Charles Maixner was its treasurer, and also the cashier of the Ceresco State Bank. Wishing to raise as much money as possible on said stock, Brockman applied to the company, acquainting both Maixner and Kenyon with his desire and authorizing them to sell it for him or to get him a loan on it. They encouraged him, but suggested that the stock be split up into certificates of different denominations in order to facilitate handling. Brockman assenting, Kenyon issued him one certificate for 1,600 shares and two for 200 shares each. These Brockman assigned in blank by indorsing them on the back in the presence of Kenyon. No sale was made, but on the 23d day of July, 1920, the Ceresco State Bank loaned Brockman $2,500 on his note, taking the stock as collateral, depositing stock and note together in its note case, and issuing its certificate of deposit for the money. Brockman put this certificate through his own bank at West Point. Later, in a conversation in regard to getting more money on the stock, Kenyon advised Brockman that he had counseled Maixner to permit the said certificate of deposit to be cashed, though the latter was loath to do so. He also told Brockman that his said stock was good for a loan of from $20,000 to $30,000. Maixner and Kenyon had an indebtedness on three notes at the American State Bank in Lincoln (to the latter or to an associated concern) amounting to $50,000 which had to be taken care of. Maixner abstracted the described 1,600-share certificate from the note case of the Ceresco State Bank and put it up with other securities as collateral to a new note for $50,000 to the American State Bank to replace the three described, the new note to be signed by himself and Kenyon. He signed it first and afterwards Kenyon went into the bank and signed it below him, apparently as a principal, as it lay upon the desk of a bank official for that purpose, with

the said certificate attached. Thereupon the note and stock were kept by the last named bank and Brockman and the Ceresco State Bank were deprived of said stock.

The theory of the state was that Maixner, being the cashier of the Ceresco State Bank and having access to its note case and vault, embezzled the stock in question, and that Kenyon received and used it along with him in putting through the acceptance of the $50,000 note above described, and in discharging an indebtedness upon which both he and Maixner were liable. The evidence strongly indicates that Kenyon not only knew that the stock belonged to Brockman, but knew that it had been embezzled, knew all about the dishonest deal, and in fact connived with Maixner to put the deal through for their joint benefit.

The evidence adduced is undoubtedly sufficient to sustain the verdict and judgment in the trial court, provided the taking and receiving on the part of the defendant above set forth is sufficient to constitute a taking and receiving according to the statute defining the crime charged, and provided of course that the trial was properly had, the evidence properly received, and the jury properly instructed.

The Nebraska cases cited by the defendant, beginning with *Chaplin v. Lee,* 18 Neb. 440, and ending with *Nelson v. State,* 86 Neb. 856, do not support his contention that the facts which the state's evidence tended to prove were not sufficient to justify a finding that there was an embezzlement. In the first of these cases there was no proof of the existence of the fund charged to have been embezzled. In another there was only a showing of indebtedness. And in the others proof was totally lacking as to false appropriation, as to felonious intent, or as to felonious adverse holding. No such absence of proof is found here. Evidence was introduced tending to prove every essential element of an embezzlement by Maixner. Nor should there be any doubt that the defendant did the crime of receiving if he knew that the stock attached to the note had been embezzled. For, whether he signed as a principal or surety, he used said stock and received a benefit from it. The benefit to

him, even if he was a surety, consisted in the lessening of his hazard by the use of the collateral. The evidence strongly tended to prove guilty knowledge on the part of the defendant Kenyon. The crime was well charged, and was defined in the instructions practically in the words of the statute. This is sufficient.

Defendant assigns as error that he was denied a continuance. Ordinarily the denial of a continuance is within the sound discretion of the trial court and no reversal will be awarded therefor unless it is clear that there has been an abuse of such discretion. Complaint is made that certain witnesses, Burtch, Brockman and Johnson, changed their testimony in material respects; that Burtch testified that the $50,000 note was given for other notes signed by Kenyon, though omitting to so testify on the previous trial; that Brockman testified that certain conversations were had with Kenyon or with Maixner and Kenyon together, when before he described the same as had with Maixner alone; and that Johnson testified that he had seen the stock in the Ceresco State Bank, though he testified before to the contrary. While this is disputed, it is quite apparent that there were material differences in the testimony of these witnesses. But what if there were? Granted, for the sake of the argument, that defendant was surprised, and that if he had been given time he could have produced testimony to the effect that the general reputation of these witnesses was bad, this would not have been enough to entitle him to a new trial. For a new trial is not ordinarily granted upon newly discovered evidence which merely tends to discredit some of the state's witnesses. *Ogden v. State,* 13 Neb. 436. Defendant had the benefit of impeachment of said witnesses by the record. He makes no showing of new evidence which would be likely, in the opinion of the court, to lead the jury to a different conclusion than that which it reached. The verdict and judgment are not to be set aside on this score.

When the trial was being had, Maixner was in the penitentiary serving a sentence for forgery, to which offense

he had pleaded guilty. There is some evidence in the record that he had been promised favor, if not clemency, by the attorney general then in office if he would testify in this case. As the attorney general was also a member of the pardon board, it was urged that a continuance should have been allowed, supposedly until lapse of time should change the condition. However, it is not contended that the attorney general offered him clemency or favorable consideration upon condition that he would give false testimony, or that he urged him to tell anything other than the truth. It appears that when sentence was passed upon said Maixner he received 20 years upon each count of a three-count information, to be served consecutively rather than concurrently. It had been intended by the attorney general, who acted in the matter, that his imprisonment should be for a total of 20 years only. At most, he promised to use his good offices in Maixner's behalf to shorten the time of his sentence accordingly. This does not impress the court as good reason for reviewing the ruling of the trial court. And we are the more certain of our ground in so holding because of the fact that the state did not use Maixner in making its case, but only called him on rebuttal after the defendant had sworn him upon his defense.

It is urged with much insistence that the trial judge committed reversible error in instructing the jury, first in refusing to specially warn it against Maixner's testimony, again in charging that the jury might take into account such things as are matters of common knowledge and experience, though not testified to, and finally in instructing that the matter of suretyship was immaterial except as between Kenyon and Maixner unless the former's intention was made known to the payee of the note at the time that it was signed. In view of the fact that Maixner was called by the defendant, as above pointed out, it is evident that the defendant is not in a position to complain because an instruction directing scrupulous care in weighing Maixner's testimony was not given. Indeed, the giving of such an instruction would have been highly improper, and a real

cause of complaint if the defendant had been minded to assign it as error. Moreover, the cautions of the court in its instructions as to credibility were sufficient to meet every contingency. There is no vice in the charge as to matters of common knowledge and experience. We can perceive no possible harm in it, except by resort to the wildest conjecture.

A more serious objection arises in the court's instruction No. 12. It is as follows:

"You are instructed that every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto, for value. In this case it appears on the face of the note that the defendant signed the $50,000 note as a maker, and it is immaterial, except as between Maixner and Kenyon, that the defendant was a surety for said Maixner unless his intention to be only a surety was made known to the payee of the note at or before the time of signing the note."

Supposing that the defendant was merely a surety signer. In such case he might have been less, or more, careful to ascertain whether collateral went with the note and whether or not he was participating in using Brockman's stock as security. To remove inquiry as to his suretyship in all respects from the jury would possibly deprive him of proper consideration in this respect. This is the contention of defendant. However, it is a contention of doubtful force. For it seems obvious that a person primarily liable on notes which it was necessary to replace would sign a note for that purpose as a matter of course and with little investigation or delay, while one who loaned his credit without expectation of profit and merely for accomodation would be particularly careful to know that there was collateral attached which would make his signing less hazardous. The court further observes in this connection that, though the defendant was interrogated at great length by his own counsel, he at no time testified that he examined the note signed by

him with less care than he would have used if he had intended to sign it as a principal.

Not only this, but, as we analyze the instruction, its object was to advise the jury that whether the defendant was a surety or a principal cut no figure if he knew that the note carried the stock as collateral and that the stock had been embezzled. It was not intended to keep the matter of suretyship from the jury in so far as that matter might have a bearing on the question of the knowledge of the defendant as to the character of the collateral, nor could that result have followed; for Kenyon was permitted to testify at length to the effect that he was only a surety. And the court in other instructions told the jury that they should consider all of the evidence in determining whether every essential element of the crime, including that of knowledge of the embezzlement, had been established. Where the instructions as a whole correctly advise the jury as to the law upon a point in issue, a single instruction which might by itself be misleading will not be permitted to work a reversal of the judgment.

Misconduct on the part of counsel for the state is next assigned as error for which the judgment of the court should be reversed. One of the attorneys for the state stated in his argument that the indictment charged Mr. Kenyon with receiving to his own use or benefit property which had been embezzled by Charles Maixner, and went on to say: "When he did that fraud, that was one of the most damnable propositions ever perpetrated upon that farmer up at West Point." Thereupon defendant's counsel broke in with the following objection: "Object to that; I except to the remark of counsel that it was one of the most damnable frauds perpetrated on Otto Brockman who bought that stock." The court then stated that he thought the objection was properly made and thereupon another of the state's attorneys said: "If the court makes that ruling, we will ask that the jury disregard it." The court then said: "The jury will understand that in the excitement or argument, if counsel discusses questions, stating them as facts concerning which

there is no evidence received, that you are to disregard, and not take mere statements of counsel in place of the truth itself, and you will disregard this particular statement. I do not remember any evidence of fraud as to how the stock was originally sold." To this the attorney who was then upon argument said: "That is the conclusion I draw from the testimony, gentlemen." Defendant's attorney excepted to that. The state's attorney continued: "And still let me go on to the next sentence and I will show them why I draw that conclusion." And the attorney went on as follows: "There is evidence in this record to this effect—now bear with me—that this man Brockman bought $66,000 worth of stock; that he took 2,000 shares of it, 2,000 shares of that stock, $50,000 worth, to Mr. Maixner and Mr. Kenyon, and how much did he borrow on it? How much did he borrow on $50,000 worth of that stock? Do you know what they loaned him? Do you know what Mr. Kenyon and Mr. Maixner loaned him? A little measley $2,500, and that is the reason for my saying it was a damnable fraud there, at the time they sold him, or at the time they loaned the $2,500." To this counsel for the defendant again excepted, and the court said: "He is justified in commenting on the magnitude of the transactions. He can say what he thinks the $2,000 transaction about which there has been testimony is; he has got the right to state what he thinks the significance of it is. The exception I think is not well taken."

There are further complaints of statements made by counsel during the course of the argument. But in one of these the fact is denied, and in the others defendant failed to preserve exception. We do not regard them as of sufficient importance to discuss. Statements of fact concerning matters outside of the record should not only be avoided, but will frequently work reversal. In many states the rule is that such statements are presumed to be of prejudicial effect. Occasionally the trial court can do nothing to cure the error or to dispel the prejudice thus created in the mind of the jury. In such cases there is nothing to do but to send the case back for a new trial. However, in many instances

where counsel transgress in the heat of argument, a proper instruction on the part of the court is enough to prevent a mistrial. And we think that such is the case here, even if the state's attorney was at fault, which the record leaves in much doubt. In the first place, so far as the record itself discloses, it is patent that the attorney for the defendant himself introduced the subject of the sale of the stock by adding the words, "who bought the stock." Nevertheless, upon the suggestion of counsel for the state, the court instructed the jury to disregard it, and the attorney who was arguing continued: "That is the conclusion I draw from the testimony." In doing this it appears to the writer that he had reference to the remark which he had himself made, rather than that made by defendant's attorney. That this is a correct conclusion is shown by the subsequent statement of the attorney as appears in the lengthy excerpt heretofore quoted. The explanation seems to have satisfied the court and it satisfies us. In any event we think that the court used great care to protect the defendant from what may have at first appeared to be an improper statement on the part of counsel for the state, and that the defendant was fully safeguarded against any possible prejudice.

A copy of the $50,000 note in question was received in evidence on the theory that the original was lost and could not be produced. The defendant contends that no sufficient foundation was laid for the introduction of the copy, and that its reception was error.

At the outset, in considering this assignment, it is to be noted that the defendant himself admits that he signed such a note—of the same date and amount, to the same party, and with Maixner. He only asserts that he signed merely for the accomodation of Maixner, and that he did not see on the face of the note the notation of Brockman's stock as collateral; his excuse being that he had implicit faith in Maixner and did not look. Under these circumstances the reception of the evidence cannot be held to have been erroneous, particularly since in such a matter the court is vested with a generous discretion. If the substance of the

writing is testified to by the defendant, and so proved without conflict, a copy should, it would seem, be admitted in evidence with less technical foundation than is commonly required. *Larson v. State*, 92 Neb. 24.

But we think that the foundation was otherwise sufficient. Burtch had the note at the preliminary hearing, and took it away at that time. He had searched for it and inquired for it in all quarters where he thought it might be found. It was last in his possession, so far as anybody knows, and he testifies that he may have destroyed it when he moved to Omaha or he may have misfiled it. He further testified that he would say that it was either lost or destroyed. A wide discretion is permitted to the trial court in the matter of foundation required for the introduction of secondary evidence of the contents of a writing lost or destroyed. *Hapgood Plow Co. v. Martin*, 16 Neb. 27; *Bradstreet v. Grand Island Banking Co.*, 89 Neb. 590. All of the foregoing leads to the conclusion that the foundation laid was sufficient and that the copy of the note was properly received.

From a full consideration of the voluminous record and briefs, we are of opinion that the district court had the right view of the issues, and correctly and capably submitted them to the jury. We hold, too, that there was no reversible error committed upon the trial. The judgment is therefore

AFFIRMED.

STATE, EX REL. WESTERN BRIDGE & CONSTRUCTION COMPANY, RELATOR, V. GEORGE W. MARSH ET AL., RESPONDENTS.

FILED NOVEMBER 16, 1923. No. 23680.

1. States: APPROPRIATIONS: DEFICIENCIES. The appropriation for one biennium cannot be resorted to for the purpose of supplying the deficiencies of the preceding biennium. *Opinion of the Judges*, 5 Neb. 566.

2. ———: ———: ———. Whether or not the legislature intended its appropriation for the biennium of 1923 and 1924 to meet federal aid to be used to pay indebtedness incurred dur-

ing the years of 1921 and 1922, the provisions of the Constitution in connection with the terms of said appropriation inhibit such payment, and the state auditor is not at liberty to issue his warrant for such a purpose.

3. Highways: APPROPRIATIONS TO MEET FEDERAL AID. The engagement of the state to meet federal aid only requires it to meet such aid with reasonable dispatch, considering its laws. Such engagement does not exempt it, in dealing with the federal government, from the direction of its Constitution and the operation of its statutes.

4. Mandamus: ISSUANCE OF WARRANT ON EXHAUSTED FUND. Where a fund has been paid out and exhausted, the auditor will not be compelled to issue a warrant thereon even to pay a valid claim against said fund, unless it is certain that such fund will be replenished; and this is so though the fund has been exhausted by unauthorized payment or other misapplication.

5. Highways: CLAIMS: EXHAUSTION OF APPROPRIATION. A claimant's contract is not impaired by the fact that the fund appropriated to pay him has been diverted or exhausted, provided the original appropriation was sufficient to satisfy his contract and others covered thereby.

Original proceeding in mandamus to compel respondents to issue warrants for highway construction. *Writ denied.*

James E. Rait, for relator.

O. S. Spillman, Attorney General, and *George W. Ayres, contra.*

Arthur F. Mullen, amicus curiæ.

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

SHEPHERD, District Judge.

This is an action in mandamus to require the respondents to issue warrants to pay the relator, and others similarly situated, for work done on certain federal aid projects of the state. There is no dispute as to the facts. The claims amount to perhaps half a million dollars. All of them arise upon contracts made and work done during the 1921-1923 biennium. All of them have been approved by the depart-

ment of public works, and by the department of finance as to amount. The contracts have been fully performed and the contractors are entitled to their pay.

But the respondents are unwilling to issue the warrant which the relator seeks, because the department of finance did not approve his claim without reservation; and because the claim belongs to the biennium ending June 30, 1923, while the money appropriated for that biennium has been exhausted. A warrant drawn upon the state aid road fund would probably result in the payment of the claim from the appropriation for the present biennium, which runs from June 30, 1923, to July 1, 1925. The respondents doubt that this would be lawful.

The obstacle in the way of granting the prayer of the petition, and so permitting these deserving claimants to have an immediate settlement of their demands, lies in the fact that payment is sought from the appropriation for 1923-1925, which appropriation is devoted to contracts made and work done during the present biennium, and cannot lawfully be applied to the obligations of the biennium preceding.

This 1923-1925 appropriation was made in an act entitled "An act making appropriations for the state government, for the biennium ending June 30, 1925, and the conditions of payment thereof." Laws 1923, ch. 28. And the Constitution of the state provides (section 22, art. III): "Each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter. And whenever it is deemed necessary to make further appropriations for deficiencies, the same shall require a two-thirds vote of all the members elected to each house, and shall not exceed the amount of revenue authorized by law to be raised in such time." Also, section 25, art. III: "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon, and no money shall

be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution."

Plainly, these provisions, in connection with the act itself, limit the appropriation now in the treasury to the obligations of the present, and prevent its use for the payment of those of the past. True, certain claims of the year of 1919 or 1920 were paid from the appropriation for 1921 and 1922, and the legislature, presumably knowing that this had been done, made the appropriation for the present biennium without criticising the practice. The relator notes this circumstance and insists that the practice thus in vogue should receive recognition at the hands of the court in dealing with the present situation. But the true rule is that a practical construction put upon an ambiguous statute by officials charged with its execution, if long acted upon and acquiesced in, will not be lightly disregarded by the courts. *Rohrer v. Hastings Brewing Co.*, 83 Neb. 111; *Douglas County v. Vinsonhaler*, 82 Neb. 810; *State v. Sheldon*, 79 Neb. 455. Clearly this rule can have no application here. The practice of the officials in the last preceding biennium was not of long standing. The language of the act of appropriation was not ambiguous. The provisions of the Constitution are not doubtful. For years the rule of law has been in direct opposition to the practice in question. *Opinion of the Judges*, 5 Neb. 566. In this opinion, handed down nearly half a century ago, the supreme court said concerning these constitutional provisions and a biennial appropriation that "we do not see how there can be a difference of opinion among men accustomed to the construction of statutes." Consistently since that early date, the law of Nebraska has been that an appropriation of the sort in question is for the debts and expenses of the particular period or biennium for which it is made, and not for those of any preceding year.

Nor is it clear that the legislature intended to make the appropriation for the present biennium applicable to the debts of the past, though the relator contends that this is

evident from what the governor said in his budget message to the legislature, coupled with what the legislature did in the light of it. The excerpt cited is as follows, as taken from the relator's brief:

"There is approximately $1,096,000 unpaid on contract work done on the state highways last year. These road contracts entered into during 1922 seem to mortgage the revenues of the state for nearly a year ahead."

It is quite possible that this statement from the pen of the executive was less to sanction the referred to practice than to expose the abuse. Be that as it may, the legislature and the governor will be presumed to have been mindful of the covering provisions of the Constitution and of the construction so long placed on them. Being so advised as to the facts and being so mindful of the law, the legislature did not in any way intimate in its appropriation for the coming biennium that it intended that such appropriation should be used to satisfy debts already incurred. There was work to be done and to be paid for during the two years to come. It was not expected that the federal aid projects of the state would stand still. The legislature must have contemplated that the improvement program would continue. To provide for its continuance the 1923-1925 appropriation was made. As a matter of law the legislature could not provide for the payment of past obligations out of an appropriation for the expenses of a future period. It did not attempt to do so, and that it did not intend anything of the kind is apparent from the house journal for 1923, page 1125:

"That with the balance due from the federal government on the road building program collected, sufficient money will be available to meet all contracts entered into."

It remains to consider the contention of the relator that a warrant should in any event issue against the fund of 1921-1923. To what end? That fund has been exhausted. Warrants were allowed in *State v. Brian*, 84 Neb. 30, because in that case the money appropriated remained to be collected in the ordinary course by taxation. The court

regarded it as certain. In this case the money was collected —was in the fund—but has been paid out. Why should the auditor issue a warrant upon a fund that has vanished and is no more? This court should not require him to do a vain thing. It is to be noted, of course, that the auditor says in his return that the fund may be replenished by a return from the federal government, but this is problematical. He adds that if this happens he will be ready to draw his warrant against it, the department of finance approving, without delay. This assures the relator that if the fortunate thing happens he will speedily have such relief as it affords. If it be certain that the appropriation of the past biennium is to be replenished, the relator should have shown it. Upon conjecture or uncertainty the writ ought not to issue. For reason and authority, see dissenting opinion in *State v. Brian, supra,* which upon this point is particularly applicable. The writer has not failed to carefully examine the cases cited by the relator upon this point, and the court is not inclined, because of the authority of such cases, to adopt a conclusion contrary to the one above expressed. The doctrine is squarely announceed in *American Metal Ceiling Co. v. New Hyde Park Fire District,* 154 N. Y. Supp. 661, and in *State v. Irwin,* 74 Wash. 589, that in the eyes of the law the fund of a sufficient appropriation remains intact, though in fact depleted, and that a warrant should issue thereon. But in a later New York case, *People v. Nowak,* 163 N. Y. Supp. 374, the court expressly said that, if it were pleaded and proved that the fund was lacking, that might constitute a defense. In the California cases, also, *McEvers v. Boyle,* 25 Cal. App. 476, and *Scott v. Boyle,* 25 Cal. App. 806, the referee found as a matter of fact that the fund still existed, though stating in his conclusions of law that it was immaterial whether it did or not, and the court declared in its syllabus that such fund would be presumed to have remained intact. *State Bank v. City of Miami,* 43 Okla. 809, deals with warrants which had been duly issued, and is not persuasive upon the point in question.

The relator ingeniously argues that, since these appropriations are all to meet federal aid, the bills should be paid when the work is done, regardless of whether the money is taken from one appropriation or another. But this, it seems to us, is rather a fanciful interpretation of the contract between the state and the United States. Interpreting more simply and more practically, the state is bound to pay with reasonable promptness, considering its laws. But conceding, for the sake of argument, that the state is obliged to do better in this regard than it is doing, we repeat that it is beyond the power of the respondent state officials to apply the money appropriated for this biennium to the payment of debts made in the preceding one; and we add that, despite the urgency of the situation, the court cannot step aside from its function and invest state officials with such power.

Undoubtedly all should be done that can be done to care for these obligations without further delay. The contracts of the claimants were not impaired by the depletion or diversion of the funds of 1921 and 1922, nor were the claimants bound to take notice of the same. Such contracts were, and are, valid and subsisting contracts, honestly acted upon and fully performed. It might be well to convene the legislature, though at great cost, to provide for these obligations by deficiency appropriation. But this is, of course, for the executive and legislative branches of the government to decide.

For reasons above stated, the writ is denied and the action dismissed at the costs of the relator.

WRIT DENIED.

DAVID L. THOMPSON ET AL., APPELLANTS, V. EVANGELICAL HOSPITAL ASSOCIATION, APPELLEE.

FILED NOVEMBER 26, 1923. No. 22586.

1. Nuisance: HOSPITAL: INJUNCTION. That a hospital in itself is objectionable to those residing in close proximity to the site of a proposed hospital, or that the value of property in the neigh-

borhood may be adversely affected, do not ordinarily constitute sufficient grounds to warrant a decree enjoining its erection.

2. Evidence examined, and *held* insufficient to warrant a court of equity in granting the relief prayed.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

Walter L. Anderson, Glen H. Foe and *Clarence G. Miles*, for appellants.

Boehmer & Boehmer, contra.

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

MORRISSEY, C. J.

Plaintiffs brought this action to enjoin defendant from erecting and operating a general hospital upon the north half of block 46 in Dawson's addition to south Lincoln. The ground selected as a site for the proposed hospital is bounded by Fourteenth street on the east, Sumner street on the north, Thirteenth street on the west, and a 16-foot alley on the south, and the tract is 142 feet by 300 feet. Plaintiffs are property owners residing with their families in the immediate vicinity of this tract of ground. The neighborhood is a closely built-up residential district and the houses are occupied by their owners.

It is alleged in the petition that it is the intention of defendant to receive and care for the sick, diseased and injured, and that plaintiffs will be continually annoyed by gruesome sights, sounds and smells at all hours of the day; "that these sights and sounds will be a continual reminder of the gloomy, morbid, uncertain side of life, and will tend to deprive these plaintiffs of the enjoyment of their homes because of these mental associations. That these plaintiffs will be depressed mentally, their vitality consequently lowered and their resistance to disease weakened because of the natural instinctive fear of contagion from the hospital; that the properties so owned by plaintiffs are improved with

dwelling-houses of the value of several thousand dollars each; that the hospital proposed will greatly depreciate and lower the value of the property to the injury of these plaintiffs; that a hospital, if established as proposed, will work a continuing irreparable injury to these plaintiffs and they are without an adequate remedy at law."

Defendant answered admitting its intention to erect a hospital on the tract of ground mentioned in the petition and that plaintiffs reside in their own homes in the immediate vicinity. It is alleged that the specifications for the building have been approved by the proper authorities of the city; that the building when erected will be 40 feet by 164 feet, three stories in height, with a basement; that no contagious diseases will be allowed to enter the proposed hospital; that a hospital is a necessity; and that defendant has no intention of injuring plaintiffs. The reply was in the form of a general denial of the new matter pleaded in the answer.

It was stipulated that defendant is a corporation; that the tract in question is in a residential district; that 48 members of the families living in immediate proximity to the site of the proposed hospital were interviewed and the substance of their statements set out in the stipulation; that the homes of the families are worth respectively from $2,000 to $8,000; that they have lived in their respective homes from one to fifteen years, and that the average term of residence per family is 7½ years; that the home nearest the proposed building is 50 feet; that in the half-block across the street on the north side of Sumner street and facing the proposed site are nine houses built upon the six lots comprising that half block; that these houses are 110 feet distant from the proposed site; that facing the proposed hospital on the Fourteenth street side are three houses which are about 40 feet from the proposed site; that across the 16-foot alley to the south of the tract are five houses, and on the Thirteenth street side and 100 feet distant from the tract is one house; that surrounding the proposed site there are 16 families living, not including those whose property

lies diagonally from the proposed site; that defendant has entered into a contract to purchase the site and has paid $500 earnest money, which is to be refunded if, as a result of this litigation, defendant is restrained from building; that the ground is now vacant; that Fourteenth street is 40 feet wide from lot line to lot line and carries a street car track. The proof shows Sumner street to be 100 feet wide from lot line to lot line and Thirteenth street to be of the same width.

The proof offered on behalf of plaintiffs is in line with the allegations of the petition and tends to show that the erection of a hospital in a residential district has a tendency to make the neighborhood less desirable for residential purposes. Plaintiffs testified that its presence would have a depressing effect upon their spirits. Expert testimony was given to show that anything which causes a feeling of depression has a tendency to injuriously affect the health of the individual. These conclusions, however, are based upon the assumption that there will be obnoxious odors coming from the institution and that the cries of the sick and the suffering patients will be heard by plaintiffs. These assumptions are disputed by the testimony given on behalf of defendant. Witnesses who have lived in the immediate neighborhood of hospitals testified from actual experience and rebut these assumptions. It is conceded, however, by plaintiffs that the fumes from the medicines and disinfectants used, that the noises arising within the institution, increased traffic, the coming and going of the ambulance, etc., in themselves do not constitute a nuisance, but that "the nuisance lies in the association of ideas that these incidents must raise in the minds of those people who, because of their close proximity, cannot escape them."

"Hospitals, whether for the insane or for other purposes, and although they are of a strictly private or of a private eleemosynary character, are not nuisances *per se*, but they may become so by reason of careless management. Neither courts nor text-writers define nuisance with exactness. Hence, in the case of hospitals, as in the case of nuisances

generally, each case must to some extent be made to depend on its own special facts and circumstances." 13 R. C. L. 951, sec. 16. That the business itself is objectionable to others or that property in the immediate neighborhood may be adversely affected is not sufficient objection to restrain the erection of a hospital. The owner of property has a right to conduct thereon any lawful business, not *per se* a nuisance, so long as the business is so conducted that it will not unreasonably inconvenience his neighbor in the reasonable enjoyment of his property. A person who lives in a city must of necessity submit himself to the consequences and obligations of occupations which may be carried on in his immediate neighborhood, which are necessary for trade and commerce, and also for the enjoyment of property and the benefit of the inhabitants of the city; and matters which, although in themselves annoying, are in the nature of ordinary incidents of city life cannot be restrained as nuisances, unless in violation of an ordinance or statute. In modern life a hospital is a public necessity, and to be of service to the public it must be so situated as to have available for its use electric current, gas mains, and sewers. And, as many of its patrons will be without private conveyances and obliged to depend upon the street cars for service to and from the hospital, it is almost imperative that it be located where these conveniences are accessible. There are people who object to a church or a school in their immediate vicinity, but the fastidious must bear with these institutions for the great good they bring to the public. It is shown that patients suffering from contagious diseases will not be received in the proposed institution. The threatened injury to the health of plaintiffs is too remote and conjectural to warrant the issuance of the writ.

The writ is denied and the judgment of the district court is

AFFIRMED.

WILLIAM P. JOHNSON, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 26, 1923. No. 22569.

1. **Negligence**: FEDERAL EMPLOYERS' LIABILITY ACT: CONTRIBUTORY NEGLIGENCE AS DEFENSE. Under the federal employers' liability statute, contributory negligence is not a complete defense to an action for personal injuries. If the injured employee was himself guilty of negligence contributing to the injury, this "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." U. S. Comp. St. (1918) sec. 8659.
2. **Master and Servant**: INJURY: PROXIMATE CAUSE. Evidence examined, and *held* that the negligent omission to change the switch and the consequent negligent moving of cars upon the wrong track without warning plaintiff was the proximate cause of the accident.
3. ———: ———: ASSUMPTION OF RISK. In actions under the federal employers' liability act, the doctrine of assumption of risk has no application when the negligence of a fellow servant, which the injured party could not have reasonably foreseen or expected, is the direct and immediate cause of the injury.
4. ———: ———: ASSUMPTION OF CARE. An employee, under said act, may assume that the employer or his agents, his coemployees, have exercised proper care with respect to his safety, until notified to the contrary, unless the want of care and the danger are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them.
5. **Instructions** given and refused examined, and *held* that the court committed no error with respect to them.
6. **Negligence**: DAMAGES. The jury not having "diminished" the damages suffered by plaintiff "in proportion to the amount of negligence attributable" to him, a remittitur is required as a condition of affirmance.

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

C. A. Magaw, T. W. Bockes and *D. F. Smith*, for appellant.

Baker & Ready, contra.

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

LETTON, J.

Action for personal injuries brought under the federal employers' liability act. Plaintiff recovered a judgment, and defendant appeals.

Defendant is a common carrier operating a railroad through several states. It maintains switching-yards in Omaha. On April 10, 1920, plaintiff was working as foreman of a switching-crew, the other members of the crew being Dennis Murray and D. R. Johnson. He was thoroughly familiar with the yards in which he was working, having worked many years in the switching-yards of defendant, in Omaha. He had received orders from his superior officer to switch 11 freight cars containing interstate shipments. At the noon hour on that day he gave directions to Murray and D. R. Johnson as to which cars were to be moved and designated the tracks upon which they were to be placed. It was Murray's duty to couple and uncouple cars, open and close switches, and communicate signals to the engineer, under plaintiff's direction. The switching-yards comprise about 10 or 12 switch tracks, converging toward the north and extending in a curve south and westerly; what is known as the "main lead track" being about the ninth or tenth track from the north at about the point where the tracks curve to the west most rapidly. During the movements ordered, plaintiff, while crossing track No. 6, was struck by two cars which had been detached, in such a manner that he fell across the rails of that track. Both of his arms were cut off, one above and one below the elbow, and other injuries were sustained.

While a number of charges of negligence are made in the petition, the essential act upon which plaintiff's cause depends is the omission of Murray to close switch No. 6, and his negligence in failing to warn plaintiff of the danger of crossing track No. 6 after he knew, or should have known, that by so doing plaintiff would be exposed to great

danger from the moving cars. The answer, in addition to a general denial, pleads negligence and carelessness on the part of plaintiff in ordering cars to be "kicked" along the lead track without ascertaining whether the switch was properly lined for that movement; in going upon the track where the accident occurred without looking or listening for the approach of cars on that track; and in failing to give any notice or attention to the switching movements which he was employed by the defendant to supervise, direct and control. It is also alleged that he assumed the risk of such an accident.

The errors assigned may be grouped as follows: The court should have instructed the jury to return a verdict in defendant's favor because plaintiff was guilty of contributory negligence as a matter of law; the verdict is excessive and appears to have been given under the influence of passion and prejudice. There are also errors assigned as to the giving of instructions, which will be noticed later.

Under the federal employers' liability statute, contributory negligence is not a defense. Defendant insists that the evidence shows so clearly that the negligence of plaintiff was the proximate cause of the accident that the question ceases to be one of fact but becomes one of law; that plaintiff assumed the risk, and that it was the duty of the court under this evidence to instruct the jury to return a verdict for the defendant.

Plaintiff had directed Murray by signals to clear track No. 7, cut off two cars and "kick" them in on the "main lead track." In order to do this, switch No. 6, which Murray had opened a short time before in order to permit cars to be moved on the "oil dock track," should have been closed or "lined" by him so that cars which were to be pushed in from the north should move past this switch upon the main lead track, and not be diverted upon track No. 6. When plaintiff gave this order he was standing near track No. 7, south and west of switch No. 6. He then walked a little east of south toward switch No. 4 in order to set that switch so that the next car, after the two had been "kicked" along

the main lead track, could be placed upon house track No. 4. To do this it was necessary for him to cross over track No. 6. Just as he was in the act of stepping over the first rail of this track he was suddenly struck by the cars which he had ordered to be placed upon the "main lead track," but which, through the negligence of Murray in not closing switch No. 6, were unexpectedly moved upon track No. 6.

Plaintiff had no reason to believe that Murray had not obeyed his instructions with regard to the setting of the switch at No. 6. In the direction in which he was walking, switch-stand No. 6 would be out of his line of vision unless he looked backward. As he walked to switch No. 4, if he had looked northeasterly toward the train, on account of the converging of the tracks of the main lead and the oil dock track and track No. 6, and on account of the speed of the train, which was moving at the rate of 10 or 12 miles an hour, it would have been almost impossible for him to determine upon which track the cars were moving, until they were almost upon him. Only a few seconds intervened from the time this became determinable until he was struck. He had given Murray the proper signals, and Murray had answered that he had received them correctly. He was no doubt intent upon the work he was about to perform, and while, as defendant argues, it was his duty to see that Murray performed the work assigned to him, and he may have been negligent in not observing the actions of Murray with regard to moving the switch so that the cars would move upon the proper track, yet, if in every instance after orders are given and their giving acknowledged, a foreman, who is also a fellow switchman having duties of his own to perform with respect to opening and closing switches, should remain quiescent until he sees that every order given to his subordinates is complied with, the business of his employer would be much delayed, and it may safely be assumed that he would not hold his position very long. Plaintiff was negligent to some degree in failing to look before he stepped on the track, but this does not prevent a recovery under the statute.

In *Illinois C. R. Co. v. Skaggs*, 240 U. S. 66, a case similar in several respects, it was said by Mr. Justice Hughes: "The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employee resulted 'in whole or in part' from the negligence of any of its other employees, it is liable under the express terms of the act. That is, the statute abolished the fellow-servant rule. If the injury was due to the neglect of a coemployee in the performance of his duty, that neglect must be attributed to the employer; and if the injured employee was himself guilty of negligence contributing to the injury, the statute expressly provides that it 'shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.' See *Second Employers' Liability Cases*, 223 U. S. 1, 49, 50; *Seaboard Air Line R. Co v. Tilghman*, 237 U. S. 499, 501." See, also, *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114.

Appellant argues that the failure of Murray to line the switch properly was not the proximate cause of the accident, and that the fact Johnson walked upon or too close to the track was an intervening cause without which the accident would not have happened. But, when an order has been given by a foreman that the cars move upon a designated track, the fact that they are run at the rate of 10 or 12 miles an hour upon an adjacent track upon which the foreman would have no reason to expect them to run, and while there was every reason to expect that he would be walking on or about this track, makes the negligent moving of the cars upon the wrong track without warning the proximate cause of the accident.

Defendant has argued at some length the proposition that the plaintiff assumed the risk of Murray's failure to line the switch. In *Reed v. Director General*, 258 U. S. 92, the facts were that a brakeman had been stationed upon the front end of a caboose which was in front of a moving engine, with a duty to signal the engineer in time for him to safely stop if the derailing switch upon the rails was set against further passage. It was so set upon this occasion; but,

either through the negligence of the decedent himself or of the engineer in failing to notice or heed the signal of the decedent, the locomotive did not stop in time, and the plaintiff's decedent was killed. The supreme court of Pennsylvania held that the decedent had assumed the risk of the negligence of the engineer. After discussing a number of cases in the United States supreme court, that court held: "In actions under the federal act the doctrine of assumption of risk certainly has no application when the negligence of a fellow servant, which the injured party could not have foreseen or expected, is the sole, direct and immediate cause of the injury. To hold otherwise would conflict with the declaration of congress that every common carrier by railroad while engaging in interstate commerce shall be liable to the personal representative of any employee killed while employed therein when death results from the negligence of any of the officers, agents or employees of such carriers."

In *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, it was held that an employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them.

In another case the facts were that a switchman, when about to apply the brake to stop a "cut" of freight cars, was thrown to the ground by a jerk due to the failure of the engine foreman to properly cut off the cars at the time he directed the engineer to retard the speed of the engine, so that the car upon which the plaintiff was about to set the brake was suddenly checked in such a manner as to throw him from the top of the car. The court said: "In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. * * * It

was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representative's negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed had opportunity to know and appreciate it, and thereby assume the risk." *Chicago, R. I. & P. R. Co. v. Ward*, 252 U. S. 18. See *Chesapeake & O. R. Co. v. Proffitt*, 241 U. S. 462.

In all of these cases, as in this, the injured party was subjected to unusual and extraordinary risks which he could not anticipate. Applying the principle that the negligence of a coemployee stands in the same relation as that of the employer as to assumption of risk, we think it clear that plaintiff did not assume the risk of the negligence of his coemployee, Murray, under the facts in the case.

Complaint is made of the refusal to give instruction No. 2, requested by defendant, which deals with the subject of contributory negligence. There was no error in this refusal. By instruction No. 5 the law as to contributory negligence was properly stated to the jury.

We think the jury were not misled by instruction No. 1, in which the court stated to the jury the substance of the petition, even though it is not expressly stated that these are the allegations therein. Considering the whole of this instruction, the jury must have understood it as merely stating plaintiff's cause of action, and not as stating the facts in the case. Nor could the jury be misled by instruction No. 2, which merely purports to state to the jury the matters of defense. We find no prejudicial error in either of these instructions. While the giving of other instructions is assigned as error, the points are not argued and it is unnecessary to consider them.

The next complaint made is that the verdict is excessive, that the negligence attributable to the plaintiff is much greater than that attributable to the defendant, and that the recovery of $47,216 clearly shows that the jury did not diminish the damages on account of plaintiff's negligence. It is said that the evidence shows that the plaintiff's earning

capacity is not entirely destroyed, and that the art of fabricating and applying artificial limbs has so advanced that an armless person can perform many kinds of labor. It is also asserted that the negligence of plaintiff was about 75 per cent. of the total, and that, even if plaintiff is entitled to recover, he should only recover about $12,000. It is true that the verdict is for a very large amount. When we consider the pain and suffering of plaintiff; his well-nigh helpless condition; his earning capacity (this at the time of the accident was $5.33 a day and overtime, but the wages of engine foremen have since been raised to $7 a day); his age, which was 37 years at the time of the trial; his expectancy of life, which was 29.64 years; and the amount of an annuity which the sum named in the verdict will purchase, it seems clear that the jury made little or no deduction on account of plaintiff's negligence, and made a liberal award, even if he had been blameless in all respects. Plaintiff was guilty of negligence. A glance would have saved him. His earning capacity is not entirely gone. We are of the opinion that $36,000, and no more, is a fair and just recovery, under all the facts.

The judgment of the district court we consider excessive to the extent of $11,216. It is therefore reversed unless plaintiff enters a remittitur of that amount, as of the date of the judgment, within 20 days from the filing of this opinion. In that case it will stand affirmed at the reduced amount.

AFFIRMED ON CONDITION.

NEBRASKA STATE BANK OF REPUBLICAN CITY, APPELLANT, V. EDSON L. WALKER ET AL., APPELLEES.

FILED NOVEMBER 26, 1923. No. 22560.

1. **Bills and Notes: DEFENSE OF FRAUD: BURDEN OF PROOF.** "Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a *bona fide* holder." *Central Nat. Bank v. Ericson*, 92 Neb. 396.

2. ———: RENEWAL: DEFENSES. "The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt. As between the original parties and as against transferees who are not *bona fide* purchasers for value, a renewal note is open to all defenses which might have been made against the original note." *Auld v. Walker*, 107 Neb. 676.

3. ———: GOOD FAITH: QUESTION FOR JURY. "Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser of a note is a question of fact for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom." *Auld v. Walker*, 107 Neb. 676.

4. ———: ———: REBUTTAL. Direct proof that plaintiff is an innocent purchaser or a *bona fide* holder of a promissory note may be rebutted by circumstantial evidence.

5. **Evidence**: PHOTOGRAPHS: SECONDARY EVIDENCE. The statute authorizing public recording officers to make use of photographic processes does not prevent the courts from admitting photographs as secondary evidence. Comp. St. 1922, sec. 8915.

6. ———: ———: ———. A properly identified, accurate photograph of a document not available because in custody of another court may be admitted in evidence.

7. ———: ———: ———. Identification of a photograph by the photographer who took it is not always essential to its admissibility as secondary evidence.

8. ———: ———: ———. The correctness of a photographic representation may be shown by any witness who is competent to speak from personal observation and knowledge.

9. **Bills and Notes**: INNOCENT PURCHASER: EVIDENCE. A pledge of the capital stock of a bank *held* admissible as a link in a chain of circumstantial evidence on the issue that the bank was not an innocent purchaser or a *bona fide* holder of the notes in suit.

10. **Evidence**: SECONDARY EVIDENCE. Where original letters are not available as evidence, carbon copies may be admissible as secondary evidence.

11. ———: EXCHANGE OF LETTERS. The exchange by due course of mail of letters comprising a correspondence between the writers may be shown by circumstantial evidence.

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

J. G. Thompson and *Bernard McNeny*, for appellant.

G. P. North and *M. L. Donovan, contra.*

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

ROSE, J.

This is an action on two promissory notes, each for $2,500, dated February 10, 1920, due six months hence and bearing interest at the rate of 8 per cent. per annum. The Nebraska State Bank of Republican City, plaintiff, was the payee and Edson L. Walker and H. E. Vansycle, defendants, were the makers.

The defenses interposed were want of consideration and fraud. Defendants pleaded: The notes in suit were executed in renewal of two former notes in which defendants were makers and the Missouri Valley Cattle Loan Company, a corporation, was payee. The original notes were given without consideration for worthless capital stock sold by the cattle loan company to defendants by means of fraudulent representations upon which the purchasers relied in ignorance of the facts. The fraud was not discovered by defendants until after they signed the renewal notes in which the Nebraska State Bank of Republican City, plaintiff, was substituted for the cattle loan company as payee. The false representations included the following statements: Vansyckle was a director of the cattle loan company and Robert Mousel was a stockholder, each to the extent of $50,000. Annual dividends of 30 per cent. of the preferred stock and 8 per cent. of the common stock were being paid. The assets of the corporation exceeded a million dollars. The capital stock was worth 100 cents on the dollar. These statements were false. In both the original and the renewal notes Vansyckle was surety for Walker. Plaintiff had knowledge of the fraud and participated therein, its banking business being controlled by R. V. McGrew, who also

controlled the cattle loan company. The renewals were devices to defeat redress and to exact payment of the notes. Upon discovering the fraud defendants tendered back the capital stock purchased and demanded a return of the renewal notes. This is a mere outline of the defenses pleaded.

In a reply plaintiff alleged it was an innocent purchaser of the original notes and that defendants paid them by giving the notes in suit.

A trial of the issues resulted in a verdict in favor of defendants. From a judgment thereon plaintiff appealed.

The evidence is sufficient to support a finding that the original notes were procured by the cattle loan company through fraud. The vital issue at the trial was raised by the plea that plaintiff was an innocent purchaser. The rules of law applicable to a determination of this question are pretty well settled:

"Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a *bona fide* holder." *Central Nat. Bank v. Ericson,* 92 Neb. 396. *Union Nat. Bank v. Moomaw,* 106 Neb. 388.

"The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt. As between the original parties and as against transferees who are not *bona fide* purchasers for value, a renewal note is open to all defenses which might have been made against the original note." *Auld v. Walker,* 107 Neb. 676. *Shawnee State Bank v. Lydick,* 109 Neb. 76; *Shawnee State Bank v. Vansyckle,* 109 Neb. 86; *Berwyn State Bank v. Swanson, ante,* p. 141.

"Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser of a note is a question of fact for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference

therefrom." *Auld v. Walker,* 107 Neb. 676. *Shawnee State Bank v. Lydick,* 109 Neb. 76; *Shawnee State Bank v. Vansyckle,* 109 Neb. 86.

Direct proof that plaintiff is an innocent purchaser or *bona fide* holder of a promissory note may be rebutted by circumstantial evidence. *Central Nat. Bank v. Ericson,* 92 Neb. 396; *Union Nat. Bank v. Moomaw,* 106 Neb. 388; *Arnd v. Aylesworth,* 145 Ia. 185, 29 L. R. A. n. s. 638.

It is insisted there is no competent evidence to overthrow direct testimony that plaintiff was an innocent purchaser of the original notes. Is this position tenable? The theory of defendants seems to have been that R. V. McGrew, vice-president of the cattle loan company, not only managed it but owned and controlled the Nebraska State Bank of Republican City, plaintiff. On this issue defendants offered, and the trial court admitted over the objections of plaintiff, a photograph of a financial statement tending to show, in connection with other proofs, that McGrew had pledged for his own benefit to the cattle loan company 150 shares of plaintiff's capital stock. The ruling is assigned as error. The objections of plaintiff are failure of defendants to comply with the statute authorizing public recording officers to make use of photographic processes and failure of the photographer himself to identify the photograph. Neither objection is well founded. The statute, according to its own terms, does not prevent the use of photographs as secondary evidence. Comp. St. 1922, sec. 8915. A properly identified, accurate photograph of a document not available because in the custody of another court may be admitted in evidence. *Stitzel v. Miller,* 250 Ill. 72. The corporate officer who made the financial statement explained fully in testifying that the original was in the federal court and not available at the trial in the district court, that he procured the photograph and that it was a correct representation of the original. Identification by the photographer himself is not always necessary. The correctness of the photographic representation may be shown by any witness who is competent to speak from personal observation and knowl-

edge. Cases cited in note in 51 L. R. A. n. s. 846; *Thompson v. De Long*, 267 Pa. St. 212, 9 A. L. R. 1326. This rule has often been applied to photographs of documents. *Fuller v. Robinson*, 230 Mo. 22; *In re McClellan's Estate*, 20 S. Dak. 498; *Parker v. Smith Lumber Co.*, 70 Or. 41. The photograph was properly admitted.

One of the assignments of error challenges a ruling admitting in evidence a formal written contract between McGrew and the Naponee Mortgage Loan Company. There does not seem to be any error in this ruling. It was shown that McGrew signed the contract for the Naponee Mortgage Loan Company and that he also signed it for himself. The contract recites that he was indebted to the cattle loan company of which he was an officer. He pledged to it many securities or articles of personal property. Among the items were 150 shares of capital stock of the Nebraska State Bank of Republican City, plaintiff. This contract tended to show that McGrew was financially interested in both the cattle loan company and the bank, contrary to plaintiff's evidence on that issue. Other evidence shows that the officers of plaintiff respected the orders of McGrew in regard to the business of the bank. The pledge was at least a circumstance in a chain of incidents tending to throw light on the nature of plaintiff's purchase of the original notes and was properly admitted. Except for circumstantial evidence of this kind, fraud perpetrated by the secret manipulation of corporate stock might escape judicial scrutiny and prevent redress demanded by law and justice.

It is further argued that the trial court erred in overruling objections to letters passing between McGrew and officers of the Nebraska State Bank of Republican City, plaintiff. The correspondence relates principally to business of the bank and the cattle loan company. It is insisted that carbon copies were received without any proper foundation and that there was a failure to show the originals were mailed to or received by the addressees. When all the proofs applicable to the carbon copies are considered, it is sufficiently shown that the originals were not obtainable

upon demands duly made therefor and that there was no error in admitting the copies as secondary evidence.

While there is no direct testimony that original letters, correctly addressed, were committed to the mails with postage prepaid or that the addressee in each instance received the letter, this is not the only method of proving those facts. The receipt of a letter may be shown by circumstances. The delivery of one of the letters comprising the correspondence was conceded by plaintiff. Some of the letters are plainly replies to those received. Many others imply the receipt of those to which they are answers. The letters or carbon copies came out of the files of the cattle loan company where the correspondence was kept. A witness familiar with the facts so testified. Disregarding for the purposes of review the irregular order in which the proofs were offered, some incidents preceding and others following the admission of a letter or a carbon copy, it may fairly be inferred from the evidence as a whole that the authors of this correspondence exchanged the letters comprising it in due course of mail.

There does not seem to be a sufficient reason for a reversal of the judgment. The issues of fact were questions for the jury, and their finding that plaintiff was not an innocent purchaser of the original notes or a *bona fide* holder of the renewal notes is final, there being in the record sufficient evidence to sustain the verdict and no error prejudicial to plaintiff.

AFFIRMED.

MARY PRICER, ADMINISTRATRIX, APPELLEE, V. LINCOLN GAS & ELECTRIC LIGHT COMPANY, APPELLANT.

FILED NOVEMBER 26, 1923. No. 22515.

1. **Electricity: NEGLIGENCE: QUESTION FOR JURY.** A street car motorman stopped his car within about four feet of a broken electric light wire which hung down and formed a loop immediately in front of the car. The wire belonged to the defendant, Lincoln Gas & Electric Light Company. It carried about 2,300 electric volts and was brought to the ground by the motorman. Whether he then knew that it was a live wire

does not appear in the evidence. Subsequently, when the wire was on the ground, he discovered that it was a live wire and that it was "spitting" at him. After telling four or five children, who were playing about the street, to move away, he applied a pick-up, which was a part of the car's equipment, to the wire at a point three or four feet from its loose end. The electric current was communicated to his body by the wire and from its effects he died in less than two weeks. *Held*, that, under the facts set forth in the opinion, whether the defendant electric company negligently and carelessly failed to inspect its wire and carelessly and negligently permitted a heavily charged electric wire to remain in place, without sufficient insulation, was a question for the jury; and *held*, that the verdict awarding damages to the decedent's administratrix is free from reversible error and is sustained.

2. **Witnesses: IMPEACHMENT.** Certain questions were addressed to a witness while testifying which would tend to render him criminally liable or expose him to public ignominy. *Held*, that, under sections 8844 and 8848, Comp. St. 1922, such questions were improper and that the court did not err in sustaining objections thereto. *Boche v. State*, 84 Neb. 845.

3. **Appeal: CONFLICT OF EVIDENCE.** The rule has been long established in this jurisdiction that, even though the evidence conflicts, the verdict will not be disturbed if there is sufficient competent evidence to support such verdict.

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

Reavis & Beghtol and *C. E. Sanden*, for appellant.

Doyle, Halligan & Doyle and *W. B. Comstock, contra.*

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

DEAN, J.

Mrs. Mary Pricer, as administratrix of the estate of her late husband, Clarence W. Pricer, sued to recover damages from the defendant, Lincoln Gas & Electric Light Company, for the death of her husband, by electrocution, while he was in the employ of the Lincoln Traction Company as a motorman on a "one man car." It is alleged generally that the

above named defendant, hereinafter called electric company, negligently and carelessly failed to have its transmission wires inspected and insulated and kept in proper repair, and that because of such negligence an electric current, from a wire which carried approximately 2,300 volts, was communicated to the body of her husband, while in the performance of duty, from which he died about 10 days thereafter. She recovered a verdict and judgment thereon for $25,000, from which the electric company has appealed.

The Lincoln Traction Company, hereinafter called traction company, was made a party defendant, it being alleged that it claimed some interest in the subject-matter of the action from the fact that under the provisions of the workmen's compensation act of Nebraska it is paying to the administratrix $15 a week on account of her husband's death.

Mrs. E. J. Bstandig was an eye-witness of the facts which immediately led up to the tragedy. She knew Pricer as a street car motorman and was on his car going west when the accident occurred at about 9 in the forenoon. She boarded the car at Thirty-third and Randolph street, which was the street car's eastern terminus. From its starting point Pricer did not stop the car until it arrived at a point midway between Twenty-seventh and Twenty-eighth streets on Randolph, at the alley, where the accident happened, and was about five blocks from the car's starting point. She was the only passenger and was seated about the center of the car on the south side. Mrs. Bstandig said that when Pricer stopped the car in the middle of the block he remarked that a wire was down. Continuing she testified: "And then I could see through the front end of the car that a wire came down and hung over the trolley. * * * Q. Describe to the jury how the wire was hanging as you saw it. A. Well, it came across from the south pole and then it looped down almost low enough for you to—well, you could see it through the front of the car, and then over across the trolley." She further testified that when Mr. Pricer stopped the car the wire was about three or four feet in front of it, and that he got out and reached up and struck the wire with an iron

bar, an instrument which she called a switch-bar, and which she said was about three feet long; that the wire loop hung down in front and was plainly visible from her position in the center of the car. She could not, however, see where the electric company's wire, which caused Pricer's death, came in contact with the trolley wire.

From her evidence it appears that when Pricer returned to the car he remarked that it was a live wire and that it was "spitting" at him; that he got the pick-up, an instrument for handling live wires, from under a car seat and left the car; that some children were playing about not far from the wire, and after he warned them of their danger and told them to go away he applied the pick-up to the wire. Almost instantly he fell on the wire and lay there about 15 minutes before it was removed from under his body. She said that during all of that time Pricer's body quivered and froth came from his mouth and before he was removed his hands were burned to a crisp.

Miss Martha Van Denbark lives at Twenty-eighth and Randolph streets. She boarded the street car where it stopped in the middle of the block, at the alley, between Twenty-seventh and Twenty-eighth streets. She testified that she got on just as Mr. Pricer stepped off and when Mrs. Bstandig, the other occupant of the car, remarked that a wire was down; she, the witness, "rose half way up and looked out and saw the wire hanging there," from the pole on the south side of Randolph street; that part of the wire was down on the ground and that it quivered and smoked and squirmed about like a live wire; that at the same time she saw five children playing near the wire in the street and heard Mr. Pricer warn them to go away; that, shortly afterward, Mrs. Bstandig screamed, and she then saw the motorman fall over the wire; that she started toward him and was about to touch him, when some one told her not to do so, and that she then ran up the street for help.

The home of the C. W. Hoke family is over the grocery store at the northeast corner of Randolph and Twenty-seventh street. From their sleeping porch, which extends

along the entire east end of the second story of the building, the defendant's wires can be plainly seen. Mrs. Hoke testified, *inter alia,* that "about three weeks before this accident—anyway three weeks, or perhaps longer—we had seen streaks of fire in different places on this wire, but we didn't think very much about it until the night before the accident there seemed to be quite a long streak of fire and we remarked about it. * * * Q. And where with reference to whether there were trees or not? A. Well, just at that one place we noticed it particularly, it didn't seem to be near the trees, it seemed to be in the open." She testified specifically that she saw the fire come out of the wire at a point remote from the trees and said she did not report it to any person nor think anything more about it except that it caused her family to fear that it was dangerous. Evidently the jury accepted the version of Mrs. Bstandig and of Miss Van Denbark and of Mrs. Hoke in respect of the condition and the location of the wire that caused the death of plaintiff's decedent.

There is evidence tending to prove that it is customary for electric concerns to be equipped with an automatic switch, or circuit breaker, and that, if the wire was grounded at the point here in question, an automatic switch, if there was one, ought to have "kicked out."

It is alleged, and there is evidence tending to prove, that on the morning of the accident, at about 7:30, a passer-by notified the electric company by telephone that the wire in question was broken down, and that some person in reply thanked his informant and said that the broken wire would be taken care of. The electric company denied that any such information was received by it and introduced evidence which tended to prove that the wire was not down until about 9 o'clock and that it did not discover the condition of its wire until about the time Mr. Pricer was electrocuted. On this point certain trouble report slips of the night operator at the telephone switchboard of the electric company's plant are in evidence. They are numbered consecutively from 4738 to 4759, inclusive. From the evidence of the

operator it appears that two of the report slips are missing, but that he did not know what became of them and that they might have been lost or they might have been duplicate slips of wire trouble reported from the same place by different parties. A portion of the insulated wire, which is in evidence, measures about 92 feet in length. The span which the wire covered measures 100 feet from pole to pole and there was some controversy at the trial as to what became of the 8 feet of missing wire which the record does not seem to make clear.

A witness testified that the pick-up was attached by Mr. Pricer about three or four feet from the loose end of the wire. The electric company contends that this constituted negligence on the part of the motorman in that he did not attach it nearer the broken end. On the other hand, there is evidence tending to prove that a motorman, before he is permitted to operate a car, serves an apprenticeship of about two weeks so that he may become accustomed to using the appliances on the cars; that he has special instructions from the superintendent in respect of the use of the special equipment and appliances; that there is no established rule with respect to the place where the pick-up should be applied to a live wire, but that is left largely to the judgment of the man who uses it; that it is customary for a cautious man to leave two or three feet from the end, for two or three reasons, one to prevent being struck by the idle end of the wire and the other to allow him to form a loop at the end of the copper, if necessary, to tie it up after he gets it up from the ground; that it is a proper practice to pick the wire up so as to prevent it from slipping off; that motormen are, to a certain extent, supposed to handle high-powered wires so as to clear the right of way so that they may proceed with their cars; that they are not instructed in respect of handling wires of other companies unless they interfere with the progress of the car so that they cannot move forward, hence he is instructed to remove such wires from the trolley wire so that if it was hanging down in front of him it became his duty to remove it, but,

on the other hand, if he saw a wire broken and lying on the side of the street he was not expected to stop and pick it up.

The electric company contends that Pricer negligently and carelessly removed the loose wire from where it hung in front of his car. Mrs. Bstandig was interrogated on this point and she testified, as hereinbefore noted, that she saw Pricer with an instrument in his hand, which she called a switch bar, with which the wire was brought down. Another witness, called by defendant, testified that, if the switch bar was in Pricer's hands when the 2,300-volt live wire was struck, the current would probably have caused severe injury or instant death, and doubtless the jury so believed.

In view of all the evidence the jury were, as we view it, justified in concluding that Pricer must have known that it was dangerous to grasp an iron bar and strike a live wire with it, and that, if he brought it to the ground by the switch bar, he must have done so by throwing it against the loosened wire or into the loop. Or, on the other hand, if the instrument which he held in his hand was only about three feet in length, as Mrs. Bstandig testified, the jury probably concluded that he struck the wire with the wood-handled pick-up, which is about two feet in length, or threw it into the loop. There is no evidence that Pricer received any shock, or suffered any inconvenience, by the manner in which the wire was brought to the ground. Certain it is that his death was not so brought about.

The electric company contends that the wire was broken by a rain and wind storm the morning of June 25, the day of the accident, and that, altogether aside from Pricer's alleged negligence, it is absolved from blame in the premises for that reason. The jury doubtless concluded that, if the wire in question had been properly insulated and was in the ordinary, usual and reasonably normal condition to carry the electric load required of it and to perform the function for which such wires are made and intended and used, it would have withstood the storm, which the evidence shows was not unusual in the vicinity at that time of year.

Whether the electric company exercised reasonable diligence in the inspection of its wires, and particularly at the place where the break occurred, was a question of fact for the jury. The court instructed the jury that the burden was on plaintiff to show by a preponderance of the evidence that the electric company was negligent and careless, "(1) in failing to have the wire in question properly insulated; (2) in failing to inspect said wire so as to know of its condition and repair it more promptly; (3) in using said wire when it was out of repair; (4) in permitting the wire to remain broken and continuing to charge it with a heavy voltage of electricity after it was so broken; (5) in omitting to repair it as soon as practicable after it found out that it was broken; and (6) in knowing or having reason to know that the said wire was broken, and nevertheless failing to shut off the power from said wire or to repair or remove the same within a reasonable time." "This case sounds in negligence, and in order to justify a verdict in favor of the plaintiff she must prove by a preponderance of the evidence (1) that the defendant Lincoln Gas & Electric Light Company was guilty of negligence in one or more of the particulars set out in the petition and detailed in instruction numbered 1 of these instructions (hereinbefore noted); (2) that such negligence on its part was the proximate cause of the accident and of its injury and death of the deceased; and (3) that by the death of the deceased his widow and child were damaged in some amount which you can determine from the evidence."

The defendant requested the court to instruct the jury that there was no evidence tending to prove that the wire was not properly insulated. The instruction was refused, and properly so, in view of the evidence on the question of insulation. And it is argued that the court erred "in submitting to the jury as an issue an alleged failure on the part of the defendant to inspect the wire in question." We do not think error can be predicated upon either assignment. It appears to us that there was sufficient competent evidence on these questions to go to the jury and to support

a finding of negligence against the electric company on both grounds. As hereinbefore noted the jury were properly instructed upon every material question in the case and there is ample evidence to support the verdict.

Unless the motorman can be charged with negligence or with bravado, or with indifference for his own safety, he cannot be said to have been guilty of contributory negligence or carelessness in the performance of duty. That he lost his life in an heroic and praiseworthy effort to prevent injury to others, or perchance death, by reason of the negligence and the carelessness of defendant and its employees who failed in the performance of their duty, no doubt appealed to the jury. The evidence which tends to prove that the electric company was informed about 7 in the morning that its wire was down and that it disregarded the information so conveyed doubtless produced a strong impression upon the mind of the jury and caused that body to believe that the electric company was grossly negligent in the premises.

Complaint is made that the verdict is so excessive as to show passion and prejudice on the part of the jury. We do not think so. At the time of the accident plaintiff's husband was 24 years of age. He had a wife and one child, an infant daughter, Thelma, then aged 7 months. In his occupation as a street car conductor he worked 12 hours a day, for which he received 52 cents an hour for 7 days a week, or almost $2,300 a year. He was a graduate of the Grand Island high school. He was a thrifty man. He had a savings account in a Lincoln bank. It was shown by the Carlisle table that the expectancy of a man of 24 is a little over 37 years.

Who can tell what door of opportunity for usefulness may open to an honest, ambitious and thrifty young man of 24 years? Had the decedent been spared to live out the allotted span of life, its influence upon his daughter, Thelma, now fatherless, could not be measured by the dollar mark. But, the fact must be recognized that, while the protection which a good husband's life affords to the home cannot be com-

puted in monetary terms, the wisdom of the ages has ordained that such computation, based on pecuniary loss, is the only one which the law recognizes and which the jury are compelled to apply.

In view of all the facts before us, and when we take into account the increase in living expenses in recent years, we do not feel constrained to reduce the amount of the verdict. As we review the evidence, we cannot bring ourselves to conclude that the jury were moved by passion and prejudice in the rendition of its verdict, and therefore it will not be disturbed.

Objections to certain impeaching questions which were addressed to one of plaintiff's witnesses, were properly sustained under sections 8844 and 8848, Comp. St. 1922. Section 8844, with respect to witnesses, provides: "When the matter sought to be elicited would tend to render him (the witness) criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as provided in the fourth next following section." Section 8848 provides: "A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." *Young Men's Christian Ass'n v. Rawlings*, 60 Neb. 377; *Boche v. State*, 84 Neb. 845. It may, however, here be added that the witness, of his own motion, denied the imputations which were sought to be established.

Other assignments of alleged error have been presented in the brief which we do not find it necessary to discuss. The judgment of the district court is right and is in all things

AFFIRMED.

Letton and Good, JJ., concur in the conclusion.

BLACK BROTHERS FLOUR MILLS, APPELLANT, V. WILLIAM B. UMPHENOUR ET AL., APPELLEES.

FILED NOVEMBER 26, 1923. No. 23487.

1. **Waters: DEPARTMENT OF PUBLIC WORKS: APPLICATION FOR RECORD OF APPROPRIATION: JURISDICTION.** In an application by a

riparian owner to the department of public works, for the sole purpose of procuring a record of a prior appropriation of water, that department has no power or jurisdiction to determine the height to which the applicant may erect and maintain a dam across the stream from which the appropriation was acquired.

2. ———: ———: APPEAL: JURISDICTION. If the department of public works has no jurisdiction to pass upon a question submitted to it, an appeal from their decision does not confer jurisdiction on this court to determine such question.

APPEAL from the Department of Public Works: *Affirmed in part, and reversed in part.*

Rinaker, Kidd & Delehant and *Sackett & Brewster*, for appellant.

Byron Clark, Jesse L. Root, J. W. Weingarten, Hazlett, Jack & Laughlin and *Max V. Beghtol, contra.*

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

DAY, J.

On November 4, 1922, Black Brothers Flour Mills, a corporation, hereinafter called "applicant," instituted this proceeding before the department of public works for the purpose of securing a formal adjudication of its claim to use, for milling and power purposes, all the waters flowing in the Big Blue river at a designated point, being in block 68 of the original town site of the city of Beatrice. The purpose of the application was not to secure a new appropriation of water, but rather to have a public record made by the department of public works of the applicant's prior right of appropriation. The applicant claimed a priority of appropriation of 350 cubic feet of water per second for milling and power purposes by virtue of a special act of the territorial legislature of Nebraska passed January 11, 1860, giving a perpetual and exclusive right to applicant's predecessors in interest to keep a milldam across the river at that point, not to exceed, when finished, 12 feet in height, and by having used the water for a beneficial purpose for

many years; and by prescription. Notice was given by the department of public works to all persons interested in water appropriations from the Big Blue river and its tributaries, to appear on a day certain to protect their rights and to submit evidence in support of and adverse to the adjudication of the water right claimed by the applicant. But one appropriator of water appeared, and it waived all objections to the allowance of the appropriation claimed by applicant. A large number of persons, property owners in the city of Beatrice, residing below the dam, and a few riparian owners residing above the dam, appeared and filed objections to the construction and maintenance of a dam 12 feet high at the location in question. In substance the objectors urged that the applicant had maintained a dam approximately 9 feet high for a period of years; that a few weeks prior to the commencement of this proceeding the applicant had increased the height of the dam to 12 feet; that prior to the increase the applicant had never owned, possessed, or used the right to flow water of a depth of more than 9 feet above low water level in said river; that it is unsafe, dangerous and threatening to the safety of life and property to have the said dam built and maintained to a height of more than 9 feet; that by reason of the course of the river and the slope of the land a permanent dam 12 feet high would, especially in times of high water, subject their property to great damage from overflow.

At the outset of the hearing the secretary of the department before whom the testimony was taken announced that the question of damages to the objectors could not be considered or determined by the department, but that testimony would be heard to show the amount of water the applicant and its predecessors had used, the head which had been maintained, and the different dates that the head had been raised or lowered. At the conclusion of the hearing the department determined that the applicant had the priority of use of all of the water in the river at the location in question, being approximately 300 cubic feet per second, sometimes more and sometimes less, for milling and

power purposes; that applicant's priority to the use of the water was based on an act of the territorial legislature passed January 11, 1860; that applicant's predecessors in interest had erected a milldam at the place in question soon after the right was granted, and ever since have maintained a dam at the location in question at various heights, and have used the water for milling and power purposes; that prior to July, 1895, the date on which the irrigation law of the state became effective, the applicant's predecessors had not erected a dam higher than 9 feet and 6 inches above tail-water; that the applicant's right to priority in the use of all of the water was limited under a head of 9 feet and 6 inches. From this judgment the applicant has appealed, claiming that under the record it is entitled to use all of the water and to maintain a dam 12 feet high.

It was evidently the theory of the department that the applicant's rights were limited to the height of the dam built by its predecessors prior to July, 1895, which the department found to be 9 feet and 6 inches above tail-water. It is not clear whether this was based upon the idea that the dam was "finished" within the meaning of that term as used in the act of January 11, 1860, or whether after July, 1895, their rights should be determined by the law as it stood on and after that date.

The record shows that on January 11, 1860, the legislature of the territory of Nebraska passed an act granting authority to J. B. Weston, his heirs and assigns, to erect and establish a dam across the Big Blue river at the location now in question, and that the applicant succeeded to that right. The act granted a "perpetual and exclusive right to keep a milldam across said stream at the place designated: * * * Provided, said dam when finished shall not exceed twelve feet in height above low water mark, so as to propel mills or any other machinery that J. B. Weston, his heirs or assigns, may want to erect." Laws 1860, p 202. Ir 1895 the legislature of the state passed an act embodying a comprehensive scheme regulating the appropriation and distribution of the waters in running rivers and

streams of the state, and placed the administration of the law in the hands of a board of irrigation. By subsequent legislation the administration of the law was placed under the control of the department of public works. The act became effective April 4, 1895, instead of July, 1895, as found by the board. The act of 1895 covers many printed pages, and it is not practical to give even an epitome of its provisions. Among other things, it declared: "The water of every natural stream not heretofore appropriated * * * is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as heretofore provided." Laws 1895, ch. 69, sec. 42.

The act of 1895 also contained a provision, now section 8411, Comp. St. 1922: "Nothing in this article contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the fourth day of April, 1895."

It appears that, soon after the passage of the act of 1860, the applicant's predecessors in interest constructed a dam across the river at the location in question, erected a mill, and ever since, except at short intervals occasioned by washouts and fire, have maintained the dam and operated a mill. The first dam constructed was very crude as compared with modern methods of construction, and consisted mostly of brush. It was about two feet high. From time to time, as needs required, the dam was heightened and rebuilt with stronger and better materials, until in 1895 it was a concrete construction which with "flash-boards" was approximately 9 feet and 6 inches high. A short time before this action was instituted the height was increased to approximately 12 feet.

From the express provision of the act of 1895 it appears that it was not the intention of the legislature to in any way interfere with prior acquired rights. It was the intention, however, to ascertain the extent of prior appropriations, and to make a public record of the same in order to

carry out the provisions of the law respecting subsequent appropriations.

The department very properly found that the applicant and its predecessors had appropriated all of the water in the river at the point designated prior to the act of 1895. The correctness of this finding is not seriously questioned by the objectors. The main contention relates to the height of the dam. A number of questions are presented in the briefs which we do not deem necessary to consider.

Upon the oral argument the point was urged by the applicant that the department had no authority to pass upon the height of the dam; that its authority was limited to a determination of the amount of the appropriation to which the applicant was entitled, and the priority of use. Commencing on an early day in the history of our territorial legislation, an act was passed January 10, 1862, which authorized abutting property owners upon streams to construct dams for milling and machinery purposes, and prescribed the method to be pursued in assessing damages to adjacent property owners by the overflow. This act with some modifications has been continued to the present time, and is now section 3377, Comp. St. 1922. In 1911 there was added to this act as it then stood a proviso to the effect that before proceedings could be commenced permission should be obtained from the board of irrigation (now the department of public works) to use the water for such purpose.

While it was within the province of the department under this application to determine the amount of water which the applicant was entitled to use by virtue of the prior appropriation, we do not think that, under the circumstances presented by the record, the height of the dam was a matter for the department's determination. This was not an application for permission to build the dam. No plans were submitted to the department for its approval. The amount of appropriation was the only question at issue.

In this discussion we are not unmindful of section 8446, Comp. St. 1922, requiring plans for proposed dams to be

submitted to the department for approval before construction of a dam is commenced. The provisions of this statute, however, do not apply to the proceedings submitted to the department for determination.

If the department of public works has no jurisdiction to pass upon a question submitted to it, an appeal from their decision does not confer jurisdiction on this court to determine such question.

The judgment of the department, in so far as it determined the amount of water the applicant is entitled to use and the date of its priority, is affirmed. That part of the judgment regulating the height of the dam is reversed upon the ground of lack of jurisdiction.

AFFIRMED IN PART, AND REVERSED IN PART.

STATE, EX REL. VINCENT JEHOREK, RELATOR, V. SAMUEL R. MCKELVIE, GOVERNOR, RESPONDENT: CHARLES W. BRYAN, GOVERNOR, SUBSTITUTED RESPONDENT.

FILED NOVEMBER 26, 1923. No. 22281.

1. **Public Lands: SALES: LAW GOVERNING.** In a sale by the state of Nebraska of its common-school lands, the transaction and rights of the parties in respect thereto are to be governed and determined by the law in force at the time the contract of sale was made.

2. ———: **BOARD OF EDUCATIONAL LANDS AND FUNDS: POWERS.** The board of educational lands and funds of Nebraska has only such powers as are specifically granted to it by the Constitution and statutes of the state, together with such as are necessarily implied to give effect to those specifically granted.

3. ———: **APPRAISAL.** In 1917, the statutes of Nebraska fixed and determined the manner of appraising the state's common-school lands for the purpose of sale. In an appraisal for such purpose under the statute then in force, in the absence of a showing to the contrary, the presumption is that the appraisers performed their duty as the law directs.

4. ———: **ACCEPTANCE OF DEED: ESTOPPEL.** The acceptance and recording by a vendee of a deed from the governor of the state of Nebraska, conveying a portion of the state's common-school

lands, and containing mineral reservations, which reservations were unauthorized and invalid, will not estop such vendee from afterwards demanding a proper deed of conveyance without such invalid reservations.

Original proceeding in mandamus to compel respondent to execute to relator a deed to certain school lands. *Writ allowed.*

Samuel J. Tuttle, for relator.

O. S. Spillman, Attorney General, and *George W. Ayres, contra.*

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

GOOD, J.

This is an action, originating in this court, for a writ of mandamus, to require the present governor to execute to relator a deed in fee simple absolute for 240 acres of land in Boyd county, Nebraska, formerly a part of the state's common-school lands.

Relator alleges that on the 18th day of July, 1917, the state of Nebraska, in the manner prescribed by the laws of said state, sold to relator the lands in controversy, and that thereafter, and on the 4th day of October, 1917, the commissioner of public lands and buildings issued six sale certificates to said relator for said lands, all identical in form except the description of the land. Each of the certificates was for 40 acres of land and contained the following reservations: "All mineral, coal, oil, gas, potash, sand, gravel, clay, volcanic ash, tripoli, and saline rights are reserved to the state, with the right to prospect for and develop the same." It is further alleged that on the 25th of January, 1921, upon the full performance of all obligations of said sale of lands aforesaid, including the full payment of consideration, the former governor issued a deed conveying said lands to relator, a copy of which is attached to and made a part of the petition, which deed contains the same reservations as the sale certificates; that the said res-

ervations are contrary to any provisions of the law and hostile thereto, and are repugnant to the character of the title agreed to be conveyed to relator at the date of the purchase and payment of consideration; that relator has made a demand upon the governor to execute to him a deed in fee simple and without the reservations referred to.

The respondent admits the sale of the lands by the state of Nebraska to the relator at the time stated; that the certificates and deed were issued to him and contained the reservations, as alleged by relator, and that demand has been made for a deed without such reservations; and for a defense alleges that, at the time the relator received a deed for said lands, to wit, on the 25th day of January, 1921, the Constitution of the state of Nebraska provided and now provides that the sale of salt springs, coal, oil, mineral, or other natural gases, on or contained in the land belonging to the state, shall never be alienated, and that prior to the 18th day of July, 1917, the board of educational lands and funds of the state of Nebraska had, by resolution duly passed, determined that, in all contracts entered into by the state of Nebraska for the sale of its school lands, there should be a clause reserving to the state all mineral, coal, oil, gas, potash, sand, gravel, clay, volcanic ash, tripoli, and saline rights; that, at the time said lands were appraised for the purpose of sale to the relator, the appraisers took into account the reservation of said mineral rights by the state in fixing the value of said lands, and that relator, at the time he purchased the land, well knew that the state was reserving all mineral rights in said lands, and accepted the deed to said lands and recorded the same with knowledge of the reservations therein contained, and that he is thereby estopped to now insist that he is entitled to receive from the state a deed without reservations. The relator has demurred to the answer.

Whether the provisions of the Constitution and statutes of the state, in force when the deed was executed by the former governor to relator, authorized or permitted such reservations as were inserted in the deed is immaterial.

The transaction must be governed and the rights of the parties determined by the law in force when the contract of sale was made in 1917. At that time there was no provision of law requiring or authorizing the officers of the state, in making sale of the state's common-school lands, to make any such mineral reservations as were attempted to be made in the instant case. There was no law authorizing the board of educational lands and funds of Nebraska to adopt such a resolution as that referred to in respondent's answer. Such board is a creature of law. It has no powers save those granted by the Constitution or statutes, together with such as are necessarily implied to give effect to those specifically granted. The terms and conditions on which the state's common-school lands could be sold were fixed and determined by the law, and the board was powerless to take from or add to these terms and conditions. It is charged that, at the time the lands were appraised for the purpose of sale to relator, the appraisers took into account the reservation of mineral rights by the state, in fixing the value of said lands. The law fixed and determined the manner of appraisal and the duty of appraisers. It required the appraisers to take an oath that they would appraise the lands at their true value, and required that such appraisal must be approved by the board of educational lands and funds before the sale could be made. There was no warrant of law for the appraisers to make any reduction from the true value of the land because of any mineral rights; nor is it alleged that any such reduction was, in fact, made. In the absence of a contrary showing, the presumption is that the appraisers performed their duty as the law directs.

As to the question of estoppel because relator accepted and recorded the deed executed by the former governor and did not bring this action until some months thereafter, it is not made to appear that the state has changed its position in reliance thereon, or that it has been in any wise prejudiced by such action on the part of the relator. The presumption arising from the facts pleaded and admitted

is that the relator paid and the state received the full value of the land. Relator was entitled to a deed conveying full fee simple title without any reservations. The deed of the former governor did not convey to relator the title for which he contracted and paid.

It is argued that mandamus is not the proper remedy, because, in effect, it seeks to try title to lands, and for the further reason that relator has an adequate remedy at law when any attempt is made by the state to assert any mineral rights to the land. We think it is perfectly clear, under the law, that the state has no rights in the land by virtue of the unauthorized and invalid reservations, and no title to land is involved in this controversy. We do not think that relator has an adequate remedy at law. In the event that relator should desire to sell or mortgage his land, as he has a perfect right to do, the reservations in the deed conveying the land to him would materially interfere with such right. He contracted and paid for a fee simple title, and is entitled to a deed that insures him such title.

It follows that the writ should be allowed.

WRIT ALLOWED.

JOE GOODELL ET AL., APPELLEES, V. UNION AUTOMOBILE INSURANCE COMPANY, APPELLANT.

FILED NOVEMBER 26, 1923. No. 22539.

1. Insurance: APPLICATION: MISREPRESENTATIONS: DEFENSE. "Section 3187, Rev. St. 1913, does not prevent an insurance company from defending, in an action brought to recover upon a policy, on the ground that fraudulent representations were made by the insured in his application for insurance, where such representations related to matters material to the risk, and where if a true answer had been made no contract of insurance would have been entered into. In such case, the right of such defense is not defeated by a showing that the false statement did not contribute to the loss." *Muhlbach v. Illinois Bankers Life Ass'n*, 108 Neb. 146.

2. ———: LOSS: BURDEN OF PROOF. 'In an action by the insured upon a policy of insurance against loss by theft which provides

that the insurer shall not be liable beyond the actual cash value of the property at the time any loss occurs, it is incumbent on the insured to prove the value of the property at the time the loss occurs.

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

Doyle & Halligan and *J. S. Garnett,* for appellant.

W. D. Oldham and *W. L. Minor, contra.*

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

GOOD, J.

Action by plaintiffs, as copartners, to recover on a policy of insurance, issued by defendant, insuring plaintiffs' automobile against theft. Defendant admitted the issuance of the policy; denied all the other allegations of the petition, and for a further defense pleaded that plaintiffs had misrepresented a material fact in their application for the insurance which deceived the defendant to its injury. The misrepresentation complained of was that plaintiffs had falsely stated that the automobile was fully paid for and unincumbered; that defendant relied on said statements, and, had it known they were false, it would not have issued the policy; that, as soon as it learned the falsity of the statements (which was subsequent to the loss), it tendered the plaintiffs the premium they had previously paid. Plaintiffs' reply was a general denial. A trial to the court without the intervention of a jury resulted in a judgment for plaintiffs for the full amount of the policy. Defendant appeals.

The only assignment of error is that the findings and judgment are not sustained by the evidence. The record discloses the following pertinent facts: April 25, 1921, plaintiffs purchased a Ford car and gave in payment therefor their promissory note for $610, due on or before the 25th day of July, 1921, and which contained the following mortgage clause: "For value received on the above note,

I hereby sell and mortgage unto the payee thereof the following goods and chattels, to wit: One Ford touring car with starter and motor No. 4470331, now in my possession and free from incumbrance." April 28, 1921, plaintiffs signed a written application to the defendant for the policy of insurance involved in this action. The statements in the application show that the automobile was purchased for $610, its actual cost to assured $610, and the question, "Is automobile fully paid for?" is answered by "Yes." The automobile was stolen May 13, 1921. At that time no part of the promissory note, given for the purchase price, had been paid. The information contained in the application for insurance consists largely of questions and answers. Defendant's agent testified that he asked one of the plaintiffs if the car was fully paid for and was given an affirmative answer; that he did not ask him all of the questions contained in the application, but did ask the question as to how much he had paid for the car, and if it was fully paid for. On the other hand, the plaintiff who signed the application testified that the insurance agent asked but a single question, and that was what the car cost, and that he correctly answered the question.

The trial court made no specific findings of fact, but found generally for the plaintiffs. It is asserted by defendant that the court reached its conclusion and rendered its judgment for plaintiffs because it construed section 3187, Rev. St. 1913, now appearing as section 7787, Comp. St. 1922, as precluding an insurance company from making the defense that the insured had made a false statement of fact, material to the risk, in the application for the policy of insurance, unless such false statement contributed to the loss. Since the rendition of the judgment by the trial court, this court has construed said section in the case of *Muhlbach v. Illinois Bankers Life Ass'n*, 108 Neb. 146, wherein it was held: "Section 3187, Rev. St. 1913, does not prevent an insurance company from defending, in an action brought to recover upon a policy, on the ground that fraudulent representations were made by the insured in his applica-

tion for insurance, where such representations related to matters material to the risk, and where if a true answer had been made no contract of insurance would have been entered into. In such case, the right of such defense is not defeated by a showing that the false statement did not contribute to the loss."

Under the above holding, it is clear that said section does not preclude the defense tendered by defendant, because the false statements did not contribute to the loss. If the statements alleged to be false were, in fact, made and but for the making of such false statements the policy would not have been issued, then it would follow that defendant would not be liable in this action. But, whether the false statements alleged to have been made were, in fact, made is a question of fact which we deem it unnecessary to further discuss except to say that upon that question the evidence is in conflict, and a finding either way by the trial court would not be disturbed by this court.

The record discloses that no evidence was received or offered as to the value of the automobile at the time it was stolen. The policy provides that the insurer shall not be liable beyond the actual cash value of the property at the time any loss occurs. If plaintiffs were entitled to recover, the measure of their damage would be the actual value of the automobile at the time it was stolen. Under the circumstances, it was incumbent upon plaintiffs to prove the value of the automobile at the time the loss occurred. There is no evidence to sustain the finding that plaintiffs were damaged in the sum of $517, or any other sum. Plaintiffs argue that the value of Ford cars is so stable and the price so uniform, and the car having been stolen only 18 days after its purchase, the court is justified in finding that the value of the car at least equaled the amount of the judgment rendered. It may be that the value of Ford cars is quite stable and uniform, but this court cannot take judicial notice of the value of a car on any particular date. It is well known that the price on all cars changes very materially from time to time, but, aside from that, there is

no evidence that the car was in the same condition at the time it was stolen as it was at the time it was purchased. Innumerable things may have occurred to cause it to deteriorate in value. A Ford car, like any other, might be worth a given sum one day, and a week or month later it might be almost valueless.

Because of the lack of any evidence as to the value of the car at the time it was stolen, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

EUGENE VIAN, APPELLEE, V. BENJAMIN J. HILBERG ET AL., APPELLEES; SARVIS LUMBER COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 26, 1923. No. 22551.

1. **Principal and Surety:** CONTRIBUTION. A number of persons at different times were induced by fraud to purchase shares of stock in a corporation giving their notes therefor; the corporation, being indebted to a bank, transferred the notes to the bank as collateral security for such indebtedness; the bank received the notes in good faith and before maturity; the corporation failed to pay the bank, whereupon one of the note-makers brought suit against the others and the bank to enforce contribution between the note-makers, the amount due the bank being less than the total amount of the notes. *Held*, that, under the conditions stated, the note-makers stood in the relation of sureties for the corporation, and in equity should bear the loss proportionately; that payment of the debt is not a prerequisite to the bringing of such a suit.
2. ———: ———: PARTIES. The corporation was not a necessary party to the suit for contribution.
3. **Venue:** SUMMONS TO ANOTHER COUNTY. A purely personal action must be brought in the county where at least one of the substantial defendants resides, or may be summoned, in order to authorize issuance of summons to other counties, and the rule is the same in equity as at law.
4. **Process:** SUMMONS TO ANOTHER COUNTY. In the present case,

the note-makers other than plaintiff were made defendants; all of them resided in Custer county and were the only defendants served in that county; the corporation and all others were residents of Lancaster county, to which summons was sent and service made. *Held*, that such summons was unauthorized.

5. ———: JURISDICTION. Certain defendants having made timely objection by answer to the jurisdiction of the court over their persons, the objections should have been sustained.

6. ———: ———: ANSWER. Under the allegations of the petition, as stated in the opinion, the want of jurisdiction did not appear upon the face of the record in such manner as to require a special appearance to raise the question, but the same was properly presented by answer.

7. ———: ———: WAIVER. The bank was also served in Lancaster county, but made no objection to the jurisdiction of the court over its person. *Held*, that the failure of the bank to claim its privilege from suit in a county other than that of its residence, if it had such privilege in this case, could not operate as a waiver of the like privilege of the objecting defendants. *First State Bank v. Ingrum*, 107 Neb. 468, distinguished.

8. FRAUD: EXPRESSION OF OPINION. The letter set out in the opinion *held* to be a mere expression of the opinion of the writer, and, in the absence of evidence that the letter was written with a fraudulent intent, it did not amount to a false representation.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed in part, and reversed in part.*

Doyle, Halligan & Doyle and *Dort, Cain & Witte*, for appellants.

Sullivan, Squires & Johnson, Good & Good, Crosgrave, Campbell & Ankeny, A. Moore Berry and *W. A. Selleck, contra.*

Heard before DEAN, ROSE and GOOD, JJ., REDICK, District Judge.

REDICK, District Judge.

This is an action in equity brought in the district court for Custer county; and before stating the substance of the

pleadings it will be necessary to state the facts regarding the parties. The plaintiff, Vian, and the defendants Hilberg, Lewis, Logan, Eddy and Pryor are all residents of Custer county; the defendants Sarvis Lumber Company, Lincoln State Bank, George P. Kimball, Willard Kimball, Perry Anthony and W. A. Selleck are all residents of Lancaster county. All the defendants residing in Custer county were served with summons therein, and all the defendants residing in Lancaster county were served in that county on summons issued by the district court for Custer county. None of the nonresidents of Custer county could be served in that county, and jurisdiction over their persons is asserted under the authority of our statute permitting issuance of summons to counties other than the residence of the defendants where the suit is properly brought in the county from which summons issued.

The facts stated in the petition, and upon which plaintiff bases his cause of action, are substantially as follows: That in 1919 defendants Anthony, the duly authorized agent of the lumber company, and Willard and George Kimball made certain false representations to the plaintiff and the defendants Hilberg, Lewis, Logan, Eddy and Pryor (all residents of Custer county), whereby they were induced to purchase in varying amounts shares of stock of the Sarvis Lumber Company, for which they executed their several notes as follows: Vian $5,000, Hilberg $750, Pryor $4,750, Eddy $2,500 and $5,000, Lewis $5,000, and Logan $5,000 and $5,000, aggregating $33,000; that the Sarvis Lumber Company, being indebted to the Lincoln State Bank in an alleged amount of about $17,000, transferred the notes above mentioned to said bank as collateral security for said indebtedness, but that said bank was not an innocent holder thereof and at the time of receiving them knew that the payors had a good defense as against the lumber company; that the defendant Selleck and the bank aided the agents of the lumber company in the perpetration of the alleged fraud by means of a certain letter of introduction and recommendation of defendant Willard Kimball, signed by

Selleck as president of the bank. The petition then contains the following which seems to present the theory upon which this action is founded:

"That said lumber company, after obtaining said notes above set out, transferred the same to the defendant bank, as collateral to an alleged indebtedness from said company to the bank, of something like $17,000, and said bank now holds all of said notes above set out, and at the time this action was begun threatened to sue this plaintiff upon his said note. Said bank knew at the time of said threats that all of the makers of said notes, as well as this plaintiff, denied that it was an innocent purchaser in due course of this said note, and knew that this plaintiff and the other defendants deny liability upon said notes to said bank, and knew that all of said parties claimed and insisted that said bank obtained the said notes with the due notice of the fraud that was practiced upon the makers thereof, in procuring the same, but plaintiff alleges that, at the time this action was begun, the defendant bank was about to single out plaintiff and to sue him first, and to make the said threatened suit against plaintiff a test case, and did not intend to bring suits against the other defendants until the suit against this plaintiff had been finally determined, and plaintiff alleges that said threatened suit against him by said bank was not in good faith for its own use and benefit, but that said suit was threatened against this plaintiff for the benefit of the said lumber company and the said defendants, Kimball and Anthony, and that at the time this action was begun the said bank proposed, at the request of the officers and stock salesmen of said corporation, to hold certain of said notes without suit, and at the time this action was begun said bank intended, if it succeeded in procuring judgment against plaintiff, to compel him to pay the full amount thereof, regardless of the obligation of the other defendants to pay any part of their notes to said bank, and it is the purpose of said bank to bring said action against plaintiff in the courts of Lancaster county, by making the said lumber company a party, which lumber company has

an office in said county, although it knows full well that a judgment against said lumber company could be, and would be, of no avail to it, and knows full well that it could never realize anything on a judgment against said lumber company."

The prayer of the petition is that the bank be required to bring said notes into court and that the same be canceled as having been obtained by fraud and without consideration; that it be decreed that the bank was not an innocent purchaser of said notes; that, in the event that the bank was found to be an innocent purchaser, judgment be rendered proportionately against the several note-makers for the amount found due, and the remainder of the notes canceled upon payment of such proportionate share, and that the plaintiff and other makers of said notes, if they desire, have judgment against the Kimballs, Anthony and Selleck for the amount required to be paid by them respectively upon said notes, and for general relief.

The defendants Hilberg, Lewis, Eddy and Pryor filed answers and cross-petitions setting up the same facts as stated in the petition, and prayed for the same relief.

Defendant Logan answered, and alleged that the court had no jurisdiction over his person or the subject-matter of the action, for the reason that the petition did not state a cause of action against him, and because plaintiff had an adequate remedy at law; admits the purchase of the stock in the lumber company from Anthony, that he gave two promissory notes therefor and the same were afterwards delivered to the bank by Willard Kimball, but denies they were delivered to the lumber company or that the lumber company was ever the owner thereof or that the bank ever had any title or interest therein; and denies each and every other allegation of the petition. He also filed a cross-petition to the same effect.

The Lincoln State Bank answered, setting up various loans to the Sarvis Lumber Company upon which it claimed to be due the sum of $17,978.21 and interest, the pledging of the several notes referred to as collateral security deny-

ing all the other allegations of the petition, and praying that the action be dismissed as to defendant for want of jurisdiction in equity.

The defendant Selleck filed a general denial of the petition and cross-petition.

The defendants Sarvis Lumber Company, George P. Kimball and Willard Kimball filed a joint and several answer, the first defense in which challenged the jurisdiction of the court in the following language:

"This court has no jurisdiction of the person of defendant Sarvis Lumber Company, because it says Sarvis Lumber Company is a corporation incorporated under the laws of the state of Nebraska, having its principal place of business in the state of Nebraska, at Lincoln, in Lancaster county, Nebraska; maintains no agency, and has no agent in Custer county, Nebraska.

"That the only service of summons upon said defendant in this action was and is summons served upon the president of said company at Lincoln, in Lancaster county, Nebraska; that it has not been served with summons in Custer county, in this action; has no agent or representative in Custer county upon whom service of summons could be made; that it is not impleaded in this action with any defendant served in Custer county, Nebraska, against whom a joint cause of action is stated.

"The defendant George P. Kimball and the defendant Willard Kimball each separately says this court has no jurisdiction of the person of either of these defendants, because each separately says the said George P. Kimball and said Willard Kimball are residents of Lincoln, in Lancaster county, Nebraska, and each of said defendants was a resident of said county and state at all of the times mentioned in the plaintiff's petition.

"Neither of said defendants was served, with summons or process of any nature in this action in Custer county, Nebraska. The only service of summons made, or attempted to be made, upon said defendants, or either of them,

was by the sheriff of Lancaster county, Nebraska, at Lincoln, in Lancaster county, Nebraska.

"No defendant was served in Custer county, Nebraska, against whom a joint cause of action is stated with either of these defendants.

"Wherefore, each of said defendants prays the service of summons as to each of them be quashed."

The answer then admits that George P. Kimball is secretary and treasurer, and Willard Kimball, at the time stated, president of the lumber company; denies that the Kimballs solicited the plaintiffs in Custer county to purchase stock in the lumber company; denies that at any time or place they made any false statement or representations concerning the property or financial condition of the lumber company; admits the purchase by the Custer county residents of the stock of said company, and the giving by them of the notes above referred to; admits the indebtedness of the lumber company to the bank in the amount alleged by the bank, and the transfer of said notes to the bank as collateral security; denies each and every other allegation of the petition, and prays that the plaintiff take nothing by his pretended cause of action, and that the court determine it has no jurisdiction of the persons of said defendants.

Replies were duly filed putting in issue the new matter contained in the answers.

The trial to the court resulted in a decree, finding that the various notes given for stock in the lumber company were procured by the fraudulent representations of Anthony and Willard Kimball, as agent and president of the lumber company, and that the makers had a good defense against the lumber company thereto; that the defendant bank was not liable in connection with the letter of Selleck, and that Selleck was guilty of no fraud in that connection; that the bank was in the position of an innocent purchaser of the notes in question, and that the indebtedness to it from the lumber company was the sum of $14,050, with interest at 8 per cent.; finds the amount due on the respective notes, and that the makers should pay the bank proportionately,

except defendant Logan. As to Logan, the finding was that, as he had interposed no defense to the notes, he should pay the full amount thereof, to be credited upon said indebtedness of the bank, the other makers to pay the balance proportionately. The decree also provided for contribution between the note-makers in case any of them were compelled to pay more than his share of said indebtedness as fixed by the decree; and the case was dismissed as to defendants Selleck and George P. Kimball.

The defendants Sarvis lumber company and Willard Kimball appeal to this court, joining Vian, Hilberg, Lewis, Logan, Eddy, Anthony, Pryor, Selleck and the bank as appellees, all of whom filed cross-appeals.

The case presents a number of complications, and for the sake of clearness we have divided the parties into groups in order that the various contentions may be more readily perceived:

Group A—plaintiff Vian and defendants Hilberg, Lewis, Eddy and Pryor.

Group B—defendant Logan.

Group C—defendant Lincoln State Bank, the lumber company, and the Kimballs.

Group D—defendants bank and Selleck.

Group E—defendants lumber company, George and Willard Kimball.

All the members of group A seek the same relief as the plaintiff, and present no contest as between themselves.

As to group B, no such relief as was granted in the decree was asked by group A, and the only contest here involved the amount which Logan should contribute to the claim of the bank, in which question none of the other defendants outside of group A had any interest.

As to group C, the charge is that they fraudulently conspired together to bring suit in Lancaster county against the plaintiff alone and thereby deprive him of the benefit of his alleged equitable right of contribution from the other note-makers.

As to group D, the charge is that Selleck and the bank

aided in the perpetration of the fraud on groups A and B.

As to group E the charge is that the lumber company, through its agents, the Kimballs and Anthony, made false representations inducing plaintiff and others of groups A and B to purchase stock of the lumber company, resulting in the giving of the various notes referred to.

It will be observed at once that the petition of plaintiff presents a number of diverse and distinct controversies, in and with no one of which are all of the defendants interested or connected. Claims cognizable in equity are joined with those of a purely legal character; as against one defendant, plaintiff seeks an accounting; as against others, the cancelation of the notes; as against others, all residents of Custer county, he seeks contribution as between sureties; and as against others, he seeks a judgment for damages for false representations.

At the threshold of this case we are met with objections to the jurisdiction of the court over the persons of the defendants included in group E. For the purpose of determining this question, the interest of the several parties in the matters stated as the basis of plaintiff's claim for relief is a controlling factor, regardless of their designation as plaintiffs or defendants; all persons having a common interest in obtaining the relief must be placed on one side, and all those opposed, on the other. Therefore, the parties composing groups A and B, all being in like situation and interested in obtaining the relief demanded (according to allegations of the petition), must be considered as plaintiffs, and those resisting the granting of such relief as defendants. It follows that the joinder as defendants of parties who have no interest adverse to the plaintiff, but who, on the contrary, are only interested in obtaining the same relief for which the plaintiff prays, can furnish no basis for the issuance of summons to other counties on the theory that the case was properly brought in the county of the process. It is essential to consider the nature of the case with reference to the county in which it must be brought, and it

is conceded to be transitory, and included within those covered by the provisions of section 8563, Comp. St. 1922:

"Every other action must be brought in the county in which the defendant, or some of the defendants, resides or may be summoned."

And the procedure in such case is governed by section 8570, Comp. St. 1922: "When the action is rightly brought in any county, according to the provisions of this code, a summons shall be issued to any other county, against any one or more of the defendants, at the plaintiff's request."

These sections have been construed many times by this court, and in *Barry v. Wachosky*, 57 Neb. 534, it was said the test for determining whether an action be rightly brought in one county against the defendant found, and served therein, so that the other defendant may be served in a foreign county, is whether the defendant served in the county in which the action is brought is a *bona fide* defendant to that action—whether his interest in the action and in the result thereof is adverse to that of the plaintiff. *Hanna v. Emerson*, 45 Neb. 708, and cases there cited. It is claimed, however, that all defendants are interested in preventing the relief asked by the plaintiff and are, therefore, properly joined. The difficulty here is that no one of the objecting defendants alleged to be so interested resided in or was served in Custer county. Service must be had in the county upon some one jointly interested with the nonresident defendant in defeating the plaintiff, before summons can issue to another county. It is stated, in the brief of appellees, to be well settled in Nebraska "that the rule in equity with regard to joinder of defendants and the bringing in of defendants from other counties differs radically from the rule in an action at law." No citations in support of this statement are given, and we think it cannot be maintained as applicable to the question of jurisdiction depending upon the proper construction of the two sections of the statute above quoted. The statute makes no such distinction, and we know of no decision announcing it in that connection. It may be conceded that in an equitable

action for an accounting or for contribution or to cancel notes or contracts, where one of the defendants against whom the particular relief is sought is properly summoned in the county of the action, summons may issue to other counties to bring in other persons jointly interested with the local defendant in defeating the plaintiff. But that is not this case. Here the only parties served in the county are those interested with the plaintiff in obtaining the same relief that he seeks; if plaintiff succeeds, all those parties will be benefited by a reduction of their debts. If this contention of appellees were true, and it was sought to obtain specific performance of a contract between A and B, on the one part, and C, on the other, the land being located in the county of C's residence, A might bring suit in some other county, join B as defendant, and compel C to defend in a county other than his residence. Again, in case of a promissory note to A and B, signed by C, by joining B as a defendant and issuing summons to another county for service upon C. And it would make no difference in either case that B would refuse to join plaintiff, and that he was therefore made a defendant, for no relief is sought against B, and therefore, from C's angle, the action is not properly brought against B. These illustrations serve to demonstrate the absurdity of plaintiff's claim that, by service upon resident defendants in Custer county, any authority to issue summons to other counties was obtained.

But it is argued that Logan, one of the defendants residing in Custer county, resisted the plaintiff and presented a real controversy; but the only controversy between plaintiff and Logan was as to whether Logan was entitled to contribution from the others, in which controversy the objecting defendants had no interest whatever; and this controversy only arose upon the filing of Logan's answer; it was not presented by the petition. The defendant served in the county of suit must have an interest adverse to the plaintiff in obtaining relief against the nonresident, in order that service upon him may be made the foundation for the issuance of summons to another county (*Hanna v. Emerson,*

45 Neb. 708), where it was also held that section 65 of the Code (8570, *supra*) does not apply where the person served in the county is only a nominal defendant. And in *Stewart v. Rosengren*, 66 Neb. 445, it was held that section 65 could not be evaded by joining nominal defendants, and the fact that the resident defendant had a controversy with the plaintiff is immaterial, since the nonresident defendant has no interest or liability in connection with such controversy. It needs no argument to show that neither of the objecting defendants had any interest in the dispute between plaintiff and Logan, above mentioned. The fact that the bank and some of the other defendants did not object to the jurisdiction over their persons cannot serve to bring the case within section 8570, *supra*, because at the time the suit was brought and summons issued the nonresident defendants were not subject to suit in Custer county, and therefore, the suit cannot be said to have been properly brought in Custer county, unless at least one substantial defendant was a resident of or served in that county, which condition, as before observed, is not present. Neither can the waiver of the bank in that connection affect the right of the objecting defendants, as each have a personal right to insist that in a purely personal action he shall not be sued in a county other than that of his residence; and this right can only be waived by him or his agent, and not by a codefendant standing in no such relation.

In this connection we have not overlooked the case of *First State Bank v. Ingrum*, 107 Neb. 468, in which it was held that, where one of two defendants liable jointly to plaintiff was served in the county where suit was brought, whether the county of his residence or not, at a time when he was in the county for the purpose solely of testifying as a witness in another case, which fact would privilege him from such service, but which privilege he waived, the nonresident could not raise it for him for the purpose of defeating the jurisdiction of the court over his person; the reason given being that the privilege from service was personal to the defendant, and he might waive it. The case is

clearly distinguishable from this, in that there was a joint liability and one of the defendants was served in the county, which furnished complete authority for the issuance of the summons, and the waiver was of a right personal to the party making it; while in the instant case the waiver of the bank and other defendants of their personal right to exemption from suit in a county other than that of their residence cannot be given effect as a waiver of the rights of the objecting defendants with respect thereto. If a joint cause of action were stated against the party served and the nonresident, no question of waiver would arise, because, one defendant being served in the county, the other may be brought in.

We are clearly of the opinion upon the considerations stated that, if the question has been seasonably presented, the district court for Custer county acquired no jurisdiction over the persons of the objecting defendants. But the plaintiff contends that all matters inimical to jurisdiction appeared upon the face of the record, and that defendants should have raised the point by special appearance, and that, by joining the objection to the jurisdiction over the person with a plea to the merits, the defendants waived the objection to the jurisdiction and entered a general appearance. It is true that this court is committed to that doctrine, and unless the petition presents some ground, at least plausible, for holding the objecting defendants jointly with other defendants properly served or in court, we would be compelled, under our former rulings, to sustain the jurisdiction; but the allegations above quoted of paragraph 6 of the petition charge that the Lincoln State Bank, in collusion with the objecting defendants, was threatening to take action against the plaintiff alone, in Lancaster county, whereby his alleged equitable rights of contribution from the other note-makers would be seriously endangered and plaintiff subjected to a large number of separate suits to obtain contribution. It therefore appears by this paragraph that one of plaintiff's claims to equitable relief is based upon confederation and collusion between several defendants, one of whom, the

bank, had appeared in court and thereby subjected itself to its jurisdiction.

Now, are we to understand counsel to claim that, for the purpose of establishing waiver, these allegations, on the face of the record, do not constitute a cause of action, but that, for the purpose of sustaining general equity jurisdiction over the case, they do? We hardly think plaintiff can be permitted to occupy these inconsistent positions. It must be presumed that these allegations were inserted in good faith, in the belief that they fortified the plaintiff's position, and he should not now be allowed to assert the contrary. The question whether or not a cause of action is stated is one which calls for the judgment of the court on a matter outside the question of jurisdiction, and it would be a dangerous proceeding to raise that question upon a special appearance; so, we think, for present purposes we must consider whether the objecting defendants are jointly touched by the claim, good or bad, of the plaintiff; and as the facts touching that claim are not apparent upon the face of the record, the right of the objecting defendants to raise the question of jurisdiction over their persons was not waived by failure to file a special appearance, but was properly raised by answer.

In *Stull Bros. v. Powell*, 70 Neb. 152, a joint liability was alleged in the petition against a resident and nonresident defendant, and it was held that the proper method of raising the question of jurisdiction was by answer, and, it appearing upon the trial that there was no joint liability, jurisdiction was denied. In *Bailey v. Chilton*, 106 Neb. 795, it was said that under the allegations of plaintiff's petition it was proper to join the defendants in the one action and to seek the relief prayed, but that upon the trial, plaintiff having failed to prove a joint liability against defendants, the objections to the jurisdiction should be sustained. And in *McNeny v. Campbell*, 81 Neb. 754, it was held: "The plaintiff in this case having shown no right of action against Carpenter (resident defendant), the district court for Web-

ster county obtained no jurisdiction of the defendants Burke & Campbell, and the action should have been dismissed."

The application of the above cases to the one at bar is found in the fact that no evidence whatever was produced by the plaintiff to sustain the allegations of paragraph 6 as to collusion of the bank and objecting defendants. It therefore appeared upon the trial that no joint liability existed, and that jurisdiction of the persons of objecting defendants had not been obtained. These were the only allegations of the petition charging the objecting defendants jointly with any one, over the person of whom jurisdiction had been obtained by service in the county; this left the case against the lumber company and the Kimballs one for cancelation of the notes for fraud in their procurement—a question between groups A and B, on the one hand, and E, on the other; as between the plaintiff and the bank the issue of fraud could be tried without the presence of the objecting defendants. Suppose the only defendants were the bank and lumber company, neither being served in Custer county: No one would contend that the suit was properly brought; and in such case it seems that the entry of appearance by the bank, whether in collusion with plaintiff or not, could not operate as a waiver of the lumber company's privilege of being sued in the county of its residence. Had the bank been served in Custer county a different question might arise, as the case would then be brought within the terms of section 8570. We therefore hold that the present case is not controlled by cases where the want of jurisdiction appears upon the face of the record, and that the objections should have been sustained.

Cross-appellant (plaintiff) complains of the finding of the court in favor of Selleck and the dismissal of the case as to him. Plaintiff's case against Selleck is based upon the following letter which it is claimed in part induced the purchase of the stock:

"Lincoln, Neb. April 26, 1918.

"To Whom It May Concern:

"I take pleasure in stating that I have known Mr. Willard

Kimball of this city for many years, at least twenty years last past. During the most of the time he was the principal owner and manager of the University School of Music located in this city.

"Mr. Kimball in his management of this institution showed marked executive ability, and is a man recognized amongst the community here, as one of high integrity, of character and of unusual ability. He built up a strong institution and parted with it only because he felt that larger opportunities were offered him in other lines.

"Mr. Kimball is worthy of every confidence and full trust in whatever statements he may make regarding his business.

"Yours truly, (Signed) W. A. Selleck,
"Pres. Lincoln State Bank."

This letter was printed in a prospectus or pamphlet published by the lumber company. There is no evidence that Selleck knew of the publication, and he is not charged with any bad faith or collusion; he is sought to be held on the ground that the statements of the letter are false, and that he is therefore chargeable with the use made thereof by Willard Kimball. There is no evidence that the statements of fact in the letter are false, but liability is based upon the last paragraph. We think that this sentence was the expression of the writer's opinion, and unless fraudulently made, gives no cause of action. No man can know absolutely that another is "worthy of every confidence." He can only form an opinion on that subject. It is not a matter of which he may be presumed to speak from knowledge; it is not susceptible of knowledge. If the speaker has knowledge of *facts* which do not warrant the opinion, the expression of it would be fraudulent. All of the cases cited by appellant on this point present this feature or some false statement of fact. For instance, in *Einstein, Hirsch & Co. v. Marshall & Conley,* 58 Ala. 153, the statement was, "He is good for all he buys," considered as assertion of financial standing; *Addington v. Allen,* 11 Wend. (N. Y.) 374, "that

he was safely to be trusted and given credit," when in fact he was indebted to the defendant in large amounts for which judgments had been rendered and remained unpaid; *Kimball v. Comstock,* 14 Gray (Mass.) 508, that he was possessed of a large amount of property and entitled to credit; *Foster v. Charles,* 6 Bing. (Eng.) 396, that he had an excellent connection and large business, when in fact he had no connection and was in debt to the knowledge of defendant giving the recommendation; *James v. Crosthwait,* 97 Ga. 673, defendant banker, being inquired of as to state of the account of the company whose shares plaintiff was about to purchase, refused to give the information, but referred plaintiff to Lamar, "He will tell you just how it is," and Lamar made false representations; there was evidence of collusion between Lamar and the banker.

None of the statements of fact in this letter are shown to be false, nor is there any evidence that Selleck was possessed of information that made his expression of opinion fraudulent. The findings of the trial court are fully sustained and we adopt them. It is not now contended that the bank is liable with Selleck.

We come now to the question of the jurisdiction of a court of equity to grant the relief prayed; and, first, can the suit be maintained as one to compel contribution as between sureties? The parties to this controversy are the note-makers, as plaintiffs, *versus* the Bank. All the plaintiffs, according to the allegations of the petition, are in same situation, viz., their notes had been procured by fraud and they had a defense to them in the hands of the payee. If the debt of the bank is less than the aggregate of the notes, it would seem equitable that the loss to plaintiffs be apportioned between them, and this can best be accomplished by a suit in equity, when the respective rights of all the parties can be protected. While the obligation of the note-makers to the lumber company in the first instance was primary, when it is shown that a good defense exists to the notes and the lumber company has placed them in the hands of an innocent third party as security for its debt, the note-mak-

ers, by operation of law, occupy the position of sureties for the payment of that debt. They are possessed of the same rights as between themselves as though they became sureties by express contract. *Wayman v. Jones*, 58 Mo. App. 313. We think the case is not distinguishable in principle from *McBride v. Potter-Lovell Co.*, 169 Mass. 7. The statement of the case is contained in the syllabus as follows:

"A banker and broker who held the promissory notes of several of his customers for sale for their benefit fraudulently pledged them at different times as security for his own debt to a person who took them in good faith, for value and without notice, and who from time to time collected enough of these notes, as they fell due, to satisfy the debt of the pledgor, who had become insolvent. One of the makers of the notes demanded the return of his note by the pledgor before it had been pledged, and refused to pay it to the pledgee. Held, on a bill in equity for contribution, brought by one of the makers of the notes against the pledgor, the pledgee, and the other makers, that, all the notes being pledged as security for the same debt, the whole loss should be borne by all the makers in proportion to the amounts of the notes so pledged; that the demand for the return of his note by one of the makers was immaterial, and that the assignees in insolvency of the pledgor had no interest or duty in the case."

The notes in that case were given at different times by different parties, without any concert between them, and were all pledged by the payee to secure the same debt. At page 9 the court say:

"The various parties selected a common agent, and this agent used its power to place them all under a common liability, thus virtually making them all sureties for itself. It might be that under such circumstances the pledgee would prefer to hold one and exonerate another, and it would have power to do so in the first instance by proceeding to collect of one, but not of another. But where several different parties have thus been exposed to loss by the fraud of their common agent, it is more equitable that the burden

of the loss should be shared *pro rata*. Under such circumstances equality is equity, without respect to the time of the maturity of the notes. The demand by the North Star Boot and Shoe Company for the return of its note was also immaterial. It was no more fraudulent to pledge this note after such demand than it would have been to pledge it before a demand. All the notes being pledged as security for the same indebtedness, the whole loss in consequence thereof is to be borne by all the makers in proportion to the amounts of the notes so pledged. *Gould v. Central Trust Co.*, 6 Abb. N. C. 381; *New England Trust Co. v. New York Belting & Packing Co.* 166 Mass. 42, and cases there cited; *Wiggin v. Suffolk Ins. Co.*, 18 Pick. 145, 153; *Warner v. Morrison*, 3 *Allen*, 566; 1 Story, Eq. Jur. sec. 493."

It is attempted to distinguish this case on the ground that the fraud was committed by a "common agent," but the distinction is not perceived. Counsel argue: "In that case the notes were pledged by the makers thereof. Here the makers of the pledged notes did not agree to pay the secured debt, nor make a pledge of their notes to secure its payment. Hence, they did not become sureties of the lumber company." The assumption that in pledging the notes the payee acted as agent of the makers is unwarranted; he acted in fraud of their rights—outside his agency—and the makers did not thereby agree to pay the debt. We approve the case of *McBride v. Potter-Lovell Co., supra.*

It is objected that suit for contribution cannot be maintained until plaintiff has paid more than his share of the debt. This might be a good defense at law, but the equitable remedy is concurrent with the legal remedy where the latter would be incomplete, inadequate or doubtful. *Comstock v. Potter*, 191 Mich. 629. That payment in such case is not a condition precedent is shown by the case of *McBride v. Potter-Lovell Co., supra.* See, also, *Davis v. First Nat. Bank*, 86 Or. 474. The bank not having objected to the jurisdiction of the person, we think the case well brought for contribution, and it will not be necessary to further discuss other grounds of equity jurisdiction.

The defendant and cross-appellant, Logan, was excluded by the decree from sharing with other note-makers the benefits of equitable contribution, for the reason that he had not filed a cross-petition joining the others in praying for a cancelation of his note on the ground of fraud. The evidence on that subject was equally applicable to him as to the others, and the finding is sustained by the evidence. We think, in a proceeding of this kind, where relief is awarded on equitable principles, that all parties in a like situation should receive equal consideration and relief; and that the failure of Logan to join the others, under the circumstances, does not warrant the imposition of a penalty such as provided by the decree. The evidence warranting it, Logan should be treated the same as the others in like situation.

The findings and judgment of the district court are affirmed as to the bank and the note-makers, except as to Logan, who must be treated the same as the others, and is hereby granted leave, if he so desires, to file an amended answer and cross-petition in accordance with the proofs. Finding and judgment against Logan in favor of the lumber company and Willard Kimball is reversed. Judgment is affirmed as to defendants Selleck and George P. Kimball. As to Sarvis Lumber Company and Willard Kimball, judgment is reversed and the case dismissed.

The cause is remanded to the district court for entry of decree in conformity with this opinion.

JUDGMENT ACCORDINGLY.

BERNARD J. CURRAN, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED NOVEMBER 26, 1923. No. 22561.

1. **Negligence: CONTRIBUTORY NEGLIGENCE: DAMAGES.** Where negligence of defendant is shown as the cause of an accident, contributory negligence of plaintiff is not a complete defense, but only calls for an apportionment of the damages under the federal employers' liability act, 35 U. S. St. at Large, ch. 149, sec. 3.

2. Master and Servant: ASSUMPTION OF RISK. Under section 4 of the federal employers' liability act, an employee assumes the risks incident to his employment, and risks due to negligence of the employer and his agents and servants, when such risks are obvious or are fully known and appreciated by him.

3. ———: ———: QUESTION FOR JURY. Where reasonable minds might differ upon the subject, the question of assumption of risk is one of fact for the jury.

4. ———: DEFECTS IN EQUIPMENT: QUESTION FOR JURY. Whether or not a defect caused by negligence of the defendant is of such an obvious character that the employee should have known of it is a question for the jury, where reasonable minds might differ upon it.

5. Damages: REMITTITUR. A verdict for $32,000 for personal injuries sustained by a railroad switchman 49 years of age, under the facts, *held* excessive, and a remittitur of $10,000 ordered.

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

Brown, Baxter & Van Dusen, for appellant.

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

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

REDICK, District Judge.

This action is brought under the federal employers' liability act to recover damages for personal injury to the plaintiff, and the facts disclosed by the evidence are substantially as follows: The defendant, in connection with extensive stock-yards, operates a railroad and is a common carrier. The plaintiff had been engaged in railroading as a switchman for about 28 years, the last 14 of which were with the defendant, and the last 3 in and about the place in the yard where he was injured. At the time of the accident a string of 15 empty freight cars were standing at one of the docks or platforms in the stock-yards at which cattle were unloaded. The platform extended to within 5 or 6 inches of the side of the freight car when standing upon the track, and was 10 or 12 feet in width, presenting

a clear space between the cars and the fencing inclosing the stock-yards, except for wooden bridges composed of two-inch planks used to cover the space between the dock and the car when cattle were being loaded or unloaded, and which would be left lying upon the dock. The dock was about 900 feet long and accomodated 24 chutes about 40 feet apart. The alley-ways or chutes through which the cattle passed from the pens to the cars were provided with gates the width of the platform, which, when opened across the platform, completed the chute to the door of the car. When not in use and after a car was unloaded, these gates were swung back to the right and left against the inclosure of the cattle pens, an iron pin being provided to keep them in place. It was the duty of the chute gang of the defendant, after each car was unloaded, to swing these gates back into position indicated and lock them with the pin. At the time of the accident resulting in the injury to the plaintiff, one member of a pair of these gates was standing open across the dock, the outer end of it reaching within a few inches of the side of passing cars. The pin above referred to was also used for fastening the gate in position when being as part of the chute, but whether it was engaged at the time of the accident is not shown by any direct evidence. The engine was headed north, and the operation being performed at the time of the accident was to push the string of cars north past the loading platform to the Northwestern Railway tracks, the engine being located at about opposite chute No. 1. The plaintiff was standing on top of the box car immediately north of the engine, and facing north during the movement, watching for signals from a switchman on top of the train at the other end in order that he might repeat them to the engineer. When the car upon which plaintiff was riding was about opposite chute No. 18 or No. 20, plaintiff received a signal to cut off the cars from the engine and kick them onto a switch, which signal he repeated to the engineer, and immediately walked to the southwest corner of the car upon which he was riding, and turned around and started to climb down the side ladder

thereon. The engineer, upon observing the plaintiff and having seen the gate extending across the dock, holloed to the plaintiff, applied the air brake, and blew his whistle, but the plaintiff did not hear, and when he was about halfway down the ladder with his head and shoulders about even with the top of the car, he was struck by the gate and thrown down between the engine and the car, one wheel of which ran over his foot, mashing it to such an extent as to require amputation of the leg below the knee. The car was provided with two ladders, one on the side with a stirrup extension, and the other just around the corner on the end. The instructions to all switchmen and the universal custom was to use the end ladder in "close quarters;" under other conditions either ladder might be used. The position of the gate across the dock was seen by the engineer at the commencement of the movement, and could have been seen by the plaintiff from his position on top of the car had he looked in that direction.

The theory of the plaintiff is that defendant's servants whose duty it was to close the gates back upon the inclosure of the pens were negligent in leaving the gate in question in the position it occupied at the time of the accident, and that such negligence was the proximate cause of his injuries.

The defendant by its answer presents three defenses: (1) That the proximate cause of the accident was plaintiff's own negligence in using the side ladder on the car; (2) that plaintiff was on the side ladder in violation of the instructions of the defendant and of the custom of switchmen in the use of side ladders in close quarters; and (3) that the injuries received by plaintiff were the result of the risks of his employment and assumed by him. The case was presented to a jury under appropriate instructions, to which no objection is made, resulting in a verdict for the plaintiff for $32,000, upon which judgment was rendered, and, motion for a new trial having been overruled, defendant presents the case here for review.

We need not consider at any length the question of negligence of defendant. That was for the jury, and their find-

ing is abundantly sustained. But, in addition to this, counsel for defendant not only fails to discuss it in his brief, but upon the argument, with great fairness, assumes the existence of negligence. Negligence of defendant being established, contributory negligence of plaintiff would not be a complete defense, but would only call for an apportionment of the damages under the federal employers' liability law.

On the question of violation of general instructions and the custom of switchmen, we do not think the rule or custom was of such a positive or definite character as to make the violation thereof a question of law. It was to operate only in "close quarters," and whether or not the operation being carried out presented a situation for the application of the rule presents a question of fact for the jury, and was such in this case. The movement of trains past the unloading docks was a usual movement, and if there were no obstructions upon the dock, the evidence seems to show that it was as safe to go down the side ladder as the end ladder. The plaintiff testified that he intended to remain upon the ladder until he had passed the loading dock. This he could do with perfect safety. The first and second defenses presented questions for the jury, and their finding thereon, being supported by the evidence, is binding upon this court.

The defense principally relied upon is assumption of risk; that the defect or condition causing the injury was of such an obvious character that plaintiff, in the exercise of ordinary care, should have known of its existence, and is therefore chargeable with such knowledge, and yet selected the dangerous way, when a safe one was provided. The evidence shows that occasionally gates will jar loose and obstruct the dock. It does not warrant an inference that such was the cause in the present case. But the conditions shown were not of such general occurrence as to bring it within the rule as being a usual and ordinary risk of the employment.

The common-law rule of assumption of risk is in full force in federal jurisdictions, except in cases in which the rule

is abrogated by section 4 of the federal employers' liability act, viz., "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death," such, for instance, as the providing of automatic couplers.

We do not understand the learned counsel for defendant to contend that in all cases not within the language of section 4 assumption of risk is a complete defense; though they cite *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, holding: "The employers' liability act having expressly eliminated the defense of assumption of risk in certain specified cases, the intent of congress is plain that in all other cases such assumption shall have its former effect as a bar to an action by the injured employee"—and *Boldt v. Pennsylvania R. Co.* 245 U. S. 441, approving that case. The manifest meaning of the clause quoted is that the rule shall remain a bar in those cases where it would have been a bar at common law. In fact, the first syllabus in the *Boldt* case states the rule as follows:

"Under the federal employers liability act, except in the cases specified in section 4, the employee assumes extraordinary risks incident to his employment, and risks due to negligence of employer and fellow employees, when obvious or fully known and appreciated by him."

It is evident that the extraordinary risks referred to are not risks due to negligence, but such risks as are incident to extra hazardous, as compared with other employments; and that risk of negligence of the master is only assumed when such negligence is obvious or known and appreciated.

The *Horton* case is to that effect. Horton, an engineer, was injured by the bursting of a water guage which was not protected by a guard glass which was a part of the regular equipment. The guard had been furnished, but was removed by the fireman to be cleaned. Its absence was obvious and known to the engineer, and he was held to have assumed the risk. The court said (p. 504): "Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of

his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court,"—citing cases.

The following cases cited by appellant are not applicable, because the alleged defects were permanent conditions of which the employee was required to take notice: *Schultheis v. United Railways Co.*, 236 S. W. (Mo.) 54, an iron post near the track; *Tuttle v. Detroit G. H. & M. R. Co.*, 122 U. S. 189, sharp curves in the tracks in railroad yards; *Choctau O. & G. R. Co. v. McDade*, 191 U. S. 64, the existence of a water tank close to the track; *Central V. R. Co. v. Bethune*, 206 Fed. 868, tracks too close together; *Southern P. Co. v. Berkshire*, 254 U. S. 415, mail crane close to the track. Other cases cited are where conditions were constant or of long standing, *Butler v. Frazee*, 211 U. S. 459; *American Car & Foundry Co. v. Allen*, 264 Fed. 647; or use of tools obviously defective, *Pryor v. Williams*, 254 U. S. 43; or the ordinary conditions incident to the occupation, *Swasey v. Maine C. R. Co.*, 115 Me. 215; *Reed v. Director General*, 267 Pa. St. 86. Such cases are not in point.

Kirbo v. Southern R. Co., 16 Ga. App. 49, is cited. It was there held that plaintiff assumed the risk of injury resulting from neglect of the master to keep its electric lighting system in proper condition so as to furnish the usual and necessary amount of light—an obvious defect.

Union P. R. Co. v. Marone, 246 Fed. 916, is specially relied upon. Plaintiff was ordered to cut some rails. He asked the foreman for something to protect his eyes as he had the other day received a piece of steel in his wrist. The defendant had provided suitable goggles for the purpose, but the foreman said, "Go on, that's all right; we never use them." Plaintiff, "because he was scared to lose his job," proceeded with the work, and a piece of steel was driven into his eye. It was held he assumed the risk. To make this case applicable, we would have to assume that Curran saw, or should have seen, the gate and assumed the risk of riding on the side ladder. This we cannot do, as shown later. This case is also cited in connection with *Swasey v. Maine C. R. Co., supra,* to the proposition that where there are two methods of doing an act, one safe and the other dangerous, and both methods are known to the employee, he is bound to use the safe method. This involves the same assumption just referred to.

From general principles and the cases cited, we think the rule may be safely stated to be that whether or not the defect due to the negligence of the master is of such an obvious character that the employee should have become aware of it in time to avoid injury, and therefore assumed the risk, is a question of fact for the jury in all cases where reasonable minds might differ.

In the instant case, while plaintiff might have seen the gate from his position on the car facing north, his duties required him to watch the switchman on the other end for signals and repeat them to the engineer. This situation continued until he was opposite chute 18 or 20, when he turned around to the south and west and started down the ladder facing east and looking down where he was going. We are, under the conditions, unwilling to hold as a matter of law that he should have seen the gate. That he did not see it is conceded. The question was for the jury.

Defendant strenuously objects that the damages allowed by the jury are so grossly excessive as to impeach the integrity of the verdict, requiring a reversal upon that ground,

rather than a remittitur. In substance the evidence shows that plaintiff's leg was amputated above the ankle; that the covering of the tibia consists only of scar and skin, and furnishes an insufficient cushion for the support of an artificial leg, so that plaintiff suffers pain when standing. The trial was about one year after the amputation, and the attending physician gives it as his opinion a second amputation will be necessary to insure a sufficient covering for the end of the bone. Plaintiff suffered great pain, was in the hospital five weeks, and in his home three or four months. He claims his back and shoulders were badly hurt; cannot do any lifting; experiences nervousness at times; pains him when he stands or walks very much; is unable to do any work. At the time of his injury he was earning $195 a month, and was 49 years old, with an expectancy of 22 years.

The damages are for the determination of the jury, and it is with the greatest reluctance the courts will, in a manner, substitute their judgment for that of the jury. The record before us warrants no inference that the jury was so influenced by passion and prejudice as to require a reversal on that account. The verdict, however, does appear to be excessive. Defendant cites a great many cases where judgments have been reduced as excessive—seventeen were for the loss of a leg, for which the average allowance was $9,500; but it must be conceded that each case must depend upon its own facts, and the loss to plaintiff is aggravated by the fact that the experience of 28 years as a switchman has been rendered valueless, and a second operation probably required.

We have considered most carefully all the circumstances and the arguments of plaintiff's counsel, and have reached the conclusion that the judgment should be reduced to $22,000. If plaintiff, within 20 days, files a remittitur of $10,000, the judgment will be affirmed; otherwise, it is reversed and remanded.

AFFIRMED ON CONDITION.

CLAUDE W. WRIGHT, APPELLANT, V. CALEB E. NEGUS, APPELLEE.

FILED NOVEMBER 26, 1923. No. 22574.

1. **Statute of Frauds:** DESCRIPTION OF LAND. Contract composed of letters and telegrams, set out in the opinion, *held* to contain a sufficient description of the land to satisfy the statute of frauds, in view of the allegation of the petition that defendant owned certain land to which the description in the contract could be applied.
2. ———: EXTRINSIC EVIDENCE. Where the writing itself suggests the means of identification of the subject-matter thereof, extrinsic evidence may be received to establish the facts thereby indicated.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed.*

F. J. Reed and *Cosgrave & Campbell,* for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

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

REDICK, District Judge.

This action is brought to recover damages for the refusal of the defendant to convey 480 acres of land claimed to have been purchased by the plaintiff under a contract consisting of five letters and telegrams passing between the parties in following terms:

"Nickerson, Neb., July 22, 1918.

"C. E. Negus: Have heard nothing from you since our conversation on train, can handle three quarters at thirty per acre pay you nine thousand four hundred, you carry five thousand back, am on deal for another piece land which must close at once, wire if you are ready deal on above basis.

"C. W. Wright."

"Fremont, Neb., July 28, 1918.

"C. W. Wright, Mitchell, Neb. Will sell you three quarters in accordance with your message thirty per acre, nine

thousand four hundred cash, five thousand back put up some money with bank and have them notify me. Where do you want abstract and deed sent?

"C. E. Negus."

"Mitchell, Neb., July 28, 1918.

"C. E. Negus, Nickerson, Neb. Will deposit with First National Bank Mitchell five hundred dollars to be paid you as soon as warranty deed reaches bank and eighty-nine hundred soon as abstract is up to date showing clear title and taxes paid to date. Five thousand back secured by mortgage on land three quarters owned by you southwest of Morrill interest six per cent on or before five years.

"C. W. Wright."

"Nickerson, Neb., July 31, 1918.

"C. W. Wright, Mitchell, Neb. Cannot make interest less than eight per cent., reply.

"C. E. Negus."

"Mitchell, Neb., July 31, 1918.

"C. E. Negus, Nickerson, Neb. Make interest eight per cent.

"C. W. Wright."

The petition set out the description of the land claimed to be the subject of the contract according to government subdivisions, and then contained the following allegations: "That the defendant, during the times herein mentioned, was the owner of said real estate, or claimed and represented himself to the plaintiff that he was such owner, and that he neither owned nor had any interest in, nor claimed to own or have any interest in, any other real estate in the vicinity of Morrill, Nebraska, other than the real estate above described; that on or about the 28th day of June, 1918, he had furnished plaintiff with the legal description of said three quarters of land, and that plaintiff and defendant had each been upon said land, and that there is no other land in any way answering the description of the land involved herein." Plaintiff then alleges compliance with the

terms of the contract and the refusal of the defendant to convey.

The defendant answered, alleging that petition did not state facts sufficient to constitute a cause of action; that the contract is void under the statutes of this state; denies all other allegations; and alleges that he had some negotiations with plaintiff for certain lands in Scotts Bluff county, Nebraska, but was only acting as agent for the owners, which fact was well known to the plaintiff. The allegations of the answer were put in issue by reply. The case came on for trial before a jury, and, upon plaintiff being sworn, defendant objected to the introduction of any testimony "for the reason that plaintiff's petition does not state facts sufficient to constitute a cause of action, in that there is no description alleged in the contract set out as a basis for this action." The objection was sustained and the jury instructed to render a verdict for the defendant, which was done, and the action dismissed by the court, and plaintiff appeals.

The question for determination is whether or not the contract contains a sufficient description of the land to satisfy the statute of frauds requiring that the contract or some note or memorandum thereof be in writing. The general principle governing this class of cases is that the writing itself must furnish the means of identification, but where the description in the writing is of a general character suggesting means of identification it will be sufficient, as in the following cases: *Ballou v. Sherwood,* 32 Neb. 666, "twenty acres adjoining Cote Brilliante, Douglas county;" *Adams v. Thompson,* 28 Neb. 53, "five a. McShane Sub.," the court holding that it was proper to prove by parol testimony that the defendant owned five acres in McShane's subdivision, and to identify it as the land referred to in the contract; *Holliday v. McWilliams,* 76 Neb. 324, the farm was described as located three miles from the county seat and mentioned the number of acres under cultivation, and it was held that from this data and the county records the land could be identified and a specific description ascer-

tained; *Ruzicka v. Hotovy,* 72 Neb. 589, where the particular quarter of the section was not specified in the contract, and it was held that extrinsic evidence showing that the defendant owned the southeast quarter, that it was in possession of his tenant, and that he had no other land that could possibly have been intended, was properly received to identify the subject of the contract; *Powers v. Bohuslav,* 84 Neb. 179, the attempted description was too defective to identify the land, but the writing referred to it as a farm owned by defendant containing 120 acres located in section 27, 3¼ miles from Brainard, and a description of the improvements, and it was held that these matters, taken together with the defective description, made the contract sufficiently definite. Perhaps the case of *Schneider v. Patterson,* 38 Neb. 680, has extended the application of these principles further than any other case from this court. There the description was "Four acres out of lot 4 in S. E. ¼ of the N. W. ¼ of Sec. 5, T. 12, R. 11, in Cass county, Neb., lying on the north side of the railroad track," and it appearing that the lessor owned more than four acres lying north of the railroad track, plaintiffs were permitted to show that the parties had gone upon the land, plowed a furrow along a portion of what was intended to be one of the lines of the tract, stepped off the rest of the tract and agreed as to the boundaries.

We think the principles announced in those cases rule this one. It must be presumed that the vendor was selling land which he owned or claimed to own. The letters speak of "three quarters," and that of July 28, 1918, contains the words, "Five thousand back secured by mortgage on land three quarters owned by you southwest of Morrill," so without the aid of any presumption, the words of the contract indicate that land owned by defendant Negus southwest of Morrill was the particular land to be sold, and this language of the contract itself points the way by which the land may be identified; that is, an examination of the records of Morrill county whereby the particular description of lands owned by Negus may be supplied. And plaintiff alleged in

the petition that no lands southwest of Morrill are owned or claimed by Negus other than those described in the petition. The means of identification are ample and the description in the contract sufficiently certain.

In *McCarn v. London*, 83 Neb. 201, cited by defendant, the description was, "The north ————feet of lot 8, block 182," and there was nothing else in the writing by which the particular portion of the lot might be identified; and it appearing that the defendant owned the whole lot, the description was insufficient. If in that case the defendant had owned only a definite portion in the north part of the lot, doubtless that fact could have been shown by extrinsic evidence for the purpose of identifying the subject of the contract. *Heenan & Finlen v. Parmele*, 80 Neb. 509, 514, also cited, was where the contract was contained in letters passing between the parties, and was held to be within the statute by the first opinion; but on rehearing it was held that the contract was made sufficiently definite by the fact that one of the letters was accompanied by an abstract of title containing a sufficient description. These and two other cases cited by defendant do not sustain his position as applied to the facts presented by the petition in the case at bar.

We conclude that, if plaintiff proves the allegations of the petition to the effect that the defendant was the owner of the lands described therein at the time the contract was made, the description therein was sufficiently definite to satisfy the statute, and that the district court erred in sustaining defendant's objection and dismissing the case. The answer of defendant denies that he was the owner of the land, and, of course, if plaintiff cannot prove his allegation in that respect his action will fail.

REVERSED AND REMANDED.

PETERSON & HOWE, APPELLEE, V. JAMES C. DAVIS, DIRECTOR GENERAL, APPELLANT.

FILED NOVEMBER 26, 1923. No. 22582.

1. Carriers: NEGLIGENCE: QUESTION FOR JURY. Evidence examined, and *held* that the question of defendant's negligence in furnishing cars for a shipment of cattle was for the jury.
2. ———: DELAY IN SHIPMENT: MEASURE OF DAMAGES. Where, upon order of the shipper, cattle were unloaded and held for several days to condition them and await a favorable market, it was error to instruct the jury that the measure of damages was the difference between the market value when they finally arrived and when they would have arrived had the carrier furnished cars seasonably. The true measure in such case is the difference in value between the date they should have arrived if the carrier had not been negligent, and the date they would actually have arrived had the trip not been interrupted by order of the shipper.

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

Wymer Dressler, Robert D. Neely and *Paul S. Topping*, for appellant.

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

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

REDICK, District Judge.

This is an action brought against the director general of railroads to recover damages to a shipment of cattle from Bassett, Nebraska, to Omaha, Nebraska; the plaintiff being a partnership composed of C. L. Peterson and Frank Howe. The facts upon which the claim of plaintiff is based are substantially these: Early in November, 1919, plaintiff notified defendant's agent at Bassett that he desired to ship nine car-loads of cattle to South Omaha on the 30th day of November, and the order was entered by the agent upon a sheet kept for that purpose. Plaintiff's home place was about 13 miles from Bassett, but the cattle in question were

kept at a ranch about 18 miles from the home place. Early on the morning of Friday, November 28, 1919, Howe called up the agent over the telephone and asked if the cars would be ready on the 30th. The agent said he would find out a little later, and about 8 o'clock telephoned that the cars would be ready. Thereupon Howe started on horseback to the ranch for the purpose of bringing the cattle in, and returned with them—about 240 head—arriving at the home place about 6 in the evening. After Howe's departure the agent called up and notified Mrs. Howe that the cars could not be furnished on the 30th, and not to bring the cattle in. Mrs. Howe had no means of communicating this information to her husband, but imparted it to him upon his arrival with the cattle in the evening. The weather on the morning of the 28th was very cold and some snow fell during the day, and that night and the following day reached the proportions of what in this country is termed a "blizzard." Howe kept the cattle at the home place Friday night, Saturday, and Saturday night, feeding them hay, and on Sunday drove them to Bassett, a distance of 13 miles. The blizzard continued, and it was necessary to break the way for the cattle with a sled. Arriving at Bassett that evenin he found the railroad stock-yards not in condition for keep ing the cattle, and made arrangements with a liveryman to take charge of them and feed them, his herd remaining, however, in an open lot connected with the livery stable. His idea in taking the cattle to Bassett was to have them there in case the cars could be furnished within a few days, and he testifies that the expense of keeping them at Bassett was no more than it would have been at the home place where he did not have sufficient feed to keep them any length of time. The next morning he inquired of the agent when he could have cars, and, getting no definite information, telephoned the train dispatcher at Norfolk, stating the position he was in, and during that day nine cars were started for Bassett, but, owing to a breakdown of the engine, were delayed and did not reach there until Tuesday night. The cattle were loaded Wednesday morning, De-

cember 3, and started for Omaha at 1:35 p. m., but by order of Howe indorsed upon the bill of lading the cattle were unloaded upon their arrival at Fremont at 6:25 a. m., December 4, and were kept in the stock-yards until December 8, when at 9:45 p. m. three cars were forwarded to Omaha, and 5:30 a. m., December 10, three more cars, and at 10:30 p. m., December 10, the remaining three cars were forwarded to Omaha, where they arrived in due time, and 224 head, the number in issue here, were sold on the market at an average of about $7.15 per cwt.

Plaintiff claims the cattle were of the class known to the trade as "good to choice," and that if they had arrived on December 2, as they should have done if shipped on November 30, they would have brought from $8.25 to $8.50 per cwt., and claims a loss of over $3,000 on account of the cattle dropping from the class "good to choice" to the class known as "fair to good," between which there appears to have been a spread of about $1.50 per cwt. in the market price. Plaintiff also claims $1,900 damages on account of excessive shrinkage of the animals from the time they arrived at Bassett until their arrival in South Omaha. Other claims for feed and expenses at Bassett and at Fremont were made in the petition, but need not be considered further. Plaintiff remitted all damages in excess of $3,000, for which he prayed judgment. The answer of the defendant was a general denial.

The case was submitted to a jury, and at the close of all the evidence both parties moved the court for a diretced verdict; the plaintiff, however, requesting the question of damages to be submitted. The court sustained the motion of plaintiff and instructed the jury to find for the plaintiff for such amount of damages as the evidence showed plaintiff had suffered by reason of negligence of the defendant, the measure of which damages was stated in the following language:

"You will consider the loss in weight of the cattle, if any, and the drop in the market; but the real test of the measure of damages is this: The difference in the market

value of the cattle at the time they reached South Omaha and what their market value would have been if they had reached it at such earlier time as you should find that they would have reached South Omaha if the director general had furnished the cars at the time they were ordered to be furnished on November 30, or as soon thereafter as they could have been furnished by the exercise of proper care by the director general. But the amount of your verdict cannot exceed $3,000 and interest thereon at 7 per cent. per annum from December 2, 1919."

The jury returned a verdict for $3,000 and interest, upon which judgment was rendered, and defendant's motion for new trial having been overruled, he brings the case here for review, assigning as error the directing of the jury to find for the plaintiff, and refusal of defendant's request to find for the defendant, and that the verdict is not sustained by sufficient evidence either as to liability or amount.

The petition is somewhat voluminous and full of repetition, and might be considered as declaring for breach of contract to deliver cars or as an action for damages for failure to furnish cars, but we understand the plaintiff to adopt the latter interpretation at this time, and that view will save some confusion as the measure of damages is substantially the same in both cases. Defendant's brief is taken up very largely with the discussion of the power of the agent, while the railroads were under federal control, to enter into a contract to furnish cars at any certain date, as involving a discrimination between shippers, and cites a number of authorities which seem to sustain his position that such power does not exist, but viewing this action, as we do, as one founded upon negligence, we do not deem it necessary to discuss that question.

The real questions for decision are, first, whether the evidence is sufficient to support a finding of negligence on the part of defendant; and, second, whether the evidence is sufficient to support the verdict of the jury as to the amount of damages, which involves the consideration of the instruction as to the measure of damages above quoted, and we will discuss these questions in their order.

The excuses presented by defendant for the failure to furnish cars on November 30 are that there was a general shortage of cars in the country and in the division of the Northwestern railroad in which Bassett was situated; that there had been a tremendous increase in stock shipments on said division, the season's quota in 1918 having been 9,000 cars, and in 1919, 16,000 cars; that it was common knowledge and particularly known to plaintiff, and this is conceded, that it was very difficult to procure cars at any specified date, and that shippers in most instances were required to wait 2 or 3 and up to 30 days for cars. These facts are abundantly supported by the evidence, but it seems to us they do not adequately meet the situation. The agent and dispatcher of defendant testified that cars were furnished Bassett, according to the ordinary rules governing in cases of shortage, as promptly as they could be furnished without interfering with the just demands of shippers at other points; but the fact remains that for at least 20 days prior to November 30 they had recorded on their order sheet a request for cars for that date, and defendant offered no evidence as to the number of idle cars, if any, at Norfolk, West Point, or other division points during the 20 days, and which might have been available for plaintiff's use if a reasonable effort had been made in that behalf. All these facts were peculiarly within the knowledge of the defendant, and on cross-examination the dispatcher at Norfolk and the superintendent of the division were inquired of as to the number of idle cars at Norfolk during that period, and the dispatcher answered that he could not tell off-hand, and the superintendent that he had no way of knowing. The law covering the duty of the carrier to furnish cars is fully stated in *State v. Chicago, B. & Q. R. Co.*, 72 Neb. 542, cited by defendant, and it is there held:

"Where through causes which are not within its control it cannot supply the cars temporarily made necessary by unusual demand therefor, it is entitled to apportion the same in a fair and equitable manner among its patrons,

and cannot be compelled to provide one shipper with cars to the exclusion of others."

But, as we have suggested, the evidence in this case is not of such a character as to require a finding that the failure to furnish cars on the 30th was occasioned by causes beyond the control of the carrier. The question here is not of equitable distribution; sufficient facts are not in evidence upon which to base a conclusion. It is rather whether defendant exercised reasonable care to furnish cars on the 30th. The mere existence of a general shortage, not connected up with the particular situation by evidence of facts supposedly within the knowledge of the carrier specially relevant thereto, is not sufficient to excuse the carrier as a matter of law. Defendant contends that "a shipper who is expressly notified of a car shortage and who has knowledge thereof and is instructed to not bring his cattle to the station for shipment, until further notice, cannot recover based upon alleged delay in furnishing cars." This may be conceded as a general proposition, but in this case notice was not received until the cattle had been started, and whether plaintiff acted as a reasonably prudent man in completing the journey under the circumstances was for the jury. We think in this condition of the evidence, in connection with other facts shown, it presented a question of fact for the lower court, with whose finding we do not feel warranted in interfering.

The instruction upon the measure of damages and the evidence upon that subject present questions requiring serious consideration. The jury were told that "the measure of damages is this: The difference in the market value of the cattle *at the time they reached South Omaha* and what their market value would have been if they had reached it at such earlier time" as the director general in the exercise of ordinary care should have furnished the cars. It will be remembered that at the request of the shipper the cattle were unloaded at Fremont on the 4th and detained there until the 9th and 10th. Now, if the cars had been furnished on the 30th, the cattle would have arrived in

South Omaha December 2; and if they had not been unloaded at Fremont, they would have arrived on the 4th. It would seem, therefore, that the market value on the 2d or the 4th would furnish one term of the comparison rather than the 10th or 11th, the days they did arrive, the delay being occasioned by the order of the shipper. Evidence of the market reports was introduced covering only the 1st, 2d, and 10th days of December, though plaintiff testified that the market gradually dropped after the 1st. If the drop was continuous, it was lower on the 10th than on the 4th, and defendant by this instruction would be charged with a greater loss than lawful. However, the evidence as to the condition and weight of the cattle at the ranch at Bassett and Fremont is quite unsatisfactory. Peterson, one of the plaintiffs, testified that he saw the cattle in July and August of 1919 on the ranch; that he was able to give a fair estimate of the weight of the cattle from seeing them, and that in his judgment the cattle in question would average 1,100 pounds. He was frank enough to admit, however, that he would not be willing to purchase cattle upon his judgment as to their weight. Howe, the other plaintiff, testified that the cattle would shrink about 50 pounds on the trip from the ranch to the home place but recover it while they were there; that they would shrink 50 pounds on the drive from the home place to Bassett and 50 pounds on the trip of 250 miles from Bassett to Omaha. He also testified that in his judgment, upon the arrival of the cattle at Bassett, they would average 1,050 pounds a head, but that, owing to the conditions under which they had to be held, they went down every day until they were shipped. The average weight of the cattle when sold upon the Omaha market was 951 pounds. There was no evidence as to the weight of the cattle upon their arrival or departure from Fremont.

The only items submitted to the jury for their consideration on the question of damages were the difference in market and the excessive shrinkage. Assuming that the cattle averaged 1,050 pounds upon arrival at Bassett, and de-

ducting 50 pounds as the ordinary shrinkage during a continuous trip to Omaha, the cattle upon arrival should have averaged 1,000 pounds, and consequently the maximum shrinkage would be 49 pounds a head, or 10,076 pounds. Was all of this chargeable to defendant on account of a negligent delay of three days in furnishing cars? Was any of it caused by the delay at Fremont on order of the shipper? There is no evidence as to the condition of the cattle upon arrival at or departure from Fremont. The evidence for plaintiff is to the effect that the stop was to improve the appearance of the cattle by resting them up, and the main purpose was to avoid arrival on Friday or Saturday, when market conditions were usually unfavorable. Peterson testifies, notwithstanding they had rest and good feed at Fremont, upon arrival at Omaha "they were sort of dead like * * * look like they had gone through quite an ordeal, hadn't had much feed or something of that kind," "looked gaunt," "don't know," but would class them about "fair to good." When asked, "Well, what reason have you for the cattle looking gaunt when fed four or five days immediately before leaving Fremont?" he answered, "Because the weather was awful bad." "Then, it was the weather?" "Well, the weather had something to do with it." How much of the gaunt appearance was due to the bad weather? The evidence is silent on this point.

The defendant cannot be charged with losses due to bad weather. If plaintiff can hold his cattle 5 days to condition them or to await a favorable market, why not 10 or 30 days. If plaintiff had held his cattle at Fremont until December 20, an instruction that the difference in market between the date they should have arrived and the 20th could not be sustained. The instruction stated an incorrect measure of damages; and the judgment is reversed.

REVERSED AND REMANDED.

JOSEPHINE C. KEPLER, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 26, 1923. No. 22580.

1. Railroads: AUTOMOBILE DRIVER: DUTY AT CROSSING. It is the positive duty of an automobile driver approaching a railroad crossing where there is a restricted vision and where he is familiar with said crossing and its surroundings to look and listen at a time and place where looking and listening will be effective; and failure to observe this rule without reasonable excuse therefor is negligence. *Philadelphia & R. R. Co. v. Le Barr*, 265 Fed. 129.

2. Negligence: CONTRIBUTORY NEGLIGENCE OF AUTOMOBILE DRIVER NOT IMPUTABLE TO PASSENGER. One who is injured in a railroad crossing accident while riding in a private vehicle may recover from the railroad company if it was guilty of negligence proximately causing said accident notwithstanding that negligence on the part of the driver of the vehicle may have contributed thereto, provided that she was herself free from negligence, and was not on a matter of joint enterprise or common concern with said driver, and had no authority or control over him. Evidence examined, and *held* in this case that the plaintiff was not upon joint enterprise or matter of common concern with the driver of the car in which she was riding.

3. Appeal: DIRECTION OF VERDICT. In reviewing the action of a trial court in directing a verdict, this court will regard as conclusively established every point favorable to the unsuccessful party which the evidence tends to establish. And, conversely, a trial court is not justified in directing a verdict for the defendant, unless, upon considering all facts favorable to the plaintiff conclusively established, in so far as the evidence tends to prove them, it is able to say as a matter of law that the plaintiff is without ground upon which to recover.

4. Witnesses: TESTIMONY AS TO SOUNDING ALARM. A witness who testifies that he had good hearing, was in a position to hear the sound of a bell or whistle, was listening intently that he might hear and would have heard had the sound been made, may testify as to whether or not the bell or whistle was in fact sounded, provided the foundation for such testimony be otherwise fully laid.

5. Husband and Wife: INJURY TO WIFE: MEDICAL EXPENSES. In the absence of proof that she was possessed of a separate es-

tate other than of her cause of action for damages for personal injury, a married woman is not entitled to recover her medical expense, etc., upon trial of such cause, unless she shows that she has paid the same in whole or in part.

6. Appeal: DAMAGES: FAILURE TO TENDER INSTRUCTION. In case the defendant does not tender an instruction proper to the evidence for a present-worth recovery of damages, the judgment will not be reversed because no such instruction was given, particularly if the damages claimed and proved are not for loss of future earnings, but only for suffering and loss of bodily function.

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

Wymer Dressler, Robert D. Neely and *Paul S. Topping*, for appellants.

Smith, Schall, Howell, Howard & Sheehan, contra.

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

SHEPHERD, District Judge.

This is a case in which Josephine C. Kepler sued the Chicago, St. Paul, Minneapolis & Omaha Railway Company for damages received by her in a crossing accident, joining the engineer of the train as a party defendant. She had a verdict for $35,000, and the company appealed to this court. The company will be designated as the defendant, and Mrs. Kepler as the plaintiff.

The plaintiff was visiting at the Cameron home, a short distance southeast of Herman, Nebraska. She wished to have some letters mailed, and upon being acquainted with her desire, her foster brother offered to take her to town in his Ford touring car. The road led west to the railroad crossing where the accident occurred, and thence about a mile north to Herman. The Ford was struck on said crossing by a south-bound freight, running wild or extra. Plaintiff was shockingly and permanently injured. She saw the train when it was 200 or 300 feet away, and when the Ford, going at the rate of 12 miles an hour, was nearly at the

end of a small bridge and about 58 feet from the crossing. She called to the driver; "Oh! Howard, there is a train." He first attempted to stop, and then, changing his mind, speeded up to get across. According to her testimony, she could see through the trees to the track, and up the track for a short distance, at a point about 120 feet back from the crossing, and also at different points back of that. In general, however, the track was much hidden from view by a growth of trees or underbrush extending to the north along the railroad right of way and along the little stream spanned by the bridge in question. She was familiar with the road, the crossing, the track, the little stream, the trees, and the topography of the vicinity generally. She had been brought up on the Cameron farm and had gone to school day after day along the road and over the crossing. It appears that the ground rose slightly from the point where she first saw the train and warned the driver. The road was good. There was no mud to make the car slip, no sun to dazzle the driver's eyes, no dust to obscure his vision, no untoward circumstances to distract his attention. He made a serious mistake in attempting to get across in advance of the train.

The plaintiff bases her right to recover on a single act of negligence on the part of the defendant, namely, its failure to sound bell or whistle for said crossing. She avers that it failed to do either, and that its failure in this regard was the proximate cause of the accident. Not only does she swear positively that she heard neither bell nor whistle, but that the afternoon was still; that when it was still the sound of even the bell would carry plainly from the town to the farm house; that she had excellent hearing; that she was listening intently at all times, and that she would have heard the sound if it had been made. She also testifies that she was carefully looking and watching for a train during the whole of the time that they were driving from the house to the crossing. A companion, Mrs. Howes, who was on the front seat with her and the driver, testifies much to the same effect.

Much depends upon the relation of this plaintiff to the driver of the car, and whether the latter's acts of negligence, if any, were imputable to her. "It is the positive duty of an automobile driver, approaching a railroad crossing where there is a restricted vision, to stop, look and listen at a time and place where stopping, looking, and listening would be effective, and failure to observe this rule is negligence." *Philadelphia & R. R. Co. v. Le Barr*, 265 Fed. 129. Late Nebraska cases are in consonance with this. In *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266, it was held by this court:

"It is the duty of a traveler on a highway, when approaching a railway crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear; and if he fails without reasonable excuse to exercise such precautions he is guilty of negligence.

"It is the duty of one approaching in an automobile a railroad crossing with which he is familiar, where his view is obstructed until he gets within a short distance of the railroad track, to keep his car under control and drive at a speed which will enable him to stop in time to avoid a collision after discovering a train. A speed which prevents such control under the circumstances is negligence as a matter of law.

"Failure of the railroad company to ring the bell or blow the whistle as the train approached the crossing, even though it may have been negligent, would not make the railroad company liable for the death of the automobile driver in a collision at the crossing, if he recklessly failed and neglected to have his car under control and by looking and listening at the proper time and place could have seen the approaching train in time to stop before reaching the track, but recklessly failed and neglected to do so, whereby there was a collision."

The following cases, *Morris v. Chicago, B. & Q. R. Co.*, 101 Neb. 479, *Seiffert v. Hines*, 108 Neb. 62, *Johnston v. Delano*, 100 Neb. 192, *Oliver v. Union P. R. Co.*, 105 Neb.

243, and *Gordon Fire Proof Warehouse & Van Co. v. Hines,* 272 Fed. 604, are to the same effect.

But we do not think that the plaintiff was chargeable with the negligence of the driver. The trial court instructed substantially that the negligence of the driver would not be imputed to the plaintiff unless he was her agent or unless she had some direction or control over him, and left it to the jury to determine in regard to this. The jury evidently found from the evidence that no agency and no such condition of control existed. The testimony of the plaintiff is that she stated to her foster brother that she had letters which she would like to have mailed, and that he thereupon invited her to get into the car with him and he would take her to town. His testimony was that she asked him to drive to town and mail some letters, and that "when we got ready to go my cousin (meaning Mrs. Howes) came out and went with us." Mrs. Nichols, who was present at the time, said that Mrs. Kepler stated that she had some letters to mail, and that Howard said, "Come on and get in the car and I will take you to town and mail them." And Mrs. Howes, who was also present, said that Mrs. Kepler remarked that "she had some letters that she wanted to take in and mail," and that Howard said, "I will get the other car and we will go in and mail them." It is without dispute that Mrs. Kepler was a guest at the Cameron home. This fact, in connection with the conversation had between the parties, would seem to indicate that Mrs. Kepler had not at first intended to go to town to mail the letters, but had expected them to be mailed by members of the family, and that Howard changed the plan by inviting her to ride with him to town. If this is so, it follows logically enough that she was his guest in the automobile.

Concerning a person in a similar situation, Judge Sanborn, in *Union P. R. Co. v. Lapsley,* 51 Fed. 174, used this language, which has been widely quoted, and is, as it seems to us, particularly applicable in this instance:

"But, where the owner and driver of a team and carriage invites another to ride in his carriage, no relation of prin-

cipal and agent is created; no relation of master and servant is established; the owner and driver of the team is not controlled by and is not in any sense the agent of the invited guest; and to hold him responsible for the negligence of the former, by whose permission alone he rides, is unauthorized by the law and repugnant to reason. * * * The defendant's wrongful omission was the proximate cause of this damage. The decedent in no way caused or contributed, by any act or omission of her's, to this injury. She had no control over her brother, the driver, who may have contributed by his carelessness to the damage. Upon what principle, now, can it be justly said that the decedent must bear all this loss when she neither caused, was responsible for, nor could have prevented it, because this third person assisted to cause the injury, the proximate cause of which was the wrongful act of the defendant company? If there exists in the realm of jurisprudence any sound principle upon which so unrighteous a punishment of the innocent and the discharge of the guilty may be based, we have been unable to discover it."

In the same opinion the learned federal judge further designates the invited person as the guest, and the driver the host, and says that to refuse a recovery to the guest on the ground that the host had been guilty of negligence that contributed to the injury would neither be just nor reasonable. The case is strikingly similar to this in point of fact.

Without going further into a discussion of the cases, it seems to us that *Loso v. Lancaster County,* 77 Neb. 466, *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 586, and *Stevens v. Luther*, 105 Neb. 184, require us, unless these cases are to be overruled, to hold that the plaintiff was not in privity with the driver, not his employer, not in control over him, and not engaged in a joint enterprise with him. In regard to joint enterprise or common purpose, concerning which the defendant has much to say in its excellent brief, it is hard to see that there was in any respect a community of interest or object between the parties on their drive to Herman. It seems clear that the object of Howard

Cameron was to render an additional courtesy to the family guest. He was not interested in the mailing of the letters. His desire was simply to afford to his foster sister the opportunity of a pleasant drive. The case differs from those in the books where two persons induced by the same considerations drive together in the vehicle of one of them to accomplish an end of common interest. The contention of defendant that the plaintiff and her brother were engaged in joint enterprise or driving upon a matter of common concern is not tenable. We hold that such was not the case, and that the negligence of Howard Cameron was not chargeable to the plaintiff.

But the mere fact that the negligence of the driver is not to be imputed to the plaintiff is not enough of itself to justify a recovery upon her part, even if the defendant was guilty of negligence in failing to ring the bell or sound the whistle as its train approached the crossing in question; for a duty devolves upon the passenger when approaching a crossing, with which he or she is familiar, to look and listen for a possible train, and not only that, but to look and listen at the appropriate time and place, and when it appears that the driver is driving into danger to warn him against so doing. As stated, Mrs. Kepler was fully acquainted with the crossing and with its surroundings. The evidence of the defendant, including its maps and photographs, is not a little persuasive to the conclusion that she must have been aware of the proximity of the train before the Ford passed onto the bridge, had she maintained a proper lookout. But the physical facts, in so far as they are indisputably established, were not sufficient to justify the trial court in so finding as a matter of law; they lacked something of being enough to unmistakably disprove the testimony of the plaintiff that, though she carefully looked and listened, she neither saw nor heard the train until she had reached the west end of the bridge. The question was for the jury. The court was right in so regarding it. For though the trial judge be ever so minded, because of what seems to him an overwhelming preponderance of the evi-

dence, to take a case from the jury, he must in the end be guided by the familiar rule which counsel for the plaintiff call attention to in their brief. "In reviewing the action of a trial court in directing a verdict, this court will regard as conclusively established every fact favorable to the unsuccessful party which the evidence proves or tends to establish." *Preston v. Stover*, 70 Neb. 632.

Another consideration supports the conclusion reached. It is apparent from the record that in the distance from the bridge to the crossing the driver could have safely stopped the car. This the defendant proved most convincingly, its testimony upon this point excluding all doubt as to the fact, in the absence of any counter proof. Just how the accident happened is indeed difficult to determine. It may have been that Howard Cameron, who had been driving a Hudson car in the morning, was momentarily rattled or taken aback by the different brakes and gears of the Ford, and failed to handle the latter to the best advantage; or it may be that he was reckless, speeding to make the hill beyond the track and careless of a possible train, as seems to have been the theory of the defendant both upon trial and in the preparation of its brief. Whatever the fact, there was nothing in his conduct, up to the time that the train was in sight and he was full 58 feet from the track and going at only 12 miles an hour, to indicate that he would be unwise enough to run for the crossing, or that he would become confused and make a mess of trying to stop. It would be demanding more than ordinary care on the part of the guest to require her to know the limitations of her host. She had a right to assume that he was a reasonably careful and capable driver. She was justified in believing that any driver, and particularly the owner of a car, would be able to stop within the distance referred to. Nor can it be said that she failed to protest against his going on when she called to him, "Oh! Howard, there is a train." This will be taken by the court to be equivalent to a request to stop. In the cry there was not only the warning but the request. And the fact that the driver did

temporarily reduce his speed is some indication that he so understood her exclamation.

No less than 34 assignments of error are presented by the defendant in its lengthy and able brief. These must be considered as nearly as possible in order. There was nothing reprehensible in the court's refusal to excuse the juror Hart. No reversible error resulted therefrom. Assignments 2 and 3 are to the effect that the verdict was not sustained by sufficient evidence, and that the court erred in refusing to direct a verdict in favor of the defendant. What we have heretofore said in this opinion is an answer to the argument of counsel upon these points. The trial court was governed by the oft-repeated rule of this court, and was not in error in submitting the case to the jury.

Complaint is made in assignment 4 because the court permitted Mrs. Kepler and Mrs. Howes to testify that the train did not sound bell or whistle. A proper foundation was laid for said testimony. Both of these witnesses testified that they were listening; that the conditions were such that they would have heard had these signals been given; that they did not hear them, and that they were not sounded. Foundation for this testimony was laid in great detail, so that their testimony is not merely the testimony of one who did not hear. They showed circumstances under which they were able to testify as to the fact, that is to say, whether the bell rang or the whistle blew.

Assignment 5 relates to the giving of instructions Nos. 7 and 7½ by the court upon its own motion. The first was to the effect that if the negligence of the company and the driver united to produce the proximate cause of the collision, and the driver was not the agent of the plaintiff, then the negligence of the latter, if any, would not relieve the defendant, provided that under the instructions as a whole the jury found the plaintiff entitled to a verdict. The second properly defined the term "agent" as applied to a case like this, and told the jury that before the defendant could charge plaintiff with the driver's negligence it had to appear that, while the latter was driving the car in which the

plaintiff was riding, he was under her control and subject to her directions, and not a mere volunteer. We are unable to give assent to the contention of the defendant that these instructions were in any wise erroneous when considered in connection with the remainder of the instructions.

A sixth assignment of error is in connection with the failure of the court to give defendant's instruction No. 9, which proceeded upon the assumption that two persons were traveling on a matter of mutual concern. There was no proof of mutual concern between the plaintiff and the driver of the Ford. The instruction was not applicable to the facts. The next assignment is subject to the same objection. Defendant's instruction No. 11 goes upon the theory that two are driving upon a matter of mutual interest. In such case it would be the duty of both to look and listen. But as a matter of law it may be said in this case that there was no matter of mutual interest between the driver and the plaintiff.

The refusal to give defendant's instruction No. 29 is the ground of defendant's eighth assignment of error. That instruction was to the effect that, where one requests the driver to take her to town to mail letters, both that one and the driver are upon common purpose and in joint interest. But there is no evidence in the record that Mrs. Kepler requested the driver to take her to town. And, moreover, we think the instruction is otherwise much too sweeping.

The ninth and twelfth assignments are that the verdict was contrary to instructions Nos. 13 and 18, given by the court. This was a matter for the jury, and these assignments amount to no more, in our opinion, than the assignment that the verdict was not sustained by the evidence and that the court refused to direct a verdict. The court did not err in giving instruction No. 14, in substance that the jury were not at liberty to find the defendant negligent in running its train at the rate at which it was running, but were at liberty to consider the speed of the train in connection with other things in concluding as to whether it was negligent in the manner charged, *i. e.*, in failing to sound

bell or whistle. There can be no error in this instruction. If the train was being run at a high rate of speed and the engineer was engaged in getting everything out of his engine that it could accomplish, it is possible that his intentness upon the matter of speed might make him forgetful of his duty to ring the bell or blow the whistle. In this respect the instruction is unassailable. And it sufficiently appears that the court otherwise in such instruction indicated that the matter of speed was not in itself a ground of negligence.

The expense of plaintiff's medical and surgical treatment was very great, amounting to at least $2,500 as disclosed by the evidence. Plaintiff was permitted to prove the value of these services, and by the instruction of the court she was permitted to recover therefor. It appears from the evidence that she was a married woman, and no showing is made that she had any separate estate, except as the inference arises from her possession of the cause of action in question. It does not appear that she has paid any of this expense. The proof is that her foster father, Mr. Cameron, paid a portion of it, and that she had undertaken to reimburse him. So far as her right of action in this case is concerned, it is obvious that it might or might not amount to something, depending upon the outcome of her action. It was problematical as to value. It might prove a liability. Under the circumstances we are of opinion that plaintiff should not have been permitted to recover on account of this expense. The cause of action for the same belongs to her husband. He was liable for it. "In an action for personal injuries by a married woman, she is not entitled to recover the value of medical services rendered, in the absence of proof that she has paid for such medical services, or that she is the owner of a separate estate which might become liable therefor." *Pomerene Co. v. White*, 70 Neb. 171, 177.

Defendant's contention that error was committed by the trial court in refusing to give instruction No. 2, requested by it, is not good. The instruction in question proceeds up-

on the theory that plaintiff and the driver were of equal authority in the operation of the automobile. This assumption was, as we have seen, unauthorized, and the instruction would have been improper. The same assumption obtains in defendant's instruction No. 6, which was refused by the court. The same rule governs and the failure of the court to give such instruction was not erroneous. This disposes of all of defendant's assignments of error to and including assignment 17.

In defendant's assignment of error 18, it complains that the court erred in refusing to give instruction numbered 14 requested by it. But said instruction was almost, if not entirely, identical with instruction No. 13 given by the court upon its own motion. There was no error in refusing it. And the same may be said in regard to instruction No. 7, requested by the defendant and refused, and No. 12 given by the court upon its own motion. The court refused to give instruction No. 19, requested by the defendant. This was an instruction to the effect that, if plaintiff failed to caution the driver to drive at a speed which would enable him to stop in the distance from the end of the bridge to the track, she was negligent. When should she give such caution? Certainly not until there was need for it; and the theory of the defendant, as well as of plaintiff, is that the driver could have stopped in the distance between the west end of the bridge and the crossing, and after she warned him that there was a train approaching. We do not think that it was incumbent upon the plaintiff to give other warning than that which she did give. The court refused to give instruction No. 38, requested by the defendant, which was to the effect that the plaintiff should have slowed down to 8 miles an hour in crossing the bridge, and that the fact that the speed of the Ford was 12 miles an hour was evidence of negligence on the part of the driver, and also on the part of the plaintiff, since the latter did not protest. The law with respect to the operation of motor vehicles provides that, when being operated in the country, an automobile should be slowed down to 15 miles upon coming

to a bridge and should not exceed that speed in passing over the same. The other provisions of the statute with respect to horse-drawn vehicles are not, we think, applicable to the situation here presented. And, in any event, our court has never required more of a passenger than to warn the driver of an approaching train and to request him to stop if there is danger. What we have said before applies to the court's refusal to give instruction No. 20, requested by the defendant, which is attacked in assignment of error 21. The plaintiff called to driver in ample time for him to have stopped, and called in a way that was equivalent to a request on her part to stop the car. We cannot agree with defendant's contention that it was error to refuse instruction No. 21 requested by it. In brief, this was an instruction to the effect that the train has superior right on the track. In substance, this was given in instruction No. 14 of the court's charge. Such superior right goes with the right of the defendant railroad company to run its trains at any necessary speed and at the speed which was being made in the instant case. The jury could not have misunderstood, or have remained uninformed as to the law, by the refusal of the court to give said instruction. The same reasoning applies to instruction No. 22, requested by defendant.

In assignment 25, which we have now reached, complaint is made that the jury were not instructed that the telegraph poles alongside of the track were not obstacles to plaintiff's view in approaching the crossing. Perhaps this should have been done. But we are convinced by a careful review of all the evidence and by an inspection of the maps and photographs that the jury could not have been misled as to this, and that at most it was error without prejudice. The same is true in regard to the refusal of the court to give defendant's instruction No. 26 as to crossing signs. In defendant's twenty-seventh assignment of error, defendant refers to the court's refusal to give its instruction No. 28. This instruction was to the effect that the allegation in plaintiff's petition that the view of the approaching train

was obstructed by the presence of the bridge on the public highway cannot be used as ground of negligence against the defendant in this case. The instructions of the court, taken as a whole, clearly point out that the plaintiff depends upon but one ground of negligence, the failure of the defendant to sound bell or whistle. This is the theory of the defendant itself in its brief. We cannot see where the instruction was applicable or pertinent. The refusal of the trial court was not erroneous. The court refused to give instruction No. 30, requested by the defendant, to the end that the driver was guilty of negligence, and that his negligence was more than slight. In view of what we have heretofore said in regard to imputing the negligence of the driver to the plaintiff, we think that this instruction was properly refused. The court also refused to instruct, though requested so to do, that grass, weeds, foliage and trees on the right of way constituted no obstruction. We consider this so apparent from the evidence that the jury could not have been misled in regard to the fact, and that the error of the court in refusing to give the same, if it was error, was without prejudice.

Defendant's thirtieth assignment of error is on the refusal of the court to give its instruction No. 35. This instruction was to the effect that, if the jury believed from the evidence that the driver recklessly operated his car over the crossing at such a rate of speed that he could not stop within the distance of 50 feet, such conduct constituted negligence which would not permit the plaintiff to recover. Unless the negligence of the driver is imputed to the plaintiff, it is obvious that this instruction could not be properly given. Without a proviso that such recklessness was apparent or known to the plaintiff—and there was no such proviso—the instruction was not applicable, and was properly refused. The same defect is apparent in instruction No. 39, requested by the defendant. The essential element of notice to the plaintiff is omitted. The driver was experienced, and she could have no knowledge that he was likely to be confused. Again, the evidence establishes

that he could have stopped within the 58 feet between the bridge and the track. The thirty-second assignment is in regard to defective brakes. The court properly refused it because it does not appear that the plaintiff was advised as to the condition of the brakes. The essential element of notice to her of the condition is lacking in the instruction.

The defendant presented a present-worth instruction telling the jury that, should it find for the plaintiff on account of future pain and suffering or future loss of earning capacity, the damages therefor should be reduced to their present worth. This instruction might have been proper were the case on a par with *Sweat v. Hines*, 107 Neb. 1, and *Sheean v. Hines*, 107 Neb. 36. But we think, as counsel for the plaintiff say in their brief, that in these cases, which were death cases, the element of pain and suffering did not enter and could not properly be considered. Damages in these cases arose from loss of future earnings. In cases of this character the present worth can readily be figured, and it seems entirely proper to confine the recovery to the present worth of future earnings. In this case it is not shown that the plaintiff had any earning capacity whatever. She claims no damages for loss of earning capacity. She attempted to show no such loss. So far this court has not established a method of ascertaining the present worth of future suffering. Nor do we see how this can be arrived at. The instruction tendered was not a good one for another reason: It injected the question of the earnings of the plaintiff when there was nothing in the pleadings or in the evidence to justify the consideration of the same. From this point of view the instruction could not have been given, and its refusal was not erroneous.

The amount of plaintiff's recovery is said to be excessive; but we do not think so. She was, indeed, terribly injured. Her sufferings were intense and continued over a long period of time. Without going into detail, it is apparent from the record that in comparatively few cases have persons endured such suffering and been fortunate enough to survive. Before the accident a strong and healthy woman of great

capacity, she is now a well-nigh helpless cripple, and will remain so if the medical testimony is to be believed. Bones were broken in the pelvic region. One of these failed to properly unite under surgical treatment, though plaintiff was in a cast for months for that purpose, and as a result she is unable to walk without crutches. She can support herself on her right leg, but not upon the left, nor is there any probability of her obtaining relief in this respect. Her backbone was broken, and she can no longer turn her head to the right. From such a one the joy of living has been largely taken away. We are not inclined to think that the recovery of $35,000 was excessive.

Complaint is made, and with reason, that there was misconduct on the part of counsel for the plaintiff in the argument of the case. It is clear that in the heat of the argument one of the attorneys for the plaintiff referred to matters not in evidence in a way that might be prejudicial. And had it not been promptly noticed and corrected by the court, we are inclined to think that a reversal must have been necessary. However, the court immediately stated that the expression used was improper and that it should be left out. And it further directed the jury to pay no attention to it. We think that this is sufficient to save the record from reversible error.

From what has been said it is obvious that the judgment must be in the main affirmed. But it must be reduced by the hospital and surgical expense, etc., which the evidence tends to prove. This amount we have heretofore found to be the sum of $2,525. If the appellee files a remittitur in this sum within the period of 20 days, the judgment will be affirmed; if not, it will stand reversed.

AFFIRMED ON CONDITION.

J. LAWRENCE EASON, APPELLANT, V. THOMAS J. MAJORS ET AL., APPELLEES.

FILED NOVEMBER 26, 1923. No. 23740.

Quo Warranto: RIGHT TO OFFICE AS TEACHER. In a case where a teacher, the head of the department of English in a state nor-

mal school, was dismissed by a letter from the president of the board of education without vote or determination of said board according to law, and his place filled by another, who holds the same to his exclusion, and where such dismissal was without notice to said teacher and without cause, and was wholly unauthorized, and where said teacher had been employed by said board for practically a year to come, the application of said teacher for a writ of *quo warranto* to test the right of the teacher employed to take his place, and to test the force of such dismissal, will not be denied on the ground that his place or position was not an "office" within the meaning of the statute.

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

Sterling F. Mutz, for appellant.

O. S. Spillman, Attorney General, George W. Ayres and *Kelligar & Ferneau, contra.*

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

SHEPHERD, District Judge.

The appellant, J. Lawrence Eason, was the head of the English department of the state normal school at Peru. In July of 1923, after he had completed the summer school work of that year, he received a letter of dismissal from the president of the state board of education, Thomas J. Majors, the appellee. This was without previous notice, for no cause stated, and after appellant had been engaged for the new year. The action of said president was not upon vote or determination of the board, as required by the statute in such cases, and was accordingly unauthorized and unlawful. Nevertheless, the president and the appellee, W. R. Pate, principal of the school, proceeded to fill appellant's place by appointing E. C. Beck, another of the appellees, thereto; and Beck took possession under his appointment and now claims the position to the exclusion of the appellant. Appellant did not care to hold by force or to create a disturbance, but at once sought explanation and redress by application to the president and to the board.

Individual members of the board gave him some information, but the president refused to answer his inquiries. Thereupon he brought this action in *quo warranto* to legally determine who had the right to the office or position in question, and whether his dismissal was effective. The trial court held against him on the one ground that he was not an officer within the meaning of the law, and therefore not entitled to maintain an action in *quo warranto*.

The facts above stated must be regarded as established, because they were well pleaded in the petition, and because the court's holding was upon demurrer admitting the same. Here is a case, then, in which the plaintiff is entitled to relief. The only question is, may he have it in *quo warranto?* Is that action available to him, a teacher and the head of a department in the Peru Normal?

We have a statute considerably extending the function of the ancient writ. It affords a remedy to the rightful claimant of any kind of an office, public or private. It is as follows:

"When any citizen of this state shall claim any office which is usurped, invaded or unlawfully held and exercised by another, the person so claiming such office shall have the right to file in the district court an information in the nature of a *quo warranto*, upon his own relation, and with or without the consent of the prosecuting attorney, and such person shall have the right to prosecute said information to final judgment; provided he shall have first applied to the prosecuting attorney to file the information, and the prosecuting attorney shall have refused or neglected to file the same." Comp. St. 1922, sec. 9305.

No restricted meaning is put upon the word "office." Ordinarily and according to Webster, the word would seem to cover well-nigh any position where authority is coupled with duty and where the duty is for a public purpose.

School districts, like municipal corporations, obtain their franchises from the state and are created for public purposes. *Dappen v. Weber,* 106 Neb. 812. In nearer degree are the normal schools of the state, created to teach and to

train teachers. Their government is committed by Constitution and by statute to a board of seven, consisting of the state superintendent, *ex officio*, and six other members appointed by the governor with the consent of the senate. Constitution, art. VII, sec. 13; Comp. St. 1922, sec. 6692. Their teachers are appointed by this board, and receive their salaries directly from the state, and necessarily have some considerable discretionary powers. By section 6695 of the statutes it is provided that the board shall appoint "a principal, assistant teachers and such other employees as may be required for each normal school." Principal and teachers seem to be catalogued as employees alike. Yet in section 6700 of the statutes it is said: "The principal of each school shall be the chief executive officer thereof." Reasoning by analogy, it would seem that the "assistant teachers," who must be assistants to the principal, are also officers, though perhaps subordinate officers. Nor does it appear how they can be other than public officers, since their function is a public one partaking of the purpose of the school itself.

When a position based upon a provision of law carries with it continuing duties of public concern which involve some exercise of the sovereign power in their proper performance, the position may be said to be an office public in character. Perhaps a better definition is that given by the New Jersey court in *Fredericks v. Board of Health*, 82 N. J. Law, 200:

"An office is a place in a governmental system created or recognized by the law of the state which, either directly or by delegated authority, assigns to the incumbent thereof the continuous performance of certain permanent public duties."

In the case cited it was held that a sanitary inspector appointed by a legal board of health under power conferred by the health act of the state is the incumbent of an office. Can it be said that the teacher who distributes the bounty of the state is less engaged in a public duty than such an inspector? The teacher has a special place by the nature

of things in the governmental system, so far as it provides for education. He is appointed and paid by the state. His place—we may well say his office—is created by the state because only through him can its free education be transmitted. Nor is he a mere conduit. Quite the contrary. For education can not be poured out to people like water from a pitcher. It must be carried to them in such a way as to engage their interest and reach their understanding, a labor involving knowledge of method, exercise of authority, and wide use of discretion. A teacher must prescribe courses, establish discipline, convince, lead. In the due performance of his duty he not only engages in a work of public concern, but wields a portion of sovereign power.

Many different positions, though undoubtedly employments, have been held by the courts to have the attributes of public office, and to be offices. Instances are as follows: The position of assistant clerk of the orphans' court, *Evans v. Luzerne County*, 54 Pa. Super. Ct. 44; the place of a jailer, *Sullivan v. McOsker*, 84 N. J. Law, 380; the place of a prison guard, *Page v. O'Sullivan*, 159 Ky. 703; the position of a policeman, *Reising v. City of Portland*, 57 Or. 295; *Blynn v. City of Pontiac*, 185 Mich. 35; the position of treasurer of a public institution whose trustees were appointed by the governor, by and with the advice and consent of the senate, *Illinois Industrial Home v. Dreyer*, 150 Ill. App. 574. But it cannot be denied that in many similar cases the courts of the country have held that such positions and places are mere employments having none of the requisites of an office. In the case cited by the appellees, *Hartigan v. Board of Regents*, 49 W. Va. 14, the judge who wrote the majority opinion says that, in approaching the simple but difficult question of what constitutes an office, he was struck by the wilderness of law upon the subject. And I might properly add from my investigation that the decisions upon the question are hopelessly apart. In the case referred to, the president of the court in writing the majority opinion stated that great differences of view had been expressed in consultation, and Judge Dent in writing

a dissenting opinion denounced the holding of the majority as contrary to the weight of judicial decision both in West Virginia and throughout the country, and utterly subversive to law.

A case in our own court is cited by the appellee (*State v. Smith*, 49 Neb. 755) in which the court said: "A contract to teach in one of the free schools of the ordinary districts is one of employment. The district, represented by the board, is an employer, and the teacher an employee. The teacher in such schools is not a public officer." It is to be observed, however, that this statement was entirely dictum. There were two points upon which the court held, as shown by the opinion, in affirming the decision of the lower court. First of all the remedy sought was by mandamus, and the court said that mandamus was not the proper method to test the holding of an office; and in the second place the relator was not the teacher who had been dismissed and who claimed reinstatement. The relators were aggrieved residents of the school district, and could not in any case be held in *quo warranto*, since none of them claimed the position or office in question. *State v. Stein*, 13 Neb. 529. Moreover, in that case it was not admitted, as in the case at bar, that the school-teacher was unlawfully dismissed, and, in addition to this, it was evident that said teacher had an adequate remedy at law. In that case, also, there was cause assigned for the dismissal of the teacher. None is here pretended. In the West Virginia case, *supra*, it was stated in the majority opinion that by practice, if not by statute, the regents had the right to dispense with the services of any professor upon 60 days' notice and by giving him pay for that period, and that the plaintiff was aware of and bound by this provision. In this case it is admitted by the demurrer that the relator had been engaged for another year. All of these considerations lead us to believe that the rule stated in the Nebraska case cited should not prevent us from giving the relator relief in this case.

No reason is apparent for denying the remedy of *quo warranto* to try the title to office in the instance of private

employment, except that there is an adequate remedy in damages. In the instant case there is no remedy in damages, because the contract, if there be a contract, has not been broken. Of course, plaintiff could have no remedy in damages if he was not legally dismissed. If he should sue the board of education for damages, the board would have the defense that the contract was not broken, and that plaintiff is still the elected, qualified and acting head of his department. And neither injunction nor mandamus will lie.

In Black's Law Dictionary, the term "office" is defined as "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, whether public, as those of magistrates, or private, as of bailiffs, receivers, or the like." In 29 Cyc. 1361, it is said that an office is "a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging." And in the case of *Rowland v. Mayor*, 83 N. Y. 372, the judge said: "Whether we look into the dictionary of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or be in office."

We think that the language of our statute extends the remedy of *quo warranto* to the appellant in this case, and that the judgment should be reversed and the cause remanded to the district court for further proceedings in accordance with this opinion and holding.

REVERSED AND REMANDED.

CHARLES I. FRAZIER, APPELLANT, V. GEORGE L. ALEXANDER, APPELLEE.

FILED DECEMBER 7, 1923. No. 22611.

1. Appeal: TRANSCRIPT: TIME FOR FILING. In order to vest the supreme court with jurisdiction to review a judgment, decree, or final order made by the district court, in civil cases, a certified transcript containing the judgment, decree, or final order, must

be filed in the supreme court within three months from the rendition of the judgment, decree, or final order, or within three months from the overruling of a motion for a new trial in the cause. Comp. St. 1922, sec. 9138.

2. ———: REVIEW. Errors committed in the trial of a case in the county court and in the rendition of a final judgment on appeal or error in the district court cannot be reviewed in the district court by a motion to recall and set aside an execution issued upon the final judgment.

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

A. R. Honnold, for appellant.

Morrow & Morrow, contra.

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

LETTON, J.

A judgment in favor of plaintiff (appellee) in this case was rendered in the county court on April 1, 1921. An appeal bond was filed by the defendant (appellant). He filed no transcript in the district court, but a transcript was filed by the plaintiff and a like judgment to that of the county court rendered against defendant. Afterwards defendant filed a petition in error from the county court to the district court, and on July 19, 1921, the court found that no error was committed and ordered that the former judgment of the district court should be enforced. This judgment was placed of record on August 16, 1921. On September 3, 1921, a motion was filed in the district court to vacate and recall an execution which the motion recites had been issued upon the judgment, on August 26, 1921. This motion was overruled on February 9, 1922. A transcript of all these proceedings was filed in this court on February 13, 1922. No transcript containing the record of either of the judgments having been filed in the supreme court within three months from the rendition of the same, this court acquired no jurisdiction to pass upon the merits. We have obtained

jurisdiction only to review the order overruling the motion to recall and vacate the execution. Assuming that this is a final order, the motion was properly sustained by the district court, since it sought to review errors committed in the county court and the rendition and sufficiency of the final judgment in the district court.

AFFIRMED.

LORENZO FLOWER ET AL., APPELLANTS, V. FRANK E. COE, APPELLEE.

FILED DECEMBER 7, 1923. No. 23301.

Vendor and Purchaser: TITLE: REFERENCE TO ATTORNEY. Where parties to a contract for the purchase of land stipulate for a title satisfactory to vendee's attorney, the latter's decision is final, if he acts reasonably and honestly in good faith, and not captiously or capriciously.

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

Ritchie, Canaday & Swenson, for appellants.

Pitzer & Tyler, contra.

Heard before MORRISSEY, C. J., ROSE and GOOD, JJ., REDICK, District Judge.

ROSE, J.

This is a suit to require Frank E. Coe, vendee, defendant, to perform a contract to purchase from Lorenzo Flower, Eva B. Flower, his wife, Charles E. Flower, and Clara M. Flower, his wife, vendors, plaintiffs, 166.25 acres of land in Scotts Bluff county at $200 an acre, less "amount of bonded water rights," a mortgage for $17,000, and all other liens. The contract was executed October 25, 1920. Pursuant to its terms defendant paid plaintiffs at the time $500 and agreed to pay $4,500 upon the furnishing of an abstract showing "title satisfactory to attorney" for defendant, and

the remainder of the purchase price March 15, 1921. Defendant resisted specific performance on the ground that the abstract furnished was not satisfactory to his attorney, who so expressed himself in a written opinion, pointing out what were regarded by him as defects in the title. The answer of defendant contained a cross-petition demanding judgment for the amount of his payment on the purchase price. The theory of plaintiffs is that they furnished "an abstract of title showing a good title of record," which defendant, under the specific terms of his purchase, was bound to accept as "satisfactory," his attorney's opinion that the title was unsatisfactory having been given in bad faith, without reason, captiously and capriciously, for the purpose of enabling defendant to evade his contractual obligations. The facts upon which the parties rely are pleaded in detail. Upon a trial of the issues the district court found generally in favor of defendant, dismissed the petition of plaintiffs and entered judgment against them for the initial payment of $500 on the purchase price. Plaintiffs have appealed.

The question presented is the right of plaintiffs to specific performance under the pleadings and the evidence. The solution depends on the contract and what was done under it. The burden of proving bad faith on the part of defendant's attorney was on plaintiffs who made that charge. There is no direct proof that the attorney did not give his client an honest opinion or that in the performance of his duties he acted captiously, capriciously or unreasonably. There is nothing in the evidence to justify a finding that he did not act in good faith in examining the abstract and in expressing the opinion that the title was unsatisfactory, unless bad faith is inferable from his decision. The attorney pointed out what, according to his views, he considered to be defects in the title. Among those enumerated were an unsatisfied mortgage, a failure to show "the amount due and times of payments of bonded water rights," and a discrepancy in the identification of a portion of the land. Without adjudicating the merits of these and other objections, it is obvious that, considered with the abstract, they

were such as could have been honestly made in good faith by a capable lawyer.

Was defendant, under the terms of the contract, bound to be satisfied with what might be "a good title of record," without regard to the opinion of the vendee's attorney that the title of vendors was not satisfactory?

In the contract plaintiffs are called "party of the first part" and defendant is called "party of the second part." Some of the terms are printed and others are in typewriting. The following agreement is printed:

"The said party of the first part agrees to furnish to second party a good and sufficient abstract of title showing a good title of record to the premises."

In the printed matter plaintiffs further agreed to convey the land "in fee simple" by "good and sufficient warranty deed." They argue that defendant is bound to be satisfied with a "good title of record" conveyed by a "good and sufficient warranty deed," that they have offered to comply with these terms, that there are no meritorious objections to the title, and that defendant is protected by a contractual right to retain a portion of the purchase price until plaintiffs furnish a satisfactory abstract. The fallacy in the argument is the failure to recognize the true import of the obligation to furnish an abstract showing title satisfactory to the attorney for defendant. In typewriting the following provisions were inserted in the printed form:

"Abstract to show title satisfactory to attorney for party of second part."

"First payment of $500 to be returned to party of second part by party of first part, and this agreement canceled, if said abstract does not show title satisfactory to party of second part."

If the provision for "a good title of record" is inconsistent with a "title satisfactory to attorney for party of second part," the latter controls under the following statutory rule of construction:

"When an instrument consists partly of written and part-

ly of printed form, the former controls the latter, where the two are inconsistent." Comp. St. 1922, sec. 8850.

The contract not only requires a "good title of record" but goes further and requires a "title satisfactory to attorney for party of second part."

The general and statutory rules of construction require the courts to give effect to every part of a contract. A satisfactory title, when examined by the attorney for the purchaser, is not necessarily the same as a "good title of record." A purchaser may exact more than a good or merchantable title. Delays, expenses and costs of litigation are sometimes consequences of accepting "a good title of record." A vendee may contract for protection from such contingencies by requiring a satisfactory title. Parties to a contract of purchase are competent to bind themselves by an agreement to abide by the opinion of the purchaser's attorney on questions in respect to a satisfactory title. Such a provision cannot be disregarded or minimized in giving effect to the terms of a purchase. There is abundant precedent for the doctrine that parties to a contract of purchase may make the purchaser or his attorney the sole judge of title in respect to its being satisfactory, subject to the limitation that the arbiter must act in good faith, honestly and reasonably, not captiously or capriciously. Cases on this topic are collected in a note beginning on page 741 in 18 L. R. A. n. s. The present case falls within the rule stated, making the opinion of the arbiter conclusive. *Thurman v. City of Omaha*, 64 Neb. 490. *Prime v. Squier*, 105 Neb. 766, belongs to another class of cases. There is nothing to show that the opinion of the attorney in the present instance was not honestly given or that it was unreasonable or that he acted captiously or capriciously. With the principal question thus determined, there is no error in the judgment from which the appeal is taken.

AFFIRMED.

H. E. SELDERS, APPELLEE, V. CORNHUSKER OIL COMPANY, APPELLANT.

FILED DECEMBER 7, 1923. No. 23641.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: CONSTRUCTION. The workmen's compensation law should be liberally construed with a view to giving effect to its provisions and purposes.

2. ———: ———: INJURY: TIME OF OCCURRENCE. A latent accidental injury to a workman, seeming at first to be trifling, but subsequently resulting in disability, may be found to occur when discovered by means of X-rays, within the meaning of the workmen's compensation law, providing that no proceeding for compensation shall be maintained unless the claim therefor is made within six months from the occurrence of the injury. Comp. St. 1922, sec. 3056.

3. ———: COMPENSATION: FINDINGS: REVIEW. In a proceeding by a workman to recover compensation for an injury, the finding of the trial court on an issue of fact is final on review, if supported by sufficient evidence.

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

Kennedy, Holland, DeLacy & McLaughlin and *E. M. Clennon,* for appellant.

Clifford L. Rein, contra.

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

ROSE, J.

This is a proceeding under the workmen's compensation law. Defendant was engaged in selling gasoline and oil at Thirteenth and High streets in Lincoln, where it had a filling station in which plaintiff was an employee. While he was performing the duties of his employment in the basement during a rain storm July 6, 1922, the outside door was suddenly forced open by a rush of water. Before plaintiff could escape through a trap-door he was overtaken by the water, and his back, as alleged, was permanently

injured by debris violently carried into the basement by the flood. After the injury he filed with the compensation commissioner a claim for compensation. From an award in his favor defendant appealed to the district court, where he recovered a judgment for $140 and compensation at the rate of $13.33 a week. Defendant has again appealed.

It is argued that the judgment should be reversed and the proceeding dismissed for the following reasons: Plaintiff did not claim compensation within six months from the date of his alleged injury, as required by the workmen's compensation law, and consequently his proceeding is not maintainable. Comp. St. 1922, sec. 3056. The injury for which plaintiff claims compensation was not sustained in the course of his employment. Are these positions tenable?

The accident occurred July 6, 1922. The claim was not filed with the compensation commissioner until April 17, 1923, an intervening period of more than nine months. There is testimony tending to prove these facts: Plaintiff was afflicted with a cold after he had been in the water July 6, 1922, but continued to perform his duties at the filling station until July 26, 1922. His health and strength appeared to be failing gradually, but he did not know the cause and consulted physicians who did not give him permanent relief or discover the nature of his disorder until it was disclosed for the first time by means of X-rays in 1923. A lumbar vertebra had been fractured. Promptly after this discovery plaintiff applied to the compensation commissioner for compensation, claiming that his injury was the result of the accident at defendant's filling station July 6, 1922. Was the proceeding maintainable after expiration of the statutory period of six months for the filing of claims? It has often been held that the workmen's compensation law must be liberally construed with a view to giving effect to its provisions and purposes. Referring to a latent injury which at first appeared to be trifling but subsequently resulted in the loss of an eye, it was observed in a recent opinion:

"It cannot be said that the injury resulted from the ac-

cident, within the meaning of the statute, before the time it was discovered that it might become permanent." *Johansen v. Union Stock Yards Co.*, 99 Neb. 328.

This reasoning, applied to the findings of the district court in the present case, supported as they are by sufficient evidence, justifies the conclusion that the proceeding was maintainable, plaintiff having filed his claim promptly upon discovering his latent, previously unknown injury and the cause of his disability.

Is the award for compensation sustained by the evidence? Disability is clearly shown. There is a reasonable view of the testimony in which it tends to prove that the fracture was caused by the accident at the filling station July 6, 1922, and resulted in plaintiff's disability. On this issue defendant took the position that the discovered deviation from the natural structure of the vertebra was due to an internal infection in no way traceable to an accident at the filling station or to external violence. In testifying on this phase of the controversy the physicians did not agree and there was proof on both sides of the issue. The evidence on behalf of plaintiff seems to sustain the finding in his favor. The reasons urged for a contrary holding, though ably presented, do not appear to call for an interference with the findings of the trial court.

AFFIRMED.

CHRISTINA WIRTELE, APPELLEE, V. GRAND LODGE, ANCIENT ORDER OF UNITED WORKMEN, APPELLANT.

FILED DECEMBER 7, 1923. No. 22513.

1. War: ALIEN ENEMIES: EXCLUSION FROM COURTS. Plaintiff, who was at all times a citizen of the United States, went to Germany before the beginning of the war and resided there continuously during the war between the United States and that country. Under the "Trading with the Enemy Act," plaintiff thereby came within the class therein denominated "alien enemy" and could not therefore, so long as the war continued, resort to the courts of this country as plaintiff. Act October 6, 1917, 40 U. S. St. at Large, ch. 106, sec. 1, p. 411.

2. **Limitation of Actions:** ALIEN ENEMIES. A citizen of the United States went to Germany before the war began between the United States and that country and remained there throughout its duration. *Held*, that, during the war period, the operation of the statute of limitations was suspended in respect of such alien enemy's cause of action against a citizen or corporation of the United States.

3. **War:** ALIEN PROPERTY CUSTODIAN: CONSTRUCTION OF POWERS. Under the act of October 6, 1917, 40 U. S. St. at Large, ch. 106, sec. 1, p. 411, known as the "Trading with the Enemy Act," the powers therein conferred upon the "alien property custodian" are to be strictly construed.

4. **Costs:** TAXATION. In an action to enforce the payment of a certificate of insurance issued by a fraternal beneficiary society, the court, on motion, taxed an attorney fee as costs a few weeks subsequent to the trial, but during an adjourned session of the same term at which the case was tried. *Held*, that error cannot be predicated on the court's ruling.

5. **Appeal:** COSTS: ATTORNEY'S FEES: TAXATION. An attorney's fee taxed as costs under section 7811, Comp. St. 1922, constitutes no part of the judgment in the action and is subject to exceptions and review in like manner as the taxation of other costs.

6. **Insurance:** APPEAL: AFFIRMANCE. The stipulation of facts examined, and *held*, that the court did not err in rendering a judgment in favor of plaintiff on the certificate of insurance in suit which was issued to the beneficiary by a fraternal beneficiary society.

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

John Stevens, for appellant.

Pitzer, Cline & Tyler, contra.

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

DEAN, J.

Mrs. Christina Wirtele began this action against the Ancient Order of United Workmen, a fraternal beneficiary society, to recover $2,000 as the beneficiary named in a certificate of insurance issued by defendant to Christian

Wirtele, her late husband. A jury was waived and the case was tried on an agreed statement of facts. Plaintiff recovered judgment for $2,162.52. Defendant appealed.

Since the appeal was perfected Mrs. Christina Wirtele died at Rotenburg, Germany, on or about November 2, 1920. Thereupon administration proceedings upon her estate were instituted in the county court of Otoe county, and on motion the action was revived here in the administrator's name. The defense urged is that the action is barred by the statute of limitations.

The material facts which appear in the stipulation on which the case was tried follow: Mr. Wirtele became a member of the defendant society January 28, 1896, at Nebraska City, and so remained, in good and regular standing, until his death. The Wirteles were, and always remained, citizens of the United States, but in June, 1914, they took up their residence at Stuttgart, in the kingdom of Wurtemberg, Germany, where Mr. Wirtele died April 28, 1915. About May 1, 1915, the defendant society received notice of the death of the insured but took no action in respect of plaintiff's claim. The required proofs of death were duly mailed to defendant, by plaintiff, from Germany, August 2, 1916, but were lost owing, apparently, to the hazardous war conditions then prevailing on land and sea. The loss was not discovered by plaintiff until the United States became engaged, with the allies, in the war against Germany. At that time an exchange of mail matter and intercourse generally between the two countries was of course practically suspended. The proofs, however, were finally furnished to defendant about July 31, 1920, which was about five years and three months after the death of the insured. Hence, the defendant pleads the statute in bar of the claim. It was further stipulated and agreed:

"That on April 6, 1917, the United States of America declared war against the German Empire, and that on the 6th day of October, 1917, the congress of the United States of America, with the approval of the president, enacted what is known as the 'Trading with the Enemy Act,' where-

by the plaintiff became an alien enemy. It is admitted that, immediately upon the passage and approval of said act, there was appointed an official known as an 'alien custodian,' with such powers as the act conferred upon him."

The "Trading with the Enemy Act" provides that the word "enemy" as used therein shall be deemed to mean "any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war." 40 U. S. St. at Large, ch. 106, sec. 1, p. 411.

Under the act Mrs. Wirtele, though at all times a citizen of the United States, by an act of law, came within the class denominated "alien enemy," and could not therefore resort to the courts of this country as plaintiff. We so held in a recent case. *In re Estate of Thiede*, 102 Neb. 747. See *McVeigh v. United States*, 11 Wall. (U. S.) 259. The *McVeigh* case was cited with approval in *Porter v. Freudenberg*, Ann. Cas. 1917C, 215 (1 K. B. Div. 1915 (Eng.) 857). See *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918 B, 185, and note.

The chronology in respect of the facts involved here may be briefly recapitulated: April 28, 1915, the insured died in Germany. A state of war between the United States and Germany was declared April 6, 1917. Active hostilities continued until November 11, 1918. The proofs of death were furnished to defendant on or about July 31, 1920. The petition was filed in the district court March 16, 1921, and the case was tried in that court September 28, 1921. It follows that, pursuant to the "Trading with the Enemy Act," and the decisions thereunder, the statute of limitations did not bar the action.

Defendant argues that plaintiff might have begun suit while the war was in progress if she had applied to the alien property custodian who was appointed under the provisions of the act in question. We are unable to find anything in the act which would have empowered that officer to begin an action for plaintiff in this class of cases. In

discussing the act and the power of the alien property custodian thereunder, it has been said: "This power is wholly statutory, and if it exists it must be found within the enumeration of his powers set forth in the creative trading with the enemy act." *Waldes v. Basch*, 179 N. Y. Supp. 713.

There being no impelling lawful reasons to the contrary, the defendant society should make its fraternal promise good to the beneficiary, or to her representatives, in return for the monthly dues which Christian Wirtele paid into its treasury for almost a score of years.

Another feature presented by the record must be noticed. The judgment is dated as of September 28, 1921. December 20, following, plaintiff filed a motion to tax an attorney fee, as part of the costs, under chapter 103, Laws 1919 (Comp. St. 1922, sec. 7811). December 27, 1921, the appeal was perfected and the record was filed in this court. January 9, 1922, at an adjourned sitting of the same term of the district court at which the case was tried, plaintiff's motion was sustained and $250 was taxed as costs. It is conceded that the fee is reasonable, but the defendant now argues that it should have been taxed immediately at the close of the trial, or not at all, and that, failing in this, the court erred in the premises. That part of the act which reads that such attorney fee shall be so taxed, "upon rendering judgment," is stressed by defendant. Defendant's argument that the tax must be imposed at the immediate sitting at which the case is tried cannot be upheld. *Barkley v. Pool*, 105 Neb. 203. In *Hendrix v. Rieman*, 6 Neb. 516, it was held that an attorney's fee taxed in a suit is no part of the judgment, but is taxed as costs, and is subject to exceptions and review in like manner as the taxation of other costs may be. The objection is technical. The court did not err in taxing the fee at an adjourned sitting of the same term at which the case was tried.

Certain correspondence between the grand recorder of the defendant society and a representative of Mrs. Wirtele appears in the record. Plaintiff earnestly contends that the letters written by the grand recorder constitute a waiver

of the statute of limitations, but we do not find it necessary to base our decision upon that ground and therefore leave that question undecided.

The judgment is

AFFIRMED.

ALBERT L. STORRS ET AL., APPELLEES, V. JOHN BOLLINGER, APPELLANT.

FILED DECEMBER 7, 1923. No. 22522.

1. **Homestead: CONTRACT TO CONVEY: SPECIFIC PERFORMANCE.** Where a contract for the sale of a family homestead is not signed by the wife of the vendor, it cannot be enforced specifically by either vendor or vendee while it remains in that condition.
2. ———: **OFFER OF SALE: WITHDRAWAL OF OFFER.** If such a contract be treated as an offer by the vendee, he may withdraw the offer at any time before it is accepted in a legal manner by the vendors.

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

Albert & Wagner and *W. J. Donahue,* for appellant.

Williams & Williams, contra.

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

DAY, J.

This action was brought by Albert L. Storrs and Cora L. Storrs, husband and wife, against John Bollinger for specific performance of a contract for the sale of certain lands. The contract was dated September 18, 1920. The alleged contract appears to be an agreement between Albert L. Storrs and John Bollinger in which Storrs is vendor and Bollinger is vendee. The contract set out in the amended petition is signed by the plaintiffs, as well as the defendant, although the testimony is clear that the wife, Cora L. Storrs, did not sign the instrument until February 26, 1921.

The defendant admitted that he signed the alleged contract, and paid thereon to Albert L. Storrs $1,500 as a part of the purchase price at the time he signed the instrument. He further alleged that the so-called contract was void and of no legal or binding effect, because the lands described therein were at all times mentioned as the homestead of the plaintiffs, and that the contract was never signed by Cora L. Storrs; that it was never acknowledged by either of the plaintiffs as required by law; that before the date of performance of the contract the defendant notified the plaintiffs that he would not perform the contract. Defendant also sought to recover back the $1,500 he had paid upon the contract, with interest thereon. The trial resulted in a judgment in favor of the plaintiffs. Defendant appeals.

The record shows that on September 18, 1920, Albert L. Storrs and John Bollinger entered into the written agreement set out in the amended petition. The contract on its face indicates that, for a consideration named, Storrs sold to Bollinger certain land, specifically described; that Bollinger paid $1,500 of the purchase price at the time, the remainder of the purchase price to be paid on March 1, 1921, at which time a deed to the land was to be delivered to Bollinger, together with an abstract of title, and possession of the land turned over to Bollinger. The contract was signed by Storrs and Bollinger, and left in a bank at Albion, Nebraska, at which place, according to the terms of the contract, final settlement was to be made on March 1, 1921. On February 26, 1921, Storrs and his wife went to the bank, and, without the knowledge or consent of Bollinger, secured the contract, and Cora L. Storrs attached her signature thereto. Storrs and his wife then acknowledged the instrument before a notary public. The notary failed to certify to the acknowledgment, or to attach his notarial seal. He did, however, write in pencil on the contract the words, "Ack. 26 Feb. W. S. P.," the letters being the initials of the notary. On the same day, without the knowledge of Bollinger, Storrs and his wife executed a deed in due form to the land in question, naming Bollinger as grantee, and left

the same with the contract and an abstract of title at the bank. On March 1, 1921, Storrs appeared at the bank, and remained there all day, ready, able and willing to perform the contract, but Bollinger failed to appear. The following day Storrs sought Bollinger and formally tendered the deed and abstract, and demanded performance, but Bollinger refused to accept the same. The testimony is clear that at all times mentioned the land, which was the subject of the contract, was the homestead of the plaintiffs.

A number of interesting legal questions are argued in the briefs, based upon the facts as above outlined, which, in the view we have taken of the testimony with respect to Bollinger withdrawing from the contract, are not deemed necessary to be considered.

We think it must be conceded that, in any view which might be taken of the instrument upon which the action is founded, it was, prior to February 26, 1921, void as a contract between the parties. Section 2819, Comp. St. 1922, which was in force at all times mentioned herein, provides:

"The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

By an unbroken line of decisions this court has held that neither spouse has the right to dispose of the homestead except with the consent of the other, and then only in the manner prescribed by the statute. Had the contract remained in the condition as originally entered into, neither party could have founded an action of specific performance thereon. It is claimed, however, that the instrument, so far as it affected Bollinger, was in the nature of a standing proposition which, when accepted by Storrs and his wife, became a binding and enforceable contract. Without discussing the legal questions which might be involved in this statement of the facts, we are of the view that the record does not present this precise question. Assuming that the instrument signed by Bollinger amounted in law to a stand-

ing proposition, he would have the right to withdraw his offer at any time before it was accepted in a legal manner by Storrs and his wife. It is the claim of the defendant that prior to February 26, the date that Cora L. Storrs signed the contract, he notified Storrs that he would not go on with the contract. Upon this issue there is a direct conflict in the testimony. Storrs testified, however, that in the early part of February Bollinger told him that "he did not think he could take the place." He also testified that John Redler, who was acting for Bollinger, stated to Storrs, before March 1, that "John (referring to Bollinger) stated he couldn't go on with the contract." Redler in his testimony fixes the date of the conversation with Storrs about the first of February, and testifies that he told Storrs "that the deal was off," and that "he might drop the deal." After these conversations Storrs and his wife procured the contract; his wife signed the same; and both pretended to acknowledge it before a notary public. Considering the entire testimony in the light of other circumstances disclosed by the record, we are satisfied that what was said to Storrs was sufficient to indicate that Bollinger had withdrawn from the contract before Mrs. Storrs signed the same.

With this view of the evidence, it seems unnecessary to decide whether parol testimony was admissible to prove the acknowledgment of the contract by Storrs and his wife, and whether the contract was an enforceable one. It may not be amiss, however, to cite *Solt v. Anderson*, 71 Neb. 826, in which it was held:

"The acknowledgment by both husband and wife of an instrument whereby it is sought to convey or incumber a homestead is an essential step in the due execution of such instrument." And: "That such instrument was thus acknowledged should appear from the instrument itself in the form of a certificate of the officer before whom the acknowledgment was taken, and, in the absence of such certificate, it is not competent to show by parol that the instrument was in fact acknowledged."

In this view of the evidence, it seems clear that Storrs had no right of action against Bollinger based upon the agreement between them. This being true, and it being admitted that Storrs has $1,500 belonging to Bollinger, it follows that Bollinger should be permitted to recover that sum from Storrs.

The judgment of the district court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

REVERSED.

J. F. TWAMLEY, SON & COMPANY, APPELLEE, V. CHICAGO, GREAT WESTERN RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 7, 1923. No. 22597.

1. Statutes: PLEADING AND PROOF. A defendant who bases his defense to an action on the statutes of another state must allege, and unless admitted by his adversary must prove, the statutory provision relied on.
2. Carriers: BILLS OF LADING: ALTERATIONS. A provision in a bill of lading, that any alteration or addition thereto shall be ineffectual unless indorsed thereon and signed by the agent of the carrier, has reference to the terms and conditions of the contract for transportation, and has no reference to an indorsement by the consignee for the purpose of transferring the title to the bill to another.
3. ———: MEMBERSHIP IN GRAIN EXCHANGE. Though the articles of incorporation of a railway company do not authorize it to engage in the buying and selling of grain, it is not unlawful for it to hold a membership in a grain exchange, when such membership enables it to ascertain when grain is to be transported to other markets, to come in contact with prospective shippers, and to solicit their shipments of grain over its line of railway. Under such circumstances, the holding of a membership in a grain exchange is properly incident to the business of a common carrier.
4. ———: BILLS OF LADING: INDORSEMENT: TITLE. An order bill of lading for a car of grain, indorsed in blank by the consignee and stamped on its face, "Receipt issued for this bill of lading under rules of Omaha Grain Exchange to (name of consignee),"

held to charge the carrier issuing such bill of lading, and which is a member of the grain exchange and had knowledge of the general nature of the business transacted by such exchange, with notice that, as provided in such rules of the exchange, title to the grain remained in the holder of the receipt until he was paid therefor.

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

Brown, Baxter & Van Dusen, for appellant.

Smith, Schall, Howell, Howard & Sheehan, contra.

Heard before MORRISSEY, C. J., ROSE and GOOD, JJ., REDICK, District Judge.

GOOD, J.

Plaintiff recovered a judgment against defendant for the conversion by it of a carload of corn. Defendant has appealed.

The facts from which this controversy arises are not in dispute, and, so far as necessary to an understanding of the questions involved, are as follows: Plaintiff delivered to defendant at Bentley, Iowa, for shipment to itself at Council Bluffs, Iowa, a car of corn and received therefor an order bill of lading from defendant. Afterwards plaintiff sold said car of corn to William Richter, doing business under the trade name of U. S. Commission Company. The sale was made on the floor of the Omaha Grain Exchange as cash grain upon Omaha weights and grades and pursuant to the rules and regulations of said exchange. Said rules required Richter to order said grain to an elevator in Omaha or Council Bluffs for the purpose of being weighed and graded. Said sale was made upon the condition that title to said car of corn should remain in plaintiff until paid for, and the same should not be shipped from the elevator in Omaha or Council Bluffs until paid for. The conditional sale was in writing, as required by the rules of said exchange. Plaintiff stamped across the face of the bill of lading the following: "Receipt issued for this bill of lad-

ing under rules of Omaha Grain Exchange to J. F. Twamley, Son & Company," and indorsed on the back thereof the name of J. F. Twamley, Son & Company, and delivered the same to Richter. Thereafter the defendant, at the request of Richter, took up and canceled said bill of lading and issued to him, under the name of U. S. Commission Company, in lieu thereof, a new bill of lading, showing full ownership in said Richter, in and to said car of corn, and shipped the same to Peoria, Illinois, and thereafter Richter sold the corn and converted the proceeds to his own use. Richter never paid plaintiff for said corn. Plaintiff, defendant and Richter were, at the time, all members of the Omaha Grain Exchange.

The rules of said grain exchange provide in part as follows: "On all sales of cash grain to go to elevators, mills or warehouses in this market, made on the floor of the exchange, on the 'Call' board, or by private sale, in accordance with the rules and regulations of the exchange, *the buyer shall order the grain to the elevator*, the ownership of such grain to remain in the seller until the grain is paid for. Where a bill of lading is transferred and the party receiving the same issues and delivers to the person surrendering the bill of lading a receipt therefor, stating that the title to the grain covered by said bill of lading shall remain in the party holding said receipt until the same is fully paid for, then the person issuing such receipt is hereby prohibited from accepting or receiving advances on said bill of lading, or negotiating the same, so long as the receipt therefor is outstanding. Where a bill of lading is transferred and receipt issued therefor as above provided, the party transferring the same shall plainly stamp or write across the face of said bill of lading the words 'Receipt issued for this bill of lading under rules of Omaha Grain Exchange to (name of holder of receipt).' "

Plaintiff's theory is that the words, "Receipt issued for this bill of lading under rules of Omaha Grain Exchange to J. F. Twamley, Son & Company," stamped upon the bill of lading, were notice to any member of said grain exchange,

accepting or dealing with said bill of lading, that title to the corn, until paid for, remained in the plaintiff, and that defendant, by taking up and canceling said bill of lading and issuing, in lieu thereof, a bill of lading to Richter, under the name of U. S. Commission Company, enabled the latter to wrongfully sell the corn and appropriate the proceeds to his own use; that, without the act of the defendant in thus issuing a new bill of lading, Richter would have been unable to gain possession of the corn and convert it to his own use, and that therefore defendant is jointly liable with Richter for conversion of the grain.

Defendant contends that plaintiff, by indorsing in blank and delivering to Richter the order bill of lading, thereby invested him with an apparent ownership of the corn; that plaintiff's action in so indorsing and delivering the bill of lading, when there was only a conditional sale of the corn, was negligent and made possible the fraud of Richter; that defendant performed its contract by delivering the corn to the bearer of the bill of lading so indorsed.

It seems quite clear that the correctness of this position must be determined by the effect that should be given the words stamped on the bill of lading. If, under the circumstances disclosed by the record, the words, "Receipt issued for this bill of lading under rules of Omaha Grain Exchange to J. F. Twamley, Son & Company," are sufficient to charge defendant with notice that the corn was sold under the rules of said exchange, then it would follow that defendant had notice that the title to the corn remained in plaintiff until paid for, or until the receipt was surrendered. If defendant, with such notice, took up the bill of lading and issued a new one to Richter under the name of U. S. Commission Company, thereby investing him with apparent ownership of the corn, and transported the same to another market where Richter sold the corn and received and appropriated the proceeds, and failed to pay plaintiff for the corn, defendant would thereby render itself liable to plaintiff in this action.

Defendant argues that the words stamped on the bill of lading are void and of no effect because in contravention of

the statutes of Iowa and contrary to the provisions of section 10 of the bill of lading. While defendant's answer contains allegations as to the provisions of the Iowa statute, they were not supported by any evidence and were denied in plaintiff's reply. The effect of the Iowa statute cannot be considered, because its provisions are neither admitted nor proved.

Section 10 of the bill of lading is as follows: "Any alteration, addition, or erasure, in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor."

The design and purpose of said section is to prevent any change in the terms and conditions of a contract of carriage, unless such change is indorsed on the contract and attested by the signature of the carrier's agent. It was plainly designed to require the whole contract for transportation to be in writing and attested in such a manner as to leave none of the terms thereof open to dispute or subject to proof by parol evidence. It was not the purpose of said section to require an indorsement by the consignee, for the purpose of transferring the bill of lading to another, to be attested by the signature of the carrier's agent. The words stamped on the bill of lading do not alter or change any of the terms or conditions of the contract between the carrier and the consignor. They can only affect the contract of indorsement so that the indorsee would not become invested with the title but only a right to possession for a specific purpose, viz., to have the corn sent to a terminal elevator for weighing and grading, and there to remain until paid for. If said section 10 would make a restricted indorsement invalid unless attested by the signature of the carrier's agent, then it would likewise prevent any transfer of the bill of lading by the consignee's indorsement in blank, unless so attested. It is quite clear to us that section 10 does not make the words stamped on the bill of lad-

ing invalid and of no effect because not attested with the signature of the carrier's agent.

While defendant admits that it has held a membership in the Omaha Grain Exchange since its organization, and that members who are engaged in the grain business on such exchange are required to take notice of the rules thereof, it contends that, because it is not dealing in grain, either buying or selling, and because the holding of such a membership is in violation of the articles of incorporation of defendant, it is not required, as a matter of law, to take notice of the rules of the exchange. Defendant asserts that the holding of a membership in the Omaha Grain Exchange is *ultra vires;* that the holding of such membership confers no rights upon the defendant and entails no obligations. We are unwilling to concede the soundness of this contention. While the railroad company may not be authorized by its articles of incorporation to engage in the buying and selling of grain, it does not follow that it may not hold a membership in an exchange for the purpose of facilitating and aiding it in carrying on the business of a carrier. Carriers may, and do, own grain elevators for the purpose of storage and to enable them to obtain and handle grain for transportation. We think they are authorized to do anything that is lawful and necessarily incident to carrying on the business of a carrier. By holding a membership in the exchange, a carrier is enabled to ascertain when grain is to be transported to other markets, to come in contact with shippers, and to solicit the consignments of grain over its line of railway. We are of opinion that the holding of such membership, under the circumstances, was not prohibited by its articles of incorporation and was not unlawful; that it was proper and legitimate and in furtherance of its lawful business.

Under the facts established by the record, the rules announced by this court in *Holmquist Elevator Co. v. Omaha Elevator Co.*, 110 Neb. 655, and in *Standard Grain Co. v. State Bank*, 106 Neb. 73, must control the decision in this case. In the former case, it was held; "Sales of grain made

upon the floor of the Omaha Grain Exchange by one member of the exchange to another member are governed by the rules of the grain exchange." In that case, the bill of lading did not bear the notation, "Receipt issued for this bill of lading under rules of Omaha Grain Exchange to (name of holder of receipt)," but the indorsee of the bill of lading was held to have notice that the title to the grain remained in the seller until paid for, as provided by the rules of the exchange.

In *Standard Grain Co. v. State Bank, supra,* it was held: "Under rules of the Omaha Grain Exchange, when a car of grain is sold and the bill of lading is assigned, the buyer issues a receipt stipulating that title shall remain in the seller until the grain is paid for, and a notation of the issuance of the receipt is stamped upon the bill of lading, thereby giving notice to Exchange members that negotiation of the bill of lading is prohibited until the seller is paid. *Held,* that a bank to which a bill of lading bearing such notation is indorsed, with accompanying draft, for deposit and credit, and through which the said paper is negotiated and the grain wrongfully sold, is liable to the owner for conversion, if knowledge on the bank's part of the meaning of said notation and of the exchange rules is directly shown or can reasonably be inferred from its previous experience and dealings." And it was also determined in that case that the stamped notation on the bill of lading was notice to members of the exchange that title to the grain represented by the bill of lading was reserved in the original consignee, and, further, that the bank cashing the draft with such bill of lading attached, although not a member of the exchange, by reason of its familiarity with the dealings between the members on the exchange, was required to take notice that title did not pass to the indorsee of the bill of lading bearing the stamped notation.

In *Rainbolt v. Lamson Bros.,* 259 Fed. 546, the same rule of the Omaha Grain Exchange was involved. It was there held: "A bill of lading for a car of grain, stamped on its face, 'Receipt issued for this bill of lading under rules of

Omaha Grain Exchange,' *held* to charge a transferee, who was a member of the exchange, with notice that, as provided in such rules, title to the grain remained in the holder of the receipt until he was paid therefor."

It is a matter of common knowledge that defendant is almost daily transporting grains to and from the Omaha market and that a large portion of such grain is handled and sold on the floor of the Omaha Grain Exchange. The defendant must necessarily have been familiar with the general nature and methods of the business transacted by the grain exchange.

Under the facts disclosed by the record and the rules announced in the authorities cited, it must be held that the notation on the bill of lading conveyed notice to the defendant that title to the grain had not passed to Richter, under the name of the U. S. Commission Company, and that the defendant, by taking such bill of lading and issuing to Richter, in lieu thereof, a new bill of lading, which would indicate that he was the absolute owner thereof, and which enabled him to dispose of the grain and appropriate the proceeds, is put in the position of aiding him in defrauding plaintiff. It follows that defendant is liable to plaintiff for conversion of the corn.

The judgment of the district court is

AFFIRMED.

GEORGE E. WALLICH, JR., APPELLEE, V. RAY S. SANDLOVICH ET AL., APPELLANTS.

FILED DECEMBER 7, 1923. No. 22592.

1. **Sales: BONA FIDE PURCHASER.** The failure of a supposed owner of an automobile to register the same with the state authorities as required by the statute is a suspicious circumstance, which, together with other matters referred to in the opinion brought to the notice of the purchaser, is sufficient to put the purchaser upon inquiry as to the vendor's title.

2. **Evidence** examined, and *held* sufficient to sustain the finding and judgment of the lower court.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

J. S. Garnett, T. S. Allen, Everett C. Wilson and *George N. Foster,* for appellants.

Hall, Baird & Williams, contra.

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

REDICK, District Judge.

Action of replevin for a Cadillac automobile; jury waived and trial to the court; finding and judgment for plaintiff, and defendant appeals.

The facts are: May 31, 1921, one Mann purchased the car in question from plaintiff at Kansas City, Missouri, and gave in payment therefor his check on a Kansas City bank for $2,500. Upon presentation of the check the next morning payment was refused for want of funds. Possession of the car was delivered to Mann the evening of the purchase; a bill of sale dated May 31, 1921, was executed by plaintiff to Mann, who appears also to have witnessed the same. June 3, 1921, at about 2 p. m., Mann, under the name of A. J. Brown, sold the car to defendants under the name Nebraska Auto Exchange, dealers in used cars at Lincoln, Nebraska, taking a Buick roadster and $400 in cash as payment. Brown (or Mann) was introduced to defendants by an acquaintance named Dietz. Brown told defendants he had traded some land for the car, and produced the bill of sale to Mann, upon the back of which, defendants testify, there was an "assignment" to Brown. One of defendants testified with regard to this: "He had a bill of sale from the Atlas Motor Company at Kansas City." Defendants permitted Brown to keep the bill of sale. The car carried a Nebraska license number L.578, which indicated a "lost" number. With reference to this, Adams, agent of defendants, who took part with Ray S. Sandlovich in making the trade, testified: "He (Brown) didn't just

exactly say it was lost. He said this license was taken out for a Buick automobile, and he said this Buick automobile he had sold, and he let this number and registration card go with this Buick and he went up and got him a lost number." "He told us this car had not been registered." "We knew this license did not belong on the Cadillac—he told us that—or he would have had the blue slip." Brown also said to Sandlovich that the registration certificate had been lost; also that he was a resident of Hallam, Nebraska. Upon completion of the sale, Brown and defendants (under their trade name) joined in a statement of the sale, in which the "present registration No." was given as "L.578," to the state motor vehicle department, and the county treasurer of Lancaster county, and requesting registration of the vehicle in the name of (blank). Nothing was done under this document, and defendants did not take a bill of sale from Brown. Defendants made no inquiries other than of Brown before purchasing the car. Palintiff replevied the car June 6, 1921.

The question is whether these facts require a finding that defendants were innocent purchasers in good faith. The lower court having answered in the negative, its finding will not be disturbed unless manifestly wrong.

The laws of this state require the owner of an automobile to have the same registered, whereupon a number is assigned to that particular car and a certificate issued, which is required to be kept posted in plain sight in the car, and number plate corresponding therewith. If the plate or certificate is lost, the owner must immediately apply for a duplicate. In case of a transfer of ownership, the parties must join in a statement thereof on the reverse side of the certificate, and forward to state authorities, who will thereupon register the car in the name of the transferee. And it is provided the title shall not pass until the statute is complied with. Comp. St. 1922, secs. 8365-8388 (in force in 1921).

No attempt to comply with the statute was made with reference to the alleged transfer from Mann to Brown.

Brown did not have the car registered in his name; the only evidence of his ownership was the bill of sale and his possession. The want of compliance with the transfer requirements, defendants contend, is not material, because the car had never been registered; yet they attempted to comply with the transfer act by making application therefor as though the car had been registered under L.578. It may be that the transfer section only applies to cars that have been registered, but section 2 of the same act (section 8365, *supra*) requires all cars to be registered by the owner. The object of this statute as expressed in its title is, *inter alia*, "to regulate and safeguard the sale and transfer of motor vehicles," and the fact of nonregistration is of itself a suspicious circumstance. In addition to this, defendants had notice of the facts that the car had been sold in Kansas City only three days before; that their vendor claimed to have traded land for it; that his desire to sell it was to get a lighter car, which evinced a rather sudden change of heart; that the car did not carry a registration certificate; that it carried a false license number, one which belonged to a Buick.

The burden of proof was upon defendants to show that they purchased in good faith without notice. *Justice v. Shaw*, 103 Neb. 423. This they have utterly failed to do. The facts above set out were clearly of a character, considering the nature of the transaction, to put defendants upon inquiry regarding the vendor's title. If they had simply called up the Atlas Motor Company at Kansas City, they would have discovered the facts. In the presence of these suspicious circumstances, we do not think defendants were justified in relying upon the recital of payment in the bill of sale. If this transaction can be sustained, the auto vehicle registration law might as well not have been passed; if the car had been regularly registered by Brown, one of the suspicious circumstances would not have existed.

The evidence is ample to sustain the finding of the district court, and its judgment is

AFFIRMED.

DOLAN FRUIT COMPANY, APPELLEE, V. JAMES C. DAVIS, DIRECTOR GENERAL, APPELLANT.

FILED DECEMBER 7, 1923. No. 22604.

1. Carriers: NEGLIGENCE. In an interstate shipment of fruit, the refusal of the carrier to perform special services en route, not offered to shippers generally by its published tariffs, will not support a charge of negligence, unless, perhaps, in case of great emergency, which is not shown in this case.
2. Trial: INSTRUCTIONS: CONTRIBUTORY NEGLIGENCE. When an allegation of contributory negligence is supported by any competent testimony, or the evidence warrants an inference thereof, it is error for the court to refuse to instruct the jury upon the law relating thereto.
3. Carriers: NEGLIGENCE: ACT OF GOD. Under the federal decisions, where property is destroyed by an act of God, but would not have been within the range of the destructive force except for the negligent delay of the carrier, the act of God, rather than the negligent delay, is the proximate cause.

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

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

James H. Woolley, W. J. Wilkinson and *Stough & Dunn, contra.*

Heard before MORRISSEY, C. J., ROSE and GOOD, JJ., REDICK, District Judge.

REDICK, District Judge.

The action is to recover $337.74 damages to a carload of bananas, alleged to have been caused by negligence of the defendant. The shipment was from Kansas City, Missouri, to Grand Island, Nebraska, and the car in question left Kansas City at 11 a. m. December 6, 1919, arrived at Lincoln 4 p. m. December 7, left Lincoln at about midnight, and arrived at Aurora 10 a. m. December 8. The bananas were in good condition at Kansas City and upon their ar-

rival at Aurora. During transportation between Lincoln and Aurora a severe snow storm commenced and it was very cold, from 3 to 7 degrees below zero, and conditions were such that the greater part of the train was abandoned at Bradshaw, about 18 miles east of Aurora, but a few cars, including the car of bananas, went forward, arriving at Aurora, as above stated. In the meantime the storm increased, and in the judgment of defendant's agents it was unsafe to continue shipment of freight from Aurora to Grand Island, about 22 miles, and the car of bananas was side-tracked at Aurora and remained there until early the morning of December 10, when it was placed on the first freight train going west after the storm. It arrived at Grand Island about noon of the 10th, and the bananas were found to be damaged so that their market value was depreciated in the sum sued for. Plaintiff claims that bananas must have air, and that it was necessary to ventilate the car; that this could not be done while the car was out in the yards, because to allow the cold air to strike the bananas would turn them black and destroy their market value, and that, therefore, it was necessary to put the car in some sheltered place where the doors might be opened and the car ventilated gradually without injury to the fruit. It was a refrigerator car provided with a heater in one end, and accompanied by a caretaker for plaintiff during the entire shipment. It is claimed that the caretaker requested the defendant to house the car in the roundhouse so that it might be properly ventilated, but that defendant refused. It is further claimed that the caretaker requested defendant to put the car of bananas on a passenger train which left Aurora at 4.18 p. m. December 8, two hours late, which defendant refused. It stopped snowing, but the wind blew very hard about midnight of the 8th, the snow drifted badly, and a snow plow was started from Aurora at 7:45 a. m. of the 9th, arriving at Ravenna, beyond Grand Island, at 9.45 a. m. The tracks in the yards at Aurora were clogged with snow so that the cars had to be dug out with shovel.

The answer denied all negligence, alleged that the delay

at Aurora was caused by the act of God, that the injury to the bananas was due to their inherent qualities and to negligence of the caretaker of plaintiff in properly protecting them. Defendant further claims that roundhousing the car or sending it forward on a passenger train was not permitted under its published tariffs, and would constitute a discrimination in favor of the plaintiff, inasmuch as such special protection was not offered to shippers generally by its published tariffs. The allegations of the answer were put in issue by the reply. Trial to a jury resulted in a verdict and judgment for the plaintiff for the amount claimed, and, motion for new trial having been overruled, defendant appeals.

Plaintiff claims defendant was negligent (1) in not putting the car in the roundhouse as requested; (2) in not continuing the freight train from Aurora to Grand Island on its regular schedule; (3) in not attaching the car of bananas to the passenger train; and (4) in delaying the shipment eight hours at Lincoln, but for which delay the car would have arrived in Grand Island before the storm.

With reference to the charge of negligent delay at Lincoln, it is sufficient to say that the established rule of the federal court is to the effect that, where there has been a negligent delay in transportation but for which the subsequent act of God would not have operated to the injury of the shipment, nevertheless the act of God, and not the negligent delay, must be considered the proximate cause of the loss. *Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. Co.*, 135 Minn. 363, and cases cited. Furthermore, it appears that the delay in Lincoln itself caused no injury, as the bananas were found in good condition upon arrival at Aurora. The lower court properly withdrew this charge of negligence from the consideration of the jury.

The charges of negligence for failure to roundhouse and refusal to forward on a passenger train may be considered together. In this connection defendant claims, and the evidence shows, that its published tariffs did not offer to the shipper any such special protection as was here demanded,

and that defendant furnished a heater to be operated and controlled by the plaintiff's caretaker who had complete control of the shipment and whose duty it was to properly protect it from the cold. This being an interstate shipment, it is governed by the federal laws and decisions. The interstate commerce law, subdivision 1, sec. 8569, 8 U. S. Comp. St. (1916), provides that the carrier shall file with the commission schedules showing all rates of transportation, "and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee." And under subdivision 7 of the same section it is provided:

"No carrier * * * shall engage or participate in the transportation of passengers or property, * * * unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; * * * nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

It seems to be well established that under these provisions of the statute the carrier is prohibited from extending to a shipper any special advantages or facilities not provided for in the tariffs so filed with the commission and that any contract to that end is void. *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155; *Bradford v. Hines*, 206 Mo. App. 582. These two cases were actions upon contracts claimed to have been made by the carrier for services and facilities in the transportation of freight which were not provided for in the published tariffs, neither one presenting any claim of negligence. In *McGovern v. Ann Arbor R. Co.*, 165 Wis. 525, it was held:

"Where a railroad company by its published tariffs, ap-

proved by the interstate commerce commission, offered the shipper of apples the opportunity to put a stove in the car, with a man in charge of it under certain conditions, but did not offer to warm or house the car itself, and a shipping contract covering a car of apples was made in the dead of winter, when both parties knew that zero weather was liable to come at any time, and the weather conditions were fully understood, and the shipper accepted a bill of lading including the words 'owner's risk,' so that the liability of the railroad was limited to liability for negligence, and the car went through expeditiously and on schedule time, but reached destination with the apples frozen, the railroad was not liable to the consignee." (162 N. W. 668.) And the court said: "In the published tariff of the defendant there is no provision for the furnishing of heat in the transportation of vegetables or fruit; the rule hereinbefore referred to authorizing the shipper to furnish a man and stove is the only provision on the subject contained in the tariff. This tariff having been approved by the interstate commerce commission is absolutely controlling, and the railroad company is not permitted to give greater or less service than it provides."

It appears, therefore, that no legal duty rested upon the carrier to protect the shipment by putting the car in the roundhouse, nor to expedite the shipment by attaching the car to a passenger train, as these services were not provided for in the published tariffs, and if they had been contracted **for with the present** shipper the contract would have been void. So the question is whether the defendant can be charged with negligence for failing to do that which the law prohibited it from contracting to do. We think the answer must be in the negative. A disregard of a positive statute is generally held to afford an inference of negligence, and we are unable to perceive how a refusal to disregard it should give rise to a like inference. No doubt in case of great emergency one may be called upon to act in a manner not enjoined upon him by law or even in face of a legal prohibition, or be subject to a charge of failing

to use ordinary care, but the facts of the present case do not in our judgment present such an emergency. The evidence discloses that at the time in question there was no space in the roundhouse where the car in question might have been placed without the removal of one of defendant's engines and subjecting it to injury. And regarding the attachment of the car to a passenger train, the evidence is conclusive that such action was entirely impracticable, especially in view of the extreme cold weather. It could not be placed between the engine and passenger cars, because there was no way of conducting the heat through or around this freight car; and it could not be placed upon the rear of the train, because that would have required a brakeman to ride upon the car, which was out of the question under the weather conditions. We think the determination of these two questions very largely depended upon the judgment of the railroad agents, and their conclusions under the conditions shown presented no question of negligence for the jury.

Defendant asked the following instruction: "You are instructed that the defendant was not required to take any extraordinary measures or steps to forward the plaintiff's shipment from Aurora, and if you find by a preponderance of the evidence that the defendant exercised that degree of care that an ordinary, prudent, and careful man would have exercised under the same circumstances and conditions (excluding from your consideration, as provided in these instructions, the claim that the shipment should have been placed in a roundhouse, or carried on a passenger train, and also excluding from your consideration any delay to said shipment prior to arrival at Aurora), then you are instructed that your verdict should be for the defendant."

According to the view we have expressed on the questions covered by this instruction, we think the court below erred in refusing to give it or one of similar import.

One of the defenses set up in the answer was that the loss on the shipment was due to the inherent qualities of the bananas and to the negligence of plaintiff's caretaker

in failing to properly protect them, but the instructions of the lower court did not state to the jury the law applicable to such defense. The defendant requested the court to instruct the jury that, if they found from a preponderance of the evidence any of the loss or damage to the bananas was caused or contributed to by any act or failure to act on the part of the caretaker in the care and protection of said shipment, they should find for the defendant. Of course, the defendant would not be responsible for any loss due to the negligence of the plantiff's caretaker *(Western Mattress Co. v. Ostergaard,* 71 Neb. 575), and the question of contributory negligence having been presented by the pleadings, and evidence having been received as to the care taken by the caretaker, the jury should have been instructed as to the effect of contributory negligence, if the same were shown.

Upon a careful review of the pleadings and evidence, we are convinced that the case should have been submitted to the jury upon the one charge of negligence in forwarding the car from Aurora to Grand Island, and the defenses of contributory negligence and act of God, and that for the errors in submitting the other questions of negligence, the refusal to instruct the jury upon contributory negligence, and the refusal of the instruction above quoted, the judgment must be reversed.

REVERSED AND REMANDED.

WILLIAM B. WHITNEY, APPELLEE, V. AMOS S. WYATT ET AL., APPELLANTS.

FILED DECEMBER 7, 1923. No. 22594.

1. **Ejectment.** Where a party is occupying the land of another to the latter's exclusion, the latter may bring ejectment without submitting the controversy to the state surveyor and draughtsman under section 4870, Comp. St. 1922.
2. **Evidence.** In a civil case, a preponderance of evidence is generally all that is required to sustain the claim of a party.
3. **Ejectment.** PROOF. "Where, in an action in ejectment, the plaintiff's chain of paper title does not reach back to the sovereign,

or to a common source from which both parties claim, he must prove that he, or at least one of the grantors in his chain of title, had at some time been in possession of the premises before he can recover." *Runkle v. Welty*, 78 Neb. 574.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Lambe & Butler and *Walter D. James*, for appellants.

Stevens & Stevens, contra.

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

SHEPHERD, District Judge.

Whitney, the appellee, brought this action in ejectment against Wyatt, appellant, in the district court for Furnas county, claiming that the latter was upon his land, and praying for his ejectment. Issue was joined and the case was tried to a jury, resulting in a verdict for the appellee upon which judgment was entered. The lots of the parties joined; the appellant's lying upon the east and the appellee's upon the west. According to their deeds, the appellee's east line is appellant's west line, and runs north and south through a point 33 rods east of the quarter corner common to sections 17 and 18 in or near Beaver City. Appellee bought his lot in 1887 and has lived upon the same ever since. Wyatt bought his in 1909 from the administrator of the estate of one Boseley who succeeded Mr. Bowsman in its ownership. There is evidence that Bowsman sowed the Wyatt lot to cane and ran a one wire fence around it extending north and south 14 feet and 8 inches west of the true line above described. But there is nothing in the record to clearly indicate when this was done. It seems that the appellee joined in paying for another fence subsequently built in the same place, though he may not have known that the same was not on the true line. The county surveyor testified that Boseley employed him to run the true line, and that he did so, finding it to be 14 feet and 8 inches east of

the said fence, and calling Boseley's attention to the fact. Afterward the surveyor told the appellee, and shortly following the latter informed Wyatt who had gone into possession under his purchase from the administrator. Thereafter the appellee planted cherry trees on the disputed strip (this was in 1915), and has watered and cultivated them ever since. He also paid for a permanent sidewalk to the point located by the surveyor on the true line.

On the other hand, it was shown upon trial that he not only helped to maintain the described fence, but that he at one time planted an elm tree at the end of the same, and at another time obtained permission from the owner of the Wyatt tract to let the fence down at a convenient point in order that he might get through with coal to his house. There are other circumstances militating for and against the appellee, and considerable conflicting testimony as to what was said and done between the parties from time to time. In a conversation between the parties in 1920 the appellant told the appellee that if he wanted to have the strip in question he would have to sue for it. This the appellee contends was the first notice he had from the appellant of any adverse holding of the strip in question.

The assignments of error are ten in number. Eight, nine and ten, being general assignments that the verdict is contrary to the law and to the evidence and that the court erred in overruling the motion for new trial, will not be discussed, as their determination is involved in the consideration of other specific assignments.

In appellant's seventh assignment he asserts that the evidence is insufficient to support the verdict, because it was disclosed upon trial that this is a boundary line dispute, and that there was no reference of the same to the state surveyor and draughtsman as required by section 4870, Comp. St. 1922. But this statute is permissive, not mandatory. *Reed v. Wellman*, 110 Neb. 166. Moreover, there was no dispute in regard to the survey or in regard to the actual location of the true line.

Appellant's fifth assignment of error is well supported

by law. The trial court in its third instruction required the defendant to establish its defense of adverse possession by clear and affirmative proof. This was requiring more than a preponderance of the evidence, and was consequently erroneous. Not only that, but it appears to us as prejudicially erroneous and such as to necessitate a reversal. It has been so held. In a civil action a preponderance of the evidence is generally all that is required to sustain the claim of a party. *Search v. Miller,* 9 Neb. 26; *McCord-Brady Co. v. Moneyhan,* 59 Neb. 593; *Marx & Kempner v. Kilpatrick,* 25 Neb. 107. This is the rule applying here.

A further contention of the appellant looks to a final disposition of the case in this court by direction to the district court to dismiss. In addition to general complaint that the trial court erred in refusing to direct for appellant, it is insisted in assignments of error one, two, three and four that, since the evidence of the appellee affirmatively showed that the appellant was in adverse possession at the time of the commencement of the action, and for some time theretofore, and since the appellee did not upon trial prove his paper title back to the government or to a common source, or prove that he or some of his grantors had been in possession of the disputed premises, he was totally without ground of recovery. And it is further insisted that this court should now do what the trial court refused to do, *i. e.,* find and direct for the appellant. In the main this contention is based upon the following testimony of the appellee brought out in cross-examination.

"Q. Now, when was the first fence built between your property and the property on the east now owned by Mr. Wyatt, if you remember? A. I cannot tell you, Mr. Lambe. Q. Was there a fence built there prior to the Boseley fence? A. That is the present fence? Q. Yes. A. There was a fence of, I think, only one wire; and I think it was around the entire tract that Mr. Wyatt owns, and came up to where this present fence is, as nearly as I remember now. Q. How long had that fence been there? A. Oh, I don't know; it was there when Mr. Boseley bought it from Mr. Bowsman; I

am not able to say whether Mr. Bowsman put it up, or whether he purchased it. Q. 167. At that time you recognized that fence on the line? A. I don't know how to answer that; I had always supposed that to be my line when I bought the property. Q. And did you not set trees out on your place with reference to this fence being the true line? A. Well, I expect likely I did; I do not know whether they had any real reference to that, except at the south end I set an elm tree, and that elm tree is directly in that fence, and it is directly in line with the produced line of what I supposed was my east line. Q. How long would you say that fence was there prior to the Boseley fence? A. I have no idea whatever; I think it might have been there three or four years. Q. You came there in 1887? A. Possibly it was there longer; I don't know. Q. You did not know Mr. Bowsman? A. No; I don't think it was there that long, because I remember distinctly that Mr. Bowsman sowed that ground, possibly not, or another piece, to cane one year; and whether he owned it more than two summers I could not say; but when it was in cane it was inclosed in that fence; now, that is as far as I can tell you about that fence."

There is nothing in the record to show when Boseley bought or when Bowsman bought the Wyatt lot, but counsel for appellant conclude from the above testimony that the fence was where it now is when Whitney bought in 1887. This inference may be fairly drawn from a reading of the testimony quoted, but it is by no means conclusive. It may be argued that appellee's answer to question 167 has reference to the line, rather than to the existence of the fence. At all events however, it is clear that from 1887 he supposed that his line was just where the fence now stands. So his understanding continued until the news of Boseley's survey reached him after the latter's death. In the interim he planted the elm to mark the line. Not in a single instance does it appear that he ever passed the fence line or set foot on the disputed strip until Boseley died and the surveyor informed him. But, conceding all this, there is no satisfactory evidence that Boseley held adversely. The

fact that he employed the surveyor to find the corner indicates that he was looking for the true line, and not disputing that that was the boundary of his holding. If it were certain that the fence was there from the time of appellee's purchase of his lot, the fact would be greatly persuasive that the holding of Boseley and his predecessor was adverse. But while it is clear that the fence was built several years before 1909, it is not at all clear that it was there any longer. If the holding of Boseley was not adverse, the title of the appellant had not ripened by adverse possession when appellee began his action, for his holding had been interrupted by entry on the part of the appellee. Nor can it be absolutely said that the appellee had not been in possession of the strip, because his going upon the same to plant and to cultivate, as well as to survey, is an indication to the contrary.

It is, as appellant says in his brief, established in this state that, "Where, in an action in ejectment, the plaintiff's chain of paper title does not reach back to the sovereign, or to a common source from which both parties claim, he must prove that he, or at least one of the grantors in his chain of title, had at some time been in possession of the premises before he can recover." *Runkle v. Welty*, 78 Neb. 574. But the facts are not such as to permit us to apply the rule and direct a reversal, because, as we have stated, it is not clear when the original fence was built, and not clear that the holding of the appellant and his predecessors, prior to 1920, was adverse. On the other hand, the testimony shows, or tends to show, that the appellee entered and held possession after Wyatt's purchase and before the commencement of this suit. This was a matter to be determined by the jury, and the court did not err in submitting it. In so determining, we have taken appellant's argument upon the law for granted and it will not be necessary to discuss the cases cited.

The judgment of the district court is reversed, and the cause remanded for a new trial.

REVERSED.

JENNIE VIDA MIXER, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED DECEMBER 31, 1923. No. 22635

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

Truman Plantz, George H. Davis and *Nelson C. Pratt,* for appellant.

George W. Leamer, contra.

J. E. Ray and *Stiner & Boslaugh, amici curiæ.*

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

PER CURIAM.

For the reasons given in *Garrison v. Modern Woodmen of America,* 105 Neb. 25, *Coverdale v. Royal Arcanum,* 193 Ill. 91, and *Boynton v. Modern Woodmen of America,* 148 Minn. 150, the judgment of the district court is

AFFIRMED.

JANE SOWER, APPELLANT, V. HENRY A. WELLS ET AL., APPELLEES.

FILED DECEMBER 31, 1923. No. 22568.

Specific Performance: ADOPTION: PAROL CONTRACT: SUFFICIENCY OF EVIDENCE. In this suit in equity to establish and enforce an alleged oral contract to adopt a minor and make her an heir, the substance of the evidence is set out in the opinion, and *held* insufficient to support the plaintiff's cause of action.

APPEAL from the district court for Merrick county: A. M. POST, JUDGE. *Affirmed.*

J. C. Martin and *Patterson & Patterson,* for appellant.

Elmer E. Ross, contra.

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

MORRISSEY, C. J.

Plaintiff filed her petition in the district court for Merrick county alleging in substance that in 1879, when plaintiff was a child ten years of age, her mother being deceased, an oral contract was entered into between her father, John Horn, and one Henry C. Wells, now deceased, whereby it was agreed that the father of plaintiff should surrender all control over her to Mr. Wells and that Mr. Wells and his wife should adopt plaintiff and rear her as their own child, and that she should be given equal social and property rights with the children born in lawful wedlock to Mr. and Mrs. Wells. The petition alleges full performance on the part of plaintiff and her father, and alleges that pursuant to this oral agreement plaintiff's father surrendered possession and control of plaintiff to Mr. and Mrs. Wells and never thereafter exercised any control over her. That in October, 1879, plaintiff was taken into the home of Mr. and Mrs. Wells and remained there for a period of five years, when she was, by Mr. and Mrs. Wells, taken to the home of her uncle and never thereafter taken into the home of Mr. and Mrs. Wells. That in pursuance of the oral agreement made between plaintiff's father and Mr. Wells together they went into the county court of Merrick county on or about November 14, 1879, for the purpose of inaugurating the proceedings necessary to effect the statutory adoption of plaintiff; that plaintiff's father executed a proper relinquishment of his control over plaintiff and his consent to her adoption by Mr. Wells. A copy of this relinquishment is attached to the petition and the original paper is found in the bill of exceptions. It is alleged that on that occasion Mr. Wells filed in the county court an application to adopt plaintiff in form sufficient to confer upon her the full property rights of a child of his body; that the application of Mr. Wells has been lost or stolen from the files and cannot now be found; that it never was recorded by the county judge, but that a proper notice of the application was published in a legal newspaper in Merrick county and due proof of its publication was filed. A copy of the notice is attached to the

petition. It is alleged that the fee book kept by the county judge shows that Mr. Wells paid as a fee the sum of $2.95 for "adoption papers," but that the county judge through oversight or neglect failed to record or enter a decree after its rendition; that Mr. and Mrs. Wells recognized plaintiff as their foster child and treated her as having been fully and legally adopted; that she remained with them in their home as a foster child and was known by the name of Jennie Wells from October, 1879, for a period of five years, and during that period rendered unto Mr. and Mrs. Wells the services of a daughter and submitted in all things to their control; that during the period covered by plaintiff's residence with Mr. and Mrs. Wells plaintiff was assured by them that she was their adopted child, and plaintiff relied upon such assurances. It is alleged that the estate of Mr. Wells is in course of administration. Certain real estate is described as forming a part of the estate, and there is a prayer that the court decree plaintiff to be the owner of a one-fifth interest therein, sharing equally with the four defendants, who are the children of Mr. and Mrs. Wells. By answer it is alleged that defendants have no knowledge of the alleged oral contract of adoption, or of any adoption of plaintiff by the father, Henry C. Wells. It specifically denies his making a parol agreement for adoption, and denies performance by plaintiff if such contract was made. The answer also alleges that, if any contract or agreement was made or entered into with relation to the adoption of plaintiff, it contained no provision bestowing property rights upon her. It is alleged that plaintiff remained in the home of Mr. Wells for five years, when she left of her volition, married within a few months thereafter, and never returned afterwards thereto or communicated with Mr. and Mrs. Wells; that she never rendered to them the services of a child or gave them her society and companionship. There was a trial to the court and a general finding for defendants. While the allegations of the petition seem to suggest that plaintiff relies both upon a legal adoption and also upon a contract to adopt, yet the form of the action is such

that we must treat this as a suit in equity to enforce the terms of the alleged oral contract to adopt, since if plaintiff's cause of action rests upon a legal adoption had in the county court she would have to proceed in that court to prove heirship, and a court of equity would be without jurisdiction to grant the relief sought. *Wiseman v. Guernsey*, 107 Neb. 647. We will, therefore, consider this as a suit in equity to enforce the alleged oral agreement to adopt plaintiff and to make her an heir. Mr. and Mrs. Wells both died intestate leaving surviving them four sons. It is not alleged that Mrs. Wells left any estate and this proceeding affects only the estate of Mr. Wells. It is chiefly upon the testimony of plaintiff that the establishment of the alleged contract to adopt depends. Plaintiff testified that about two weeks after she was taken into the home of Mr. Wells her father visited her and at that time she overheard a conversation between her father and Mr. Wells in relation to her status. It is this conversation which forms the basis for plaintiff's claim. She was asked: "Was there any arrangement made with reference to you, as to what was to be done in the future, as to whether you were to remain there?" To this she answered: "They were to arrange to adopt me as one of their own children and do with me just the same as their own children." This testimony is repeated a number of times in slightly varying form, but the substance is always the same. Mr. and Mrs. Wells and plaintiff's father all having deceased, there is no witness to either contradict or corroborate plaintiff as to this conversation. There is, however, conclusive proof that about the time of this conversation plaintiff's father, Mr. Wells, and a Mr. Cole, who had taken into his family a little sister of plaintiff, went together to the county judge of Merrick county for the ostensible purpose of effectuating the adoption of plaintiff by Mr. Wells and the adoption of plaintiff's sister by Mr. Cole. This is shown by the testimony of Mr. Cole and is in part sustained by certain entries and papers found in the county court. There is found in the bill of exceptions a paper executed by plaintiff's father November

14, 1879, and acknowledged before the county judge, whereby he relinquished all right of custody and all right of control over plaintiff to the end that she might be adopted by Mr. Wells, but the right of the plaintiff to inherit from the adoptive parent is not mentioned. This paper bears no filing mark, but there is also found the original wrapper in which the county judge encased this paper bearing the inscription: "Adoption of Jane Horn. Final settlement Dec. 6th, 1879." And apparently forming a part of the same record is a copy of a notice with proof of its publication for three consecutive weeks in a newspaper printed and published in Merrick county, wherein it is said: "In the Matter of the Adoption of Jane Horn, Minor Child of John Horn, by Henry C. Wells: After reading and considering the statement of the said John Horn filed herein, it is ordered that the same be set for hearing on Saturday, December 6th, A. D. 1879, at 10 o'clock a. m." None of these papers bears any filing mark, but they were found in the archives of the county court. And the fee book kept by the county judge shows that he received from Henry C. Wells $2.95 for "adoption papers." There is, however, no evidence that any petition for adoption was ever signed or filed by Mr. Wells, and with the exception of the papers mentioned the records of the county court are silent as to the adoption of plaintiff. So far as this record may be considered, it goes only to the corroboration of the testimony of plaintiff. And in this it shows negotiations for an adoption, but does not indicate an agreement to make a property settlement upon plaintiff. The statute on adoption which was in force at that time (Gen. St. 1873, ch. 57, secs. 796-801) conferred a right of inheritance upon an adopted child only where the articles of adoption made specific provision therfor. A person was free to adopt a child "with such limitations and conditions as shall be agreed upon." The paper signed by plaintiff's father imposes no conditions so far as property rights are concerned. And there is no evidence that Mr. Wells signed any paper having to do with the adoption of plaintiff. We are left, then, to consider the testimony of plaintiff to the

effect that Mr. and Mrs. Wells were "to adopt me as one of their own children and do with me just the same as their own children." This testimony was given 42 years after the conversation is alleged to have taken place. If it be claimed that the language is to be construed as broad enough to include an agreement that she not only be taken into the family and treated as a child, but that the adoptive parents should also confer upon her the right of inheritance, then its accuracy must be determined in the light of all the facts disclosed. Plaintiff was less than ten years of age; her mother had recently deceased; her father was in meager circumstances with a family of small children for whom he was anxious to secure suitable homes. Did he insist upon Mr. and Mrs. Wells, who were then the parents of four living children, binding themselves to confer the right of inheritance upon plaintiff, or was he content with an arrangement that admitted her into their home without the right of inheritance? Did Mr. and Mrs. Wells obligate themselves not only to rear this orphan child, but that she should share equally in their property with the four children born to them? The application signed by plaintiff's father in the presence of the county judge makes no mention of a property settlement, and to some degree it contradicts the testimony of plaintiff. The absence of any paper bearing the signature of Mr. Wells in the archives of the county court when considered with the conduct and situation of the parties, may well lead to the conclusion that, while negotiations were entered into looking to the adoption of plaintiff, no final agreement was reached. This conclusion, we think, is supported not alone by the incomplete record in the county court but by the subsequent conduct of the parties. Plaintiff remained at the home of Mr. Wells nearly five years and during that time she was enrolled as a pupil in the public school as Jennie Wells. According to her own story, she was then taken by Mr. and Mrs. Wells to the home of her uncle and not thereafter permitted to return to the home of her foster parents. Her father is shown to have been in the neighborhood, to have had knowledge of this

change in the circumstances of his daughter, and it does not appear that he taxed Mr. and Mrs. Wells with a breach of contract. And within a comparatively short time plaintiff married under the name of Jennie Horn. This course of conduct, followed by all the parties in interest, is inconsistent with plaintiff's claim of an adoption, or an agreement to adopt. Plaintiff's cause of action is not supported by that clear, satisfactory and convincing evidence which is necessary to establish the contract pleaded.

The judgment of the district court is fully sustained by the evidence, and it is

AFFIRMED.

LIBBIE H. PECKHAM, APPELLEE, V. BYRON E. PECKHAM, APPELLANT.

FILED DECEMBER 31, 1923. No. 22572.

1. **Divorce: EXTREME CRUELTY.** "A continuing course of conduct on the part of either spouse, which so grievously wounds the mental feelings or which so utterly destroys the peace of mind as to seriously impair the bodily health and endanger the life or reason of the other, or which nullifies the legitimate ends and objects of matrimony, constitutes extreme cruelty within the meaning of the statute." *Hartshorn v. Hartshorn*, 104 Neb. 561.
2. **Evidence** examined, and *held* to support the decree of the trial court.

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

Dort, Cain & Witte, for appellant.

Barton & Barton, contra.

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

MORRISSEY, C. J.

Plaintiff was awarded a decree of divorce and a judgment for alimony. Defendant appeals. Plaintiff's cause

of action is based on a charge of extreme cruelty coupled with an allegation of desertion. The allegation in reference to the desertion is insufficient of itself to state a cause of action and the record has been examined solely with the view of ascertaining whether it sustains the decree based on the charge of extreme cruelty.

The parties lived together for nearly forty years and have reared nine children. The story of their troubles is a long one. Counsel for neither party has set out an abstract of the evidence, and we shall refrain from doing so here, feeling that publication of the numerous acts of which plaintiff complains is unnecessary, if not improper. If we accept plaintiff's story as true, and it seems to bear the hall-marks of truth, during the greater part of their married life the husband has been guilty of numerous acts of cruelty, any one of which, had suit been brought at the time, would have warranted the granting to her of an absolute divorce. Suit was not brought, however, and if we understand the contention of defendant's counsel, plaintiff may not now maintain this action because by continuing to reside with defendant and maintain the marriage relation she condoned these acts of cruelty. But we cannot take this view of the matter. For many years the conduct of defendant was such that it must have made life well-nigh unbearable, and we may well assume that plaintiff would not have continued to bear with defendant except for her commendable desire to maintain a home for her growing children. The children now being grown to manhood and womanhood, plaintiff is entitled to be freed from the bonds that have so long bound her.

"A continuing course of conduct on the part of either spouse, which so grievously wounds the mental feelings or which so utterly destroys the peace of mind as to seriously impair the bodily health and endanger the life or reason of the other, or which nullifies the legitimate ends and objects of matrimony, constitutes extreme cruelty within the meaning of the statute." *Hartshorn v. Hartshorn*, 104 Neb. 561.

But one other question is presented, and that is as to the amount of alimony allowed. The trial court found the value of defendant's property to be approximately $37,000 in real estate and awarded plaintiff the sum of $11,700, together with an attorney's fee. Under the circumstances disclosed by the record, the judgment for alimony is not excessive, and the judgment is

AFFIRMED.

NANCY J. MOORE, APPELLANT, V. GRANT W. WILLIAMS, APPELLEE.

FILED DECEMBER 31, 1923. No. 22608.

1. Judgment: RECITAL OF SERVICE. When, in a suit upon a foreign judgment, the question at issue is whether service of summons was made upon defendant in the suit where the foreign judgment was secured, the recital in the transcript of the foreign judgment that personal summons was made is only *prima facie* evidence of the fact and is subject to contradiction by evidence *aliunde*.

2. Evidence: WEIGHT OF EVIDENCE. The weight to be given to evidence cannot be determined alone by the number of witnesses who testify to a given state of facts, but rather by the character of each witness, his appearance and demeanor upon the witness-stand, his bias or prejudice, his relationship, if any, to the parties, the reasonableness or unreasonableness of the story told, and by those intricate tests that are either consciously or unconsciously applied by triers of fact as they observe the witness upon the stand and hear his testimony as it is uttered from his own lips.

3. Judgment: PROOF OF SERVICE: QUESTION FOR JURY. Whether the uncorroborated testimony of a defendant in a suit based upon a foreign judgment, denying the officer's return of service upon him in the foreign jurisdiction, is sufficient to overcome such return and the evidence given in support thereof or not is a question for the jury.

4. ———: ———: INSTRUCTION. In a suit upon a foreign judgment, where the question in issue is whether or not service of summons was had upon defendant in the court of the sister state, it is proper for the trial court to give the following instruction to the jury, viz.:

"With respect to the judgment sued upon in this case, the

jury are instructed that it is a valid judgment on it's face and binding upon this court unless you find from the evidence that the summons in that case was not served upon the defendant. Upon this question the burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence that the summons was served as stated in the return, that is, by reading to and delivering a copy to the defendant personally in Cook county, Illinois; the presumption is in favor of the truth of the return, as the law presumes that all officers perform their duties faithfully, but this presumption is rebuttable, that is, the defendant may show, if he can, that the return is false; the evidence, however, contradicting the return should be clear and satisfactory; but if upon a full and fair consideration of all the evidence in the case you are not satisfied by a preponderance of the evidence that the return is true, the judgment falls and you should find for defendant on that cause of action."

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

W. J. Connell, for appellant.

Lambert, Shotwell & Shotwell, contra.

Heard before MORRISSEY, C. J., ROSE, DAY and GOOD, JJ.

MORRISSEY, C. J.

This action was brought in the district court for Douglas county upon a judgment for $1,000 entered in the circuit court of Cook county, Illinois, in favor of plaintiff and against defendant. The petition contains all the necessary allegations to state a cause of action on a foreign judgment. The answer is a general denial, coupled with a claim by way of set-off for $113.50. Defendant's real defense to plaintiff's cause of action was that he had never been served with summons in Cook county, Illinois, and that the circuit court of that county was wholly without jurisdiction to render the judgment sued on here. There was a verdict in favor of defendant, and plaintiff prosecutes this appeal. Two main assignments are made, namely, that the verdict is not sustained by sufficient evidence, and that the court erred in giving instruction No. 2, which will later be set out.

Formerly plaintiff was a citizen of Omaha, and while she

resided there defendant, who was, and is, a practicing dentist, did some dental work for her. After this work was done plaintiff removed to Chicago, where in June, 1919, she was residing with her two unmarried sons. Defendant claimed that she owed him a balance of about $150 for his professional services, and on Saturday, June 21, 1919, he called at her home in Chicago with a view of collecting this bill. Plaintiff paid defendant $13, and it was agreed that he should call again at her home the following Monday, when, according to defendant's testimony, she was to pay an additional $12, and execute a note, payable to him, for the balance due. As to the matters just related there is little, if any, dispute in the evidence of plaintiff and defendant, but as to other occurrences there is flat contradiction. Plaintiff testified that upon this occasion defendant showed signs of drunkeness, and that he was very abusive to her and made remarks reflecting upon her character. Plaintiff testified that after Dr. Williams left her home she, on the advice of her son, visited an attorney and made arrangements with him to bring a suit against Dr. Williams based upon the language which he had used toward her on the occasion of his visit; that she informed her attorney that Dr. Williams would call at her home on the following Monday, and an understanding was reached between her and her attorney that the suit would be instituted and a deputy sheriff would be sent to her home to await the coming of Dr. Williams in order that service of summons might be made upon him; that, on the evening of the Monday following, a deputy sheriff called at her home and awaited the coming of defendant; that defendant called and had with him a friend, who was a stranger to plaintiff. In testifying as to what then occurred, plaintiff states that defendant introduced his friend to plaintiff as an attorney, but that she subsequently learned that he was a dentist; that defendant asked plaintiff if she had any money for him, to which she replied that she had not; that defendant then asked her to sign a note, which she declined to do, stating, among other things, that his services had not been satisfactory, and con-

cluded by telling him that he had insulted her upon the previous visit. In considerable detail she recites the alleged conversation, and states that defendant finally threatened that, if she did not sign the note or pay him the money, he would "strip her clothes off her back," and grabbed her by the waist. At this point, she claims, the deputy sheriff, who was secreted in another room, stepped out and said to defendant: "Take your hands off that woman. * * * I am a deputy sheriff. I guess you are Dr. Grant W. Williams of Omaha. * * * I am here to serve summons on you in a lawsuit of Mrs. Moore's." The witness then testifies at some length as to the conversation between the deputy sheriff and defendant. The purport of this testimony is to the effect that the deputy sheriff read a summons to defendant and delivered him a copy, and that defendant threw the copy on the floor; that defendant again made accusations against her character, and the deputy sheriff first advised plaintiff to order defendant out of her house, but upon defendant's failure to go immediately, the deputy sheriff advised her to call the police. The witness also described a scuffle between the parties present followed by the flight of defendant and his friend. This testimony is corroborated by the testimony of plaintiff's son and by the testimony, in the form of a deposition, given by the deputy sheriff. In addition to this, there is a duly authenticated transcript, including the return of the deputy sheriff showing service upon defendant, from the circuit court of Cook county, Illinois.

To meet this proof defendant testified in his own behalf. He told of his call at the home of plaintiff on the afternoon of June 19, but explicitly denied the charges made against his conduct of that day. He said that plaintiff paid him $13 in cash, and that her son, a young man 22 or 23 years of age, drew up a contract reciting that, if defendant would call at the house the following Monday, they would pay him $12 in cash and give him a note for the balance due; that, in pursuance of this agreement, he called at plaintiff's house on Monday, June 21, accompanied by a friend. He explicit-

ly denies that the man representing himself to be a deputy sheriff either read a summons to him or gave him a paper of any kind, or that any attempt to serve a summons on him was made; and as explicitly denies that he threatened plaintiff with personal violence or made any movement indicating his intention to inflict punishment upon her. According to defendant's version of what occurred, he apologized for being a few moments late, and stated to plaintiff that he had a note prepared for her to sign; that she refused to sign the note, assigning as her reason therefor that defendant "tried to blacken my character," that, while plaintiff and defendant were debating this question, a man stepped in from another room, and throwing open his coat exhibited a badge and said to defendant, "You are under arrest." Then, further detailing the occurrences, defendant states that he protested that he had done nothing for which he should be arrested; that plaintiff immediately announced that she was going to call the police, and defendant and his friend, suspecting that they were to be made the victims of a conspiracy, forthwith departed from the house; that as defendant left the premises he was followed to his taxicab, which he had left in the street, by the deputy sheriff, if such he was, who, from time to time gave directions to plaintiff, "Get the police and have him arrested."

Defendant made no appearance in court, and, according to his story, had no notice or knowledge that he had been sued. The judgment which forms the basis for this action was entered against defendant by default.

We are seriously urged to hold that it was error for the trial court, in view of the duly authenticated transcript of the judgment, including the officer's return showing personal service to have been made, supported by the oral testimony offered in behalf of plaintiff and contradicted only by the testimony of defendant, to submit to the jury the question as to whether service had in fact been made upon defendant. The recital in the record of the foreign judgment that personal service of summons was made is only *prima facie* evidence of that fact and is subject to contra-

diction by evidence *aliunde*. 7 Ency. of Evi. p. 844. Defendant was therefore at liberty to offer oral testimony to contradict it. To be sure, the officer's return is supported by the oral testimony of plaintiff and her witnesses. Against the record as it was made up by plaintiff, defendant interposed only his own testimony, but defendant's testimony could not be disregarded merely because it stood alone. Often there does arise the situation where the only testimony that the party to the litigation has is his own uncorroborated statement, and to deny him the right to have that statement submitted to the jury or considered by the court would, in fact, result in a refusal to accord him a hearing in a court of justice. This has never been held to be the rule. The settled rule is that the weight to be given to evidence is not to be determined alone by the number of witnesses who testify to a given state of facts, but rather by the character of the witness, his appearance and demeanor upon the witness-stand, his bias or prejudice, his relationship, if any, to the parties, the reasonableness or unreasonableness of the story told, and by those intricate tests that are either consciously or unconsciously applied by the triers of fact as they observe the witness upon the stand and hear his testimony as it is uttered from his own lips.

"Whether the uncorroborated testimony of the defendant in a case, denying the officer's return of service upon him, is sufficient to overcome such return or not is a question for the tribunal which tries the facts." *Trager v. Webster*, 174 Mass. 580. The court did not err in submitting the controverted question of service of summons to the jury for its determination.

Having found that it was proper for the court to submit to the jury the question as to whether or not service of summons was had upon defendant in Cook county, Illinois, we are left to consider the correctness of the court's instruction to the jury, which instruction reads as follows:

"With respect to the judgment sued upon in this case, the jury are instructed that it is a valid judgment on its face and binding upon this court unless you find from the

evidence that the summons in that case was not served upon the defendant. Upon this question the burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence that the summons was served as stated in the return, that is, by reading to and delivering a copy to the defendant personally in Cook county, Illinois; the presumption is in favor of the truth of the return, as the law, presumes that all officers perform their duties faithfully, but this presumption is rebuttable, that is, the defendant may show, if he can, that the return is false; the evidence, however, contradicting the return should be clear and satisfactory; but if upon a full and fair consideration of all the evidence in the case you are not satisfied by a preponderance of the evidence that the return is true, the judgment falls and you should find for defendant on that cause of action." This instruction is criticised because, as said in appellant's brief: "The court below took the view that the burden of proof was on the plaintiff to establish by a preponderance of testimony that the summons was served as set forth in the return of the deputy sheriff." With respect to this assignment, then, we are called upon to determine upon which of the parties rested the burden of proof, or the burden of evidence, to show that the service was in fact made.

"Although the phrase 'burden of proof' is one of double meaning, which circumstance has been the cause of confusion so great as to suggest the propriety of adopting a less objectionable term, it has a firmly established place in legal phraseology and cannot well be superseded. The ambiguity lies in the indiscriminate use of the phrase 'burden of proof,' as meaning either, first, the necessity of establishing the existence of a certain fact or set of facts by evidence which preponderates to a legally required extent; or, second, the necessity which rests on a party at any particular time during the trial to create a *prima facie* case in his own favor or to overthrow one when created against him. In this article the phrase 'burden of evidence' will be applied to this second meaning, and the phrase 'burden of

proof' to the necessity of finally establishing a fact or set of facts in issue. 'Burden of evidence' represents a very ordinary and, indeed, inevitable incident of any contest which is to be decided by the use of reason as influenced by facts and argument. Confusion can, to a certain extent, be avoided, and apparent contradictions reconciled, by bearing in mind the distinction between 'burden of proof' and 'burden of evidence' to be hereinafter stated, and also the fact that in the vast majority of cases any such distinction is entirely ignored by the courts. The general rule is that the burden of proof rests upon the party who has the affirmative of the issue, as determined by the pleadings, or, where there are no pleadings, by the nature of the investigation. This rule is founded upon the obvious purpose of facilitating justice by serving the convenience of the court; and as the rule as to burden of proof is a fixed rule of law, the burden never shifts from the party having the affirmative of the issue. The rule as to the burden of proof is important and indispensable in the administration of justice, and constitutes a substantial right of the party upon whose adversary the burden rests. It should therefore be jealously guarded and rigidly enforced by the courts. The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being of course on the adverse party." 22 C. J. 67 *et seq.*

And this court has held: "The burden of sustaining the affirmative of an issue involved in an action does not shift during the progress of the trial, but is upon the party alleging the facts constituting the issue, and remains there until the end." *Rapp v. Sarpy County*, 71 Neb. 382.

This rule is elucidated in the body of the opinion in *Beckman v. Lincoln & N. W. R. Co.*, 79 Neb. 89.

The instruction correctly applies the rule. We find no error in the charge, nor in the record as a whole, and the judgment of the district court is

AFFIRMED.

BERNARD J. CARDEN ET AL., APPELLANTS, V. PATRICK MCGUIRK ET AL., APPELLEES.

FILED DECEMBER 31, 1923. No. 22588.

1. Limitation of Actions: TRUST PROVISIONS OF WILL. The statute of limitations ordinarily begins to run against a suit to set aside certain trust provisions in a will as being indefinite and void when the will is probated and an executor is appointed.
2. ———: TOLL OF STATUTE. Where the statute of limitations begins to run before the death of a person entitled to maintain a suit for an interest in real estate, his death does not toll the statute, but it continues to run against his heirs.
3. ———: PETITION. A petition which shows upon its face that the action is barred by the statute of limitations is subject to a general demurrer.

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

Henderson, Fribourg & Hatfield and *W. D. McCarthy*, for appellants.

J. J. McCarthy and *A. R. Davis, contra.*

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

LETTON, J.

The petition in this case alleges in substance that plaintiffs were the owners of about 200 acres of land in Dixon county, by inheritance from Thomas McClusky; that McClusky died on February 26, 1900, leaving a will, a copy of which is made a part of the petition; that the will, in so far as it provides a trust fund for masses for the repose of the soul of the testator, is void, the trust provisions being too indefinite, and that the plaintiffs are each entitled to the shares of the intestate estate as set forth in the petition; that the will was probated, and on March 26, 1900, defendant Patrick McGuirk was appointed executor; that on July 23, 1901, McGuirk fraudulently and wrongfully conveyed the real estate of the decedent to one Patrick Gunn, his brother-in-law, without consideration, for the

purpose of cheating and defrauding these plaintiffs, and with the understanding and arrangement that Gunn would at a later date convey the real estate to the executor or to some person acting for him; that on March 3, 1916, Gunn, in pursuance of this fraudulent scheme, conveyed the real estate to Catherine McGuirk, the wife of the executor, and he and his wife are now claiming title to the same; that plaintiffs did not discover this fraudulent intent and purpose until January, 1920; that, if there was any consideration for the conveyance from Gunn to Mrs. McGuirk, it was furnished by her husband. The prayer is that the fee title to the real estate be quieted in plaintiffs, that defendants be barred from claiming any interest in the same, and that the trust provisions of the will be declared void. A general demurrer to the petition of plaintiffs was sustained by the district court, and the action dismissed.

The petitioners, who are the grandchildren of Thomas McClusky, base their right to relief upon two separate and distinct grounds. The first question presented is whether the allegations as to the fraudulent sale to the executor, or to his wife for his benefit, state a cause of action.

It is the duty of an executor to act in good faith toward the estate of which he is a trustee. It is also unlawful for him to become a purchaser, either directly or indirectly, at any sale of the real estate belonging to the estate of which he is executor. Comp. St. 1922, sec. 1408; *Johnson v. Erickson,* 110 Neb. 511. Such sales are voidable, but not void. *Veeder v. McKinley-Lanning Loan & Trust Co.,* 61 Neb. 892. Ordinarily a fraudulent sale by an executor will be set aside at the suit of interested parties. But they must act with reasonable diligence. Plaintiffs derive all their interest, if any, in the estate by inheritance from their respective parents. There is nothing in the petition to show that each of these parents did not have full knowledge of the facts with respect to the alleged fraudulent scheme as soon as the deed from McGuirk to Gunn was executed and placed of record, or that any of them were dead when the will was probated and the deed recorded, or that they had no knowl-

edge before their respective deaths. If the parents had such knowledge, the fact that it was not imparted to the children would be entirely immaterial. The statute of limitations having commenced to run as against the parents, their death thereafter did not toll it as to the children. *Lyons v. Carr*, 77 Neb. 883; *McNeill v. Schumaker*, 94 Neb. 544. The will was probated in March, 1900. The alleged fraudulent conveyance to Gunn was made and recorded July 23, 1901. The respective parents of the plaintiffs might each have had full knowledge and notice of the fraud and lived for years after this time so far as the petition shows. A petition which shows on its face that an action is barred by the statute of limitations is subject to a general demurrer. *Peters v. Dunnells*, 5 Neb. 460; *Eayrs v. Nason*, 54 Neb. 143. This point is not argued in the brief of the appellees, but the demurrer is general, and we are not advised upon what ground the trial court held the petition vulnerable. The mere fact that appellees have not called attention to this fatal defect in the petition does not prevent this court from noticing it. The demurrer was properly sustained as to these allegations.

As to the second point: The alleged invalidity of the trust provisions of the will was as plainly manifest when the will was probated as it is now. The petition was filed 20 years afterward. The law aids the vigilant, and not those who have slept upon their rights for such a period of time. The same principles apply in this connection as discussed with reference to the attack on the conveyance made by the executor.

AFFIRMED.

OLIVER WATSON V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1923. NO. 23390.

1. Criminal Law: INSTRUCTIONS. "Noninstruction alone on the question of evidence of good character, in the absence of a proffered instruction correctly stating the law, is not reversible error." *Sweet v. State*, 75 Neb. 263.
2. ———: MISCONDUCT OF PROSECUTING ATTORNEY. A judgment

will not ordinarily be reversed for misconduct of the prosecuting attorney in his closing argument, where the objections made by defendant to improper statements of counsel were either sustained by the court or were properly overruled, although a reviewing court, even though the objections were sustained, if satisfied that the prejudicial effect of such statements was not or could not be removed from the mind of the jury by the direction and admonition of the trial court, will reverse a judgment of conviction so obtained.

ERROR to the district court for Otoe county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

D. W. Livingston, for plaintiff in error.

O. S. Spillman, Attorney General, and George W. Ayres, contra.

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

LETTON, J.

Samuel Trant and Oliver Watson, the petitioner in error, were informed against on the charge that on December 19, 1922, they stole a Ford coupé automobile, the property of John E. Gaskill, in Otoe county, Nebraska. Watson requested a separate trial, which was granted, and a verdict of guilty was returned against him.

He assigns as error that the verdict is not supported by sufficient evidence; that the venue of the crime was not proved; that the court erred in refusing to give instruction No. 18, requested by him, and that there was misconduct of the county attorney in his argument to the jury.

The evidence shows that a Ford coupé belonging to Mr. Gaskill was stolen on the evening of December 19, 1922. Mrs. Gaskill, about 4 p. m., had left the car upon Eighth street, in Nebraska City. When the car was taken the gasoline in it was nearly exhausted. Several hours later a witness saw it being backed down hill by Trant on a cul-de-sac street and partly hidden among some bushes. Trant testified to taking the car, at Watson's direction, and hiding it, as the former witness testified. He then went up-

town to where Watson was waiting for him. Watson gave him the money and he procured five gallons of gasoline from a near-by garage and took it to Watson's car, which was then driven to where the stolen car was concealed. By this time a police officer was at the stolen car. He halted the car with the two young men and had it taken to the police station, where the car and the prisoners were searched. Trant, who is 18 years of age, testified that he had become acquainted with Watson, whose age is 29, in South Omaha; that on the day the car was stolen Watson told him he wanted him to go to Nebraska City with him to drive a car back; that as they were leaving Omaha he asked him if he could drive a car; that soon after leaving Omaha Watson agreed to give him $25 if he would drive the car back; that near the Platte river bridge Watson asked him to change coats so that the toll-keeper would not be able to recognize him as he returned; that he also handed him a piece of wire so arranged at the ends that it could slip over the two wires in a Ford car, thus making an electric circuit even though the car was locked, and explained the manner of operation to him. This wire and the keys of the stolen car were found in Watson's car. Trant's mother, who lives in South Omaha, also testified that Watson and Trant were at her house on that day, and that they left about 3 p. m. with a Ford coupé. There is other testimony tending to establish the commission of the crime by the accused.

On the other hand, Watson testified that the first time he ever saw Trant was at Nebraska City; that he was sitting in his car near a garage when Trant appeared and asked him to take five gallons of gasoline to his car. He contradicts the testimony of Trant and Mrs. Trant *in toto*. He says that on December 19, from 1 p. m. to 4:30 p. m., he was at the residence of his employer, Dr. Smith, in South Omaha; that he remembers the date particularly on account of it being her birthday and he was attending a birthday dinner; that at 4:30 p. m. he left Dr. Smith's with one Feda, in a Ford coupé belonging to Feda; that he drove

first to the Miller hotel in Omaha, and then to his father's house at Fort Crook; that his purpose in going to Nebraska City was to visit an aunt and to sell Riley Rays headlights for automobiles. His father testifies that he drove into his yard at Fort Crook about 5 p. m. Six or seven witnesses testified to the good reputation of Watson in the vicinity of his residence, and this testimony was not impeached, nor was it much shaken by cross-examination.

It is apparent that the jury chose between these conflicting states of testimony and believed that Trant and Watson were guilty, as Trant testified. There is ample evidence to sustain the conviction, and the first assignment of error is not established.

The next assignment of error is that the venue of the crime was not proved. There is positive proof that the car was taken in Nebraska City, and Mr. Brown testified that he saw Watson in Nebraska City, Otoe county, on Seventh street, when he stopped the car in which Watson and Trant were riding.

The next two assignments of error are more serious. Instruction No. 18, which was requested by defendant and refused, is as follows: "The defendant has put his reputation for good character and being a law-abiding citizen in issue, and you are instructed that he is entitled to have the jury take into consideration this testimony in determining the probability or improbability of his having committed the crime here charged." This instruction is faulty in that it singles out the evidence as to good character and instructs the jury to consider it without telling them it should be considered together with all the other evidence in the case. It is subject to the vice of the instruction in *Sweet v. State*, 75 Neb. 263, to some extent, and is not in accordance with the instructions tendered in *McDougal v. State*, 105 Neb. 553. It would have been well for the trial court to have given an instruction on the subject in proper form, but in *Sweet v. State*, *supra*, it is said in the syllabus: "Noninstruction alone on the question of evidence of good character, in the absence of a proffered instruction correctly stating the law, is not

reversible error." In the general charge the rights of the accused were well protected and the jury told to consider all the evidence bearing on the question of the guilt or innocence of the accused.

The next assignment of error is misconduct on the part of the county attorney in his closing argument at the trial. The bill of exceptions contains eleven objections to remarks made by the county attorney, with rulings of the court upon the objections. Seven of the objections made by the accused to the statements of counsel were sustained by the trial court. Three of the others were not justified by the facts in evidence. The objection to another was overruled. The proof as to this one is as follows: "Mr. Livingston: Defendant objects to the statement of the county attorney that the defendant is not only guilty of the theft of this car, because it is not based on any evidence in the record. It is a matter for the jury to decide and not for counsel to argue. The Court: Overruled. He has the right to try to establish his theory of the case." The evidence for the state tends to prove that the accused "is not only guilty of the theft of this car," as counsel said, but that he was guilty of leading Trant into crime and deceit. We are satisfied that there was no prejudicial error in the ruling upon this remark.

It is not always possible to remove, by a direction to the jury to disregard it, the unfair and evil effect upon the minds of the jurors of unwarranted and prejudicial statements of counsel not based upon the evidence. In flagrant cases a reviewing court will reverse a judgment of conviction so obtained, even though the trial court may sustain the objections, and this the more especially in a close case. In the present case, while we cannot approve of the conduct of counsel for the prosecution in his repeated disregard of the admonitions of the trial court, we think that his conduct, considering the nature of the statements made by him and the rulings and directions of the court, was not so prejudicial to the defendant as to justify this court in granting a new trial for this reason alone.

AFFIRMED.

CHARLES SHAFFER V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1923. No. 23423.

Evidence examined, and *held* to support the verdict.

ERROR to the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed: Sentenced reduced.*

Halligan, Beatty & Halligan, for plaintiff in error.

O. S. Spillman, Attorney General, and *Richard F. Stout, contra.*

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

LETTON, J.

Defendant was convicted of a violation of the liquor laws, being charged, in two counts, with the possession of a still for the making of intoxicating liquors, and with possession of mash and other material used in the manufacture of intoxicating liquors.

The principal errors assigned are that the evidence is insufficient to support the verdict, that there was error in the giving and refusal of certain instructions, and that the sentence of the court is excessive under the facts in the case.

Defendant is a young man 22 years of age. The evidence establishes that on the night of September 16, 1922, he attended a dance in North Platte with another man named Miles. After the dance they took two girls home. About 3 o'clock in the morning they called for the girls with a rented car. They then drove to the house in which the stills and mash were found, where defendant procured two pints of whisky. With the chief of police of the city, the party went hunting near a town several miles distant, returning to North Platte about 11 a. m. The whisky was consumed on this excursion. On their return they again drove to the house mentioned. Defendant and one of the girls went into the house. A neighbor who observed this summoned the sheriff, who found defendant and one of the

girls in a room with two pint bottles of whisky on the table, and a keg containing whisky, in the same room. In an adjoining room there were two stills with coils, standing upon oil stoves, but not in operation, and about 500 gallons of mash contained in 10 barrels. Defendant told the sheriff that he found the key to the house in the alley outside. Afterwards he told him that he had procured the key from a small boy and said he did not know to whom the stills and mash belonged. Defendant testifies that he procured the key to the house from one Harn, from whom he had before then purchased whisky; that when they were at the house in the early morning Harn came to the door and gave him the whisky, for which he paid him $2; that when they returned from the hunting trip he met him, Harn, upon the street, told him he wanted to get some whisky, and that Harn did not want to go to the house, but gave him the key. He admitted that he made untruthful statements to the sheriff, and gave as a reason that he did not want to tell on Harn. He says he never saw the stills or mash, and never operated them. On cross-examination he said that he had not seen Harn since that time. His companion, Miles, testifies substantially to the same effect, and his description of Harn corresponds with that of Wilken, the owner of the house, who says he rented it to Harn. On cross-examination, however, Wilken testified that he knew nothing about Harn before he rented the house to him and that he had not seen him since. No witnesses, except Wilken, Miles, and defendant, testified to ever having seen or known of any individual by the name and description of Harn in the vicinity of the house or in North Platte. A neighbor, who lives across the street in the next block west, with no house between his home and the Wilken house, testified that he had seen the defendant drive away from this house several days before and saw him twice at the house before his arrest; that he did not know Harn and had never seen him.

It seems evident to us that the jury were not convinced that the defendant was not in possession of the stills and

mash, and that they were skeptical as to the actual existence of Harn. Considering all the facts, there is sufficient evidence to justify the jury in believing either that Harn was a mythical character, or that the defendant was associated with him in the possession of the illegal property. If not the prime mover in the illegal enterprise, he was so associated with the business and with the possession that the verdict was a proper one to be rendered under the facts. When arrested he was in the possession and control of the premises. Under the statute, this placed the burden of proof upon him to satisfactorily explain his possession.

Complaint is made that there was an erroneous statement of law in instruction No. 10; but, if the jury took either view of the facts above suggested, there was no prejudicial error in this instruction. Complaint is made of the refusal to give instructions No. 1 and No. 2, to the effect that the mere fact that the defendant procured a key and went to the premises where the stills and mash were kept would not make him guilty of the crime, unless they further found that the defendant was the owner of or had an interest in, or owned and maintained, or in some manner helped to operate and maintain the stills and mash for the purpose of manufacturing intoxicating liquor. The substance of these instructions was embodied in the charge of the court, and the court did not err in refusing to give them.

The sentence imposed upon defendant was that he be committed to the county jail for 30 days and pay a fine of $1,000 and cost of prosecution, and it was ordered that the defendant stand committed to the county jail until the fine and costs were paid. We are convinced that, under the evidence in this record, the fine is excessive. Apparently this is the first offense of this character of which the young man has been guilty. He has evidently been consorting with loose associates and has not had the regard for the law of the state which every good citizen should possess. We believe that it is the certainty of punishment and not the severity of it which tends to prevent such crimes. This

being a first offense, we think justice should be tempered with mercy. The amount of the fine is reduced to $250. In all other respects the judgment of the district court is affirmed.

AFFIRMED: SENTENCE REDUCED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. NEBRASKA STATE BANK OF MILLIGAN, APPELLANT: KATIE VAVRA, CLAIMANT, APPELLEE.

FILED DECEMBER 31, 1923. No. 23473.

Banks and Banking: GUARANTY FUND. Accrued interest on deposits in state banks, evidenced by certificates of deposit bearing interest, is under the protection of the bank guaranty fund to the same extent as general deposits.

APPEAL from the district court for Fillmore county: RALPH D. BROWN, JUDGE. *Affirmed.*

Sloan, Sloan & Keenan, for appellant.

R. M. Proudfit, contra.

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

LETTON, J.

Katie Vavra, in June, 1922, deposited $3,200 in the Nebraska State Bank of Milligan, Milligan, Nebraska. She received a certificate of deposit drawing interest at the rate of 5 per cent. per annum if left six months, and 5 per cent. per annum if left for 12 months. The bank failed and a receiver was appointed. A claim was filed by Mrs. Vavra, upon this certificate, for $3,200 with 5 per cent. interest to date of payment. The court found in favor of claimant for both principal and interest. The receiver has appealed.

The appellant states that he is now convinced that the allowance of the principal sum of $3,200 was a proper charge against the guaranty fund of the state of Nebraska, but contends that no interest should be allowed against such

fund upon the certificate of deposit. While no specific assignments of error are to be found in the brief, as rule 11 of court rules (94 Neb. X) requires, the statement of the issues and of the propositions of law is sufficiently clear so that we may regard it as an assignment that the judgment is not supported by the evidence. However, it is the better practice to follow rule 11 in the preparation of briefs, as this facilitates greatly the work of the court.

The argument of the receiver is that the guaranty fund was established to secure the repayment of actual deposits; that it was not established for the purpose of protecting profits of an investing depositor who obtains interest, as against a depositor who places his money in the bank on general deposit; that to hold otherwise is a discrimination against "the legitimate depositor," and that the other banks of the state should not be compelled to guarantee the payment of profit in the form of interest.

We cannot see but that the time depositor is as "legitimate" a depositor as he who deposits upon an open checking account. The purpose of the bank in paying interest on time deposits is to obtain funds at low cost which it can lend at a higher rate of interest and thus carry on a profitable business. It is not for the purpose of conferring a benefit on the depositors. The receiving of such deposits and the payment of interest upon them is and has been for many years recognized as a legitimate and proper function of banks. Would not the argument of appellant apply equally as well to interest paid to depositors by savings banks? Could it ever have been the intention of the legislature to deprive the small depositor in such a bank of the protection afforded by the guaranty fund to the interest earned by the use of his money? Unless the statute is clear that this was its intention we cannot so hold.

While it is true that the assessment of state banks for the creation of the guaranty fund is made upon a percentage of the actual deposits in such banks, there is no specific provision in the statute restricting the payment to depositors from that fund to the exact amount of money deposited.

Under section 8033, Comp. St. 1922, it is the *claims* of depositors for deposits and the claims of holders of exchange which are accorded priority, and are a first lien on all the assets of the corporation. If the cash in the hands of the receiver is insufficient to pay "the claims of depositors," the court shall determine the amount required to supply the deficiency, and when the amount is drawn by the department from the guaranty fund the same is "to be applied on the said claims of depositors." Money on deposit in the state banks of Nebraska is largely upon time deposit and is evidenced by the issuance of interest bearing certificates of deposit. The guaranty fund law expressly provides that interest may be paid by a state bank not in excess of 5 per cent. per annum. The fair implication is, when this provision is found in the law creating the fund, that the intention was to make the fund liable for the payment of such interest.

The judgment of the district court is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. STATE OF NEBRASKA ET AL.

FILED DECEMBER 31, 1923. No. 23693.

1. **Taxation**: ASSESSMENTS. While the Constitution, section 1, art. VIII, requires that "taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises," and the statute, section 5820, Comp. St. 1922, requires that all property be assessed at its actual value, an assessment will not be set aside merely because all property has not been assessed at its actual value, provided that the assessment has been made with reasonable uniformity and proportion upon all classes of property.

2. ———: ———: DISCRIMINATION. The exclusion by the assessing authorities of "labor costs" in the valuation of improvements upon lands is not warranted by law, and the exclusion of "labor costs" from the value of such improvements when no such exclusion of "labor costs" is made in the valuation of improvements upon railroad property is erroneous, there being no authority of law for such discrimination.

3. ———: ———. In 1920 the valuation of lands and improvements as returned to the state board of equalization and assessment by the county boards averaged more than 68 per cent. of the actual value. The state board adopted 68 per cent. as a basis for equalization purposes and reduced the valuation accordingly. The valuation of lands and improvements for 1921 and 1922 as returned to the board was much reduced from the value fixed by the assessment of 1920, which valuation is based as stated by the board, upon investigations made in 1919 and 1920 "previous to the land boom, and does not cover the period of the highest prices." In 1923 the total reduction from the 1920 valuation was $357,196,797. *Held*, that, under the evidence, the assesment of land in 1923 still remained at about the same percentage of its actual value as in the reduced assessment of 1920.

4. ———: ———. *Held*, further, that, based upon the evidence in the record, the valuation made by the board in 1923 of the property of the complainant railroad was made "at its full actual value," or more.

5. ———: ———: DISCRIMINATION. To assess one class of property at 68 per cent. to 75 per cent. of its actual cash value, and to value the property of another taxpayer at 100 per cent. of its actual cash value, constitutes an unlawful discrimination, which is prohibited by the Constitution and statutes of the state.

6. ———: ———: REVIEW. While there may be other elements or factors upon which to determine the value of that portion of the line of an interstate railway within this state than those in evidence before the state board of equalization and produced in these proceedings, this court in reviewing the action of such board can only determine the value from the facts in evidence before the board, and those of which it is entitled to take judicial notice.

7. ———: ———: RAILROAD PROPERTY. Since there is no evidence that the portion of the line of the complainant railroad extending into other states is of more or less value than the portion of the line in this state, and there is nothing in the record to indicate that this method of allocation is unfair or unjust, the value of the portion in this state may be determined upon a mileage basis, in the proportion that the number of miles in this state bears to the mileage of the whole system.

8. ———: ———: ———. There are no settled or infallible rules for the ascertainment of the actual value of railroad property for the purpose of taxation. Approximation to actual value is all that can reasonably be expected. If the value fixed

by the state board bears a similar proportion to the actual value that the valuation of other property does, such a valuation for assessment purposes is valid.

9. ———: ———: VALIDITY: REVIEW. Where a collateral attack is made upon the validity of a tax or of an assessment, by injunction, mandamus, or like proceedings, those attacking its validity must show that the valuation was fraudulently made or that there was an intentional discrimination made between classes of property or taxpayers. But where the proceedings of such a board are reviewed in the supreme court upon error proceedings in the same case, the order of the board, like the judgment of a court in a law case, may be set aside if it is manifestly wrong, and the proceedings remanded to the assessing body for the correction of the error made.

ERROR to the State Board of Equalization and Assessment. *Reversed.*

E. P. Holmes, Guy C. Chambers, W. F. Peter and *W. F. Dickinson,* for plaintiff in error.

O. S. Spillman, Attorney General, George W. Ayres and *Hugh LaMaster, contra.*

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

LETTON, J.

This is a proceeding in error under section 5901, Comp. St. 1922, to review the assessment for taxation made by the state board of equalization and assessment of that part of its property and franchises required by law to be assessed by that body. The complainant alleged in its petition for a hearing before the state board that all property in the state other than railroad property has been valued for assessment purposes by the county authorities at not to exceed 50 per cent. of its actual value; that the law provides that the property of complainant be also valued on the same basis as used for the valuation of all other classes of property; that if the tentative assessed valuation of its property be not reduced to the same percentage of actual value as other property, or unless all other property be valued and assessed

by increasing the value to the percentage at which the complainant's property has been assessed, complainant would be denied the equal protection of the law, and its property would be taken for public use without just compensation and without due process of law. It alleges that the tentative assessment of $10,694,409, made on June 15, 1923, is in excess of the actual value of the complainant's property, which does not exceed $5,186,920, and that this valuation should be further equalized with the assessment of other property in the state. The complainant requested that the board either reduce the valuation of its property to the same percentage of actual value as other property, or that it increase the valuation of all classes of property in each county to the same percentage at which the complainant's property has been assessed. Other railroad companies filed similar complaints. A hearing was had and at its conclusion the board adhered to the tentative valuation.

The testimony on behalf of the railroad companies was in substance as follows: That an investigation was made for them of the sales prices of land in 72 counties for the year ending April 1, 1923. The instructions to the examiners were to omit all transactions that appeared to be the closing up of a farm sale or transfer, and conveyances between parties who were members of the same family, or for natural love and affection, or consideration of love and one dollar. No judicial sales or sales under process were included. The investigation covered 3,227 deeds, the number of acres sold was 648,475, and the total consideration shown by the deeds was $42,411,493. The assessed valuation of the same land in 1922 was $23,730,780. The average sale price per acre was $65.40, and the average assessed valuation per acre on the same land was $36.59, being 56.9 per cent. of the sales value. It was not shown which of the sales were for cash or upon terms. There was no assessment of real estate required under the statute in 1923. The 1922 assessment remains except for improvements placed upon the land within the tax year of 1922-1923. Investigation was also made with regard to mortgaged lands. The

valuation placed upon the property by the owners, the appraisement made by the loan companies and the assessed valuation. were compared. In these counties the owners' valuation was $60,854,436; the appraisement made by the loan companies was $49,004,938, and the assessed valuation for 1922 was $24,905,799. The assessed value was 40.9 per cent. of the owners' valuation, and 50.8 per cent. of the loan companies' appraisement. There was also introduced a large number of affidavits of different landowners in the respective counties, all substantially to the effect that in each county the affiant had personally investigated the lands transferred in said county from April 1, 1922, to March 31, 1923, so as to acquaint himself with the actual sale price, location and market value of the land. A list of transfers is attached, and the affiants swear that, in their opinions arrived at from actual observation and from information obtained from grantees of some of these transfers the market value on March 31, 1923, was on the average 100 per cent. of that shown by the deeds.

Exhibit 11 was received in evidence. This exhibit contains the evidence and proceedings had before the state board in 1922, the year in which the present assessment of real estate was made. By this it is shown that, as the result of its own investigation in 1919 and 1920, the board of equalization and assessment found and determined, as to real property, for the year 1920, that "the valuations as returned by the county boards averaged 68 per cent. of the real valuation as determined by the ratio process." This ratio of 68 per cent. of the actual value of real estate was adopted by the board as the basis for equalization purposes. Before this meeting of the board, at its request, a tentative plan of equalization between the counties of lands and improvements had been prepared by the secretary of the state board of equalization and the secretary of the department of finance. Part of this report is as follows: "Before the assessment period began, a list of the transfers of lands in the different counties, *from July 1, 1918, to July 1, 1919,* was secured from the proper county officials. The list as

sent in gave the number of transfers, the description of the land, number of acres, consideration, and 1919 assessed value of the same acres. When these lists were received, they were carefully checked over and transfers which plainly showed they were not *bona fide* sales were not used in compiling the average sale value for the county." The following statement was made and published by the board:

"In the matter of equalization between counties, the state board has adhered to the early announced plan of accepting for valuation purposes the average value placed on lands and improvements by the precinct and county assessing officials. For equalization between counties, the value returned by the assessing officials of each county has been compared with the average real value, as established by the ratio process, based on *bona fide* sales from July 1, 1918, to July 1, 1919. The equalization of the counties on the basis of the sale average was requested of the board at the meeting of the assessing officials of the counties held July 20, 1920. The ratio process, used in correcting the sale averages, is the plan used by Wisconsin for a number of years, and Minnesota and other states have adopted the same plan.

"Under this plan of equalization, the state board has the combined judgment, as to value, of the assessing officials of the counties and of the buyers and sellers of real estate for a year's period. *The year taken was previous to the land boom and does not cover the period of the highest prices.*

"The valuations as returned by the county boards *averaged 68% of the real value,* as determined by the ratio process, and the *state board adopted this 68%* as the basis for equalization purposes. * * *

"That the board has adhered very closely to the above plan is shown by the fact that the average real value, as determined by the ratio process, for the state was $94.33, and the average value for assessment purposes $64.98, or 68%.

"Under this plan, the board has accepted and adopted the

average valuation of the local assessing officials. In making this equalization the state board has decreased the total value of lands and improvements of the state $91,317,444, or $18,263,549 assessed value." In 1920 land was assessed at one-fifth of its actual value.

The law was changed in 1921 so that all real property was required to be assessed in 1921 and 1922, and every second year after 1922, "which assessment shall be used as a basis of valuation for taxation until the biennial assessment." Laws 1921, ch. 125, approved March 11, 1921. This act was no doubt passed because it was believed that there had been a decline in the value of farm lands and that the former assessment was not a proper measure of the actual value of the land in 1921. In 1921, following the passage of this act, the board issued a statement to the county assessors, a part of which is as follows: "The unexpected passage of this emergency law makes it impossible for this department to follow up with any figures to assist you and you will have to rely on last year's figures, together with your knowledge of your local county, and, in addition to this, follow instructions from this department and the law governing your duties." Instructions were also sent out by the state tax commissioner to county assessors to "value any improvements that may have been added to or removed from any parcel of land or lot where such improvement is of the value of $100 or more," and that in "arriving at the value for added improvements it would seem to be equitable to *exclude from the value of such improvements the labor costs* of such improvements." It is to be presumed that the assessors followed the instructions of the tax commissioner, the secretary of the state board, and did not assess the labor costs of the improvements made during the years following these instructions.

The effect of this action of the board and of these instructions is shown by the report of the state auditor for 1922. The total assessed valuation of land and improvements for 1920 was $446,328,959, reduced to $428,894,670 by the board. This was upon a valuation of 20 per cent.

of the actual value. The actual value was therefore considered to be $2,144,473,350, while the assessed valuation for 1921, based on actual value, was $1,831,048,878, a reduction of $313,424,472 from the previous assessment, although this included the value of added improvements, less "labor costs." In 1922 there was again a reduction of $77,736,568, making a total reduction of $391,161,040, exclusive, presumably, of the "labor costs." The exclusion of these must have made a large added reduction. Why labor costs, which are ordinarily considered to be about one-third of the cost of building above the cost of material when the material is on the ground, should be excluded from the value of the improvements to lands, and no such exclusion of labor costs be made in the valuation of improvements made upon railroad property, is unexplained. The board made no change in the returns, so it is to be presumed that about one-third of the value of improvements upon lands was omitted from the valuation. These instructions show an intent to discriminate between these respective classes of property, which was erroneous, and, since never withdrawn, they must be considered in fixing a relative equality of valuation.

The assessment of 1920, as equalized, adopted 68 per cent. of the actual value of farm lands and improvements as the basis of valuation. The state board on July 25, 1921, passed a resolution fixing the railroad valuation at the same as that fixed by the board in May, 1920, reciting: "Considering the fact that land and improvements outside of the railroad right of way, in 1920, was increased approximately 62 per cent. over that of the prior year, and it having been assumed by the board at the time of fixing the valuation of the railroads in May of 1920 that the general average increase obtained in the state would not exceed 40 per cent., and for a further reason that the land constituting the right of way of the railroad companies is, to the minds of the board, a better grade of land than the general average in the state, and is improved to the extent that it is graded for the accommodation of the rolling stock of the companies, and to which no consideration has here-

tofore been given, and from the fact that the average reduction over 1920, per acre, as returned by the assessing authorities is approximately 15.51 per cent., that by allowing the railroads to be and remain as fixed by the state board heretofore in May, 1920, will result in a fair and an equal valuation as compared to farm lands generally in the state." We have not been able to ascertain on what, if any, evidence this finding was made.

In 1922 the assessing resolution adopted merely expressed in general terms that the board, having taken into consideration all the facts required to be supplied by the railroad companies, from all the information which they were able to obtain, "do hereby ascertain, appraise, fix and assess for the purpose of general taxation the *full actual value* of the property of each of the several systems or companies in the state of Nebraska as hereinafter recited," fixing the value of the property of complainant at $10,694,326. There is in evidence a formula which was used by the state board in 1922 in determining the value of the property of appellant in this state, which is as follows:

Rock Island.

"Net Earnings in Nebraska	$ 118,480.83	deficit
Assessment	11,502,985.00	
Six per cent. of which is	690,179.10	
This added to deficit gives	808,659.93	
This deducted from $11,502,985 gives	10,694,326.93	
Or assessment for 1922."		

The exhibit was received without objection, but neither complainant nor counsel for the state board have been able to explain why this manner of assessment was adopted.

On June 15, 1923, the following resolution was adopted by the board:

"Whereas, the various railroad companies operating in Nebraska have requested of this board a reduction in the valuation of their property for assessment purposes this year, and whereas, it is not possible under the statute to revalue farm property and other real estate until next year,

and whereas, the records disclose that the percentage of increase in the assessed valuation of farms, homes and other forms of real estate has been out of proportion to that of other property, and that the percentage of the taxes paid by the railroads is not in excess of their proportionate share of the total taxes paid by all classes of property, be it therefore resolved, that the application for a reduction in the valuation of railroad property be denied."

The board also resolved that it "do hereby ascertain, appraise, fix and assess for the purpose of general taxation the *full actual value* of the property of each of the several systems or companies in the state of Nebraska as hereinafter recited: Chicago, Rock Island & Pacific Railway Co. 245.51 miles of track; total actual value $10,694,409." At the hearing on the complaint it was stated by the secretary of the board that this resolution was based upon a table prepared by him. This table is in evidence as exhibit No. 9. It compares the assessed valuation and the actual valuation of farm lands and improvements, town lots and improvements, and railroad property from 1902 to 1922, inclusive. The statement purports to show that the assessed valuation of farm lands from 1902 to 1920, inclusive, increased 377.62 per cent., while the increase in the value of railroad property was only 136.4 per cent. One of the tax experts of the complainant testified that he had made an analysis of the figures in exhibit No. 9. He called attention to the fact that in 1902—the year in which the secretary takes the actual value as five times the assessed value, and from which he draws the conclusion that from 1902 to 1922 the increase in value of farm lands and improvements was 377.62 per cent.—land was only assessed at about one-tenth of its value, instead of one-fifth. The new statute requiring one-fifth of the value to be taken was not in force until September, 1903. So that in this respect the percentage of increase submitted to the board and adopted by it as a basis of comparison with the increase in the value of railroad property as assessed by the state board is fallacious. He further testifies that the increase in railroad mileage

between 1902 and 1922 was 526.98 miles, or 9.3 per cent., while the increase in acreage of farm lands between 1902 and 1922 was 41.4 per cent., and that the average assessed value of improved land in Nebraska for 1902 was $3.71 an acre as shown by the report of the state auditor for that year, page 159.

A number of affidavits from taxpayers in many counties of the state are in the record, substantially to the effect that the assessed valuation in 1922 was 100 per cent. of the real value of the land, and that lands have decreased in value since that time.

Objection was made by the state that the railroad companies did not at the time when the assessment of real estate was made, that is, 1922, object to these assessments. But the record shows that complaint was made in 1922, and that statistics were produced showing a disproportion between the sales value and the assessed valuation of lands, but that the 1922 assessment was made as hereinbefore set forth. From a consideration of all the evidence, and in consideration of the reduction from the assessed valuation of land and improvements made in 1920, which assessment was made, as the board recites, "before the boom period of land sales," and which was only 68 per cent. of the actual market value of the lands, and the later omission of labor costs in the valuation of improvements, we are convinced that the percentage of assessed valuation of lands and improvements to actual value remains about as it was in 1920.

We must now consider upon what basis the assessed valuation of the property of the complainant was made, and whether, as the board recites in its resolutions of 1921 and 1922, it is based upon the actual value of the property. The law requires that all property be assessed "at its actual value," which is defined to be "its value in the market in the ordinary course of trade." Comp. St. 1922, sec. 5820. If, however, as between two classes of taxpayers, the property of each is assessed at a lower value but at the same proportion of its actual value, there is no ground for complaint on the part of either. But if the property of one is

valued at its actual value and that of another at only 68 per cent. of its actual value, inequality results and an unjust and unlawful exaction is made. *State v. Osborn*, 60 Neb. 415. At the time the tentative assessment of June 15 was made, the state board had before it the report of the complainant required to be made by the statute. Comp. St. 1922, sec. 5841. This report, with supplementary information, shows the entire mileage of the system to be 7,635.13. It is conceded by the state that the total mileage of track operated by the complainant in this state is 250.41, of which it owns 241.51 miles. The report shows that there is $129,556,489 of paid-up capital stock, that its actual market value is $78,411,431.76, and the total amount of obligations, including notes given for equipment, is $262,411,305.98. In addition to this, the report contains the number of acres of right of way, an enumeration of property subject to be locally assessed, situated outside the right of way, and also an account of the equipment used in the state. We are unable to determine upon what basis the tentative assessment was made by the board. At the later hearing on the complaint, the complainant introduced exhibits Nos. 1 to 5, inclusive, estimating the value of the entire line on five different bases—the par value of stocks and bonds, market value of stocks and bonds, the value of the line as represented by the net railway operating income capitalized at 7 per cent., the value as represented by the annual rental paid by the government capitalized at 7 per cent., and the property investment as determined by Ex Parte 74 of the interstate commerce commission. These values range from 199 millions in gross figures to 375 millions, which represents the par value of the stocks and bonds and equipment notes.

A number of decisions have been cited as to what elements should govern in the valuation of railroad property. There seems to be some conflict as to the proper rule to be adopted, especially with regard to valuation for rate making purposes. We believe that, in reviewing the action of the board, we must consider only those elements of value, the existence

of which rests upon the facts in evidence. We may not act upon mere conjecture or theory, which, though the theory may be sound, can only be apprehended by an explanation made by some witness conversant with the intricacies of railroad accounting. No such explanation was made. The following methods of valuation are presented by the record. They do not possess all the elements or factors generally required by the courts, but they are all that were before the state board, and, since we are merely reviewing their action, we cannot consider any others.

The market value of the corporate stock of the railroad company, together with the value of its bonds and of its outstanding obligations for the purpose of equipment, represent in a sense the market value of the entire property, although other elements should enter into the valuation, since the value of stocks and bonds fluctuates frequently from extraneous causes. The report to the state board shows that the market value of the stock is $78,411,431.76; that the total amount of the funded debt and outstanding equipment notes is $262,411,305.98, making the total indebtedness and the market value of the stock $340,822,737.74. Again, the net railway operating income for 1922 is in evidence. The value of the property may in one sense be considered to be the amount of capital investment which will produce that amount of income at the rate of 5¾ per cent. per annum, which is considered by the interstate commerce commission to be a fair rate of return on such an investment, or at 6 per cent. which we consider to be a fair rate. It was stipulated in open court by the parties that the net income from the operation of the railroad for 1922, after payment of taxes, equipment rents, track rents, and operating expenses, was $13,934,468.51. Assuming that a net income of 6 per cent. per annum is a fair return upon the capital invested, we may consider as one estimate of the value $232,241,141.83.

There is a discrepancy between the original report to the board and exhibit No. 2 introduced at the hearing, with respect to the market value of the stocks and the amount of

the funded indebtedness and equipment notes. In the original report this is placed at $340,822,737.74, while in exhibit No. 2 it is placed at $286,981,456. The par value of the stocks and securities of the entire system is $375,529,812. The evidence shows that $10,463,501 of the stock was not paid up, leaving the total par value of the paid-up stock and the outstanding obligations $365,066,311. A statement made to the interstate commerce commission as of October 1, 1919, shown in exhibit No. 5, places the entire property value at $343,802,202. Averaging all of these figures, we are satisfied that the value of the entire system is not less than about 314 million dollars. None of these outstanding obligations include claims for damages, wages, interest, and other liabilities which are payable out of income and which do not represent investments in property.

There are other elements of value which, under the decisions, should or might be considered, but we are confined to the proofs which were actually before the board. The rule in *Smyth v. Ames*, 169 U. S. 466, 547, stated by Mr. Justice Harlan, is as follows: "The original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

In *State v. Savage*, 65 Neb. 714, 757, the question how the value of railroad property shall be assessed is considered, and it is said by Judge Holcomb: "While conceding that the market value of the stocks and bonds of a railroad corporation may not always furnish the best evidence, or the exclusive criterion of the value of the corporate property, it cannot, we think, be gainsaid that the amount and value of such stocks and bonds, if not subject to extraneous in-

fluences would very generally, if not uniformly, be a most important factor in the determination of the value of the corporate property which they represent, and should receive due consideration, with other pertinent evidence, in reaching a correct conclusion as to the actual value of such property."

In *State Railroad Tax Cases*, 92 U. S. 575, 605, it is said by Mr. Justice Miller: "It is therefore obvious that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."

The next important question is how much of this value should be allocated to the property of the complainant in Nebraska. The report shows that the main track mileage operated in this state is 250.41. There being no evidence to show any difference in the relative value of the mileage in this state as compared with that in other states it is not improper under this state of the record to distribute the value upon a mileage basis. In *Wallace v. Hines* 253 U. S. 66, and *Davis v. Wallace*, 257 U. S. 478, in which an excise tax, which was apportioned on the ratio which the mileage within the state of North Dakota bore to the entire mileage of the system, and in which the bill of complaint alleged that on account of the differences of value of the line in the region through which the road passed in North Dakota, from its value in the more densely populated portion of the country in which its valuable terminals lay, the value of the mileage in North Dakota was very much less than the value of the mileage in other states, the supreme court of the United States held that, under these facts, the ratio which the mileage in North Dakota bore to the entire mileage was not a fair method of determining the value of that part of the system lying in North Dakota.

The evidence upon which the state board of equalization

acted in this case shows no such disparity in value or difference in conditions between the mileage of the Rock Island road in Nebraska and in other states. So far as appears there is nothing unjust or unfair in ascertaining the value of the property of the railroad in Nebraska by comparison of the amount of mileage of main track in this state with the amount of mileage of main track operated in its entire system. The rule is as stated in *Fargo v. Hart*, 193 U. S. 490: "A state cannot tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the states. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line, in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the state to the whole system." See *Cleveland, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 439; *Illinois C. R. Co. v. Greene*, 244 U. S. 555.

On the basis of the value of 314 million dollars for the entire system, the value per mile of the operated main trackage is $40,951. The operated mileage in Nebraska is 250.41, which, upon a mileage allocation, makes the total value of the property of the complainant in Nebraska $10,254,539. The property outside of the right of way

locally assessed, which is not assessable by the state board, amounts to $70,273, leaving the value of the assessable property in this state, on this basis, $10,184,266. Some of the lines operated by complainant are owned by subsidiary companies of which it owns all or a large part of the stock, some are leased lines, and upon some of the operated property it has merely trackage rights. However, value inheres in both the trackage rights and in the leases. The value of the whole property must be considered. The statements of value contained in this opinion are only approximate, and not intended to limit or control the state board if or when it becomes necessary to assess or reassess the value of complainant's line of railroad in Nebraska. The board is entitled to ascertain all the facts which are necessary upon which to base its judgment as to value, and it is the duty of the railroad company whose property is to be assessed to make a full, fair and complete statement of all relevant facts, and to assist the board to make a fair valuation. The subject of the valuation of railroads is a difficult one. Neither railroad commissioners, nor taxing authorities, nor courts have as yet arrived at settled or infallible rules or criteria for the ascertainment of actual value of such property. Approximation is all that can reasonably be expected.

The Constitution, section 1, art. VIII, requires that "taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises." It is impossible to secure absolute uniformity in the valuation of property for taxation, more especially where it belongs to different classes. The most that any assessing officer or board can do in this direction is to make a valuation in such a reasonable manner, having regard to all the circumstances, as to show that the intention was not to create disparity but to secure uniformity. And if, after indulging the presumption that the assessing authorities have been endeavoring to perform their difficult and arduous duties in good faith and with impartiality, the differences and discrepancies are not so great or so obvious as to indicate that there has been a substantial error to the prejudice of the

complainant, the assessment will not be disturbed. *State v. Savage,* 65 Neb. 714. On the other hand, if it is shown by the evidence that the property of one person, individual or corporation, has been assessed out of a reasonable and fair uniformity with that of other property and that the disparity is so great that it violates the requirement of the Constitution, then a reviewing court may and should remand the proceedings to the assessing board for correction in order to make the percentage of assessed valuation to actual valuation of all classes and kinds of property as nearly as possible the same. *Sioux City & P. R. Co. v. Washington County,* 3 Neb. 30; *McGee v. State,* 32 Neb. 149; *State v. State Board,* 81 Neb. 139; 2 Elliott, Railroads (3d ed.) 280, 281, 282. As to error from such tribunals, see *Mathews v. Hedlund,* 82 Neb. 825; *Munk v. Frink,* 75 Neb. 172.

The valuation for the year 1923 of lands and improvements, as shown by the records of the tax commissioner, is $33,964,244 greater than the valuation for 1922. The total reduction from the assessed value of such property in 1920 (which valuation, as the board has stated, was made before the great increase in land values) is $357,196,797, a reduction of about 16 per cent. from a valuation made on a basis of 68 per cent. of actual value. From a careful consideration of all the facts in evidence, we are of the opinion that the valuation of the property of complainant lacks reasonable uniformity with the assessment of lands and improvements; that, as the record recites, the railroad property has been assessed at "full actual value," and that the other class mentioned has been assessed at a much lower percentage. This being the case, the property of complainant should be revalued as nearly as possible at the same percentage of actual value as all other property.

Having come to this conclusion, the finding and order of the state board of equalization and assessment of the value of complainant's property is set aside and the proceedings are remanded to that body for further proceeding in accordance with law. While section 5882, Comp. St. 1922, seems to apply specifically to where "any tax or part there-

of levied under the provisions of this article shall be adjudged illegal and nonenforceable, or shall be set aside by any court of competent jurisdiction on any ground whatever," and specifies what the duty of the board shall be as to reassessing and redetermining the value in such case, the procedure prescribed for such cases seems to be well adapted to such a case as this, where the assessment of the property of the complainant has been decided to lack uniformity with that of other classes of property. We desire in this connection to call special attention to section 5842, Comp. St. 1922, which gives the board power to consider all facts and information not contained in the reports made by the railroad companies. Where such information is considered, the source from which it has been obtained should, so far as possible, be mentioned in the record, so that a reviewing court may consult the same sources and thus stand in the shoes of the assessing body.

REVERSED AND REMANDED.

FRANK VICKERS, V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1923. No. 23313.

1. **Criminal Law: PROSECUTING ATTORNEY AS WITNESS.** In a criminal prosecution the impropriety of the county attorney in being at the same time a witness for the state and a public prosecutor does not necessarily constitute error prejudicial to accused.
2. **Information: BURGLARY. LARCENY.** Burglary and larceny may be charged in a single count of an information, where the criminal acts of which defendant is accused constitute parts of the same transaction.
3. **Larceny: VALUE OF PROPERTY.** A penitentiary sentence on a verdict that defendant is guilty of grand larceny cannot be sustained, where the jury fail to comply with the statute requiring them to ascertain and declare the value of the property stolen. Comp. St. 1922, sec. 10154.
4. ———: **VERDICT: INTENDMENT.** In a criminal prosecution the legal intendment of a general verdict against accused is to find him guilty of the graver offense, where two offenses of

different grades constituting parts of the same transaction are charged in a single count of the information.

5. Harmless error in a criminal prosecution is not a sufficient ground for the reversal of a conviction.

ERROR to the district court for Gage county: LEONARD W. COLBY, JUDGE. *Affirmed.*

Grant G. Martin and *Bartos & Bartos,* for plaintiff in error.

O. S. Spillman, Attorney General, and *Mason Wheeler, contra.*

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

ROSE, J.

In a prosecution by the state in the district court for Gage county, Frank Vickers, defendant, was accused of breaking into a Union Pacific freight car at Beatrice and of stealing therefrom a phonograph and other property exceeding in value $35. The jury rendered a general verdict of guilty as charged in the information. For committing the felony of burglary he was sentenced to the penitentiary for a term of three years. Defendant, as plaintiff in error, presents for review the record of his conviction.

It is first insisted that the trial court erred in permitting the county attorney to make an argument to the jury, urging a conviction, after he had testified as a witness against defendant. Prejudicial error in this respect is not shown. Three persons were implicated in the criminal acts charged. One of the culprits, Sam Parker, pleaded guilty and testified to the guilt of the others—Frank Vickers, defendant, and Melvin Stanley. Defendant and Stanley were by consent tried together. The county attorney testified to a confession of guilt by Stanley and to a declared purpose by him, before trial, to plead guilty. While the confession incriminated defendant also, it was excluded as evidence against him. The propriety of the county attorney testifying as a

witness was not questioned. Without objection, after he left the witness-stand, he continued to participate in the trial as one of three attorneys for the state. To his addressing the jury, after both parties had rested, there was, however, an objection on the ground that he had testified as a witness against defendant. This was overruled, but the bill of exceptions does not show that the county attorney argued the case to the jury. Unless an assignment of error in the motion for a new trial implies that fact, there is nothing in the transcript of the proceedings to indicate that the county attorney addressed the jury on the merits of the prosecution. If he did so, no attempt to preserve what he said in argument was made. In a criminal prosecution the impropriety of the county attorney in being at the same time a witness for the state and a public prosecutor does not necessarily constitute error prejudicial to accused. Prejudice in this respect does not affirmatively appear in the record presented for review.

It is next argued that the sentence cannot stand because the verdict is fatally defective. The point is not well taken. In a single count of the information defendant was accused of burglary—feloniously breaking into a freight car with intent to steal—and of larceny—stealing articles from the freight car. The charging of both criminal acts in a single count was permissible. *Lawhead v. State,* 46 Neb. 607. The larceny tends to show the criminal intent essential to burglary. The evidence is sufficient to sustain a verdict against defendant for either burglary or larceny. Under the instructions the jury were at liberty to acquit defendant entirely or to find him guilty of either felony. In one instruction the jury were permitted to find defendant guilty of larceny only, a lesser offense than burglary, but there was no direction, in the event of such a verdict, to determine and declare the value of the property stolen. The verdict was guilty as charged in the information. This is challenged on the ground that it fails to state definitely the particular crime for which defendant is punishable, he being answerable for one offense only, since the criminal acts charged

are parts of the same transaction. Defendant did not request an election between charges and the prosecution made none. The information is sufficient to sustain a conviction for either crime. *Aiken v. State,* 41 Neb. 263. The general verdict of guilty included the charge of burglary. For that felony alone defendant was sentenced. By including the lower grade of crime in the general verdict of guilty without finding the value of the property stolen the jury did not subject defendant to a sentence for larceny and none was imposed. Comp. St. 1922, sec. 10154. The omission of the trial court to require such a finding, if defendant committed larceny only, and the failure of the jury to ascertain the value of the property stolen did not vitiate the verdict against defendant for burglary or call for a new trial. The case falls within the rule of the criminal law that the legal intendment of a general verdict against accused is to find him guilty of the graver offense, where two offenses of different grades constituting parts of the same transaction are charged in a single count of the information. Error in these particulars was harmless.

Instructions are criticised, and it is urged in addition that the sentence is excessive, but in these respects there is no meritorious ground for complaint. Prejudicial error has not been pointed out or found. Defendant had a fair trial and the evidence sustains the judgment.

AFFIRMED.

FRANCIS SOUTH V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1923. NO. 23385.

1. Criminal Law: IMPANELING JURY: REVIEW. Preliminary proceedings relating to the calling and impaneling of a jury and to the qualification of jurors are not reviewable in the supreme court, where the bill of exceptions fails to disclose the facts on which the presiding judge acted in making his rulings.

2. ———: CHANGE OF VENUE: DISCRETION OF COURT. The conviction of accused in a criminal prosecution will not be reversed

for failure to grant a change of venue, unless the record shows an abuse of discretion in the overruling of the motion therefor.

3. ———: WITNESSES: PROVINCE OF COURT. In a criminal prosecution, the conduct of the trial judge in asking a witness questions, in limiting the examination of witnesses and in voluntarily directing witnesses not to answer questions propounded by counsel is not erroneous, when confined strictly to orderly procedure, to the proper ascertainment of issuable facts, to the exclusion of inadmissible or unnecessary testimony, to the preventing of objectionable repetition and to the observance by counsel of recognized rules of evidence.

4. ———: TRIAL: USE OF SHACKLES. Accused in a criminal prosecution should be free from shackles during his trial unless they are necessary to prevent violence or escape, but this rule does not extend to his custody outside of court.

5. ———: ———: DIRECTING USE OF SHACKLES. During the trial in a prosecution for murder, a general order by the trial judge, in presence of the jury, directing the sheriff and the chief of police to use handcuffs in the jail, while taking precautions to prevent the escape of prisoners, is not necessarily an error entitling accused to a new trial in the event of a conviction.

6. Homicide: MURDER IN FIRST DEGREE. Homicide in committing, or in attempting to commit, a robbery is declared by statute to be murder in the first degree, the turpitude of the felonious act of robbery taking the place of deliberate and premeditated malice, and the purpose to kill being conclusively presumed from the criminal intention constituting the essence of robbery. Comp. St. 1922, sec. 9544; *Morgan v. State*, 51 Neb. 672.

ERROR to the district court for Gage county: LEONARD W. COLBY, JUDGE. *Affirmed.*

Lloyd Crocker, for plaintiff in error.

O. S. Spillman, Attorney General, Lloyd Dort and *H. F. Mattoon, contra.*

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

ROSE, J.

In a prosecution by the state in the district court for Gage county, Francis South, defendant, was accused of mur-

der in the first degree. It was charged in the information that defendant, in attempting in Beatrice to rob Charles Wolf of $63, struck him on the head with a blunt instrument November 29, 1922, and that as a result of the assault he died December 2, 1922. Defendant pleaded not guilty and upon a trial of the case he was convicted of murder in the first degree, the jury fixing his punishment at imprisonment for life. The district court pronounced sentence on the verdict. Defendant, as plaintiff in error, presents for review the record of his conviction.

Invalidity of the proceedings resulting in the calling of the jury, failure to quash the panel and disqualification of jurors were propositions argued in the brief of defendant and presented orally at the bar. In these respects the record does not disclose error. The showing upon which the trial court acted in ruling against defendant on preliminary questions was not preserved in the manner required by statute. The affidavits upon which defendant relies are not in the bill of exceptions. The preliminary examination of jurors and the rulings relating to their qualifications do not appear in the record. There is no complaint of misconduct by any juror during the trial. Through mercy of the jury defendant escaped the penalty of death. When the evidence is considered with the verdict there is no reasonable inference that any juror was prejudiced or disqualified. The presumption of regularity in calling, selecting and impaneling jurors prevails in absence of an affirmative showing to the contrary.

Defendant challenges as error the overruling of a motion for a change of venue, but there is nothing to indicate an abuse of discretion in this respect, the showing in support of the motion not appearing in the record in a form to be considered.

Some of the assignments of error are directed to the conduct of the trial judge in interrupting counsel by interrogating the witness on the stand, by limiting the examination of witnesses and by directing witnesses not to answer questions to which no objections were made. An

examination of a group of assignments relating to these subjects fails to show any error. The criticised questions, rulings and remarks of the trial judge were confined to orderly procedure, to the proper ascertainment of issuable facts, to the exclusion of testimony having no bearing on the issues, to the unnecessary repetition of details already stated, and to the observance by counsel of recognized rules of evidence. In these particulars the rights of defendant were carefully protected. There was no general examination by the trial judge of any witness. No ruling has been found which deprived defendant of the benefit of any admissible proofs tending to throw light on his defense. It is equally clear that the evidence adduced by the state to prove the charge was confined to proper bounds. Untenable assignments of error relating to rulings on evidence were multiplied to an extent precluding a separate discussion of each, but all have been considered without finding a prejudicial error.

An assignment of error argued at considerable length presents for review extraneous remarks from the bench during the trial. After the state had made its case in chief by evidence tending to prove that defendant had participated in a shocking homicide while attempting to rob his victim of a roll of currency, the trial judge, in the presence of the jury, addressed the sheriff of Gage county and the chief of police of Beatrice as follows:

"I want you two to act in conjunction and I wish you would remove all prisoners from the lower floor and handcuff those for whom you have sufficient handcuffs, and make a careful examination of each bar on the lower floor and see how many have been sawed off, varnished and covered over, and see to the condition of all the bars on the lower floor, and you can do this best by removing all prisoners up to the upper floor. It is quite important because we don't want to have any jail delivery or any outside influences come here into this county to relieve this county of any prisoners that have been convicted or are on trial, and I ask that you act in conjunction in this matter."

The necessity for the precautions thus directed will be presumed, since there is nothing to indicate the contrary, but there does not seem to be any justification for disclosing to the jury the views of the presiding judge on the necessity for the use of handcuffs in the jail or on the proper means to prevent the escape of prisoners. Should a new trial be granted on this ground? The law seems to be that accused in a criminal prosecution should be free from shackles during his trial unless they are necessary to prevent violence or escape, but this rule does not extend to his custody outside of court. 16 C. J. 819, sec. 2075. The directions to the police officers did not require the use of handcuffs in court. The use of shackles in conducting to and from court a prisoner accused of murder, or in inspecting a prison, is a reasonable precaution. The presiding judge had in mind general conditions relating to the prison and the prisoners therein. No direct reference to defendant was made. The police officers, not the jury, were addressed. The jury as sensible men would naturally see the situation in its true light. The subsequent charge of the court to the jury themselves not only required them to decide the case on the evidence, but went further and directed them not to construe any act or ruling of the judge as an intimation of his opinion as to the innocence or guilt of defendant. The record as a whole does not seem to justify the inference that the jury were misled or the defendant prejudiced by the remarks assailed. The evidence of guilt was too convincing to suggest a resort by the jury in deliberating on their verdict to the extraneous orders directed by the presiding judge to the sheriff and the chief of police. The conclusion is that defendant is not entitled to a new trial on this ground.

In argument it is said defendant did not intend to kill Charles Wolf, and that the deliberate and premeditated malice essential to murder in the first degree was not proved. There is evidence that defendant united with two older malefactors in a common purpose to rob Wolf of a roll of currency carried by him on his person, that in the

attempt to commit the robbery Wolff was fatally struck on the head with a blunt instrument, and that the sum of $54 was taken from him and distributed equally among the three robbers. There is evidence also that defendant participated directly in the robbery. Afterward there was human blood on his garments. This fact was shown by a scientific analysis in connection with oral testimony. The circumstances proved, when considered with the oral testimony of witnesses, justified the jury in finding defendant guilty of murder in the first degree beyond a reasonable doubt. Homicide in committing, or in attempting to commit, a robbery is declared by statute to be murder in the first degree, the turpitude of the felonious act of robbery taking the place of deliberate and premeditated malice, and the purpose to kill being conclusively presumed from the criminal intention constituting the essence of robbery. Comp. St. 1922, sec. 9544; *Thompson v. State*, 106 Neb. 395; *Rhea v. State*, 63 Neb. 461; *Morgan v. State*, 51 Neb. 672. Within the meaning of the statute all elements of murder in the first degree were proved.

Assignments relating to rulings in excluding or in admitting evidence have been considered in detail without finding an error entitling defendant to a reversal of his conviction. The instructions as a whole are free from error. Finding no prejudicial error in the record the judgment is

AFFIRMED.

GEORGE EIGBRETT V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1923. No. 23626.

1. **Criminal Law: INDORSEMENT OF WITNESSES ON INFORMATION.** In a criminal prosecution it is within the discretion of the district court to permit the county attorney to indorse on the information, after it has been filed, the names of additional witnesses.
2. **———: SERVICE OF COPY OF INFORMATION.** Accused in a criminal prosecution is entitled to a copy of the information within 24 hours after it is filed in the district court, but he is not, as a matter of right, entitled to an additional copy merely be-

cause, with his knowledge, additional names of witnesses are properly indorsed on the information, nor because the information is amended in an immaterial respect in no wise changing the accusation. Comp. St. 1922, secs. 10087, 10104.

3. ———: SALE OF MORTGAGED CHATTELS: ABATEMENT. In a state court a criminal prosecution for selling mortgaged chattels without the mortgagee's consent is not abated by the declared bankruptcy of mortgagor in a federal court.

4. Chattel Mortgages: IDENTITY OF CROPS. The lien of a chattel mortgage on a properly identified growing crop called "acres of wheat" extends to the harvested crop, unless the parties in their contract provide otherwise.

ERROR to the district court for Clay county: WILLIAM A. DILWOTH, JUDGE. *Affirmed as modified.*

J. E. Willits, for plaintiff in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

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

ROSE, J.

In a prosecution by the state in the district court for Clay county, George Eigbrett, defendant, was accused of selling mortgaged chattels without the mortgagee's consent in writing. The chattel mortgage was executed June 7, 1922, and incumbered live stock, farming implements and growing crops. Defendant was mortgagor and the First State Bank of Kenesaw was mortgagee. In the information it was charged that defendant, September 18, 1922, without the mortgagee's consent in writing, sold to the Nebraska Farmers' Union Association at Trumbull the following described property upon which the chattel mortgage was at the time a lien: About 485 bushels of wheat from two-thirds of 40 acres in Hamilton county and two-fifths of 35 acres in Hall county. Defendant pleaded not guilty, and upon a trial the jury found that he had feloniously sold mortgaged chattels as charged in the information. For that offense

he was sentenced to the penitentiary for a term of one year. As plaintiff in error defendant presents for review the record of his conviction.

Two assignments of error are based on the assertion that defendant was deprived of his statutory right to a copy of the amended information on which he was tried and that without such a copy he was illegally required to plead and to enter upon his trial. In these respects there was a substantial compliance with law. A copy of the information as originally drawn was served on defendant as required by statute within 24 hours after it was filed. Comp. St. 1922, sec. 10104. The only changes in the information thereafter consisted in indorsing thereon the names of three additional witnesses, and in inserting in the county attorney's recital of the date on which he filed the information in court the year "1923." Permission to allow the county attorney to indorse on the information, after it was filed, the names of additional witnesses, even during the trial, was within the discretion of the district court. Comp. St. 1922, sec. 10087; *Ridings v. State,* 108 Neb. 804. There was no change in the accusation or in the date of the offense charged. Defendant already had a copy of the original information which was in no wise amended to his injury, and he had notice of the amendments. He was allowed the statutory time of one day to plead after the information had been changed in the two respects mentioned. Comp. St. 1922, sec. 10104. There is clearly no merit in these assignments of error.

The overruling of a plea in abatement is also assigned as error. Bankruptcy of defendant was the basis of the plea. It was properly overruled. In a state court a criminal prosecution for selling mortgaged chattels is not abated by the declared bankruptcy of mortgagor in a federal court.

The principal argument on behalf of defendant is directed to the proposition that the chattel mortgage was not a lien on the wheat when sold by defendant and that therefore there was no violation of law. In this connection defendant invokes the statute and the terms of the mortgage

itself. What was forbidden by law without the consent of the mortgagee in writing was a sale of mortgaged chattels during the existence of the lien or title created by the mortgage. Comp. St. 1922, sec. 425. In a long list of items including live stock, farming implements and other personal property mortgaged to secure a debt of $3,582.55 the property which defendant was accused of selling in violation of law was described as follows: Two-thirds of 40 acres of wheat in Hamilton county; two-fifths of 35 acres of wheat in Hall county. The chattel mortgage provided further:

"It is expressly understood that this mortgage covers and secures all extensions or renewals of the within described notes, and that this mortgage includes, and this debt is to be further secured, upon demand of said mortgagee, by all increase from any of the stock mentioned in said mortgage, and also by the matured crops of growing grain."

Defendant takes the position that, under the mortgage, the lien attached only to the "acres of wheat," and not to the harvested grain; that the right "to be further secured" by a lien on "matured crops" depended upon a demand by mortgagee—a step never taken. This interpretation of the language used by the parties is not permissible. The purpose of the mortgage was to create a lien on the property described to secure the payment of a debt. It was not the intention to limit the lien on the growing grain to the period preceding the harvest. It would be a strange construction to hold that the lien terminated as soon as the mortgaged crop became available for the payment of the debt secured. In view of the unmistakable purpose to create a lien to secure a debt, the meaning conveyed, as determined by the natural and logical reading of the forms of expression employed, is that the "mortgage includes," without demand, "all increase from any of the stock mentioned" and "the matured crops of growing grain." The word "demand" appears in what seems to be a parenthetical phrase relating to security in addition to that provided by the mortgage as executed. Defendant is not entitled to a reversal of his conviction under this assignment of error.

With the principal question decided adversely to defendant, there does not seem t be any prejudicial error in the proceedings below or in the finding of the jury.

It is suggested that mortgagee waived its lien and consented to the sale, but the evidence from which these inferences are drawn by defendant does not justify his conclusion. It may be, however, that he unwisely assumed he was entitled, under the terms of the mortgage, to a demand for further security as a condition of extending the lien on the growing crop to the harvested wheat and that he had mortgagee's tacit permission to make the sale, but his unwarranted assumption and unfounded inferences do not constitute a defense or call for a new trial. This phase of the case, however, may properly be considered in fixing the punishment for his violation of law. The property unlawfully sold by defendant consisted of about 485 bushels of wheat. The minimum punishment for such an offense is a fine of $100. Under the circumstances justice will be subserved by reducing the penitentiary sentence to a fine. The judgment of the district court is reduced to a fine of $250 and the payment of the taxable costs in both courts. Defendant is committed to the county jail of Clay county until the fine and costs are paid. As thus modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

VIOLET A. SALTZGABER, APPELLEE, V. MORRILL COUNTY, APPELLANT.

FILED DECEMBER 31, 1923. No. 22533.

1. **Highways: EXCAVATIONS: LIABILITY OF COUNTY.** Plaintiff sued to recover damages from the defendant county for personal injuries, and also for damage to an automobile, incurred by driving into an excavation in the road. The highway, at the time, was in process of construction by the department of public works under sections 8333-8354, Comp. St. 1922. Plaintiff recovered judgment for $7,500. Reversible error does not appear in the instructions. The evidence conflicts on material ques-

tions, but there is sufficient competent evidence to sustain the verdict, which is not excessive, and we decline to set it aside.

2. ———: ———: ———. Evidence examined, and *held* that the defendant county is liable, under sections 8336, 8340, 8342, and 8355, Comp. St. 1922, for damages for personal injuries sustained by plaintiff, and also for damages to automobile in suit.

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

K. W. McDonald and *J. H. Steuteville,* for appellant.

W. D. Oldham and *Williams, Hurd & Neighbors, contra.*

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

DEAN, J.

This action was brought to recover damages from Morrill county for personal injuries sustained by plaintiff and for the destruction of an automobile, all occasioned by driving into an obstruction on a public highway where a bridge was being installed about a half mile southeast of Bridgeport. The jury returned a verdict for plaintiff for $7,500. The county brings the record here to have the proceedings reviewed.

The action was brought under section 2746, Comp. St. 1922, which provides: "If special damage happens to a 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."

The argument on the part of the defendant county is that the highway in question is one which it was not liable to keep in repair when the accident happened and that it cannot therefore be holden for damages. The county argues that the highway is not a county highway but is part of a system of state highways which are established under the supervision of the state board of irrigation, highways and

drainage, as provided by section 8333, Comp. St. 1922. The highway in question here is numbered 87 under the foregoing act.

The undisputed evidence of the district engineer, the project engineer and the contractor is that the highway, at the place where the accident occurred, was not yet completed when the accident happened and had not at the time been turned over to the county authorities. The accident occurred in August, 1920, and the highway was not turned over to the county until some time in May, 1921. It is clearly established that at the time of the accident the highway was still in process of construction, with funds which were being furnished by the state and federal governments. It was then under the control and management of the department of public works of Nebraska.

Defendant, in large part, bases its argument of nonliability on the foregoing facts. In view of the statute we do not think the argument is tenable. Section 8336, Comp. St. 1922, provides:

"On and after January 1, 1920, each county shall adequately maintain the whole of the state highway system lying within the county in accordance with the directions, specifications and regulations made for such maintenance by the department of public works. Such maintenance shall include improvements to the existing surface of said highways, to bridges, culverts and other structures thereon, as well as the erection and maintenance of suitable markers as may be deemed necessary for the convenience and safety of the traveling public."

Section 8340 provides generally that, if any county fails to adequately maintain that portion of the state highway in the county, the department of public works shall notify the county clerk of such failure. It is then the department's duty to furnish the required maintenance at the county's cost. The county board is authorized by section 8342 to close temporarily any portion of a state highway for repairs or to make improvements, and the county board is required to post notice of such closure at the roadside by suitable

signs. Section 8355 provides generally that the department of public works, jointly with the county board, may let the contract for such work or it may be done under the direction of the department of public works.

There is no escape from the meaning of the statutory language. It requires no discussion to establish that, in a proper case, a county cannot avoid liability under the act, where its requirements as to notice and the like are ignored, as was the fact in the present case.

The record contains an exhibit which shows an acceptance by the county board of "all of the provisions of the federal and state aid road acts," as provided by an act of the sixty-fourth congress (39 St. at Large, ch. 241, p. 355) and house roll 722 of the 1917 session of the Nebraska legislature, approved April 19, 1917 (Laws 1917, ch. 185). In that instrument, which appropriately described the highways, the county board made application for state and federal funds, for road maintenance and the like, for Morrill county, as apportioned by the legislature in the foregoing bill.

In respect of the facts, the evidence on plaintiff's part tends to show that when the accident happened plaintiff's husband was driving the car at a speed rate which did not exceed 18 miles an hour. There were objects on the side of the highway, but not in the traveled portion, which her husband saw at a distance of from 25 to 30 feet, and he testified that he applied the brakes at that point but was unable to stop before the car ran into the ditch.

It seems that it was a moonlight night when the accident occurred. A witness on defendant's part testified that he and plaintiff raced their cars when they were about a half mile from the excavation in question, and that he overtook and passed plaintiff's car while traveling at a rate of 45 miles an hour, and that plaintiff's car was making about 38 or 40 miles an hour. There is also evidence tending to prove that there was a pile of sand and a cement mixer and other objects on the side of the road which could be seen at a distance of 100 yards or thereabout before reaching the ditch. Defendant therefore contends that, if plaintiff had

exercised ordinary care for the safety of herself and her car, there would have been no accident. But the objects were not in the road, but on the roadside; so that the jury doubtless concluded they did not come within plaintiff's range of vision. On the question of speed the evidence conflicts. But it was submitted to the jury for their consideration. And, besides, the court instructed on comparative negligence, and the jury appears to have found in favor of plaintiff, on every material fact, under instructions in which reversible error does not appear.

The evidence shows that the plaintiff's injuries were severe and that the Paige car in which the occupants rode was practically demolished. There is no dispute in respect of the extent of the injuries to person or property. That there is sufficient competent evidence to support the verdict clearly appears, and in such case we decline to set it aside.

The judgment is

AFFIRMED.

CENTRAL NEBRASKA MILLWORK COMPANY, APPELLEE, V. OLSON & JOHNSON COMPANY ET AL., APPELLANTS.

FILED DECEMBER 31, 1923. NO. 22555.

1. **Schools and School Districts: CONTRACTS: ARBITRATION.** Where a contractor enters into a contract for the erection and construction of certain school buildings with the owner, the contract reciting that the buildings are to be constructed according to certain plans, drawings and technical specifications which by specific reference are made a part of the contract, and where the technical specifications provide in substance that the architect shall be the sole arbitrator of all disputes and of the character of work and materials furnished, and where subsequently the contractor enters into another contract with a third party to furnish certain millwork and glass delivered at the place, and the third party obligates himself to furnish the materials in accordance with the plans and specifications, he does not thereby contract that the architect shall be the arbitrator of questions of damage or disputes as to whether the materials are in conformity to the plans and specifications.

2. ———: ———: ———. In such case the reference to the plans and specifications in the contract between the original contractor and the third party is for the specific purpose only of pointing out how the work is to be done and the character and quality of the materials to be used.

APPEAL from the district court for Adams county: WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

Max V. Beghtol and *Tibbets, Fuller & Tibbets*, for appellants.

Harry S. Dungan and *Stiner & Boslaugh, contra.*

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

DAY, J.

This action was brought by the Central Nebraska Millwork Company, hereinafter referred to as plaintiff, against Olson & Johnson Company, hereinafter called the contractor, and the United States Fidelity & Guaranty Company, hereinafter called defendant. The plaintiff alleged two causes of action, based on two separate bonds executed by the contractor to the school district of York, Nebraska, upon each of which said bonds the defendant bonding company was surety. No service of process was had on the contractor. The trial resulted in a verdict and judgment in favor of the plaintiff for $4,511.15. Defendant appeals.

The following facts, as disclosed by the record, will serve to make clear the points in controversy: On June 9, 1917, and again on August 21, 1917, Olson & Johnson Company entered into separate contracts with the school district of York, Nebraska, for the erection and construction of certain school buildings in accordance with plans and specifications prepared by an architect which were adopted by the school district. The first contract called for the erection and construction of three grade school buildings, and the second for the erection and construction of a high school building. Each of these contracts referred to certain

plans, general and technical specifications, and made the same a part of the contract the same as though fully written therein. The technical specifications in general made the architect the sole arbitrator of all disputes arising between the contractor and the school district, and also the sole arbitrator as to whether the work and materials conformed to the plans and specifications. To insure the faithful performance of the contracts, the contractor pursuant to the requirements of section 3224, Comp. St. 1922, executed the two bonds on which the action is founded, one in the penal sum of $118,485 to insure the performance of the contract for the three grade school buildings, and one for $117,405 for the high school building. Each of the said bonds contained the following condition:

"Now the conditions of this obligation are such that if the said Olson & Johnson Company shall well and truly keep and perform all the conditions of this contract and pay off and settle in full, with the person or persons entitled thereto, all the accounts and claims that may become due by reason of laborers' or mechanics' wages or for materials furnished or services rendered for the Olson & Johnson Company in executing and performing the obligation of said contract, so that all such persons shall receive his just dues in that behalf, then this obligation shall be of no effect; otherwise it shall remain in full force and effect in law."

On June 23, 1917, and again on September 10, 1917, the Olson & Johnson Company entered into separate contracts with the plaintiff to furnish certain materials and millwork to be used in the construction of said school buildings. The two contracts were identical in form, except as to the consideration to be paid, and the buildings for which the materials were to be furnished, one referring to the three grade school buildings, and the other to the high school building. These contracts provided that the plaintiff would furnish and deliver f.o.b. cars at York, Nebraska, for use in the construction of the school buildings at York, certain materials and millwork specifically described in the con-

tracts, in accordance with the plans, specifications, drawings and details as prepared by the architect. The plaintiff claimed there was a balance due upon the first contract which, together with extras furnished to the contractor, at his request, and which were used in the construction of the buildings described in the first contract, amounted to $637.42. Upon the second contract, together with extras, the plaintiff claimed a balance due of $3,364.20. Plaintiff prayed for $4,001.62 with interest.

The answer of the defendant admitted the contracts pleaded, and the execution of the bonds. By way of cross-petition the defendant alleged that as surety it became subrogated to the rights of the contractor under its contract with the plaintiff; that the plaintiff did not perform its contract as provided by the terms thereof; that the materials delivered were of such a defective character that they were rejected by the school district; that the defendant was obliged to perform the obligations of plaintiff's contract at a big expense; and that defendant had been damaged by the breach of the plaintiff's contract in the sum of $10,000. The allegations of the answer other than the admissions were denied in the reply.

One of the theories of the defendant was that, under the contract between the plaintiff and the contractor, the architect of the building was made the sole arbitrator of whether the materials furnished complied with the plans and specifications for the buildings, and that his judgment with respect to the amount of damages the contractor may have sustained by a breach of the contract on the part of the plaintiff was final and conclusive.

In support of this theory, the defendant sought to introduce in evidence a report made by the architect at the request of the school district, in which in a great many particulars it was stated that the buildings had not been constructed in accordance with the plans and specifications, and also it was therein determined what the amount of damages was that the school district sustained by reason of the breach of the contract. This report had special

reference to the contract betwen Olson & Johnson Company and the school district, but it also stated that the contract between the plaintiff and Olson & Johnson Company had not been performed in accordance with the terms thereof. With respect to the three grade schools, the architect determined that the school district had been damaged in the sum of $5,836.91, which he decided should be borne in equal proportions by the contractor and the plaintiff as subcontractor, to-wit, $2,918.45 each. He also determined that the plaintiff should pay $361 for inferior glass used in the performance of its contract, making a total chargeable to the plaintiff of $3,279.45.

Defendant also sought to show by the architect's report to the school district that in the construction of the high school building the district had been damaged by a breach of the contract on the part of the general contractor in the sum of $5,812.38, and that this damage should be borne in equal proportions by the contractor and the plaintiff, each paying $2,906.19. His report further showed that the plaintiff should be charged an additional sum of $1,682.28 for the use of defective materials in breach of its contract, making a total sum chargeable to the plaintiff on the high school contract of $4,588.47. The trial court excluded these reports of the architect, on the theory that under the contract between plaintiff and Olson & Johnson Company the architect was not made arbitrator.

The principal error assigned relates to the exclusion of this testimony, and the failure to give certain instructions tendered by the defendant, which embodied the general idea that the contract between the plaintiff and the contractor made the architect the sole arbitrator of whether the materials furnished by plaintiff were in accordance with the plans and specifications, and also that he was the sole arbitrator of any damages which the school district or the contractor may have sustained by reason of the breach of plaintiff's contract. In this wise the different viewpoints between the plaintiff and the defendant as to what the plaintiff's contract embodied was presented to the court.

The question of the correctness of the ruling of the court turns upon the interpretation placed upon the plaintiff's contract. By the terms of the plaintiff's contract it was to furnish certain materials f.o.b. cars at York for use in the school buildings. Said materials to be in accordance with the plans and specifications and drawings. By the use of this language can it be said that the plaintiff contracted to be bound by the action of the architect in determining whether its contract had been properly performed, and also made him the sole arbitrator of any damage which might be occasioned by the breach of plaintiff's contract? We think not. It is fundamental that a person cannot be bound beyond the terms of his contract. Assuming that the contract between the original contractor and the school district gave such authority to the architect, the terms of that contract cannot be engrafted upon the plaintiff's contract unless the latter contract clearly indicates that it should be done. Generally speaking, in a contract where reference is made to another writing for a particular specified purpose, such other writing becomes a part of the contract for such specified purpose only. The reference to the plans and specifications in plaintiff's contract serve no other purpose than to show how the work was to be done, and the quality and kind of material to be used in the performance of plaintiff's contract. Cases sustaining this view are: *Moreing v. Weber*, 3 Cal. App. 14, and *Woodruff v. Hough*, 91 U. S. 596.

Of course, it was the duty of the plaintiff to perform its contract, and it would be liable for any breach thereof. Some of the items in the report of the architect, if substantiated, would indicate that the plaintiff had not fully performed its contract, and that there should have been some reduction for this failure. The report, however, was offered in its entirety, and for reasons heretofore given was properly excluded.

If under a proper construction of the plaintiff's contract the architect was not made an arbitrator, it necessarily follows that the court did not err in refusing to give the instructions requested by the defendant.

Other questions presented by the record relate to the sufficiency of the evidence to support the judgment. We think that was clearly a question for the jury. The plaintiff's contract required it to furnish the materials f.o.b. at York, Nebraska. It had nothing to do with the installation of the material it manufactured. That was done by the contractor. The testimony shows that when the buildings were completed the rain beat in around the windows and other openings, and did a great amount of damage to the buildings, necessitating the removal of plaster and taking out and replacing a large amount of masonry at great cost to the school district. This was the occasion of the report made by the architect. It is difficult to imagine upon what theory the architect apportioned this damage equally between the contractor and the plaintiff who was sub-contractor.

A large number of cases are cited by defendant's counsel, but an analysis shows that the contracts which they were dealing with are entirely different from the contract in the case at bar. Authorities in this class of cases are not of much avail, because in the end each case must turn upon the phraseology of the contract involved.

The defendant also complained of the taxing as part of the costs of $400 as fees for plaintiff's attorneys. We think that an allowance of an attorney's fee in this kind of an action is sanctioned by section 7811, Comp. St. 1922. An additional sum of $100 is allowed plaintiff's attorneys for services in this court. *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.*, 98 Neb. 863.

Upon reviewing the entire record, we think the issues were fairly submitted to the jury, and that the verdict and judgment are sustained by the evidence.

The judgment of the trial court is, therefore,

AFFIRMED.

EDITH M. MUDGE, APPELLEE, V. CLIFFORD C. MUDGE, APPELLANT.

FILED DECEMBER 31, 1923. NO. 22587.

1. Process: SERVICE OF SUMMONS. Under section 8574, Comp. St. 1922, the words "residence" and "usual place of residence" are generally synonymous with the term "domicile," hence the residence essential to confer jurisdiction upon the court is a legal one equivalent to the domicile of defendant.
2. Domicile. "The domicile of a defendant is that place where he has his fixed and permanent home, and to which, when absent, he has the intention of returning." *Wood v. Roeder*, 45 Neb. 311, followed.
3. ———: CHANGE OF DOMICILE. "To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. The mere residing at a different place, although evidence of the required intention, does not *per se* constitute a change of domicile." *Wood v. Roeder*, 45 Neb. 311, followed.
4. Process: USUAL PLACE OF RESIDENCE. Evidence examined, and *held* that the place of the service of the summons was, at the time of the service, the "usual place of residence" of the defendant.

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

Crossman & Munger, for appellant.

Mulfinger & Webb, John O. Yeiser and *John O. Yeiser, Jr.*, *contra.*

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

DAY, J.

Action by Edith M. Mudge against Clifford C. Mudge for separate maintenance. Summons was issued on August 9, 1919, and served on the defendant on August 11, 1919, by leaving a copy of the summons at the usual place of residence of the defendant. On October 11, 1919, the defendant appeared by his attorneys, and filed a special appearance

objecting to the jurisdiction of the court upon the ground that no legal service of summons was ever had on the defendant. The special appearance was overruled, default entered against defendant, and a decree entered granting to plaintiff separate maintenance, and ordering the defendant to pay a certain sum each month to the plaintiff for her support. Defendant appeals.

The only question presented by the record which we are called upon to determine goes to the sufficiency of the service of the summons to give the court jurisdiction. There is nothing upon the face of the return of the summons to indicate that it is irregular in any way, or that it does not recite the truth as to the manner of its service.

It is the contention of the defendant that the place where the summons was left was not the usual place of residence of the defendant at the time of the pretended service. This presents a question of fact to be determined by the record.

Section 8574, Comp. St. 1922, in force at the time, provides the manner of service of summons, as follows: "The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day." The words "usual place of residence," as used in the statute, mean the place of abode at the time of the service. *Blodgett v. Utley*, 4 Neb. 25. In *Wood v. Roeder*, 45 Neb. 311, the court held: "The words 'residence' and 'usual place of residence,' as employed in the statutes, are generally synonymous with the term 'domicile,' hence the residence essential to confer jurisdiction is a legal one equivalent to the domicile of the defendant. The domicile of a defendant is that place where he has his fixed and permanent home, and to which, when absent, he has the intention of returning." In the same case it was held, to effect a change of domicile, there must not only be a change of residence, but an intention to permanently abandon the former home. With these principles of law in mind, we now proceed to examine the facts in the case under consideration.

The record shows that on May 4, 1919, the defendant,

under the name of Don C. Wallace, rented an apartment in the St. Regis apartment house in the city of Omaha. The lease ran for a period of one year from May 4, 1919, and called for the payment of a monthly rental of $70. About the date mentioned he commenced living in the apartment with a woman, other than his wife, whom he introduced as his wife, and who was generally known among the neighbors as "Mrs. Wallace." To all outward appearances it met all the requirements of a refined, well-regulated home of husband and wife. On August 1, 1919, the plaintiff, who with her daughter, the issue of her marriage with the defendant, had been living in Chicago, appeared in Omaha, and soon located the defendant living under the circumstances described in the St. Regis. The plaintiff immediately took steps to institute criminal proceedings against the defendant in the federal court for violating the Mann act, and also commenced a civil proceeding in which she sought to obtain possession of the furniture in the apartment, and also the present action for separate maintenance.

The defendant, learning that his wife had discovered his whereabouts, hurriedly left the St. Regis a few days prior to August 9, 1919. His paramour also left about the same time. On August 11, 1919, while the officers were executing the writ of replevin for the furniture, and had about one-half of it loaded on the moving van, the officer with the summons in the present action appeared at the apartment, and served the summons by leaving it on the mantel (one witness says it was left on the piano), in the apartment occupied by the defendant and his paramour. When the defendant and his companion left the apartment, they said nothing concerning their intention not to return. They made no arrangements about their rent, gas, or electric light service. Everything was left in the apartment as though they expected to return in a few hours. All the furniture, dishes and clothing were left. Provisions in the ice box were left, including bread, butter, and a bottle of Gordon gin. After their departure the janitor's wife received a note, signed "Mrs. Wallace," in which she states

that she would be detained three or four days longer than she expected, and requested the janitor's wife to use the perishable food in the ice box. In the showing made on behalf of the defendant, we are not favored with the personal testimony of the defendant, or with his affidavit. As to what his intention was with respect to abandoning the apartment in the St. Regis as his residence must be determined from the record. The moving out of the furniture was not done at his instigation. In fact, it was contrary to his wish. While not properly in the record, it was stated on the hearing that the furniture was afterwards recovered by the defendant. In the same way it appears that the defendant presented himself in the federal court, and plead guilty to a charge of violating the Mann act, and was fined $100, which he paid.

Considering the entire record, we are of the view that at the time of the service of the summons the usual place of residence of the defendant was the apartment occupied by him in the St. Regis apartment house, and that the manner of the service of the summons conferred jurisdiction on the court.

A very guarded suggestion is made by defendant's counsel, with the view of avoiding a general appearance, to the effect that the court erred in permitting the sheriff to amend his return on the summons. We think there is no merit in the suggestion. An amendment of the return to the summons to conform to the facts is well recognized in our practice.

The judgment of the district court is

AFFIRMED.

JOSEPHINE ASKEY, APPELLEE, V. MANDERSON ASKEY ET AL., APPELLEES: WILMA MAY ASKEY ET AL., APPELLANTS.

FILED DECEMBER 31, 1923. No. 22595.

1. Wills: REMAINDERS: TIME OF VESTING. It is the general rule that, in the absence of controlling equity, or of an express or

implied provision in a will to the contrary, where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in possession whenever the prior gift ceases or fails in whatever manner. This doctrine rests upon the presumed intention of the testator, and will be applied only when promotive of his intention.

2. ———: ———: ———. Will examined, and *held* that it was the intention of the testator that the remaindermen should not take the estate until after the death of the life tenant.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

John F. Fults, for appellants.

Edward J. Lambe, Walter D. James, J. G. Thompson and *J. H. Sherwood, contra.*

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

DAY, J.

This is an action in partition, commenced by Josephine Askey, the widow of William Askey, Sr., in which the children and grandchildren of William Askey, Sr., deceased, and the tenant in possession of the land were made parties defendant. There is no controversy as to the rights of the plaintiff to maintain partition and no objection to the decree in so far as it relates to the plaintiff. The real controversy is between Arden D. Askey and Fern I. Askey, minors, grandchildren of William Askey, Sr., deceased, acting through their guardian, and Wilma May Askey and 17 other minors, grandchildren of the deceased, acting through their guardian. Arden D. and Fern I. Askey were born after the widow elected to take under the law of descent and distribution, rather than under the will of her deceased husband. The other grandchildren in the class with Wilma May Askey were born prior to the date of the election by the widow. The trial court found that the plaintiff was the owner of an undivided one-fourth interest in the quarter section of land which was the subject of partition,

and ordered that partition be made as to her interest. The court also found that the remaining undivided three-fourths interest in the land vested in the grandchildren of William Askey, Sr., deceased, including Arden D. and Fern I. Askey, subject to be opened up and to let in after-born grandchildren of William Askey, Sr., deceased, who may be born prior to the death of Josephine Askey, the plaintiff. The court also found that the grandchildren defendants were not entitled to partition at this time; that a sale of the minors' interest in the land at this time would not be to the interest of the minors; and the referee was directed not to sell or partition the land among the several grandchildren defendants. From this judgment the grandchildren in the class represented by Wilma May Askey, through their guardian, have appealed.

The principal objection of the appellants is to that part of the decree permitting Arden D. and Fern I. Askey to share in the distribution of the land. The question presented turns upon the construction to be given to the last will and testament of William Askey, Sr., deceased, which has been duly admitted to probate.

The record shows that William Askey, Sr., died testate on October 29, 1918, being at the time the owner of the land which is now the subject of partition, and other property. He left surviving him his widow, Josephine Askey, his second wife. There was no issue of this marriage. He also left surviving him 6 children and 18 grandchildren. After the probate of the will the widow, plaintiff, elected to take under the law of distribution and descent, rather than under the will, and shortly thereafter commenced this action.

It is the claim of the appellants that by the terms of the will Arden D. and Fern I. Askey are not entitled to share in the real estate in question. The clause in the will which forms the basis for the present controversy is as follows: "Second. I give and bequeath to my beloved wife, Josephine Askey, enough of the proceeds of my property for her living and support during her natural life, and to occupy the house

and building for her own use and benefit while she shall remain my widow, but if she again marry after my death then this amount shall stop, together with all rights and privileges mentioned in this will, and at the death of my wife I want the property sold and divided among my grandchildren share and share alike." The will then named his children, to each of whom he gave $5 out of his personal property.

It is the contention of the appellants that, when the widow elected to take under the law rather than under the will, that act was equivalent to her death as respects the distribution of the estate under the will, upon the happening of that event, and that, therefore, the grandchildren of the testator living at the time of the election by the widow are the only ones entitled to participate in the distribution of the land in question. It is the general rule that in the absence of a controlling equity, or of an express or implied provision in the will to the contrary, where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in posesssion whenever the prior gift ceases or fails in whatever manner. *Holdren v. Holdren,* 78 Ohio St. 276, 18 L. R. A. n. s. 272, note; 23 R. C. L. 555, sec. 102, and cases cited. This rule of acceleration is founded upon the presumed intention of the testator that the remainderman should take on the termination of the previous estate, notwithstanding the prior donee may be still alive. It is applied only in promotion of the intention of the testator, and never to defeat it. 23 R. C. L., 556, sec. 103, p. 557, sec. 104.

In *McCollum v. McCollum,* 108 Neb. 82, it was held that the renunciation of the will by the widow will not be allowed to break the testamentary plan further than is absolutely necessary. The same principle is announced in *In re Estate of Grobe,* 101 Neb. 786. What, then, was the intention of the testator as appears from the will? Did he intend that the estate should be distributed among his grandchildren upon the happening of any event which might terminate the life estate of his wife before her death? We

think not. It will be noted that the will mentions a contingency upon the happening of which the life estate of the wife was to cease. In express terms the will provides that, if the wife should remarry after the death of the testator, all her rights and privileges under the will should stop. Notwithstanding that it was in the mind of the testator that her rights might be ended before her death, he provided in the will that upon her death the property should be sold and the proceeds divided among his grandchildren share and share alike. It would seem, therefore, that in fixing the event upon the happening of which he desired a distribution of the estate, he did it advisedly, and that it was not his intention that the time of distribution should be accelerated by the happening of some event other than her death, which might terminate her life estate.

Besides this, the remainder was to go to a class, and it might well have been in the mind of the testator that other grandchildren might be born, whom he desired to also be recipients of his bounty, and he fixed the date of the death of his wife as a time for distribution. We think the construction given by the trial court to the will was right, and the judgment is, therefore,

AFFIRMED.

JAMES BARNES ET AL., APPELLANTS, V. MANLIUS LUCAS, APPELLEE.

FILED DECEMBER 31, 1923. No. 22602.

Vendor and Purchaser: FRAUD: RELIEF IN EQUITY. Where parties in a contract for the sale of a large tract of land agree orally as to the price to be paid per acre, and the seller in reducing the contract to writing, for the purpose of gaining an inequitable advantage to himself, puts the purchase price in the contract at a gross sum and largely in excess of the amount computed on the number of acres at the price agreed upon, and the contract as thus written is signed by both parties, the act of the seller constitutes such fraud that a court of equity will on application of the defrauded party cancel the contract and relieve him from performance.

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

John N. Dryden and *W. M. Glenn*, for appellants.

W. D. Oldham and *Sinclair & McDermott, contra.*

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

DAY, J.

James Barnes and C. M. Doty, copartners, brought this action against Manlius Lucas upon a check for $8,000, given by the defendant to the plaintiffs as an initial payment upon an option contract for the purchase of a tract of land situated in Kiowa county, Colorado. The defense interposed was fraud on the part of the plaintiffs in securing the check, and also fraud in securing the signature of the defendant to the option contract. The defendant prayed that the contract be canceled and held for naught, and that he be relieved from any and all liability on the check. The reply of the plaintiffs denied that any fraud was practiced on the defendant in securing the check or the contract. A trial was had to the court, resulting in findings and judgment in favor of the defendant, Plaintiffs appeal.

The main contention of the plaintiffs is that the judgment is not in accordance with the evidence. The record shows that the defendant is a man over 73 years of age, of very limited education, and unable to compute figures except in a limited way. He was a bachelor, and lived alone on his farm for many years. His home was about 300 miles from the land described in the option contract. He had never been in that section of Colorado before. and had no personal knowledge of land values in that part of the state. By hard work, and most exacting economy, he had accumulated what many would regard as a snug fortune. A few days prior to the signing of the contract and the check, he was met at his home by W. H. Bailey and his son, M. W. Bailey, who were acting as agents for the plaintiffs in procuring pro-

spective customers for plaintiffs in their land business, for which service they received a commission on all sales made to customers procured by them. The defendant, accompanied by the Baileys, was taken to Towner, Colorado, where he was introduced to C. M. Doty, one of the plaintiffs. Defendant was taken to a tract of land consisting of 2,240 acres, and which he was told by Doty was in one body. While there is a dispute between the plaintiffs' evidence and that of the defendant as to the price of the land, the version given by the defendant and his witnesses is entitled to the greater credence. The defendant testified that Doty told him that the different pieces composing the tract were of different prices, but the average price was $27 an acre. He further testified that when he signed the contract he understood the price to be $27 an acre for the entire tract. Both the Baileys in a measure corroborate the defendant in this regard. Both of these witnesses say that the price fixed by Doty when they were looking at the land was $27.50 an acre. Doty testifies that he told defendant that the price of the land was $37.50 an acre for the three sections in the Berges tract, and $27.50 an acre for the other half section. On their return to town defendant asked Doty, "Is that the best you will do on that ranch?" and, when informed that it was, said he would take it. Doty drew up the contract and placed the contract price at a lump sum of $80,400, payable as follows: $8,000 cash; $41,000 on or before March 1, 1920; and $30,800 to be carried back on the land as a first mortgage, due in three years with interest at 6 per cent. From these figures in the contract it is evident that on any view of the evidence a mistake has been made somewhere. The aggregate items of the payments total $79,800, while the price in the contract calls for a payment of $80,400. If the testimony given by Doty as to the agreed price of the land be accepted as the correct version, the total amount would be $80,800. The Baileys further testified in substance that when Doty returned to the office, and was preparing to write the contract, he figured the price at $27.50 an acre; that while he was doing so, Lucas

commenced to figure, but in doing so he put down the price as $37.50 an acre, and finally remarked that it came to a little over $80,000. When Doty discovered that defendant had in mind $37.50 an acre, he immediately changed his figures from $27.50 to $37.50 an acre. The Baileys testified that, when they discovered this, they told Doty that he ought to give them a larger commission, because he "was sticking Lucas for an extra $10 an acre." This was denied by Doty. On the way home the defendant discovered that the description of the land in the contract would not place the land in one body. This the plaintiffs admit, claiming it was an error which they were quite willing to correct. The defendant, on arriving home, went to his attorney, who figured the price per acre over for him, when for the first time he claims he learned that he was paying more than $27 an acre for the land. He immediately stopped payment on the check, and the suit followed. Some of the circumstances seem strongly to support the plaintiffs' claim as to the price per acre given to the defendant, one being that they were paying more than $27.50 an acre for a large part of the land. On the whole, however, we conclude that the weight of the testimony supports the defendant's version of the transaction. But, if we eliminate the question of fraud, it seems quite clear to us that the defendant never consciously agreed to pay more than $27 an acre for the land. That was the price as he understood the proposition. If the plaintiffs did in fact price the land as Doty says, $37.50 for part and $27.50 for part, and it was understood by defendant to be $27, then a condition is presented of a failure of minds to meet, and no contract would in fact exist. It is elementary that in every contract of sale the minds of the parties must meet. The case is one which calls for the interposition of the equity powers of the court. It would be unconscionable to enforce the contract and thus enable the plaintiffs to recover about $20,000 more than the price for which they were willing to sell the land. The insertion in the contract of a higher price than that agreed upon for the purpose of gaining some advantage is a species of

trickery and dishonesty which a court of equity will not tolerate.

The judgment of the district court was right and it is

AFFIRMED.

WILLIAM E. FOSTER V. JEANETTE L. FOSTER, APPELLEE: DAISY T. FOSTER, APPELLANT.

FILED DECEMBER 31, 1923. No. 22613.

1. **Divorce**: JURISDICTION. In an action for divorce, jurisdiction over the defendant may be acquired by personal service on the defendant within or without the state, or by his voluntary appearance in court, or by constructive service obtained in the manner provided in section 1520, Comp. St. 1922.
2. ———: CONSTRUCTIVE SERVICE. Under section 1520, Comp. St. 1922, constructive service may be obtained only when it is made to "appear to the satisfaction of the court by the affidavit of the petitioner or of his or her attorney that the petitioner does not know the address or residence of the defendant, and has not been able to ascertain either, after reasonable and due inquiry and search continued for three months after the filing of the petition." After such affidavit has been filed, the court or judge in vacation shall authorize notice by publication, to be given in the manner provided in other cases under the Code.
3. ———: VOID DECREE. Where a petition for divorce was filed June 29, 1920, and no service of summons had or appearance of the defendant, a decree entered August 18, 1920, reciting that "due and legal service by publication" has been had on the defendant is void.
4. **Judgment**: VOID JUDGMENT: VACATING. A void judgment may be set aside at any time upon motion made to the court.

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

Hoagland & Carr and *C. G. Perry*, for appellant.

Williams, Hurd & Neighbors, contra.

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

DAY, J.

This action is based on an application of Daisy T. Foster to cancel and vacate an order of the district court setting aside and vacating a decree of divorce entered in favor of William E. Foster and against Jeanette L. Foster. The trial court overruled the application and the applicant, Daisy T. Foster, has appealed.

The record shows that on June 29, 1920, William E. Foster filed a petition for divorce against Jeanette L. Foster in the district court of Morrill county, Nebraska. On August 18, 1920, the court entered a decree granting the divorce as prayed for. The decree recited that the defendant had due and legal service by publication. The affidavit for publication service, the order for such service, or proof of service, do not appear in the record. In fact, the recitation in the decree that publication service had been had is the only mention made of service. It further appears that soon after the decree was rendered, William E. Foster removed to Baltimore, Maryland, where he was married on September 15, 1920, to Daisy T. Foster, the applicant herein. On November 20,1920, William E. Foster died in Baltimore, Maryland.

On March 26, 1921, Jeannette L. Foster, defendant in the divorce suit, filed a motion to have the divorce decree set aside, on the grounds that there had been no service upon her; that she had no notice of the pendency of the suit; that the pretended service by publication was null and void; and that the court was without jurisdiction to enter the decree of divorce. Hearing was had upon this motion on April 5, 1921, the motion sustained, and the decree set aside and ordered stricken from the files. On this hearing the trial court found: "That there was a total failure of the service of process or other notice of the pendency of said action upon the defendant; that the court was without jurisdiction to render said decree as appears from the files and upon the face of the proceedings had in this court."

In making the order setting aside and vacating the decree it would seem that the action of the trial court was

clearly right. The record shows that the petition was filed on June 29, 1920, and 50 days thereafter the decree was rendered, based on a pretended service by publication. Section 1520, Comp. St. 1922, provides the manner of service of process in divorce actions. That section provides:

"No person shall be entitled to a divorce, unless the defendant shall have been personally served with process if within this state, or with personal notice duly proved and appearing of record, if out of this state, or unless the defendant shall have entered an appearance in the case; but if it shall appear to the satisfaction of the court by the affidavit of the petitioner or of his or her attorney that the petitioner does not know the address or residence of the defendant, and has not been able to ascertain either, after reasonable and due inquiry and search continued for three months after the filing of the petition, the court or judge in vacation shall authorize notice by publication of the pendency of the suit for divorce, to be given in the manner as provided in other cases under the Code of Civil Procedure."

Notwithstanding the recital in the decree that "due and legal service by publication" had been made, it is certain that it had not been so made. The date of the filing of the petition, and the date of the decree, clearly show that the requirements of the statute for obtaining service by publication had not been observed. These requirements of the statute are necessary to give the court jurisdiction, where service is sought to be obtained by publication. It seems clear from the record that the court had no jurisdiction to enter the original decree, and therefore the judgment was void and a nullity.

It is urged by the appellant that the court was without power to cancel and set aside its judgment of August 18, 1920, because more than six months had elapsed since the rendition of the judgment, and the order setting it aside; and also because in the meantime the plaintiff William E. Foster had died. We think this contention is without merit. The case is not one of a mere irregularity in the entry

of the decree. It is a void judgment for lack of jurisdiction o' 'r the defendant.

A void judgment is in legal effect nothing. Such a judgment may be vacated at any time on motion for that purpose. A court may at any time clear its records of unauthorized and illegal entries. Abundant authority can be readily found supporting these views. *Hayes County v. Wileman*, 82 Neb. 669; *Heffner v. Gunz*, 29 Minn. 108; *Foreman v. Carter*, 9 Kan. 674.

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

AFFIRMED.

EDMOND C. RECTOR ET AL., APPELLEES, V. GEORGE H. GUTRU ET AL., APPELLANTS.

FILED DECEMBER 31, 1923. NO. 22603.

Brokers: CONTRACT OF BROKERS: LIABILITY OF PRINCIPAL. A real estate broker, who for an agreed commission procures a contract for the exchange of his principal's land for land of another, and then, by a further verbal agreement with his principal, undertakes to sell the land so acquired by the latter, and to receive out of such sale the amount of his commission, does not thereby acquire an interest in such land; nor is he thereby authorized to enter into a written contract which will bind his principal to convey the land. If the broker then enters into a further written contract to purchase the land from his principal, and then in his own name enters into another contract to sell the land to a third party, his principal is not liable in damages for a breach of the broker's contract to convey.

APPEAL from the district court for Antelope county: WILLIAM V. ALLEN, JUDGE. *Reversed.*

J. F. Boyd and *H. Halderson*, for appellants.

Jackson & Rice and *J. A. Donohoe, contra.*

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

GOOD, J.

This is an action to recover damages for breach of a contract to convey real estate, in which Edmond C. Rector and Henry H. Drayton are plaintiffs, and George H. Gutru, Frank Hough, and Austin C. King, Jr., are defendants. Judgment went in favor of defendant King and for plaintiffs as against Gutru and Hough. The latter two have appealed.

On the 31st day of December, 1918, King entered into a written contract, whereby he agreed to convey to Rector an 80-acre tract of land in Antelope county, Nebraska, for a consideration of $5,300, of which $500 was then paid in cash. It was for a breach of this contract that the action was brought. Plaintiffs allege that in entering into said contract Rector acted for himself and his coplaintiff Drayton, and that each was to furnish half of the consideration. They also allege that in entering into said contract King acted for himself and for Gutru and Hough. Plaintiffs allege, in substance, that at the time of the execution of said contract King, Gutru and Hough were the joint owners of a contingent interest in the aforesaid real estate, such interest being based upon a written contract between the said Gutru and Hough and one W. T. Brookhouser, and that the said King, Gutru and Hough, prior to the execution of the contract by King, entered into a verbal agreement, by the terms of which it was understood and agreed that King should obtain a purchaser for the said real estate on the terms set forth in the contract, and that upon King obtaining such purchaser Gutru and Hough, with King, would convey such real estate to said purchaser; that Gutru, Hough and King were joint owners of the aforesaid real estate and were jointly liable for failure to comply with the terms of said contract.

Each of the defendants answered separately. King, for his answer, admits entering into the contract, and alleges that he was acting for and on behalf of himself and the defendants Gutru and Hough; that on the 30th of December, 1918, he had received a contract for the sale of said land

from Gutru and Hough, and, in entering into the contract of sale with Rector, he was acting for himself and for Gutru and Hough, and that they failed to furnish him (King) with an abstract of title and warranty deed as agreed; and alleges further that his failure to perform the contract was due to the failure of Gutru and Hough to fulfil their contract with him. The answers of Gutru and Hough are the same in substance. Each admits that at one time he had an interest in a contract with Brookhouser, but avers that King at no time had any interest in the same, and that at no time did King have any authority from the answering defendant to make any contract relative to the land described in the petition, and denies all the other allegations in the petition.

The record discloses without substantial dispute that Gutru and Hough, who were residents of Newman Grove, Nebraska, were copartners engaged in selling western Kansas lands; that they employed King, a resident of Orchard, Nebraska, as agent to solicit and find purchasers for the lands they were handling, and orally agreed to pay him a commission of $2.50 an acre for land sold to purchasers procured by King, such commissions to be paid when each deal was closed and the consideration paid. Pursuant to this arrangement, King procured one Brookhouser to enter into a contract with Gutru and Hough for exchange of lands, whereby Gutru and Hough were to convey to Brookhouser 320 acres of land in Greeley county, Kansas, and as consideration therefor, Brookhouser was to pay $400 in cash and convey to Gutru and Hough 80 acres of land in Antelope county, Nebraska. This exchange contract was made in November, 1918, and provided for exchange of deeds of the parties thereto on or before December 1, 1918.

From this on, there is a conflict in the evidence. King, who is apparently quite friendly to the plaintiffs, was called as a witness for them, and testifies, in substance, that in December, 1918, there was an oral agreement between him and Gutru and Hough, whereby he was not to receive his commission on the Brookhouser deal until he (King) should

sell the land that Brookhouser had agreed to convey, and that he should sell this land for $5,300, of which he should receive $800 and Gutru and Hough $4,500; that he found a purchaser for this land in the person of Rector, and notified Gutru by telephone that he had a purchaser for the land; that thereupon Gutru sent Hough to him; that he did not disclose to them who the purchaser was, but that, pursuant to the understanding and arrangement that he was to sell the land upon the terms agreed upon, Gutru and Hough executed a contract, whereby they agreed to convey to King the same land for a consideration of $4,500, and that King at that time paid to Hough the sum of $250. Gutru denies that any such oral agreement was made; denies having the telephone conversation which King testified to, and says that he knew nothing of the contract between King and Rector for many months thereafter. Hough testifies that on or about December 30, 1918, he stopped in Orchard to see King in regard to closing up the Brookhouser deal, and that at that time an agreement was made whereby Gutru and Hough were to convey the land to King for $4,500, but Hough says that he did not then know that King had agreed to sell the land to Rector or anyone else, but inferred that he was buying the land to sell to others.

Brookhouser failed to carry out his contract and convey the land to Gutru and Hough, and, in an action between them over the controversy, the contract between Brookhouser and Gutru and Hough was cancelled. Gutru and Hough never acquired title to the Antelope county land, and so could not convey it to King, and King could not convey to Rector.

Numerous assignments of error are alleged, but, in the view we take of the case, it will be necessary to consider but one of such assignments, viz., that the verdict is not sustained by the evidence.

Plaintiffs argue that King, Gutru and Hough were engaged in a joint enterprise; that King, together with Gutru and Hough, had a joint interest in the land at the time the contract was made between King and Rector; that, having

such joint interest in the land, King had authority to enter into the contract with Rector without written authority from Gutru and Hough, and, in any event, that the contract signed by Gutru and Hough, whereby they undertook to convey the land to King, was a sufficient compliance with the statute of frauds.

We do not think the facts disclosed by the record will sustain plaintiffs' position. No facts were proved which would establish a partnership or joint venture between King and Gutru and Hough. If the deal with Brookhouser had been finally consummated, King would have been entitled to a commission of $800 for procuring the sale of the Kansas land. The validity of that contract was litigated in court, and it was determined that Brookhouser was not liable thereon. The contract between Brookhouser and Gutru and Hough was never consummated. It follows that King was never entitled to a commission for making the sale of the land to Brookhouser.

Again, taking King's testimony, that there was an oral arrangement that he should sell the Brookhouser tract and should receive his commission therefrom for the two deals, which commission should be $800, this was not sufficient to give King any interest in the land; nor was it sufficient to authorize him to make a contract for the sale of the land which would bind Gutru and Hough. Under the facts proved, King at no time had any interest in the land, except under his contract of purchase. The most that can be claimed is that King was acting as the agent of Gutru and Hough for the sale of the Antelope county land which Brookhouser had agreed to convey. It is elementary that an agent, who has no interest in the property, cannot bind his principal by a contract to convey the principal's land unless such authority is in writing. It is not claimed that there was any such written authority. But, counsel argue, Gutru and Hough having signed the contract, wherein they agreed to convey the land to King, this was sufficient authority for King to enter into a contract to convey the land to Rector. It is admitted by King, as a witness for the

plaintiffs, that he did not disclose that Rector was a prospective purchaser of the land. The contract which was executed by Gutru and Hough to King was for a consideration of $4,500. The contract from King to Rector was for a consideration of $5,300. The contract from Gutru and Hough to King did not constitute and was not an authority for King to execute another contract to Rector for a different consideration, which would be binding on Gutru and Hough. It follows that Gutru and Hough were never bound by, and never became liable upon, the contract between King and Rector. They could not, therefore, be liable in damages for the breach of the contract.

Plaintiffs further argue that, even if the defendants Gutru and Hough were not bound by the contract entered into by King and Rector, still, as between King and Rector, the contract is fully binding, and Gutru and Hough, by having failed to answer the cross-petition filed against them by their codefendant King, confessed the allegations thereof and are now bound by the judgment in this case. The fallacy of this argument lies in the fact that King did not file any cross-petition. After setting forth the facts, above stated, in his answer, the prayer of his answer was in a dual form, as follows: "Defendant prays that said petition be dismissed as to him, that, if judgment be recovered against the defendant King, the defendants Gutru and Hough be required to respond to the defendant King for the payment thereof." There were no allegations in King's answer wherein he sought any relief against the defendants. The prayer is no part of the allegations of the answer. Nor was any question submitted to the jury as to any cross-action on the part of King against Gutru and Hough. The answer of King did not require any reply on the part of the defendants Gutru and Hough. In addition to that, the plaintiffs, in their reply to the answer of King, deny every allegation of such answer. Technicalities may be resorted to to prevent a failure of justice, but should not be resorted to to sustain an injustice. The only one of the defendants who could have been liable to the plaintiffs in this case was King, and,

for some reason that is not apparent, the jury held that King was not liable.

The verdict is not sustained by the evidence, and the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HENRY FURRER ET AL., PLAINTIFFS, V. NEBRASKA BUILDING & INVESTMENT COMPANY ET AL., DEFENDANTS, ROSE SCHAAF, CLAIMANT, APPELLANT, W. E. BARKLEY, RECEIVER, APPELLEE, F. B. BAYLOR, TRUSTEE, INTERVENER.

FILED DECEMBER 31, 1923. No. 22615.

1. **Principal and Agent:** AUTHORITY OF AGENT. Ordinarily, an agent may not borrow money and bind his principal for its repayment, unless authority so to do is expressly conferred or necessarily implied by the authority that is granted.
2. ———: UNAUTHORIZED CONTRACTS: RETENTION OF BENEFITS. A principal cannot knowingly retain the benefits accruing from the unauthorized act of his agent and escape the legal obligations, assumed by the agent in the name of the principal, from which the benefits accrue.
3. ———: ———: RATIFICATION. Ratification by the principal of the unauthorized act of his agent has the same effect as prior express authority.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed in part, and reversed in part.*

Sterling F. Mutz, for appellant.

F. C. Foster, O. K. Perrin, S. M. Kier, Good & Good and *Boehmer & Boehmer, contra.*

F. B. Baylor and *Johnson, Moorhead & Rine,* for intervener.

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

GOOD, J.

This is an appeal by the claimant, Rose Schaaf, from the disallowance of a claim filed by her against the Nebraska Building & Investment Company and its receiver. The claim was for work and labor in the sum of $1,280, and for money loaned and advanced in the sum of $1,019.60.

With respect to the claim for labor, while the evidence is in substantial conflict, the finding of the trial court seems to be supported by the evidence. We do not understand that the claimant seriously contests the finding on this item, and it will not receive further consideration.

As to the item for money loaned and advanced, there is no conflict in the evidence. The record discloses that the Nebraska Building & Investment Company, hereinafter referred to as the company, owned and operated near Kearney, Nebraska, a ranch, produce from which was used to a considerable extent in hotels owned or controlled by the company, and that A. J. Schaaf, husband of the claimant, was the manager of the ranch, which was known as "1733 Ranch." Schaaf seems to have had full control and management of the operation of the ranch, sold and marketed the products, purchased the lumber and other materials necessary, and paid the expenses incident to its management and operation. A bank account was kept in the Central National Bank of Kearney in the name of "Schaaf 1733 Ranch," which was replenished from time to time by moneys advanced by the company and by the proceeds from the sale of produce from the ranch. This account was checked on by Schaaf, as manager, for the payment of expenses incident to the operation and management of the ranch. May 17, 1920, this account had been depleted to such an extent that there was not sufficient to pay checks that had been drawn thereon. The checks drawn were in excess of the balance in the account by several hundred dollars. At this time Schaaf, the manager, procured a loan of $1,000 from the claimant which was placed to the credit of the Schaaf 1733 Ranch account, and was used largely to liquidate the checks which had been previously drawn on the account. At

the time Schaaf, the manager, informed the claimant of the condition of the ranch account and represented to her that within a few days money from the sale of products and other funds would be coming in from the company, when she would be repaid. Subsequent to this date the claimant, at the request of Schaaf, the manager, advanced the additional sum of $19.60 for the payment of some of the ranch bills. No part of this $1,019.60, advanced by the claimant has ever been repaid. With the money so loaned, the company's obligations have been paid and discharged to an amount equal to the money loaned. The company has received and still retains the benefits from these loans. It has never repudiated the transaction of its manager. The receiver concedes all of this, but relies for a defense on the proposition that Schaaf, the manager, had no authority to borrow money and pledge the credit of the company, and that it is, therefore, not liable, because of the lack of such authority.

It is a rule of law, supported by ample authority, that an agent may not borrow money and bind his principal for its repayment, unless such authority is expressly conferred or necessarily implied by the authority granted. The record in this case does not disclose that express authority was conferred on the manager to borrow money.

From the record it may fairly be inferred that Schaaf, as manager, was invested with authority to purchase feed, fuel, supplies, lumber and farm machinery necessary for operating the ranch, and to employ labor to make repairs to wind-mills, heating plant, fences, buildings, and generally do all things necessary in carrying on the business of the 1733 Ranch; and it also may fairly be inferred that for these items he was authorized to pledge the credit of the company. In any event, it appears that he was performing all these acts, and there is not a syllable of testimony that such acts were disapproved by his principal. The checks he had issued, and which were outstanding at the time he borrowed $1,000 from claimant, were given in payment for labor, lumber, fuel, farm machinery and materials used on

the ranch. The company still retains all the benefits accruing from these acts.

We are inclined to the view that the situation disclosed is sufficient to warrant a finding that the manager had implied authority to borrow money to carry on the ranch operations; but in any event it must be presumed that the company, from time to time, inspected and checked up the bank account and other operations and business transactions of its manager, and, if so, it had knowledge of the acts of its manager in borrowing the money in question. The rule is well settled that a principal cannot knowingly retain the benefits accruing from the unauthorized act of his agent and escape legal obligations, assumed by the agent in the name of the principal, from which the benefits accrue. *Dinsdale v. Sprague Tire & Rubber Co.*, 110 Neb. 290; *Moller v. Mallory*, 110 Neb. 269. Under the circumstances disclosed, the act of Schaaf, the manager, if not impliedly authorized, was ratified by his principal. Ratification has the same effect as prior express authority. *Oberne v. Burke*, 50 Neb. 764; *Shimonek v. Nebraska Building & Investment Co.*, 109 Neb. 424.

It follows that the judgment of the district court, in disallowing items for labor, should be and is affirmed, and in disallowing the item of $1,019.60, for money loaned, is reversed and remanded.

AFFIRMED IN PART, AND REVERSED IN PART.

CHARLES S. BATES, APPELLANT, V. ST. ANTHONY'S CHURCH OF SOUTH OMAHA, APPELLEE.

FILED DECEMBER 31, 1923. No. 22623.

Contracts: ESTIMATE OF COST: AMOUNT RECOVERABLE. Where one party, desiring certain work performed, requests another to submit an estimate of the cost, and the other submits an estimate that the proposed work will cost from $1,125 to $1,200, and offers to guarantee that the cost will not exceed $1,200, whereupon the first party directs the second party to go ahead and perform the work, no contract for any specific sum arises, and the

second party is entitled to recover no more than the reasonable value of the services rendered, but not to exceed the larger sum.

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

Edward R. Burke, for appellant.

E. F. Leary, contra.

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

GOOD, J.

This is an action for the foreclosure of a mechanics' lien in which plaintiff alleges there was a balance of $1,110 due him on a contract to furnish material and perform labor. The defendant admits that plaintiff furnished the material and performed the labor, but denies that there was any contract as to the amount that plaintiff should receive therefor. The trial court found there was due plaintiff the sum of $650, and entered a decree accordingly. Plaintiff appeals.

The principal question for determination is as to whether there was a definite contract between the parties for furnishing the material and labor. The record discloses that a number of pews and kneeling benches in defendant's church building were destroyed and others damaged by fire. After the pews and benches had been removed from the church building and piled outside, the priest in charge of the church requested the plaintiff to make a bid on rebuilding and repairing them. Plaintiff replied that it would be impossible to make an estimate upon them in their present condition, as they were partially covered with snow at the time. He volunteered to take the pews and kneeling benches to his shop or planing mill, clean them up, and see how much new material would be required, and would then tell the defendant's representative about what it would cost to "make them over." A few days later the plaintiff returned, and, according to his testimony, the following conversation occurred: "I gave him (meaning the priest in

charge) a price of, an estimate of between $1,125 and $1,200. Couldn't determine the exact amount, guaranteeing that it would not cost over $1,200." The priest in charge told him to go ahead and do the work. This, in substance, is the arrangement under which the material was furnished and labor performed. After the pews and benches had been rebuilt and repaired and returned to the church building, plaintiff rendered a bill for $1,160, on which $50 has been paid. Plaintiff filed mechanics' lien for the balance.

Plaintiff argues that the language above quoted is sufficient to constitute a contract for $1,160. The general rule is that, when an offer is made by one party, looking to the making of a contract, the other party must accept the offer as made; otherwise, the minds of the parties do not meet and there is no agreement. In the present case, the plaintiff did not undertake to furnish the material and do the work for any specific amount, and the defendant's representative, in telling him to go ahead with the work, did not agree to pay any definite or specific sum. We are at a loss to understand how the language used could be construed as a contract whereby the defendant was to pay $1,160 for the material and labor. While the amount of the bill rendered is for a sum about equidistant between the estimates submitted by the plaintiff, the principle would be the same, had the plaintiff submitted a proposition, stating that it would cost not less than $200 nor more than $1,200. In the supposed case, the range of prices would be wider; the principle the same. Clearly, there never was a meeting of the minds, nor an agreement as to any specific amount. If the language used amounted to a contract in any respect, it could only be with reference to the larger sum, $1,200; that is, that the cost should not exceed that sum. The views herein expressed find support in the following cases: *Weibert v. Hanan*, 121 N. Y. Supp. 35; *Kennedy v. McKone*, 41 N. Y. Supp. 782.

Since there was no contract to pay a definite sum, the amount that plaintiff was entitled to for material and labor would be their reasonable market value. This phase of the

case was submitted to the court upon conflicting evidence. The evidence on behalf of plaintiff tended to show that $1,160 was a reasonable amount; that on behalf of defendant indicated that $600 or $700 was a reasonable amount. The trial court had the benefit of seeing the witnesses and observing the manner in which they testified, and, at the instance of the parties, visited the church and personally inspected the work that was done.

While a finding for a larger amount might have been sustained, we conclude that the trial court's finding is supported by the evidence. No error is apparent. Judgment is

AFFIRMED.

GEORGE H. WENTZ, APPELLEE, V. HENRY FRICKEL ET AL., APPELLANTS.

FILED DECEMBER 31, 1923. No. 22648.

1. **Appeal:** ISSUES: OBJECTIONS ON APPEAL. Where evidence is received without objection to its relevancy, and the issues to which it is applicable are presented and tried as though such issues were presented by the pleadings, objection will not be heard in this court that the pleadings are insufficient to present such issues.
2. **Evidence** examined, and finding of trial court approved.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

Reavis & Beghtol and *C. E. Sanden,* for appellants.

John S. Bishop, contra.

Heard before MORRISSEY, C. J., ROSE and GOOD, J.J., REDICK AND SHEPHERD, District Judges.

REDICK, District Judge.

Action to foreclose a mechanic's lien for plumbing and steam heating, upon a three-story and basement frame rooming-house in the city of Lincoln; defendants counterclaimed for damages for delay in the installation of the heating plant; plaintiff answered the counterclaim by a general

denial. There was a finding for plaintiff and against defendants on the counterclaim, and decree establishing and foreclosing the lien, and defendants appeal.

The plumbing and heating contract was in writing, and no question is made as to its performance except as to time: The contract was dated March 26, 1919, and contained this provision: "It is understood that I will not be obliged to set the boiler until some time in the summer or before cold weather, but may do so at any time I desire." We construe this to mean that the boiler will be set before cold weather in the year 1919. It was not set until March, 1920, and the last radiators were not connected until March, 1921, and the principal dispute is over the question as to which party was responsible for the delay; the defendants contending that the building was ready to receive the heating plant from and after May, 1919, and the plaintiff that floors were not laid so that radiators could be finally installed on the second and third floors until the spring of 1921, and that finally some of them had to be installed upon blocks because the final flooring was not laid. Both of these contentions find some support in the evidence, but it would serve no useful purpose to set out the evidence produced by the respective parties, and we must content ourselves and counsel with announcing our conclusion, after a careful reading and consideration of the evidence as contained in the bill of exceptions, that the contentions of plaintiff are sustained. The evidence in support of the counterclaim is, to say the least, not convincing. Defendants testify that the floors were all laid in the building in the same condition that they were at the time of trial before defendants went to Wyoming in May, 1919, while, in fact, only the rough flooring was laid and the finished flooring was not completed on the second and third floors at the time the last radiators were set, and that the same had to be set upon blocks upon that account. They further testified that the house was ready to receive roomers in the fall of 1919, whereas, in fact, the front stairs were run to the first landing in the spring of 1920, and not extended to the third floor until December of that year, until

which time only temporary stairways existed. They further testified that the cement flooring in the basement was complete in May, 1919, but it appears that the material therefor was not delivered until late in November of that year, and then only a portion of the cement floor was laid, the time of its final completion not being precisely shown.

The facts are that the building was constructed without the employment of an architect or a contractor, by Henry Frickel himself, with the assistance of one carpenter, sometimes two, and Frickel himself was away months at a time in the summer, when little, if anything, was done, and the work of construction dragged slowly along, so that a building which ordinarily should be completed in five or six months was not finished for over two years; and it appears that the installation of the heating plant by plaintiff kept pretty close pace with the work of construction; the roughing-in work was done promptly, and the various fixtures, bathtub, lavatories and radiators were installed from time to time upon request of defendants. Furthermore, no complaint seems to have been made by defendants on account of the delay in the installation of the heating plant, or that they had sustained any damages on that account, until the filing of the counterclaim in this suit. The only complaint which defendants made was contained in a letter of December 7, 1920, in which they said to plaintiff:

"You have attempted to install second-hand radiators in said house instead of new ones as required by our contract. Unless you, at once, proceed to complete said heating plant with the best materials as required by said contract, I will proceed to have said heating plant completed by other parties and hold you responsible for all damages that I may suffer by reason of your failure to carry out your contract."

This letter evinced no intention on the part of defendants to make any claim on account of the delay, but referred to the fact that plaintiff claimed the right, under a modification of the contract, to install a certain number of second-hand radiators; this dispute was settled by the parties

going to an attorney's office and plaintiff agreeing to install new radiators, but nothing was said in those negotiations about delay in performance.

Without pursuing the matter further, we think the parties by common consent disregarded the provision as to the time when the heating plant should be installed, and that defendants' claim of delay and consequent damage is an afterthought having its origin in the situation brought about by the commencement of suit to foreclose mechanics' liens held by plaintiff and other parties; and that the finding and judgment of the district court should not be disturbed.

One matter regarding the pleadings requires notice. Defendants contend that plaintiff was not entitled to present evidence excusing the delay in the installation of the heating plant beyond the time fixed by the contract, because he had not pleaded the facts constituting the basis of such claim, but had merely filed a general denial. This point was not raised in the court below, and so we do not feel called upon to discuss it; the evidence of plaintiff on this subject was received without objection as to its relevancy, and the case was presented to the district court for decision as though the issue had been properly presented by the pleadings, and it is now too late for defendants to raise the point. The judgment of the district court is right and must be affirmed.

AFFIRMED.

OSCAR F. SMITH V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1923. No. 23236.

1. Criminal Law: SEPARATION OF JURY: DISCRETION OF COURT. Whether, during the trial of a criminal case, the jury shall be allowed to separate, after being duly cautioned, is a matter for the discretion of the trial court, and the exercise of such discretion, unless abuse or prejudice is shown, furnishes no ground for error.

2. ———: CONSPIRACY: EVIDENCE: STATEMENTS OF CO-CONSPIRATORS. When the state has produced evidence tending to show a conspiracy to commit a crime, statements and acts of any one of

the conspirators pending the accomplishment of the common plan are evidence against the others.

3. Evidence examined, and *held* sufficient to sustain the verdict.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

T. S. Allen and *E. G. Maggi*, for plaintiff in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

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

REDICK, District Judge.

Plaintiff in error, defendant, was convicted of the crime of grand larceny, in the robbing of an oil station September 6, 1920, and sentenced to the penitentiary for one to seven years, and brings the record here for review.

The first assignment of error is that the court permitted the jury to separate after the evidence was all in and arguments of counsel made, and before giving instructions, which was done the next morning. The record shows that the jury were duly admonished before being excused, and that the court immediately and without the transaction of other business adjourned until 9 o'clock the next morning when the instructions were duly given. No objection was made nor exception taken by defendant to this proceeding, and no prejudice is shown to have resulted therefrom. Whether the jury should be allowed to separate during the trial of a criminal case rests in the sound discretion of the court, and the record fails to show any facts warranting this court in finding that the discretion was abused in this case.

It is next urged that the verdict is not sustained by sufficient evidence. The defendant was charged jointly with one Balderson, but upon his application was granted a separate trial. The only direct evidence offered by the state connecting defendant with the crime was by an accomplice,

Howell, to the effect that defendant stood guard while witness and Balderson entered the station and took the money from the safe by the use of the combination furnished by Howell, a former employee at the station; that the crime was executed in accordance with a plan formed earlier in the evening. It was further shown that defendant first became acquainted with Balderson about September 1, 1920, and they were in the garage business together in the winter after the larceny until March, 1921, during which period he knew Howell. Miss Heinschel, who was arrested and detained as having some knowledge of the crime, testified that Balderson and defendant came out for her in an automobile when she was released from the detention home a little over a month after the crime was committed.

The defendant denied all connection with the crime and sought to establish an alibi, but the evidence did not cover the time when the crime was committed.

The questions of fact were for the jury, and while the character of the state's witnesses was not all that might be desired, if the jury believed the testimony of Howell in preference to that of defendant, it was sufficient to sustain the verdict.

It is further urged that the court erred in receiving in evidence conversations between Howell and Balderson and Balderson and Miss Heinschel prior to the crime, tending to connect Smith. The state having produced evidence of the existence of a conspiracy or common plan between the three persons to rob the oil station, the acts and statements of each party looking toward the carrying out of the plan were competent against the others. *Lamb v. State*, 69 Neb. 212; *O'Brien v. State*, 69 Neb. 691.

Objections are made to two instructions, but we find them without merit.

AFFIRMED.